

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

____ Priority
____ Send
____ Clsd
____ Enter
____ JS-5/JS-6
____ JS-2/JS-3
____ Scan Only

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NISSAN MOTOR CO., LTD., et) Case No. CV 99-12980 DDP (Mcx)
al.,)
)
Plaintiffs,) **ORDER GRANTING IN PART**
) **PLAINTIFFS' EX PARTE APPLICATION**
)
v.)
) [Motion filed on 11/01/01]
NISSAN COMPUTER CORPORATION,)
)
Defendant.)
_____)

This matter comes before the Court on the plaintiffs' ex parte application for an order: (1) compelling Neil Greenstein ("Greenstein"), counsel for the defendant Nissan Computer Corporation ("NCC"), to state whether any conversations with counsel for plaintiffs have been recorded; and (2) prohibiting counsel for NCC from recording any such conversations in the future. After reviewing and considering the materials submitted by the parties, and hearing oral argument, the Court adopts the following order.

I. Factual Background

The issue of whether Greenstein has tape-recorded conversations with counsel for the plaintiffs Nissan Motor Co.,

1 Ltd. and Nissan North American Inc. (collectively "Nissan") first
2 arose in June 2000. At that time, a conflict emerged during a
3 failed mediation attempt regarding what the parties had said during
4 earlier telephone calls concerning their respective positions on
5 settlement. (Schindler Decl. ¶ 4.) Greenstein accused David
6 Schindler ("Schindler"), counsel for Nissan and a partner at the
7 law firm of Latham & Watkins, of misrepresenting what had been said
8 during a prior telephone conversation.¹ Schindler categorically
9 denied Greenstein's accusation. In response, Greenstein told
10 Schindler that Greenstein planned to tape record all future
11 conversations between counsel in this matter. (Schindler Decl.
12 ¶¶ 3-5.) Schindler explicitly informed Greenstein that Schindler
13 strongly objected to the threatened practice, and that Greenstein
14 did not have consent to tape record conversations with Schindler or
15 with any other member of the Nissan legal team. (Id. at ¶ 5.)
16 Because Greenstein refused to confirm that he would not record
17 future calls, and in order to minimize further disputes, Schindler
18 chose to permanently cease further telephonic communication with
19 Greenstein. (Id. ¶ 6.)

20 Other lawyers at Latham & Watkins, however, continued to
21 communicate with Greenstein via telephone. In October 2001, a
22 dispute again arose between Greenstein and counsel for Nissan,
23

24 ¹Specifically, Schindler states: "I believed that Neil
25 Greenstein, counsel for NCC, had told me that Mr. Uzi Nissan had
26 come down significantly from his '8 figure' demand for the sale of
27 the nissan.com domain name. Mr. Greenstein denied that he made
28 those comments. Indeed, at one point towards the end of the
mediation, Mr. Greenstein became quite agitated, got out of his
chair and started screaming that counsel for Nissan was lying about
conversations that had taken place in advance of the mediation."
(Schindler Decl. ¶ 4.)

1 Catherine Bridge ("Bridge"), this time regarding the scheduling of
2 certain expert depositions. (Bridge Decl. ¶ 4.) The parties
3 disagreed about who was responsible for the delays in scheduling.
4 At this time, Greenstein informed Bridge that all telephone calls
5 and meetings between counsel "may be" tape recorded. (Id.)
6 According to counsel for Nissan, until Greenstein reiterated his
7 threats to Bridge in October 2001, counsel for Nissan were not
8 aware that Greenstein had disregarded Schindler's explicit
9 statement seventeen months prior that counsel for Nissan did not
10 consent to the recording of any telephone calls. (Pls' App. at 7.)
11 Bridge again informed Greenstein that no attorneys at Latham &
12 Watkins had consented to Greenstein tape recording their telephone
13 conversations, and she asked Greenstein directly whether he had in
14 fact been recording conversations. (Bridge Decl. Ex. A.)
15 Greenstein refused to confirm or deny if any telephone calls had
16 been recorded.

