

NEW YORK STATE BAR ASSOCIATION
Committee on Professional Ethics

Opinion #328 - 3/18/74 (30-73)

Clarified by 51

Topic: Fairness and candor; Secret recording of conversation

Digest: Except in special situations improper for attorney engaged in private practice to electronically record a conversation with another attorney or any other person without first advising the other party

Code: Canon 1; EC 1-5; 9-6; DR 1-102(A)(4); 7-102(A)(8)

QUESTION

May a lawyer in the course of his practice of law electronically record a conversation with another lawyer or with any other person without first informing him that the conversation is being recorded?

OPINION

This Committee does not pass upon the legality of professional conduct, but if such conduct is illegal it is of course unethical. DR 1-102(A)(4); EC 1-5; cf., DR 7-102(A)(8). Even if the secret electronic recording of a conversation is not illegal it offends the traditional high standards of fairness and candor that should characterize the practice of law and is improper except in special situations such as those referred to below. Canon 1; DR 1-102(A)(4); EC 9-6.

The Bar is a guardian of the public interest. The morals of the marketplace are not always sufficient as standards for the legal profession. The application of the Canons is not necessarily affected by statutes or regulations prescribing less stringent standards. ABA 203 (1940); N.Y. State 272 (1972). "Professional standards adopted in the public interest often condemn the doing of what the law has not forbidden." N.Y. State 323 (1974); see, Stone, *The Public Influence of the Bar*, 48 Harv. L. Rev. 1, 13 (1934). To maintain a respected position in society lawyers should act in a manner deserving of respect despite the absence of statutory condemnation of an activity.

There is a general aversion to the secret electronic recordation of private conversations. Unrecorded private conversation encourages uninhibited and easy flow of expression and facilitates the exchange of ideas even though in unguarded and imprecise language which might not have been employed if the speaker had had knowledge that a literal transcript was being made. Elemental fairness ordinarily dictates that all participants be aware of the ground rules governing a conversation. They may then conduct themselves accordingly.

A lawyer should be candid and fair. Of equal importance, he should be regarded as such by other lawyers and the public and his conduct should not be susceptible to an interpretation that he is less than candid and fair. EC 9-6 states that "every lawyer owes a solemn duty to strive to avoid not only professional impropriety but also the appearance of impropriety."

The secret recording of telephone conversations has been considered by ethics committees in a number of jurisdictions and has uniformly been disapproved, with only one exception that has been brought to our attention. See, ABA Inf. 1009 (1967); ABA Inf. 1008 (1967); N.Y. City 813 (1958); N.Y. City 836 (1958); Los Angeles 272, 39 L.A.B.B. 405 (1964); Colo. 22, Colo. Bar Assn. Annual Report 24 (1963), 39 Dicta 59(1963); Louisiana 158, 12 La. B. J. 217 (1964); Cleveland 35 (1962); Michigan 201 (1966), Mich. State B. J. 29 (May 1967); Maru, Digest of Ethics Opinions 70, 75, 131, 396 (1970); contra, Texas 84, 16 Texas B. J. 701 (Nov. 1953); Maru, Digest of Ethics Opinions

455 (1970).

N.Y. City 813 (1956) condemned the use of a concealed tape recorder in the office of an attorney to record the conversation between himself and opposing counsel while they were reviewing exhibits, stating:

"The practice is unethical and should not be countenanced. [Former] Canon 22 requires that the 'conduct of a lawyer...with other lawyers should be characterized by candor and fairness'. The employment of a concealed tape recorder under the circumstances described is not consistent with candor and fairness."

See also, Interim Report of the Science and Law Committee, Association of the Bar of the City of New York, 20 *The Record* 649 (1965).

The same principles are applicable in forbidding a secret recording of a conversation with prospective witness or with any other person. See, Colo. 22, Colo. Bar Assn. Annual Report 24 (1963); 39 *Dicta* 59 (1963); Louisiana 158,12 *La. B. J.* 217 (1964), Maru, *Digest of Ethics Opinions* 75, 131 (1970); cf. ABA Inf. 1008 (1967) (recording conversation with one's own client); cf. *Matter of Wittner*, 264 App. Div. 576, 35 *NYS 2d* 773 (1942), *aff'd* 291 *N.Y.* 574 (1943).

There may be extraordinary circumstances when secret recordings of conversations by lawyers are rendered permissible, as for example, if sanctioned by express statutory or judicial authority. This opinion is not directed toward such exceptions each of which must be considered on its own merits.