SUPREME COURT OF ARIZONA
ATTORNEY ETHICS ADVISORY COMMITTEE

MEMORANDUM

TO: Supreme Court of Arizona

FROM: The Attorney Ethics Advisory Committee

DATE: January 28, 2021

RE: The Attorney Ethics Advisory Committee Ethics Opinion EO-19-0010

During the January 28, 2021 meeting of the Attorney Ethics Advisory Committee, formal opinion EO-20-0002 received a vote of 12-0-4 to submit the proposed opinion to the Supreme Court for review.

Pursuant to Rule 42.1(i), Ariz. R. Sup. Ct., the Committee shall submit proposed ethics opinions to the Supreme Court for review. The Supreme Court has 90 days to review a proposed ethics opinion and take such action as it deems appropriate.

The Attorney Ethics Advisory Committee has attached the proposed ethics opinion EO-20-0002, ethics opinion request, and submitted public comments.

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SUPREME COURT OF ARIZONA
ATTORNEY ETHICS ADVISORY COMMITTEE
Ethics Opinion File No. EO-20-0002

The Attorney Ethics Advisory Committee was created in accordance with Rule 42.1.

Undisclosed recording of a telephone or other conversation by a lawyer, or a person acting at the lawyer's direction, is not a *per se* violation of the Rules of Professional Conduct, provided that the recording does not violate applicable laws. This Opinion revisits prior Arizona Ethics Opinions, including Arizona Ethics Opinions 75-13, 90-02, 95-03, and 00-04, as they relate to a lawyer's involvement in recording activities or directing others, including agents and clients, concerning the recording of communications with others. To the extent those opinions, or any other opinions, may have created a rule that an attorney who records another individual without disclosing the recording is acting *per se* unethically or with some form of "inherent deception," or otherwise conflict with this opinion, those opinions are superseded.

While the Supreme Court Attorney Ethics Advisory Committee (the "Committee") is unable to find a textual basis that supports a *per se* ban on undisclosed recordings, the Committee cautions lawyers to proceed with such recordings very carefully, if at all. The particular manner in which a recording is made or used could easily violate specific provisions of the Rules, such as the prohibition on making of false statements of fact or law, the requirement that information relating to the representation of a client remain confidential, and the prohibition on using means that have no purpose other than embarrassment. It is also rare that a client's interest would ever be served by lawyers making undisclosed recordings of conversations between lawyer and client, and therefore unlikely that undisclosed recording of a lawyer-client conversation would ever be appropriate. Undisclosed recordings may also have serious negative effects on what would otherwise be collegial working relationships with opposing counsel. Before choosing to make an undisclosed recording, the Committee strongly recommends that lawyers consider whether a *disclosed* recording would serve the same purpose, in order to avoid unnecessarily risking the potential pitfalls of undisclosed recording.

Facts and Issue Presented:

The Committee *sua sponte* addresses whether an attorney may ethically record a telephone or in-person communication between the lawyer and another without disclosing that the lawyer is recording the conversation when the recording does not violate applicable federal or state law.

Relevant Ethical Rules:

ER 1.1:

A lawyer shall provide competent representation to a client.

ER 1.2(d):

A lawyer shall not counsel to engage, or assist a client in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences

of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

ER 1.3:

Comment 1: A lawyer shall pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate the client's cause or endeavor.

ER 1.6(a):

A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted or required by paragraphs (b), (c) or (d) or ER 3.3(a)(3).

ER 3.3(a):

A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.

ER 3.4:

Comment 1: Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery and the like.

ER 4.1:

In the course of representing a client a lawyer shall not knowingly

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by ER 1.6.

ER 4.3:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

ER 4.4(a):

> In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden the other person, or use methods of obtaining evidence that violate the legal rights of such a person.

ER 8.4:

> It is professional misconduct for a lawyer to:
>
> . . . .
>
> (b) commit a criminal act that reflects adversely on the lawyers honesty, trustworthiness or fitness as a lawyer in other respects;
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> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.
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> (d) engage in conduct that is prejudicial to the administration of justice.

ER 8.5(a):

> A lawyer may be subject to the disciplinary authority of this jurisdiction and another jurisdiction for the same conduct.

Relevant Ethics Opinions:

ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-422 (2001); Alaska Bar Ass'n, Ethics Op. 2003-01 (2003); DC Ethics Op. 229; Me. Prof'l Ethics Comm'n, Op. 168 (1999); Mich. Informal Ethics Op. RI-309 (1998); Mo. Sup. Ct. Advisory Comm., Formal Op. 123 (2006); Neb. Ethics Advisory Op. for Lawyers, No. 06-07 (2006); N.Y.C. Bar Ass'n, Formal Op. 2003-02 (2003); Ohio Sup. Ct., Bd. of Comm'rs on Grievances and Discipline, Op. 2012-1 (2012); Okla. Bar Ass'n Legal Ethics Panel, Op. 307 (1994); Tenn. Rules of Prof'l Conduct 8.4 cmt. 6; The Prof'l Ethics Comm. For the State Bar of Tex., Op. 575 (2006); Utah State Bar Ethics Op. 96-04 (1996).

OPINION

A. Both Arizona and Federal Law Permit Recordings Where Only One Party to the Conversation Is Aware the Recording Is Being Made.

Arizona law, characterized as a "one party consent" law, permits the recording of wire, electronic, and oral communications so long as one party to the communication consents to the recording. A.R.S. §§ 13-3005; 13-3012(9). Thus, when one party to a communication records the communication with another, the party doing the recording "consents" to the communication, making a communication "legal" under Arizona law. Federal law likewise permits one-party consent to the recording of a wire, electronic, or oral communication. *See* 18 U.S.C. § 2511(2)(d).

Although Arizona and federal law allow for one-party consent, some states require that all parties to the communication consent to a recording in order for the recording to be legal. As of the date of the publication of this Opinion, these states include, with some variations in the specific requirements among them, California, Connecticut, Florida, Illinois, Maryland, Massachusetts, Montana, Nevada, New Hampshire, Oregon, Pennsylvania, and Washington.[1] This bears noting because Arizona lawyers whose practices lead them to engage in professional services in another state that does not permit one-party consent may violate the professional responsibility rules of that jurisdiction, *see* ER 8.5(a), and by doing so, would violate the Arizona Rules of Professional Conduct by engaging in criminal conduct that "reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." ER 8.4(b).

Nonetheless, as a result of the Arizona and federal one-party-consent laws, lawyers practicing in Arizona can legally record telephone communications to which they are a party. Although an attorney may legally record such communications, the Committee recognizes, and appreciates, that we, as attorneys, hold ourselves to a higher standard. As such, the legality of a lawyer's actions has never been sufficient to conclusively demonstrate ethical conduct.

