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SURREPTITIOUS RECORDING BY ATTORNEYS: IS IT ETHICAL?

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I. INTRODUCTION

Attorney ethics rules serve a number of purposes, one of which is to set forth commonly held ethics principles. A related purpose is to provide guidance to attorneys as to an ethical course of action, and a final purpose is to provide a basis for disciplinary action against those attorneys who violate the rules. Because ethics rules are subject to interpretation, the American Bar Association (ABA) and state bar associations issue ethics opinions applying ethics rules to various fact situations.[1]

Ethics rules generally set forth commonly held ethics principles in broad terms that usually generate little debate. What sometimes generates debate is a position taken in an ethics opinion. Whether it is ethical for an attorney to record a conversation has generated a great deal of debate over the years.

Society's view of whether attorney recording is unethical has shifted to some extent over the past thirty years. The ABA's view of the issue has shifted as well from its 1974 opinion, which made attorney recording unethical except for certain well-defined exceptions involving government attorneys,[2] to its 2001 opinion

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1. *See* American Bar Association, ABA Formal Opinions, http://www.abanet.org/cpr/pubs/ethicopinions.html (last visited May 15, 2008) (providing access to formal ethics opinions).

2. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 337 (1974); *see also* Anderson v. Hale, 159 F. Supp. 2d 1116, 1117 (N.D. Ill. 2001) (noting that Formal Opinion 337 restricts "surreptitious recording by attorneys" as "inherently deceitful"); David G. Trager, *Do Bar Association Ethics Committees Serve the Public or the*

that officially withdrew the 1974 opinion.[3] The 2001 opinion allows an attorney to secretly record a conversation with a non-client where not illegal.[4] In those same twenty-seven years, the ABA transitioned from the Code of Professional Responsibility (Code) to the Model Rules of Professional Conduct (Model Rules). Both the Code and the Model Rules prohibited "conduct involving dishonesty, fraud, deceit, or misrepresentation";[5] however, the Code's warning that an attorney "[s]hould [a]void [e]ven the [a]ppearance of [p]rofessional [i]mpropriety"[6] is absent from the Model Rules.

States' opinions as to whether it is ethical for an attorney to record a conversation without all parties' consent have not been uniform, and the issue has spawned a great deal of discussion.[7] At one extreme are the states that prohibit secret attorney recording as unethical and, at the opposite extreme, are the states that permit secret attorney recording; others have taken positions somewhere between the two extremes.[8] Even a state prohibiting attorney recording as unethical may allow the attorney to advise a client on whether recording is illegal.[9] Several states prohibit an

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Profession?: An Argument for Process Change, 34 HOFSTRA L. REV. 1129, 1139 (2006) (noting that surreptitious recording used by prosecuting attorneys was a necessary exception to the general proscription against unilateral recording in Formal Opinion 337).

3. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-422 (2001); *see also* Midwest Motor Sports v. Arctic Cat Sales, 347 F.3d 693, 699 (8th Cir. 2003) ("[T]he ABA published a new Formal Opinion which reverses its position in Formal Opinion 337 and states that a lawyer who electronically records a conversation without the knowledge of the other party or parties to the conversation does *not* necessarily violate the Model Rules of Professional Conduct."); Jennifer L. Sabourin, *Professional Responsibility*, 49 WAYNE L. REV. 575, 587 (2003) ("Formal Opinion 01-422, by its language, repudiates Formal Opinion 337.").

4. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-422 (2001); *see also* Colin P. Marks, *Thompson/McNulty Memo Internal Investigations: Ethical Concerns of the "Deputized" Counsel*, 38 ST. MARY'S L.J. 1065, 1095 n.133 (2007) (noting that Formal Opinion 01-422 now governs the conduct of attorneys when recording conversations).

5. MODEL CODE OF PROF'L RESPONSIBILITY DR 1-102(A)(4) (1980); *accord* MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2007).

6. MODEL CODE OF PROF'L RESPONSIBILITY Canon 9 (1980).

7. *See Taping Conversations: 1991 Opinion #130 Said "No" but in What Situations Does This Apply?*, ADVOC., Aug. 1994, at 24, 24 ("Perhaps no other ethics opinion has generated as much discussion since publication.").

8. *See* Appendix A.

