

112

SURREPTITIOUS RECORDING OF CONVERSATIONS OR STATEMENTS

Adopted July 19, 2003.

Disclaimer to Formal Opinion 112, Surreptitious Recording of Conversations or Statements.

In September 2017 the Colorado Supreme Court amended Rule 8.4(c) of the Colorado Rules of Professional Conduct adding this exception:

It is professional misconduct for a lawyer to:

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation, except that a lawyer may advise, direct, or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities.

This new exception supersedes that portion of Formal Opinion 112 relating to directing agents to surreptitiously record conversations, provided doing so is part of lawful investigative activities. The Committee currently is considering modifying or amending the Opinion.

Syllabus

Surreptitious recording of a conversation or statement occurs where one party to the conversation (the recording party) has consented to the recordation but at least one other party to the conversation or statement is not aware of the recording. Because surreptitious recording of conversations or statements by an attorney may involve an element of trickery or deceit, it is generally improper for an attorney to engage in surreptitious recording even if the recording is legal under state law. For the same reason, a lawyer generally may not direct or even authorize an agent to surreptitiously record conversations, and may not use the “fruit” of such improper recordings. However, where a client lawfully and independently records conversations, the lawyer is not required to advise the client to cease its recording, nor to decline to use the lawfully- and independently-obtained recording.

The Committee believes that, assuming that relevant law does not prohibit the recording,¹ there are two categories of circumstances in which attorneys generally should be ethically permitted to engage in surreptitious recording or to direct surreptitious recording by another: (a) in connection with actual or potential criminal matters, for the purpose of gathering admissible evidence; and (b) in matters unrelated to a lawyer’s representation of a client or the practice of law, but instead related exclusively to the lawyer’s private life. The bases for the Committee’s recognition of a “criminal law exception” are the widespread historical practice of surreptitious recording in criminal matters, coupled with the Committee’s belief that attorney involvement in the process will best protect the rights of criminal defendants. The Committee recognizes a “private conduct exception” because persons dealing with a lawyer exclusively in his or her private capacity have diminished expectations of privacy in connection with those conversations; therefore, in the opinion of the Committee, purely private surreptitious recording is not ordinarily deceitful. However, the Colorado Supreme Court has not recognized either of these exceptions to the general prohibition against surreptitious recording by lawyers.

Issues

Under what circumstances, if any, may an attorney surreptitiously record or direct another to surreptitiously record an in-person or telephone conversation with another person? Do the ethics rules recognize distinctions between surreptitious recording by attorneys in civil and criminal matters? Do the rules recognize distinctions between attorneys who surreptitiously record conversations in the course of representing clients or otherwise acting in a professional capacity, versus attorneys acting in a purely private capacity?

This opinion does not address non-consensual recording, *i.e.*, wiretapping, in which a non-party to the conversation engages in surreptitious recording. It also does not address the circumstances, if any, in

which lawyers may use false pretenses to gather evidence, for example in investigating claims of housing discrimination and trademark infringement.

Existing Legal Authority

The Committee does not write on a clean slate. In its Formal Opinion 22 (“CBA 22”), originally issued on January 26, 1962, the Committee considered the broad question of whether “[a] lawyer, by means of a mechanical or electronic device, [may] record conversations with and statements by other persons.” The Committee resolved the issue under the then-applicable Colorado Canons of Professional Ethics (the predecessor to the Colorado Code of Professional Responsibility (“Colorado Code”) that, in turn, preceded the Colorado Rules of Professional Conduct (“Colorado Rules”). The Committee concluded:

One of the principal purposes of the Canons of Ethics is to increase public confidence in the legal profession. This end can be achieved only if individual members of the Bar earn a reputation as men of honor, integrity and fair dealing. Conversely, every deceptive practice and resort to artifice by an attorney must necessarily demean the Bar as a whole in addition to the particular attorney involved.

...

[W]e believe that the large majority of persons would not suspect that a conversation with an attorney was being surreptitiously recorded. Moreover, one reason for an attorney intentionally not disclosing that a particular conversation or statement is being recorded may be a belief that the person whose conversation is being recorded would choose his words more carefully, or speak less freely, or not at all, if such knowledge were imparted to him.

