

Utah Ethics Opinions

1987.

90. USB EAOB Opinion No. 90

Utah State Bar

Ethics Advisory Opinion No. 90

Approved May 1, 1987

[Affirmed by Opinion No. 96-04]

Note: The following original Opinion No. 90 was reversed by the Board of Bar Commissioners on Sept. 23, 1988. This reversal was affirmed by Opinion No. 96-04.

Issue: Is it unethical for an attorney to surreptitiously record by electronic or mechanical means communications with clients, witnesses, or other attorneys?

Opinion: It is unethical for an attorney to surreptitiously record by electronic or mechanical means communications with clients, witnesses or other attorneys.

Analysis: The request was originally posed in terms of in-person and telephone communications. The Committee sees no principled basis upon which to distinguish between the two. It may be that one is more intrusive than the other. But what is said below applies equally to both.

The request was also posed in terms of whether it would be ethical for the attorney to direct his client to do the recording. An attorney cannot side-step proscriptions in the rules of professional conduct by causing or encouraging another to engage in unethical conduct on his or her behalf. *See* Disciplinary Rule 7-104(A)(1) (attorney shall not cause another to communicate with party he or she knows to be represented by a lawyer). The Committee's opinion is the same even if the attorney has someone else do the recording.

People communicate with each other, whether in person or over the telephone, anticipating that their conversations are not being secretly recorded. It is deceitful for the recorder not to tell the other party that the conversation is being recorded. What is true for the layman is doubly true for the attorney charged with maintaining the integrity of the profession (Canon 1), avoiding the appearance of professional impropriety (Canon 9), and preserving the confidences and secrets of the client (Canon 4).

Disciplinary Rule 102(A)(4) of the Utah Code of Professional Responsibility compels the conclusion reached

here. It proscribes conduct involving "dishonesty, fraud, deceit, or misrepresentation." The American Bar Association Committee on Ethics and Professional Responsibility concluded that surreptitious recording of conversations by an attorney falls squarely within the confines of Disciplinary Rule 102(A)(4). *See* Formal Opinion No. 337 (1974).* *See also Parrott v. Wilson*, 707 F.2d 1262, 1270-72 (11th Cir. 1984) (clandestine recording by attorney of conversations with

*The ABA Committee later reconsidered Formal Opinion No. 337, but let it stand in Informal Opinion No. 1320 (1975). The Committee also determined, as part of Informal Opinion No. 1230, that it would be unethical for an attorney to record or cause to be recorded a conversation between the attorney's investigator and another person who would not know the conversation was being recorded.

witnesses unethical and vitiated work product privilege claimed by attorney) (citing Formal Opinion No. 337). The Committee finds what is said in Formal Opinion No. 337 to be persuasive.

Surreptitious recording of telephone conversations does not appear to be illegal under Utah law. *See* Utah Code Ann. § 77-23a-4(2)(c). That fact should give no comfort to attorneys obliged to inspire the confidence, respect and trust of the public, Ethical Consideration 9-6, and avoid conduct that appears to be unethical or illegal. Ethical Considerations 9-7 and 1-5. The laws of at least ten states prohibit the surreptitious recording of telephone conversations. *See* ABA Formal Opinion No. 337, at page 4 n.3. The public cannot be expected to confine its scrutiny of the Utah legal profession to the fortuities of state boundaries.

Little need be said about surreptitiously recording conversations with one's client. Preserving the confidence and secrets of a client does not mean committing them to mechanical or electronic memory. The attorney cannot inspire the confidence, respect and trust of his or her clients by trusting them so little that he or she would not advise them that their conversation together is being recorded. *See* Ethical Consideration 9-6. *See also* ABA Informal Opinion No. 1008 (1967) (lawyer -nay not record conversations with client without prior disclosure).

There is nothing about communications between attorneys that changes the Committee's opinion here. In a system that is dependent on the exchange of "courtesies" by opposing

counsel, Ethical Consideration 7-38, attorneys should anticipate treatment by their fellow attorneys that is no more and no less courteous than that expected by laymen in their business pursuits. See ABA Informal Opinion No. 1009 (1967) (lawyer may not record conversations with lawyer for adverse party without prior disclosure). See also Informal Opinion No. 1407 (1978) (unethical for chief investigator for disciplinary board of state supreme court to use electronic surveillance to "monitor" conversation between attorney being investigated and client).

The Committee can conceive of exceptions that should be made for attorneys involved in law enforcement. However, exceptions should only be made for circumstances that are extraordinary." See Formal Opinion No. 337, at page 3. Ordinarily, recording will be undertaken by law enforcement officials without direction from prosecuting attorneys and will not run afoul of what is said in this opinion. Exceptions should only be allowed to develop on a case-by-case basis.

Opinion No. 90 (revised), issued September 23, 1988.

It is not unethical for an attorney to surreptitiously record by electronic or mechanical means communications with clients, witnesses or other attorneys.

Opinion No. 90 (revised) was generally affirmed and explained by Opinion No. 96-04, issued July 3, 1996.

Utah State Bar

Ethics Advisory Opinion Committee

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Rule Cited: