

## Advisory Opinion 1996-2

In Formal Opinion 1988-6, issued June 11, 1988, the Advisory Opinions Committee considered the question of whether an attorney would be acting unethically in interviewing potential witnesses by making a tape recording of the interview without telling the person interviewed that a tape recording was to be made. Although the committee was divided, a majority of the members who considered the request concluded that the practice would be a breach of an attorney's ethical obligations.

In giving its opinion, the committee recognized that it was not unlawful to make a secret record of conversations so long as there was consent by one of the parties present to the conversation. The committee relied upon ABA Comm. on Ethics & Professional Responsibility Formal Op. 337 (1974) which concluded that with the exception of prosecutors acting within strict statutory and constitutional limitations, secret recording is unethical. The committee has now been asked to give further consideration to this question.

In several reported decisions, the New Mexico Court of Appeals has expressly condoned the secret recording of conversations by an attorney or in circumstances in which an attorney was involved. *State v. Hogervorst*, 90 NM 580, 566 P. 2d 828 (Ct. App.) , cert. denied 90 N.M. 636, 567 P.2d 485 (1977), was a criminal proceeding in which the defendant was convicted of bribery of a public official. Evidence introduced in the case included the transcripts of two conversations, one between the defendant and an investigator transmitted by a device concealed on the investigator and overheard by a person in a parked car nearby. The second conversation was between the defendant and the District Attorney, transmitted by a concealed device to an investigator. The court reasoned that a police agent who conceals police connections may write down a conversation with a defendant and later testify without violating the Fourth Amendment. The court found no difference between the writing down of such conversations, a simultaneous record made by electronic equipment, or a situation in which the conversation was transmitted to another agent.

In a later case, *State v. Arnold*, 94 NM 385, 610 P.2d. 1214 (Ct.App. 1979), *rev'd.*, 94, N.M. 381, 610 P.2d 1210 (1980) the court again approved the use of a secret recording in a criminal proceeding. Following the *Hogervorst* case, the court held that one who voluntarily enters into a conversation with another takes the risks that the other person may memorize, record or even transmit the conversation. The New Mexico Supreme court reversed the Court of Appeals in *Arnold*, concluding that there had been a failure to comply with the requirements of the New Mexico Abuse of Privacy Act in recording the conversations. *Arnold v. State*, 94 N.M. 381, 610 P.2d 1210 (1980). However, neither the opinion of the court, the special concurrence nor the dissent considered the ethical implications of an attorney's involvement in the making of secret recordings. All three opinions approved *State v. Hogervorst* and the secret recording of face to face conversations.

The Court of Appeals has extended to civil actions its approval of the secret recording of conversations. In *Robinson v. Katz*, 94 NM 314, 610 P.2d. 201 (Ct.App.) , cert. denied, 94 N.M. 675, 615 P.2d 992 (1980), on several occasions a real estate broker returned telephone calls and allowed a third person to listen on an extension and record the conversation in shorthand. The court concluded that it would not have been illegal for the realtor to have written down the conversation in shorthand; and the fact that someone else undertook the task for the realtor did not make the activity unlawful.

The question presented to the committee is whether, in view of specific judicial approval of the practice of making secret recordings, both in a criminal and in a civil context, the committee nevertheless adheres to its position that such secret recording is unethical. In rendering its earlier opinion, the committee did not discuss these New Mexico opinions, but expressly recognized that it was probably not unlawful to make a secret record of conversations, citing *United States v. White*, 41 US 745 (1971).

To date, ABA Formal Opinion 337 has not been withdrawn, and in several informal opinions, the ABA has declined to change its stand with respect to secret recordings. See ABA Comm. on Ethics & Professional Responsibility Informal Ops. 1320 (1975), 1407, (1978).

The question has been considered by a number of state and local committees, and a review of the opinions discloses a variety, of different, and inconsistent, conclusions. In 1991, the Legal Ethics Committee of the Dallas Bar Association, opinion 1991-02, concluded that even though federal and state laws may generally permit the recording when one party to a conversation consents, surreptitious recording is nevertheless inconsistent with a lawyer's ethical responsibility to avoid conduct that involves dishonesty, fraud, deceit or misrepresentation. An exception noted in the opinion was that in certain circumstances government lawyers may be able to make and use secret recordings if they comply with strict statutory

guidelines. The committee in Virginia reached a similar conclusion. Virginia Bar Assoc. Comm. on Legal Ethics Op. 1448 (1992). A later opinion stated that such practice should be reported to the disciplinary authorities. Virginia Bar Assoc. Comm. on Legal Ethics Op. 1635 (1993); see also South Carolina Bar Assoc. Ethics Advisory Comm. 91-14 (1991); Alaska Bar Assoc. Ethics Comm. Op. 92-2 (1992); Arizona Bar Assoc. Comm. on Rules of Professional Conduct Op. 95-3 (1995); Connecticut Bar Assoc. Comm. on Professional Ethics Op. 94-30 (1994).