9. *See, e.g.*, Ariz. Bar Ass'n Comm. on the Rules of Prof'l Conduct, Op. 2000-04 (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

attorney from advising a client to secretly record a conversation because such advice would allow the attorney to do something the attorney is not otherwise permitted to do.[10] A related question is whether the secretly recorded conversations are protected by the work product doctrine and therefore not discoverable.[11]

This paper explores the wide divergence of opinion on this issue and discusses whether the 2001 ABA opinion may signal a trend for the future.

II. THE AMERICAN BAR ASSOCIATION'S REACTION TO SURREPTITIOUS RECORDING

The ABA adopted the Code of Professional Responsibility in 1969 and the Model Rules of Professional Conduct in 1983.[12] Some form of the Model Rules has been adopted in an overwhelming majority of states, and a handful of states continue to use some form of the Code.[13] The ethics rules in the remaining states incorporate provisions of the Model Rules and the Code, along with some unique provisions.[14] Rule 8.4(c) of the Model

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recording, if the attorney concludes that such taping is not prohibited by federal or state law."); Iowa Ethics Op. 98-28 (1999) (allowing attorneys to advise clients of their ability to record conversations without the other party's consent in domestic abuse cases); Ky. Comm. on Ethics and Unauthorized Practice of Law, Op. E-289 (1984) (indicating that an attorney can advise a client of the legality of surreptitious recording); S.C. Bar Advisory Ethics Op. 92-17 (1992) (differentiating between the mere act of interpreting a statute for a client in order to advise the client about surreptitious recording, and instructing a client to record a conversation).

10. *See* Colo. Bar Ass'n Ethics Comm., Op. 112 (2003) (noting that an attorney cannot engage, direct, or authorize a surreptitious recording of a conversation even if the recording is legal under state law); S.C. Bar Advisory Ethics Op. 91-14 (1991) ("[N]o attorney should record, cause to be recorded, counsel a client to record or assist a client to record any conversation without the consent or prior knowledge of all parties to the conversation.").

11. *See* Otto v. Box U.S.A. Group, Inc., 177 F.R.D. 698, 701 (N.D. Ga. 1997) (prohibiting the plaintiff from claiming the work product privilege for secret recordings, since such ruling would defy logic and fairness); Ward v. Maritz, Inc., 156 F.R.D. 592, 598 (D.N.J. 1994) ("The unprofessional behavior of plaintiff's attorneys in counseling Ward to surreptitiously record conversations, during one of which she denied that the recording was taking place, should abrogate the protection of the work product doctrine.").

12. Sean McKeveney, Note, *The Dishonesty Rule: A Proposal for Reform*, 81 TEX. L. REV. 381, 384–85 (2002) (noting that the 1969 Code was the predecessor to the 1983 Model Rules).

13. Tom Lininger, *Should Oregon Adopt the New ABA Model Rules of Professional Conduct?*, 39 WILLAMETTE L. REV. 1031, 1035 n.24 (2003).

14. *Id.*

Rules of Professional Conduct, adopted in 1983, provides that "[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation."[15] Its predecessor, DR 1-102 of the 1969 Code of Professional Responsibility, had likewise prohibited "dishonesty, fraud, deceit, or misrepresentation."[16]

Neither the Code nor the Model Rules explicitly prohibit an attorney from secretly recording a conversation. In 1974, the dishonesty and deceit rule from the Code was interpreted by ABA Formal Opinion 337 to prohibit an attorney from recording a conversation without consent from all parties to the conversation.[17] However, Formal Opinion 337 contained an exception allowing a government or law enforcement attorney to record a conversation without all parties' consent.[18] The following year, the ABA declined to reconsider Opinion 337 and additionally opined that a lawyer may not ethically direct a third party, such as a private investigator, to record a conversation without the consent of the other party to the conversation.[19]

ABA opinions carry a great deal of weight and a number of states were influenced by Formal Opinion 337. The Alaska Bar

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15. MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2007).

16. MODEL CODE OF PROF'L RESPONSIBILITY DR 1-102(A)(4) (1980).

17. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 337 (1974) ("The conduct proscribed in DR 1-102(A)(4), *i.e.*, conduct which involves dishonesty, fraud, deceit or misrepresentation in the view of the Committee clearly encompasses the making of recordings without the consent of all parties.").