B. Prior Opinions Absolutely Prohibit Undisclosed Recording, Subject to a Series of Exceptions that Have Been Articulated Over Time.

The ethical ramifications of recording by lawyers of their communications with others, the direction by lawyers to third persons, such as investigators, to record communications, and the advice given by lawyers to clients concerning recording of communications with others, especially with opposing parties, are matters of much controversy among lawyers. Throughout the years, the prior State Bar Committee on Professional Responsibility (the "State Bar Ethics Committee") struggled to define the boundaries of what constitutes ethical conduct when it comes to undisclosed recording of communications by a lawyer, and the resulting opinions are somewhat difficult to reconcile.

Up until 1975, the State Bar Ethics Committee had determined that it was unethical in essentially all circumstances for an attorney to surreptitiously record a telephone conversation, including a conversation with another attorney, *see* Ariz. Ethics Op. 176A (1965); a conversation with a witness, potential witness, or an adverse party, *see* Ariz. Ethics Op. 74-18 (1974); and unethical to cause or encourage police or other investigators to surreptitiously record a

[1] *See, e.g.*, Cal. Penal Code § 632(a)–(d); Conn. Gen. Stat. § 52-570d; Del. Code. Ann. tit. 11, §§ 1335(a)(4), 2402(c)(4); Fla. Stat. Ann. § 934.03(3)(d); 720 I.L.C.S. § 5/14-2(a); Md. Code Ann., Cts. & Jud. Proc. § 10-402(c)(3); Mass. Gen. Laws Ann. ch. 272, § 99(B)(4) and (C)(1); Mont. Code Ann. § 45-8-213; Nev. Rev. Stat. §§ 200.620 (requiring all parties to consent to telephonic recording), 200.650 (allowing one-party consent for in-person recording); N.H. Rev. Stat. Ann. § 570-A:2; Or. Rev. Stat. Ann. §§ 165.540 (allowing one-party consent for recording of telephone conversations, but requiring all parties consent to the recording of an in-person conversation); 18 Pa. Cons. Stat. Ann. §§ 5702, 5704; Wash. Rev. Code Ann. § 9.73.030.

conversation with a witness or potential defendant, s*ee* Ariz. Ethics Op. 74-35 (1974) (overruled by Ariz. Ethics Op. 75-13).

In Arizona Ethics Opinion 75-13 (1975), the State Bar Ethics Committee continued to recognize a broad, general rule that it was "improper for a lawyer to record by tape recorder or other electronic device any conversation between the lawyer and another person, or between third persons, without the consent or prior knowledge of all parties to the conversation." However, in Arizona Ethics Opinion 75-13, the State Bar Ethics Committee created four exceptions to the general rule against undisclosed recording: (1) "an utterance that is itself a crime, such as an offer of a bribe, a threat, an attempt to extort or an obscene telephone call"; (2) "[A] conversation in order to protect himself, or his client, from harm that would result from perjured testimony. . . . [S]olely to provide a shield for the lawyer, or his client… not…secret recordings for the purpose of obtaining impeachment evidence or inconsistent statements"; (3) "…conversations with informants and/or persons under investigation simply as a matter of self-protection"; and (4) conversations "specifically authorized by statute, court rule or court order."[2]

In Arizona Ethics Opinion 90-02 (1990), the State Bar Ethics Committee considered whether an investigator for the public defender could ethically tape record an interview—without disclosure—with a potential witness in a criminal case for impeachment purposes at trial. The State Bar Ethics Committee acknowledged that it was "common practice for law enforcement agencies to surreptitiously record interviews and/or conversations in criminal investigations," and decided that criminal defense attorneys should have the same opportunities. Ariz. Ethics Op. 90-02, at 4. The State Bar Ethics Committee expanded the exceptions to the general prohibition against recording by an attorney to allow "the recording of witness conversations by criminal defense attorneys or their agents, with the consent of only one party to the conversation, . . . for the purpose of protecting against perjury or for the purpose of obtaining impeachment material should the testimony of the witness be different at trial." Ariz. Ethics Op. 90-02, at 6.

In 1995, the State Bar Ethics Committee addressed whether an attorney could ethically record a telephone conversation with opposing counsel without disclosure. Ariz. Ethics Op. 95-03 (1995). Citing ER 8.4(d), prohibiting "conduct involving dishonesty, fraud, deceit, or misrepresentation," the State Bar Ethics Committee determined that "the objective" of undisclosed recording an opposing counsel is "inherently deceptive." At that time, the State Bar Ethics Committee decided that the only reason that an attorney could want to record an opposing counsel is to "capture his or her opponent on tape, making a statement that would not be made if the taping

[2] The Committee notes that one published Arizona Supreme Court opinion cites to Arizona Ethics Opinion 75-13 (1975) with approval and references that Opinion's broad rule against undisclosed recording under the predecessor to the Rules of Professional Conduct. *See In re Wetzel*, 143 Ariz. 35, 44, 691 P.2d 1063, 1072 (1984). The *Wetzel* opinion did not address the particular considerations addressed in this opinion, nor does the Arizona Supreme Court appear to have revisited the issue of undisclosed recording since the issuance of subsequent opinions recognizing exceptions to the broad rule stated in Opinion 75-13. The Committee encourages interested attorneys to review the *Wetzel* opinion.

were revealed." Ariz. Ethics Op. 95-03, at 4. The State Bar Ethics Committee noted that, at the time, the ABA Committee on Ethics and Professional Responsibility as well as various State Bar ethics committees (Iowa, Kentucky, and Idaho) had reached similar conclusions.

Most recently, in Arizona Ethics Opinion 00-04 (2000), the State Bar Ethics Committee addressed whether an attorney could ethically advise his or her client that the client may record a conversation without disclosing the recording. The State Bar Ethics Committee recognized that both federal and Arizona laws allow tape recording of a telephone conversation without the consent of all parties involved. Moreover, the State Bar Ethics Committee concluded that, so long as the attorney determines that the client may legally tape record certain conversations, the attorney is not ethically prohibited from advising the client of his or her legal rights to do so. Ariz. Ethics Op. 00-04. The State Bar Ethics Committee reiterated, however, that "while an attorney may advise a client about the client's right to surreptitiously record conversations, the attorney may not participate in the surreptitious recording of a conversation, except as permitted by our prior opinions." Ariz. Ethics Op. 00-04. Review

C. The Existing Opinions Provide Little Guidance in Circumstances Not Specifically Addressed, and Are Difficult to Reconcile.

