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BAR BRIEFS

OPINION NO. 22 OF THE ETHICS COMMITTEE OF THE COLORADO BAR ASSOCIATION ADOPTED JANUARY 26, 1962

SYLLABUS

It is improper for an attorney to record by means of a mechanical or electronic device conversations or statements without disclosing that the conversations or statements are being recorded.

FACTS

A lawyer, by means of a mechanical or electronic device, records conversations with and statements by other persons. The lawyer deliberately does not disclose that a record is being made of the conversations or statements. Is there any impropriety in such action?

OPINION

One of the principal purposes of the Canons of Ethics is to increase public confidence in the legal profession. This end can be achieved only if individual members of the Bar earn a reputation as men of honor, integrity and fair dealing. Conversely, every deceptive practice and every resort to artifice by an attorney must necessarily demean the Bar as a whole in addition to the particular attorney involved.

Great advances in the availability and effectiveness of various kinds of recording devices have been made in recent years. Most attorneys use some type of recording device routinely in their

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offices and such devices are often helpful in taking and preserving conversations and statements by clients, potential witnesses and others. Insofar as these devices permit a more efficient utilization of an attorney's time, their use should be encouraged.

There is, however, a significant distinction from an ethical standpoint between the open and acknowledged use of such device by an attorney on the one hand, and secret, concealed and undisclosed use on the other hand. Where an attorney discloses that he is recording a conversation, he is, in effect, asking the other persons present for their consent to such procedure. A person so advised has the option of having his words recorded or of saying nothing. No such option is accorded one whose words are recorded without his knowledge.

Despite the increasing frequency with which various recording devices are used in our society, we believe that the large majority of persons would not suspect that a conversation with an attorney was being surreptitiously recorded. Moreover, one reason for an attorney intentionally not disclosing that a particular conversation or statement is being recorded may be a belief that the person whose conversation is being recorded would choose his words more carefully, or speak less freely, or not at all, if such knowledge were imparted to him.

Consequently, there is inherent in the undisclosed use of a recording device under these circumstances an element of deception, artifice or trickery which falls below the standard of candor and fairness which all attorneys are bound to uphold. Canon 22, Canons of Professional Ethics. See Opinions numbered 624 and 633, Association of the Bar or the City of New York. The fact that in some instances the statements secretly recorded are those of potentially adverse witnesses in no way alters our opinion. Canon 18, Canons of Professional Ethics. Cf. Opinion No. 117, Opinions of Committee on Professional Ethics and Grievances, American Bar Association.

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