Utah Ethics Opinions

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Utah State Bar

Ethics Advisory Opinion Committee

Opinion No. 96-04

Approved July 3, 1996

Issue: Is it unethical for an attorney, without prior disclosure to other parties to a telephone conversation, electronically or mechanically to record communications with clients, witnesses or other attorneys?

Opinion: 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.

Analysis: The full text of Utah State Bar Ethics Opinion No. 90, as approved on September 23, 1988, reads: "It is not unethical for an attorney to surreptitiously record by electronic or mechanical means communications with clients, witnesses or other attorneys." (fn5) There is no discussion of the conclusion. The Utah State Bar Board of Bar Commissioners has requested that the Ethics Advisory Opinion Committee revisit this issue.

Having considered the issue in light of the Utah Rules of Professional Conduct, applicable Utah law and comments submitted by members of the Utah State Bar, (fn6) we have concluded that it is not *per se* unethical for an attorney to record such a conversation with a client, witness or other attorney without disclosure. This conclusion is consistent with Opinion No. 90. However, given the brevity and absence of explanation in Opinion No. 90, some may have been misled to the conclusion that recording conversations could never be unethical. Our Opinion should clarify the extent to which an attorney may tape-record conversations without exceeding ethical bounds.

Utah law makes clear that it is *legal* to record conversations to which a person is a party without prior disclosure to the other parties, unless it is done for a criminal or tortious purpose. (fn7) The question of whether or not this action, when taken by a lawyer, is a violation of *legal* ethics has been the subject of opinions from ethics committees from many states, as well as the American Bar Association. Invariably these opinions have focused on provisions similar to Rule 8.4(c) of the Utah Rules of Professional conduct, which provides: "It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

A majority of states still follow ABA Formal Opinion 337, published in 1974, which found that it is generally unethical for lawyers to tape conversations secretly. That opinion may have been partially a reaction to then-current events-namely, the activities of various attorneys during the Watergate scandal. It leaves only a narrow exception for government prosecutors and gives no clearly reasoned basis for declaring that all other surreptitious tape recording of communications is unethical. The ABA based the prosecutor exception on the United States Supreme Court's holding in *United States v. White*. (fn8) As the Mississippi Supreme Court has pointed out:

[T]he United States Supreme Court held [in *White*] that a government agent may constitutionally record any statement made by a criminal so long as the mere hearing of the statement by the agent would not violate the speaker's justifiable expectations of privacy. Formal Op. 337 apparently sought to work around White by limiting its rationale to the context of criminal prosecutions. The distinction is ill founded, however, because even law-abiding citizens have limits on their justifiable expectations of privacy. (fn9)

We believe there is no reason to make a distinction between prosecuting attorneys and attorneys in other areas of practice.

As the *White* court stated, "[i]t is thus untenable to consider the activities and reports of the police agent himself, though acting without a warrant, to be a 'reasonable' investigative effort and lawful under the Fourth Amendment but to view the same agent with a recorder or transmitter as conducting an 'unreasonable' and unconstitutional search and seizure." (fn10) The act of taking notes during a conversation or dictating a memo to the file regarding a conversation should not be considered differently from actually recording it within the limitations discussed in this Opinion.

One basis for allowing attorneys to record conversations is founded in the same reasoning as stated in *White*. "An electronic recording will many times produce a more reliable rendition of what a defendant has said than will the unaided memory of a police agent." (fn11) An attorney's ability to recall information from conversations is important to his competence in undertaking an action. (fn12)

The Mississippi Supreme Court has also established a "context-of-the-circumstances" test. (fn13) As the

Mississippi court stated in *Attorney M*:

> The categorical pronouncement of Formal Op. 337 . . . goes too far. Situations will arise where (surreptitious recording) is both necessary and proper. Under certain circumstances, . . . an attorney may be justified in making a . . . recording in order to protect himself or his client from the effects of future perjured testimony. On the other hand, an attorney who uses a secret recording for blackmail or to otherwise gain unfair advantage has clearly committed an unethical-if not illegal-act. Ethical complications arise not so much from . . . recordings *per se* as from the manner in which attorneys use them. The context-of-the-circumstances test contemplates this distinction, Formal Op. 337 does not. (fn14)

Privacy expectations are different in 1996 from what they were in 1974. As Stanley S. Arkin and the New York County Lawyers' Association have pointed out, it is reasonable in today's world to expect a conversation to be recorded, given the relative ease of the process. Apart from the basic reasoning that a lawyer needs to have an accurate means of preserving what is being told during the course of an important conversation, tape recorded conversations are becoming common-place. Arkin goes on to explain:

> Technology has put the power to secretly tape record within the easy reach of every lawyer and litigant. Overall, the tape recorder, and its cousins-the hidden camera and the computer-allow outsiders to peer into and preserve aspects of life that were typically thought to be private and ephemeral. Hidden cameras in offices monitor the comings and goings of workers as well as their displays of affection and other personal matters. And tape recorders-the hidden kind-can be anywhere, recording words the speaker thought, and expected, were uttered in private. We may feel anonymous or alienated or alone, but increasingly we are subject to monitoring by technology. (fn15)