...

[T]here is inherent in the undisclosed use of a recording device under these circumstances an element of deception, artifice or trickery which falls below the standard of candor and fairness which all attorneys are bound to uphold.

In 1974, the American Bar Association (“ABA”) reached a similar result in its Formal Opinion 337 (“ABA 337”), concluding that under the ABA Model Code of Professional Responsibility, with a possible exception for conduct by law enforcement officials, a lawyer may not engage in undisclosed recording of any conversation.

The Colorado Supreme Court relied on CBA 22 and ABA 337 in *People v. Selby*, 198 Colo. 386, 606 P.2d 45 (1979), an attorney disciplinary case, as support for the following broad statements: “A lawyer may not secretly record any conversation he has with another lawyer or person. Candor is required between attorneys and judges. Surreptitious recording suggests trickery and deceit.” 606 P.2d at 47. *Selby* involved a criminal defense attorney who surreptitiously recorded an in-chambers conference with the trial judge and the prosecutor, then used partial quotations out of context from the surreptitiously-recorded conference, and testified falsely before the Grievance Committee concerning the circumstances of the taping. Under those circumstances, the Court ordered disbarment. *See also People v. Wallin*, 621 P.2d 330, 331 (Colo. 1981) (citing *Selby*, disciplining attorney for, *inter alia*, surreptitious recording of telephone conversation with witness).

In *People v. Smith*, 778 P.2d 685 (Colo. 1989), the Colorado Supreme Court suspended an attorney for his involvement in undercover activities related to a criminal investigation of a former client. Acting at the request of the Colorado Bureau of Investigation, the lawyer surreptitiously recorded an in-person conversation in which the former client sold illegal drugs to the attorney. The Court cited *Selby* for the general rule that “[t]he undisclosed use of a recording device necessarily involves elements of deception and trickery which do not comport with the high standards of candor and fairness to which all attorneys are bound.” *Id.* at 687. The Court also recognized the potential for a “prosecutorial exception to the general rule that the standards for prohibiting deceit, dishonesty and fraud preclude attorneys from surreptitiously recording communications with clients and others,” *id.*, but it found that potential exception inapplicable where the respondent was a private, not prosecuting, attorney: “We do not agree that the above-described policy considerations [in favor of law enforcement objectives] permit private counsel to deal dishonestly and deceitfully with clients, former clients and others. To hold otherwise would fatally undermine the foundation of trust and confidentiality that is essential to the attorney-client relationship in the context of civil as well as criminal proceedings.” *Id.* The Colorado Supreme Court cited neither CBA 22 nor ABA 337 in *Smith*. *See also Sequa Corp. v. Lititech, Inc.*, 807 F.Supp. 653, 663 (D.Colo. 1992) (in *dictum*, recognizing existence of “‘prosecuting attorney’ exception,” but limiting it to law enforcement authorities, not private attorneys).

CBA 22 relied on Canon 22 of the old Colorado Canons for its conclusion that surreptitious recording is inherently unethical. That canon stated that a lawyer’s conduct “should be characterized by candor and fairness.” ABA 337, *Selby*, *Wallin* and *Smith* relied on DR 1-102 of the ABA Model Code and the Colorado Code, which prohibits a lawyer from engaging “in conduct involving dishonesty, fraud,

deceit, or misrepresentation,” and “any other conduct that adversely reflects on his fitness to practice law.” ABA 337; *Smith*, 778 P.2d at 686-87; *Wallin*, 621 P.2d at 331; *Selby*, 606 P.2d at 46.

The Colorado Rules took effect on January 1, 1993. Colorado Rule 8.4(c) maintains the prohibition against “conduct involving dishonesty, fraud, deceit or misrepresentation.” Colorado Rule 4.4 addresses “respect for rights of third persons,” and proscribes “means [of representation of a client] that have no substantial purpose other than to embarrass, delay or burden a third person,” and “methods of obtaining evidence that violate the legal rights of such a person.” Colorado Rule 4.1 prohibits making false or misleading statements of facts to third persons, but does not require disclosure of material facts to third persons unless disclosure is necessary to avoid assisting a client in a criminal or fraudulent act. No published Colorado decision has considered the issue of surreptitious recording under the Colorado Rules.