18. Formal Opinion 337 stated:

> There may be extraordinary circumstances in which the Attorney General of the United States or the principal prosecuting attorney of a state or local government or law enforcement attorneys or officers acting under the direction of the Attorney General or such principal prosecuting attorneys might ethically make and use secret recordings if acting within strict statutory limitations conforming to constitutional requirements.

Id.

19. ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1320 (1975); *see also* Haigh v. Matsushita Elec. Corp. of Am., 676 F. Supp. 1332, 1358 (E.D. Va. 1987) (indicating that Informal Opinion 1320 refused to reconsider Formal Opinion 337); David B. Isbell & Lucantonio N. Salvi, *Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation Under the Model Rules of Professional Conduct*, 8 GEO. J. LEGAL ETHICS 791, 828 (1995) (noting that Informal Opinion 1320 did not overrule Formal Opinion 337 and declaring soliciting surreptitious recording from an investigator to be unethical).

Association Ethics Committee adopted Formal Opinion 337, as did Tennessee.[20] Prior to the adoption of Formal Opinion 337 by the ABA, the State Bar of Arizona had placed a total ban on an attorney secretly recording a conversation. Arizona reconsidered its position in light of Formal Opinion 337 and adopted four exceptions that would apply in "rare cases."[21] Also, federal courts have followed Formal Opinion 337.[22]

Other states refused to follow the opinion. In Maine, the Professional Ethics Commission of the Board of Overseers of the Bar found that the ABA opinion and state ethics opinions following it "are highly conclusory, contain little if any analysis of any kind and fail to rely on provisions in the applicable ethical rules of the jurisdiction."[23] The Mississippi Supreme Court found

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20. Alaska Bar Ass'n Ethics Comm'n, Op. 78-1 (1978) (withdrawn Jan. 24, 2003); Tenn. Bd. of Prof'l Responsibility, Op. 81-F-14 (1981) (rescinded July 18, 1986); *see also* Susan L. Kopecky, *Dealing with Intercepted Communications: Title III of the Omnibus Crime Control and Safe Streets Act in Civil Litigation*, 12 REV. LITIG. 441, 460 n.128 (1993) (mentioning Alaska and Tennessee as two of the states that have followed Formal Opinion 337).

21. Ariz. Bar Ass'n Comm. on the Rules of Prof'l Conduct, Op. 95-03 (1995).

22. *See, e.g.*, Anderson v. Hale, 159 F. Supp. 2d 1116, 1118 (N.D. Ill. 2001) (siding with the majority view that upholds the standards espoused by Formal Opinion 337); Sea-Roy Corp. v. Sunbelt Equip. & Rentals, Inc., 172 F.R.D. 179, 182–83 (M.D.N.C. 1997) (ordering the surrender of surreptitious recordings under the reasoning of Formal Opinion 337). Federal district courts are not governed by a single set of ethics rules. A vast number of the federal district courts have adopted the ethics rules of the state in which the court is located through district court local rules, and some courts apply ABA ethics rules. However, district courts follow federal case law and ABA comments to the ABA ethics rules in interpreting the state ethics rules. *Sea-Roy*, 172 F.R.D. at 184. Federal district courts regard state and ABA ethics opinions as persuasive authority. *See* Susan J. Becker, *Discovery of Information and Documents from a Litigant's Former Employees: Synergy and Synthesis of Civil Rules, Ethical Standards, Privilege Doctrines, and Common Law Principles*, 81 NEB. L. REV. 868, 885 n.80 (2003) (indicating there are no federal ethics rules for attorneys in federal court, which prompts many federal courts to give deference to ABA ethics opinions). Federal Rules of Attorney Conduct were proposed and discussed but not adopted by the Federal Judicial Conference. *Id.* at 886 n.87. A United States statute makes United States attorneys subject to state ethics rules. 28 U.S.C. § 530B (2000). "An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State." *Id.*

23. Me. Bar Ass'n Prof'l Ethics Comm'n, Op. 168 (1999); *see also* Allison A. Vana, Note, *Attorney Private Eyes: Ethical Implications of a Private Attorney's Decision to Surreptitiously Record Conversations*, 2003 U. ILL. L. REV. 1605, 1605 (2003) (distinguishing states that follow the strict recording prohibition found in Formal Opinion 337 from other states, such as Maine, which interpret the validity of surreptitious recording based on individual circumstances).

