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Tape Recording Telephone Conversations—Is It Ethical For Attorneys?

Charles W. Adams*

Technological advances and regulatory changes in recent years have made it much easier to record telephone conversations. In the past, equipment for tape recording telephone calls could be obtained only from telephone companies and was not generally available to consumers. Today telephone answering machines are in wide use and are found in approximately twenty-eight percent of American households.¹ Nearly one-half of the answering machines that are sold have a feature for making a tape recording of both sides of a telephone conversation without the knowledge of the other party to the conversation.² As a consequence, it is likely in this electronic age that large numbers of telephone conversations are being recorded in secret.

Undoubtedly, many attorneys will be attracted to the idea of using surreptitious tape recordings as an inexpensive and effective means of preserving evidence for trial. In addition to making their own tape recordings of conversations with witnesses and opposing counsel, some attorneys might recommend that their clients secretly record telephone conversations with potential adversaries or opposing witnesses. Once the statements are on tape, they would be available for introduction at trial either for substantive purposes as an admission of a party opponent³ or for impeachment purposes as a prior inconsistent statement of a nonparty witness.⁴ Secret tape recordings might be especially useful in divorce cases, where one spouse might make an unguarded admission to the other not knowing that the statement is being recorded so that it could be played back at trial. The potential use of secret tape recordings is not limited to divorce proceedings, of course, and might find application in any case where the parties would have occasion to communicate with each other over the telephone.

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¹ Bradsher, That Private Phone Conversation May Be on Tape, N.Y. Times, Dec. 17, 1989, at 1, col. ____ (nat'l ed.).
² Id.
⁴ See, e.g., Fed. R. Evid. 613.
This article addresses the ethics of attorneys’ tape recording telephone conversations or advising their clients to do so. The examination is limited to tape recordings done by one of the parties to a telephone conversation. Tape recording of a telephone conversation by someone other than a party to the conversation is wire tapping, which is prohibited under federal law and by state law in many jurisdictions. However, exemptions for tape recording by a party to the conversation are provided by federal law and the laws of many states. Although the secret tape recording of a telephone conversation by a party is unlawful in some states, it is not unlawful in most jurisdictions. The fact that an activity is lawful does not necessarily mean it is ethical, though, and thus, the ethical considerations pertaining to the tape recording of telephone conversations by attorneys need to be investigated.

The leading authority dealing with the ethics of tape recording

5. 18 U.S.C. § 2511(1) (Supp. 1988) provides that a person who “intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication” is subject to a fine or imprisonment of not more than five years, or both.


7. 18 U.S.C. § 2511(2)(d) (Supp. 1988) provides:
   It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic 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.


Tape Recording Telephone Conversations

telephone conversations is ABA Formal Opinion 337. In a sweeping opinion, the Ethics Committee of the American Bar Association ruled that "secret recording by attorneys of conversations of any persons is unethical even though legal under federal law." It further noted that prior Informal Opinions had prohibited an attorney's tape recording a conversation with a client or with another party's attorney without prior disclosure. Finding no basis for distinguishing recordings of these persons from recordings of other persons, the Ethics Committee extended these prior Informal Opinions to the tape recording by attorneys of conversations with any persons.

The Ethics Committee based its Formal Opinion 337 on Canon 9 of the Code of Professional Responsibility, entitled "A Lawyer Should Avoid Even the Appearance of Professional Impropriety" and DR 1-102(A)(4), which provides that "[a] lawyer shall not . . . [e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Similarly, the Informal Opinions upon which the Ethics Committee relied were based on the former Canon 22 adopted by the American Bar Association in 1908 which provided: "The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness." The rationale behind Formal Opinion 337, and the Informal Opinions that were its predecessors, was that there is a deceitful aspect to recording a conversation without disclosing the fact of the recording to the other party. The usual reason for not disclosing that a recording is being made is to catch the other party off guard in the hopes that he will say things that he otherwise might not. While secrecy may aid in bringing out candid, unguarded statements from the other party, it also involves, as the various rules indicate, an element of deception, or at least a lack of "candor and fairness" toward the other party.