Where does this leave the issue? In the past 40 years, the State Bar Ethics Committee imposed a general blanket prohibition against an attorney recording a conversation without disclosure, based on the view that any such recording is inherently deceptive and in violation of ER 8.4(c[3]). However, despite taking the position that undisclosed reporting is inherently deceptive, the State Bar Ethics Committee has opined that such recording is nonetheless permissible in a host of particular circumstances:

- When the recording is of a statement that is itself a crime (such as a bribe or obscene phone call). Op. 75-13.
- To protect the lawyer or client against perjured testimony, but not merely to record evidence of inconsistent statements or for other impeachment purposes. Op. 75-13.
- When speaking with an informant or the subject of an investigation "as a matter of self-protection." Op. 75-13.
- For criminal defense attorneys, when conducting an investigation. Op. 90-02.
- By the lawyer's client, with advice from the lawyer regarding the legal right to do so. Op. 00-04.
- When authorized by statute, court rule, or court order. Op. 75-13.

Taken as a whole, the State Bar Ethics Committee's prior opinions appear to recognize that undisclosed recording, by the lawyer or by the client with the lawyer's advice, may be an appropriate action to protect the interests of the client or the attorney in the context of a particular matter. But if, as Op. 95-03 stated, undisclosed recording is "inherently deceptive" and violative of ER 8.4(c), then it would be beyond the authority of this Committee to create any exceptions to that rule without some textual support.

[3] This reference appears to be a typo because the quote is from ER 8.4(c).

The piecemeal nature of the exceptions defined by the Committee also leaves attorneys with little guidance regarding how the Rules of Professional Conduct will be applied in circumstances that have not yet been specifically addressed. If criminal defense attorneys may record interviews to protect their clients, may civil defense attorneys do so as well? If lawyers may advise their clients regarding their legal right to make an undisclosed recording, may lawyers then use the recordings their clients make, despite the general prohibition on directing others to do what the lawyer cannot do her or himself? *See* ER 5.3(c).

And some of the articulated exceptions are themselves difficult to implement. If a lawyer may record a conversation that includes speech constituting a crime, how is the lawyer to know before the conversation starts that the conversation will fall into that category? The lawyer cannot reasonably be expected to wait until her conversational partner offers a bribe and then ask that person to hold while she turns on recording equipment, and then to repeat the criminal statement. The crime exception works only if lawyers can record conversations they reasonably believe in advance may involve statements constituting a crime, even though their predictions will sometimes be wrong and innocent statements recorded as a result. Similarly, no guidance is provided on how to draw the line between a recording that "protect[s] . . . against perjured testimony" and one that merely seeks to "obtain[] impeachment evidence or inconsistent statements." Op. 75-13.

This Committee believes that there comes a point where so many exceptions to a rule indicate that the rule itself should be reexamined. *Cf.* ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-422 (2001) ("A degree of uncertainty is common in the application of rules of ethics, but an ethical prohibition that is qualified by so many varying exceptions and such frequent disagreement as to the viability of the rule as a basis for professional discipline, is highly troubling."); Ohio Sup. Ct., Bd. of Comm'rs on Grievances and Discipline, Op. 2012-1 (2012) (noting that "so many exceptions have been recognized to justify surreptitious recording that it seems patently unfair to maintain that it is misconduct per se when a lawyer does it").

D. Undisclosed Recordings Are Not "Inherently Deceptive," and Are Therefore Not Per Se Prohibited by the Rules of Professional Conduct.

The inconsistent nature of the State Bar Ethics Committee's prior opinions suggests that reexamination may be in order. We begin that reexamination with the text from which our authority derives – the Rules of Professional Conduct themselves.

To the extent that our prior opinions have referenced specific provisions of the Rules in articulating a blanket prohibition on undisclosed recording, they have focused on the provision of Rule 8.4(c) that defines as professional misconduct actions "involving dishonesty, fraud, deceit or misrepresentation." Specifically, our 1995 opinion reasoned that the only purpose for an undisclosed recording was to capture a statement "that would not be made if the taping were revealed," and that this was an "inherently deceptive" objective. Ariz. Ethics Op. 95-03, at 4.

The exceptions articulated in our prior opinions undercut this conclusion. Take, for example, the 1975 opinion that an undisclosed recording would be permissible to capture "an utterance that is itself a crime, such as an offer of a bribe, a threat, an attempt to extort or an

obscene phone call." Ariz. Ethics Op. 75-13. The lawyer who records such a call certainly seeks to make a record of a statement that likely would not be made if the recording had been known, but not to deceive the speaker into making the criminal statement. Rather, the lawyer seeks to record the statement so that the speaker cannot later falsely deny the criminal statement was made, and thereby avoid the consequences of his or her wrongdoing. In that instance, recording the conversation does not constitute deception, but avoids it. A similar purpose is served in recording a conversation with opposing counsel manifesting an agreement, thereby preventing the counsel from reneging on and denying that agreement, or by recording a conversation with opposing counsel who acts abusively and unprofessionally when they believe that there will be no witnesses to their misconduct.

Similarly, the exceptions we have previously identified regarding witness interviews likewise serve an important, non-deceptive purpose. Ariz. Ethics Op. 75-13 (to prevent perjury and to protect the interviewer of an informant or person under investigation); Ariz. Ethics Op. 90-02 (for impeachment purposes in criminal cases). In those instances, the conversation is one whose contents are sufficiently important that it may be necessary to have an accurate record at a later point, and an audio recording is a superior record to handwritten or typewritten notes that might be less complete or subject to concerns about accuracy. Surely we expect competent and diligent counsel to make notes as necessary to memorialize important conversations, and anyone speaking with a lawyer (particularly one who represents someone else) should reasonably expect that the lawyer will want to remember what was said and make some records to that end. If taking accurate notes of a conversation by hand or on a computer would be both appropriate and expected, then how does making an accurate audio recording of the same conversation put the speaker in any worse position with regard to future accountability for statements made during the conversation? In fact, given the greater accuracy and completeness of an audio recording, that method may provide more protection for all participants in the conversation than either side's handwritten notes or memories.[4]

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[4] In this regard, although the Committee's analysis does not rest on this ground, it is worth noting that contemporary understandings of the prevalence of recording may be changing in response to widespread access to and use of audio and video recording technology, on even inexpensive mobile telephones. To the extent prior opinions rested on an unspoken, shared understanding that conversations were, by default, *not* recorded, for society in general it is possible that understanding may be changing. The Committee's changed viewpoint is supported by the numerous similar opinions issued by fellow State Bar ethics committees from other jurisdictions as well as the ABA's opinion. *See, e.g.*, ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-422 (2001) ("Devices for the recording of telephone conversations on one's own phone readily are available and widely are used. Thus, even 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 . . . ."); Ohio Sup. Ct., Bd. of Comm'rs on Grievances and Discipline, Op. 2012-1 (2012) (finding that an attorney's surreptitious recording of a conversation is not inherently unethical based in part on the fact that "public expectations of privacy have changed given advances in technology and the increased availability of