On June 24, 2001, the ABA issued its Formal Opinion 01-422 (“ABA 422”), which abandoned ABA 337’s general prohibition on surreptitious recording of conversations by attorneys. In its place, ABA 422 recognized a general rule that, where state law permits surreptitious recording of conversations, a lawyer may do so without violating the ABA Model Rules. However, ABA 422 further concluded that a lawyer may not misrepresent that the conversation is not being recorded and that the surreptitious recording of conversations with clients is, at the least, inadvisable. ABA 422 relied on multiple considerations, including the fact that surreptitious recording of conversations is now a more widespread, accepted and expected practice than it was in 1974 (when ABA 337 was issued); hence, ABA 422 concluded that it should no longer be treated as inherently deceitful. The opinion further identified the numerous exceptions that had developed to the general rule against surreptitious recording as stated in ABA 337; the opinion concluded that a better approach would be to substitute a general rule *permitting* such conduct except “where it is accompanied by other circumstances that make it unethical.” Finally, to support that conclusion, ABA 422 relied on differences between the Model Rules and the predecessor Model Code: the Model Rules do not include the prohibition on “even the appearance of impropriety” that had appeared in the Model Code, and Model Rule 4.4 directly addresses the circumstances under which a lawyer may gather evidence from third parties, in terms that are broad enough to encompass surreptitious recording. Based on all of those factors, ABA 422 concluded that a general prohibition of surreptitious taping is no longer appropriate.

Analysis

Surreptitious Recording is Generally Deceitful and, Therefore, Prohibited

The Committee believes that the reasoning of CBA 22 remains sound, *i.e.*, that despite advances in technology and reduced expectations of privacy, “the large majority of persons would not suspect that a conversation with an attorney was being surreptitiously recorded,” and, therefore, that “there is inherent in the undisclosed use of a recording device . . . an element of deception, artifice or trickery which falls below the standard of candor and fairness which all attorneys are bound to uphold.” Canon 22, which was the basis for CBA 22, required lawyer conduct to be “characterized by candor and fairness.” Colorado Rule 8.4(c), like prior DR 1-102, prohibits “conduct involving dishonesty, fraud, deceit or misrepresentation.” As a result, for the same reason that CBA 22 and the Colorado Supreme Court concluded that it is improper for an attorney to surreptitiously record conversations or statements, the Committee reaches the conclusion under the Colorado Rules that, generally, a lawyer may not surreptitiously record conversations with a third person.

For the same reasons, it is also generally improper for an attorney to direct or even authorize another, such as an investigator or legal assistant, to record conversations surreptitiously. *See* Colo. RPC 5.3 (lawyer may not direct or ratify conduct of nonlawyer who is employed or retained by or associated with the lawyer if that conduct would violate the Colorado Rules); Colo. RPC 8.4(a) (it is misconduct for lawyer to violate rules through the act of another); *e.g.*, CBA Ethics Comm. Abstract 98/99-05 (where private investigator retained by an attorney surreptitiously recorded a witness interview without the lawyer’s prior knowledge or approval, the attorney should not listen to or use the tape without the witness’ permis-

sion). On the other hand, the general prohibition applicable to a lawyer does not preclude a client or third party acting on the client's behalf from independently engaging in surreptitious recording. For example, if a client has recorded conversations with others before hiring a lawyer, the lawyer should not be required to advise the client to cease recording conversations and should be able to use those recordings; an opposite result would limit the rights the client otherwise would have simply because the client hired a lawyer. However, if the lawyer learns facts indicating that the client's past recording was improper under the law, the lawyer has a duty not to use the unlawful recording. *See* Colo. RPC 1.2(d) (lawyer may not assist or counsel client to engage in fraudulent conduct); Ariz. Op. 88-08 at 8 (lawyer was barred from using client's secret tape recording, made during deposition break, of conversation between opposing counsel and his client; permitting use of the tape would "come too close to assisting the client in the underlying improper conduct," in violation of Arizona's identical version of Rule 1.2(d)). If a client asks the lawyer if prospective recording by the client would be permissible, the lawyer should be permitted to advise the client of the legal (as distinguished from ethical) parameters that apply to surreptitious recording, and then to leave the decision to the client.

