Wisconsin Formal Ethics Opinion EF-24-01

Recording Others Without Disclosure or Consent

February 6, 2024

Synopsis: *Recording conversations with others is increasingly commonplace. Lawyers are no different. When all parties are informed and in agreement, the recording lawyer has no legal or ethical issues. In contrast, when the target of the recording is unaware and has not consented both legal and ethical issues can arise.*

One-party consent recordings are lawful in most states, including Wisconsin. Thus, recording in these jurisdictions will not expose a lawyer to criminal or civil liability but whether recording others without disclosure or consent violates other disciplinary rules that address dishonest or deceptive conduct may depend on specific facts. This opinion addresses the issue in the context of recording clients, opposing counsel, judicial officers, court personnel or others. It concludes, consistent with Wisconsin Ethics Opinion E-94-5, that recording of clients, judicial officers or court personnel without their knowledge or consent is prohibited by the disciplinary rules but that recording of opposing counsel or others, is not ordinarily prohibited by the disciplinary rules.

Wisconsin Ethics Opinion E-94-5 is hereby withdrawn.

Introduction

At one time, recording others without their knowledge or consent was deemed to be misconduct by the American Bar Association ("ABA") and most jurisdictions. Subsequently, the ABA has softened its approach and concluded that recording another without their knowledge or consent alone does not constitute deception and thus a violation of the disciplinary rules. This change is based on the view that increasing reliance on technology has changed public norms such that recording another without explicit notice does not ordinarily constitute deception. However, not all in the profession have accepted this view resulting in a splintered approach to the issue. Nearly thirty years ago, the State Bar Standing Committee on Professional Ethics (the "committee") concluded that Wisconsin's disciplinary rules supported neither a complete bar nor unqualified permission to make surreptitious recordings of others, instead opining that the appropriateness of recording depended on the circumstances of the particular case. Wisconsin Ethics Opinion E-94-5. The committee viewed recordings of clients and court personnel differently, concluding that recording in these situations would never be appropriate. While the committee agrees in

principle with Ethics Opinion E-94-5, it believes additional discussion and analysis can provide greater guidance to lawyers.

A. Recording in jurisdictions that require two-party consent.

Several states statutorily prohibit recordings of others without notice to and the consent of all parties involved.[1] If violation of the prohibition is a criminal offense, unauthorized recording may also be a disciplinary rule violation in states that have adopted ABA Model Rule 8.4(b), which provides, "[i]t is professional misconduct for a lawyer to … commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects …."[2] This is not the case in Wisconsin, which allows one-party consent recording.[3] Thus nonconsensual recording does not violate SCR 20:8.4(b).[4]

B. Recording in jurisdictions that require only one-party consent.

Neither Wisconsin nor the ABA have adopted a disciplinary rule to specifically address the issue of nonconsensual recording of others. Instead, analysis of the issue has focused on ABA Model Rule 8.4(c), or its Wisconsin counterpart, Supreme Court Rule ("SCR") 20:8.4(c), both of which provide, "[i]t is professional misconduct for a lawyer to … engage in conduct involving dishonesty, fraud, deceit or misrepresentation …."[5]

The question presented is whether recording someone without their knowledge or consent is dishonest and deceptive. The ABA had little difficulty finding it was in Formal Ethics Opinion 337 (1974)[6], concluding that the rule prohibiting dishonesty, fraud and deception "clearly encompasses the making of recordings without the consent of all parties" such that "no lawyer

[1] California, Florida, Illinois, Massachusetts, Michigan, Montana, New Hampshire, Pennsylvania and Washington require the consent of everybody involved in a conversation or phone call before the conversation can be recorded. The provisions in each state differ and most provide for exceptions for law enforcement and telecommunications companies. Several have made their prohibitions criminal violations.

[2] Wisconsin has adopted the ABA Rule as SCR 20:8.4(b).

[3] *See* Wis. Stat. §§ 968.27; 968.31 and 885.365(1). Laws governing recording are often part of a criminal code providing what activities are prohibited rather than what are permitted. Accordingly, lawyers may need to focus on what is not covered by the state prohibitions to determine what recordings are permissible.

[4] Although one-party recording is not unlawful in Wisconsin the recordings are not admissible as evidence in civil cases. Wis. Stat. § 885.365.

[5] Similar language appeared in the ABA Code of Professional Responsibility – DR1-102(A)(4).

