

State Bar of New Mexico

Ethics Advisory Committee

FORMAL ETHICS ADVISORY OPINION

FORMAL OPINION: 2005-03

DATE: November 19, 2005

RE: Ability of Lawyer or Lawyer's Agent to Record Telephone Interview With Witness Who Has Expressed Unwillingness to Speak "On the Record;" Application of NMRA 16-804(C) prohibiting conduct involving dishonesty, fraud, deceit or misrepresentation

DISCLAIMER: The Ethics Advisory Committee is constituted for the purpose of advising inquiring lawyers on the interpretation of the Rules of Professional Conduct, as applied to the inquiring lawyer's duties. The Committee's opinions are not binding, and are intended only to assist lawyers in the course of their conduct.

QUESTION PRESENTED: May a lawyer, or someone under the lawyer's employment or contract, record an interview of a witness, without the witness's knowledge, when the lawyer believes, through expressions from the witness (e.g., an expression by the witness that the interview is "off the record"), that the witness would either refuse to give a recorded statement or would not give an accurate statement if the witness knew that the statement was being recorded?

SHORT ANSWER: No, under the facts of the inquiry.

RULES IMPLICATED: 16-804(C) NMRA 2005.

FACTUAL & HISTORICAL BACKGROUND: This opinion is based upon an inquiry from a lawyer requesting an advisory opinion on whether, in light of ABA Formal Opinion 01-422, a recording can be made of a potential witness. The lawyer states that the witness would either refuse to give a recorded statement, or would not give an accurate statement, if the witness knew that the statement was being recorded. The request is made in a civil dispute setting, outside of the context of a prosecutor or other lawyer involved in the criminal justice system.

ANALYSIS: At the outset, the Committee recognizes that it has published two formal opinions on secret recordings of conversations (Formal Opinions 1988-6 and 1996-2). Both of those opinions made reference to ABA Comm. on Ethics & Professional Responsibility Formal Op. 337 (1974), which was withdrawn by the ABA Committee in its more recent ABA Formal Opinion 01-422. Both of the Committee's earlier opinions advise that clandestine recordings, except where expressly permitted by rule, are disfavored if not prohibited. ABA Formal Opinion 01-422 indicates the ABA

Committee's view that the rule has somehow been relaxed over time, despite the lack of amendment to the rule. However, having considered the applicable rules and the facts presented to the Committee, the withdrawal of the older ABA Formal Opinion does not impact this Committee's analysis of the instant request. Nor is this Committee presently inclined to withdraw either Formal Opinion 1988-6 or 1996-2. As set forth particularly in Formal Opinion 1996-2, there may be instances where clandestine recording might be permissible. Analysis of the issue is very fact specific. However, the factual background in this instance does not present a situation in which the Committee believes a clandestine recording would be permitted.

Being fact specific, the Committee's analysis does not consider the application of rules, statutes or case law with regard to the investigation of criminal matters by prosecutors or others involved in the criminal justice system, with regard to which special substantive or procedural provisions regarding secret recordings may apply. Rather, the focus of this opinion is on civil or other non-criminal proceedings and transactional matters, wherein no special rules exist for the practice.

The Committee acknowledges, as the Committee did in Formal Opinion 1996-2, that under New Mexico law, the recording of a teleconference is not unlawful so long one of the parties is aware of the recording. However, the inquiry cannot be based solely on what is legal. As the Committee noted in Formal Opinion 1996-2:

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.

The Committee also believes that the following questions, set forth in Formal Opinion 1996-2, remain of vital importance as the lawyer considers whether clandestine recording would be permissible:

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?

In the instant case, the analysis is not so difficult. The lawyer's conclusion, that the witness would either refuse to be interviewed or tell falsehoods if the witness knew the

interview was being recorded, indicates that the witness believes the interview is not being recorded by the lawyer. Rule 16-804 NMRA 2005 provides:

It is professional misconduct for a lawyer to:

* * *

- C. engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

The Committee believes that the misconduct referenced in 16-804(C) includes both acts of commission and omission. Thus, withholding information under certain circumstances may be just as violative of the rule as providing incorrect information.

The lawyer, having reached the conclusion referenced above, would violate Rule 16-804 if the lawyer recorded the interview without the witness's knowledge of the recording. This is because, having reached that conclusion regarding the witness, the lawyer knows that the witness does not anticipate that the interview will be recorded, but instead believes it will be "off the record." Having this knowledge, the lawyer is obligated to tell the witness prior to initiating a recorded interview that the interview will be recorded. Otherwise, the secret recording of the conversation deceives the witness, based on the lawyer's knowledge that the witness would refuse to proceed if the interview were recorded.

Further, the lawyer cannot instruct someone under the lawyer's control to record the interview in the lawyer's stead. Rule 16-804(A) NMRA 2005 defines professional misconduct to include "violat[ion] [of] the Rules of Professional Conduct ... through the acts of another." This provision forbids a lawyer's use of third parties, whether employees, contractors or agents, to commit acts that are forbidden to the lawyer.

The Committee recognizes that, as a result of complying with Rule 16-804(C), there is the possibility that efforts to obtain information that would be helpful in litigation or other matters may be impeded. However, the prohibitions of Rule 16-804(C) are mandatory and not merely aspirational. The applicable rules of civil procedure, particularly those involving depositions, may provide the more appropriate method of obtaining or compelling testimony.

CONCLUSION: The Rules of Professional Conduct preclude the secret recording of a witness interview by a lawyer, or anyone acting under the lawyer's control, if such a recording would involve deceiving the witness either by commission or omission. Circumstances that would bar such a recording include, but may not be limited to, instances wherein the witness has made any expression that the witness believes the interview is "off the record" or has indicated that, if a recording were made, no interview would be granted. Despite the withdrawal of ABA Formal Opinion 337, the Committee believes that the prudent New Mexico lawyer will still be hesitant to record conversations without the other party's knowledge and must always consider the obligations placed upon a lawyer by the Rules of Professional Conduct. In so doing, the Committee does

not mean to opine that under no circumstances would the practice be permissible. Rather, the analysis remains a very fact specific one.