The Committee Believes that There Should Be Limited and Discrete Exceptions to the General Rule Against Surreptitious Recording

The prohibition articulated in CBA 22 is broad and absolute: "It is improper for an attorney to record by means of a mechanical or electronic device conversations or statements without disclosing that the conversations or statements are being recorded." In the view of the current Committee, CBA 22 stated the prohibition *too* broadly. The Committee identifies two circumstances in which attorneys generally should be ethically permitted to engage in surreptitious recording or to direct surreptitious recording by another: (a) in connection with actual or potential criminal matters; and (b) in matters unrelated to a lawyer's representation of a client or the practice of law, but instead related exclusively to the lawyer's private life.

The Committee recognizes that the Colorado Supreme Court has yet to recognize either of these exceptions to the general rule against surreptitious recording, and that the Committee's endorsement of the exceptions arguably is inconsistent with the Court's decisions in *Selby* and *Smith*.² As a result, attorneys should exercise particular care in relying on this ethics opinion, which, like all CBA ethics opinions, is advisory only.

The Criminal Law Exception

With regard to surreptitious recordings, criminal law materially differs from civil law for two reasons. First, the practice of criminal law regularly implicates fundamental constitutional rights that generally are absent from the everyday practice of civil law. Second, surreptitious recordings are and have long been commonplace in criminal law, where conversations with witnesses, subjects, targets, law enforcement officers and others often are recorded surreptitiously in an effort to gather evidence for trial. *See People v. Velasquez*, 641 P.2d 943, 949 (Colo. 1982). Surreptitious recordings are a powerful tool for both law enforcement and defense counsel. Not surprisingly, courts have long sanctioned surreptitious recording as an appropriate, effective means of gathering evidence in the criminal arena. *See People v. Morley*, 725 P.2d 510, 515 (Colo. 1986) ("while the undercover operation was itself built on deceit [and surreptitious recordings], governmental activity in the pursuit of crime 'is not confined to behavior suitable for the drawing room'") (*quoting United States v. Murphy*, 768 F.2d 1518, 1529 (7th Cir. 1985)). This is because, as the Supreme Court has recognized for more than forty years, the United States Constitution offers no protection for "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." *Hoffa v. United States*, 385 U.S. 293, 302 (1966) (*quoting Lopez v. United States*, 373 U.S. 427, 465 (1963) (Brennan, J., dissenting)). Any analysis of the ethical propriety of surreptitious recording in the criminal context must include a careful consideration of the implications for both the defense and prosecution, and, ultimately, of the constitutional rights of the defendant.

The Committee further recognizes that surreptitious recording as a method to gather evidence in criminal matters will continue regardless of whether attorneys may ethically participate in such recording. In other words, investigative agents will act independently in surreptitiously recording conversations for the prosecution or defense, regardless of whether attorneys have a role in the process. An absolute prohibition against attorney involvement simply would remove attorneys from the activity, but would not stop the activity itself. The absence of attorney involvement presents its own risks in light of the constitutional implications of surreptitious recordings. The Committee believes that without the input of lawyers, investigators lacking formal legal training might surreptitiously record conversations under circumstances that could be unconstitutional or otherwise unlawful. The Committee concludes that it is preferable to promote substantive involvement of attorneys, rather than to create an ethical bar to such participation.

Therefore, based on the historical and court-approved practice of surreptitious recording in criminal matters, and to encourage attorney oversight of such recording, the Committee draws a bright-line distinction between criminal and civil law and adopts the reasoning set forth in ABA 422 for the criminal law setting. The Committee's approach also finds support in court and ethics opinions in other states.³

In the opinion of the Committee, an attorney may surreptitiously record, and may direct a third party to surreptitiously record conversations or statements for the purpose of gathering admissible evidence in a criminal matter. By way of example, the Committee identifies three common situations in which an attorney may actively participate in surreptitiously recording a conversation in a criminal matter without violating his or her ethical obligations:

A prosecutor or criminal defense attorney may legally advise investigative agents to surreptitiously record conversations for the purpose of gathering admissible evidence, or to participate in the execution of a court-issued wire-tap or other order permitting surreptitious recording. For example, a prosecutor may direct a law enforcement officer or government informant to surreptitiously record a conversation during a drug deal.