17 Greenstein contends that throughout the course of this
18 litigation, counsel for Nissan have repeatedly mischaracterized and
19 mis-stated what occurred in telephone conversations. In
20 particular, Greenstein contends that counsel for Nissan "took
21 advantage of their size and would deny that certain statements were
22 made in such conversations, or would assert that Defendant's
23 counsel had made a certain statement, which he did not." (Def's
24 Opp. at 1.) It was in response to this conduct, Greenstein claims,
25 that he "notified Plaintiffs that all oral communications were
26 subject to being recorded" so that "parties remain honest and
27 truthful when describing what occurred in the oral communications."
28 (Def's Opp. at 2.)

1 Greenstein's allegations regarding the supposed misconduct are,
2 at best, extremely vague.² Counsel for NCC asserts that counsel for
3 Nissan engaged in "improper tactics" and "unorthodox actions" which
4 required that Greenstein take certain "defensive actions." (Def's
5 Opp. at 1-2.) For example, Greenstein asserts, without providing
6 any specific names or dates, that "[t]here were times when certain
7 key items in a conversation were later denied by Plaintiff's
8 counsel." (Greenstein Decl. ¶ 3.) Similarly, Greenstein asserts
9 that "[t]here have been instances during this lawsuit when a counsel
10 for Plaintiffs made one representation to me and then later denied
11 that such representation was ever made to me." (Id.) Again, no
12 details are provided. The sole specific allegation that Greenstein
13 makes is that counsel for Nissan intentionally delayed the
14 depositions of plaintiffs' expert witnesses and that this activity
15 is "precisely why the threat of recording is necessary in this
16 case." (Def's Opp. at 4.) In short, the Court finds no basis for
17 Greenstein's allegations. Specifically, the Court finds no basis
18 whatever for the allegations that Schindler and other counsel for
19 Nissan have acted in other than a highly ethical and professional
20 manner throughout this litigation.

21
22
23

24 ²During oral argument, the Court asked counsel for NCC to
25 recollect, in general terms, the worst incident that Greenstein
26 could remember of misconduct by counsel for Nissan. Counsel for
27 NCC was unable to recollect the details of a single incident in
28 which counsel for Nissan had misrepresented the substance of an
earlier conversation. The Court finds it curious that counsel for
NCC was not able to recollect a single incident despite the fact
that it was this conduct that allegedly provoked the threats to
record conversations between counsel in the first place.

1 **II. Discussion**

2 A. Did Counsel for NCC Record Conversations With Opposing
3 Counsel?

4 As a threshold matter, it is not clear whether, to this date,
5 counsel for NCC has in fact recorded any conversations with counsel
6 for Nissan, or whether he has only threatened to do so. Greenstein
7 refuses to confirm or deny if any calls were recorded, and obliquely
8 refers to his threats to record conversations between counsel as
9 "the decision to subject all oral communications to potential
10 recordation." (Def's Opp. at 2.) Greenstein has made the following
11 statements to counsel for Nissan: "As you may know, there were some
12 issues earlier in this case where your team made certain statements
13 that were later denied. As such, the team was put on notice that
14 all calls and in-person meetings may be recorded" (Bridge Decl. Ex.
15 A); "You, as well as your other team members, are on notice that all
16 calls are susceptible of being recorded" (Bridge Decl. Ex. A); "Your
17 firm has been on notice, both written and oral, about potential
18 recording of calls for over a year now" (Bridge Decl. Ex. A); and
19 "Whether or not a particular call was recorded, it requires that
20 your lawyers be honest in future dealings about what transpires in
21 the conversations" (Pl's Appl., Ex. B).