The Ethics Committee also pointed out that the Federal Communications Commission (FCC) had issued an opinion requiring telephone companies to file tariff regulations concerning the notification of all par-

11. Id. at 3 (original emphasis).
16. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 22 (1908).
ties whenever a tape recording of a telephone conversation is being made.\(^7\) In a proceeding that the FCC initiated to investigate the need for regulation of telephone recording devices, the FCC decided to allow the devices to be used as long as their use was regulated to protect the right of privacy in telephone communications. The FCC determined that the appropriate means to protect this right of privacy was through the giving of adequate notice to all parties that a telephone conversation was being recorded through the use of a beep tone, or an automatic tone-warning that would be repeated at regular intervals throughout the telephone conversation.\(^8\) The FCC opinion was directed toward telephone companies, rather than the public-at-large though, and required the telephone companies to include provisions in the tariff regulations they file with the FCC requiring their customers to use beep tones when tape recording telephone conversations. Although neither the FCC nor the tariff regulations made it a criminal offense to tape record a telephone conversation without using a beep tone, a telephone company could discontinue telephone service to a customer who violated its regulations. The Ethics Committee found that there was, therefore, a conflict between the federal statute\(^9\) providing that the tape recording of a telephone conversation by a party was not unlawful and the FCC opinion.\(^10\)

Several state supreme courts in jurisdictions where the tape recording of telephone conversations by parties is not unlawful have followed Formal Opinion 337.\(^11\) For example in People v. Smith,\(^2\) an attorney performed undercover work for the Colorado Bureau of Investigation, which included making secret tape recordings of telephone conversations with a former client who was being investigated by the Bureau. The attorney, who had previously been a cocaine user, purchased cocaine from the former client while wearing a body

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18. *Id.* at 1049-50, 1055.
microphone so that the Bureau's agents could monitor their conversation. The former client was eventually arrested and pleaded guilty to various felony drug charges. Before tape recording the telephone conversations with the former client, the attorney obtained assurances from the state attorney general's office that this conduct would not violate the Code of Professional Responsibility. Nevertheless, the Colorado Supreme Court concluded that the tape recording violated DR 1-102(A)(4), and ordered the attorney suspended from the practice of law for two years. The Colorado Supreme Court held: "The undisclosed use of a recording device necessarily involves elements of deception and trickery which do not comport with the high standards of candor and fairness to which all attorneys are bound."

Similarly, the South Carolina Supreme Court disciplined an attorney for tape recording a telephone conversation in In re Anonymous Member of the South Carolina Bar. In the course of the attorney's investigating an auto accident for a client, he telephoned the other driver, who was not represented by counsel. When asked his identity, the attorney said that he was the victim's cousin, but did not disclose that he was an attorney or that he was tape recording the telephone conversation. Following Formal Opinion 337, the South Carolina Supreme Court ruled: "We hold under these facts, an attorney is guilty of misconduct under DR 1-204(A)(4) where a recording is made of a conversation with an adversary or a potential adversary without the knowledge and consent of all parties to the conversation. After finding misconduct, the supreme court decided to impose only the comparatively lenient sanction of a private reprimand because it considered the issue of the propriety of the attorney's conduct to present a novel question.

The Mississippi Supreme Court and the Tennessee Court of Appeals also have stated in dicta that it is unethical for an attorney to tape record secretly a telephone conversation to which he is a party.

Several federal court decisions have addressed the ethics of clandestine tape recordings by attorneys in the context of ruling on attorney work product objections to production of tape recordings. In Par-

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26. Id. at ____, 322 S.E.2d at 669.
rott v. Wilson, the Court of Appeals for the Eleventh Circuit affirmed the trial court’s order requiring production of tape recordings of telephone conversations between an attorney and two witnesses which the attorney had secretly made. The attorney objected to having to produce the tapes on the ground that they were attorney work product. The Eleventh Circuit noted that while the clandestine tape recording of telephone conversations was not illegal under either federal or the applicable state law, attorneys are governed by a higher standard than mere legality. It pointed to Formal Opinion 337 as authority that the taping was unethical. While the Eleventh Circuit expressly declined to determine whether the tapes actually were work product material, it held "whatever work product privilege might have existed was viti- ated by counsel’s clandestine recording of conversations with wit- nesses." Several other federal courts have followed the Parrott holding.

