



Making a Record: Recording Opposing Counsel

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Earlier this year, the OADC listserv lit up with a lively debate on the legal, ethical and professional considerations of recording a telephone call on a motion conferral with opposing counsel. The recording that gave rise to the debate was posted to the listserv and was actually quite moderate in tone and content. Nonetheless, the lawyer who made the recording and later submitted it to the court with his conferral certification did not tell opposing counsel that the call was being recorded.

In this article, we'll examine the legal and ethical rules in Oregon on recording conversations in the context of conferrals with oppos-



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ing counsel. Oregon statutory law draws a significant distinction between recording telephone calls and in-person conversations that, in turn, produces differing results under the ethics rules. We'll look at both telephone and in-person recording. Because the recording rules are not uniform throughout the country, we'll conclude with a discussion of resources to determine the law and professional rules on this issue in other jurisdictions. Although we'll focus on recording opposing counsel, the same general principles apply equally to recording conversations with any person—including witnesses and even our own clients.

At the outset, I should emphasize three caveats. First, we'll look at what the

law and the ethics rules permit and not whether recording opposing counsel is either "professional" or even a good idea in any given circumstance. Second, we'll focus on civil practice rather than the use of recordings by law enforcement in criminal investigations and prosecutions. Third, we'll discuss circumstances where the lawyer's identity is known, rather than covert investigations that are the purview of Oregon's unique RPC 8.4(b).

Telephone Calls

Recording a telephone call in which the person recording is a participant is legal in Oregon under both federal and state law. 18 USC § 2511(2)(d) governs the former and ORS 165.540(1)(a) controls the latter. With both, the key element is that they only require the consent of one participant, and the requisite consent can be supplied by the participant do-

ing the recording. Neither requires disclosure to other participants that the conversation is being recorded. The roots of the ORS 165.540 stretch back over 50 years, and its legislative history is chronicled in *State v. Lissy*, 304 Or 455, 747 P2d 345 (1987).

Because statutory law in Oregon permits recording calls, the Oregon State Bar concluded in Formal Ethics Opinion 2005-156 (2005) that lawyers can record telephone conversations without violating the prohibitions in RPC 3.3(a)(5) and RPC 8.4(a)(2) on illegal conduct. Although this opinion was issued following the adoption of the Rules of Professional Conduct in 2005, it is substantively similar to predecessors (Legal Ethics Opinions

1999-156 (1999) and 1991-74 (1991)) applying the former Oregon Disciplinary Rules. In fact, the Oregon Supreme Court in *In re Binns*, 322 Or 584, 589-92, 910 P2d 382 (1996), relied on a telephone conversation between a client and a lawyer recorded without notice by the client in disciplining a lawyer and, in doing so, specifically noted that ORS 165.540(1)(a) permits such recording.

Formal Ethics Opinion 2005-156 (again like its predecessors) cautions, however, that although notice is not required under governing statutory law, a lawyer cannot represent that a conversation is *not* being recorded when, in fact, it is. In that instance, the lawyer would have violated RPC 8.4(a)(3), which prohibits "conduct involving dishonesty, fraud, deceit or misrepresentation[.]"

In the conferral that triggered the listserv discussion, there was no issue of



misrepresentation. Therefore, as the Bar's General Counsel concluded in an email later posted on the listserve, Formal Ethics Opinion 2005-156 controlled and there was no violation.

In-Person Conversations

Federal law (again, 18 USC § 2511(2)(d)) allows in-person conversations to be recorded without notice as long as one of the participants consents; the consenting participant can be the person recording the conversation. Oregon law, however, is different. Unlike telephone conversations, ORS 165.540(1)(c) generally requires that *all* participants to an in-person conversation be informed of the recording. Exceptions under ORS 165.540(6) include public events like government hearings, trials, press conferences, and classes at educational institutions. Importantly for present purposes, ORS 165.540(6)(c) also creates an exception for private meetings involving an unconcealed recording device where all of the participants knew "or reasonably should have known that the recording was being made."