22 When counsel for Nissan restated their objection to the
23 practice in November 2001, Greenstein refused to refrain from tape
24 recording future conversations between counsel. Greenstein's
25 failure to confirm whether he has in fact recorded any conversations
26 in the past may reflect his recognition that such conduct violates
27 California penal law, or at the very least, that the law is
28 unsettled in this area. Either way, the fact that counsel must

1 engage in semantic games to avoid potentially implicating himself in
2 criminal conduct demonstrates why it is inappropriate for counsel in
3 civil litigation to threaten to record conversations with opposing
4 counsel.

5 B. Does California Penal Code § 632 Prohibit the Alleged
6 Conduct?

7 California Penal Code § 632, a part of the Invasion of
8 Privacy Act, provides that:

9 Every person who, intentionally and without the consent of all
10 parties to a confidential communication, by means of any
11 electronic amplifying or recording device, eavesdrops upon or
12 records the confidential communication, whether the
13 communication is carried on among the parties in the presence
14 of one another or by means of a telegraph, telephone, or other
15 device, except a radio, shall be punished by a fine not
16 exceeding two thousand five hundred dollars (\$2,500), or
17 imprisonment in the county jail not exceeding one year, or in
18 the state prison, or by both that fine and imprisonment.

19 Cal. Penal Code § 632(a).³

20 Counsel for NCC contends that California Penal Code § 632 is
21 inapplicable to these facts because (1) the communications at issue
22 are not "confidential"; and (2) the communications at issue are
23 exempt from § 632 under the statutory exception for "judicial
24 proceedings." The Court disagrees.

25 1. Are the Communications At Issue Confidential?

26 California Penal Code § 632 defines "confidential
27 communication" as follows:

28 ³Under California Penal Code §637.2, a civil action for
invasion of privacy may also be brought against the person who
committed the violation. Warden v. Kahn, 99 Cal. App. 3d 805
(1979).

1 The term "confidential communication" includes any
2 communication carried on in circumstances as may reasonably
3 indicate that any party to the communication desires it to be
4 confined to the parties thereto, but excludes a communication
5 made in a public gathering or in any legislative, judicial,
6 executive or administrative proceeding open to the public, or
7 in any other circumstance in which the parties to the
8 communication may reasonably expect that the communication may
9 be overheard or recorded.

6 Cal. Penal Code § 632(c).

7 Counsel for NCC contends that the communications at issue are
8 not "confidential" (and therefore § 632 does not apply) because the
9 parties lacked an objectively reasonable expectation that the
10 conversation would not be divulged to anyone else. Deteresa v.
11 American Broad. Cos., 121 F.3d 460, 465 (9th Cir. 1997) (holding
12 that application of the definition of "confidential communication"
13 under § 632(c) turns on the reasonable expectations of the parties
14 judged by an objective standard rather than by the subjective
15 assumptions of the parties). It is well settled that construction
16 of § 632 calls for a determination as to whether the circumstances
17 reasonably indicate that any party to such communication desires it
18 to be confined to the parties, or whether the circumstances are such
19 that the parties to the communication would reasonably expect that
20 the communication may be recorded. Deeter v. Angus, 179 Cal. App.
21 3d 241 (1986). A participant to a telephone communication is exempt
22 from the prohibition against recording the communication only if the
23 other participant knows that it is being recorded. People v. Suite,
24 101 Cal. App. 3d 680 (1980).

25 In this case, the conversations between counsel involved
26 litigation-related matters such as discovery disputes, scheduling
27 issues, and court-mandated meet and confers. The question is
28 whether the parties had an objectively reasonable expectation that

1 these conversations would not be divulged to anyone else. The Court
2 finds that counsel for Nissan did have this objectively reasonable
3 expectation, and that conversations between counsel in civil
4 litigation are confidential communications within the meaning of
5 § 632.

6 Counsel for NCC contends that there was no objectively
7 reasonable expectation of privacy regarding the conversations
8 between counsel because counsel for Nissan were put "on notice" that
9 the conversations were "subject to being recorded" in June 2000. It
10 is true that in June 2000 Greenstein threatened to record future
11 conversations. Counsel for Nissan maintained an objectively
12 reasonable expectation of privacy regarding these conversations,
13 however, because Schindler explicitly told Greenstein that Nissan's
14 attorneys did not consent to being tape recorded.

