

MEMORANDUM OF LAW

DATE: February 12, 1987

TO: Lieutenant C. R. Munro, SDDP via Commander
Enerson
FROM: City Attorney
SUBJECT: Penal Code Section 653m

In your memorandum of December 17, 1986, you inquired whether the elements of Penal Code section 653m are met if the victim receives the annoying or obscene phone call on his or her telephone answering machine. We have researched this question and conclude that the elements of that violation are met even if the victim receives the call through an answering machine.

Penal Code section 653m reads, in pertinent part:

(a) Every person who with intent to annoy telephones another and addresses to or about such other person any obscene language or addresses to such other person any threat to inflict injury to the person or property of the person addressed or any member of his family, is guilty of a misdemeanor.

(b) Every person who makes a telephone call with intent to annoy another and without disclosing his true identity to the person answering the telephone is, whether or not conversation ensues from making the telephone call, guilty of a misdemeanor.

Where an answering machine takes and records the phone call, the only questionable element for a subsection (a) or (b) violation is whether a telephone call within the meaning of the statute was made. The other elements of either subsection are clearly met whether the victim takes the call directly or through his or her answering machine.

A computer search did not disclose any cases of obscene, threatening or annoying telephone calls via answering machine in any jurisdiction in the United States. Accordingly, an analysis of the issue must rely on collateral aspects.

In several obscene telephone call cases where the underlying defense has been vagueness of the statutes, courts have recognized the state interest in prohibiting intrusion into people's homes by means of telecommunications. See generally, Annot., 95 A.L.R. 3d 411 (1979); *Baker v. State*, 16 Ariz. App. 463, 494 P.2d 68 (1972). While an argument might be made that

the intrusion is less with an answering machine because the victim is not summoned by the ringing phone, the counter argument is that the victim cannot "hang up" an answering machine without missing subsequent messages.

It has been held that when an answering service, via a third person operator, takes a call for the intended recipient, the call was not "completed," as it could only be "completed" when the defendant actually got through to the intended recipient. U.S. v. Darsey, 342 F. Supp. 311 (E.D. Pa. 1972). The federal statute at issue in that case, 47 U.S.C. section 223, contains a subdivision, section 223(1)(b) that is nearly identical to Penal Code section 653m(b). Although subsection (d) of 47 U.S.C. section 223(1) was at issue in Darsey, not subsection (b), both require that a "telephone call" be made.

The key point from Darsey is that the intended recipient, not a third party, must take the call for it to be "completed" within the meaning of the statute. And taking the call from an answering machine is arguably the same as taking it in person. There is no intermediary. The recipient hears the very words spoken by the caller, though not contemporaneously. So if the language "makes a telephone call" in Penal Code section 653m(b) is construed the same as the identical language in the analogous federal statute, 47 U.S.C. section 223(1)(b), then the call would be made or completed when the intended recipient either took the call personally or listened to the recording of the call on his or her answering machine.

In conclusion, the elements of Penal Code section 653m are met even if the victim takes the call, i.e., recorded message, from his or her own answering machine.

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By

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