Our prior opinion that all undisclosed recordings have a deceptive purpose, and are thus in violation of Rule 8.4(c), does not appear to withstand closer scrutiny. We therefore overrule our prior Opinion 95-03, and find that Rule 8.4(c) does not support a *per se* prohibition on undisclosed recordings by, or at the direction of, lawyers, provided that the recording otherwise complies with applicable laws.[5] In reaching this conclusion, the Committee does not endorse deception or trickery on the part of lawyers to the end of harming members of the public, but rather concludes that, in considering the benefit of recording as a way of advancing the interests of the client against the burden to the public of compromising expectations of privacy, the balance inures in the direction of permitting undisclosed recording. *See* Comment 1 to ER 4.4; Preamble, ¶ 9.

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recording equipment. The public has an almost ubiquitous ability to record others through the use of smart phones, tablets, and other portable devices."); Utah State Bar Ethics Op. 96-04 (1996) (determining that "a lawyer will not violate the Rules of Professional Conduct by making an undisclosed recording of a telephone conversation" based in part on a "changing environment" where "[t]echnology has put the power to secretly tape record within the easy reach of every lawyer and litigant").

[5] Based on the Committee's review of ethics opinions and ethical rules from other states in which one-party consent recording is legal, the Committee is comfortable that making such a change in the interpretation of Arizona attorneys' ability to record a communication is in line with a majority of our sister states. *See, e.g.*, Alaska Bar Ass'n, Ethics Op. 2003-01 (2003) ("[T]he 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 conversations without the express permission of all other parties to the conversation"); Me. Prof'l Ethics Comm'n, Op. 168 (1999); Mich. Informal Ethics Op. RI-309 (1998); Mo. Sup. Ct. Advisory Comm., Formal Op. 123 (2006) (agreeing with the reasoning of ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-422 (2001)); Neb. Ethics Advisory Op. for Lawyers, No. 06-07 (2006); N.Y.C. Bar Ass'n, Formal Op. 2003-02 (2003); Ohio Sup. Ct., Bd. of Comm'rs on Grievances and Discipline, Op. 2012-1 (2012); Okla. Bar Ass'n Legal Ethics Panel, Op. 307 (1994); Tenn. Rules of Prof'l Conduct 8.4 cmt. 6 ("The lawful secret or surreptitious recording of a conversation or the actions of another for the purpose of obtaining or preserving evidence does not, by itself, constitute conduct involving deceit or dishonesty"); The Prof'l Ethics Comm. For the State Bar of Tex., Op. 575 (2006) ("In view of the fact that persons in Texas are generally not prohibited from making undisclosed recordings of their telephone conversations on business premises with or without notice, the Committee does not believe that an undisclosed recording of a telephone conversation by a party to a conversation can be termed to involve 'dishonesty, fraud, deceit or misrepresentation' within the meaning of Rule 8.04(a)(3)"); Utah State Bar Ethics Op. 96-04 (1996).

E. Undisclosed Recordings Can Be Deceptive, or Violate Other Ethical Rules, in the Manner in Which They Are Made or Used.

However, this Opinion should not be read as a wholesale endorsement of undisclosed recordings in all circumstances. The misgivings expressed in our previous opinions about the potential uses of undisclosed recordings and their effects were real and meaningful, and should not be ignored or dismissed. In reviewing these concerns, the Committee believes that they are largely addressed in a number of the Rules of Professional Conduct, which guide the actions of lawyers in these circumstances and provide a means of sanctioning improper behavior.

The difference between this Opinion and our prior guidance on this subject is that we now recognize that any ethical problems with undisclosed recording arise not because the act of recording itself is inherently deceptive, but because the manner in which it is conducted or the ways in which the recording is used may implicate specific Rules of Professional Conduct. We thus conclude our analysis by discussing several ways in which undisclosed recordings may violate the Rules, and cautioning lawyers to consider these issues carefully before deciding to make an undisclosed recording.

Deception During the Recorded Conversation. Among the most obvious ways in which an undisclosed recording could violate the Rules requiring lawyers to be honest in their dealings with others[6] is by acts of deception prior to or during the recorded conversation itself. If the lawyer is asked whether the conversation is being recorded, they must answer honestly. Even if the lawyer is not asked, they may not make false statements as to whether the conversation is being recorded, either directly or by implication. Thus, they may not state that the conversation is unrecorded, while knowing that it is being recorded, nor may they imply that the conversation is unrecorded, by making statements such as "it's just us, you can tell me, no one will ever know." *See* ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-422 (2001) ("A lawyer who records a conversation without the consent of a party to that conversation may not represent that the conversation is not being recorded."); Utah State Bar Ethics Op. 96-04 (1996) ("[I]t would be unethical for an attorney to fail to answer candidly if asked whether the conversation is being recorded.").

Deception After the Recorded Conversation. Similarly, lawyers must not use the recording of the conversation in ways that are deceptive or false. Examples would include using partial recordings of the conversation that have the effect of altering its meaning, or manipulating the recording to omit or change its contents. Also impermissible would be lying about how the recording was obtained, for example by stating that both parties knew they were being recorded, if that was not the case. Similarly, an Arizona attorney may not engage in undisclosed recording

[6] *See* ER 1.2(d) (lawyers may not engage or assist in criminal or fraudulent conduct); 3.3(a) (lawyers may not make or fail to correct false statements of fact or law to tribunals); 4.1(a) (lawyers may not make false statements of material fact or law to third parties); 4.3 (lawyers may not falsely state or imply that they are disinterested, when dealing with unrepresented persons); 8.4(d) (lawyers may not engage in dishonesty, fraud, deceit or misrepresentation).

if the act of recording is to be used to assist the client in criminal or fraudulent activity, *see* ER 1.2(d) and ER 4.1(b).

Improper Recording Purposes. Lawyers must also be mindful of ER 4.4(a), which prohibits the use of "means that have no substantial purpose other than to embarrass, delay, or burden the other person, or use methods of obtaining evidence that violate the legal rights of such a person." It would be ethically impermissible to make a recording that had no relevance to the lawyer's work on behalf of the client other than to embarrass the opposing party or counsel, or that interfered with the other party's rights. Undisclosed recordings of conversations between an adverse party and their lawyer, or recordings of highly personal matters not relevant to a legal dispute, would fall within this prohibition.