15 In People v. Pedersen, in a prosecution of the defendant for
16 embezzlement from his partnership, the court found that a recorded
17 conversation of a meeting between Pedersen and several general
18 partners was not a confidential communication within the meaning of
19 § 632 because the nature of the meeting and the manner in which it
20 was carried out allowed the court to reasonably conclude that it was
21 no different than other business meetings of these parties that were
22 not confidential. 86 Cal. App. 3d 987 (1978). Under this analysis,
23 it could be argued that any business or commercially-related
24 communications are analogous to the business meeting in Pedersen, in
25 which there was no expectation of confidentiality. Pedersen is
26 distinguishable, however, because in that case, the communication
27 occurred in a context where Pedersen was under suspicion for
28 embezzling funds, and at a meeting where he was being cross-examined

1 by his partners regarding the fraud in preparation for the filing of
2 criminal charges.

3 In Deteresa, the plaintiff was a flight attendant on the flight
4 that O.J. Simpson took the night that his wife Nicole Brown Simpson
5 was murdered. After the flight, the plaintiff was approached by a
6 television producer, who explained that he worked for ABC and that
7 he wanted to speak with her about appearing on television to discuss
8 what she had observed on the airplane. The plaintiff told the
9 producer that she would consider appearing on the show. In the same
10 conversation, she provided information about O.J. Simpson's behavior
11 on the flight, which the producer tape recorded. Subsequently, when
12 the plaintiff decided not to appear on the show, the producer
13 informed her that he had recorded their entire conversation. The
14 Ninth Circuit held that no one in the plaintiff's shoes could
15 reasonably expect that a reporter (who had immediately revealed
16 himself as such) would not divulge her account of Simpson's
17 activities on the flight.

18 Deteresa is distinguishable from the instant case on several
19 grounds. In that case, the plaintiff voluntarily shared information
20 regarding a celebrity murder scandal with a self-identified
21 journalist. It is clear that someone who encountered O.J. Simpson
22 in the aftermath of Nicole Brown Simpson's murder, and then
23 discussed his or her observations with a journalist, could be said
24 to lack an objectively reasonable expectation that the conversation
25 would remain confidential. Attorneys participating in private civil
26 litigation, however, cannot be said to occupy an analogous role to
27 the plaintiff in Deteresa.

28

1 Even more significant is the fact that Schindler explicitly
2 told Greenstein in June 2000 that counsel for Nissan strongly
3 objected to Greenstein's threatened practice of tape recording
4 conversations, and that Greenstein did not have consent to tape
5 record any calls with any member of the Nissan legal team.
6 (Schindler Decl. ¶ 5.) The Court agrees that the clear effect of
7 Schindler's statements was to reinforce the expectation that all
8 subsequent calls between counsel for Nissan and counsel for NCC
9 would not be tape recorded. In other words, counsel for Nissan
10 reasonably expected that their conversations would not be recorded
11 because they had expressly objected to the practice. Therefore, the
12 Court finds that the communications were still confidential under
13 the Deteresa standard.

14 Counsel for NCC also contends that there was no reasonable
15 expectation of privacy surrounding the communications because the
16 content of conversations between counsel are routinely presented to
17 the Court in the form of declarations. For example, during the
18 course of this litigation, counsel for Nissan have filed
19 declarations with the Court setting forth the substance of certain
20 discovery-related conversations between counsel. The Court does not
21 find this argument to be persuasive.

