

Member's Quarterly

Winter 2020 Edition

Feature

To Record or Not to Record

Update your corporate Smartphone policy

Jody Wilson-Raybould making public a phone call she secretly recorded between herself and Canada's top civil servant, Privy Council Clerk Michael Wernick regarding the SNC-Lavalin matter set off a heated debate around her actions in recording that call with Michael Wernick's knowledge, let alone consent.

Having a conversation, sometimes a without prejudice or off the record conversation, with a co-worker or your employer, has a different context than emailing or texting with that person. Generally speaking, people accept that someone can take notes during a conversation or meeting, but it would be fair to hypothesize that most people take calls from co-workers or colleagues with the presumption that they are NOT being recorded. From the Jody Wilson-Raybould incident and with the rampant use of smartphones at work, employers, employees and professionals should be thinking about when it is ever permissible or desirable to record any conversation and how can one protect him or herself from being unknowingly recorded in the workplace.

As Attorney General, Jody Wilson-Raybould recorded that call as the Federal Government's top-ranking lawyer speaking with the highest ranked Federal civil servant, in essence her client. From a professional regulatory perspective, her actions are strictly prohibited. For instance, the Law Society of Ontario's Rules of Professional Conduct clearly state that "a lawyer shall not use any device to record a conversation between the lawyer and a client or another legal practitioner, *even if lawful*, without first informing the other person of the intention to do so." Similar provisions exist across provincial legal governing bodies.

From a legal perspective, her act to record the call was not illegal. According to s. 184 of the *Criminal Code*, one can record a private conversation as long as one of the parties involved consents to the recording. This is commonly referred to as the "one party consent" rule. The *Criminal Code* strictly prohibits an individual from secretly recording conversations of others. Such action, if convicted, carries a strict penalty of up to five years in jail.

This issue of whether it is proper (putting aside the issue of legality) to record a conversation is relevant to any profession and workplace not just the Federal government or amongst lawyers and their clients. For instance, the Canadian Medical Protective Association advises that doctors are required to obtain the express consent from their patient first before recording any clinical encounter with their patient. However, the same is not true for patients. Patients can record a conversation with their doctor without their doctor's consent. Think about conversations between two employees in any office or work environment. The relevance of this issue spans all professions and workplaces.

Generally speaking, most employees are subject to the "one party consent" rule. However, just because a recording may be legal under the "one party consent" rules does not necessarily make it welcomed or wanted in any workplace or office setting, or in various professions. What can employers, in particular HR professionals, do to deal with the reality of people using their smartphones to record conversations?

Just as it is the accepted norm (and legally required) for companies to have harassment policies, employers and professionals should think about implementing a "Smart" policy on the use of smartphones in the workplace. This policy could be a part of a larger technology or social media policy, if one exists.



Ruben Goulart
LL.B.
Partner, Bernardi
Human Resource Law
LLP



Christine Krueger
LL.B.
Lawyer, Bernardi
Human Resource
Law LLP

Member's Quarterly

Winter 2020 Edition

Feature continued

The Smartphone policy should address amongst other things:

- 1) Create a standard that no employee should record another employee, even if it is a lawful recording, without first at a minimum advising the other person that they are being recorded, if not obtaining their actual consent;
- 2) If a recording is made, make it available to the other person and to the organization's HR Manager and allow the recorded employee the opportunity to comment on the recording and make any necessary explanation or additions to the recording in writing;
- 3) Prohibit the posting of "one party consent" recordings to any social media platform; and
- 4) Make a breach of the "Smart" policy subject to disciplinary action including and up to termination.

The underlying issue surrounding recording one's conversations with co-workers or your boss is one of trust, professional and reputation. We all saw what happened with Ms. Wilson-Raybould because of her unprecedented actions. With a "Smart" policy, employers can be proactive and informative to their workforce as to what is and what is not acceptable conduct.

Ruben Goulart is a Partner & HR Advisor with Bernardi Human Resource Law LLP and can be reached via email at rgoulart@hrlawyers.ca.

Christine Krueger is a Lawyer and Human Resource Advisor with Bernardi Human Resource Law LLP and can be reached via email at ckrueger@hrlawyers.ca.