Violation of the Duty of Loyalty to the Client. Lawyers should also avoid undisclosed recordings of conversations with their own clients, due to the likelihood that such recordings, if later discovered, would undermine the trust and candor that are essential to the lawyer-client relationship. *See Amfac Distrib. Corp. v. Miller*, 138 Ariz. 155, 159, 673 P.2d 795, 799 (App. 1983) (discussing the "essential element of trust in the attorney-client relationship); ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-422 (2001) (the relationship of trust and confidence that clients need to have with their lawyers likely would be undermined by client's discovery that lawyer secretly recorded communications with client).

F. Lawyers Should Consider Whether a *Disclosed* Recording Would Serve Their Purposes Equally Well.

As reflected in the above discussion, in order to remain in compliance with the Rules of Professional Conduct, an Arizona attorney must be conscious of the reason and purpose behind the need to record a conversation without disclosure, and the manner in which the recording will be used. Given the potential for ethical pitfalls, as well as the potential negative impact on working relationships with opposing parties, counsel, and witnesses, the Committee strongly recommends that any lawyer contemplating making an undisclosed recording consider whether they could achieve the desired result through making a recording with full disclosure. If the purpose of the recording is to make sure there is an accurate record of what was said for future use, then lawyers may wish to simply let their conversational partners know that they record conversations for record-keeping purposes. If they do so, then there can be no later accusations of unfairness or deception, nor any adverse effects on professional relationships as a result of being surprised with a recording.

CONCLUSION

This Committee believes that it is not *per se* unethical or "inherently deceptive" for an attorney in Arizona to record a telephone communication between the attorney and another individual without disclosing that the attorney is recording the communication, so long as the recording does not violate applicable federal or state law. The lawyer must still act consistent with all applicable Arizona Rules of Professional Conduct in making and using the recording, and an attorney's undisclosed recording may still violate various Ethical Rules, depending on the facts of each case.

DISSENT[7]

Over the past 40 years, Arizona has imposed a general blanket prohibition against an attorney recording a conversation without disclosure based on the view that any such recording is inherently deceptive and in violation of ER 8.4(c). This blanket prohibition is subject to a number of exceptions that have been articulated in several ethics opinions. The bedrock for the blanket prohibition is the simple proposition that, although such recordings may be legal under Arizona law (see ARS §§13-3005; 13-3012(9)), at the end of the day, lawyers need to hold themselves to a higher standard. Over those 40 years, this rule, along with its exceptions, has worked well. There has been no hue and cry for a change.

Proposed EO-20-0002 states a new general rule: "Undisclosed recording of a telephone or other conversation by a lawyer, or a person acting at the lawyer's direction, is not a *per se* violation of the Rules of Professional Conduct, provided that the recording does not violate applicable laws." EO-20-0002 at 1. The bases for this proposed change, the answer to "why are we making this change?," are essentially twofold: (1) there is no "textual support" in ER 8.4(c) for the current general rule; and, (2) the "piecemeal nature of the exceptions defined by the Committee . . . leaves attorneys with little guidance . . . [and] are themselves difficult to implement." EO-20-0002 at 7.

Taking these justifications for the change in reverse order, the new EO-20-0002 would already be subject to at least five exceptions *See* EO-20-0002 at 11-12), and if history is any guide, additional exceptions may be developed in the years to come.

The first justification (no "textual support" for the general prohibition) raises the question of the intent and purpose of ER 8.4(c), as well as the other ethical rules

Are the ethical rules intended to be a laundry list of every possible unethical act that an attorney can commit or are they intended to provide reasonable guidance for attorneys to use in conducting their professional affairs and otherwise? According to the Preamble to the Arizona Rules of Professional Conduct, "[t]he Rules do not . . . exhaust the moral and ethical considerations that should inform a lawyer" . . . [but rather] . . . "[t]he Rules simply provide a framework for the ethical practice of law." Preamble at [16]. We, therefore, are convinced that the text of ER 8.4(c) as it currently exists supports the prevailing general prohibition against surreptitious recordings.

There were two public comments to proposed EO-20-0002, one in favor of the change and one from a respected former Superior Court Judge in Maricopa County who articulated an opposition to the proposal that is both eloquent and persuasive:

> [I]t seems that a major rationale for the opinion is that there are so many exceptions to the rule against surreptitious recording that the rule itself should be re-examined. Respectfully, I wonder about that rationale. The hearsay rule, for example, also has many exceptions. But that doesn't mean we should get rid of it.

[7] The dissenting Committee members are Wm. Charles Thomson, Maret Vessella, and Michael Aaron.

I believe Opinion 95-03 was right when that committee wrote:

"We conclude that the secret tape recording of a telephone conversation with opposing counsel involves an element of deceit and misrepresentation. Despite the proliferation of modern recording devices and advancements in technology, it still is not common to record ordinary-course conversations between legal professionals. Attorneys do not expect that their opponent is recording a telephone conversation. On the contrary, attorneys normally expect that such recording is not occurring. The deceit and misrepresentation lies in the recording attorney's failure to disclose the fact that he or she is recording and preserving the statements of the other attorney for some purpose beyond the conversation.

Consider the intentions of an attorney who secretly records a telephone conversation with opposing counsel. Why does the recording attorney not disclose that the conversation is being taped? — precisely because disclosure would defeat the recording attorney's purpose: to capture his or her opponent on tape, making a statement that would not be made if the taping were revealed. This objective is inherently deceptive. It succeeds only if the other lawyer assumes, incorrectly, that the conversation is not being recorded and therefore speaks more forthrightly than he or she would if the recording were disclosed. Secretly recording conversations with opposing counsel thus contains an element of deception and trickery that flies in the face of the high ethical standard established by ER 8.4(d)."

I fear that something like the following will happen in civil litigation if this opinion is approved and disseminated to members of the Bar:

Any time a careful lawyer talks to opposing counsel on the telephone, he or she should start the conversation by saying "Please don't be offended but I must first ask you whether you are recording this conversation. If so, I will be less candid with you than I might otherwise be. It may hamper our ability to get this case resolved amicably and quickly but I have to ask this in order to protect myself."