22 There is [, however,] a qualitative as well as a quantitative
23 difference between secondhand repetition by the listener and
24 simultaneous dissemination to a second auditor, whether that
25 auditor be a tape recorder or a third party. . . . In the
26 former situation the speaker retains control over the extent of
27 his immediate audience. Even though that audience may
28 republish his words, it will be done secondhand, after the
fact, probably not in entirety, and the impact will depend upon
the credibility of the teller. Where electronic monitoring is
involved, however, the speaker is deprived of the right to
control the extent of his own firsthand dissemination . . . In
terms of common experience, we are all likely to react
differently to a telephone conversation we know is being

1 recorded, and to feel our privacy in a confidential
2 communication to be invaded far more deeply by the potential
3 for unauthorized dissemination of an actual transcription of
4 our voice.

5 Warden, 99 Cal. App. 3d at 813-14 (citations and quotations
6 omitted).

7 In short, counsel for Nissan retained an objectively reasonable
8 expectation of privacy regarding the conversations between counsel
9 because Schindler told Greenstein that no attorney at Latham
10 consented to being tape recorded. The fact that counsel routinely
11 submit declarations to the Court regarding the substance of
12 conversations between counsel in no way alters this analysis.

13 2. Communications Made In Connection with Judicial
14 Proceeding

15 Counsel for NCC contends that the conversations between counsel
16 are part of the judicial process and are "communications made in
17 furtherance of the litigation process." (Def's Opp. at 7.)
18 Therefore, it is argued, these communications are not "confidential
19 communications" because they are subject to the statutory exception
20 relating to communications made as part of any legislative,
21 judicial, executive or administrative proceeding open to the public.
22 The fact that there may be a strong public policy in favor of an
23 open and public litigation process, as counsel for NCC argues, in no
24 way provides support for the proposition that counsel may secretly
25 tape record conversations with other attorneys.⁴ There is also no
26 authority for the proposition that private conversations between

27 ⁴The Court notes that email communication sent by Greenstein
28 to counsel for Nissan that was submitted to the Court is marked
"Confidential." (Pls' Reply, Ex. A.)

1 counsel are part of a "judicial proceeding" and the Court declines
2 to adopt this overly broad and unsupported interpretation of the
3 phrase "judicial proceeding."

4 As far as the Court is aware, there are few other reported
5 decisions that address the question of whether lawyers may tape
6 record conversations with opposing counsel, during the normal course
7 of litigation, as part of an ostensible effort to prevent later
8 disputes about what was said.⁵ The lack of reported cases may well
9 reflect the fact that this practice is relatively unprecedented, and
10 that the vast majority of lawyers understand it to be undesirable.

11 3. Professional Ethics

12 Ethical problems are clearly presented by an attorney's tape
13 recording of another party without his or her knowledge or consent.
14 The American Bar Association Standing Committee on Ethics and
15 Professional Responsibility recently issued a Formal Opinion which
16 stated that a lawyer who electronically records a conversation
17 without the knowledge of the other party or parties to the
18 conversation does not necessarily violate the Model Rules of
19 Professional Conduct. The Committee advised that a lawyer may not,
20 however, record conversations in violation of the law in a
21 jurisdiction that forbids such conduct without the consent of all

23 ⁵Most cases that address tape recording on the part of counsel
24 have considered whether it is ever appropriate for attorneys to
25 record conversations with their own clients. One decision which
26 the Court finds instructive is People v. Selby, 198 Colo. 386
27 (1979), where the court held that an attorney who surreptitiously
28 tape recorded a conference between himself, the district attorney,
and the judge in chambers was guilty of misconduct. The court
stated that a lawyer may not secretly record any conversation he
has with another lawyer, that candor is required between attorneys
and judges, and that surreptitious recording suggests trickery and
deceit. Id. at 390.

1 parties, nor falsely represent that a conversation is not being
2 recorded.⁶ See American Bar Association Standing Committee on
3 Ethics and Professional Responsibility, Formal Opinion 01-422,
4 "Electronic Recordings by Lawyers Without the Knowledge of All
5 Participants," June 24, 2001.

