

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES & DISCIPLINE

65 SOUTH FRONT STREET, 5TH FLOOR, COLUMBUS, OH 43215-3431

614.387.9370 888.664.8345

FAX: 614.387.9379

www.supremecourt.ohio.gov

RICHARD A. DOVE
SECRETARY

MICHELLE A. HALL
SENIOR COUNSEL

OPINION 2012-1

Issued June 8, 2012

Surreptitious (Secret) Recording by Lawyers

SYLLABUS: A surreptitious, or secret, recording of a conversation by an Ohio lawyer is not a per se violation of Prof.Cond.R. 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation) if the recording does not violate the law of the jurisdiction in which the recording takes place. The acts associated with a lawyer's surreptitious recording, however, may constitute misconduct under Prof.Cond.R. 8.4(c) or other Rules of Professional Conduct. In general, Ohio lawyers should not record conversations with clients or prospective clients without their consent. Advisory Opinion 97-3 is withdrawn.

QUESTION PRESENTED: May an Ohio lawyer engage in the surreptitious recording of a conversation if the recording is permitted by the law of the jurisdiction where the recording occurs?

APPLICABLE RULE: Rule 8.4(c) of the Ohio Rules of Professional Conduct

OPINION: Before the Board is a request to articulate its current view on surreptitious, or secret, recording of conversations by lawyers. The Board last addressed surreptitious recording 15 years ago in Advisory Opinion 97-3. In that opinion, which was issued under the now-superseded Code of Professional Responsibility (Code), the Board advised that in "routine circumstances" surreptitious recording by lawyers in legal representations is unethical. *See* Ohio Sup. Ct., Bd. of Comm'rs on Grievances and Discipline, Op. 97-3 (June 13, 1997). The Board based its conclusion on DR 1-102(A)(4), the Code provision that subjected lawyers to discipline for engaging in "conduct involving dishonesty, fraud, deceit, or misrepresentation." *Id.* at 3.

In Opinion 97-3, the Board also recognized three widespread exceptions to its characterization of surreptitious recording. First, the Board found that prosecutors and law enforcement lawyers acting pursuant to statutory, judicial, or constitutional authority could engage in surreptitious recording. Second, the Board indicated that criminal defense lawyers were permitted to use surreptitious recordings to further their clients' constitutional rights to zealous representation. Finally, the Board identified an "extraordinary circumstances" exception for situations such as when lawyers must defend themselves or their clients against wrongdoing. With all three exceptions, the Board concluded that the lawyer had the burden of demonstrating that the surreptitious recording did not amount to conduct involving dishonesty, fraud, deceit, or misrepresentation.

Opinion 97-3 was based in part on the American Bar Association's (ABA) stance on surreptitious recording at that time. In 1974, the ABA opined that "no lawyer should record any conversation whether by tapes or other electronic device, without the consent or prior knowledge of all parties to the conversation." ABA Commt. on Ethics and Prof'l Responsibility, Formal Op. 337 (Aug. 10, 1974). The only exception noted by the ABA was one for prosecutors and law enforcement lawyers. Interestingly, the ABA's opinion was issued one day after Richard Nixon resigned from the presidency as a result of the Watergate wiretapping scandal.

In 2001, the ABA readdressed surreptitious recording by lawyers in Formal Opinion 01-422. In that opinion, the ABA reversed its position and withdrew Formal Opinion 337. The ABA now concludes that "[w]here nonconsensual recording of conversations is permitted by the law of the jurisdiction where the recording occurs, a lawyer does not violate the Model Rules [of Professional Conduct] merely by recording a conversation without the consent of the other parties to the conversation." ABA Commt. on Ethics and Prof'l Responsibility, Formal Op. 01-422 (June 24, 2001), at 7.

In Ohio, recording of wire, oral, and electronic communications is legal if the person instituting the recording is a party to the communication or one of the parties to the communication has given prior consent. R.C. 2933.52. Ohio joins the majority of states and the federal government in this "one-party consent" approach. See Bast, *Surreptitious Recording by Attorneys: Is It Ethical?*, 39 St. Mary's L.J. 661, 681 (2008). In a minority of states, recording conversations is illegal except when all of the parties to the conversation give permission for the recording. *Id.* These states are known as "all-party consent" states. *Id.*

