

Wiretapping, Tape Recorders, and Legal Ethics: An Abridged Overview of Questions Posed by Attorney Involvement in Secretly Recording Conversation

August 9, 2012

Congressional Research Service

<https://crsreports.congress.gov>

R42649

Summary

In some jurisdictions, it is unethical for an attorney to secretly record a conversation even though it is not illegal to do so. A few states require the consent of all parties to a conversation before it may be recorded. Recording without mutual consent is both illegal and unethical in those jurisdictions. Elsewhere the issue is more complicated.

In 1974, the American Bar Association (ABA) opined that surreptitiously recording a conversation without the knowledge or consent of all of the participants violated the ethical prohibition against engaging in conduct involving “dishonesty, fraud, deceit or misrepresentation.” The ABA conceded, however, that law enforcement recording, conducted under judicial supervision, might breach no ethical standard. Reaction among the authorities responsible for regulation of the practice of law in the various states was mixed. In 2001, the ABA reversed its earlier opinion and announced that it no longer considered one-party consent recording per se unethical when it is otherwise lawful.

Today, this is the view of a majority of the jurisdictions on record. A substantial number, however, disagree. An even greater number have yet to announce an opinion.

An earlier version of this report once appeared as CRS Report 98-251. An unabridged version of this report is available with the footnotes and attachment as CRS Report R42650, *Wiretapping, Tape Recorders, and Legal Ethics: An Overview of Questions Posed by Attorney Involvement in Secretly Recording Conversation*.

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Introduction

Has an attorney engaged in unethical conduct when he or she secretly records a conversation? The practice is unquestionably unethical when it is done illegally; its status is more uncertain when it is done legally. The issue is complicated by the fact that the American Bar Association (ABA), whose model ethical standards have been adopted in every jurisdiction in one form or another, initially declared surreptitious recording unethical per se and then reversed its position. Moreover, more than a few jurisdictions have either yet to express themselves on the issue or have not done so for several decades. A majority of the jurisdictions on record have rejected the proposition that secret recording of a conversation is per se unethical even when not illegal. A number endorse a contrary view, however, and an even greater number have yet to announce their position.

Background

Federal and state law have long outlawed recording the conversation of another. Most jurisdictions permit recording with the consent of one party to the discussion, although a few require the consent of all parties to the conversation.

Both the ABA's Code of Professional Responsibility (DR 1-102(A)(3)) and its successor, the Model Rules of Professional Conduct (Rule 8.4(b)), broadly condemn illegal conduct as unethical. They also censure attorney conduct that involves "dishonesty, fraud, deceit or misrepresentation." In 1974, the ABA concluded in *Formal Opinion 337* that the rule covering dishonesty, fraud, and the like "clearly encompasses the making of recordings without the consent of all parties." Thus, "no lawyer should record any conversation whether by tapes or other electronic device, without the consent or prior knowledge of all parties to the conversation." The *Opinion* admitted the possibility that law enforcement officials operating within "strictly statutory limitations" might qualify for an exception.

Reaction to the *Opinion 337* was mixed. The view expressed by the Texas Professional Ethics Committee was typical of the states that follow the ABA approach:

In February 1978, this Committee addressed the issue of whether an attorney in the course of his or her practice of law, could electronically record a telephone conversation without first informing all of the parties involved. The Committee concluded that, although the recording of a telephone conversation by a party thereto did not per se violate the law, attorneys were held to a higher standard. The Committee reasoned that the secret recording of conversations offended most persons' concept of honor and fair play. Therefore, attorneys should not electronically record a conversation without first informing that party that the conversation was being recorded.

The only exceptions considered at that time were "extraordinary circumstances with which the state attorney general or local government or law enforcement attorneys or officers acting under the direction of a state attorney general or such principal prosecuting attorneys might ethically make and use secret recordings if acting within strict statutory limitations conforming to constitutional requirements," which exceptions were to be considered on a case by case basis.

... [T]his Committee sees no reason to change its former opinion. Pursuant to Rule 8.04(a)(3), attorneys may not electronically record a conversation with another party without first informing that party that the conversation is being recorded. *Supreme Court of Texas Professional Ethics Committee Opinion No. 514* (1996).

A second group of states—Arizona, Idaho, Kansas, Kentucky, Minnesota, Ohio, South Carolina, and Tennessee—concurred, but with an expanded list of exceptions, for example, permitting recording by law enforcement personnel generally, not just when judicially supervised; or recording by criminal defense counsel; or recording statements that themselves constitute crimes, such as bribery offers or threats; or recording confidential conversations with clients; or recordings made solely for the purpose of creating a memorandum for the files; or recording by a government attorney in connection with a civil matter; or recording under other extraordinary circumstances.

