

Opinion 514
February 1996
Tex. Comm. on Professional Ethics, Op. 514, V. 59 Tex. B.J. 181 (1996)

QUESTIONS PRESENTED

1. May a lawyer, in the course of his or her practice of law, ethically electronically record a telephone conversation to which the lawyer is a party, without first informing all other parties to the conversation?
2. May a lawyer ethically advise a client to tape record a telephone conversation to which the client is a party without first informing all other parties to the conversation?

DISCUSSION

The above questions are governed by Texas Disciplinary Rules 8.04(a)(3), Misconduct.

In February 1978, this committee addressed the issue of whether an attorney, in the course of his or her practice of law, could electronically record a telephone conversation without first informing all of the parties involved. (See Ethics Opinion 392, Tex. B.J., July 1978, page 580.) The committee concluded that, although the recording of a telephone conversation by a party thereto did not *per se* violate the law, attorneys were held to a higher standard. The committee reasoned that the *secret* recording of conversations offended most persons' concept of honor and fair play. Therefore, attorneys should not electronically record a conversation with another party, without first informing that party that the conversation was being recorded.

The only exceptions considered at that time were A. . . extraordinary circumstances in which the state attorney general or local government or law enforcement attorneys or officers acting under the direction of the attorney general or such principal prosecuting attorneys might ethically make and use secret recordings if acting within strict statutory limitations conforming to constitutional requirements, A which exceptions were to be considered on a case-by-case basis.

The disciplinary rules upon which Opinion 392 is based have been incorporated into the new Texas Disciplinary Rules of Professional Conduct. See DR 8.04(a)(3), Misconduct (formerly DR 1-102(A)(4)). Therefore, this committee sees no reason to change its former opinion. Pursuant to DR 8.04(a)(3), attorneys may not electronically record a conversation with another party without first informing that party that the conversation is being recorded.

This brings the committee to the issue of whether an attorney can ethically advise a client to electronically record a telephone conversation to which the client is a party, without first informing all other parties involved. Both Texas and federal law permit a party to a conversation to tape record that conversation without first informing the other parties that the conversation is being recorded. (See 18 U.S.C. §2511 (2)(d); Tex. Penal Code Ann. (Vernon 1986).) An attorney is required to provide his or her client with both an accurate statement of the law, and an honest opinion of the consequences likely to result from a particular course of conduct. (See Comment 7 to DR 1.02.) Hence, an attorney may advise his or her client that both Texas and federal law permit the client to electronically record conversations without first informing the other parties involved, where the equities of the situation merit such advice.

An attorney, however, may not circumvent his or her ethical obligations by requesting that

clients secretly record conversations to which the attorney is a party. Under these circumstances, the attorney would be ethically required to advise the other parties of the electronic recording, in advance. An attorney may not solicit the aid of his or her clients to undertake an action that the attorney is ethically prohibited from undertaking. (See DR 8.04(a)(1)(discussing violations of the disciplinary rules through the acts of others).)