Turning from the legality of surreptitious recording to the question of whether such recording is ethical, 13 states take the position that surreptitious recording by lawyers is not per se misconduct. *Id.* at 711. In ten states, surreptitious recording is both illegal and unethical for lawyers. *Id.* Additionally, in nine states surreptitious recording is unethical, but allowed in certain circumstances. *Id.* at 703, 711. Four states evaluate surreptitious recording on a case-by-case basis, and 13 states have not expressed an opinion on the issue. *Id.* at 711.¹ In sum, 26 states permit surreptitious recording by lawyers in at least some situations. *Id.* at 703.²

The Supreme Court of Ohio (Court) has addressed surreptitious recording in only one lawyer discipline case. In *Ohio State Bar Assn. v. Stern*, 103 Ohio St.3d 491, 2004-Ohio-5464, a lawyer secretly videotaped a meeting with investigators from the Office of Disciplinary Counsel. The lawyer also lied to the investigators about videotaping their meeting. The sole charge of misconduct against the lawyer was that the recording and accompanying lie constituted conduct involving dishonesty, fraud, deceit, or misrepresentation. The Court recognized Opinion 97-3, but dismissed the charge of misconduct, finding that the bar association had not proven that the videotaping involved dishonesty, fraud, deceit, or misrepresentation. *Id.* at ¶ 17, 38. The Court indicated that its dismissal was based upon the unique facts of the case including the effects that a major head injury had on the lawyer's conduct and the ulterior motives of the grievants. *Id.* at ¶ 24-39. Three justices dissented, stating that the lawyer should have received a public reprimand for lying to the investigators. *Id.* at ¶ 40-42. Neither the majority nor the dissent found surreptitious recording to be per se misconduct.

In addition to *Stern*, the Board reviewed disciplinary cases from other states involving surreptitious recording. Of a number of reported cases considered by the Board, only one held that a lawyer's surreptitious recording did "not rise to the level of dishonesty, fraud, deceit, or misrepresentation." *Attorney M. v. The Mississippi Bar*, 621 So.2d 220, 224 (Miss. 1992). In *Attorney M.*, the Supreme Court of Mississippi reviewed the conduct of a lawyer representing the plaintiff in a medical malpractice action. Two physicians had treated the

¹ In two states, recording of telephone conversations is not per se unethical, but recording of face-to-face conversations is either illegal or has not been addressed. *Id.* at 714.

² Ohio is not included in these totals. Although based on the Bast law review article from 2008, the Board's independent research revealed that the Bast totals appear to remain accurate.

plaintiff. The lawyer recorded two telephone conversations with one of the physicians without consent. Because the lawyer was taking the physician's statement during the calls, the physician testified that he assumed the conversations were being taped, and there was no evidence that the lawyer intended to use the tapes for an improper purpose, the court dismissed the allegation of conduct involving dishonesty, fraud, deceit, or misrepresentation. *Id.* at 225.

In the other cases considered, surreptitious recording was found to be misconduct. However, all of the cases finding a disciplinary violation either rely on the ABA's 1974 opinion or involve extenuating facts such as the lawyer lying about the recording, the subject of the recording being a client or judge, or a motive for the recording that benefits the lawyer's own interests. See *Midwest Motor Sports v. Arctic Cat Sales, Inc.*, 347 F.3d 693 (8th Cir. 2003) (recording of adverse party's employees conducted through false representations); *Matter of Wetzel*, 143 Ariz. 35, 691 P.2d 1063 (1985) (lawyer recorded disciplinary counsel and opposing counsel for the purpose of future impeachment); *People v. Smith*, 778 P.2d 685 (Colo. 1989) (lawyer recorded a judge and used the statement out of context in a judicial grievance); *Comm. on Prof'l Ethics and Conduct of the Iowa State Bar v. Mollman*, 488 N.W.2d 168 (Iowa 1992) (lawyer recorded client without consent to secure leniency in the lawyer's own criminal case); *Comm. on Prof'l Ethics and Conduct of the Iowa State Bar v. Plumb*, 546 N.W.2d 215 (Iowa 1996) (recording of judge in chambers); *In re Crossen*, 880 N.E.2d 352 (Mass. 2008) and *In re Curry*, 880 N.E.2d 388 (Mass. 2008) (creating and recording fake job interview with former law clerk in attempt to have judge disqualified); *The Mississippi Bar v. Attorney ST*, 621 So.2d 229 (Miss. 1993) (lawyer lied about the recording); *Matter of an Anonymous Member of South Carolina Bar*, 304 S.C. 342, 404 S.E.2d 513 (1991) (relies on former ABA opinion), modified by *In the Matter of the Attorney General's Petition*, 308 S.C. 114, 417 S.E.2d 526 (1992) (recognizing exception for law enforcement investigations); *In re PRB Docket No. 2007-046*, 989 A.2d 523 (Vt. 2009) (misleading statements about whether conversation was being recorded).³ In these out-of-state disciplinary cases, the approach is similar to *Attorney M.* in that misconduct is determined based on additional facts connected to the recording. Only the Supreme Court of South Carolina in *Matter of an Anonymous Member of South Carolina Bar* found that surreptitious recording is inherently unethical.