The Committee in Oregon made a distinction between the recording of telephone conversations and the recording of in-person interviews, concluding that a lawyer may record a telephone conversation without informing the individual involved, but may not record a private, in-person conversation without informing the individual in question. Oregon Bar Assoc. Legal Ethics Comm. Op. 1991-74 (1991).

A contrary opinion by the Committee of the District of Columbia Bar concluded that a lawyer could tape an interview with a representative of a federal agency investigating the lawyer's client, without revealing that the tape was being made, so long as the lawyer made no affirmative misrepresentation about the taping. District of Columbia Bar Assoc. Legal Ethics Comm. Op. 229 (1992). The Committee on Professional Ethics of the New York County Lawyers Association categorically stated that a lawyer may secretly record telephone conversations, concluding that the secret recording was neither deceitful per se nor a violation of applicable criminal laws. New York County Lawyers Assoc. Comm. on Professional Ethics Op. 696 (1993); see also North Carolina Bar Assoc. Ethics Comm. Op. 171 (1994). However a Committee of the New York City Bar concluded that a lawyer could not secretly tape a conversation with opposing counsel. New York City Bar Assoc. Comm. on Professional Ethics Op. 1995-10 (1995).

The dilemma faced by ethics committees being asked to condemn as unethical a practice which the courts hold is perfectly legal is reflected in an opinion of the Legal Ethics Committee of the Oklahoma Bar Association. That committee noted that a lawyer had the same right as any other citizen to make legal recordings of telephone conversations but concluded that the fact the practice was lawful could not render it ethical. Whether the recording without the knowledge or consent of another party is deceptive and unethical is "situation specific." Because a lawyer is bound to be truthful, if an inquiry is made, the lawyer must acknowledge that the conversation is being recorded. Oklahoma Bar Assoc. Legal Ethics Comm. Op. 307 (1994).

A recent opinion of the Ethics Committee of the Texas Bar reasoned that secret recording of conversations offended the concept of honor and fair play. The committee was not so clear in dealing with the question whether the lawyer could ethically advise a client to tape record a telephone conversation but noted that an attorney is required to advise the client with an accurate statement of the law and an honest opinion of any consequences likely to follow. Texas Bar Assoc. Professional Ethics Comm. Op. 514 (1995).

The committee recognizes that the secret recording of conversations is lawful when done by or with the authority of a person participating in the conversation. The New Mexico Court of Appeals has held that the record of such conversations made by or under the direction of an attorney may properly be received in evidence in a criminal prosecution. In these circumstances, the committee cannot say that the secret recording of a conversation by a prosecutor, in New Mexico, following all applicable statutes and procedural guidelines is unethical. The question then is whether lawyers, other than prosecutors in criminal proceedings, are at liberty to make and use such secret recordings.

The Rules of Professional Conduct impose upon lawyers special obligations of fairness, SCRA 1986, 16-306, and truthfulness, SCRA 1986, 16-401. In particular, a lawyer may neither knowingly make a false statement of material fact nor fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act. In dealing with unrepresented persons, a lawyer may not state or imply that the lawyer is disinterested or take any action which might result in the unrepresented person misunderstanding the lawyer's role. SCRA 1986, 16-403. The lawyer may be required to produce or disclose to opposing counsel the secret recording. See, e.g., Fed. R. Civ. P. 26(a).

In considering whether to engage in the secret recording of a conversation with a potential witness, the lawyer is presented with a number of ethical and practical questions. Will the act of recording likely lead to a controversy which could make the lawyer a witness, for example by making the lawyer's conduct or alleged misconduct an issue? Did the lawyer make any false statement to get the witness to talk? Did the lawyer fail to disclose something obvious, fail to make clear the lawyer's role or position in the litigation? Is the witness represented by counsel, or likely to be represented by counsel, in connection with the litigation? Did the lawyer do or say anything which might mislead the witness? Did the lawyer's actions trick or coerce the witness in any way?

There may be circumstances in which a lawyer, consistent with the lawyer's duties and obligations, may be justified in making a secret recording of a conversation or an interview. If the lawyer determines that a secret recording is otherwise justified, the lawyer, must observe professional obligations, must disclose the secret recording whenever a failure to do so would be untruthful or misleading, and must respond honestly if questioned about the recording of a conversation.

It does not necessarily follow from the fact that the secret recording of conversations is lawful, that the making of secret recordings by or at the direction of an attorney is ethical. The Rules of Professional Conduct impose high standards of honesty and integrity on lawyers. The opinions of other bar committees dealing with the subject reflect great difficulty in deciding the extent to which otherwise lawful conduct may not be permitted within the scope of ethical rules applicable to lawyers. There are no clear guidelines when a lawyer may engage in the making of secret recordings, and the prudent lawyer should probably avoid it entirely. If a lawyer does engage in the making of secret recordings, special attention must be paid to the lawyer's ethical obligations at all stages in the making, disclosure and use of the secret recordings.