The following writing sample was written as the December 2004 exam for my Legal Research and Writing class. It was a "closed universe" exam for which we were given two cases and a statute. The work was done over a weekend and the submitted paper had to be less than than 2,800 words.

The exam instructions were to analyze whether California Penal Code section 632 would prevent from being used at trial a transcript made from a surreptitious tape recording of a meeting.

I have since revised the paper after feedback from the professor.

Memorandum

To: William Beretta

From: Adam Marcus

Date: November 8, 2004

Subject: Applicability of California Penal Code section 632

Statement of Facts

David Gunn was employed at Pacific Software, Inc. until he was terminated on January 6, 2003. Mr. Gunn has retained our firm to pursue a claim for breach of an implied-in-fact employment contract. This memo focuses on whether the meeting is considered confidential and whether a transcript Mr. Gunn made from a surreptitious recording of the meeting is admissible at trial.

Suspecting he was going to be terminated and believing he had a right to record the conversation "so that [he] could accurately tell others in the future why [he] was fired," Mr. Gunn surreptitiously recorded the termination meeting using a tape recorder he placed in his jacket pocket. The two other participants in the meeting were John Wesson, Vice President of Human Resources, and Dora Smith, Executive Tax Director and Gunn's supervisor. Wesson attended the meeting because it was part of his job to participate in employment termination meetings for managerial employees. Wesson and Smith were not aware of the recording.

The meeting took place in Dora Smith's office. The office is large enough to hold a desk and credenza in one area and a small conference table on the other side. The walls of the office extend to the ceiling. During the meeting, the office door was either "about half open" (according to Smith) or "slightly ajar" (according to Wesson), so Smith could call to her administrative assistant if needed during the meeting. The facts presented do not reveal whether Smith's administrative assistant actually overheard the conversation.

The purpose of termination meetings, as stated by Wesson, is to explain the reasons for the termination so that the employee can explain what happened to others and so that the Human Resources department can finish necessary paperwork with the terminated employee. Smith began the meeting by stating that Gunn was being terminated because there was not sufficient improvement in four areas noted on the thirty-day performance improvement plan given to Gunn on November 8, 2002. When asked if he had questions, Gunn stated that he had lots of questions but he was going to discuss the matter with his attorney first because he believed the reasons for his termination were fabricated. Wesson responded as follows:

> All right, all right, so the bottom line, the bottom line is this, the company does not want to continue your employment. So, I understand that you feel you've got to do something about this. But I will tell you that as far as we can tell you were treated fairly. …

The rest of the meeting consisted of standard termination matters and ended with Wesson walking Gunn to the Human Resources department to handle the remaining paperwork.

No party specifically stated at the time that they expected the conversation to be confidential. Smith and Wesson both stated in their depositions that they were not aware that Gunn had recorded the meeting and would not have agreed to have it recorded if they had been asked. Smith stated that she did expect Gunn to reveal the contents of the conversation to his wife. She held a meeting with the entire tax department later that day during which she informed

them of the reasons for Gunn's termination. Wesson stated that he expected Gunn would state why his employment was terminated when applying for unemployment insurance benefits.

In response to the subpoena for his deposition, Gunn transcribed the tape recording into a two-page document.

Questions Presented

1. Are communications in an employee termination meeting considered confidential under section 632(c) of the California Penal Code for purposes of admissibility of a recording or transcript of the meeting, where one party records the meeting, when the two other parties were not aware that the conversation was recorded but expected the conversation to be divulged to third parties, and when the door of the office in which the meeting took place was partially open so that one of the parties could call to her administrative assistant?

2. If the court does consider the conversation a confidential communication, does California Penal Code section 632(d) still allow a transcript of a surreptitious tape recording of the meeting made by the terminated employee to be used at trial to refresh his memory or to counter contradicting testimony made by the company representatives present at the meeting?

Discussion

The court should not consider Gunn's termination meeting confidential and should allow the transcript to be admitted as evidence. Whether the transcript can be used at trial depends on if the court determines that the conversation was confidential and how much Gunn remembered of the meeting without the aid of the recording or transcript. If the court determines that the conversation was confidential and suppresses any of Gunn's testimony because of improper reliance on the transcript, the transcript could still be used to impeach the company

representatives as witnesses if their testimony contradicts any statements they made in the tape-recorded conversation.

