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Wiretapping, Tape Recorders & Legal Ethics: Questions Posed by Attorney Involvement in Secretly Recording Conversation

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Summary

The American Bar Association considers recording a telephone or face to face conversation without the knowledge and consent of the parties to conversation contrary to the ethical standards of the legal profession. Some of the state court and bar association committees responsible for the regulation of the practice of law agree; some disagree; and some agree but with exceptions.

Query

Has an attorney engaged in unprofessional 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.

Both the Code of Professional Responsibility (DR 1-102(A)(3)) and the Model Rules of Professional Conduct (Rule 8.4(b)), models for the standards binding on members of the Bar in most jurisdictions, broadly condemn illegal conduct as unethical.[1] In the absence of an applicable exception, secretly recording either a telephone or face to face conversation is a violation of the Electronic Communications Privacy Act provisions that proscribe the use of an electronic or mechanical device to intercept wire, oral or electronic communications, 18 U.S.C. 2510, 2511.

Exceptions are available for judicially supervised, law enforcement interceptions under procedures dictated by the Act, 18 U.S.C. 2511(1). It is likewise "not unlawful" under the federal Act to record a conversation, as long as one of the parties to the conversation consents, regardless of whether the recording is accomplished by someone "acting under color of law" (the police) or someone "not acting under color of law" (everyone else), 18 U.S.C. 2511(2)(c), (d).

State law frequently follows a similar pattern—recording is outlawed subject to a one party consent exception for either the police or both the police and everyone else. Yet several states make unlawful what is "not unlawful" under federal law; they ban recording but are less forgiving of consent interceptions. In California, Delaware, Florida, Illinois, Kansas, Maryland, Massachusetts, Michigan, Montana, New Hampshire, Oregon, Pennsylvania, and Washington, some types of recording that are lawful as a matter of federal law are illegal as a matter of state law and consequently are unethical.[2]

In the remaining jurisdictions, recording that is lawful may nevertheless be unethical. Its status turns upon construction of the command that attorneys avoid "conduct involving dishonesty, fraud, deceit, or misrepresentation," DR 1-102(A)(4); Rule 8.4(c). Almost a quarter of a century ago, the ABA declared that the phrase "dishonesty, fraud, deceit or misrepresentation" includes recording a conversation without the consent of all of the parties to a conversation, even if the conduct is lawful, ABA *Formal Op. 337* (1974).[3] The Opinion conceded an exception for court-ordered interceptions.[4] Most jurisdictions to consider the question have concurred. In doing so, some recognize an expanded class of exceptions. And some disagree.

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[1] Strictly speaking neither model includes all crimes. The Rules of Professional Conduct refer to any criminal act "that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects" and the Code of Professional Responsibility to conduct "involving moral turpitude." No one doubts inclusion of illegal wiretapping or electronic eavesdropping within the proscribed class in either case, *N.C. RPC 192* (1995); *Ore. State Bar Ass'n Formal Opinion 1991-74*; *Va. LEO #1324* (1990). Summaries or excerpts from state courts and state bar association ethics committees are appended to the longer version of this report, CRS Report 98-250.

[2] Some of these jurisdictions permit interception with one party consent for either telephone or oral communications but not both; some permit interception in criminal cases with one party consent but require the consent of all parties for interception by the general public or if the interception is unrelated to any of a list of statutory designated offenses.

[3] "The conduct proscribed in DR 1-102(A)(4), i.e., conduct which involves dishonesty, fraud, deceit or misrepresentation . . . clearly encompasses the making of making of recordings without the consent of all parties . . . [N]o lawyer should record any conversation whether by tapes or other electronic device, without the consent or knowledge of all parties to the conversation," *ABA Formal Op. 337*, at 3 (1974).

[4] "There may be extraordinary circumstances in which the Attorney General of the United States or the principal prosecuting attorney of a state or local government or law enforcement attorneys or officers acting under the direction of the Attorney General or such principal prosecuting attorneys might ethically make and use secret recordings if acting

The convictions expressed by the Texas Professional Ethics Committee are 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. Tex. Prof. Eth. Comm. Opinion No. 514 (1996).

The states that appear to share this view include Alabama, Alaska, Colorado, Hawaii, Iowa, Missouri, and Virginia.[5] Thus far, the federal courts also seem to be in accord.[6]

A second group of states—Arizona, Idaho, Kansas, Kentucky, Minnesota, Ohio, South Carolina, and Tennessee—concur but with an expanded list of exceptions, e.g., permitting recording by law enforcement personnel generally not just when judicially supervised,[7] or recording by criminal defense counsel,[8] or recording statements that themselves constitute crimes such as bribery offers or threats,[9] or recording confidential conversations with clients,[10] or recordings made solely for

within strict statutory limitations conforming to constitutional requirements. This opinion does not address such exceptions which would necessarily require examination on a case by case basis" *id*.

Note that under federal law in effect at the time an application for judicially supervised wiretapping for law enforcement purposes required the approval of the Attorney General or principal prosecuting attorney of a state or political subdivision of a state, but law enforcement wiretapping with one party consent required no such approval, 18 U.S.C.2516, 2511 (1972 ed.).

[5] *Ala. Opinion 84-22* (1984); *Alaska Bar Ass'n Eth.Comm. Ethics Opinions No. 92-2 (1992) and No. 91-4* (1991); *People v. Smith*, 778 P.2d 685, 686, 687 (Colo. 1989); *Haw. Formal Opinion No. 30* (1988); *Iowa State Bar Ass'n v. Mollman*, 488 N.W.2d 168, 169-70, 171-72 (Iowa 1992); *Mo.Advisory Comm. Op. Misc. 30* (1978); *Va. LEO #1635* (1995), *Va. LEO #1324*; *Gunter v. Virginia State Bar*, 238 Va. 617, 621-22, 385 S.E.2d 597, 600 (1989).