the circumstances in which the ABA opinion allowed secret recording by an attorney to be too restrictive.[24] The Michigan Bar Association Standing Committee on Professional and Judicial Ethics rejected Formal Opinion 337, stating that it was "over broad, and the rationale which supported its statement some twenty-four years ago has weakened."[25] The Oklahoma Bar Association Legal Ethics Committee agreed that Formal Opinion 337 was "overly broad" and "that [secret recording by an attorney] is not per se deceptive."[26] The Ethics Committee of the Utah State Bar criticized the ABA opinion for not allowing secret recordings when recording is "necessary and proper."[27]

On June 24, 2001, the ABA adopted Formal Opinion 01-422.[28] This opinion superseded Formal Opinion 337, which had been adopted in 1974.[29] Formal Opinion 01-422 permits an attorney to secretly record conversations with non-clients in states allowing recording on one-party consent: "A lawyer who electronically records a conversation without the knowledge of the other party or parties to the conversation does not necessarily violate the Model Rules."[30] Although Formal Opinion 01-422 represents a major change in policy, the opinion is limited and cautious in some respects. It contains two direct prohibitions on attorney recording and fails to take a stand on two scenarios in which attorney involvement in recording is likely to occur.[31]

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24. Miss. Bar v. Attorney ST, 621 So. 2d 229, 232 (Miss. 1993); Attorney M v. Miss. Bar, 621 So. 2d 220, 223–24 (Miss. 1992).

25. Mich. Ethics Op. RI-309 (1998); *see also* Jennifer L. Sabourin, *Professional Responsibility*, 49 WAYNE L. REV. 575, 589 (2003) (noting that Michigan courts "have held that secret recording, in and of itself, is not violative of any ethical rules," provided that local laws and standard practices of fairness allow such action).

26. Okla. Bar Ass'n, Op. 307 (1994); *see also* Lawrence K. Hellman, *When "Ethics Rules" Don't Mean What They Say: The Implications of Strained ABA Ethics Opinions*, 10 GEO. J. LEGAL ETHICS 317, 331 n.47 (1997) ("Interestingly, one of the three surviving Oklahoma opinions [Opinion 307] issued during the *Model Rules* era expressly *rejected* the ABA's formal opinion on the same issue [Formal Opinion 337].").

27. Utah Ethics Comm. Op. 96-04 (1996). "Under certain circumstances, . . . an attorney may be justified in making a . . . recording in order to protect himself or his client from the effects of future perjured testimony." *Id.* The opinion added: "Ethical complications arise not so much from . . . recordings *per se* as from the manner in which attorneys use them." *Id.*

28. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-422 (2001).

29. *Id.*

30. *Id.*

31. *Id.*

Under opinion 01-422, the two prohibitions are that an attorney cannot secretly record a conversation in a jurisdiction in which recording with only one-party consent is illegal and an attorney may not falsely say that the conversation is not being recorded.[32] "A lawyer may not, however, record conversations in violation of the law in a jurisdiction that forbids such conduct without the consent of all parties, nor falsely represent that a conversation is not being recorded."[33] The opinion does not take a stand on whether an attorney recording a client is unethical or on whether investigative activities either under assumed identities or for purposes other than those stated is deceitful and therefore unethical.[34] "The committee is divided as to whether a lawyer may record a client-lawyer conversation without the knowledge of the client, but agrees that it is inadvisable to do so."[35]

The opinion stated three reasons for the policy change. First, with the prevalence of recording ability, it may not be reasonable for an individual to have an expectation that a conversation is not being recorded unless there is something in the relationship with the other party or an action from the other party that would make the individual reasonably believe that the conversation is not being recorded.[36] Another basis for the policy shift is that there are situations in which the need for recording is legitimate, including:

- recording statements that are the basis for criminal charges such as bribery and extortion,
- recording witnesses who might later make inconsistent statements,
- recording a conversation to protect an attorney,
- recording by prosecutors,
- recording evidence by a criminal defense attorney to balance the prosecutor's ability to record, and
- recording to preserve statements key to claims such as discrimination.[37]

The third reason for the policy shift is that Rule 4.4 protects third

32. *Id.*
33. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-422 (2001).
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*

persons against unconscionable tactics,[38] as explained below.