Summary of Applicable Law

California Penal Code section 632(d) states that a conversation is considered confidential when the circumstances "reasonably indicate that any party to the communication desires it to be confined to the parties thereto," but excludes any conversations in which "the parties to the communication may reasonably expect that the communication may be overheard or recorded." Cal. Penal Code § 632 (West 1999 & Supp. 2004). Courts have interpreted these two clauses as requiring that all parties have "an objectively reasonable expectation that the conversation is not being overheard or recorded," *Flanagan v. Flanagan*, 27 Cal. 4th 766, 768 (2002), and "reasonably expect[] the communication to be confined to the parties," *Frio v. Superior Court*, 203 Cal. App. 3d 1480, 1488 (1988). The exception for overheard conversations does not require that the conversation is actually overheard, just that the participants objectively expect that it may be. Cal. Penal Code § 632(c) (West 1999 & Supp. 2004).

In determining whether someone can reasonably expect a communication to be confined to the parties, courts have looked at the character of the communications--the business matters discussed, *Id.* at 1489, any sensitive personal aspect of the conversation, *Frio v. Superior Court*, 203 Cal. App. 3d 1480, 1490 (1988), and whether the party discussed the possibility of litigation, *Id.* at 1489. When conversations "relate[] to ongoing business matters which apparently were in a state of great flux," relate to "market data or business strategy," or the business "involve[s] a few key people, a highly visible product and the potential for substantial profit," it is reasonable to believe the parties expect the conversation will not be recorded. *Id.* at 1489. If the subject of a conversation is "a sensitive one on a personal level as among the parties," the conversation

should be considered protected. *Id.* at 1490. A final factor is whether a party "invite[s] the scrutiny of law enforcement" during a conversation, which contradicts the expectation of confidentiality. *Id.* at 1489. However, the existence of pending litigation does not make all related communications unprotected. *Id.* at 1489.

No evidence obtained as a result of recording a confidential communication shall be admissible in any judicial proceeding. Cal. Penal Code § 632 (West 1999 & Supp. 2004). If the court determines that the conversation was not confidential, the recording does not violate California Penal Code section 632 and the transcript can be used to help Gunn remember the details of the meeting and to impeach any contradictory statements made by Smith and Wesson.[1] Cal. Penal Code § 632(d) (West 1999 & Supp. 2004). The transcript could also be admitted as evidence if Pacific Software, Inc. requests it. *Frio v. Superior Court*, 203 Cal. App. 3d 1480, 1492. If Pacific Software, Inc. attempts to introduce any part of the transcript as evidence, we are free to introduce any other part or the entire transcript as evidence. *Id.* at 1493 n.5.

Was the Conversation Confidential?

If Smith and Wesson had the *expectation* that the assistant would overhear the conversation, that expectation is enough to make the conversation not confidential. The distance between Smith's administrative assistant and Smith's office and where the parties were seated during the termination meeting is very important in determining their expectations. Assuming the conference table is between the door and the desk and Smith left her door open enough to be

[1] I am assuming that if the transcript can be read into evidence as a past recollection recorded, *Frio v. Superior Court* at 1492, it can also be used to refresh Gunn's memory of the details and used to contradict Smith and Wesson's testimony.

heard by her assistant when calling from her desk, the assistant may have been able to overhear a conversation taking place at the conference table.

Alternatively, although Smith and Wesson stated they would not have agreed to have the conversation recorded, the evidence shows that they could not have objectively considered the conversation confidential. Wesson stated that the purpose of employment termination meetings is "so that the employee can explain what happened to others such as his family, his friends, co-workers, state agencies such as the Employment Development Department when applying for unemployment insurance benefits, and to future prospective employers." Wesson specifically stated that at the time of the meeting he expected Gunn would file for unemployment insurance and that Gunn would need to state why his employment was terminated on the insurance forms. Smith stated that she expected Gunn would reveal the contents of the conversation to his wife, which Smith had previously met on a number of occasions. Smith also held a subsequent meeting with the entire tax department later the same day in which she relayed the essential details of the meeting. Finally, Gunn himself stated during the meeting that he was going to discuss the matter with his attorney.

None of the business factors mentioned above were present in the conversation between Gunn, Smith, and Wesson. Gunn's position as tax manager for sales and property is not likely to be a highly visible area of the company, and the termination conversation did not discuss market data or business strategy. The stated reason for Gunn's termination was simply that he had failed to improve in four areas of his performance improvement plan, not for any reason that could be considered highly visible or a potential loss of substantial profit. Wesson noted that Gunn's termination was "a very standard process."