[6] ABA Formal Opinion 337 followed several earlier ABA opinions. ABA Formal Opinion 150 (1936) (prosecutor could not ethically use secret tape of attorney and client at trial); ABA Informal Opinion 1008 (1967)(improper to record client without disclosure), and ABA Informal Opinion 1009 (1967)(attorney may not secretly record opposing counsel).

should record any conversation whether by tapes or other electronic device, without the consent or prior knowledge of all parties to the conversation."[7] The opinion made no distinctions between recording clients, opposing counsel, or others. It did acknowledge the possibility of a law enforcement exception to the general prohibition.[8]

Implicit in the ABA opinion is the belief that failing to disclose the fact that a communication was being recorded was deceitful and dishonest. The Texas Professional Ethics Committee expressed its agreement with ABA Formal Opinion 337 in an opinion that reflected this sentiment:[9]

> The Committee concluded that, although the recording of a telephone conversation by a party thereto did not per se violate the law, attorneys were held to a higher standard. The Committee reasoned that the secret recording of conversations offended most persons' concept of honor and fair play. Therefore, attorneys should not electronically record a conversation without first informing that party that the conversation was being recorded.

Texas Professional Ethics Committee Opinion. No. 514 (1996).[10]

The ABA revisited the issue in 2001, resulting in ABA Formal Ethics Opinion 01-422. It rejected the broad prohibition of Formal Opinion 337 and concluded:

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[7] ABA Formal Opinion 337 at 2.

[8] Id. at 2-3.

[9] *See Alabama Bar Association Opinion* 1983-183 (1984); *Alaska Bar Association Ethic Committee Ethics Opinions No. 92-2* (1992) and *No. 91-4* (1991); *People v. Smith*, 778 P. 2d 685, 686, 687 (Colo.1989); *Hawaii Formal Opinion No. 30* (1988); *Iowa State Bar Association v. Mollman*, 488 N.W. 2d 168, 169-70, 171-72 (Iowa 1992); *Missouri Supreme Court Advisory Committee Opinion Misc. 30* (1978); *Virginia State Bar Association Legal Ethics Opinions 1635* (1995) and 1324; *Gunter v. Virginia State Bar*, 238 Va. 617,621-22,385 S.E. 2d 597, 600 (1989).

[10] In another case in which lawful recording was viewed as unethical the Kansas Bar Association addressed the propriety of recording all incoming and outgoing phone calls to a law firm without some form of notice.

> "A lawyer inquired as to any ethical objections to his recording all telephone calls made from or received in his office for purposes of internal office management. He does not intend to inform those outside of his office of the practice. Even assuming such recording is legal, the practice of surreptitiously recording telephone conversations is considered offensive to the traditional high standards of fairness and candor that must characterize the practice of law. It is unprofessional for lawyers to secretly record conversations except with the consent of all parties—that are to be used for any purpose other than an accurate recital in memoranda to the files."

Kansas Bar Association Opinion 96-9 (1997).

1. Where nonconsensual recording of conversations is permitted by the law of the jurisdiction where the recording occurs, a lawyer does not violate the Model Rules merely by recording a conversation without the consent of the other parties to the conversation.

2. Where nonconsensual recording of private conversations is prohibited by law in a particular jurisdiction, a lawyer who engages in such conduct in violation of that law may violate Model Rule 8.4, and if the purpose of the recording is to obtain evidence, also may violate Model Rule 4.4.

3. A lawyer who records a conversation without the consent of a party to that conversation may not represent that the conversation is not being recorded.

4. Although the Committee is divided as to whether the Model Rules forbid a lawyer from recording a conversation with a client concerning the subject matter of the representation without the client's knowledge, such conduct is, at the least, inadvisable.

The ABA advanced three reasons for its change of position (1) changing societal norms regarding the propriety of one-party consent recordings (2) the existence of many exceptions to the prior prohibition which made adherence to the rule difficult if not impossible and (3) the Model Rules change in approach lawyer regulation.[11]

While many jurisdictions have followed ABA Formal Opinion 01-422[12] others have not.[13] And, some states that concluded one-party consent recordings are not *per se* unethical have cautioned against the practice.[14]

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[11] ABA Formal Opinion 01-422 at 2-5. ABA Formal Opinion 337 and its predecessor opinions relied in part on Canon 9 of the Code of Professional Responsibility which warned lawyers to "avoid even the appearance of impropriety". The abandonment of this approach in the Model Rules was seen as undercutting the rationale underlying the earlier opinions. *See* ABA Model Rule 4.4, Wolfgram, *Modern Legal Ethics* (1986) at 650.