In addition to court rulings, bar association ethics opinions have followed Formal Opinion 337 in finding secret tape recordings by attor- neys to be ethical misconduct in the following states: Alabama, Alaska, Arizona, Colorado, Hawaii, Indiana, Kentucky, Alabama, 707 F.2d 1262 (11th Cir. 1983), cert. denied, 464 U.S. 936 (1983).

30. Id. at 1272 n.21.

31. Id. at 1272 (footnotes omitted).

32. Chapman & Cole v. Itel Container Int’l B.V., 865 F.2d 676, 686 (5th Cir. 1989) ("[T]he clandestine taping of a telephone conversation implicitly waives the protection of the work product doctrine because it violates the American Bar Association’s Model Rules of Professional Conduct.") (alternative holding); Wilson v. Lamb, 125 F.R.D. 142, 143 (E.D. Ky. 1989) ("Based on the authority of Parrott, MOODY, and Haigh, [an attor- ney’s tape recording a meeting with a witness without the consent of the witness] vitiates any work product privilege and the plaintiff is ordered to produce this tape for the defendants.") (alternative holding) (footnotes omitted); Haigh v. Matsushita Elec. Corp. of Am., 676 F. Supp. 1332, 1358-59 (E.D. Va. 1987) (work product privilege was vitiating when attorney actively encouraged and affirmatively supported client’s secretly taping conversations).


Louisiana, Minnesota, Missouri, New York, North Dakota, Tennessee, Texas, and Wisconsin. The only bar association to have issued an ethics opinion that generally authorizes attorneys to record conversations secretly is the Utah State Bar.


A lawyer should not be allowed to circumvent an ethical prohibition by having another person engage in the prohibited activity for him. Thus, it would seem that if it is improper for an attorney to tape record a telephone conversation secretly, it is equally improper for him to suggest that his clients do the tape recording themselves.\(^4\) On the other hand, it should be permissible for an attorney to advise a client that the client’s tape recording of a telephone conversation would not violate either federal or state law.\(^5\) An attorney also should be allowed to use a secret tape recording made by a client, if the attorney did not assist or advise the client in connection with the recording.\(^6\) Distinguishing between an attorney’s passive acquiescence in a client’s making secret tapes and his actively encouraging the taping may be difficult in particular circumstances.\(^7\) Therefore, in a close case, a prudent attorney should err on the side of caution and advise his client against the taping, if the attorney believes that it would be unethical for him to do the taping himself.


\(^5\) In Op. 515 (Dec. 27, 1979), 52 N.Y. St. B.J. 162 (1980), digested in O. Maru, 1980 Supplement to the Digest of Bar Association Ethics Opinions No. 12281 (1982), the New York State Bar Association answered the following question in the affirmative: “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?” The Opinion added the qualification that a lawyer might be required also to advise the client in particular circumstances that surreptitious tape recording might be unfair to the rights of the person being recorded even though it was not against the law. Opinion 515 was followed by the Kentucky Bar Association in Op. E-289 (1984) (lawyer may respond to client inquiry with advice that secretly recording telephone conversations is not unlawful), 1985 KENTUCKY BENCH & B. 51, digested in Law. Man. on Prof. Conduct (ABA/BNA) No. 801, at 3910-11 (Jan. 23, 1985).

\(^6\) Cf. CENTER FOR PROFESSIONAL RESPONSIBILITY, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT 151-52 (1987) (Reporter for the Rules explained in response to a question at the February 1983 Midyear Meeting of the American Bar Association that “if evidence was obtained by another in violation of a third party’s rights, and the lawyer had not participated in obtaining the evidence improperly, the Rule was not intended to impose a sanction against the lawyer for using that evidence.”).