³ See also *Wilbourn III v. Wilbourn*, 2010-CA-00014-COA (Miss. Ct. App. 2012) (surreptitious recording by trustee of co-trustee found improper when purpose of recording was to have co-trustee declared incompetent and removed).

Taking into account the current ABA position on surreptitious recording, R.C. 2933.52, other states' ethics opinions and disciplinary cases involving surreptitious recording, and the *Stern* decision, the Board believes it is time to deviate from the position taken in Opinion 97-3. On February 1, 2007, the Court rescinded the Code and adopted the Ohio Rules of Professional Conduct. Unlike the Code, the Ohio Rules are based in large part on the ABA's Model Rules of Professional Conduct. Accordingly, the Board finds that the ABA's interpretations of its Model Rules carry at least some weight in the application of the Ohio Rules. After careful study of ABA Formal Opinion 01-422, the Board concludes that it is a well-reasoned approach that provides better guidance for Ohio lawyers than Opinion 97-3 has done.

Like the Code, the Ohio Rules do not explicitly prohibit surreptitious recordings of conversations by lawyers. In Opinion 97-3, the Board found that surreptitious recording is misconduct in "routine circumstances" because it involves dishonesty, fraud, deceit, or misrepresentation as prohibited under DR 1-102(A)(4). Prof.Cond.R. 8.4(c) has replaced DR 1-102(A)(4), and Rule 8.4(c) also states that it is misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. Surreptitious, or secret, recording by a party to a conversation is legal in Ohio unless it is conducted for an improper purpose. R.C. 2933.52.⁴ Such recordings are used in "widespread practice by law enforcement, private investigators, and journalists, and the courts universally accept evidence acquired by such techniques." ABA Formal Opinion 01-422 at 4. Additionally, public expectations of privacy have changed given advances in technology and the increased availability of recording equipment. *Id.* The public has an almost ubiquitous ability to record others through the use of smart phones, tablets, and other portable devices. Further, 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. In Opinion 97-3, the Board identified sweeping exceptions for law enforcement lawyers, prosecutors, criminal defense lawyers, and in "extraordinary circumstances." Other jurisdictions have found exceptions for recordings in situations involving threats or obscene calls, of witnesses to avoid perjury, for a lawyer's self-preservation, when authorized by law or court order, and for housing discrimination and trademark infringement investigators. *Id.* A rule

⁴ The recording cannot be for the "purpose of committing a criminal offense or tortuous act in violation of the laws or Constitution of the United States or [Ohio] or for the purpose of committing any other injurious act." R.C. 2933.52(B)(4).

with a significant number of variables simply does not provide appropriate guidance for Ohio lawyers. For all of these reasons, the Board finds that the general rule should be that legal surreptitious recording by Ohio lawyers is not a per se violation of Prof.Cond.R. 8.4(c).

Although the Board is fashioning a new standard for surreptitious recording by Ohio lawyers, the Board is not in any way indicating that a lawyer cannot be disciplined for conduct involving such recordings. As demonstrated by the out-of-state disciplinary cases cited above, the acts associated with a lawyer's surreptitious recording may rise to the level of misconduct, including a violation of Prof.Cond.R. 8.4(c). Examples include lying about the recording, using deceitful tactics to become a party to a conversation, and using the recording to commit a crime or fraud.⁵ Under Prof.Cond.R. 4.4, lawyers also cannot employ surreptitious recording if it has "no substantial purpose other than to embarrass, harass, delay, or burden a third person" or is a means of obtaining evidence that violates the legal rights of a third person. "A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others." Ohio Rules of Prof'l Conduct, Preamble, ¶ [5].

In the alternative, as revealed in *Stern*, the facts and circumstances may cause the Court to find that a seemingly-deceitful surreptitious recording was justifiable and not misconduct. The mere act of surreptitiously or secretly recording a conversation should not be the impetus for a charge of misconduct. Instead, the totality of the circumstances surrounding the recording must be evaluated to determine whether a lawyer has engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Prof.Cond.R. 8.4(c). As eloquently stated by the Supreme Court of Iowa in 1996, "[i]t is not the use of recording devices, but the employment of artifice or pretense, that truly poses a threat to the trust which is the bedrock of our professional relationships." *Plumb, supra*, at 217.

