

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OPINION 97-3

Issued June 13, 1997

WITHDRAWN BY OPINION 2012-1 ON JUNE 8, 2012

[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]

SYLLABUS: An attorney in the course of legal representation should not make surreptitious recordings of his or her conversations with clients, witnesses, opposing parties, opposing counsel, or others without their notification or consent. The act of surreptitious recording by attorneys may violate DR 1-102(A)(4) unless the act when considered in the context of the circumstances does not rise to the level of dishonesty, fraud, deceit, or misrepresentation. The burden would be upon each individual attorney to justify on a case by case basis why the facts and circumstances surrounding the surreptitious recording did not violate DR 1-102(A)(4). Recognized exceptions to the prohibition on surreptitious recording include prosecuting and law enforcement attorney exception; criminal defense attorney exception; and extraordinary circumstances exception.

OPINION: This opinion addresses the surreptitious recording by attorneys of their conversations with others in the course of legal representation.

Is it ethically proper for an attorney in the course of legal representation to surreptitiously record his or her wire or oral communication with clients, witnesses, opposing parties, opposing counsel, or others?

Surreptitious is an adjective defining that which is “[m]ade, done, acquired by clandestine or stealthy means.” *Webster’s II New Riverside University Dictionary* 1166 (1984). Secret recordings made by a party to a conversation without the knowledge or consent of the other party to the conversation are commonly referred to as “surreptitious recordings.” Such recordings are also referred to as “one-party consensual recordings.”

The issue is not whether such recordings are legal. Under federal law it is not unlawful “for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act

in violation of the Constitution or laws of the United States or of any State.” 18 U.S.C. § 2511(2)(d)(1994). Under Ohio law, the prohibition against interception of communications does not apply to “[a] person who is not a law enforcement officer and who intercepts a wire, oral, or electronic communication, if the person is a party to the communication or if one of the parties to the communication has given the person prior consent to the interception, and if the communication is not intercepted for the purpose of committing a criminal offense or tortious act in violation of the laws or Constitution of the United States or this state or for the purpose of committing any other injurious act.” Ohio Rev. Code Ann. § 2933.52(B)(4) (Baldwin, 1997). However, the issue addressed herein is whether surreptitious recordings are ethical. The fact that it is lawful does not settle the issue of whether it is ethical.

Over twenty years ago, the American Bar Association Committee expressed the view that conversations recorded without the consent of all parties is conduct proscribed by DR 1-102(A)(4). In Formal Op. 337(1974), the ABA Committee on Ethics and Professional Responsibility advised that with the exception noted below “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.” Canons 1, 4, 7, and 9 and Ethical Considerations 1-5, 4-4, 4-5, 7-1, 9-2, and 9-6 were cited in support of the conclusion. The stated exception was that “[t]here 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 within strict limitations conforming to constitutional requirements.” ABA, Formal Op. 337 (1974).

Some states take the approach that it is not unethical per se for a lawyer to record his or her conversations without the consent or prior knowledge of the other parties to the conversation. *See e.g.*, Hawaii SupCt, Formal Op. 30 (Modification 1995) (advising that it is subject to case by case review); Mississippi Bar, Op. 203 (1992); New York County Lawyers’ Ass’n, Op. 696 (1993); Oklahoma Bar Ass’n, Op. 307 (1994); Utah State Bar, Op.96-04 (1996).

Some states follow the ABA view, prohibiting surreptitious recordings by attorneys except for law enforcement attorneys and prosecuting attorneys. *See e.g.*, Dallas Bar Ass’n, Ops. 1991-02 (1991), 1981-5 (1981); State Bar of Texas, Ops. 514 (1995), 392 (1978). Some states recognize an exception for both prosecuting attorneys and criminal defense attorneys. *See e.g.*, State Bar of Arizona, Op. 90-02 (1990) (extending the criminal law enforcement exceptions of Arizona Op. 75-13 (1975) to lawyers who represent criminal defendants); Kentucky Bar Ass’n, Op. E 279 (1984) (permitting criminal defense attorney to record witnesses); Tennessee SupCt, Formal Op. 86-F-14(a) (1986) (recognizing exceptions for prosecutors and criminal defense attorneys). Some states also acknowledge an exception for secret recordings of an utterance that is itself a crime. *See* State Bar of Arizona, Op. 90-02 (1990); Tennessee SupCt, Formal Op. 86-F-14(a) (1986).