Thus, opinion 01-422 shifts the line on attorney recording such that it is no longer per se unethical for an attorney to record and, if the perceived context of the attorney recording makes the recording unethical, the attorney's actions can be dealt with under Rules 4.4 and 8.4(c).[39] Rule 4.4 of the Model Rules contains some protections for third parties not contained in the Code. Rule 4.4 prohibits "means that have no substantial purpose other than to embarrass, delay, or burden a third person" and "methods of obtaining evidence that violate the legal rights of such a person."[40] Even with the policy shift, the attorney's recording could be unethical under Rule 8.4(c) if the action involves "dishonesty, fraud, deceit, or misrepresentation."[41]

Formal Opinion 01-422 has influenced at least five states to change position on secret attorney recording. On June 3, 2002, the Minnesota Lawyers Professional Responsibility Board repealed Opinion 18 that prohibited attorneys from secretly recording conversations, which the board had interpreted as being deceitful.[42] "However, given the ABA's recent change of heart, and its rationale, the Minnesota Lawyers Board was doubtful about whether secret recording by itself continued to fall clearly within the deceit proscription of Rule 8.4(c)."[43] On January 24, 2003, the Alaska Bar Association Ethics Committee adopted an ethics opinion allowing secret recording of telephone calls by an attorney and withdrew a prior state ethics opinion that had adopted Formal Opinion 337.[44] Likewise, Missouri, on March 8, 2006,[45] the Tennessee Supreme Court, on April 29, 2003,[46] and

38. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-422 (2001).

39. *Id.*

40. MODEL RULES OF PROF'L CONDUCT R. 4.4(a) (2007).

41. MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2007).

42. Kenneth L. Jorgensen, *Opinion Barring Secret Recording of Conversations Is Repealed*, MINN. LAW., June 3, 2002, *available at* http://www.mncourts.gov/lprb/fc060302.html.

43. *Id.*

44. Alaska Bar Ass'n Ethics Comm'n, Op. 2003-1 (2003); *see also* Kathleen Maher, *Tale of the Tape: Lawyers Recording Conversations*, 15 PROF. LAW. 10, 12 (2004) ("The Alaska Bar Association Ethics Committee recently withdrew a 1978 opinion that had concurred with ABA Opinion 337 and adopted the ABA's new stance.").

45. Mo. Supreme Court Advisory Comm., Op. 123 (2006), *reprinted in Secret Electronic Recording of a Conversation with a Nonclient Is Not a Violation, Absent Other Circumstances*, 62 J. MO. B. 102 (2006) (rejecting ABA Formal Opinion 337 and adopting

Texas, in November 2006,[47] relied on the 2001 ABA opinion in changing their positions on attorney recording.

III. CASES CONCERNING WHETHER SECRET ATTORNEY RECORDING IS ETHICAL

This section describes some of the cases in which an attorney was threatened with disciplinary action for secretly recording a conversation or advising a client to do so. The context in which the cases occurred gives snapshot glimpses of the circumstances surrounding secret attorney recording. One notices similarities in some of the situations in which secret attorney recording has occurred. In several of the cases, the attorney secretly recorded a conversation with a client or former client and in other cases the attorney secretly recorded a conversation with a judge. Other cases represent situations in which an attorney may desire to record a conversation surreptitiously. For example, an attorney recorded a conversation simply as a way of taking notes; another case involved an attorney lying about whether the attorney was secretly recording the conversation; and in yet another situation, a potential witness suspected, but was not certain, that the attorney was secretly recording the conversation. Other cases concerned an attorney advising a client as to whether it was permissible for the client to secretly record a conversation.

Four cases involved an attorney secretly recording a conversation with a client or a former client. In an Iowa case, *Committee on Professional Ethics & Conduct of the Iowa State Bar Ass'n v. Mollman*,[48] and in a Colorado case, *People v. Smith*,[49] an

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new ABA Formal Opinion 01-422).

46. *See* Tennessee Bar Association, Tennessee Rules of Professional Conduct, http://www.tba.org/committees/Conduct/index.html (last visited May 15, 2008) (noting that the Tennessee Supreme Court reversed a ban on surreptitious recording, prompted by ABA Formal Opinion 01-422).

