Donald Sterling And Telephone Privacy Rights

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Jackie Ford, partner in the Vorys Houston and Columbus offices, authored an article for *Privacy Law360* about the privacy rights of individuals engaged in a private communication. In the article, Ford uses the Donald Sterling story (Sterling is an NBA team owner who made racist comments in a private telephone conversation that were recorded and released) as a vehicle for analyzing what forms of private communication are and are not legally protected, and what implications those legal distinctions may have for the evolving definition of privacy rights. The full text of the article is included below.

Donald Sterling And Telephone Privacy Rights

Privacy rights are nearly always defined in decidedly nonprivate ways. It is only after an otherwise private communication is widely exposed — and its privacy lost — that courts, and the public, have a privacy issue ripe for debate. Consequently, discussions of privacy rights often have a slightly unseemly quality to them, as though we are all engaged in a kind of publicly sanctioned voyeurism.

That tension, between public discourse and private communication, and a related collective confusion about boundaries and consequences of private speech, is playing out once again in the uproar over racist comments recently made by Los Angeles Clippers owner Donald Sterling in a private telephone conversation. In addition to its obvious importance to discussions of race, the Sterling episode is a useful vehicle for analyzing what forms of private communication are and are not legally protected, and what implications those legal distinctions may have for our evolving definition of privacy rights.

As has been widely reported, an audio recording of Sterling making race-related comments was recently posted on the gossip website TMZ. In the recording, Sterling appears to be advising a female friend to avoid being photographed or seen in public with African American men. Not surprisingly, the comments were met with near-universal outrage. Sterling was quickly banned for life from the NBA and fined

$2.5 million by the league. Since then, a second, later Sterling recording has surfaced, in which the embattled owner insists he is not a racist and that his earlier comments were taken out of context.

The primary issue raised by the Sterling fiasco — namely, the racial views of a man at the helm of a major sports franchise — got essentially a consensus response. Sterling was condemned by pundits across the political spectrum, and the NBA's swift and severe punishment was greeted with widespread approval.

But despite the loud outcry over the substance of Sterling's remarks, there has been relatively little discussion of how those remarks came to be recorded and released in the first place, and whether Sterling — a man now vilified in virtually every corner — might himself have been the victim of a crime.

News accounts suggest that Sterling's initial remarks were recorded in California. The circumstances of the second recording are less clear. The federal law applicable to both calls requires only one party's consent to the electronic recording of a conversation; as long as a single participant in the call consents to the taping, the recording does not run afoul of the Wiretap Act. However, California's more stringent wiretap law requires (with a few key exceptions) all-party consent. (See Cal. Penal Code. § 632.) A dozen other states have similar all-party requirements. In many of those states, recording someone's voice without their consent is a felony. Prosecutions of such crimes are relatively rare, yet often require, as a condition precedent, the exposure of highly embarrassing remarks.

Consider, for example, the 1999 indictment of Linda Tripp for recording telephone conversations with presidential paramour Monica Lewinsky. Tripp recorded those conversations from her home in Maryland, which is an all-party consent state, then shared them with a writer at Newsweek magazine. Although the tapes were used to support the impeachment of a president, Tripp was criminally charged for making them. Ultimately, the charges against Tripp were dismissed after a state court ruled that her immunity agreement with federal prosecutors prohibited using the tapes against her.

V. Stiviano, the woman who apparently recorded Sterling's racial comments, has said through her legal counsel that Sterling consented to her recording of their conversation. If that's the case, she did not commit a state or federal crime, at least not by either taping the conversation or releasing it (if indeed she did release it). It is unclear whether Sterling was aware he was being taped, much less consented to a public airing of his remarks, in either his call with Stiviano or in the second more recently released conversation.

It is possible, for example, that he consented to being recorded but with the understanding that the recording would not be shared beyond those who were parties to the original calls. But such an expectation — that a recorded conversation would remain private — seems glaringly out of step with the realities of both recorded conversations and the public's appetite for the airing of embarrassing secrets.

