
**E-94-5 Recording telephone calls without
disclosure or consent**

Question

May an attorney record statements made over the telephone without disclosing to persons concerned that their statements are being recorded and without securing consent to do so?

Opinion

It is not unlawful in Wisconsin to record telephone conversations to which one is a party, even in the absence of disclosure to and consent of other parties to the conversations. *See* Wis. Stat. § 968.31(2)(c), 18 U.S.C. § 2511(2)(c)(d). However, ethics opinions from other jurisdictions are divided on whether a lawyer may ethically record telephone conversations with others without the other person's consent or prior knowledge. *See, e.g.*, ABA Formal Op. 337 (generally unethical), Alaska Op. 91-4 (same), New York County Op. 696 (generally permissible if lawful), Oklahoma Op. 307 (generally permissible unless circumstances involve deception), Oregon Op. 1991-74 (same), South Carolina Op. 91-14 (generally unethical).

The ABA Committee on Ethics and Professional Responsibility based its conclusion that the practice is unethical on a finding that secret recording constitutes dishonesty, fraud, deceit or misrepresentation. The dishonesty presumably results from the other party's reasonable expectation that telephone conversations are not recorded unless a warning is given. Some other ethics opinions would prohibit unconsented to or secret recording only under circumstances where the other party has been led to believe that no recording is being made.

The State Bar of Wisconsin Professional Ethics Committee believes that the Rules of Professional Conduct do not support a blanket interpretation that generally either permits or prohibits secret recording by lawyers of telephone conversations. Whether the secret recording of a telephone conversation by a lawyer involves "dishonesty, fraud, deceit or misrepresentation" under SCR 20:8.4(c) depends upon all of the circumstances operating at the time. This

determination is highly fact intensive and numerous factors are involved, including the prior relationship of the parties, statements made during the conversation, whether threatening or harassing prior calls have been made and the intended purpose of the recording. In this latter connection, it should be noted that section 968.31(2)(c) of the Wisconsin Statutes implicitly prohibits secret recordings “for the purpose of committing any criminal or tortious act . . . or for the purpose of committing any other injurious act.” The secret recording of telephone conversations also may violate the Attorney’s Oath, which requires lawyers to “abstain from all offensive personality.” SCR 20:8.4(g) and 40.15; *Disc. Proc. Against Beaver*, 181 Wis. 2d 12, 510 N.W.2d 129 (1994).

Different standards apply when the other party involved is a client. The fiduciary duties owed by a lawyer to a client and the duty of communication under SCR 20:1.4 dictate that statements made by clients over the telephone not be recorded without advising the client and receiving consent to the recording after consultation. Similarly, the secret recording of telephone conversations with judges and their staffs is generally impermissible. Courts are responsible for determining when and how a record should be made of activities in the court. *See, e.g.*, Wis. Stat. § 59.39. Moreover, the Attorney’s Oath requires lawyers to “maintain the respect due to courts of justice and judicial officers.” SCR 20:8.4(g) and 40.15.

Even in circumstances in which secret recording of telephone calls is permissible, lawyers should be very cautious in deciding whether to do so. In some circumstances, a recording of a telephone conversation may constitute “material having potential evidentiary value” that the attorney has an obligation to preserve or turn over to a prosecutor or opponent in litigation under SCR 20:3.4. In addition, the secret recording of telephone calls is offensive to many persons and may harm the attorney’s reputation when such conduct is discovered.

The foregoing considerations prohibit the routine secret recording of telephone conversations by lawyers and law offices. Whether any particular telephone call may permissibly be recorded depends upon the circumstances of that particular call. Thus, routine secret recording would almost certainly violate the Rules of Professional Conduct.

This should be distinguished from the use of telephone caller identification equipment, which does not record statements but merely identifies the telephone number from which the call originates. The use of caller ID by lawyers is

generally permissible, as it does not involve the same risks of deception inherent in secretly recording telephone conversations.