

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

Repealed: April 18, 2002

OPINION NO. 18 SECRET RECORDINGS OF CONVERSATIONS

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.

Adopted: September 20, 1996.

Repealed: April 18, 2002.

Committee Comment

It has been the position of the Lawyers Professional Responsibility Board and the Office of Lawyers Professional Responsibility for over a decade that surreptitious recording of conversations by a lawyer constitutes unprofessional conduct. This position is consistent with that announced by the ABA Committee on Ethics and Professional Responsibility in Formal Opinion 337 (August 10, 1974). It is also the position held by the majority of state ethics authorities who have addressed the issue. The ABA and other state ethics authorities recognize that although secret recording is not illegal (provided one of the parties to the conversation consents to the recording), such conduct is inherently deceitful and violates the profession's standards prohibiting conduct involving dishonesty, fraud, deceit or misrepresentation. *See* Rule 8.4 (c), Rules of Professional Conduct and DR 1-102(A)(4), Code of Professional Responsibility. The committee agrees that in most instances secret recording violates these standards.

The exceptions provided for in this opinion recognize that in certain limited circumstances, the interests served by surreptitious recordings outweigh the interests protected by prohibiting such conduct through professional standards. For example, a lawyer who is the subject of a criminal threat ought not be subject to discipline for secretly recording the threat. The "in connection with the lawyer's professional activities" language is intended to limit application of the opinion to those situations where a lawyer is representing a client or is representing him or herself in a legal matter.

Another exception is secret recording in the criminal prosecution area where such conduct has become a recognized law enforcement tool provided it is done within constitutional requirements. *See e.g.*, ABA Formal Opinion 337 at page 3. The committee determined, however, that such an exception should also be recognized for lawyers engaged in the defense of a criminal matter. *See also*, Arizona Opinion No. 90-02; Tennessee Ethics Opinion 86-F-14 (a), July 18, 1986); and Kentucky Opinion E-279 (Jan. 1984). Creating an exception only for prosecutors could create an imbalance raising potential constitutional problems. *See e.g.*, *Kirk v. State*, 526 So.2d 223, 227 (La. 1988) (court found disparity between permitting prosecutors to secretly record and prohibiting defense lawyers was impermissible denial of equal protection).

The exception provided to government lawyers engaged in civil law enforcement similarly recognizes that to effectively protect the public, surreptitious recording is a necessary law enforcement tool. In certain areas such as consumer fraud, false advertising, deceptive trade practices and charitable solicitation, there may be few, if any, alternatives to surreptitious recording for effective enforcement. The exception also recognizes that during the investigative stage, a government lawyer may not be able to determine with certainty whether the violations are civil, criminal or both.

Finally, because surreptitious recording with the consent of one of the parties is not illegal, the committee determined that a lawyer should not be prohibited from advising a client about the legality or admissibility of such a recording. This exception is not intended, however, to permit non-lawyer employees or agents of the lawyer to record conversations in violation of this opinion. *See* Rule 5.3, Minnesota Rules of Professional Conduct.