A prosecutor or criminal defense attorney may counsel his or her client to surreptitiously record a conversation for the purpose of gathering admissible evidence. For example, this might occur when a defense attorney has determined that it is in his or her client's best interest to cooperate with the prosecution as a government informant.

An attorney acting as an investigative agent, with no role as an attorney on the case, may surreptitiously record a conversation for the purpose of gathering admissible evidence. This situation might arise when a law enforcement officer also is a licensed attorney, or when the attorney himself or herself is the subject or target of an investigation. However, an attorney who surreptitiously records a conversation as an investigative agent may not thereafter act as an attorney in the case.

The criminal law exception that the Committee recognizes is not unlimited. A prosecutor or criminal defense attorney may not surreptitiously record conversations where the law prohibits such recording. Nor may a prosecutor or criminal defense attorney participate in surreptitious recordings, either himself or herself or through others, where such conversations are for purposes other than gathering admissible evidence. For example, conversations among attorneys or *pro se* parties concerning trial preparation, plea negotiations, or proffers are not for the purposes of gathering admissible evidence, and an attorney therefore could not ethically record such conversations surreptitiously.

The Private Conduct Exception

Colorado Rule 8.4 applies to a lawyer's conduct both in the representation of clients and in the lawyer's private life. Lawyers may be subject to discipline under that rule for conduct arising in their private lives, outside of an attorney-client relationship. *See, e.g., In re Hickox*, 57 P.3d 403, 405 (Colo. 2002) (disturbing the peace, assault, and domestic violence); *People v. Reaves*, 943 P.2d 460 (Colo. 1997) (driving while impaired, harassment, and disorderly conduct); *People v. Nelson*, 941 P.2d 922 (Colo. 1997) (third-degree assault); *People v. McGuire*, 935 P.2d 22, 24 (Colo. 1997) (disturbing the peace and damaging private property); *see generally* Patrick O'Rourke, *Discipline Against Lawyers for Conduct Outside the Practice of Law*, 32 *The Colorado Lawyer* 75, 76-78 (April 2003). Specifically, the ban under

Colorado Rule 8.4(c) on conduct involving dishonesty, deceit, fraud or misrepresentation applies to both professional and private activities. *See, e.g., People v. Rishel*, 50 P.3d 938, 942 (Colo. O.P.D.J.) (attorney disbarred for converting season-ticket-pool money); *but see* David B. Isbell and Lucantino N. Salvi, *Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation Under the Model Rules of Professional Conduct*, 8 *Georgetown J. Legal Ethics* 791, 816 (1995) (acknowledging that Model Rule 8.4(c) applies regardless of whether attorney is acting in professional or private capacity, but arguing that rule applies to private conduct only when it is so grave as to call into question the lawyer's fitness to practice law).

The Committee has found no controlling law in Colorado as to whether legally but surreptitiously recording a conversation in one's private capacity constitutes dishonesty, fraud, deceit or misrepresentation.⁴ There is authority from outside Colorado that permits surreptitious recording by a lawyer acting as a private citizen rather than in a professional capacity. *See, e.g., ABA 422; In re Hunter Studios, Inc.*, 164 B.R. 431, 439 (Bankr. E.D.N.Y. 1994) (conclusion that a lawyer may not surreptitiously record conversations does not apply in the context of an attorney acting in a purely private capacity: "The unfavorable characteristics of the action when taken by an attorney engaged in the representation of someone other than her or himself, are not present when taken by a layperson or non-engaged attorney. The non-engaged attorney should have the same rights as the layperson . . ."); *Ariz. Op. 75-13* (June 11, 1975) (attorney may document threats, obscene calls, etc.); *cf., New York City Ethics Op. 2003-2* (2003) (lawyer may surreptitiously tape a conversation "if the lawyer has a reasonable basis for concluding that disclosure of the taping would significantly impair pursuit of a generally accepted societal good," including to preserve evidence of threats made against the lawyer or a client).⁵

