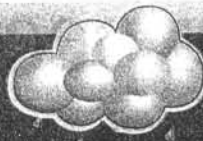


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Recording saps trust, say defense attorneys

DA's recusal sought in McInerney case

By **Raul Hernandez**
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Local defense attorneys say the secret recording of plea-bargain negotiations between lawyers representing 16-year-old murder suspect Brandon McInerney and Ventura County prosecutors has created an atmosphere of mistrust and suspicion.



MCINERNEY

There has been an erosion of trust, said attorney Jay Leiderman, who is the information officer with the Ventura County Criminal Defense Bar Association.

"We have to work with these people (prosecutors). Can we trust them?" he said.

Prosecutors say the recording, which occurred more than two months ago in a conference room at the District Attorney's Office, was legal and the event is being blown out of proportion.

McInerney is accused of the execution-style shooting of 15-year-old classmate Larry King during a computer lab class at E.O. Green School in Oxnard on Feb. 12, 2008. Prosecutors allege the slaying was a hate crime because King said he was gay.

The discovery of the secret recording led McInerney's lawyers, Scott Wippert and Robyn Bramson, to file a motion on Nov. 9 to recuse the District Attorney's Office from the coming murder trial. Wippert stated in his motion that prosecutor Maevé Fox refused to turn over the tape recording, saying it's not part of trial discovery.

Ventura County Superior Court Judge Charles Campbell set a hearing on the recusal motion for Nov. 29.

Wippert has said the Aug. 27 meeting in the DA's office to discuss possible plea agreement negotiations included sensitive and confidential communications that aren't even divulged in court. He fears that these secretly recorded communications could be used to the disadvantage of his client, depriving him of his constitutional right to a fair trial.

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Recording gives local defense attorneys pause

MCINERNEY CASE

From A1

There was no reason to tape it, Wippert has said.

Local defense attorneys agree, saying the incident has raised many questions about why it happened, if there have been other secret recordings, and whether defense lawyers have to worry that their private communications will be tape-recorded without their knowledge.

Prosecutors say they are confident Wippert's motion will be rejected. If the motion to recuse the district attorney is granted, however, lawyers with the state attorney general will be appointed to prosecute McInerney, potentially causing a long delay in the start of the trial.

District Attorney Greg Totten would not comment Thursday, saying it was inappropriate because of a pending hearing.

Wippert, the lead attorney in the McInerney case, said Friday that he would not comment until after the hearing.

Jury selection in the McInerney case had been expected to begin last week, but because of the recusal motion, along with an unrelated legal issue involving the availability of a defense expert, the process is in limbo.

Was it an investigation?

Wippert and Bramson attended the DA's Aug. 27 meeting along with defense investigator Kathryn Lestelle and Randall Hecht, an expert witness for the defense.

The prosecution's team included Totten, Chief Assistant District Attorney Jim Ellison, Chief Deputy Mike Frawley; Robert Coughlin, an investigator; Fox, and Simi Valley Police Detective Dan Swanson.

Citing the California Penal Code, Ellison said earlier this month that the tape recording of that meeting done by Swanson wasn't an illegal recording. It is unlawful for a private citizen to secretly record private communications; however, police officers can do this in the course of an investigation.

Swanson referred questions about the matter to the district attorney.

Ventura defense attorney Philip Gunnels questioned how police could still be investigating.

"That's stretching it way too far," said Gunnels, noting that jury selection was scheduled for last week. "What are they investigating?"

Surreptitious taping

Ellison had said nobody on the district attorney's staff knew that a hidden tape recorder had been turned on during the meeting. He said Fox found out about it on Oct. 12, after investigator Coughlin told her.

Ellison said he assumed Swanson, who is a gang expert, had concluded he met the standard for secretly taping the meeting.

Swanson testified last year in McInerney's preliminary hearing about white supremacist philosophy and gangs, a racist belief system that prosecutors allege McInerney has adopted. McInerney was charged with a hate crime. King told people he was gay, and Swanson testified that gays are considered enemies of racist groups.

Ellison said he didn't know whether Swanson gave the tape to anyone or shared any information from it with other people.

While this clandestine recording may or may not have been illegal, Leiderman said, it was offensive and wrong.

"It is ethically repugnant," he said.

Defense attorney Mark Pachowicz, of Camarillo, agreed.

"I think it will cause everyone who deals with the District Attorney's Office to think that, maybe, their conversations are being recorded, too," Pachowicz said.

Gunnels said he found it hard to believe that Swanson would take it upon himself to do clandestine taping without the knowledge or approval of higher-ups. He said Swanson is considered an integral part of the prosecution's team in the McInerney case.

When the taping began

One of the key questions for the defense is when the recording began. When the defense team was led into the meeting room on Aug. 27, they were alone for a while before the prosecution team joined them.

Wippert had said he didn't know whether Swanson's tape recorder was in the room and turned on at that time.

Ellison said no tape recording was done while McNerney's lawyers were alone in the conference room.

If the evidence shows that Wippert and his defense team were secretly being recorded before prosecutors and investigators came into the conference room, Gunnels said, it would be a violation of attorney-client privilege.

"That's illegal. I don't think there is any doubt about that," Gunnels said.

Listening to Swanson's recording would determine when the recording started and when it stopped, Pachowicz said.

Threat to open exchange

Pachowicz, who worked as a prosecutor for 12 years in the Ventura County District Attorney's Office, said plea bargaining involves both sides putting everything on the negotiating table.

"You are going to talk to the other side about anything and everything that you think is going to get the other side to do what you want them to do," he said.

This, he said, includes discussing evidence, background and criminal history of the defendants, and the problems that either side might incur with certain witnesses' testimonies and pieces of evidence.

Leiderman said 98 percent of criminal cases are closed by way of plea agreements or dismissed by prosecutors.

"If we are not free to talk about these cases without fear that our communications are being recorded, we'll have to stop communications or hold back on communications," he said.

Release of the tape

If the tape recording was part of an investigation, Pachowicz said, by law it must be turned over to defense lawyers. If it isn't, Pachowicz said, it brings into question the legality of Swanson's surreptitious recording.

"Hey, if it's not a big deal why not just turn it over?" Pachowicz said. "The tape should answer the question."

Both sides, he said, can ask Judge Campbell to seal the tape recording and order that its contents not be discussed.

Leiderman said Swanson should have put the tape recorder on top of the table for everyone to see and record only after all sides agreed to allow it, "so there is no misunderstanding."

Leiderman said Totten should state what his policy is regarding the recording of conversations at the District Attorney's Office.

"Whatever the DA's policy is, I wish he would clarify it and publicly announce it," he said.