Regardless of the answer, the careful lawyer cannot be sure that he or she is not being recorded so that lawyer is also going to think, "I don't want this guy presenting a partial transcript (leaving out the part where he said he wasn't recording, among other omissions) of one of our phone conversations one of these days to the trial judge

> or to his client. I also don't want to find a recording or a partial transcript out there on social media one of these days, so I better start surreptitiously recording my conversations with opposing counsel as well. At least that way I know I will have a complete record and transcript and can protect myself. I still won't be as candid with him as I otherwise would be. And I hope he doesn't ask me if I'm recording the conversation, because I don't want to get a reputation as a sharp practitioner, but this seems like the prudent thing to do now that it's allowed."
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> An exaggeration? I hope so. I hope I'm wrong. But I am concerned that conduct like that will occur.
>
> I suspect too that civil motion practice, particularly discovery motions, motions to enforce a claimed settlement agreement and similar motions, will change as well. The exhibits will now include transcripts of the surreptitious recordings of conversations between counsel. And what about at trial? Does the surreptitiously recorded conversation with opposing counsel contain an admission by an agent under Evidence Rule 801(d)(2)(D)? Even if careful practice might now be to first ask in every conversation if the lawyer is being recorded, I don't think most lawyers are going to ask. And they will be recorded. And it will have consequences.
>
> The preamble to the Arizona Rules of Professional Conduct reads that "A lawyer, as a member of the legal profession, is * * * an officer of the legal system and a public citizen having special responsibility for the quality of justice. Whether or not engaging in the practice of law, lawyers should conduct themselves honorably." Arizona Supreme Court opinions tell us we are "officers of the court."
>
> I fear that this proposed opinion will encourage conduct that should not be undertaken by an officer of the court. If lawyers should conduct themselves honorably they should not be secretly recording conversations with opposing counsel.

The undersigned dissent from proposed EO-20-0002 and, instead, urge the Committee, if changes need to be made, to combine the ethical opinions to date touching on this topic and issue a new ethical opinion that harmonizes any inconsistencies in the general prohibition and clarifies, deletes or adds exceptions as necessary.

ETHICS OPINION REQUEST

BEFORE THE ATTORNEY ETHICS ADVISORY COMMITTEE OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF FORMER STATE BAR ETHICS COMMITTIEE OPINION:	**NOTICE OF - REQUEST FOR ETHICS OPINION**
Op. 95-03	

On December 19, 2019 the Attorney Ethics Advisory Committee of the Supreme Court of Arizona determined by a vote of 14-0-1[1], to review State Bar ethics opinion Op. 95-03. This motion is given for the purpose of docketing the opinion request.

DATED this 30 day of January, 2020

Judge Paul McMurdie, Chair
Attorney Ethics Advisory
Committee of the Supreme Court of Arizona

[1] Committee member Maria Hubbard did not participate in this matter.

Original of the foregoing filed this 30 day of January 2020 with:

Supreme Court of Arizona
Court Clerk's Office
1501 West Washington, Suite #402
Phoenix, AZ 85007-3231
Phone: (602) 452- 3396

Copy of the foregoing filed this 30 day of January 2020 with:

Attorney Ethics Advisory Committee
Of the Supreme Court of Arizona
1501 West Washington Street, Suite 104
Phoenix, Arizona 85007
E-mail: aea@courts.az.gov

By: B. Farmer

State Bar of Arizona Ethics Opinions

95-03: Tape Recording; Opposing Counsel 2/1995

The secret tape recording of a telephone conversation with opposing counsel involves an element of deceit and misrepresentation. As such, the surreptitious tape recording of a telephone conversation with opposing counsel does not comport with Arizona ethics standards. This opinion specifically does not overrule or revisit prior opinions 75-13 and 90-02. [ER 8.4]

FACTS AND QUESTION PRESENTED[1]:

The inquiring attorney asks whether it is ethically permissible for a lawyer surreptitiously to tape record a telephone conversation with opposing counsel.

RELEVANT ETHICAL RULES

E.R. 8.4 Misconduct:

It is professional misconduct for a lawyer to:

* * *

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation....

OPINION

The secret tape recording of telephone conversations by lawyers has received wide-spread attention by courts and ethics committees. This Committee has addressed the issue on several occasions over the past 30 years.

Opinion 176A, issued by the Committee on September 21, 1965, addressed the precise question presented by the inquiring attorney: is it ethical for one lawyer to secretly tape record a telephone conversation with opposing counsel? Opinion 176A concluded that such conduct violated the ethical rules that applied to Arizona lawyers in 1965:

> [I]t must be recognized that lawyers, in conversing with one another on behalf of their respective clients, do so with the assurance that each of them is entitled to receive the other's utmost trust and confidence until the converse is shown. This is true whether the conversation is concerned with negotiations looking toward settlement, discussion of their respective positions, or any other matter in which their clients have an interest.
>
> . . .
>
> The employment of recording devices as indicated in the factual situation submitted, tends to undermine this foundation of respect and confidence and has the further damaging effect of weakening the entire structure of our profession. It is therefore the opinion of the Committee that a lawyer, while engaged in a telephone conversation with another lawyer, should not record the conversation without first informing him of such intention.

In Opinion 74-18, issued on August 6, 1974, the Committee considered whether a lawyer could secretly record a conversation with a witness, potential witness, or potential adverse party. We concluded that such conduct would violate DR 1-102, which, like our present rule 8.4(d), proscribed conduct involving dishonesty, fraud, deceit, or misrepresentation:

> It is the considered opinion of the Committee that an attorney may not manually, electronically, or mechanically record conversations with or verbal communications of a potential witness, witness, or potential adverse party without first advising the person that the communication or conversation is being electronically, manually, or mechanically recorded for reproduction at a later time.... What we have here condemned as unethical is the misrepresentation by a lawyer in omitting to advise the witness, the potential witness, or the potential party of the present use of such a device.

Two months later, in Opinion 74-35, we held that this rule applied to lawyers engaged in criminal investigations. We also noted that the rule prevented a lawyer from employing an investigator to surreptitiously record such a conversation. See Opinion 74-35. Thus, as of October 1974, this Committee had found the secret tape recording of telephone conversations to be unethical in virtually all circumstances.

The Committee changed this opinion only seven months later. In Opinion 75-13, issued June 11, 1975, the Committee overruled and vacated Opinions 74-18 and 74-35, holding that the secret recording of telephone conversations may be ethical in some situations. This change was brought about by ABA Formal Opinion 337, which, although holding that it generally is unethical for a lawyer surreptitiously to record telephone conversations, also recognized that such recordings are warranted in certain law enforcement situations. Upon learning of this ABA opinion the Committee consulted with a number of Arizona attorneys engaged in both criminal and civil practice. On the basis of these consultations and the ABA opinion, the Committee reversed its previous position and issued Opinion 75-13.

Opinion 75-13 first adopted the following general rule concerning the ethical propriety of secretly recording conversations:

> We are of the opinion that it is improper for a lawyer to record by tape recorder or other electronic device any conversation between the lawyer or other person, or between third persons, without the consent or prior knowledge of all parties to the conversation. This prohibition likewise precludes a lawyer from doing directly through a non-lawyer agent what he may not himself do.

