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BEFORE THE ARIZONA CORPORATION COMMISSION
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8 IN THE MATTER OF THE APPLICATION OF
 9 JOHNSON UTILITIES, LLC FOR AN
 10 INCREASE IN ITS WATER AND
 WASTEWATER RATES FOR CUSTOMERS
 WITHIN PINAL COUNTY, ARIZONA.

Docket No. WS-02987A-08-0180

NOTICE OF ERRATA

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13 The Residential Utility Consumer Office ("RUCO") hereby files this Notice of Errata in

14 the above-referenced matter. RUCO's Exhibit A was inadvertently left out of its Opening

15 Brief which was filed May 11, 2009.

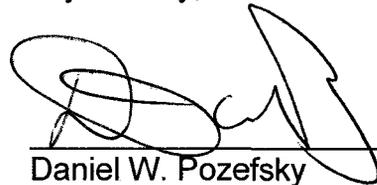
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17 RESPECTFULLY SUBMITTED this 11th day of May, 2009.

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19 Arizona Corporation Commission
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Daniel W. Pozefsky
Chief Counsel

21 DOCKETED BY 

1 AN ORIGINAL AND THIRTEEN COPIES
of the foregoing filed this 11th day
2 of May, 2009 with:

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EXHIBIT A

OPINION NO. 90-02
March 16, 1990

FACTS:

The retained investigator for the public defender service in county X wishes to tape record an interview with a potential witness in a criminal case without the knowledge of that witness. The purpose of this surreptitious tape recording is to obtain impeachment material on the witness should the testimony of the witness be different at the trial than in the interview.

QUESTION:

Is it ethically proper for an attorney or the attorney's agents at his or her direction to surreptitiously tape record interviews of potential witnesses in a criminal case?

ETHICAL RULES CITED:

Arizona Rules of Professional Conduct, Supreme Court Rule 42, 17A A.R.S.:

ER 3.1. Meritorious Claims and Contentions:

. . . A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

ER 4.1. Truthfulness in Statements to Others:

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by ER 1.6.

ER 4.3. Dealing with Unrepresented Person:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

ER 4.4. Respect for Rights of Third Persons:

In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

ER 8.4. Misconduct:

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

RELEVANT PRIOR OPINIONS:

1. Opinion No. 176A, dated September 21, 1965 - One attorney should not record surreptitiously a telephone conversation with another attorney to be later played back to his client.
2. Opinion No. 74-18, dated August 6, 1974 - An attorney may not surreptitiously record a conversation with a witness, potential witness or potential adverse party. (Vacated by Opinion No. 75-13 of June 11, 1975.)
3. Opinion No. 74-35, dated November 5, 1974 - The committee opined, following its Opinion No. 74-18, that a county attorney or deputy county attorney cannot ethically cause or encourage police or other investigators to surreptitiously tape record a conversation with a witness or potential defendant. (Vacated by Opinion No. 75-13 of June 11, 1975).
4. Opinion No. 75-13, dated June 11, 1975 - The committee opined, modifying and vacating its Opinions Nos. 74-18 and 74-35, that the previous absolute prohibition against surreptitious tape recording should be subject to four exceptions permitting a lawyer to secretly record:

(a) "an utterance that is itself a crime, such as an offer of a bribe, a threat, an attempt to extort or an obscene telephone call";

(b) ". . . a conversation in order to protect himself, or his client, from harm that would result from perjured testimony. In this category, however, it is important to note that the purpose of the secret recording is solely to provide a shield for the lawyer, or his client, and that this exception does not authorize secret recordings for the purpose of obtaining impeachment evidence or inconsistent statements.";

(c) "conversations with informants and/or persons under investigation simply as a matter of self-protection."; and

(d) conversations, etc., "where specifically authorized by statute, court rule or court order."

OPINION:

The use of surreptitious tape recording by attorneys in Arizona is a question of interest to all criminal law practitioners, given the present realities of law enforcement practices. Unless the right to privacy restricts all surreptitious recording, the use of such devices should not be forbidden to the criminal defense bar.

Within Arizona (contrary to the law in some other jurisdictions), there appears to be no state or local prohibition against surreptitiously recording conversations where one party to that conversation agrees to such recording. A.R.S. § 13-3005(A)(2). Under federal law, surreptitious recording of conversations with one party consenting is also legal (18 U.S.C. § 2510 et seq.), although a long-standing Federal Communications Commission regulation forbids such recordings unless adequate notice is given to all parties by the use of an automatic tone warning device. Taped conversations obtained in violation of this FCC regulation have been held not to prohibit the introduction of such tapes. Battaglia v. United States, 349 F.2d 556, 559 (9th Cir. 1965), cert. denied, 382 U.S. 955 (1965). The surreptitious recording of conversation appears to be legal in relation to in-person and telephonic conversations. Additionally, there is no question that both parties in a criminal case are entitled to interview potential witnesses. Rule 15, Arizona Rules of Criminal Procedure. For these reasons, the "legal rights" of a third person would not appear to be violated by surreptitiously tape recording an interview of a witness.

