

# City Bar Nixes Lawyer Taping

BY SARAH DIANE MCSHEA

That golden age, when law was practiced gently, with gentility, and by ladies and gentlemen, beckons like a childhood fantasy. Oh, that we might represent our clients in that wonderful era when witnesses told the truth without preparation or prompting, litigants asserted only meritorious claims and substantive defenses, and our fellow lawyers were as honest as the day was long. That longing for a bygone romanticized era seems to be behind a strongly-worded, but slightly-wistful, ethics opinion recently issued by the City Bar Association condemning all lawyer taping which does not advance any "generally accepted societal good."

## ABA Opinion 01-422

Two years ago, in Formal Opinion 01-422, the American Bar Association reversed itself and withdrew its prior opinion condemning lawyer taping, holding that "the mere act of secretly but lawfully recording a conversation inherently is not deceitful" and that lawyers could ethically record their conversations without running afoul of the ethics rules. (See McShea, "*ABA: Lawyers May Tape Their Conversations*," NYPRR, November 2001). The ABA cited the confusing, patchwork quilt of exceptions to its former ban on lawyer taping, the ubiquity of telephone recording devices and their widespread use, and the change in our privacy expectations: "[E]ven though recording a conversation without disclosure may to many people 'offend a sense of honor and fair play,' it is questionable whether anyone today justifiably relies on an expectation that a conversation is not being recorded by the other party, absent a special relationship with or conduct by that party inducing a belief that the conversation will not be recorded."

The ABA also noted that the blanket ban on lawyer taping was inconsistent with the Model Rules' approach, which discarded the amorphous instruction to lawyers to "avoid even the appearance of impropriety." Model Rule 4.4, which deals with a lawyer's obligations to respect the rights of third persons, proscribes conduct that has "no substantial purpose other than to embarrass, delay or burden a third person." Thus, taping a conversation "with no substantial purpose other than to embarrass or burden a third person" violates Model Rule 4.4, thereby subjecting the lawyer to professional discipline.

The ABA Ethics Committee concluded that "to forbid obtaining of evidence by nonconsensual recordings that are lawful and consequently do not violate the legal rights of the person whose words are unknowingly recorded, would be unfaithful to the Model Rules." The ABA Committee did not believe that lawyer taping violated Model Rule 8.4(c) (proscribing conduct involving "dishonesty, fraud, deceit or misrepresentation"), although it did caution lawyers to be truthful if asked whether they were recording a conversation, for a false statement about taping would violate Model Rule 4.1.

## City Bar Disagrees with ABA Opinion

The City Bar's Committee on Professional and Judicial Ethics disagreed, holding that lawyer taping "smacks of trickery" and violates Disciplinary Rule 1-102(a)(4), which prohibits conduct involving

"dishonesty, deceit, fraud or misrepresentation." Reaffirming its 1980 Opinion (NY City 80-95), the City Bar Committee held that lawyers may not ethically tape-record their own conversations without disclosing the taping, unless the taping "advances a generally accepted societal good." (NY City 2003-02).

The City Bar sharply criticized ABA Opinion 01-422 for "abandoning a general prohibition against undisclosed taping." The Committee wrote that it was "unpersuaded that there has been any material change in societal attitudes or practices with respect to undisclosed taping since the 1970s" and that it was "unaware of any reason to believe that undisclosed taping is significantly more prevalent today as an investigative technique than it was in the 1970s."

The Committee rejected the ABA's conclusion that our privacy expectations have changed. Citing the recordings commonly heard when calling a bank, credit card or telephone company, that conversations may be monitored or recorded for quality control or training purposes, the Committee asserted that "it is neither unlikely nor unjustifiable that many individuals assume that a commercial transaction will not be recorded unless they have been given notice of the possibility that it will be." Whatever the merits of or evidentiary basis for this claim, the Committee concluded that it did not "think it unjustifiable for individuals to assume - or advisable for the legal profession to discourage individuals from assuming - that the business practices of lawyers are any less courteous and honorable than those of the local bank or telephone company."

