

Lawyers Professional Responsibility Board Opinions

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- 18 Secret Recordings of Conversations

TEXT OF OPINIONS

[For text of 1. to 17., see M.S. 1996, Volume 15]

OPINION NO. 18

Secret Recordings of Conversations

It is professional misconduct for a lawyer, in connection with the lawyer's professional activities, to record any conversation without the knowledge of all parties to the conversation, provided as follows:

1. This opinion does not prohibit a lawyer from recording a threat to engage in criminal conduct;
2. This opinion does not prohibit a lawyer engaged in the prosecution or defense of a criminal matter from recording a conversation without the knowledge of all parties to the conversation;
3. This opinion does not prohibit a government lawyer charged with civil law enforcement authority from making or directing others to make a recording of a conversation without the knowledge of all parties to the conversation;
4. This opinion does not prohibit a lawyer from giving legal advice about the legality of recording a conversation.

Adopted: September 20, 1996

Committee Comment

It has been the position of the Lawyers Professional Responsibility Board and the Office of Lawyers Professional Responsibility for over a decade that surreptitious recording of conversations by a lawyer constitutes unprofessional conduct. This position is consistent with that announced by the ABA Committee on Ethics and Professional Responsibility in Formal Opinion 337 (August 10, 1974). It is also the position held by the majority of state ethics authorities who have addressed the issue. The ABA and other state ethics authorities recognize that although secret recording is not illegal (provided one of the parties to the conversation consents to the recording), such conduct is inherently deceitful and violates the profession's standards prohibiting conduct involving dishonesty, fraud, deceit or misrepresentation. See Rule 8.4 (c), Rules of Professional Conduct and DR 1-102(A)(4), Code of Professional Responsibility. The committee agrees that in most instances secret recording violates these standards.

The exceptions provided for in this opinion recognize that in certain limited circumstances, the interests served by surreptitious recordings outweighs the interests protected by prohibiting such conduct through professional standards. For example, a lawyer who is the subject of a criminal threat ought not be subject to discipline for secretly recording the threat. The "in connection with the lawyer's professional activities" language is intended to limit application of the opinion to those situations where a lawyer is representing a client or is representing him or herself in a legal matter.

Another exception is secret recording in the criminal prosecution area where such conduct has become a recognized law enforcement tool provided it is done within constitutional requirements. See e.g., ABA Formal Opinion 337 at page 3. The committee determined, howev-

er, that such an exception should also be recognized for lawyers engaged in the defense of a criminal matter. See also, Arizona Opinion No. 90-02; Tennessee Ethics Opinion 86-F-14(a), July 18, 1986; and Kentucky Opinion E-279 (Jan. 1984). Creating an exception only for prosecutors could create an imbalance raising potential constitutional problems. See e.g., Kirk v. State, 526 So. 2d 223, 227 (La. 1988) (court found disparity between permitting prosecutors to secretly record and prohibiting defense lawyers was impermissible denial of equal protection).

The exception provided to government lawyers engaged in civil law enforcement similarly recognizes that to effectively protect the public, surreptitious recording is a necessary law enforcement tool. In certain areas such as consumer fraud, false advertising, deceptive trade practices and charitable solicitation, there may be few, if any, alternatives to surreptitious recording for effective enforcement. The exception also recognizes that during the investigative stage, a government lawyer may not be able to determine with certainty whether the violations are civil, criminal or both.

Finally, because surreptitious recording with the consent of one of the parties is not illegal, the committee determined that a lawyer should not be prohibited from advising a client about the legality or admissibility of such a recording. This exception is not intended, however, to permit non-lawyer employees or agents of the lawyer to record conversations in violation of this opinion. See Rule 5.3, Minnesota Rules of Professional Conduct.

Rules of the Supreme Court for Registration of Attorneys

Adopted August 4, 1970
With amendments received through August 1, 1997

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Rule

2. Registration Fee

TEXT OF RULES

[For text of 1., see M.S. 1996, Volume 15]

Rule 2. Registration Fee

A. In order to defray the expenses of examinations and investigations for admission to the bar and disciplinary proceedings, over and above the amount paid by applicants for such admission, with exception hereinafter enumerated, each attorney admitted to practice law in this state and those members of the judiciary who are required to be admitted to practice as a prerequisite to holding office shall hereinafter annually pay to the clerk of the appellate courts a registration fee in the sum of Two Hundred and Seven Dollars (\$207) or in such lesser sum as the court may annually hereafter determine.