[12] *Alabama State Bar Disciplinary Commission Formal Opinion 1983-183; Alaska Bar Association Ethics Committee, Ethics Opinion No. 2003-1 (2003); Minnesota Lawyers Professional Responsibility Board Repeal of Opinion No. 18 (repealing earlier opinion); Missouri Supreme Court Advisory Committee, Formal Opinion 123 (2006); Nebraska Ethics Advisory Opinion for Lawyers No. 06-07(2006); Association of the Bar of the City of New York, Formal Opinion No. 2003-02 (2004); Ohio Board of Commissioners on Grievances & Discipline Opinion No. 2012-1 (2012); Oregon State Bar Association Formal Opinion No. 2005-156 (2005);* TENN. R. PROF. COND. Rule 8.4, cmt.[6]; *Supreme Court of Texas Professional Ethics Committee Opinion No. 575 (2006); Utah State Bar Ethics Advisory Opinion No. 02-05 (2002).*

[13] *Colorado Bar Association Ethics Committee, Ethics Opinion 112* (2003); *South Carolina Bar Ethics Advisory Committee Ethics Advisory Opinion 08-13* (2008).

[14] *New Mexico Ethics Advisory Committee, Formal Ethics Advisory Opinion 2005-03* (2005)("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."); *Minnesota Lawyers Professional Responsibility Board Repeal of Opinion No. 18, Minnesota Lawyer (June 3, 2002)*("[A]lthough it may not be unethical to record client

A primary reason for the lack of consensus appears to be an institutionalized distaste for nonconsensual recording of any kind – that such conduct is a betrayal of the ethos of trust that informs our professional identity as lawyers. A corollary to this view is that a lawyer would expect to be informed if recorded and that absent notice it is reasonable to assume otherwise. Deception has been defined as "the act of causing someone to accept as true or valid what is false or invalid".[15] For lawyers who adhere to this belief, recording without being told or asked permission is deceptive.

The contrary view appears to be a variant of "caveat emptor" – assume you are being recorded unless you proactively confirm otherwise.

Although there does not appear to be empirical data reflecting which of these competing views is dominant, both have support in the profession. The committee believes this lack of consensus is reflective of Wisconsin lawyers. Some believe in a code of honor that transcends competing interests while others believe vigorous advocacy requires use of any tactic not strictly prohibited. This being so, the committee does not believe it appropriate to interpret SCR 20:8.4(c) as either an absolute prohibition or absolute approval for nonconsensual recording.[16] Instead, the committee agrees with Ethics Opinion E-94-5, that the propriety of nonconsensual recording depends on the circumstances of each individual situation.

Additional guidance can be found by considering the target of the recording and the unique issues raised.

C. Recording Clients

Ethics Opinion E-94-5 concluded:

> 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.

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conversations, except in very limited circumstances (e.g., client is making threats to the lawyer) it is certainly inadvisable to do so without disclosure.")

[15] *See https://www.merriam-webster.com/dictionary/deception*. See also SCR20:1.0(h) which defines misrepresentation as "communication of an untruth, either knowingly or with reckless disregard, whether by statement or omission, which if accepted would lead another to believe a condition exists that does not actually exist."

[16] The committee's view would change, if, for example, the lawyer was to claim the conversation was not being recorded when in fact it was. This would be a clear violation of SCR 20:8.4(c) and possibly SCR 20:4.1(a).

The committee agrees with this conclusion and would expand its reach to any communications with the client, whether telephonic or otherwise, such as recording an in-person conversation on a smartphone. While it may be true that recording client communications can have benefits – making a complete record, avoiding memory problems, and overcoming communication problems,[17] – it can also be problematic. Trust lies at the core of every lawyer-client relationship. If the client realizes they are being recorded without being told or asked for permission, or if they learn they have been recorded after the fact, it can damage the rapport between the lawyer and client. This is particularly true since lawyers and clients often discuss sensitive subjects that the client has an understandable desire to keep confidential.

A loss of trust can impair the lawyer's ability to serve the client in any number of ways, including by discouraging the client from providing complete and forthright information to the attorney, and compromise the lawyer's ability to provide competent representation.[18] There is also an enhanced risk that confidentiality could be breached if a recording exists that could be obtained by others. In view of these considerations, the committee believes clients are entitled to make an informed decision about whether their communications with their lawyer will be recorded, that a client should not be recorded without their knowledge and consent, and thus that recording clients without their knowledge and consent violates SCRs 20:1.4(b) and 20:8.4(c). [19]

D. Recording Opposing Counsel.

The disciplinary rules outline several responsibilities a lawyer has in dealings with opposing counsel – fairness, SCR 20:3.4, truthfulness, SCR 20:4.1 and refraining from contact with a represented opposing party absent the consent of their attorney, SCR 20:4.2.[20] None of these rules directly address the propriety of nonconsensual recording of contacts with opposing counsel nor does the plain language of these rules expressly prohibit nonconsensual recording of opposing counsel.