The City Bar Ethics Committee held that the privacy expectations of those being recorded were "considerably less relevant than the state of mind of the individual making the decision to engage in undisclosed taping." The problem with taping is why it is being done. The Committee asserted that "it cannot seriously be doubted that an individual who engages in undisclosed taping does so in the hope that the target is not expecting to be taped," and, therefore, undisclosed taping "smacks of trickery."

This is a dubious premise, for most lawyer taping is defensive rather than offensive. Few lawyers spend their time trying to catch others in misrepresentations or deceptive conduct. The chief exceptions are law enforcement officials or lawyers pursuing civil rights and trademark infringement claims. Ethics practitioners report that practicing lawyers inquire about the propriety of taping a third party person primarily when they face deceptive conduct by that other person and seek to protect their client's interests or their own license and reputation. While it is true that the lawyer recording a conversation expects that the person being taped will not tailor his or her words, it is also true that if everyone "spoke for the tape," there might be little need for defensive taping.

A lawyer who tapes an unwary speaker has not "tricked" the speaker into saying anything. Rather, the lawyer has obtained potentially compelling evidence not only of what the speaker said, but of the speaker's tone of voice and inflection, which would be missing if the lawyer's secretary took a complete stenographic account of the same conversation.

Interestingly, the Committee raised no objection to the transcription of every conversation by a lawyer's secretary, even without disclosure to the other parties. What seems to make taping objectionable is that the results are undeniable and irrefutable. Lawyers may ethically ask their investigators to videotape adverse parties who claim permanent physical injuries - a picture of the "injured" party changing a tire, lifting boxes or running around a ball field is a compelling (and very sneaky) bit of evidence. The Committee did not address the inconsistency between forbidding a lawyer from taping a conversation

with opposing counsel who insists that his client is too disabled to attend a deposition, and permitting the lawyer's investigator to videotape the adverse party as he changes a tire the day before the scheduled deposition.

### **"No Bright Line Test for Lawyer Taping"**

While ABA Opinion 01-422 urged the importance of certainty in the ethics rules, noting the many exceptions throughout the country to the per se ban on lawyer taping, City Bar Opinion 2003-02 rejected the importance of a bright-line test for practicing lawyers. Instead, the City Bar advocated a "cautious case-by-case evolution toward the general principle that if undisclosed taping is done under circumstances that can be said to further a generally accepted societal good, it will not be regarded as unethical."

Lawyers can easily minimize the risks of ethical violations, advised the City Bar, "by confining the practice of undisclosed taping to circumstances in which the societal justification is compelling." Even if the lawyer's assessment of the importance of the taping turns out to be wrong, this won't really be a serious problem, concluded the City Bar, for "there is little likelihood of, and no need for, the imposition of sanctions as long as the attorney had a reasonable basis for believing that the surrounding circumstances warranted undisclosed taping."

In a slightly different formulation, the Committee also rejected lawyer taping as a "routine practice," which included "merely wishing to obtain an accurate record of what was said," as well as a lawyer's "desire to guard against the possibility of a subsequent denial of what was said," by individuals who are not potential witnesses. The City Bar Committee rejected convenience and increased accuracy as sufficient reasons for taping, holding that undisclosed taping gives the taping lawyer the "unfair advantage of being able to use the verbatim record if it helps his cause and to keep it concealed if it does not." Convenience will not justify taping, held the Committee, because lawyers can rely on "memory, notes, shorthand, transcription, etc."

Finally, the Committee concluded that "a lawyer may tape a conversation without disclosure of that fact to all participants if the lawyer has a reasonable basis for believing that disclosure of the taping would significantly impair pursuit of a generally accepted societal good. However, undisclosed taping entails a sufficient lack of candor and a sufficient element of trickery as to render it ethically impermissible as a routine practice."