Such fee, or portion thereof, shall be paid on or before the first day of January, April, July, or October of each year as requested by the clerk of the appellate courts.

All sums so received shall be allocated as follows:

- \$20 to the State Board of Law Examiners
- \$14 to the State Board of Continuing Legal Education
- \$110 to the Lawyers Professional Responsibility Board
- \$13 to the Minnesota Client Security Fund
- \$50 to the Legal Services Advisory Committee.

An attorney who certifies that his or her gross income from all sources, excluding the income of a spouse, is less than Twenty-five Thousand Dollars (\$25,000) per year, shall pay a registration fee in the sum of One Hundred Eighty-two Dollars (\$182). The allocation to the Legal Services Advisory Committee shall be reduced by Twenty-five Dollars (\$25).

B. The following attorneys and judges shall pay an annual registration fee of One Hundred and One Dollars (\$101):

- (a) Any attorney or judge whose permanent residence is outside the State of Minnesota and who does not practice law within the state;
- (b) Any attorney while on duty in the armed forces of the United States.

The One Hundred and One Dollars (\$101) so received shall be allocated as follows:

- \$20 to the State Board of Law Examiners
- \$7 to the State Board of Continuing Legal Education
- \$24 to the Lawyers Professional Responsibility Board
- \$50 to the Legal Services Advisory Committee.

An attorney who certifies that his or her gross income from all sources, excluding the income of a spouse, is less than Twenty-five Thousand Dollars (\$25,000) per year, shall pay a registration fee in the sum of Seventy-six Dollars (\$76). The allocation to the Legal Services Advisory Committee shall be reduced by Twenty-five Dollars (\$25).

C. Any attorney who has not been admitted to practice for more than three years shall pay an annual registration fee of Ninety-six Dollars (\$96).

The Ninety-six Dollars (\$96) so received shall be allocated as follows:

- \$20 to the State Board of Law Examiners
- \$14 to the State Board of Continuing Legal Education
- \$24 to the Lawyers Professional Responsibility Board
- \$13 to the Client Security Fund
- \$25 to the Legal Services Advisory Committee.

An attorney who certifies that his or her gross income from all sources, excluding the income of a spouse, is less than Twenty-five Thousand Dollars (\$25,000) per year, shall pay a registration fee in the sum of Eighty-three Dollars and fifty cents (\$83.50). The allocation to the Legal Services Advisory Committee shall be reduced by Twelve Dollars and fifty cents (\$12.50).

D. Any attorney who is retired from any gainful employment or permanently disabled, or who files annually with the clerk of the appellate courts an affidavit that he or she is so retired or disabled and not engaged in the practice of law, shall be placed in a fee-exempt category and shall remain in good standing. An attorney claiming retired or permanently disabled status who subsequently resumes active practice of law shall promptly file notice of such change of status with the clerk of the appellate courts and pay the annual registration fee.

E. Any judge who is retired from any gainful employment or permanently disabled, who no longer serves on the bench or practices law, and who files annually with the clerk of the appellate courts that he or she is so retired or disabled and not engaged in the practice of law, shall be placed in a fee-exempt category and shall remain in good standing. A judge claiming retired or permanently disabled status who subsequently resumes service on the bench or the active practice of law shall promptly file notice of such change of status with the clerk of the appellate courts and pay the annual registration fee.

(Amended August 12, 1980; amended May 18, 1982, effective for payments due after July 1, 1982; amended February 10, 1983; amended January 13, 1984; amended July 25, 1984, effective for payments due after October 1, 1984; amended April 7, 1987, effective for payments due after July 1, 1988; amended November 14, 1990, effective for payments due on or after July 1, 1991; amended April 15, 1992, effective for payments due between July 1, 1992 and June 30, 1993; effective for payments due on and after July 1, 1993; amended effective December 3, 1993; amended June 13, 1996, effective for licenses due for renewal on October 1, 1996, and for new licenses issued on or after October 1, 1996; amended February 5, 1997, effective for licenses due for renewal on July 1, 1997, and for new licenses issued on or after July 1, 1997; amended effective August 6, 1997, for licenses being renewed on or after August 6, 1997, and for new licenses issued on or after August 6, 1997, the allocation of fees set by Supreme Court Order C9-81-1206 shall continue in effect until June 30, 1998.)

[For text of 3. to 9., see M.S. 1996, Volume 15]