[6] *Parrott v. Wilson*, 707 F.2d 1262 (11th Cir. 1983); *Moody v. IRS*, 654 F.2d 795 (D.C. Cir. 1981); *Ward v. Maritz, Inc.*, 156 F.R.D. 592 (D.N.J. 1994); *Wilson v. Lamb*, 125 F.R.D. 142 (E.D.Ky. 1989); *Haigh V. Matsushita Electric Corp.*, 676 F.Supp. 1332 (E.D.Va. 1987).

[7] *Ariz. Opinion No. 95-03* (1995); *Ky.Opinion E-279* (1984); *Minn.Law.Prof. Resp.Bd. Opinion No. 18* (1996); *Ohio Bd.Com.Griev.Disp. Opinion No. 97-3* (1997); *S.C. Ethics Advisory Opinion 92-17* (1992); *Tenn.Bd.Prof.Resp. Formal Ethics Opinion No. 86-F-14(a)* (1986).

[8] *Ariz. Opinion No. 95-03* (1995); *Ky.Opinion E-279* (1984); *Minn.Law.Prof.Resp.Bd. Opinion No. 18* (1996); *Ohio Bd.Com.Griev.Disp. Opinion No. 97-3* (1997); *Tenn.Bd.Prof.Resp. Formal Ethics Opinion No. 86-F-14(a)* (1986).

[9] *Ariz. Opinion No. 95-03* (1995); *Tenn.Bd.Prof.Resp. Formal Ethics Opinion No. 86-F-14(a)* (1986).

[10] *Idaho Formal Opinion 130* (1989); *Minn.Law.Prof.Resp.Bd. Opinion No. 18* (1996)

the purpose of creating a memorandum for the files,[11] or recording by a government attorney in connection with a civil matter,[12] or recording under other extraordinary circumstances.[13]

A third group of jurisdictions have 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 suggest that the position that the propriety of an attorney surreptitiously recording his or her conversations where it is lawful to do so depends upon the other circumstances involved in a particular case.[14]

In New York, the question of whether an attorney's surreptitiously recording conversations is ethically suspect is determined by locality.[15] There is general agreement that attorney may advise his or her clients of the circumstances under which surreptitious recording is lawful, but that an attorney may not use client, agent or any other individual to evade any ethical limitation to which the attorney is subject.

In several jurisdictions, the question of whether lawful recording is per se unethical has yet to arise. Elsewhere the hold of precedent of either persuasion may prove unsure for a simple reason. There is no rational consistency between the per se rule and its exceptions; between the reason why one party consent should be lawful and why it should be unethical. They represent two irreconcilable schools of thought with the outcome of any given case determined by the predilection of the tribunal. The prudent lawyer avoids surreptitious recording, aware that in similar circumstances others may be allowed to indulge with impunity.[16] The lawfulness of wiretapping and electronic eavesdropping is the subject of federal law. Recently questions have arisen as to how this applies to attorneys.

[11] *Kan.Bar Ass'n Opinion 96-9* (1997).

[12] *Minn.Law.Prof.Resp.Bd. Opinion No. 18* (1996).

[13] *Ohio Bd.Com.Griev.Disp. Opinion No. 97-3* (1997).

[14] *D.C. Opinion No. 229* (1992) (recording was not unethical because it occurred under circumstances in which the uninformed party should have anticipated that the conversation would be recorded or otherwise memorialized); *Mississippi Bar v. Attorney ST.*, 621 So.2d 229 (Miss. 1993)(context of the circumstances test); *N.M.Opinion 1996-2* (1996)(members of the bar are advised that there are no clear guidelines and that the prudent attorney avoids surreptitious recording); *N.C. RPC 171* (1994)(lawyers are encouraged to disclose to the other lawyer that a conversation is being tape recorded); *Okla.Bar Ass'n Opinion* 307 (1994)(a lawyer may secretly record his or her conversations without the knowledge or consent of other parties to the conversation unless the recording is unlawful or in violation of some ethical standard involving more than simply recording); *Ore.State Bar Ass'n Formal Opinion No. 1991-74* (1991) (an attorney with one party consent may record a telephone conversation "in absence of conduct which would reasonably lead an individual to believe that no recording would be made"); *Utah State Bar Ethics Advisory Opinion No. 96-04* (1996) ("recording conversations to which an attorney is a party without prior disclosure to the other parties is not unethical when the act, considered within the context of the circumstances, does not involve dishonesty, fraud, deceit or misrepresentation"); *Wis.Opinion E-94-5* ("whether the secret recording of a telephone conversation by a lawyer involves `dishonesty, fraud, deceit or misrepresentation' under SCR 20:8.4(c) depends upon all the circumstances operating at the time").

[15] Compare, *Ass'n of the Bar of City of N.Y. Formal Opinion No. 1995-10* (1995)(secret recording is per se unethical), with, *N.Y.County Lawyer's Ass'n Opinion No. 696* (1993)(secret recording is not per se unethical).

[16] "[T]he prudent lawyer should probably act as if just about everything said over the phone while practicing law may well end up on tape. Likewise, any lawyer who undertakes to record a conversation should take extreme care to ensure demonstrable compliance with the ethical requirements governing this practice", Gilbreath & Cukjati, *Tape Recording of Conversations: Ethics, Legality and Admissibility*, 59 TEXAS BAR JOURNAL 951, 954 (1996).

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