Again mirroring state statutory law, Formal Ethics Opinion 2005-156 finds that in-person conversations recorded in violation of ORS 165.540(1)(c) also violate RPC 3.3(a)(5) and RPC 8.4(a)(2), which convert knowing violations of statutory law into violations of the RPCs. To the extent that the conversation, involved evidence gathering, RPC 4.4(a) also prohibits lawyers from knowingly using "methods of obtaining evidence that violate the legal rights" of another person. Beyond the professional rules, illegal in-person recordings could open the lawyer concerned to potential criminal charges under ORS 165.540(1)(c), and ORS 41.910(1) prohibits the introduction into evidence of conversations recorded in violation of ORS 165.540.

ORS 165.540(1)(c) only prohibits *secret* in-person recordings. In *State v. Matthews*, 55 Or App 708, 639 P2d 705 (1982), the Court of Appeals found that as long as a

participant is told that the conversation is being recorded, no violation results, even if the other participant doesn't consent. Similarly, in *State v. Knobel*, 97 Or App 559, 777 P2d 985 (1989), the Court of Appeals emphasized that ORS 165.540(1)(c) applies primarily to concealed recording devices. ORS 165.540(6)(c) makes this explicit by exempting unconcealed devices where the participants in the conversation knew or reasonably should have known that the conversation was being recorded.

This last point was highlighted in a recent disciplinary case involving an in-person conferral between counsel. Because the charge against the lawyer was dismissed, the decision was reported as "name withheld" in the June 2008 *Bar Bulletin*. Counsel were handling a difficult case and their relationship had become strained to the point that they largely confined their conferrals to writing and "on the record" discussions during depositions. At one deposition, the court reporter was not set up yet when the lawyers began a conferral. One lawyer switched on the recorder in his "smart phone" (a model the other lawyer owned, too, and that had a bright red light when recording), announced "let's get this on the record" and placed the phone on the conference table between them. The other lawyer objected and filed a complaint against the recording lawyer with the Oregon State Bar. A Disciplinary Board trial panel dismissed the charge, finding that no violation occurred under ORS 165.540(6)(c) because the recorded lawyer either knew or should have known the conferral was being recorded.

Beyond Oregon

It is important to stress that states vary in their treatment of lawyer recording both in terms of their statutory law and interpretive ethics opinions. For example, some states—such as Washington under its Privacy Act (RCW 9.73.030)—generally require consent of all participants to a recording regardless of whether the con-

versation is by telephone or in-person. Others find by way of ethics opinions that, even if permitted by statutory law, recording without notice and consent is inherently deceptive. ABA Formal Ethics Opinion 01-422 (2001) catalogs many of these varying approaches. It is available on the ABA Center for Professional Responsibility's web site at www.abanet.org/cpr.

Oregon and most other states now include a choice-of-law provision in their Rules of Professional Conduct patterned on ABA Model Rule 8.5(b). In litigation, the professional rules of the forum state (or federal district court) generally apply unless the "predominant effect" of the conduct occurs in a different state. An argument can certainly be made under the "predominant effect" exception that even a call from Oregon to another state may be governed by that other state's recording law because the predominant effect of the recording occurs in the other state. In short, if you are handling a case in another venue or even calling opposing counsel in another state, you should check both the law and bar ethics opinions in that other state before making a decision on recording without notice and consent.

Summing Up

We've probably all had times when we wish we had a recording of what was said during a conferral. Moreover, although UTCR 5.010 only requires a "good faith effort to confer," many judges encourage telephone or in-person conferral rather than an exchange of emails or letters. U.S. District Court LR 7-1(a) goes still further by specifically requiring attorneys to confer by telephone or in person. Although recording opposing counsel is generally permitted under Oregon statutory law and ethics rules subject to the limits just discussed, lawyers should carefully weigh the practical ramifications before making that kind of record. ☪