

BE CAREFUL WHAT YOU SAY: A LAWYER MAY BE RECORDING YOU!

by Bruce A. Campbell



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For almost 30 years in Texas, it has been unethical for a lawyer to make an undisclosed recording of a telephone conversation. In many other states the rules have been similar. Over the years a few lawyers have been sanctioned for making undisclosed recordings of telephone conversations. Some lawyers however have “taken the risk” because they felt that certain information was so crucial and otherwise non-replicable that the risk was worth taking.

Recently in a little-publicized ethics opinion issued by the Professional Ethics Committee for the State Bar of Texas, the prohibition of undisclosed telephone recordings by lawyers ended. Ethics Opinion 392 (1978) and 514 (1976), which had prohibited lawyers from making undisclosed recordings of telephone calls, were explicitly overruled. Texas lawyers have been given the right to secretly record telephone conversations with clients and third parties as long as certain requirements are met. There are four basic requirements: First, an undisclosed recording of a client should only

be made if there is a legitimate reason to make the recording for the protection of a legitimate interest of the client or of the lawyer. (The lawyer may not record the conversation if it will involve a conflict of interest as described in Texas Disciplinary Rule 106). Second, if the recording is made of a conversation with a client, the lawyer must protect the confidential information as provided under Texas Disciplinary Rule 1.05. Third, the undisclosed recording cannot constitute a serious criminal offense under the laws of the jurisdiction applicable to the telephone conversation recorded. Finally, the lawyer may not make a recording of a telephone conversation if the making of the recording would be contrary to a representation made by the lawyer to a client or to any other person.

The implications of this change in the law are potentially quite expansive. Nevertheless, it is likely to take several years before we have any indication of whether allowing undisclosed recordings by lawyers will have a chilling effect on the attorney-client relationship. For instance, sophisticated clients who regularly hire lawyers might use the question of test of whether to hire the lawyer. Nevertheless, given the lack of publicity that followed the issuance of Opinion 575, it is likely that the vast majority of clients have no idea that their lawyer may record them without their knowledge. Under these circumstances, it could be that an undisclosed recording

that “came to light,” which was helpful to a client, might be “overlooked” during the attorney-client relationship, but questioned later. On the other hand, to the extent an undisclosed recording adversely affected a client’s interest, then it seems likely that the client will be inclined to find a new lawyer and, depending on the severity of any consequences, the client might look for ways to assert a claim or file a grievance against the lawyer.

Undisclosed telephone recordings of third parties could also have far-reaching effects. For instance, if the lawyer made an undisclosed recording of a witness who told the lawyer “off the record” the facts were “x, y, z” but who later refused to testify or testified to the contrary might hear the recording in subsequent litigation. It is likely that the witness would have a hard time explaining to the trier of fact his earlier inconsistent statements.

A similar issue could arise if the lawyer suggested that his client make the undisclosed recording of a third-party witness. Nevertheless, such recordings do have potential risks. For instance, there would still be a problem with advising a client to make an undisclosed recording of a conversation with opposing parties who were known to be represented by counsel. Disciplinary Rule 4.02 would prohibit such a recording. Although on its face the violation would not appear to involve a

serious criminal violation, it is likely that a grievance committee could take a decidedly different view.

Of course, the broader issue is whether a lawyer could make an undisclosed recording that occurred in person and not on a telephone call. Opinion 575 was drafted narrowly and did not address this issue. The question is thus, whether the rationale behind Opinion 575 will be followed in a non- telephone recording? Historically, there have been a number of limitations placed on lawyers that related to whether the contact was in person or by some other means, such as mail. On the other hand, in today's business and technological environment, in which it is possible to record nearly anything, is there a reason to draw a distinction between what lawyers record and what anyone else records? It is possible the Ethics Committee may address the issue in the future. We will have to wait for further action from the Committee before we will know for sure. It will be interesting to see if other states follow Texas.

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