The Committee concludes that purely private surreptitious recording is not necessarily deceitful. In the opinion of the Committee, the logic underlying CBA 22, ABA 337, *Selby*, and *Smith* is that third persons expect lawyers not to record conversations—and, thus, it is inherently deceitful to surreptitiously record conversations—*when those third parties are speaking with lawyers in their professional capacity as lawyers*. The Committee notes that Canon 22, on which the Committee principally relied when it issued CBA 22, addressed only "[t]he conduct of the lawyer *before the Court and with other lawyers*" (emphasis added), rather than *all* of a lawyer's conduct, including his or her purely private conduct. *See also Smith*, 778 P.2d at 687 (permitting surreptitious recording of conversations with former client "would fatally undermine the foundation of trust and confidentiality that is essential to the attorney-client relationship . . ."); *Selby*, 606 P.2d at 47 ("[A] lawyer has a very special responsibility for candor and fairness in all of his dealings with a court. Absent mutual trust and confidence between a judge and a lawyer—an officer of the court—the judicial process will be impeded and the administration of justice frustrated.").

When the surreptitiously-recorded conversation does not relate to the representation of clients, there is no heightened expectation of privacy or "honor, integrity and fair dealing"; indeed, the third person might not even know that he or she is communicating with an attorney. For these reasons, the Committee believes that a lawyer's recording of a private conversation is not necessarily deceitful. Therefore, for example, if a lawyer is subject to harassing telephone calls or threats of harm having no relationship to his or her representation of clients or professional activities, Rule 8.4(c) should not apply to prohibit that activity.

NOTES

1. As in many other states, under Colorado law, it is lawful for a person, whether a lawyer or a non-lawyer, to surreptitiously record telephone and in-person conversations with another person if the recording person is a participant in the conversation. CRS § 18-9-304. In addition, as discussed below, a large body of constitutional law in the criminal realm bears on the ethical limits of surreptitious recording of conversations by or at the direction of prosecutors and criminal defense attorneys.

2. On the other hand, an argument can be made that, because *Selby* did not need to address the existence of either a criminal law or private conduct exception, its broad language constitutes *dictum* when applied beyond the narrow fact pattern that existed in the case. Similarly, although the respondent in *Smith* received discipline for surreptitious recordings at the request of law enforcement personnel, that outcome arguably flowed from the fact that the lawyer recorded conversations with a former client rather than with a third person.

3. *E.g.*, Supreme Court of Ohio, Board of Commissioners on Grievances and Discipline Op. 97-3 (1997) (recognizing exception to prohibition against secret recording for prosecutors and criminal defense attorneys); Arizona State Bar Association Ethics Committee Op. 90-02 (1990) (recognizing exception for recording of witness statements in connection with investigation of criminal conduct or defense of criminal case); Supreme Court of Tennessee Board of Professional Responsibility Formal Ethics Opinion 86-F-14(a) (allowing surreptitious recordings of witness interviews in investigation of criminal conduct or defense of criminal case); Kentucky Bar Association Ethics Opinion KBA E-279 (1984) (allowing attorneys defending criminal charges to surreptitiously record conversations with witnesses); Association of the City Bar of New York Opinion 80-95 (1980) (ethical prohibition on surreptitious recordings does not apply to lawyers working on criminal cases).

4. *But c.f.*, *Matters Resulting in Diversion*, 29 *The Colorado Lawyer* 117, 118 (Oct. 2000) (attorney agreed to participate in diversion program for surreptitiously recording a telephone conversation with a former client in an attempt to collect her bill) (citing Colo. RPC 8.4(c)).

5. The Committee does not rely on a “good cause” exception to operation of the ethics rules as the basis for its analysis. *See People v. Pautler*, 47 P.3d 1175, 1181 (Colo. 2002) (rejecting “greater good” justification for prosecutor’s violations of Colorado Rules 4.3 and 8.4(c)); *see also* Isbell and Salvi, 8 *Georgetown J. Legal Ethics* at 807 (“There is no valid ethical distinction to be drawn that turns on whether the deception serves a larger social purpose.”).