KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-279
Issued: January 1984

This opinion was decided under the Code of Professional Responsibility, which was in effect from 1971 to 1990. Lawyers should consult the current version of the Rules of Professional Conduct and Comments, SCR 3.130 (available at http://www.kybar.org), before relying on this opinion.

Question 1: May an attorney secretly record conversations with client, attorneys, judges, and the public, including public officials, where said persons are not witnesses in a criminal proceeding in which the attorney is employed as defense counsel?

Answer 1: No.

Question 2: May an attorney employed to defend a person accused in a criminal proceeding secretly record conversations with witnesses in that proceeding?

Answer 2: Yes.

References: ABA Formal Opinion 337; Code of Professional Responsibility: Canons 1, 4, 7 and 9; Disciplinary Rule 1-102(A)(4); and Ethical Consideration 1-5, 4-4, 4-5, 7-1, 9-2 and 9-6; Opinion No. 80-95, The Committee on Professional and Judicial Ethics of the Bar Association of the City of New York; KBA E-98.

OPINION

ABA Formal Opinion 337 generally stated that with certain exceptions spelled out in the opinion, 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. The basis for this opinion was that Canon 9 of the Code of Professional Responsibility stated that a lawyer should avoid even the appearance of professional impropriety. The opinion also relied upon DR 1-102(A)(4) of the Code of Professional Responsibility which stated that "a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation." The opinion went on to say: Canons 1, 4, 7 and 9, and Ethical Consideration all clearly express axiomatic norms for attorney conduct. Each in the view of the Committee supports the conclusion that lawyers should not make recordings without consent of all parties. Ethical Considerations EC 1-5, 4-4, 4-5, 7-1, 9-2 and 9-6 all state in various ways the conduct of which lawyers should aspire. None would condone such conduct. The conduct prescribed in DR 1-102(A)(4), *i.e.*, conduct which involves dishonesty, fraud, deceit or misrepresentation in the view of the Committee clearly encompasses the making of recordings without the consent of all parties…"

Thus, where the lawyer is not representing a client in a criminal case and is not conversing with a witness in that proceeding, then the recording of the conversation without the consent of all parties would be deemed a breach of the Canons of Ethics.

However, when the attorney is representing a person accused in a criminal case it may be proper for him to secretly record conversations with witnesses in that proceeding.

ABA Formal Opinion 337, in the last paragraph of the opinion stated that there may be extraordinary circumstances in which the Attorney General of the United States or the principal prosecuting attorney of a state or local government or law enforcement attorneys or officers acting under the direction of the Attorney General or such principal prosecuting attorneys might ethically make and use secret recordings if acting within strict statutory limitations conforming to constitutional requirements. However, nothing was said about a defense attorney in a criminal proceeding ethically making and using secret recordings if acting within strict statutory limitations conforming to constitutional requirements. This oversight was noted by the Committee on Professional and Judicial Ethics of the Bar Association of the City of New York in Opinion No. 80-95. In that opinion, the Committee stated that its conclusion was limited to the secret recording of conversations with witnesses in criminal proceedings. The Committee stated: "We continue to endorse the view that secret recordings of conversations with other lawyers or with clients is improper in any context, criminal or civil. Moreover, we continue to view as unethical secret recordings of witnesses in civil or commercial matters."

There are several valid reasons for permitting a lawyer acting as defense counsel to secretly record conversations with witnesses in the proceeding. Those reasons are as follows:

1. The Omnibus Crime Control and Safe Streets Act, passed in 1968 by Congress, contains Title III and authorized unconsented electronic interception of conversations through wiretaps and bugs. 18 U.S.C. § 516. The statute provided that secret recordings by consent, that is, by a participant to a conversation, were legal. 18 U.S.C. 2511(d). In United States v. White, 401 U.S. 745 (1971), the Supreme Court of the United States upheld the constitutionality of using such secret recordings in trials. Thus, there is both legislative and judicial sanction for the use of such secret recordings by the government in criminal cases, and Congress expected prosecutors to play a role in the making of such recordings. Opinion 80-95, pp 3-4.
2. Why should a prosecutor be permitted to secretly record conversations and rely upon them but defense counsel not be entitled to record conversations of witnesses in the proceeding? To deny a defendant this right may well violate his constitutional rights under the Sixth and Fourteenth Amendments to the United States Constitution.
3. While agreeing with ABA Opinion 337 that a legislative determination that conduct is lawful does not always make the conduct ethical, by permitting defense counsel to secretly record the conversations of witnesses "is one which does not so plainly diverge from accepted standards of candor and fairness that it is inconsistent with ethical behavior... " Opinion 80-95, p. 9.
4. Canons 6 and 7 of the Code of Professional Responsibility require a lawyer to exercise competence in the zealous representation of his client. These duties apply in the context of criminal cases and justify his secret recording of conversations of witnesses in the representation of his client.

There are additional reasons why it may be necessary for an attorney representing a defendant in a criminal case to secretly record the conversations with witnesses. In some instances, law enforcement officials may be attempting to entrap the defense attorney into making some statement that could be used against the attorney, either during the course of the trial that he is defending or in a prosecution against the attorney. A recording of what was said is the best evidence under the circumstances. This will preclude a future swearing contest between the witness and the attorney as to what was said.

The distinction made here between secretly recording the conversation of a witness and the lawyer's client is simply that if the client will refuse to consent to the recording of a conversation with the attorney, the attorney is free to withdraw from the case either by consent of the client or with court approval. There should be a degree of mutual trust between the attorney and his client. However, while the attorney seeks the truth from the witness, there generally does not exist a feeling of mutual trust. The attorney by law has a right to record the conversation even without the consent of the witness. 18 U.S.C. 2511(d). If the witness later disputes the conversation or what was said during the conversation, the recording will be the best evidence. Questions may arise as to whether the recording was tampered with so as to change the meaning thereof. However, in this day of scientific electronic equipment, it can generally be determined whether there has been any alteration of the recording following its initial recording. Any attorney secretly recording a conversation should take steps to preserve the integrity of the recording so as to preclude any serious question being raised about a subsequent alteration thereof.

This Opinion revokes KBA E-98.

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). The Rule provides that formal opinions are advisory only.