



Covert Recording

“What Kind of a Lawyer Would Tape a Client?”: The Ethics of Secretly Recording Your Clients

By Caitlyn Parsley

In September 2016, New York lawyer Michael Cohen surreptitiously recorded a conversation between himself and his then-client, President Donald Trump. This year, the recording was obtained by CNN, and the contents of that recording have since been aired and discussed by various news broadcasts and publications. Cohen’s lawyer claimed that it was part of Cohen’s general practice to tape his conversations with clients in lieu of taking notes. But because the recording was made without the client’s knowledge, the president’s reaction to the tape was what any other client might have thought: “What kind of a lawyer would tape a client?”

This raised a number of questions about the rules of legal ethics, among other things. Is it legal for a lawyer to record a conversation with a client without the client’s knowledge? Is it ethical?

Is it legal for a lawyer to record a conversation with a client without the client’s knowledge? That depends on the state.

In all-party consent states, a lawyer may only record a conversation if the lawyer has the prior consent of all parties to the conversation. In these states, it is illegal for a lawyer to record a conversation with a client without the client’s knowledge. Currently, 11 states have all-party consent laws, including Florida and California. *See, e.g.,* Cal. Penal Code §632 (West 2018); Fla. Stat. §934.03(2)(d) (2018).

In one-party consent states, however, a lawyer may record a conversation as long as the lawyer is a party to the conversation. In these states, it is legal for lawyers to record conversations with their clients secretly. The majority of states have one-party consent laws, including New York and North Carolina. *See, e.g.,* N.Y. Penal Law §§250.00(1), 250.05 (McKinney 2018); N.C. Gen. Stat. Ann. §15A-287(a) (2018). The District of Columbia

has a one-party consent law, too. D.C. Code §23-542(b) (3) (2018). In the case of the Cohen–Trump scandal, it was legal for Cohen to record the conversation secretly because both Trump and Cohen were in New York, a one-party consent state, at the time of the recording.

So while it may be legal in some states for a lawyer to record a conversation with a client without the client’s knowledge, is it also ethical?

Is it ethical for a lawyer to record a conversation with a client without the client’s knowledge?

The ethics rules regarding covert recordings are not as straightforward.

Rule 8.4(c) of the ABA Model Rules of Professional Conduct states that it is professional misconduct for a lawyer to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” Initially, the ABA Standing Committee on Ethics and Professional Responsibility concluded that a lawyer who secretly records a conversation with a client violates Model Rule 8.4(c) by engaging in deceptive conduct. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 337 (Aug. 10, 1974).

However, the committee later withdrew that opinion and concluded that a lawyer who secretly records a conversation with a client “does not necessarily violate the Model Rules.” ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 01-422 (June 24, 2001). A lawyer may not record conversations in violation of all-party consent laws. *Id.* A lawyer also may not falsely deny that a conversation is being recorded. *Id.* The ABA Standing Committee on Ethics and Professional Responsibility was split on whether a lawyer may secretly record a conversation with a client but agreed that it is inadvisable to do so. *Id.*

While the 2001 ABA opinion discussed above was written 17 years ago, the committee predicted the potentially damaging outcomes of situations such as the Cohen–Trump case:

Clients must assume, absent agreement to the contrary, that a lawyer will memorialize the client’s communications in some fashion. But a tape recording

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■ Caitlyn Parsley is an attorney with Bush Ross PA in Tampa, Florida. She graduated from the University of Florida Levin College of Law in 2017. Ms. Parsley focuses her practice on professional liability defense. She is a member of the DRI Lawyers Professionalism and Ethics Committee and the DRI Young Lawyers Committee.



it will be up to hospitals to implement the voice-activated technology properly in the health-care system.

This new, eager virtual assistant is not improper for all health-care purposes. For example, giving a patient a smart home device to set a reminder to take medications at a certain time is an acceptable use. However, ordering a prescription for a patient through the service would be a violation, since personal information such as name, prescription, and home address would need to be provided and protected. As another example, asking Google Assistant to look up the definition of sphenop

palatine ganglioneuralgia is acceptable, but setting a reminder to tell patient Jane that her headaches are caused by eating ice cream too quickly would violate HIPAA. Amazon has reportedly put together a team to work on legislation aligned with HIPAA to make its virtual assistant, Alexa, health-care compliant. Even though popular voice assistants are built around smart speakers, such as Amazon Echo, Google Home, and Homepod, devices are in development specifically for the health market that may be released later in the year. However, most of these devices are specifically for patient care at

home and not for use in a hospital or physician's office. With nearly a million smart speakers expected to be used in hospitals by 2021, it seems that the entry of HIPAA-compliant smart speaker technology into the market will happen very soon.

While your health-care clients may be tempted to bring their shiny new Amazon Echo or Google Home to their offices, you would be well to advise them either to limit their use to non-healthcare purposes, or better yet, keep them at home for the time being, until virtual assistance become better acquainted with HIPAA. **FD**

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that captures the client's exact words, no matter how ill-considered, slanderous or profane, differs from a lawyer's notes or dictated memorandum of the conversation. If the recording were to fall into unfriendly hands, whether by inadvertent disclosure or by operation of law, the damage or embarrassment to the client would likely be far greater than if the same thing were to happen to a lawyer's notes or memorandum of a client conversation.

Id.

There are benefits to recording conversations with clients. Recording them can save lawyers from having to take notes and ensure an accurate record. *Id.* But most of the time, the recording does not need to be done secretly. *Id.* As pointed out by the ABA Standing Committee on Ethics and Professional Responsibility, "[t]he relationship of trust and confidence that clients need to have with their lawyers, and that is contemplated by the Model Rules, likely would be undermined by a client's discovery that, without his knowledge, confidential communications with his lawyer have been recorded by the lawyer." *Id.*

So while secretly recording conversations with your clients may be legal in some jurisdictions and is not ethically impermissible per se, it is not recommended. **FD**