

NEW YORK STATE BAR ASSOCIATION
Committee on Professional Ethics

Opinion #515 - 12/27/79 (49-79)

Clarifies 328

Topic: Surreptitious recording of conversation; fairness and candor; representing client zealously within bounds of law

Digest: Lawyer in private practice may under certain circumstances counsel client concerning conversations to be recorded without notice or consent

Code: EC 7-8; DR 1-102(A)(4), 7-101(A), 7-102(A)(7), (8)

QUESTION

May a lawyer, in response to a client's request for advice, counsel a client concerning the recording of a conversation between the client and a third party to whom no notice is given?

OPINION

We have been asked to review and clarify our opinion concerning the ethical issues raised when conversations are recorded without notice with particular reference to criminal law matters and requests from clients for advice concerning the permissibility of such recording.

In N.Y. State 328 (1974) we concluded that except in special situations it is improper for a lawyer engaged in private practice to record electronically a conversation with another attorney or any other person without first advising the other party. We said that even if secret electronic recording of a conversation with one party's consent is not illegal, it offends the traditional standards of fairness and candor that should characterize the practice of law.

Several months later ABA 337(1974), relying on DR 1-102(A)(4) ("A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation"), also concluded that no lawyer should record any conversation, whether by tape or other electronic devices, without the prior consent or knowledge of all parties to the conversation.

Neither N.Y. State 328 nor ABA 337 explicitly addressed the question of whether a lawyer, although precluded from recording a conversation without notice to all parties, could properly counsel a client concerning such conduct. A few months after ABA 337, the ABA's standing committee held in an informal opinion that the recording, at the instance of a lawyer, of colloquy between an investigator and a sales clerk, when the investigator knows that the recording is being made but the clerk does not, would constitute unethical conduct by the lawyer. ABA Inf. 1320 (1975). It is unclear whether the result would have been the same if the question had been whether counsel (rather than initiating such conduct) had simply advised a client that recording in such circumstances was legally permissible.

Since these opinions are rooted in notions of what constitutes fair conduct by a lawyer, the principles they articulate would apply as well to situations where electronic recording devices are not used. Thus, a special committee of the Association of the Bar of the City of New York expressed the view that the use extension telephones to permit associates or secretaries to make records of, or simply to listen to, telephone conversations without the knowledge or consent of the other parties involved would be unethical. Interim Report of the Science and Law Committee, "Monitoring Devices and Lawyers," 20 The Record 648 (1965).

In certain situations where conversations are monitored the ethical concern goes beyond notions of fairness and candor. A lawyer is forbidden to engage in illegal or fraudulent conduct or to assist a client in doing so. DR 1-102; DR 7-102(A)(7),(8). In some jurisdictions recording of a conversation is illegal without the consent of all parties (see, e.g., Ill. Ann. Stat. ch. 38, §14-2 [Smith-Hurd 1979]), and in those jurisdictions counsel should not participate in or assist a client in such unlawful activities. N.Y. State 455 (1976). FCC regulations, promulgated in the interest of preserving telephone privacy, provide that in the case of interstate or international telephone calls recording (except by law enforcement officers acting under lawful authority) is permitted only if adequate notice is given to all parties by the use of an automatic tone warning device. 11 F.C.C. 1033, In the Matter of Use of Recording Devices in Connection with Telephone Service (1947). ABA 337 cites two California bar opinions holding that because of the FCC policy it would be unethical for an attorney to record a telephone conversation without the use of a warning device.

We have reviewed these ethical authorities(*1) because we believe clarification is required as they apply to criminal law matters and requests from clients for advice concerning the permissibility or legality of recording conversations where only one party consents.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, which provides criminal penalties for willful interception of wire or oral communications, has two relevant exceptions in 18 U.S.C. §2511 (2):

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

Similarly, N.Y. Rev. Pen. Law §§250.00, 250.05 (McKinney 1967) forbids electronic eavesdropping and wiretapping without a court order, but explicitly excepts circumstances in which one party consents.

