

FORMAL OPINION NO. 130

The Committee has been asked to answer the question of whether it is a violation of the Idaho Rules of Professional Conduct to "record a telephone conversation without notifying the other party or parties that the conversation is being recorded." Particular attention is directed to instances involving "conversations with clients, opposing counsel, potential witnesses, and members of the public."

The recording of telephone conversations is permitted by Federal Law, 18 U.S.C. § 2511, and Idaho Law, IC §§ 18-6701 et. seq. As long as one party to the conversation consents, a recordation may be made, without notice to any other participant in the conversation. Therefore, the recordation of a telephone conversation, in the manner prescribed by these statutes, would not be criminal conduct prohibited by IRPC 8.4(b). The Committee feels, however, that such recordation would nonetheless be a violation of IRPC 8.4(d) which states: "It is professional misconduct for a lawyer to: ... (d) engage in conduct that is prejudicial to the administration of justice; ... ."<sup>1</sup>

Judicial system philosophy has, particularly in the past fifty years, shifted from "litigation by ambush" to one of litigation after full disclosure. The purposes of the change have been to provide dispute resolution based on all of the relevant facts, to expedite litigation and to decrease the cost of litigation. This philosophy has been most apparent in the instigation and broadening of the rules of discovery.

Judicial philosophy also favors resolving disputes without a trial. This is promoted by the availability of information through use of discovery, pre-trial conferences and a change in the rules of evidence, which now exclude testimony regarding settlement negotiations to establish liability. The exclusion is based on the theory that cases are more likely to settle if a person does not have to be cautious about what is said during such negotiations.

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<sup>1</sup> The Committee has also considered the application of IRPC 4.4 and 8.4(c). IRPC 4.4 prohibits the use of "methods of obtaining evidence that violate the legal rights ..." of third persons. IRPC 8.4(c) deems it ... "misconduct for a lawyer to: ... (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; ... ." Although these rules may be applicable to the questions presented, the Committee has decided that IRPC 8.4(d) is sufficiently dispositive of the question.

It is the opinion of the Committee that undisclosed recordation of communications between attorneys, or an attorney and a potential witness does not encourage the judicial system's objectives. People are more cautious, and therefore less candid in their discussions, when they know, or believe their conversations are being recorded. People are arguably even more cautious with recordations than they are with written documents. With written documents, at least there is time to review the language and consider its consequences before signature. With conversations, there usually is much less, if any, opportunity to first reflect on what should be said and the consequences of the statements. The result is a less voluntary disclosure of information.

The failure of a free exchange of information forces a resort to the formal discovery processes. As every attorney knows, these processes take longer, cost the client more, and, in many cases, are less effective than a frank discussion. Decreasing the flow of information, which prolongs litigation and increases its costs violates judicial system philosophy, and therefore, can only be viewed as prejudicial to the administration of justice.

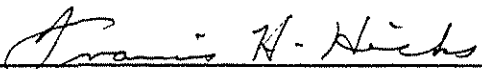
The Committee is cognizant of the arguments made for allowing recordation of telephone conversations of attorneys and witnesses. Recordation obviously makes it more difficult for either an attorney or a witness to change their statement. Also, if there is a misunderstanding, there is some record to determine what was said, and possibly meant. However, if the attorney is concerned a person will testify differently from what he says on the telephone, the attorney can either ask permission to record or inform the potential witness the conversation will be recorded. The attorney also has the options to take a deposition or do an in-person interview in the presence of a third party.

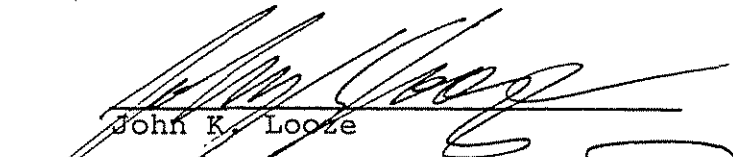
Regarding conversations with another attorney, a misunderstanding can be avoided by any of the simple expedients that most lawyers presently use. Examples of these are: a confirmation letter, stipulation or other writing memorializing the conversation. Lawyers, above all professionals, know that a written memorial of a transaction is best because it is done only after there has been an opportunity to reflect, and is also intended to embody the entire agreement, rather than being only a portion of protracted discussions.

Having addressed the issue of recording the conversations of prospective witnesses and another attorney, the Committee now addresses the inquiry regarding recordation of clients and members of the public. As to clients, all conversations between an attorney and the client are

confidential, which every client has a right to expect and require. Therefore, the recordation of such a conversation should not impede the candid discussions between the client and the attorney. As to "members of the public", a category so broad as to include all persons in all situations, the Committee cannot frame an opinion which is equally so all inclusive. Therefore, the Committee can only recommend that the attorney keep in mind the parameters set out in this Opinion.

Dated this 10th day of May, 1989.

  
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Frank H. Hicks, Chairman

  
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John K. Looze

  
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