In light of this currently changing environment and the Utah statute, we do not find ABA Opinion 337 to be persuasive. Other bar opinions and some courts from various jurisdictions have begun to reflect this changing environment also. For example, the Mississippi Supreme Court held that, under certain circumstances, an attorney may tape a conversation with a potential party opponent without his knowledge or consent. (fn16) Some bar associations have also issued formal opinions holding that, under some circumstances with various limitations, surreptitious sound recording by an attorney of a conversation is permissible. (fn17) As stated by the New York County Lawyers' Association: "The secret recording of a telephone conversation, where one party has consented, cannot be deceitful *per se*. Recording of telephone conversations is authorized under law, and either party should reasonably expect the possibility that the conversation may be recorded." (fn18)

Some have expressed an intuitive feeling that the use of tape recorders by attorneys in this type of circumstance is "bush league" or "unseemly." Although we do not condone deceptive, deceitful or fraudulent actions, we see no principled reason to find it to be unethical for an attorney, within the limits discussed elsewhere in this opinion, to tape-record a conversation when it is expressly permitted by Utah law for all other persons.

Nevertheless, a number of issues that have arisen in other jurisdictions illustrate circumstances where the act of undisclosed recording of a conversation by an attorney *would* violate an ethical rule.

For example, it would be unethical for an attorney to fail to answer candidly if asked whether the conversation is being recorded. In *Mississippi Bar v. Attorney ST*, (fn19) the Mississippi Supreme Court held that an attorney who taped conversations with a judge and a police chief while representing a client whose civil rights he believed were being abused was acting to protect his client's interests and did not act unethically. However, when asked by the police chief if he was recording their conversation, the attorney denied so doing, and the court held that the attorney violated the Mississippi Rule of Professional Conduct 4.1, which requires that a lawyer be truthful when dealing with others on a client's behalf. This violation warranted a private reprimand. (fn20)

The lawyer's failure to identify himself, the client, or the purpose of the conversation could also constitute unethical misrepresentation. In *In re An Anonymous Member of the South Carolina Bar*, (fn21) an attorney representing a family member for the purpose of investigating an auto accident, telephoned the driver of the other vehicle, who was not represented by counsel, telling him that he was the injured driver's cousin. He did not indicate that he was an attorney, and he secretly recorded the conversation. (fn22) The South Carolina Supreme Court found the attorney to be guilty of misconduct. (fn23)

When interacting with non-clients, attorneys must also be mindful of Rules 4.1 through 4.4, governing transactions with persons who are not clients. Specifically, Rule 4.4 provides: "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violates the legal rights of such a person." Similarly, under Rule 4.1, an attorney must not make false statements of material fact to a third person.

Within the guidelines of this Opinion, a lawyer will not violate the Rules of Professional Conduct by making an undisclosed recording of a telephone conversation to which

the lawyer is a party.

Footnotes

5. For a chronology of events leading to the final version of Opinion No. 90 in September 1988, see Nathan B. Wilcox, *Surreptitiously Tape-Recording Your Conversations with Witnesses, Clients, and Other Attorneys: Is It Legal and Ethical?*, [Utah State Bar] Voir Dire, Summer 1995, at 32.

6. In the February 1996 issue of the *Utah Bar Journal*, members of the Bar were invited to comment on Ethics Opinion No. 90.

7. Utah Code Ann. § 77-23a-4(7)(b) (1995).

8. 401 U.S. 745, 751 (1971).

9. *Attorney M v. Mississippi Bar*, 621 So. 2d 220, 223-24 (Miss. 1992).

10. *White*, 401 U.S. at 753.

11. *Id*.

12. *See* 621 So. 2d at 228 (concurring opinion).

13. *Netterville v. Mississippi State Bar*, 397 So. 2d 878, 883 (Miss. 1981).

14. 621 So. 2d at 224.

15. *Stanley S. Arkin, Attorneys, Tape Recorders & Perfidy*, 211 N.Y.L.J. 3; N.Y. Co. Lawyers' Comm. on Prof. Ethics, Op. 696 (1994).

16. *See, e.g., Netterville v. Mississippi State Bar*, 397 So. 2d 878 (Miss. 1981); *Attorney M v. Mississippi Bar*, 621 So. 2d 220 (Miss. 1992); *Mississippi Bar v. Attorney ST*, 621 So. 2d 229 (Miss. 1993).

17. *See* 32 A.L.R.5th 715, 721 (1994), citing to Ariz. State Bar, Op. No. 90-2; Idaho State Bar, Op. No. 130 (1990); Ky. Bar Assoc., Op. No. E-279 (1984); N.Y.C. Bar Assoc., Op. No. 80-95; Tenn. Bd. of Prof. Responsibility, Op. No. 81-F-14 (1986), 1981 WL 165069.

18. N.Y. Co. Lawyers' Comm. On Prof. Ethics, Op. 696 (1994).

19. 621 So. 2d 229 (Miss. 1993).

20. *Id.* at 232-33.

21. 283 S.E.2d 667 (S.C. 1984).

22. *See* 32 A.L.R.5th 715, 724-25 (1994).

23. The court relied on ABA Formal Opinion 337 in its decision. While we do not support the conclusion of the ABA opinion, the behavior in Anonymous Member would also be found unethical under our Opinion.

Rule Cited:

8.4