As more and more of both public and private life is played out on the very nonprivate World Wide Web, and the lines between public and private grow ever blurrier, some courts appear to be questioning the applicability of "privacy" protections for conversations that are either arguably public to begin with or which occur in a society embracing ever lowering standards for what constitutes "private" communication.

For example, Illinois' all-party consent statute was recently struck down because of the broad range of

recordings it criminalized. In a pair of cases, the state's Supreme Court ruled unanimously that the eavesdropping statute violates the U.S. Constitution's free speech provisions. In a twist on the typical embarrassing-remark-goes-public scenario underlying most high-profile privacy cases, People v. Clark and People v. Melongo concerned citizen recordings of public officials performing public duties.

In Clark, the defendant was criminally charged for recording attorneys and a judge discussing a child-support case. Melongo involved a defendant who spent nearly two years in jail for recording her phone calls with a court employee concerning alleged errors in a hearing transcript. After posting the recorded call online, Melongo was charged for both recording the conversation and disseminating it. The Illinois Supreme Court found both the recording and the disclosure to be constitutionally protected, and struck down the entire statute as overbroad. In so doing, the court distinguished the recording of public events and public officials from the recording of otherwise private conversations by private citizens. While the former category concerns free speech rights guaranteed by the U.S. Constitution, the latter, the court suggested, does not.

The court noted that the broadly worded statute criminalized the recording of all types of conversations, including "a loud argument on the street, a political debate on a college quad, yelling fans at an athletic event, or any conversation loud enough that the speakers should expect to be heard by others," and thus concluded that "the statute's scope is simply too broad" because it burdened "more speech than necessary." The court did suggest, however, that laws protecting "conversational privacy" would withstand constitutional challenge because they narrowly further the state's legitimate interest in protecting the privacy of truly personal, confidential, and private communications.

California's wiretap status anticipates some of the Illinois problems and limits its application to "confidential" conversations. "Confidential" conversations are defined as those carried on "in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto," and specifically excludes any "communication made in a public gathering or in any legislative, judicial, executive or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded."

While the Illinois decision and California law both attempt to create a distinction between overtly public conversations and unquestionably private ones, the near-constant presence of recording technology further complicates any such analysis. Like many a privacy statute, the Illinois law and federal protections for electronic communications were drafted decades ago, long before smartphones and similar technology made electronic recording a ubiquitous feature of everyday life.

The most recent U.S. Supreme Court case concerning the privacy of communications recorded through electronic devices, City of Ontario v. Quon, concerned whether police officers had any reasonable expectation of privacy in sexually explicit messages sent via the city-issued pagers they used to communicate with each other. In another illustration of the gap between slow-moving legal structures and fast-moving technological change, pager technology itself had largely disappeared by the time the Supreme Court issued its opinion in 2010.

In any event, while the justices disagreed about whether the officers had any reasonable expectation of

privacy in their pager messages, the majority did agree that any such privacy expectations were not violated by the city's legitimate investigation of the ways in which its officers were using city-provided technology. That the investigation revealed steamy messages being sent by one of the officers — the details of which became fully public once the officer filed his privacy-based lawsuit — was simply the unanticipated outcome of the city's legitimate oversight of its technology.

As the Illinois cases suggest, "conversational privacy" still has some degree of legal protection under federal law and the laws of most states. Whether the "all-party consent" standards of California, Maryland and other states can withstand further constitutional challenges and shifting definitions of personal privacy remains to be seen. As the majority observed in Quon, courts are reluctant to establish rules applicable to any emerging technologies before the technology's "role in society has become clear."

As a result, changing technology, and a changing society, rather than laws now on the books, may well determine whether any conversational privacy rights will ultimately remain, or whether ever-present recording technology in cell phone, tablets, and the myriad other recording devices now filling our lives has effectively eliminated any reasonable expectation of privacy any of us may have.