

**THE PROFESSIONAL ETHICS COMMITTEE  
FOR THE STATE BAR OF TEXAS  
Opinion No. 575**

**November 2006**

**QUESTION PRESENTED**

May a lawyer electronically record a telephone conversation between the lawyer and a client or third party without first informing the other party to the call that the conversation is being recorded?

**STATEMENT OF FACTS**

A lawyer electronically records telephone conversations with clients and third parties without the other party or parties to the conversation being made aware that the conversations are being recorded.

**DISCUSSION**

This Committee has considered the question of a lawyer's undisclosed recording of telephone conversations three times. In 1953, in Professional Ethics Committee Opinion 84 (November 1953) the Committee ruled that the undisclosed recording by a lawyer of his telephone conversations was not a violation of the Canons of Ethics. The question was considered again in Opinion 392 (February 1978), in which the Committee overruled Opinion 84 and ruled, under the then applicable Texas Code of Professional Responsibility, that a lawyer's undisclosed recording of his telephone conversations "offends the sense of honor and fair play of most people" and was generally not permitted under the disciplinary rules then applicable to Texas lawyers. When the question was again considered in Opinion 514 (February 1996), the Committee reaffirmed the conclusion of Opinion 392, citing Rule 8.04(a)(3) of the Texas Disciplinary Rules of Professional Conduct.

In the years since this Committee last considered the issue here presented, the issue has been the subject of rulings by a number of ethics committees, most notably by the American Bar Association Standing Committee on Ethics and Professional Responsibility (the "ABA Committee") in Formal Opinion 01-422 (June 24, 2001). In that opinion, the ABA Committee withdrew Formal Opinion 337 (1974), which had held that a lawyer was not permitted to make undisclosed recordings of telephone conversations, and instead ruled that a lawyer may record his telephone conversations without disclosure to other parties to the calls provided that the recording is not in violation of applicable law and is not contrary to a representation by the lawyer that the conversation is not being recorded. The ABA Committee indicated that it was divided as to whether a lawyer was permitted to make an undisclosed recording of a telephone

conversation with a client but indicated the Committee's view that such recordings were generally inadvisable.

It is recognized that there are legitimate reasons a lawyer would electronically record conversations with a client or third party. Among the legitimate reasons are to aid memory and keep an accurate record, to gather information from potential witnesses, and to protect the lawyer from false accusations.

No provision of the Texas Disciplinary Rules of Professional Conduct specifically prohibits a lawyer's unannounced recording of telephone conversations in which the lawyer participates. Moreover, applicable law does not generally prohibit such recordings in Texas by a participant to a telephone conversation, whether or not the participant recording the conversation is a lawyer. See section 16.02 et seq. of the Texas Penal Code and section 2511 of title 18 of the United States Code.

After reconsidering the issue, this Committee is of the opinion that the Texas Disciplinary Rules of Professional Conduct do not generally prohibit a lawyer from making undisclosed recordings of telephone conversations in which the lawyer is a party, provided that certain requirements are complied with as discussed below.

Rule 8.04(a)(3) of the Texas Disciplinary Rules of Professional Conduct provides:

“(a) A lawyer shall not:  
...  
(3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;  
...”

In view of the fact that persons in Texas are generally not prohibited from making undisclosed recordings of their telephone conversations and that many businesses routinely record telephone conversations on business premises with or without notice, the Committee does not believe that an undisclosed recording of a telephone conversation by a party to the conversation can be termed to involve “dishonesty, fraud, deceit or misrepresentation” within the meaning of Rule 8.04(a)(3). Hence, absent more, a Texas lawyer's undisclosed recording of his telephone conversation with another person should not be held to violate Rule 8.04(a)(3). Since, as already noted, an undisclosed recording of a telephone conversation by a party to the conversation is not a crime under Texas or Federal law, there appears to be no other provision of the Texas Disciplinary Rules of Professional Conduct that could be said to be violated by such an undisclosed recording. Accordingly, subject to the qualifications discussed in the next paragraph, the undisclosed recording of telephone conversations by a Texas lawyer should not be treated as a violation of the Texas Disciplinary Rules of Professional Conduct.

The Committee notes several qualifications to the conclusion reached above. First, in view of the rights of a client to the lawyer's protection of confidential client information as provided in Rule 1.05 and the client's rights against a lawyer's involvement in an impermissible conflict of interest contrary to Rule 1.06, a lawyer should make an undisclosed recording of

telephone conversations involving a client only if there is a legitimate reason to make the recording in terms of protection of the legitimate interests of the client or of the lawyer. Second, a lawyer should not make a recording of a telephone conversation with a client unless the lawyer can and does take appropriate steps consistent with the requirements of Rule 1.05 to safeguard confidential information that may be included in the recording of the telephone conversation. Third, in view of the requirement of Rule 8.04(a)(2) that a lawyer not be involved in the commission of a serious crime, a lawyer should not make an undisclosed recording of a telephone conversation if the telephone conversation proposed to be recorded by a lawyer is subject to other laws (for instance the laws of another state) that make such a recording a serious criminal offense. Finally, regardless of whether the client is involved in the telephone conversation or has consented to the recording, the lawyer may not under Rule 8.04(a)(3) make a recording of a telephone conversation if the making of such a recording would be contrary to a representation made by the lawyer to any person.

## **CONCLUSION**

The Texas Disciplinary Rules of Professional Conduct do not prohibit a Texas lawyer from making an undisclosed recording of the lawyer's telephone conversations provided that (1) recordings of conversations involving a client are made to further a legitimate purpose of the lawyer or the client, (2) confidential client information contained in any recording is appropriately protected by the lawyer in accordance with Rule 1.05, (3) the undisclosed recording does not constitute a serious criminal violation under the laws of any jurisdiction applicable to the telephone conversation recorded, and (4) the recording is not contrary to a representation made by the lawyer to any person. Opinions 392 and 514 are overruled.