

**ETHICS OPINION NUMBER 203
OF THE MISSISSIPPI BAR
RENDERED OCTOBER 30, 1992
AMENDED APRIL 6, 2013**

RESPECT FOR RIGHTS OF THIRD PERSON - An attorney may ethically record telephone conversations of an opposing party without his knowledge or consent provided that such recording does not suggest dishonesty, fraud, deceit or misrepresentation and the information recorded is of the type one might reasonably expect to be taken down for future use.

PRACTICE OF LAW - An attorney may not ethically advise a client to secretly record conversations between parties if this would violate a criminal statute.

PRACTICE OF LAW - An attorney may ethically use telephone conversations secretly taped by his client without his knowledge to the extent permitted by law.

The Ethics Committee of The Mississippi Bar has been requested to render an opinion on the following factual scenario:

1) Attorney A is receiving a series of threatening and harassing telephone calls from Attorney B who was formerly opposing counsel in a lawsuit. Under what circumstances can A ethically record these conversations, with and without B's knowledge or consent?

2) Attorney Y represents Jane Doe in a domestic case. Doe indicates that her husband frequently uses their home telephone to call his girlfriend. Doe asks for Attorney Y's advice about "bugging" the telephone and recording her husband's conversation. Under what circumstances may Attorney Y ethically advise the client to secretly record conversations between third parties without their knowledge or consent?

3) Client Doe describes the same facts as in No. 2 except that she informs Attorney Y that she has already recorded several conversations between her husband and his girlfriend without his knowledge or consent and without the knowledge of Attorney Y. What are Attorney Y's ethical obligations in so far as the use of these recordings as

evidence, using information therefrom to further investigate the case and using the recordings as part of settlement negotiations?

1. RECORDING CONVERSATIONS WITH THIRD PARTIES

The general rule governing the surreptitious tape recording of conversations was established by the Mississippi Supreme Court in *Netterville v Mississippi State Bar*, 397 So.2d 878 (Miss. 1981). In that case, the Court determined that such tape recordings are not unethical when the act, considered within the context of the circumstances, does not rise to the level of dishonesty, fraud, deceit or misrepresentation. 397 So.2d at 883. Specifically, the Court held that secret recordings are not per se unethical if the information requested [by the attorney during the telephone conversation] is of such a nature as to reasonably import to the person called the probability, if not certainty, it would be taken down in some manner for future use. *Id.*

More recently, in *Attorney M v. The Mississippi Bar*, the Court stated:

Generally speaking, an attorney is not ethically bound to keep the confidences of any person other than his client. Absent some express or implicate assurance to the contrary, a person who speaks to an attorney with whom he has no attorney/client relationship must realize that his statements are subject to publication.

621 So.2d 220, 224 (Miss. 1992). The Court went on to state that such recordings do not per se violate Rules 8.4 (conduct involving dishonesty, fraud, deceit or misrepresentation or conduct prejudicial to administration of justice).

The Committee is of the opinion that at a minimum, the lawyer should fairly identify himself, his representation and his purpose, and should refrain from making false or misleading statements concerning whether the conversation is being recorded. Although the Committee does not condone or recommend the surreptitious recording of telephone conversations with third parties, it is not unethical to do so within the limits set forth above.

2. ADVISING A CLIENT TO SECRETLY RECORD TELEPHONE CONVERSATIONS

The legality *vel non* of recording telephone conversations is a question of criminal law and the Committee expresses no opinion on whether the facts presented would result in violation of a criminal statute. To the extent the secret tape recording of conversations by the client of her spouse's conversations violates any criminal law or statute, the lawyer would be prohibited from advising the client to engage in such activity. Rule 1.2 governs this situation and provides:

A lawyer shall not counsel a client to engage, or assist a client, in conduct that a lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist the client to make a good faith effort to determine the validity, scope, meaning or application of the law.

In fact, if the attorney did advise the client to commit an illegal act, it would not only run afoul of Rule 1.2, but would also constitute a violation of Rule 8.4 which makes it an act of professional misconduct for an attorney to violate the rule or to knowingly assist or induce another to do so or do so through the acts of another. If the client proposes this course of conduct, the attorney should discuss the consequences of committing such an act with the client and advise the client as to its possible illegality.

To the extent the facts presented are not in violation of a criminal law or statute, it is the opinion of the Committee that the attorney may ethically advise the client to make the proposed tape recordings.

3. USE OF SECRETLY OBTAINED RECORDINGS OF TELEPHONE CONVERSATIONS

The use of tapes secretly obtained by the client without the attorney's knowledge is essentially an evidentiary matter. Although the Supreme Court has stated that "the value of most tape recordings in ferreting out truth is beyond question, and this Court has observed that the admission of such records into evidence is sometimes 'fully justified'", *National Life and Accident Insurance Co. v. Miller*, 484 So. 2d 329, 338 (Miss.1985), the Committee is of the opinion that this question is one of law as opposed to ethics.

As to whether the attorney may make use of information contained in the tapes to further investigate the case or in settlement negotiations, it is the opinion of the

Committee that such information may be used for these purposes. Rules 1.1 and 1.3 require an attorney to zealously represent his client and to prepare a case with thoroughness. Once again, the Committee expresses no opinion on the extent to which such materials may be used for evidentiary purposes, if any.