Despite the extensive list of authorities condemning the making of secret tape recordings by attorneys, it appears that secret tape recordings are not prohibited under the Model Rules of Professional Conduct that have now been adopted in most jurisdictions,\textsuperscript{53} as long as the recording is not unlawful. The provisions in the Code of Professional Responsibility upon which Formal Opinion 337 was based have been replaced by Rule 4.4, entitled "Respect for Rights of Third Persons," which 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 violate the legal rights of such a person."\textsuperscript{54} The Model Rules of Professional Conduct have done away deliberately with the "appearance of impropriety" standard in former Canon 9.\textsuperscript{55} Instead of this "appearance of impropriety" standard, Rule 4.4 is concerned with whether the methods used in obtaining evidence from third persons violate their legal rights.\textsuperscript{56} The United States Code and the statutes of many states\textsuperscript{57} expressly provide that it is not unlawful for a party to a telephone conversation to tape record it surreptitiously. Accordingly, an attorney's secret tape recording of a telephone conversation with another person does not violate that person's legal rights in most states, and presumably is not proscribed under Rule 4.4. Of course, an attorney's making a surreptitious tape recording would be unethical in those jurisdictions\textsuperscript{58} where it is prohibited by law.

\textsuperscript{53} The Lawyers' Manual on Professional Conduct (ABA/BNA) lists 36 states that have adopted the Model Rules. Law. Man. on Prof. Conduct (ABA/BNA) No. 01, at 3 (Dec. 19, 1990).


\textsuperscript{55} G. HAZARD & W. HOLDES, THE LAW OF LAWYERING 123 (appearance of impropriety standard "is too vague for fair application, and was accordingly dropped from the Model Rules"), 176.1 ("The Model Rules avoid the Canon 9 expression 'appearance of impropriety,' because it is too vague a standard for discipline.") (1989); C. WOLFRAM, MODERN LEGAL ETHICS § 7.1.4 (1986) ("The framers of the 1983 Model Rules plainly meant to abandon [the appearance of impropriety standard in Canon 9] as an independently operating standard."). See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 comment (criticizing appearance of impropriety standard in the context of vicarious disqualification of a lawyer who changes law firms because it requires subjective assessments and it is too vague).

\textsuperscript{56} C. WOLFRAM, MODERN LEGAL ETHICS § 12.4.4 (1986) states: "The limitation of the prohibition in 1983 Model Rule 4.4 against methods of obtaining evidence that violate legal rights of third person is inconsistent with the approach of Opinion 337 and should serve to overrule it."

\textsuperscript{57} See supra notes 7 and 8.

\textsuperscript{58} See supra note 9.
Concluding that the Model Rules of Professional Conduct permit secret tape recording by attorneys raises serious concerns. Although the tape recording of a telephone conversation may be viewed as merely a more modern and accurate means to preserve the conversation than using one's memory or taking notes, it may be unfair to the person who is being recorded, because it is contrary to his reasonable expectations. While a party to a telephone conversation would expect that the other party would remember the conversation or take notes, he may be surprised by the recording. Naturally, as tape recording becomes more widespread, these expectations will have to be adjusted, but the changes in expectations are likely to produce undesirable consequences. The recognition that a telephone conversation with opposing counsel may be recorded is apt to contribute to a possibly already elevated level of suspicion between counsel; chill candid discussion; and lead to greater posturing. Also, allowing surreptitious tape recording of conversations between attorneys might diminish the spirit of camaraderie that exists within the Bar and make the practice of law less enjoyable. In addition, the public's awareness that attorneys are allowed to tape record telephone conversations with witnesses secretly and advise their clients to do likewise may tarnish the profession's image.

Although these are serious policy considerations, they would seem to have been resolved by the federal and state legislation providing that secret tape recording by parties is not unlawful and by the adoption in most jurisdictions of the Model Rules of Professional Conduct, which have abandoned the "appearance of impropriety" standard for attorneys. Nevertheless, there is considerable uncertainty in this area due to precedent from many jurisdictions to the contrary and the fact that the Model Rules of Professional Conduct do not address the subject of secret tape recording directly. Thus, it would be helpful if the state supreme courts and bar associations would issue new opinions to provide authoritative guidance to attorneys on this troublesome subject.