

## Publications

### How Employers Can Address Secret Workplace Recordings

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Jackie Ford, a partner in the Vorys Houston office and a member of the labor and employment group, authored an article for *Employment Law360* titled "How Employers Can Address Secret Workplace Recordings." The full text of the article is included below with permission from *Law360*.

### How Employers Can Address Secret Workplace Recordings

Unlikely as it may seem, we can all probably learn a thing or two from Michael Cohen and Omarosa Manigault Newman.

The two public figures have been tabloid favorites for years, their triumphs and travails featured on countless websites and magazine covers. Personalities and publicity aside, however, revelations regarding secret recordings apparently made by both President Donald Trump's former lawyer and the former White House staffer provide a useful vehicle for reviewing the ethics and legality of surreptitious taping, and may be instructive for employers concerned about limiting such recording within their own workplaces.

Is workplace taping becoming more common? Although reliable data is elusive, it appears that the proliferation of personal smart phones may have led (perhaps inevitably) to a spike in surreptitious recordings. In 2011, a U.S. Equal Employment Opportunity Commission official was quoted as estimating that at least a third of the cases before the agency that year included employee-made recordings.

#### Basic Rules for Recording With or Without Consent

Manigault Newman apparently recorded numerous conversations she had with several of her (now former) colleagues at the White House.[1] It appears that some of those recordings were made in Washington, D.C., while others may conceivably have been made in New York (home of Trump Tower and *The Apprentice*), Florida (home of Mar-a-Lago

Club) or other locations.[2] The location of the recording is important to its legality; indeed, in matters of surreptitious recording, as in matters of real estate, it's all about the location.

Under federal law, any participant in a conversation may electronically record that conversation with or without the knowledge of the other parties.[3] This “one party consent” standard is also the rule in the majority of states. However, some states (including Florida) require the consent of all parties. Consequently, the legality of Manigault Newman’s secret recordings — or of anyone else’s — depends in large part on where the recordings were made.

### **Special Recording Rules for Lawyers**

According to news reports, Cohen, former personal counsel to Trump and the Trump Organization, secretly recorded many conversations concerning matters Cohen was attending to on his client’s behalf.[4] It remains unclear whether his client had any knowledge that he himself was being taped, or ever asked Cohen whether he was taping their conversations or any others.

The ethical rules pertaining to lawyer recordings are inconsistent and are, again, different by jurisdiction. In 2001, the American Bar Association Ethics Committee found that the Model Rules do not prohibit a lawyer from taping his own conversations with third parties, provided the taping is not otherwise illegal in the relevant jurisdiction and the lawyer does not make any false statements to other participants regarding whether the conversation is being taped. However, the committee was less sure about the propriety of recording one’s own client. Meanwhile, various bar associations continue to disagree about the appropriate boundary for lawyer recordings. For example, in 2003 the New York City Bar Association determined that surreptitious taping by lawyers is unethical, stating bluntly that, with narrow exceptions, “undisclosed taping smacks of trickery and is improper as a routine practice.” Yet the New York County Lawyers’ Association has found that it is not unethical for lawyers to secretly record their conversations.

Broader ethical rules also come into play when lawyers engage in, or advise clients to engage in, secret recording. Lawyers are prohibited from instructing clients or other parties to engage in illegal conduct or to do for the lawyer that which the lawyer is legally barred from doing herself. Consequently, in any state requiring all-party consent, a lawyer should not advise a client to secretly record conversations.

Special rules related to national security and other types of secrets. It is unclear whether Manigault Newman recorded or shared any classified information. If so, she may potentially have violated provisions of the Espionage Act. While the act itself is not of concern to most workplaces, the underlying concept — that recording in certain areas, or regarding certain highly sensitive or proprietary subjects — may be prohibited by law, and should be prohibited as well by the employer’s policy.

Can employers prohibit workplace recording? Many employers are concerned that secret taping records not just workplace wrongdoing but many other types of conversations intended to be private. Disclosure of that kind of private content can be devastating for a business. Proprietary information, trade secrets and other nonpublic information may be caught up in such recordings. And just as importantly, employees confiding in each other in the break room do not reasonably expect their co-workers to record those personal conversations. Given the ubiquitousness of smart phones, however, it is difficult, to say the least, for employers to know whether their employees are secretly recording workplace conversations — until

those recordings are made public. Nevertheless, there are a few steps employers can take to make such recordings less likely.

- Create, distribute and enforce a policy prohibiting surreptitious workplace recording.
- Provide training on the recording policy, and emphasize the ways in which all employees benefit from not having to worry about whether their every uttered word may be preserved for others to hear. A policy will have little effect if it is merely one of dozens given to employees in a handbook on their first day of employment.
- Ensure that the training is well done both substantively and stylistically. If it consists solely of a harried manager simply reciting a script, employees may conclude that the company doesn't actually care much about the policy or about the issues that might lead someone to turn on a hidden recorder. Instead, the trainer should explain the "why" of the policy and the potential privacy issues involved, and also note the various resources employees can use to raise concerns about workplace issues.
- Ensure that the policy emphasizes that both secret recording and secret photography are prohibited, particularly in areas such as restrooms, changing areas, and similar locations in which employees would have a reasonable expectation of privacy.

Broadly speaking, secret recordings in the workplace are rarely a good sign. An employee who is secretly taping the people around him has likely lost trust in his employer, his co-workers or some combination of those things. Likewise, employees who fear their co-workers may be recording them will be far less inclined to develop a strong rapport with those co-workers. Consequently, employers responding to taping issues should consider not just the legal quandaries such taping may present but also what that taping may say about deeper organizational issues.

[1] Maggie Haberman, "[Omarosa Manigault Newman Taped Her Firing by John Kelly](#)," *The New York Times*, Aug. 12, 2018; Peter Nicholas, "[Reality Contestant Turned White House Aide Secretly Taped Trump Conversations](#)," *The Wall Street Journal*, Aug. 9, 2018.

[2] The locations of the various alleged tapings are unclear. However, news reports have indicated that Manigault Newman has a "treasure trove" of recordings, suggesting that the recordings may have been made in more than one venue. See e.g., Darlene Superville, "[AP: Omarosa has 'Treasure Trove' of Tapes, Videos, Texts, to Back her Anti-Trump Book](#)," *USA Today*, Aug. 17, 2018.

[3] See 18 U.S.C. 2511(2)(d).

[4] Matt Apuzzo, et al, "[Michael Cohen Secretly Taped Trump Discussing Payment to Playboy Model](#)," *The New York Times*, July 20, 2018; Nicholas, *supra*.