The City Bar Committee wrote vaguely that "there are circumstances other than those addressed in our prior opinions in which an attorney may tape a conversation without disclosure to all participants," but Opinion 2003-02 gives little indication what those circumstances may be. Prior ethics opinions and court cases have permitted taping by criminal defense lawyers (to level the playing field with prosecutors), civil rights lawyers (to prove fair housing and other civil rights violations), trademark and copyright lawyers (to prove trademark or copyright infringement claims) and to document criminal threats or perjury by prospective witnesses.

The ABA sensibly concluded that the exceptions were too numerous and that it made more sense to counsel against taping, but to permit practicing lawyers to exercise their good judgment as to when to tape their conversations.

## **Present Law in New York**

At present, there is no consistent ethical guidance for New York lawyers. In Opinion 696 (1993), the New York County Lawyers Association discarded the blanket ban on taping, citing the prevalence of consumer recording devices and the ineffectiveness of the prohibition. The New York State Bar Association is likely to reconsider its prior opposition (State Bar Opinions 328 and 515) to lawyer taping in light of ABA Opinion 01-422. Also, New York is in the process of considering the changes to the Model Rules adopted by the ABA last year. The ABA's conclusion that taping does not violate Model Rule 8.4(c) (prohibiting dishonesty, fraud, deceit and misrepresentation) is squarely at odds with the City Bar's conclusion that taping violates DR 1-102(a)(4), the parallel rule in the Code of Professional Responsibility. If New York adopts the Model Rules, which looks increasingly likely, an interpretation consistent with the ABA approach will be important for New York lawyers.

## **An Ethics Overview**

Tape recording conversations unquestionably presents some potentially thorny legal issues and raises serious professional concerns which lawyers should carefully consider before taping any conversation. It is a practice which should be seldom used, and then only when necessary to the effective and zealous representation of a client or defense of a serious matter, including one's own reputation and license. A lawyer who tapes a conversation must consider issues such as the preservation and integrity of the tape. Taping only a portion of a conversation may raise issues about the taping lawyer's own conduct. The loss or absence of a tape which is known to have been made can be damning evidence, far worse than anything on the tape itself. Suppose the tape contains embarrassing information about an individual who is not involved in the proceeding; should that individual be given an opportunity to object to production of the tape as part of a public record? Also, the lawyer must consider the nature of the equipment used for the taping. Federal wiretapping statutes (18 U.S.C. §§ 2511, 2512), ban the use and possession of devices like martini-olive, fountain-pen and cuff-link transmitters, as well as wall plugs and wireless microphones. These and other legitimate concerns are scarcely discussed in City Bar Opinion 2003-02, which focuses instead on the impropriety of lawyer taping and provides little practical guidance for lawyers. Given the ubiquity of relatively inexpensive recording equipment, it seems futile to try to turn the clock back. But it is unfortunate that New York lawyers are still without consistent, clear, and bright line practical guidance on how to represent their clients within the bounds of the Code of Professional Responsibility when circumstances threaten their clients' interests and their own livelihood, licenses and reputations.

## **Some Thoughts on Privacy Expectations**

What exactly are our privacy expectations? Banks, telephone companies and many ordinary retailers now warn us that our telephone conversations with them may be recorded or monitored (presumably to protect them against their customers and their own employees).

Our neighbors are equipped with inexpensive scanners to monitor the conversations of the police and fire departments, as well as anyone within easy range who is talking on a portable telephone or walkie-talkie. Stores, shopping malls, hotels and other operators of quasi-public or public areas monitor the activities (and presumably the conversations) of everyone passing by.

Answering machines come equipped with standard features like "monitor" and "record," features which seem to be routinely used by many people in daily life. Parents monitor the activities of their babysitters and some spouses record their partner's conversations during or in anticipation of matrimonial disputes. Government investigators routinely monitor and record the mail, e-mail and telephone communications of individuals suspected of criminal conduct, sometimes with court supervision and sometimes without. High public officials, including some who are still in office, have been involved in taping their own conversations, as well as those of their political rivals.

The City Bar's contention that most individuals would be "shocked, simply shocked" by lawyer taping may be nearly as outdated as Casablanca. We may wish things were different, but we must have practical ethics guidance attuned to the times we actually live in.

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