

Directing the Tape-Recording of Phone Conversations
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Reprinted from *Minnesota Lawyer* (October 2, 2000)

In 1996, the Minnesota Lawyers Professional Responsibility Board (LPRB) adopted Opinion 18, which prohibits an attorney's tape-recording of telephone conversations without the knowledge of the other party to the conversation. LPRB Opinion 18 provided exceptions to the broadly stated rule, and left many questions, which often fall to the Office of Lawyers Professional Responsibility advisory opinion service to answer.

One question that has been asked about Opinion 18 is whether an attorney can advise a divorce client to tape-record a child's phone conversations with the adverse party. Perhaps the mother has temporary custody, but suspects that the father is trying to undermine her authority with the child.

Perhaps the noncustodial parent makes disclosures to the child and tells the child not to tell the custodial parent. Perhaps the safety and security of the child truly is at stake. Many arguments are made in support of surreptitious taping. However, more often than not, one party is attempting to gain an advantage by catching the other side unaware and in a compromised position.

Arizona has recently provided an answer to the question of whether an attorney may recommend that the client record telephone conversations between a minor child and the other parent and has opined that the attorney should not advise the divorce client to tape-record the child's phone calls with the other party. (Arizona State Bar Comm. on the Rules of Professional Conduct, Op. 2000-04, 3/00.) Would the Minnesota disciplinary system give the same answer? LPRB Opinion 18 reads as follows:

It is professional misconduct for a lawyer, in connection with the lawyer's professional activities, to record any conversation without the knowledge of all parties to the conversation, provided as follows:

1. This opinion does not prohibit a lawyer from recording a threat to engage in criminal conduct;
2. This opinion does not prohibit a lawyer engaged in the prosecution or defense of a criminal matter from recording a conversation without the knowledge of all parties to the conversation;
3. This opinion does not prohibit a government lawyer charged with civil law enforcement authority from making or directing others to make a recording of a conversation without the knowledge of all parties to the conversation;
4. This opinion does not prohibit a lawyer from giving legal advice about the legality of recording a conversation.

In contrast, note that Minnesota statutory law allows tape-recording of conversations with consent of one party to the conversation.

Arizona, prior to March 2000, followed Ariz. Op. 95-03, holding that it is unethical conduct for counsel to surreptitiously record opposing counsel and Ariz. Op. 75-13, holding that it is improper for a lawyer to surreptitiously record any conversation between the lawyer and another person, except in limited circumstances, or between third persons. The exceptions in Ariz. Op. 75-13 are the same as those set out in LPRB Opinion 18. Arizona has adopted the Rules of Professional Conduct, as has Minnesota. In addition, Arizona law allowed for the recording of conversations with consent of one party. Thus, Arizona and Minnesota used the same underlying ethics rules and opinions and had the same statutory law concerning tape-recording of conversations prior to March 2000.

Ariz. Op. 2000-04 considered the following scenario. The client is a divorced parent. In good faith, your client (parent #1) believes that during telephone conversations between the child and parent #2, parent #2 is undermining the child's relationship with parent #1, your client. After the conversations, the child demonstrates severe emotional upset, often lasting for hours. Note that the factual scenario is not dependent upon who is the custodial parent. Note, also, that the consent of the child, or at least the consent of the client-parent, is presumed, so that the tape-recording is not in violation of state or federal law.

The Arizona opinion holds that directing such tape-recording violates Rules 8.4(a) and (c), which prohibit an attorney violating the rules through the acts of another and which prohibit conduct involving fraud, deceit or misrepresentation. The opinion also notes that the whole point of not disclosing the recording of the conversation is to capture the other party on tape making a statement that would likely not otherwise be made if the taping were revealed. As to the uninformed party, the taping is deceitful.

As a result, although such recording may not be illegal, the opinion holds it is unethical. An attorney's advice to a client to tape-record conversations between the other parent and a child in which only one of the parties to the conversation is aware of being recorded violates Arizona's ethics rules.

The Minnesota Lawyers Professional Responsibility Board has not issued an opinion on this factual scenario. To date, the Director's Office has not sought public or private discipline on similar facts. However, in telephone advisory opinions the advice given by the office comports with the recent Arizona opinion: it may be legal, but it's not ethical.