

Missouri Supreme Court Advisory Committee

Formal Opinion 123

SECRET ELECTRONIC RECORDING OF A CONVERSATION WITH A  
NONCLIENT IS NOT A VIOLATION, ABSENT OTHER CIRCUMSTANCES

The issue to be addressed is whether an attorney violates the Rules of Professional Conduct by secretly recording a conversation.

Missouri informal advisory opinions<sup>1</sup> have stated that an attorney may not secretly record a conversation, even if the attorney is a party to the conversation. This approach originated long ago and was, historically, the approach taken by the ABA<sup>2</sup> and other jurisdictions. However, the ABA<sup>3</sup> and many other jurisdictions have changed their approach to this issue. The Advisory Committee is of the opinion that the approach in Missouri should change as well. The Advisory Committee agrees with the reasoning of ABA Formal Opinion 01-422.

An attorney may record a conversation, to which the attorney is a party, without notifying the other parties to the conversation, unless other factors are present including, but not limited to: (1) laws prohibiting the recording in the jurisdiction in which the recording would occur, (2) the attorney states or implies that the conversation is not being recorded, or (3) the conversation involves a current client of the attorney.

In some jurisdictions laws prohibit secret recording, even if the person recording is a party to the conversation. An attorney may not record a conversation, secretly or otherwise, if the act of recording would be illegal.

An attorney may not engage in dishonesty, deception, misleading statements, or misrepresentation about whether the attorney is recording the conversation. Such conduct would violate Rule 4-8.4(c).

If the recording is of a conversation with a current client, the attorney must give some notice to the client that the attorney is, or may be, recording the conversation. Giving this notice is necessary under the attorney's duty to communicate with the client<sup>4</sup> and is consistent with the attorney's duty of loyalty to the client. This notice could be given by disclosure at the time of the recording. The attorney could also have previously informed the client that the attorney tape records conversations from time to time and will not necessarily notify the client each time. However, if the client objects to lack of

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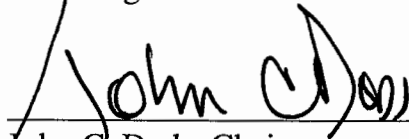
<sup>1</sup> For example, Informal Advisory Opinions 970022 and 950074

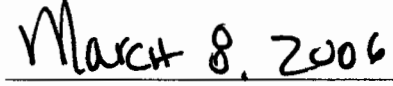
<sup>2</sup> ABA Formal Opinion 337 (1974) (Withdrawn 2001)

<sup>3</sup> ABA Formal Opinion 01-422 (2001)

<sup>4</sup> Rule 4-1.4

specific notice, the attorney must give specific notice to the client at the time of recording.

  
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John O. Dods, Chair

  
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Date