The question then becomes whether such recording is itself an act of deceit in violation of SCR 20:8.4(c). The committee concludes that that it is not a *per se* violation and agrees with ABA Formal Ethics Opinion 01-422 that nonconsensual recording of opposing counsel alone is not misconduct. Of course, a lawyer would violate SCR 20:8.4(c) and SCR 20:4.1(a) if, when asked if

[17] Bliss, *The Legal Ethics of Secret Client Recordings*, 33 Geo. J. Legal Ethics 55, 73-77 (2020), Dempster, *Surreptitious Recordings by Attorneys: Ethical Issues and Possible Remedies*, 44 Seton Hall Leg. J. 115 (2020).

[18] SCR 20:1.1.

[19] SCR 20:1.6. *See* Section G., infra, for a further discussion of consent in the context of recording others.

[20] SCR Chapter 62 outlines several civility responsibilities. These are aspirational and not enforceable by the disciplinary process.

a conversation was being recorded, the lawyer gave a false answer or attempted to mislead the questioner. But failure to peremptorily disclose the fact of the recording is not misconduct.

Nonetheless, lawyers should carefully consider the possible consequences before taking such a step. Effective client representation is served when the lawyer has a reasonable working relationship with opposing counsel based on respect and trust. These relationships can be damaged if counsel chooses to record opposing counsel without their knowledge or consent. The risks involved were succinctly described by the Arizona Supreme Court's Ethics Advisory Committee Opinion 95-03[21] when it opined that contacts with opposing counsel could not be recorded without disclosure and consent:

> We conclude that the secret tape recording of a telephone conversation with opposing counsel involves an element of deceit and misrepresentation. Despite the proliferation of modern recording devices and advancements in technology, it still is not common to record ordinary-course conversations between legal professionals. Attorneys do not expect that their opponent is recording a telephone conversation. On the contrary, attorneys normally expect that such recording is not occurring. The deceit and misrepresentation lies in the recording attorney's failure to disclose the fact that he or she is recording and preserving the statements of the other attorney for some purpose beyond the conversation.

Nonconsensual recording creates a risk of harming the lawyer's relationship with opposing counsel, which in turn can impair the lawyer's ability to provide competent representation by reducing cooperation, causing delays, and making litigation or transactional representations more difficult and contentious.

Importantly, the harm caused may not be limited to a single case. If the recording lawyer develops a reputation of being untrustworthy it can be harmful both to the lawyer and all their future clients. While the committee does not conclude that recording opposing counsel may never be done, it cautions lawyers to carefully consider the risks and potential harm in doing so.

E. Recording Judges and Court Personnel.

The issue of recording judges or court personnel can arise in two situations – court proceedings and off the record communications.

[21] The Arizona Ethics Committee modified its view of surreptitious recording in a split decision in Ariz. Opinion EO-20-0002, adopting the view of ABA Formal Opinion 01-422. Nonetheless, it did not repudiate the views expressed in Ariz. Opinion 95-03 and cautioned lawyers to consider the risks in such recordings.

Management of court operations is within the exclusive province of the judiciary, with authority based in the state constitution,[22] case law,[23] statutes,[24] and court rules.[25]

SCR Chapter 61 addresses the use of recording devices inside Wisconsin courtrooms. It provides detailed procedures for video or audio recording of on-record court proceedings. SCRs 61.01(1), 61.03(4). SCR 61.07 prohibits recordings of interactions between lawyers, clients, and the court. While Chapter 61 focuses on recording by members of the news media, the absence of any mention of recording by attorneys or the public suggests that any recording of court-related matters outside the articulated procedures or without explicit judicial approval is prohibited.

The committee believes that surreptitious recordings of court proceedings or off the record interactions with court personnel without the knowledge or prior approval of the court would contravene the statutes and rules that vest management authority in the courts. That such recordings would be without the knowledge and consent of the court cannot be reconciled with the notion that the court controls the way cases proceed. One cannot manage that which they are unaware of. Surreptitious recording to evade judicial control suggests the failure to "maintain the respect due to courts of justice and judicial officers"[26] as well as a failure to abide by the lawyer's obligations under the rules of the tribunal. SCR 20:3.4(c).

