

# ATTORNEY ETHICS ADVISORY COMMITTEE

**Thursday February 20, 2020**

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**No. 3 Update and possible action regarding Ethics Opinion drafts:**

- EO-20-0002

Committee member Angela Woolridge will present information at the meeting.

# **ETHICS OPINION REQUEST**

FILED  
JAN 8 0:2020  
JANET JOHNSON  
CLERK SUPREME COURT  
BY: *[Signature]*

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

IN THE MATTER OF FORMER STATE  
BAR ETHICS COMMITTEE OPINION:

Op. 95-03

NOTICE OF -  
REQUEST FOR ETHICS OPINION

On December 19, 2019 the Attorney Ethics Advisory Committee of the Supreme Court of Arizona determined by a vote of 14-0-1<sup>1</sup>, 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

<sup>1</sup> Committee member Maria Hubbard did not participate in this matter.

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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](mailto: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 widespread 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:

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[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.

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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."

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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



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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

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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. © State Bar of Arizona 1995