A third group of jurisdictions refused to adopt the ABA unethical per se approach. In one form or another the District of Columbia, Mississippi, New Mexico, North Carolina, Oklahoma, Oregon, Utah, and Wisconsin suggested that the propriety of an attorney surreptitiously recording his or her conversations where it was otherwise lawful to do so depended upon the other circumstances involved in a particular case.

In 2001, the ABA issued *Formal Opinion 01-422* and rejected *Opinion 337*'s broad proscription. Instead, *Formal Opinion 01-422* concluded that:

1. Where nonconsensual recording of conversations is permitted by the law of the jurisdiction where the recording occurs, a lawyer does not violate the Model Rules merely by recording a conversation without the consent of the other parties to the conversation.
2. Where nonconsensual recording of private conversations is prohibited by law in a particular jurisdiction, a lawyer who engages in such conduct in violation of that law may violate Model Rule 8.4, and if the purpose of the recording is to obtain evidence, also may violate Model Rule 4.4.
3. A lawyer who records a conversation without the consent of a party to that conversation may not represent that the conversation is not being recorded.
4. Although the Committee is divided as to whether the Model Rules forbid a lawyer from recording a conversation with a client concerning the subject matter of the representation without the client's knowledge, such conduct is, at the least, inadvisable.

Current Status

Where Recording Is Illegal Without All Party Consent

There seems to be no dispute that where it is illegal to record a conversation without the consent of all of the participants, it is unethical as well. Recording requires the consent of all parties in 10 states: California, Florida, Illinois, Massachusetts, Michigan, Montana, New Hampshire, Oregon, Pennsylvania, and Washington.

Lawful but Unethical

Only two states, Colorado and South Carolina, have expressly rejected the approach of the ABA's *Formal Opinion 01-422* since its release. Yet a number of other states have yet to withdraw earlier opinions that declared surreptitious records ethically suspect: Arizona, Idaho, Indiana, Iowa, Kansas, and Kentucky.

Not Unethical Per Se

A substantial number of states, however, agree with the ABA's *Formal Opinion 01-422* that a recording with the consent of one, but not all, of the parties to a conversation is not unethical per se unless it is illegal or contrary to some other ethical standard. This is the position of the bar in Alabama, Alaska, Hawaii, Minnesota, Missouri, Nebraska, New York, Ohio, Oregon, Tennessee, Texas, Utah, and Vermont. In four other states—Maine, Mississippi, North Carolina, and Oklahoma—comparable opinions appeared before the ABA's *Formal Opinion 01-422* was released and have never withdrawn or modified. Yet even among those that now believe that secret recording is not per se unethical, some ambivalence seems to remain. Nebraska, for example, refers to full disclosure as the “better practice.” New Mexico notes that the “prudent New Mexico lawyer” hesitates to record without the knowledge of all parties. And Minnesota cautions that surreptitiously recording client conversations “is certainly inadvisable” except under limited circumstances.

Although the largest block of states endorse this view, whether it is a majority view is uncertain because a number of jurisdictions have apparently yet to announce a position, for example, Arkansas, Connecticut, Delaware, Georgia, Louisiana, Nevada, New Jersey, North Dakota, Rhode Island, West Virginia, and Wyoming.

Exceptions

Lying

Besides Rule 8.4's prohibition on unlawful, fraudulent, deceptive conduct, the Code of Professional Conduct also condemns making a false statement of material fact or law. As a consequence even when surreptitious recording is not considered a per se violation, it will be considered unethical if it also involves a denial that the conversation is being recorded or some similar form of deception.

Evidence Gathering

While illegality and false statements exist as exceptions to a general rule that permits surreptitious recording, evidence gathering is an exception to a general rule that prohibits such recordings. The earlier ABA opinion conceded a possible exception when prosecuting attorneys engaged in surreptitious recording pursuant to court order. Various jurisdictions have expanded the exception to include defense attorneys as well as prosecutors. Some have included use in the connection with other investigations as well.

Other Exceptions

Other circumstances thought to permit a lawyer to record a conversation without the consent of all of the parties to the discussion in one jurisdiction or another include instances when the lawyer does so in a matter unrelated to the practice of law; or when the recorded statements themselves constitute crimes such as bribery offers or threats; or when the recording is made solely for the purpose of creating a memorandum for the files; or when the “the lawyer has a reasonable basis for believing that disclosure of the taping would significantly impair pursuit of a generally accepted societal good.”

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