The committee concludes, consistent with Ethics Opinion E-94-5 that lawyers may not record judges or court personnel either in or out of court without their knowledge or permission.[27]

The committee recommends the same approach for hearings conducted by administrative law judges (ALJs). While they are not "judges" in Wisconsin,[28] the Wisconsin Administrative Code acknowledges their authority to regulate hearings to ensure a fair process[29] and does allow for

[22] Wis Const. art. VII sec. 2.

[23] *See also City of Sun Prairie v. Davis*, 226 Wis. 2d 738, 595 N.W. 2d 635 (1999); *In re Courtroom*, 148 Wis. 109, 134 N.W. 490 (1908).

[24] Wis. Stat. Chapter 757.

[25] *See e.g.*, SCR Chapters 60, 61.

[26] SCR 40.15. SCR 20:8.4(g) incorporates the Attorney's Oath into the Wisconsin disciplinary rules making a violation a sanctionable act.

[27] Formal Opinion E-94-5 in which the committee opined, "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."

[28] *See* SCR 60.01(8). However, they are considered 'tribunals' by SCR 20:1.0(p).

[29] Wis. Adm. Code §3.08(1)(d).

the recording of hearings with notice to and the consent of the ALJ.[30] Recording without the knowledge and consent of the ALJ is not contemplated by the relevant rules and undercuts the tribunal's ability to control and manage the proceedings. At a minimum, surreptitious recordings of administrative hearings and related conferences or proceedings could be seen as violating the prohibition against deceptive conduct. SCR 20:8.4(c).

F. Recording Others.

Recordings of third parties, typically parties or witnesses, implicate different disciplinary rules. If the person is represented in the matter SCR 20:4.2 prohibits communication about the matter by the lawyer absent the consent of opposing counsel. If the party is unrepresented, SCR 20:4.3 requires that the lawyer clarify their role in the matter and prohibits the lawyer from giving advice other than to seek independent counsel if the unrepresented person's interests may be adverse to those of the lawyer's client. SCR 20:4.1(a)(1) prohibits making a false statement of law or fact to third person.

As discussed above, the committee does not believe that failure to disclose that a conversation with a third party is being recorded is itself misconduct. A false or misleading response to a question regarding whether the conversation is being recorded will violate SCRs 20:4.1(a) and 20:8.4(c).

G. Consent

The concept of consent is critical to analyzing the propriety of nonconsensual recording because it often controls whether the conduct is lawful or unlawful, ethical, or unethical and whether evidence obtained is admissible in civil cases.

Statutes and rules requiring two-party consent have not applied the definition of "informed consent" found in the disciplinary rules[31] to determine if one has consented to be recorded. Instead, consent is typically found if the person received some form of notice, presumably to afford them an opportunity to refuse. Notification can be accomplished by asking the person directly, a recorded message,[32] or in some instances, by a periodic beep during the call.[33] Should

[30] Wis. Adm. Code §4.12.

[31] SCR 20:1.0(f) provides, "'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."

[32] Many businesses utilize a recorded message such as "this call may be recorded for quality assurance or training purposes."

[33] See ABA Formal Opinion 337 (1974) (noting that the FCC required an automatic tone warning to signify if a call was being recorded).

the person continue to engage after the notification, it is assumed they have consented, and rules or statutes requiring two-party consent have not been violated.[34]

However, in applying the disciplinary rules the committee believes the definition of "informed consent" found in SCR 20:1.0(f) is the appropriate standard to apply at least in seeking to record a communication with a client. This requires the lawyer to explain the fact of the recording, for what purpose the recording will be used, any foreseeable risks to the clients in consenting to being recorded and, perhaps most importantly, the fact that the client may refuse to be recorded. Because informed consent requires more than simple permission, the lawyer must be cautious to meet all the requirements of informed consent. Some businesses routinely record phone calls with customers and rely on recorded notice that a call may recorded for "quality control or training purposes." This practice does not meet the informed consent standard, and while there is nothing in the disciplinary rules that would prohibit a law firm from routinely recording calls, the standard commercial notice does not suffice to establish consent to record calls with current, former or prospective clients. Clients must be informed of all the above and crucially must be given the option to decline to be recorded.

Conclusion

While lawyers normally do not need to disclose the fact that a conversation with a nonclient is being recorded, disclosure and consent must occur before recording clients or court personnel. Formal Opinion E-94-5 is withdrawn.

[34] In contrast, Wisconsin statutes prohibit the use of one-party recordings as evidence in civil cases unless the person is told they are being recorded and that it may be used in a court proceeding. Wis. Stat. §885.365(2).