Opinion 75-13 then recognized that there are certain necessary exceptions to this rule. Four were identified:

> 1. An attorney secretly may record "an utterance that is itself a crime, such as an offer of a bribe, a threat, an attempt to extort, or an obscene telephone call."
>
> 2. A lawyer may "secretly record a conversation in order to protect himself, or his client, from harm that would result from perjured testimony."
>
> 3. "In many areas of criminal investigations, for example, narcotics and fraud, it will be necessary for a prosecutor, or a police officer or investigator working directly with or under the supervision of the prosecutor, to secretly record conversations with informants and/or persons under investigation simply as a matter of self-protection." The opinion noted that this exception "does not authorize secret recordings for the purpose of obtaining impeachment evidence or inconsistent statements."
>
> 4. The opinion recognized "that secret recordings would be proper where specifically authorized by statute, court rule, or court order."

After identifying these exceptions, Opinion 75-13 noted that they would apply only in rare cases, and again emphasized the general rule:

> we emphasize the general prohibition announced, rather than the exceptions. Secret recordings will be warranted only in rare cases where the attorney has first satisfied himself that there are compelling facts and circumstances justifying the use of a secret recording.

The Committee most recently considered this subject in Opinion 90-02, dated March 16, 1990. This opinion broadened the conclusions of Opinion 75-13 in two respects. First, it stated that Opinion 75-13's distinction, in a criminal law setting, "between surreptitious recording to protect against perjury (which the opinion permitted) and surreptitious recording for impeachment purposes (which the opinion prohibited) does not appear to have any basis in the present Rules of Professional Conduct." Second, we extended the criminal law enforcement exceptions of Opinion No. 75-13 to lawyers retained to represent criminal defendants. Our conclusion was stated in these words:

> [W]e conclude that the recording of witness conversations by criminal defense attorneys or their agents, with the consent of only one party to the conversation, may be ethically permissible either for the purpose of protecting against perjury or for the purpose of obtaining impeachment material should the testimony of the witness be different at trial.

Thus, the undisclosed tape recording of conversations has been a subject of substantial consideration and discussion by previous members of this Committee. Against this historical background, we now address whether a lawyer's secret tape recording of a telephone conversation with opposing counsel would violate our present ethical rules.

Rule 8.4(d) prohibits "conduct involving dishonesty, fraud, deceit or misrepresentation." These words are not precisely defined in the rules and potentially cover a wide array of conduct, but they nonetheless are elements, and should be elements, of Arizona's modern ethical rules for lawyers.

We conclude that the secret tape recording of a telephone conversation with opposing counsel involves an element of deceit and misrepresentation. Despite the proliferation of modern recording devices and advancements in technology, it still is not common to record ordinary-course conversations between legal professionals. Attorneys do not expect that their opponent is recording a telephone conversation. On the contrary, attorneys normally expect that such recording is not occurring. The

deceit and misrepresentation lies in the recording attorney's failure to disclose the fact that he or she is recording and preserving the statements of the other attorney for some purpose beyond the conversation.

Consider the intentions of an attorney who secretly records a telephone conversation with opposing counsel. Why does the recording attorney not disclose that the conversation is being taped? -- precisely because disclosure would defeat the recording attorney's purpose: to capture his or her opponent on tape, making a statement that would not be made if the taping were revealed. This objective is inherently deceptive. It succeeds only if the other lawyer assumes, incorrectly, that the conversation is not being recorded and therefore speaks more forthrightly than he or she would if the recording were disclosed. Secretly recording conversations with opposing counsel thus contains an element of deception and trickery that flies in the face of the high ethical standard established by ER 8.4(d).

This conclusion accords with the majority of committees and courts that have addressed the question. In Formal Opinion 337, the ABA Committee on Ethics and Professional Responsibility concluded that surreptitious tape recording of conversations is "conduct which involves dishonesty, fraud, deceit, or misrepresentation." This same conclusion was reached by the ABA in Informal Opinions Nos. 1008 and 1009. Similar conclusions have been reached by the Iowa State Bar Association (Opinion 83-16), the Supreme Court of Iowa (Iowa State Bar Association Committee on Professional Ethics v. Mollman, 488 N.W.2d 168 (1992)), the Kentucky Committee on Professional Ethics (Opinion E-289), and the Idaho Ethics Committee (Formal Opinion 130). The Supreme Court of Colorado made the point in these words: "Inherent in the undisclosed use of a recording device is an element of deception, artifice, and trickery which does not comport with the high standards of candor or fairness by which all attorneys are bound." People v. Selby, 606 P.2d 45, 47 (1979).

We are aware that the Committee on Profession Ethics of the New York County Lawyers' Association has concluded that secretly recording telephone conversations is not unethical because it "may be accomplished by the touch of a button" and is sufficiently commonplace that "a party to a telephone conversation should reasonably expect the possibility that his or her conversation may be recorded." Opinion 696, dated June 21, 1993. But whatever accuracy this opinion may have in describing practices elsewhere, it does not accurately describe them here. Members of the Committee believe that lawyers in Arizona do not expect that opposing counsel is surreptitiously recording their telephone conversation. The unrevealed recording therefore continues, at least in this State, to involve an element of deception that does not comport with Arizona ethical standards.

As noted in the historical discussion at the beginning of this opinion, our Committee previously has recognized several exceptions to an absolute ban on secret tape recording -- exceptions that arise in the field of criminal law and most often would apply to an attorney's conversations with non-lawyers. The question posed by the

inquiring attorney does not require us to revisit these exceptions, nor are we inclined to do so on our own account. Because the exceptions identified in Opinions 75-13 and 90-02 were not explained on the basis of their being non-deceptive, some members of the Committee have questioned whether those exceptions are consistent with the general conclusion stated above. It is not necessary to address that question in full at this time, but we note that the expectations of parties involved in criminal conduct, criminal law proceedings, or criminal investigations may be such that the deception inherent in secretly recording conversations does not arise. We also note that the compelling societal interests which give rise to many of our criminal laws and procedures, and the complex and sometimes difficult principles of due process and equal protection, may give rise to considerations that supersede the principles addressed in this opinion. For this reason, the Committee articulates a general principle that will apply to conversations between opposing counsel without revisiting or overruling the exceptions established in Opinions 75-13 and 90-02.

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[1]Formal Opinions of the Committee on the Rules of Professional conduct are advisory in nature only and are not binding in any disciplinary or other legal proceedings.

PUBLIC COMMENTS

Farmer, Brianna C

From: Debra Legge < >
Sent: Thursday, September 03, 2020 9:58 AM
To: Attorney Ethics Advisory Committee
Cc: Chris Skelly
Subject: Proposed EO 20-0002; Comment in Opposition

FROM: CHRIS SKELLY

I write briefly in opposition to the proposed opinion.