47. Tex. Comm. on Prof'l Ethics, Op. 575, 70 TEX. B.J. 265 (2006).

48. Comm. on Prof'l Ethics & Conduct of the Iowa State Bar Ass'n v. Mollman, 488 N.W.2d 168 (Iowa 1992). In *Mollman*, Attorney Mollman had been good friends with Johnson and had served as Johnson's attorney on one occasion. *Id.* at 169. Mollman and Johnson had used illegal drugs for a few years; FBI agents wanted Mollman, acting as an FBI informant, to implicate Johnson by Mollman buying drugs from Johnson. *Id.* Mollman refused, even though offered immunity from prosecution, but Mollman did record a conversation with Johnson in Johnson's home for the FBI. *Id.* at 169–70. The Supreme Court of Iowa suspended Mollman for thirty days, finding that Mollman obtained Johnson's incriminating statements by "dishonesty, deceit and misrepresentation."

attorney secretly recorded a conversation with a friend and former client. In both *Mollman* and *Smith*, the recording was made at the request of law enforcement and the conversation concerned an illegal drug deal.[50] While the Iowa Supreme Court suspended Mollman for thirty days, the Colorado Supreme Court suspended Smith for two years.[51] In a Tennessee case, *Cleckner v. Dale*,[52] the attorney secretly recorded a conversation with a client. The Tennessee Court of Appeals noted that the attorney's use of the secretly recorded conversation against the client was unethical.[53] In *In re Wetzel*,[54] the Arizona Supreme Court disbarred an attorney for secretly recording conversations with a client and others, as well as for taking other unethical actions.[55]

Two cases concerned an attorney secretly recording a

Id. at 173.

49. People v. Smith, 778 P.2d 685 (Colo. 1989). While dependent on cocaine, Smith represented a client on a charge of possession of cocaine. *Id.* at 685. After the representation was over, law enforcement officers demanded that Smith help in investigating illegal drug sales or they would press criminal charges against Smith. The Colorado Bureau of Investigation (CBI) asked Smith to secretly record conversations. Smith did so after CBI agents told Smith that the secret recording would not violate the state legal ethics rules. Smith's former client was charged with selling cocaine to Smith, based on the information Smith had recorded. *Id.* at 686. The Colorado Supreme Court suspended Smith from the practice of law for two years, deciding that in secretly recording the former client, Smith was deceitfully attempting to secure leniency for himself, and Smith had previously been disciplined for violating the legal ethics code. *Id.* at 688.

50. *Mollman*, 488 N.W.2d at 170; *Smith*, 778 P.2d at 686.

51. *Mollman*, 488 N.W.2d at 173; *Smith*, 778 P.2d at 688.

52. Cleckner v. Dale, 719 S.W.2d 535 (Tenn. Ct. App. 1986). The court opined that for an attorney to secretly record a conversation without all parties' consent violated the state ethics rules, as does the attorney's use of the recorded information against the client. *Id.* at 537 n.1. In this case the attorney had secretly recorded a telephone conversation with a client. *Id.* at 537.

53. *Id.*

54. *In re* Wetzel, 691 P.2d 1063 (Ariz. 1984).

55. *Id.* at 1071. Wetzel, an Arizona attorney, secretly recorded telephone conversations with a client, an employee of the state bar who was investigating ethics claims filed against Wetzel, and opposing counsel in a case handled by Wetzel. *Id.* The court decided that the secret recording was unethical. *Id.* at 1072. Although Wetzel cited to a paragraph of Arizona ethics opinion 75-13 in his defense, that paragraph did not help Wetzel. *Id.* The opinion states that an exception to the general rule disallowing attorney secret recording does not include secret recording done to gather information that could be used later to impeach the speaker. *In re Wetzel*, 691 P.2d at 1072. Wetzel testified that he made the tapes to be prepared to later impeach the speaker. *Id.* Wetzel told the court he possessed tapes of conversations with parties to a case in which he had been an opposing party, but when produced, the tapes were blank. *Id.* The Arizona Supreme Court stated the secret recording and Wetzel's deceit regarding the blank tapes were sufficient to disbar Wetzel, even without other claims of unethical conduct. *Id.* at 1071–73.

conversation with a judge in the judge's chambers. In *People v. Selby*,[56] the Colorado Supreme Court disbarred Selby for the secret recording and for other ethics violations.[57] In *Iowa Supreme Court Board of Professional Ethics & Conduct v. Plumb*,[58] the Iowa Supreme Court declared the attorney's action of secretly recording a judge's conversation in the judge's chambers to be unethical and ordered that Plumb be publicly reprimanded.[59]

