

Advisory Opinion 1988-6

An attorney asks whether he would be acting unethically were he to interview potential witnesses, tape-recording the interviews, without telling the interviewees that they were being tape-recorded or that the interview was being conducted for the purpose of ascertaining facts for use in possible lawsuits. There are two issues here: (1) the secret tape-recordings and (2) the interview without stating the purpose.

1. The ABA Committee on Ethics and Professional Responsibility has considered the question of whether an attorney may secretly record conversations and has stated that, with the exception of prosecutors acting within strict statutory and constitutional limitations, secret recording is unethical. ABA Formal Opinion 337 (1974). The committee considered the fact that it is probably not unlawful to secretly record conversations. See *U.S. v. White*, 401 U.S. 745 (1971). Rules like SCRA 1986, Rules of Professional Conduct 16-804(C), however, state that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. It was the view of the ABA Committee that secretly recording conversations violated this rule.

Support was found for this result in two prior informal opinions of the committee. ABA Informal Opinion 1008 (1967); ABA Informal Opinion 1009 (1967). These opinions construed the problem under old Canon 22, which stated that the conduct of a lawyer before the court and with other lawyers should be characterized by candor and fairness. Candor and fairness indicate that, when making a recording of conversations, all parties to the conversation should be aware of that fact. The fact that the literal words of the canon only applied to the court and other attorneys was not seen as limiting. A lawyer should operate with candor and fairness toward all.

Additional support for the result was found in a survey of state opinions on the subject. According to ABA Opinion 337, all states save one had stated that secret recordings constitute a breach of an attorney's ethical obligations. We agree with these opinions and believe they should represent the rule in New Mexico at least to the extent that they consider it unethical for a lawyer, by his silence, to impliedly represent that he was not recording the interview with the witness. We note that it is not unlawful to secretly record conversations in New Mexico as long as the consent of one of the parties is present. N.M. Stat. Ann. 5 30-12-1(C) (1984). See SCRA 1986, Rules of Professional Conduct 16-404. Nonetheless, the Rules of Professional Conduct emphasize that a lawyer should be truthful in his statements to others, SCRA 1986, Rules of Professional Conduct 16-401, and go so far as to require a lawyer to correct any misunderstanding an unrepresented person has as to the lawyer's role when the lawyer has reason to know that the unrepresented person may misunderstand the lawyer's role, SCRA 1986, Rules of Professional Conduct 16-403.

We express no opinion on whether nonlawyers, acting as agents of the lawyer, may secretly record or on whether lawyers may secretly record conversations that are not interviews with witnesses made with a view toward ascertaining the facts. Our view, however, is that it is an implicit misrepresentation to record the type of witness interview about which inquiry is made without informing the witness that the interview is being recorded.

2. Our opinion on the second issue flows from our opinion on the first. The lawyer should not act in a deceptive manner with the witnesses. If the witnesses are unlikely to appreciate that they are being interviewed by a lawyer with a view toward potential claims, the lawyer should inform them that he is a lawyer and who he represents as a matter of candor. See Rule 16-403. Without knowing the exact language the lawyer intends to use or the sophistication of the potential witnesses, however, the committee is unable to give an opinion on whether the lawyer's intended course of action would be ethical.

[THE FOREGOING OPINION WAS APPROVED BY A DIVIDED COMMITTEE, WITH FIVE MEMBERS APPROVING THE OPINION AND THREE MEMBERS OPPOSED.]