Before I do, however, I want to thank you sincerely for your work on the Attorney Ethics Advisory Committee. Years ago I served on and then chaired the State Bar of Arizona Committee on the Rules of Professional Conduct – the old State Bar Ethics Committee. I know first-hand that the work you do is important and requires a significant investment of your time and talents. So, thank you.

As to the opinion:

I note first that it is *sua sponte*. It revisits prior Arizona Ethics Opinions 75-13, 90-02, 95-03 and 00-04 and supersedes them to the extent they conflict with this opinion. I ask respectfully: Why the need for the change from the guidance that has been in place for over 40 years? It doesn't appear that anyone is asking for the change. I know the ABA issued an opinion similar to this opinion in 2001 (ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op 01-422 (2001)). But that doesn't mean we have to. Many other states haven't, and we haven't in the twenty years since the ABA opinion was published. Is it necessary that this opinion be published? Will the opinion improve the law, the administration of justice and the quality of service rendered by the legal profession? (See Preamble, Arizona Rules of Professional Conduct, at [6].). If you think the answers to these questions are "no," I would ask you to please reconsider the proposed opinion.

Next, it seems that a major rationale for the opinion is that there are so many exceptions to the rule against surreptitious recording that the rule itself should be re-examined. Respectfully, I wonder about that rationale. The hearsay rule, for example, also has many exceptions. But that doesn't mean we should get rid of it.

I believe Opinion 95-03 was right when that committee wrote:

> We conclude that the secret tape recording of a telephone conversation with opposing counsel involves an element of deceit and misrepresentation. Despite the proliferation of modern recording devices and advancements in technology, it still is not common to record ordinary-course conversations between legal professionals. Attorneys do not expect that their opponent is recording a telephone conversation. On the contrary, attorneys normally expect that such recording is not occurring. The deceit and misrepresentation lies in the recording attorney's failure to disclose the fact that he or she is recording and preserving the statements of the other attorney for some purpose beyond the conversation.
>
> Consider the intentions of an attorney who secretly records a telephone conversation with opposing counsel. Why does the recording attorney not disclose that the conversation is being taped? – precisely because disclosure would defeat the recording attorney's purpose: to capture his or her opponent on

> tape, making a statement that would not be made if the taping were revealed. This objective is inherently deceptive. It succeeds only if the other lawyer assumes, incorrectly, that the conversation is not being recorded and therefore speaks more forthrightly than he or she would if the recording were disclosed. Secretly recording conversations with opposing counsel thus contains an element of deception and trickery that flies in the face of the high ethical standard established by ER 8.4(d).

I fear that something like the following will happen in civil litigation if this opinion is approved and disseminated to members of the Bar:

Any time a careful lawyer talks to opposing counsel on the telephone, he or she should start the conversation by saying "Please don't be offended but I must first ask you whether you are recording this conversation. If so, I will be less candid with you than I might otherwise be. It may hamper our ability to get this case resolved amicably and quickly but I have to ask this in order to protect myself."

Regardless of the answer, the careful lawyer cannot be sure that he or she is not being recorded so that lawyer is also going to think, "I don't want this guy presenting a partial transcript (leaving out the part where he said he wasn't recording, among other omissions) of one of our phone conversations one of these days to the trial judge or to his client. I also don't want to find a recording or a partial transcript out there on social media one of these days, so I better start surreptitiously recording my conversations with opposing counsel as well. At least that way I know I will have a complete record and transcript and can protect myself. I still won't be as candid with him as I otherwise would be. And I hope he doesn't ask me if I'm recording the conversation, because I don't want to get a reputation as a sharp practitioner, but this seems like the prudent thing to do now that it's allowed."

An exaggeration? I hope so. I hope I'm wrong. But I am concerned that conduct like that will occur.

I suspect too that civil motion practice, particularly discovery motions, motions to enforce a claimed settlement agreement and similar motions, will change as well. The exhibits will now include transcripts of the surreptitious recordings of conversations between counsel. And what about at trial? Does the surreptitiously recorded conversation with opposing counsel contain an admission by an agent under Evidence Rule 801(d)(2)(D)? Even if careful practice might now be to first ask in every conversation if the lawyer is being recorded, I don't think most lawyers are going to ask. And they will be recorded. And it will have consequences.

The preamble to the Arizona Rules of Professional Conduct reads that "A lawyer, as a member of the legal profession, is * * * an officer of the legal system and a public citizen having special responsibility for the quality of justice. Whether or not engaging in the practice of law, lawyers should conduct themselves honorably." Arizona Supreme Court opinions tell us we are "officers of the court."

I fear that this proposed opinion will encourage conduct that should not be undertaken by an officer of the court. If lawyers should conduct themselves honorably they should not be secretly recording conversations with opposing counsel.

Thank you for considering my input.

Respectfully,

Christopher M. Skelly
Skelly, Oberbillig & Phillips, LLC

From: Scott Weible
Sent: Friday, October 23, 2020 8:32 AM
To: Attorney Ethics Advisory Committee
Subject: Comment on EO 20-0002

Although I do not make undisclosed recordings of conversations with anyone (and in any event, I can't remember the last time I thought it might be useful to make a recording of anything) … it is my professional view that even this welcome change from 'a lawyer may never' to the currently proposed 'a lawyer may at her or his peril' is still pernicious and serves no useful public purpose; nor does it assist in the administration of justice for anyone. It should be left to the lawyer's professional judgment as to whether to make undisclosed recordings. Period.

Finally, the idea that, somehow the ability to make undisclosed recordings will damage "collegiality" amongst lawyers is simply an invitation for some lawyers to be sloppy in their manner of expression, grossly unprofessional and abusive in their manner of communication. From virtually the first day I practiced law, the Court of Appeal's Justice for whom I worked after law school (Justice Corcoran), my partners and my mentors all ingrained in me that whatever comes out of my mouth reflects on me, my firm, my client and my profession and I should assume that I am being "recorded". In other words, I should, at all times, conduct myself so that, if a transcription of my words were made public, I would not embarrass myself, my client or lawyers in general. If lawyers may be assumed to be acting honorably at all times, then why would they care if their non-attorney-client privileged communications were being recorded? And, if they are not acting honorably, if they are abusive, overbearing, rude and contemptuous in their expression, then why should the Rules of Professional Conduct "assist" them in their dishonorable conduct?

I appreciate the Committee's consideration of my views.

Scott Weible, Esq.
Weible Law Firm PLLC
Innovation Corporate Center