This opinion assumes that a lawyer's surreptitious recording does not violate the law of the jurisdiction where the recording takes place. If an Ohio lawyer chooses to record a conversation in another jurisdiction, the lawyer is advised to verify that the recording is legal. Once a surreptitious recording becomes an illegal act, the recording may violate Prof.Cond.R. 4.4 (obtaining

⁵ However, Prof.Cond.R. 8.4(c) "does not prohibit a lawyer from supervising or advising about lawful covert activity in the investigation of criminal activity or violations of constitutional or civil rights when authorized by law." Prof.Cond.R. 8.4, comment [2A].

evidence in violation of a person's legal rights), 8.4(b) (illegal act reflecting adversely on honesty or trustworthiness), 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation), or 8.4(h) (conduct adversely reflecting on fitness to practice). In addition, under Prof.Cond.R. 8.5(b), a lawyer may be subject to the disciplinary rules of another jurisdiction for conduct occurring in that jurisdiction. Thus, Ohio lawyers are further advised to confirm that a recording that occurs in another jurisdiction is permissible under that jurisdiction's rules of professional conduct.

On a final note, the Board finds that it must separately address surreptitious recordings by lawyers of their conversations with clients and prospective clients. In Formal Opinion 01-422, the ABA stated as follows: "[a]lthough the Committee is divided as to whether the Model Rules forbid a lawyer from recording a conversation with a client concerning the subject matter of the representation without the client's knowledge, such conduct is, at the least, inadvisable." ABA Formal Opinion 01-422 at 8. The Board agrees with the ABA's general admonition against surreptitious recording of client conversations. A lawyer's duties of loyalty and confidentiality are central to the lawyer-client relationship, and recording client conversations without consent is not consistent with these overarching obligations. See Preamble, ¶ [4], Prof.Cond.R. 1.6, and Prof.Cond.R. 1.7, comment [1]. While there may occasionally be extraordinary occasions in which a surreptitious recording of a client conversation would be justified, such as when a lawyer believes a client plans to commit a crime resulting in death or substantial bodily harm, a lawyer generally should not record client conversations without the client's consent.

If a person is a prospective client as defined in Prof.Cond.R. 1.18(a), a lawyer's conversation with that person should also generally not be recorded without consent. As stated in Prof.Cond.R. 1.8(b), lawyers have a duty not to use or disclose information revealed during a consultation with a prospective client. These expectations of trust and confidentiality are similar to those found in the lawyer-client relationship, and inconsistent with the routine, nonconsensual recording of prospective client conversations. A person must truly be a prospective client for the general admonition to apply, however, and a unilateral communication to a lawyer without a reasonable expectation that the lawyer is willing to consider a lawyer-client relationship does not make the person initiating the communication a prospective client. Prof.Cond.R. 1.18, Comment [2].

CONCLUSION: A surreptitious, or secret, recording of a conversation by an Ohio lawyer is not a per se violation of Prof.Cond.R. 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation) if the recording does not violate the law of the jurisdiction in which the recording took place. Because surreptitious recording is regularly used by law enforcement and other professions, society as a whole has a diminished expectation of privacy given advances in technology, the breadth of exceptions to the previous prohibition on surreptitious recording provides little guidance for lawyers, and the Ohio Rules of Professional Conduct are based on the Model Rules of Professional Conduct, the Board adopts the approach taken in ABA Formal Opinion 01-422. Although surreptitious recording is not inherently unethical, the acts associated with a lawyer's surreptitious recording may constitute a violation of Prof.Cond.R. 8.4(c) or other Rules of Professional Conduct. Examples of misconduct may include lying about the recording, using deceitful tactics to become a party to a conversation, and using the recording to commit a crime or fraud. As a basic rule, Ohio lawyers should not record conversations with clients without their consent. A lawyer's duties of loyalty and confidentiality are central to the lawyer-client relationship, and recording client conversations without consent is ordinarily not consistent with these overarching obligations. Similar duties exist in regard to prospective clients, and Ohio lawyers should also refrain from nonconsensual recordings of conversations with persons who are prospective clients as defined in Prof.Cond.R. 1.8(a).

Advisory Opinion 97-3 is withdrawn.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Ohio Rules of Professional Conduct, the Ohio Code of Judicial Conduct, and the Attorney's Oath of Office.