ABA 337 recognized that there may be "extraordinary circumstances" where law enforcement officials "might ethically make and use secret recordings if acting within strict statutory limitations conforming to constitutional requirements." The opinion stressed, however, that "the mere fact that secret recordation in a particular instance is not illegal will not necessarily render the conduct of a public law enforcement officer in making such a recording ethical."

N.Y. State 328 noted that there may be "extraordinary circumstances when secret recordings of conversations by lawyers are rendered permissible, as, for example, if sanctioned by express statutory or judicial authority," but said each such exception "must be considered on its own merits."

The ABA Project on Standards for Criminal Justice, Standards Relating to Electronic Surveillance (Approved Draft 1971) provides (§4.1), "The surreptitious overhearing or recording of a wire or oral communication with the consent of, or by, one of the parties to the communication should be permitted, unless such communication is overheard or recorded for the purpose of committing a crime or other unlawful harm." This represented a change from the original standard (Tentative Draft 1968), which would have distinguished between overhearing or recording by law enforcement officers where consent of one of the parties was required and private recording which would have required the consent of all parties. Similarly, ABA Standards for Criminal Justice, The Defense

Function (Approved Draft 1971) provides (§4.2), "It is unprofessional conduct for a lawyer to use illegal means to obtain evidence or information or to employ, instruct or encourage others to do so." Consistent with these authorities, lawyers engaged in a criminal matter, representing the prosecution or a defendant, may ethically record a conversation with the consent of one party except where the purpose is to commit a criminal, tortious or injurious act. (*2)

N.Y. State 328 did not specifically address the situation where a client in a civil matter requests counsel's advice concerning the propriety of the client (not counsel) recording a conversation without the other party's consent. DR 7-101 (A) mandates that counsel should not fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules, subject to certain exceptions.

There do not appear to be Constitutional prohibitions against monitoring conversations where one party consents. Greenawalt, "The Consent Problem in Wiretapping & Eavesdropping: Surreptitious Monitoring with the Consent of a Participant in a Conversation," 68 Col. 1. Rev. 189, 203 (1968). Apart from the FCC policy requiring use of an automatic tone warning device in interstate and international calls, which has been adopted by most states, neither Congress nor the New York legislature has acted to prohibit party monitoring.

In N.Y. State 455 (1976) we said, "where the lawyer does no more than advise his client concerning the legal character and consequences of the act, there can be no professional impropriety. That is his proper function and fully comports with the requirements of Canon 7."

But counsel asked to advise concerning the legality of participant monitoring is not limited to restating the law; counsel can, of course, explain to the client whether in the particular context such monitoring is appropriate, having regard to its purpose, the parties involved, the time and place, the extent and nature of the conversation likely to be recorded, possible harmful social consequences and other pertinent considerations. If, for example, the client's purpose is to record a conversation with an employee who previously confessed to wrongdoing in order to gather incriminating evidence in convincing form, counsel may urge on the client that such conduct, although legal, might be unfair and might, indeed, infringe on the employee's rights.

As EC 7-8 states, "Advice of a lawyer to his client need not be confined to purely legal considerations... In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible." Each situation should be considered on its own merits, weighing the contribution to social good (such as obtaining authoritative evidence of wrongdoing) against the danger to privacy of communications.

For the reasons stated, and subject to the qualifications hereinabove set forth, the question posed is answered in the affirmative.

FOOTNOTES

*1 N.Y. State 328 cited only one exception to uniform disapproval of secret recordings of conversations by lawyers and no other exception has come to our attention. See Greenawalt, "The Consent Problem in Wiretapping & Eavesdropping: Surreptitious Monitoring with the Consent of a Participant in a Conversation," 68 Col. L. Rev. 180 (1968).

*2 This limited exception would permit counsel to record a conversation for the purpose of obtaining evidence reasonably believed to relate to the commission by another party of any serious crime, such as extortion, kidnapping, bribery, any felony involving violence against the person, or threatening telephone calls. See Cal. Pen. Code §633.5 (1970).