



ETHICS ADVISORY OPINION

08-13

UPON THE REQUEST OF A MEMBER OF THE SOUTH CAROLINA BAR, THE ETHICS ADVISORY COMMITTEE HAS RENDERED THIS OPINION ON THE ETHICAL PROPRIETY OF THE INQUIRER'S CONTEMPLATED CONDUCT. THIS COMMITTEE HAS NO DISCIPLINARY AUTHORITY. LAWYER DISCIPLINE IS ADMINISTERED SOLELY BY THE SOUTH CAROLINA SUPREME COURT THROUGH ITS COMMISSION ON LAWYER CONDUCT.

Factual Background:

Mrs. Smith, who is a lawyer, is divorcing Mr. Smith, who is a doctor. Both Mr. and Mrs. Smith have independent counsel in the divorce case. Mrs. Smith is not acting in any capacity as a lawyer in her own case.

Mrs. Smith wants to record a telephone conversation with her spouse. She is aware that it is unethical, under Rule 8.4(d), for a lawyer to record a telephone conversation without the consent of all parties to the conversation when the lawyer is acting as a lawyer representing a client. Because she is a lawyer, she is unsure whether it would be improper for her to record a conversation with her spouse, even though she is acting solely as a private citizen and not as a lawyer.

Question Presented:

May a lawyer who is a party to a divorce action (not acting as counsel) tape record telephone conversations with her estranged spouse without her spouse's consent?

Opinion:

While representing a client, a lawyer may not surreptitiously record any conversation, subject to certain law-enforcement related exemptions. The question whether a lawyer may do so when acting solely as a private citizen and not as a lawyer has not been definitively answered in South Carolina. Therefore the history of the prohibition merits discussion.

In 1984, the South Carolina Supreme Court first declared that surreptitious recording violated the Code of Professional Responsibility's prohibition of conduct involving dishonesty, fraud, deceit or misrepresentation (contained at the time in DR 1-102(A)(4) and now contained in Rule 8.4(d) of the Rules of Professional Conduct) where the lawyer fails to obtain the consent of all parties to the conversation. See *In re Anonymous Member of the South Carolina Bar*, 283 S.C. 369, 322 S.E.2d 667 (1984) ("Anonymous P"). The Court again confirmed the prohibition in *In re Warner*, 286 S.C. 459, 335 S.E.2d 90 (1985), and *In re Anonymous Member of the South Carolina Bar*,

304 S.C. 342, 404 S.E.2d 513 (1991)(“*Anonymous II*”). In *Anonymous II*, the Court reaffirmed the two prior rulings and stated, “Henceforth, this rule shall be applied irrespective of the purpose(s) for which such recordings were made, the intent of the parties to the conversation, whether anything of a confidential nature was discussed, and whether any party gained an unfair advantage from the recordings.”

Nevertheless, a year later, the Court carved out several exemptions from the prohibition: recording of anonymous threats received over the telephone, recording of anonymous information received over the telephone, recording attempts to bribe the recording attorney, and cooperating with law enforcement in a legitimate criminal investigation. See *In re Attorney General’s Petition*, 308 S.C.114, 417 S.E.2d 536 (1992).

As noted in *Anonymous II*, the Court in *Anonymous I* relied primarily on ABA Formal Opinion 337, issued in 1974 in the wake of the Watergate scandal, and each South Carolina opinion since has relied in turn on *Anonymous I*. Formal Opinion 337, however, came under increasing scrutiny in the 1990s, see, e.g., Utah State Bar Ethics Advisory Opinion Committee Opinion No. 96-04 (1996), and was ultimately withdrawn in 2001 by ABA Formal Opinion 01-422. South Carolina has not correspondingly withdrawn its prohibition. The Committee is asked to advise whether the South Carolina rule is broad enough to prohibit surreptitious recording by a lawyer not acting as a lawyer but as a private litigant—in other words, by a party to litigation who also happens to be a lawyer—when it is not illegal for non-lawyers, including the opposing party spouse, to do so.

The prohibition today is based on Rule 8.4(d) of the Rules of Professional Conduct, and certainly the Rules prohibit some conduct that lawyers engage in outside their practice. See Rule 8.4 Cmt. [2] (willful failure to file income tax returns); Wilcox & Crystal, Annotated South Carolina Rules of Professional Conduct, 340 (2005 Ed.) (drug offenses, financial crimes, criminal sexual conduct, and misconduct in public office). However, in each such instance, the professional sanction is in addition to criminal liability for conduct that is illegal regardless of the RPC, which surreptitious recording is not. Indeed, in the only published opinion in which our Court has found misconduct based on a lawyer’s recording of conversations when acting as a litigant and not as a lawyer, the conduct was also criminal because the lawyer recorded conversations to which he was not a party. See *In re Nester*, 343 S.C. 526, 541 S.E.2d 538 (2001). The Committee is not aware of any sanction for a lawyer’s actions that are both a) otherwise lawful and b) engaged in purely as a private person and not as a lawyer.

Comment [5] to Rule 8.4 does acknowledge responsibilities imposed on lawyers acting outside their roles as lawyers. However, that Comment specifically refers to lawyers abusing public office or “positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.” As before, such misconduct would implicate civil and possibly criminal liability. Comment [3] on the other hand states that 8.4(d) proscribes conduct that is not otherwise illegal—“manifest[ing], by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or

socioeconomic status”—but only when the lawyer does so “in the course of representing a client” (i.e., when acting as a lawyer). The Rules do not appear to prohibit a lawyer from doing what is otherwise lawful while acting as a private citizen and not as a lawyer.

The broader question of fairness—whether a private party lawyer-litigant should be prohibited from doing something the non-lawyer opposing party spouse is allowed to do—is ultimately for our Supreme Court to decide. However, the Committee believes it should be allowed. It has not been expressly or implicitly prohibited; nor has it expressly exempted in *In re Attorney General’s Petition*, although the question was not before the Court in that case. Even the sweeping language of *Anonymous II* was in the context of a lawyer acting as a lawyer on behalf of a client. Furthermore, the Court has since backed away from the blanket prohibition, consistent with the trend among our sister jurisdictions toward liberalizing the rule.

Therefore, the Committee advises that surreptitious recording by a lawyer is ethically permissible only when a) the lawyer is not acting as a lawyer, as a public official, or in any other position of trust and b) such recording is not otherwise prohibited by law. The Committee further advises that, if a lawyer decides to engage in this conduct, she should look to Rule 229, SCACR, to obtain a definitive answer to the question.