6 C. Federal Rule of Civil Procedure 1

7 Federal Rule of Civil Procedure 1 instructs that district
8 courts are to construe and administer the federal rules to "secure
9 the just, speedy, and inexpensive determination of every action."
10 Fed. R. Civ. P. 1. The Advisory Committee Notes to Rule 1 elaborate
11 that it is "the affirmative duty of the court to exercise the
12 authority conferred by these rules to ensure that civil litigation
13 is resolved not only fairly, but also without undue cost or delay."
14 Id.; see also Loya v. Desert Sands Unif. Sch. Dist., 721 F.2d 279,
15 281 (9th Cir. 1983).

16 The Court finds that Greenstein's conduct interferes with the
17 just and speedy determination of this action. It is inefficient for
18 counsel to be reduced to communicating solely in writing. More
19 generally, the conduct of counsel for NCC is simply inconsistent
20 with the courteous and professional administration of the legal
21 system.

22

23 **III. Conclusion**

24 It is wrong to use the coercive and privacy-violating technique
25 of tape recording (or threatening to tape record) what the Court

26

27 ⁶Obviously, a dispute exists in this case as to whether the
28 taping at issue is in fact surreptitious given that NCC's counsel
apparently "warned" Nissan that conversations were subject to being
recorded.

1 finds to be confidential communications. Threatening to record
2 conversations between counsel (or actual recordation of such
3 conversations) is a troubling tactic. If counsel believes that
4 conversations are being mischaracterized, there are traditional and
5 non-invasive ways to address this situation. The parties may
6 promptly confirm important communications in writing or via email.
7 In more extreme situations, the parties may require the presence of
8 third-parties. As the parties are well aware, however, it is often
9 essentially impossible to avoid oral communication given the pace of
10 litigation, conflicting schedules, and the rules that may require
11 person-to-person conferences.⁷

12 The Court finds that the recordation of conversations between
13 counsel in the normal course of litigation, without consent, is a
14 violation of California Penal Code § 632. In addition to being
15 illegal, the Court finds that it is inherently unethical for an
16 attorney to record a conversation with another attorney regarding
17 the routine progression of litigation without the other party's
18 knowledge or consent. "Inherent in the undisclosed use of a
19 recording device is an element of deception, artifice, and trickery
20 which does not comport with the high standards of candor and
21 fairness by which all attorneys are bound." Selby, 198 Colo. at
22 390. Such conduct damages the ordinary level of trust that should
23 exist between counsel and contributes to the further deterioration

24

25 ⁷See e.g., Local Rule 6.1 which provides in part that
26 "[w]ithin thirty (30) days after service of the answer by the first
27 answering defendant, and thereafter as each defendant answers,
28 counsel for the **parties shall meet in person** for the purpose of
making the initial disclosures required hereunder and preparing a
joint report to be submitted to the Court." C.D. Cal. Local Rule
6.1 (emphasis added).

1 of cordiality in the legal profession. This behavior raises
2 suspicions, injures public confidence in the legal profession (and
3 thereby the legal system), seriously impedes relations between
4 counsel, and exerts a chilling effect on the normal flow of
5 communication between opposing parties. "Simply put, such tactics
6 are not becoming of an officer of the court." Anderson v. Hale, 202
7 F.R.D. 548, 556 (N.D. Ill. 2001).

8 The Court orders counsel for NCC to cease: (1) any threats to
9 record conversation between counsel; and (2) any actual recording of
10 conversations between counsel. The Court denies counsel for
11 Nissan's request that the Court compel counsel for NCC to disclose
12 whether any past conversations were recorded.⁸

13

14 IT IS SO ORDERED.

15

16 Dated: _____

DEAN D. PREGERSON
United States District Judge

18

19

20

21

22

23

24

25 ⁸Because the Court finds that tape recording conversations
26 between counsel under these facts violates California Penal Code §
27 632, an order requiring NCC to disclose whether the threatened
28 recordings were made could violate Greenstein's 5th Amendment
rights. Therefore, the Court denies the plaintiffs' request that
the Court order counsel for NCC to state whether any conversations
with Nissan were tape recorded in the past.