

Recording ● Conversations

...Is It Legal?

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We often receive calls from members when they find out that their conversation with a parent has been recorded. They ask what their legal rights are, and we must advise them that there is no known law that prohibits a person from recording another person, whether it is a telephone conversation or a face-to-face conversation. While one would hope that a person would ask for permission to tape their conversation, they do not need to. Oftentimes, there is a challenging situation at the school level and a parent records their conversation with the teacher, Vice-Principal or Principal without notifying them.

What Does the Law Say?

We asked **Lisa Slater of DLA Piper** to share the legal perspective:

The law respecting admissibility of a recoding into evidence is generally as follows in a family law proceeding:

- (a) If the information is relevant, the identity of the parties known, and the recording trustworthy, then the general rule is that the evidence by way of taped conversation should be received;*
- (b) Discretion to exclude the evidence is limited if, in the circumstances of the case, the best interests of the child militated in favour of admitting the evidence;*
- (c) The test for admissibility is three prong: relevance, identification and trustworthiness, including taking into account:
 - (i) Completeness of the recordings, i.e. complete conversations are included or portions;*
 - (ii) Accuracy of transcription;*
 - (iii) Does the recording begin “in the middle of the action” so that the court is left to question what preceded a bit of conversation, how a topic came to be introduced, whether there was coaching or manipulation of the conversation, or prompting;**
- (iv) The recorder will have to give evidence about the recording including who made the recording, how and when.*
- (d) The question of fairness and the effect on the reputation of the administration of justice of allowing evidence of this kind may be considered;*
- (e) The judicial exercise of discretion involves a balancing of competing interests which can be usefully viewed as assessing the probative value of the evidence as against its prejudicial effect.*

If the three tests, listed above, for admissibility are not satisfied, it is not admissible, in addition to the fairness and justice factors.

A chambers application proceeds on the basis of affidavits and so a recording transcript may be admitted and given weight providing the above tests are satisfied. The accuracy and completeness of the transcript must be established as well as the veracity of the original recording.

It is preferable but not necessary that the transcription should be done by a certified transcriber and not the party himself or herself. The recorded person can say that it is incomplete or not accurately transcribed, or that the recording may have been edited, if that is the case. If requested, the original recording or a true copy of it should be produced to the requesting party so they can either get their own transcript, if they think it was not accurately transcribed or if a whole, rather than partial, transcript should be included.

It is often the case that a witness tries to put into evidence a ‘partial’ transcript rather than the whole conversation and the person recorded may feel that additional statements were made that are relevant, but were not transcribed, or that an excerpt’s meaning is distorted if taken out of context of the whole conversation.

It is also possible that there may be additional evidence to put the conversation in context, or to provide explanation for statements made.

There is no known law that imposes an obligation to give notice to the person being recorded, either that a transcript has been made, or that it will be used in court or at a hearing. The other party to the proceeding could have contacted the Principal or Vice-Principal to inquire if the transcript was an accurate reflection of the conversation, or may have obtained a copy of the recording and been satisfied as to its accuracy.

How Do You Ensure that You Are Not Being Recorded?

There is no guarantee that you will not be recorded in future conversations. However it is advisable that, during conversations with parents, students, staff or others, you conduct yourself in a professional manner at all times. Do not use inflammatory language, keep your conversation as factual as possible, and always follow up the conversation with an email stating the salient points of the conversation that you had with the individual.

As a Precaution ...

If you feel that the conversation is going to be challenging, or if there is a history of conflict with the person and your intuition is telling you to be careful, you could always ask the following question before getting into the conversation:

"Is the conversation that we are about to have being recorded?"

It does send a message to the individual, who may think twice about proceeding with a recording, or may inform you that they intend to record the conversation.

Note that they are under no obligation to inform you that they are recording the conversation.

The best advice?
Remain calm, and
stay professional
at all times.

