

SURREPTITIOUS RECORDING BY ATTORNEYS: ETHICAL?



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In recent years, disciplinary authorities in various states have addressed the ethical issues posed by lawyers surreptitiously recording conversations with clients, opposing counsel, and others. In Ohio, the Board of Professional Conduct (the “Board”) issued Advisory Opinion 2012-1 entitled “Surreptitious (Secret) Recording by Lawyers.” Therein, the Board concluded that while a surreptitious recording of a conversation by an Ohio lawyer is not a per se violation of Prof.Cond.R. 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation) if the recording does not violate the law of the jurisdiction in which the recording takes place, the acts associated with a lawyer’s surreptitious recording may well constitute misconduct under Prof.Cond.R. 8.4(c) or other rules. Furthermore, the Board stated that in general, Ohio lawyers should not record conversations with current clients or prospective clients without their consent. The opinion was based in part on the ABA Standing Comm. on Ethics and Professional Responsibility, Formal Op. 01-422 (“ABA Opinion”).

Legality of Surreptitious Recording

The first question is whether such a recording is legal. Ohio is a “one party consent” state. Specifically, in Ohio, recording of wire, oral, and electronic communications is legal if the person instituting the recording is a party to the communication or one of the parties to the communication has given prior consent. R.C. 2933.52. Thirty-seven other states and the District of Columbia have similar requirements. Federal law, under 18 U.S.C. § 2511, also allows “one party consent.” However, eleven states require the consent of all parties to a conversation or phone call before a conversation can be recorded.

Those states are California, Delaware, Florida, Illinois, Maryland, Massachusetts, Montana, Nevada, New Hampshire, Pennsylvania, and Washington. Vermont currently has no statute. As such, any surreptitious recording in these jurisdictions would presumably be illegal and per se unethical.

Unethical Acts Associated with Surreptitious Recording of Non-Clients by Lawyers

Even if surreptitious recordings are legal in a given jurisdiction, attorneys must be mindful not to violate ethical rules. Examples of unethical acts include lying about the recording, using deceitful tactics to become a party to a recorded conversation, and using the recording to commit a crime or fraud. In addition, under Prof.Cond.R. 4.4, lawyers are prohibited from employing surreptitious recording without substantial purpose and may not utilize them to embarrass, harass, delay, or burden a third person. Furthermore, the surreptitious recording cannot be a means of obtaining evidence that violates the legal rights of a third person. See Prof. Cond.R., Preamble ¶ [5] (“A lawyer should use the law’s procedures only for legitimate purposes and not to harass or intimidate others.”)

Recording Clients or Prospective Clients

Where conversations with a client or prospective clients are concerned, the Board opines that a lawyer should not record client conversations without the client’s consent. Secretly recording a client is simply not consistent with the lawyer’s duties of loyalty and confidentiality, which are central to the attorney-client relationship. See Preamble, ¶ [4], Prof.Cond.R. 1.6, and Prof.Cond.R. 1.7, comment [1]. Exceptions to this general rule might arise in very rare instances. For example, a surreptitious recording may be ethical when

a lawyer believes a client plans to commit a crime resulting in death or substantial bodily harm. The ABA Opinion contains an additional deviation from this general rule and suggests a surreptitious recording may be ethical where the lawyer has no reason to believe the client might object. The Board, however, did not adopt this deviation.

Similar concerns of trust and confidentiality arise if a person is a prospective client as defined under the Rules of Professional Conduct. In addition, Prof.Cond.R. 1.8(b) provides, lawyers have a duty not to use information revealed during a consultation with a prospective client. Accordingly, per the Board, an attorney’s conversation with that person should not be recorded without consent.

Conclusion

In Ohio, a surreptitious, or secret, recording of a conversation by an Ohio lawyer is not a per se ethical violation if the recording does not violate the law of the jurisdiction in which the recording took place, but the acts associated with a lawyer’s surreptitious recording may constitute a violation of the Rules of Professional Conduct. In addition, as a general rule, the Board has submitted that Ohio lawyers should not record conversations with clients or prospective clients without their consent.

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