Similarly, there was nothing of a personal nature discussed during the meeting. As Wesson explained, "the major purpose of holding these employment termination meetings is to explain the reasons for an employee's job termination so that the employee can explain what happened to others such as his family, his friends, co-workers, state agencies …, and to future prospective employers." The essential details of the meeting--that Gunn had been terminated for failing to improve during a thirty-day performance improvement plan--were shared with the entire tax department later that day. The only possible detail that could be considered personal is the detail that there was no improvement in four areas of the improvement plan, and this seems too insignificant to make the entire meeting confidential. None of the three ever said that anything should be considered personal or confidential.

There was no flux to the decision to terminate Gunn. Both Smith and Gunn clearly knew the termination was inevitable, and it is likely that Wesson also knew about the meeting for some time. It had been over thirty days since the performance improvement plan was given to Gunn. The decision to terminate Gunn had been made well enough before the meeting to schedule a meeting of the entire tax department to inform them of Gunn's termination later the same day. Gunn himself was not even surprised. He had already removed most of his personal items and he brought the tape recorder expecting to be terminated at the meeting. Smith stated that they came to the decision to terminate Gunn "after careful consideration" and Wesson stated that it was "a very drawn out process."

Finally, Wesson invited legal scrutiny and thus should not expect confidentiality. *Frio v. Superior Court*, 203 Cal. App. 3d 1480, 1489 (1988). Because Smith and Wesson both represent Pacific Software, that invitation should apply to both of them. In the case of *People v. Pedersen*, Pedersen was accused of embezzlement and responded by saying "that if they thought he had

done something criminal, then take the necessary steps." *Id.* at 1489 (citing *People v. Pedersen*, 86 Ca.App. 3d 987, 994 (1978)). That statement was enough for the court to consider him inviting legal scrutiny. Wesson's statement that, "… the bottom line is this, the company does not want to continue your employment. So, I understand that you feel you've got to do something about this. But I will tell you that as far as we can tell you were treated fairly" should also be considered an invitation for legal scrutiny.

Can the transcript be used at trial?

If the court determines that the conversation was confidential, it is up to the judge to decide whether the transcript functions to refresh Gunn's present recollection or Gunn is wholly dependent on the transcript for the facts of the conversation. *Frio v. Superior Court*, 203 Cal. App. 3d 1480, 1495 (1988). In making this determination, our case should be compared to *Frio v. Superior Court*. In that case, Frio recorded numerous telephone conversations between May, 1984 and June, 1985. He combined notes made during the conversations with notes made from listening to the recordings into a total of 671 pages of notes. *Id.* at 1486. To prepare for his deposition, Frio reviewed his notes "[o]nce for sure, possibly twice." *Id.* at 1486. The judge ruled that "Frio's memory of the conversation in which he participated, is independent of the illegality and is not so tainted by mere refreshing with an illegally obtained writing so as to render it inadmissible." *Id.* at 1495. In our case, Gunn's testimony will be of a single short meeting that took place only twenty-two months prior and should thus not be considered "tainted" by the two-page transcript. Opposing counsel will likely point to the fact that Gunn made the transcript himself and must have listened to the recording many times to do so as reason to consider his testimony tainted by the illegal recording. If the trial court in *Frio v. Superior Court* did not block Frio from testifying on conversations recorded at least twenty-two months before he

reviewed his notes in preparation for his deposition, we should argue that it sets a horizon on how far back present recollections can span that should apply to Gunn.

If the judge suppresses all or part of Gunn's testimony because of improper reliance on the transcript, the transcript could be used to impeach the company representatives as witnesses if their testimony contradicts any statements they made in the tape-recorded conversation. *Id.* at 1497. If Gunn's testimony is not suppressed, the transcript cannot be used to impeach other witnesses. *Id.* at 1498-1499.

Conclusion and Recommendations

In conclusion, there is a strong case for being able to use the transcript both to help Mr. Gunn refresh his memory of the recorded conversation and to counter any statements made by Ms. Smith or Mr. Wesson in their trial testimony that contradict statements made in the recording. The conversation should be ruled not confidential on the grounds that there was a reasonable expectation that it would be overheard, that there was no reasonable expectation of privacy. and because Wesson invited legal scrutiny. I recommend seeking additional information about the physical layout of Smith's office and the results of the remanded *Frio* case.