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By Andrew Strickler

Law360 (July 23, 2018, 9:58 PM EDT) -- Michael Cohen didn't commit a crime under New York law when he secretly recorded phone calls with now-President Donald Trump, legal ethics experts said, but the practice strongly suggests a toxic attorney-client relationship and could amount to a breach of his duty of loyalty.

Lawyers who tape calls with a client without their knowledge also invite ethics-focused challenges in court if they ever do try to use tapes to establish their version of events, adding another wrinkle to the already complex dynamic between Cohen and Trump.

Last week, Trump attorney Rudy Giuliani confirmed to the New York Times and other outlets that federal agents had a recording of a call between Cohen and Trump in which they discussed potential payments to Karen McDougal, a former Playboy model who claims she had an affair with Trump. The conversation took place just two months before the 2016 election. Giuliani denied that Trump had done anything wrong and described the contents as "exculpatory" for his client.

Barry Temkin, a partner at Mound Cotton Wollan & Greengrass LLP in New York, said there are extreme circumstances in which a lawyer might be in an ethical safe zone when surreptitiously recording a client, as when a client had threatened the attorney with violence or extortion. But secretly recording smacks of deception and self-dealing, even in New York, a so-called one-party consent state for recording one's conversations, he said.

And even if Cohen had anticipated some kind of dispute with Trump and the need for protection, those circumstances would likely call for him to quit the relationship with Trump altogether, not to turn to trickery.

"A lawyer deceiving an adversary is bad, but there is a certain amount of puffery and exaggeration that is expected,” Temkin said. "But deceiving the client violates the bedrock principle of the legal profession and tends to destroy the attorney-client relationship, which is fundamentally a relationship of trust."

Following the Friday reports about the recordings, which were among the materials seized from Cohen’s office and residences in Manhattan earlier this year, Trump on Saturday called it “inconceivable” that a lawyer would tape a client. In a tweet, he called the practice “perhaps illegal.”

But New York is among the majority of jurisdictions that allow the lawful recording of phone conversations in which only one party consents to it. And while the American Bar Association and many local bars opposed the practice for decades, the ABA in 2001 changed course, calling the practice permissible as long as it's legal in the relevant state and the attorney informs the client about the recording if asked.

In 2003, the New York City bar issued its own opinion stating that a lawyer cannot secretly record conversations “as a matter of routine practice.” But the bar also said it was allowable if the attorney
had a reasonable basis for believing that disclosing that a recording was taking place would "impair pursuit of a generally accepted societal good."

Considering the uneven legal and ethical terrain, Kenneth Balkan, a professional responsibility expert and counsel to L’Abbate Balkan Colavita & Contini LLP, called any surreptitious recording “dangerous” for lawyers.

If the calls are to become evidence admitted in court or part of a conduct inquiry, Cohen would be called on to explain how’d he’d intended to use them and whether a disclosure might fall within the bounds of an exception to the attorney-client privilege or the “generally accepted societal good” category.

Balkan also noted that lawyers are given some leeway to disclose otherwise protected information to defend themselves from accusations of malfeasance or malpractice.

“There is no black and white here, and an ethics opinion is not binding on the courts or a grievance committee, so you’re always in an area of interpretation,” he said. If a lawyer “has a sense that the client feels that if the client is going down, he’s taking the lawyer with him, then you get into the area of the crime-fraud exception” to attorney-client privilege.

Other experts said that even while legal, recording clients without their knowledge for reasons other than protecting the client could run afoul of the Rule 8.4 prohibition against lawyers engaging in deceit, confidentiality rules and the attorney-as-fiduciary duties.

Dane Ciolino, a legal ethics expert and professor at Loyola University New Orleans College of Law, said Cohen’s decision to record calls about a matter as sensitive as the McDougal payments also suggested he felt personally at risk and saw Trump as a possible adversary.

“If he was doing this to protect Michael Cohen and not to protect Donald Trump, he also had a personal conflict there and should have just withdrawn from the representation,” Ciolino said.

On Sunday, CNN cited unnamed sources in a report that Trump’s legal team had waived privilege over the September 2016 recording.

On Twitter over the weekend, Cohen’s attorney Lanny Davis took shots at Giuliani’s assertion that the recording was “exculpatory,” saying they would not hurt Cohen. He also said Cohen had not shared any recording or anything else with Michael Avenatti. Avenatti, who represents another Trump accuser, Stormy Daniels, said in recent days that federal agents seized multiple recordings of Cohen and Trump.

A Davis representative referred a request for comment to Davis’ Twitter.

A Monday filing by the special master reviewing the seized Cohen materials said the privilege designations had been withdrawn for 12 audio recordings, prompting their turnover to the government. The review is ongoing.

Deborah Scalise of Scalise & Hamilton LLP in Scarsdale, New York, who primarily represents New York lawyers in professional responsibility and conduct cases, downplayed the ethical risks of recording calls without a client’s knowledge.

Lawyers can and do record conversations, including with clients, most often to memorialize what was said, she argued. And in the absence of conduct rules prohibiting the practice, the legality in New York of the one-party consent statute applies to lawyers as much as anyone else.

“A lawyer’s handwritten notes, emails, I just don’t see how recording a conversation is any different than those other than you can hear the tenor of the voice,” she said. "And since Watergate, has anyone ever been unaware that conversations can be recorded?"