

## FORMAL OPINION NO 2005-156

[REVISED 2015]

### **Illegal Conduct: Electronic Recording of Conversations**

#### **Facts:**

Lawyer *A* proposes to tape-record a telephone conversation with a person in Oregon without informing that person of Lawyer *A*'s intention or using any sort of beep or tone that would indicate the presence of a recording device.

Lawyer *B* proposes to record a private, in-person conversation with a person in Oregon without informing that person of the recording.

#### **Questions:**

1. May Lawyer *A* make the recording?
2. May Lawyer *B* make the recording?

#### **Conclusions:**

1. Yes, qualified.
2. No.

#### **Discussion:**

The recording of a telephone call or in-person conversation in Oregon is subject to regulation by state and federal statutes, and cases interpreting the statutes. Sometimes the recording is permitted, at other times the recording is not permitted. *See, e.g.*, ORS 165.540; 18 USC §§ 2510–2521. As a general rule, Oregon law allows one party to a telephone conversation to record the conversation without notice to or consent of the other person. However, in-person conversations may not be recorded unless all persons participating know or have notice that the conversation is being recorded. For an extensive discussion of wiretaps, see *Checkley v. Boyd*, 198 Or App 110, 107 P3d 651, *rev den*, 338 Or 583 (2005).

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A lawyer who makes a recording in knowing disregard of statutory prohibitions to the contrary would be in violation of Oregon RPC 3.3(a)(5), which prohibits a lawyer from knowingly engaging in illegal conduct. See also Oregon RPC 8.4(a)(2), which makes it professional misconduct for a lawyer to “commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.”

If the substantive law does not prohibit a recording, however, and in the absence of conduct that would affirmatively lead a person to believe that no recording would be made, the lawyer may make a recording.

**Approved by Board of Governors, September 2015.**

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COMMENT: This opinion replaces OSB Formal Ethics Op No 2005-74. For additional information on this general topic and other related subjects, see *Restatement (Third) of the Law Governing Lawyers* § 8 (2000) (supplemented periodically); and ABA Model RPC 3.3–3.4.