



Client is secretly recording counseling sessions

Question: I am counseling a couple, and the husband told me that the wife has been recording our sessions on her phone. I'm not comfortable with this practice but would like to know whether this poses potential legal or ethical problems. Can you shed any light on how I should handle this issue?

Answer: This surreptitious recording of counseling sessions seems to be occurring more frequently in recent years, perhaps because our cell phones are small and people perform so many functions with them. Based on what I have heard from counselors, the practice of secret recording occurs more frequently when couples are on the verge of divorce and custody battles. It may be that one party distrusts the other spouse or therapist, or one spouse may be angling to get an edge in a potential legal dispute.

Recording conversations or phone calls may be legal in some states and illegal in others. Federal law permits recording with the consent of one party, such as the client alone (see law.cornell.edu/uscode/text/18/2511). Likewise, some state wiretap laws require the consent of only one party, while other states require the consent of all involved parties. If laws requiring the consent of all parties are violated, the person conducting the recording could face the possibility of both criminal and civil liability. Civil liability may give the injured party the

right to sue for monetary damages. A summary of many state laws addressing this topic is available at dmlp.org/legal-guide/recording-phone-calls-and-conversations.

I would recommend that you address the issue of recording through your informed consent process (see Standard A.2.a. in the 2014 *ACA Code of Ethics*) and put a statement in the written informed consent document. You may be able to ward off potential issues of mistrust by clarifying that the *couple* is the client (see Standard B.4.b.) and your job is not to take sides in any domestic dispute. If either party is looking for your support in a future divorce and custody lawsuit, suggest instead that a neutral, independent evaluator be appointed.

It is equally important for you to explain the potential loss of confidentiality and trust for both spouses if sessions are recorded. It would typically be wise to avoid “accusing” the person who has recorded the sessions of a crime, but point out expectations going forward, as well as potential legal ramifications, depending on state law. You may wish to request that all prior recordings be deleted.

Interestingly, the issue of secretly recording sessions with health care providers has come up recently in a somewhat different context, but the outcome could have relevance to counselors. The state of California is

considering a bill that would criminalize the secret recording of confidential meetings with health care providers. Planned Parenthood is in favor of the bill, whereas abortion opponents and certain media groups are against it, based on its potential to chill free speech (see washingtontimes.com/news/2016/may/31/calif-outlaw-undercover-film-planned-parenthood). Counselors should remain current on any changes in their state laws regarding recording of therapy sessions.



The question addressed in this column was developed from a deidentified composite of calls made to the Risk Management Helpline sponsored by the American Counseling Association. This information is presented solely for educational purposes. For specific legal advice, please consult your own local attorney. ♦

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