One state prohibits surreptitious taping without acknowledging an exception. *See* Virginia State Bar, LEO 1635 (1995), 1324 (1990). One state permits the recording of a telephone conversation, but prohibits the recording of in-person conversation. *See* Oregon State Bar Ass'n, Op. 1991-74 (1991). One state permits secret recordings of clients, but prohibits secret recordings of other lawyers or witnesses. *See* Idaho State Bar, Op. 130 (1989). The surreptitious taping of a conversation with opposing counsel has been viewed as ethical. *See e.g.*, North Carolina State Bar Ass'n, Op. 171 (1994). It has also been viewed as unethical. *See e.g.*, State Bar of Arizona, Op. 95-03 (1995). One state advises that routine secret recording of telephone conversations would almost certainly violate the ethical rules, but whether any particular telephone call may be recorded depends on the circumstances of that call. *See* State Bar of Wisconsin, Op. E94-5 (undated). One state concludes that there are no clear guidelines and that the prudent lawyer should probably avoid surreptitious recording. *See* State Bar of New Mexico, Op. 1996-2 (1996).

Like other states, this Board strives for an interpretation that is reasoned. This Board's consideration of the issue is based upon DR 1-102(A)(4) of the Ohio Code of Professional Responsibility.

DR 1-102(A)(4) A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

The legal profession has a duty of candor. The prohibition in DR 1-102(A)(4) against dishonesty is a reflection of the duty of candor. Although society may change, the duty remains. Individuals still expect candor from attorneys who are officers of the court. Individuals still have some expectations of privacy in our society. This is true despite advances in technology that make recording devices almost imperceptible. There are those who do not expect their private conversations with others to be routinely recorded. With this expectation, their words may not be spoken with the same precision as the words would be written.

On the basis of candor and privacy expectations, it would be easy to conclude that surreptitious taping by attorneys in legal representations is unethical. This is our conclusion under routine circumstances; however, circumstances are not always routine, and the Board would be in remiss to ignore necessary exceptions.

Valid exceptions to prohibition on surreptitious recording include: prosecuting and law enforcement attorney exception (which applies to criminal law enforcement activity conducted in accordance with statutory, judicial, or constitutional authority); criminal defense attorney exception (which permits zealous representation to protect constitutional rights of a criminal defendant); and extraordinary circumstances exception (which might include attorneys' needs to defend themselves or their clients against wrongdoing by another). However, with these exceptions the burden would be upon each individual attorney to justify why the facts and circumstances surrounding the surreptitious recording did not violate DR 1-102(A)(4).

Although the accurate recall of information is important to attorneys in providing legal representation, this on its own does not persuade the Board to condone the routine use of surreptitious recordings in the practice of law. For those who wish to use taping as a way of assisting the memory, consent may be obtained. The fact that an attorney wants to hide the recording from the other person suggests a purpose for the recording that is not straightforward. Recordings made with the consent of all parties to the communication are consistent with the ideals of honesty and fair play, whereas recordings made by clandestine or stealthy means suggest otherwise.

In conclusion, this Board advises that an attorney in the course of legal representation should not make surreptitious recordings of his or her conversations with clients, witnesses, opposing parties, opposing counsel, or others without their notification or consent. The act of surreptitious recording by attorneys may violate DR 1-102(A)(4) unless the act when considered in the context of the circumstances does not rise to the level of dishonesty, fraud, deceit, or misrepresentation. The burden would be upon each individual attorney to justify on a case by case basis why the facts and circumstances surrounding the surreptitious recording did not violate DR 1-102(A)(4). Recognized exceptions to the prohibition on surreptitious recording include the prosecuting and law enforcement attorney exception; the criminal defense attorney exception; and the extraordinary circumstances exception.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office.