The prior Arizona ethics decisions on this subject matter were based on the Ethical Considerations and Disciplinary Rules in effect in this state prior to the substantial revisions made by Arizona Supreme Court Order on September 7, 1984, effective February 1, 1985. These provisions -- DR 1-102(A)(4) (prohibition against engaging in conduct

involving dishonesty, fraud, deceit, or misrepresentation) and Canon 9 (avoidance of even the appearance of professional impropriety) -- can no longer provide the basis for prohibiting surreptitious recording of interviews. The ethical admonition to avoid the appearance of impropriety no longer is specifically included in the 1985 Rules. Although the pre-1985 Disciplinary Rule 1-102(A)(4) is substantially continued in Ethical Rule 8.4(c), the addition of new Ethical Rule 4.4 that a lawyer shall not use "methods of obtaining evidence that violate the legal rights" of third persons seems, by implication, to allow the legal surreptitious recordation of statements of witnesses. C. Wolfram, Modern Legal Ethics, Section 12.4.4, pp. 649-650 (1986).

The practicalities of the present day criminal justice system seem to be inconsistent with any continued prohibition against surreptitious recordation of a witness. More specifically, it is common practice for law enforcement agencies to surreptitiously record interviews and/or conversations in criminal investigations. The committee believes that a serious imbalance would be created by permitting law enforcement attorneys and their agents to use this device without allowing defense attorneys to do the same. Indeed, at least one court has found that this disparity constitutes an impermissible denial of equal protection of the law. Kirk v. State, 526 So. 2d 223, 227 (La. 1988). Additionally, ethics committees in other states which have recently considered this problem have concurred that fairness and the Sixth Amendment to the United States Constitution allow defense attorneys or their agents to surreptitiously tape record witnesses to the same extent accorded law enforcement personnel. See, Kentucky Opinion E-279, January, 1984; Tennessee Ethics Opinion 86-F-14(a), July 18, 1986.

It is also very common for both parties in a criminal proceeding to have an investigator or other third party present during interviews for the sole or substantial purpose of enabling the third person to testify to the substance of the conversations should the subject of the interview testify inconsistently. Obtaining the presence of an investigator or other third person at interviews to act as an impeachment witness at trial is an encouraged practice. During the interview, there is no requirement that the witness be warned of possible incrimination, the need for counsel, or notice that the investigator/third person may testify as an impeachment witness at trial should the witness testify inconsistently.¹

¹ The ABA Standards relating to the Administration of Criminal Justice (Second Edition), states, in pertinent part:

(Footnote continued on next page.)

There is a distinction between investigator interviews and surreptitious taping in that, in the former case, the person being interviewed is more likely to infer that what he is saying to the investigator may be taken down for later use. However, the practical considerations in favor of taping, whether by the attorney or his investigator, lie in the greater accuracy of this method.

Considering the Rules of Professional Conduct currently in effect and the realities of present day practices, we must broaden the sentiment expressed in our prior Opinion No. 75-13 that an ethical prohibition against the surreptitious recording of witness interviews in a legal manner cannot be established as a blanket rule. That opinion sought to limit surreptitious recordation to "rare cases where the attorney has first satisfied himself that there are compelling facts and circumstances justifying the use of a secret recording". While we agree that it is a worthy practice to protect the privacy rights of Arizona citizens by prohibiting surreptitious recording, or limiting surreptitious recording of witnesses to instances where there are compelling circumstances, that is a matter which more properly must be addressed by the Arizona legislature or the Arizona Supreme Court in its interpretation of the Arizona Constitution. If there are no legal restrictions against one-party consensual recording, and law enforcement agents are additionally allowed to engage in such activities, then the criminal

(Footnote continued from previous page.)

Section 4-4.3 Relations with Prospective Witnesses

"b) It is not necessary for the lawyer or the lawyer's investigator, in interviewing a prospective witness, to caution the witness concerning possible self-incrimination and the need for counsel.

"d) Unless the lawyer for the accused is prepared to forego impeachment of a witness by the lawyer's own testimony as to what the witness stated in an interview or to seek leave to withdraw from the case in order to present such impeaching testimony, the lawyer should avoid interviewing a prospective witness except in the presence of a third person."

The ABA standards have not yet been adopted or approved by the Arizona Supreme Court, but we find them persuasive on this issue.

defense lawyer, in fulfilling his or her legal and ethical duties to zealously represent a client, must equally be permitted to develop important impeachment evidence through this method. The importance of preventing persons from twisting the truth may, depending on the circumstances, be necessary to the effective representation of a criminally accused client. Therefore, the distinction drawn in our Opinion No. 75-13 between surreptitious recording to protect against perjury (which the opinion permitted) and surreptitious recording for impeachment purposes (which the opinion prohibited) does not appear to have any basis in the present Rules of Professional Conduct. The result of our present opinion seems in perfect accord with our Opinion No. 75-13 because a surreptitious recording would ordinarily be used only when the witness, under oath, makes a statement contrary to the tape-recorded testimony, in possible violation of the perjury and/or false swearing statutes. See, A.R.S. §§ 13-2702 et seq.

