

## Opinion Barring Secret Recording of Conversations is Repealed

by

**Kenneth L. Jorgensen, First Assistant Director  
Minnesota Office of Lawyers Professional Responsibility**

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At its April 18, 2002, meeting, the Lawyers Professional Responsibility Board repealed Opinion No. 18, which made it unethical for lawyers to secretly record conversations with others. The repeal of Opinion No. 18 followed the lead of the American Bar Association (ABA) in changing its longstanding position condemning the surreptitious, but legal, recording of conversations by lawyers.

### ABA reconsideration

In June 2001, the ABA issued Formal Ethics Opinion 01-422, which withdrew its previous opinion (Formal Opinion 337) that had been in effect since 1974 prohibiting secret recording. The reasons proffered by the ABA for abandoning its general prohibition against secret recording were:

- The belief that nonconsensual recording of conversations is inherently deceitful, a concept embraced by the ABA in 1972, is not universally accepted today. Secret recording of conversations is now an accepted practice by law enforcement, private investigators and journalists. Moreover, courts routinely admit evidence obtained through secret recordings.
- The existence of circumstances in which requiring disclosure of the recording could defeat a legitimate and necessary activity (e.g., documenting criminal threats, protecting against witness perjury, use of testers in discrimination and quasi-governmental investigations).
- Unlike the prior code of professional responsibility, the existing Rules of Professional Conduct do not include the antiquated admonition to “avoid even the appearance of impropriety.” Instead, Rule 4.4 now expressly limits lawyer methods of obtaining evidence to those that “violate the legal rights of such a person.” Since nonconsensual recordings are lawful in the vast majority of states, they do not violate the rights of the person who was unknowingly recorded.

Despite reversing its general position on secret recording, the ABA cautioned lawyers about activities related to now permissible nonconsensual recording that could subject lawyers to violations of the Rules of Professional Conduct.

First, lawyers should be aware that although federal law, and most state law, permits recording with

the consent of only one party to the conversation, some states prohibit recordings unless consent has been obtained from all parties to the conversation. In addition, lawyers who falsely deny their secret recording of conversations would likely violate Rule 4.1 prohibiting false statements of material fact to a third person.

Finally, the ABA Ethics Committee was divided over whether lawyers can ethically record client conversations without their consent. In differentiating client conversations with those involving third parties, the committee cited the lawyer's duty of loyalty to the client. Without resolving whether it is "ethical" for a lawyer to record a client conversation, the committee unanimously agreed that it was "almost always inadvisable" for a lawyer to record a client conversation without disclosure.

### **Minnesota reconsideration**

For the most part, Minnesota Lawyers Board opinions constitute interpretations or clarifications of the Minnesota Rules of Professional Conduct. Opinion No. 18 was premised upon the belief that secret recording of conversations by lawyers was inherently deceitful and therefore unethical except in the limited circumstances enumerated in the opinion. The comment to Opinion No. 18 relied principally upon the ABA opinion from 1977 for the proposition that secret recording was inherently deceitful and therefore violated the ethical standards.

The Minnesota Rules of Professional Conduct generally prohibit lawyers from engaging in conduct that involves deceit. See Rule 8.4(c). A number of states, like Minnesota, have, since 1974, issued ethics opinions concluding that secret recording was deceitful and therefore unethical. However, given the ABA's recent change of heart, and its rationale, the Minnesota Lawyers Board was doubtful about whether secret recording by itself continued to fall clearly within the deceit proscription of Rule 8.4(c).

It was this doubt that led the board to withdraw or repeal Opinion No. 18. In repealing the opinion, the board and its opinion committee echoed the concerns expressed by the ABA. Lawyers should be aware, however, that secret recording is illegal in some states and therefore prohibited by Rule 4.4.

Moreover, lawyers who falsely deny recording conversations will be subject to discipline under Rules 4.1 and 8.4(c). And finally, although it may not be unethical to record client conversations, except in very limited circumstances (e.g., client is making criminal threats to the lawyer) it is certainly inadvisable to do so without disclosure.

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