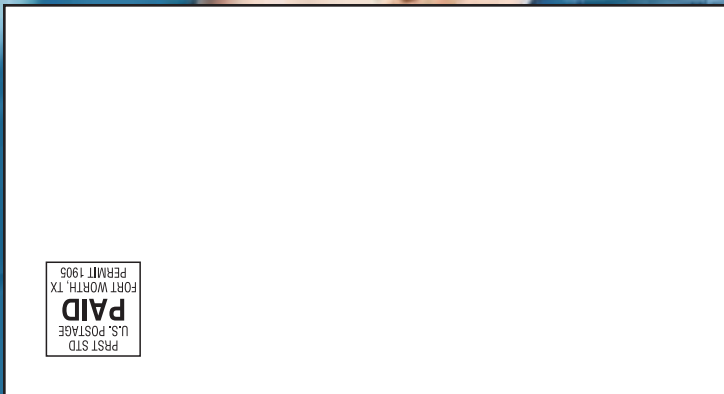


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The Legal Corner

By Wes Bearden, Esq.



To Record, or Not to Record, That is the Question!



Although that question may not be as serious as Hamlet's famous soliloquy which ponders life and death, it is for investigators a common conundrum. Should I audio record my witness interviews or not in a civil matter? What about the

attorney who has directed me not to do so? Why are they doing that? What alternatives do I have? Is it a good idea to record every interview or to not record any of them?

In Texas, and thirty-nine other states, one party covert audio recordings are allowed by law. See Tex. Penal Code § 16.02. Making these recordings are common place amongst investigators, reporters and others who need to document the statements of others. However, your author has noticed the continuing trend by various legal counsel in civil matters requesting, directing or requiring that their retained investigator conduct a live interview unrecorded.

Many times the reasoning of such by client's counsel lies the discovery sections of the Texas Rules of Civil Procedure. See Tex. Rules of Civ. Pro. § 192.3. Under sub-section (h) of the preceding rule, a party can discover a "witness statement" of any person with knowledge of relevant facts. The rule even defines witness statements as being a written and signed statement, such as an affidavit of fact or other adopted written document. In addition, the statute also defines a witness statement as being any oral recording. By the very definition, that would include your routine covert witness recordings.

By instructing you not to record, your client's lawyer is attempting to disallow any discoverable information that might be uncovered in your interview. Any covert recorded statement, whether in your possession, your client's or his attorney will likely be discoverable once made. Before you quickly conclude that you shouldn't make any recording at all to avoid such discovery, consider the reasons why we do record. They include preservation of evidence, documentation of impeachment testimony, and, maybe most importantly, safety. In your author's experience, the later reason exceeds the former two.

Occasionally, we witness a private investigator who, usually working solo, is accused of some wrongdoing in his interview. These accusations have included physical violence, sexual assault, "browbeating," bribery, and intimidation. Such accusations are easy to make as many times the investigator is alone with his interviewee. Often

sensitive matters are discussed and assertions challenged. In such cases, the only protection against such accusations is your recording. Your only insurance policy in such an accusation is the recorded statement.

So what do you do? Consider pacifying both discovery and safety considerations. When deciding against a recording, try and find some other measure to ensure safety. That may be as simple as being accompanied by another investigator or interviewing in a public place. Think about whether the telephonic interview will suffice. Consider the possibility

Avoid the record and delete method. This method, utilized by some investigators, provides for recording an interview, and if it went without a "blow-up," then delete the recording. Does that really protect you from anything? Most, if not all, accusations don't occur moments after the interview. Rather, it is days, weeks and months after the interaction took place. From a safety consideration it provides little if any real benefit.

Furthermore, you may create a spoliation issue. Under Texas law, spoliation is the improper destruction of relevant evidence. A party seeking evidence must show that the party to produce the evidence had a duty to preserve that evidence, that the evidence was destroyed and the seeking party is prejudiced. *Trevino v. Ortega*, 969 S.W.2d 950 (Tex. 1998).

Although spoliation claim analysis can be complicated, if the court finds spoliation it has occurred it may exclude evidence, order sanctions and spoliation jury instructions. Id. Obviously, these are much more damning to your case than your efforts to skirt discovery. Finally, would you ever want to explain to an opposing counsel, the court or a jury that you destroyed evidence in an active investigation? That would likely destroy any credibility that you might have.

In conclusion, think about the purpose of recording. Record where you can. Recordings provide you some of the cheapest insurance and protection in a high liability business. When you make a decision not to record, consider your alternatives. It will be your word against theirs. Be creative and mitigate the risk as best as possible. Finally, don't record and delete. It will offer little protection and potentially ruin your credibility.