Accordingly, we conclude that the recording of witness conversations by criminal defense attorneys or their agents, with the consent of only one party to the conversation, may be ethically permissible either for the purpose of protecting against perjury or for the purpose of obtaining impeachment material should the testimony of the witness be different at trial.

00-04: Recorded Conversations; Advice to Client; Divorce

11/2000



An attorney may ethically advise a client that the client may tape record a telephone conversation in which one party to the conversation has not given consent to its recording, if the attorney concludes that such taping is not prohibited by federal or state law. [ERs 1.2(d), 1.4(b), 2.1]

FACTS[1]

The inquiring attorney's client is a divorced parent. On good faith, the client believes that during telephone conversations between the client's children and the client's former spouse, the former spouse undermines the children's relationship with the client. After the conversations, the children demonstrate severe emotional upset, often lasting for hours. The inquiring attorney has been asked by the client whether the client may tape record telephone conversations between the children and the former spouse without the former spouse's knowledge or consent.

QUESTION PRESENTED

May an attorney ethically advise a client that the client may record telephone conversations between the client's children and the client's former spouse without the former spouse's knowledge or consent?

RELEVANT ETHICAL RULES**ER 1.2. Scope of Representation**

* * * *

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

* * * *

ER 1.4. Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

ER 2.1. Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

OPINION

This Committee has issued a number of opinions that address whether an *attorney* may ethically participate, directly or indirectly, in tape recording a conversation without the consent or prior knowledge of all parties to the conversation. See, e.g., Ariz. Op. 95-03 (summarizing prior opinions). In Ariz. Op. 75-13, decided before the Model Rules of Professional Conduct were adopted in Arizona, we stated a broad general rule that, with certain exceptions, it was "improper for a lawyer to record by tape recorder or other electronic device any conversation between the lawyer and another person, or between third persons, without the consent or prior knowledge of all

parties to the conversation." Ariz. Op. 75-13 at 2. In our most recent opinion, Ariz. Op. 95-03, we said that an attorney may not surreptitiously tape record a telephone conversation with opposing counsel because such conduct involved an element of deceit and misrepresentation and thus violated ER 8.4(d). Ariz. Op. 95-03 at 5. We have not previously considered whether an attorney may ethically advise his or her *client* that the client may surreptitiously tape record a conversation.

Federal and state laws allow tape recording of telephone conversations without the consent of all parties under certain circumstances. See 18 U.S.C. § 2511(2)(d); A.R.S. § 13-3005; *State v. Allgood*, 171 Ariz. 522, 523-24, 831 P.2d 1290, 1291-92 (App. 1992). Whether those circumstances exist here is a question of law beyond the scope of our jurisdiction.

If the inquiring attorney concludes that the client's proposed conduct is illegal under federal or state law, then the inquiring attorney may not, under ER 1.2(d), advise the client to tape record telephone conversations between the client's children and the client's former spouse.

If, on the other hand, the inquiring attorney concludes that the client may legally tape record those conversations, is there anything in our prior opinions on the ethical propriety of an attorney's participation in surreptitious tape recording that would preclude the inquiring attorney from so advising the client? We think not. Our earlier opinions on surreptitious tape recording recognized ethical limitations on an attorney's direct participation in surreptitious tape recording, either personally, or through an agent, such as an investigator. Here, by contrast, it is the proposed conduct of a client, not an attorney, that is at issue. The inquiring attorney has a duty to "provide [] [his or her] client with an informed understanding of the client's legal rights and obligations and [to] explain[] their practical implications." Preamble to Arizona Rules of Professional Conduct. See *also* ERs 1.4(b) and 2.1. That the inquiring attorney is ethically precluded from engaging in surreptitious tape recording except in certain limited circumstances does not mean that the inquiring attorney may not advise the client that the client may legally do so. See Tex. Professional Ethics Comm. Op. No. 514 (February 1996) (attorney may ethically advise client that client may legally tape record conversation without consent of other party). *Contra* S.C. Bar Ethics Advisory Comm. Op. No. 91-14 (July 1991).

CONCLUSION

We hasten to add that, while an attorney may advise a client about the client's right to surreptitiously tape record conversations, the attorney may not participate in the surreptitious tape recording of a conversation, except as permitted by our prior opinions. Further, even if a client does not raise the issue of surreptitious tape recording, the attorney may on the attorney's own initiative advise the client about the client's right to surreptitiously tape record conversations under Arizona law. Finally, attorneys may not use third parties to tape record conversations which an attorney ethically cannot tape record under the prior opinions of the Committee, Ariz. Ops. 75-13, 90-02, and 95-03.[2]

[1] Formal Opinions of the Committee on the Rules of Professional Conduct are advisory in nature only and are not binding in any disciplinary or other legal proceedings. © State Bar of Arizona 2000

[2] Ariz. Op. 95-03 is limited in its prohibition to tape recording between attorneys because of the expectation of lawyers in Arizona that conversations between opposing counsels will not be recorded.