

**ALASKA BAR ASSOCIATION
ETHICS OPINION NO. 2003-1**

Undisclosed Recording of Conversations by Lawyer

On June 24, 2001, the American Bar Association issued Formal Opinion 01-422 relating to “Electronic Recordings by Lawyers Without the Knowledge of all Participants.” That Opinion withdrew Formal Opinion 337 (1974) and determined that a lawyer who electronically records a conversation without the knowledge of the other party or parties *does not necessarily violate the Model Rules*. Because this Committee previously accepted and relied on Opinion 337 we determined to once again evaluate the ethical issues relating to undisclosed recording by attorneys.

Like the American Bar Association, this Committee is now of the opinion that electronic recording of a telephone conversation by a lawyer without the consent of the other participant(s) to the conversation is not *per se* unprofessional conduct if the recording is not prohibited by law or regulation. Undisclosed recording may, however, be unethical if conducted under circumstances, or the recording is used in a manner, that is otherwise prohibited by the Rules of Professional Conduct. The Committee therefore withdraws Ethics Opinions 78-1, 91-4, and 92-2.

ABA Formal Opinion 337 was based on two ethical precepts. The first, set forth in former Canon 9 of the Code of Professional Responsibility, required lawyers to “*Avoid Even the Appearance of Professional Impropriety.*” That standard was not adopted by the American Bar Association in the Model Rules of

Professional Conduct, nor by the Alaska Supreme Court in the Alaska Rules of Professional Conduct, and has little current application.

The second standard used to support the conclusion of Opinion 337 was from DR 1-102(A)(4) of the Code of Professional Responsibility which provided that “A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.” That prohibition was retained in Rule 8.4(c) of the Alaska Rules of Professional Conduct which became effective in July of 1993.

Neither ABA Formal Opinion 337, nor Alaska Ethics Opinion 78-1, which adopted that opinion, explains how the unconsented to recording of a conversation by an attorney constitutes “dishonesty, fraud, deceit, or misrepresentation” in every circumstance other than specific situations in the criminal prosecution context. It appears, however, that conclusion is based on an *assumption* that anyone speaking with an attorney would justifiably believe the conversation was not being recorded. With that assumption in place, the rationale seems to be that an attorney’s failure to advise that a conversation is being recorded is the equivalent of a representation by the lawyer that the conversation is not being recorded. It would then logically follow from the initial assumption used in Opinion 337 that an attorney who records a conversation without giving notice or obtaining consent has engaged in misrepresentation or deceit, because the attorney has recorded a conversation after impliedly representing that the conversation was not being recorded.

In the same manner that the ABA Committee writing Opinion 337 assumed

the existence of a reasonable expectation that attorneys would never record telephone conversations without consent, Opinion 01-422 concludes that assumption is no longer valid because of the prevalence of the use of telephone recording devices. With regard to such expectations that Opinion states:

[E]ven though recording of a conversation without disclosure may to many people 'offend a sense of honor and fair play,' it is questionable whether anyone today justifiably relies on an expectation that a conversation is not being recorded by the other party,

In the absence of an assumption that there is a reasonable and generally held expectation that attorneys will not record conversations, there is no basis for finding an implied representation that conversations with attorneys will not be recorded. If there is no implied representation that attorneys will not record conversations, there is no basis for a finding of dishonesty, fraud, deceit, or misrepresentation from a failure by an attorney to disclose that the conversation is being recorded.

As reflected in the discussion in Opinion 01-422, the conclusion that undisclosed recording by attorneys was unethical, which appeared to have general acceptance in 1974, has been the subject of a great deal of disagreement by courts, ethics committees and commentators over the intervening years. The controversy has produced many exceptions in various jurisdictions for such activities as documenting criminal utterances, documenting conversations with potential witnesses to protect against later perjury, documenting conversations for self-protection of the lawyer, gathering evidence by "testers" in housing

discrimination and trademark infringement cases, and recording when otherwise specifically authorized by statute, court rule or court order. All of these exceptions recognize the value of a recorded statement when the content of a conversation is disputed.¹

¹Decisions creating these exceptions are cited on page 4 of ABA Formal Opinion 01-422. At first blush one can easily ask the legitimate question, “Why would any attorney want to record a conversation without disclosing that the conversation is being recorded?” But the numerous exceptions reflect that in some circumstances there may be legitimate reasons for undisclosed recording by or at the direction of an attorney.

In the absence any rule or statute specifically prohibiting attorneys from recording conversations without notice, we are confronted with the issue of whether an attorney violates any Rule of Professional Conduct by reliably preserving information through recording, without notice to other parties to the conversation. The act of recording a conversation, standing alone, is not harmful to a party who has not been advised of or consented to the recording.² An undisclosed recording might, however, be used in a manner that would be harmful to an individual. Examples include recording or preserving only portions of the conversation to distort its content, using a recording to embarrass the other party to the conversation or a third party, or improper disclosure of a client confidence contained in a recording. But any such misuse of a recorded statement can be addressed by application of the Rules without straining to interpret the Rules as creating a *per se* prohibition against undisclosed recording.

In summary, the Committee is of the opinion that, while the better practice may be for attorneys to disclose or obtain consent prior to recording a conversation, attorneys are not *per se* prohibited from ever recording

²Because the simple act of recording does not, in and of itself, cause direct harm to anyone, there is a natural temptation to address the ethical acceptability of such recording by analyzing the potential adverse effect of widespread attorney recording on candor and free discussion. But we are only evaluating professional ethics, not privacy rights or other related issues. If a court determines that an attorney's undisclosed recording violates the Alaska constitutional right of privacy or some other law, then such undisclosed recording would also be unprofessional. We need not, therefore, address that issue.

conversations without the express permission of all other parties to the conversation. Absent conduct reflecting actual misrepresentation, deceit or fraud when taping the conversation, or circumstances in which the taping violated existing law or infringed on a specific court-defined privacy right, an attorney does not act unethically by recording a conversation with a third party without disclosure of such recording.

Approved by the Alaska Bar Association Ethics Committee on
December 6, 2002.

Adopted by the Board of Governors on January 24, 2003.