In Mississippi, the court's decision depends on whether the attorney lies about secretly recording a conversation or deceives the other party to the conversation. In *Mississippi Bar v. Attorney ST*,[60] the Mississippi Supreme Court ordered that an attorney be privately reprimanded after the attorney falsely denied that he was recording a telephone conversation with a potential witness.[61] However, in *Attorney M v. Mississippi Bar*,[62] the Mississippi

56. People v. Selby, 606 P.2d 45 (Colo. 1979).

57. *Id.* at 46. Selby, a criminal defense attorney, secretly audio-taped a preliminary hearing in a courtroom, a conference with the district attorney, and the judge in the judge's chambers. Selby used some of the recorded information in his motion to disqualify the judge. The Colorado Supreme Court disbarred Selby for secretly recording, for using "partial quotations out of context which falsely attributed to the court a purported bias which is totally unsupported by the record of the preliminary hearing," and because of his history of prior disbarment and private and public reprimands. *Id.* at 45, 47.

58. Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Plumb, 546 N.W.2d 215 (Iowa 1996).

59. *Id.* at 218. In *Plumb*, attorney Plumb was representing family members in a dispute, while Cleverly was representing the other party to the dispute. *Id.* at 216. After Cleverly withdrew from this representation, Plumb secretly recorded his conversation with Cleverly in Cleverly's chambers while Cleverly was "serving as a part-time magistrate and alternate associate judge." *Id.* at 216. The Iowa Supreme Court issued Plumb a public reprimand for violation of the ethics code, finding that the recorded information did not concern a "purely personal transaction." *Id.* at 217–18.

60. Miss. Bar v. Attorney ST, 621 So. 2d 229 (Miss. 1993).

61. *Id.* at 233. The issue in the case was "whether sanctions should be imposed against an attorney who vehemently denied to a potential witness with whom he was speaking on the telephone that he was recording the conversation, when, in fact, that conversation was being recorded." *Id.* at 230. The attorney had secretly recorded a conversation with an acting city judge and with the city police chief. The attorney lied to the police chief when the attorney told the police chief that their conversation was not being recorded. The Mississippi Supreme Court decided that the attorney had violated the state ethics rules and gave the attorney a private reprimand. *Id.*

62. Attorney M v. Miss. Bar, 621 So. 2d 220, 221 (Miss. 1992). In *Attorney M,* a patient's attorney called the patient's physician. The attorney later sent the physician a letter regarding the patient's treatment in which the attorney stated the physician might become a defendant. The attorney talked to the physician a second time. The attorney recorded both calls. The physician assumed, but did not know, that both calls were

Supreme Court found that secret recording by another attorney was not unethical. Attorney M recorded two telephone conversations with a physician. During the two calls, the attorney informed the physician that the physician might become a defendant and the physician assumed, but did not know, that the conversations were being recorded.[63] The court decided that surreptitious recording was not unethical where there was no "dishonesty, fraud, deceit, or misrepresentation."[64]

A case from New York and a case from Virginia involved an attorney advising a client on the legality of secretly recording a conversation. In *Mena v. Key Food Stores Cooperative, Inc.*,[65] the attorney advised an employee client on the legality of recording conversations with the employer and found a private investigator to help set up the recording.[66] The secret recording was not illegal because the employee was a party to the conversation and the New York Supreme Court for Kings County found that the attorney's conduct was not unethical.[67] In *Gunter v. Virginia State Bar*,[68] the husband's attorney suggested that the husband secretly record telephone calls in the marital home.[69] The Virginia Supreme

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recorded. *Id.* at 221–22. The attorney's actions were not unethical because they did not involve "dishonesty, fraud, deceit, or misrepresentation"; the physician assumed that he was being recorded, and the attorney had no improper purpose in making the secret recordings. *Id.* at 224–25.

63. *Id.* at 221–22.

64. *Id.* at 224–25.

65. Mena v. Key Food Stores Coop., Inc., 758 N.Y.S.2d 246 (N.Y. 2003).

66. *Id.* at 247. The issue was: "To what extent may a lawyer help his client secretly record telephone conversations with third parties without violating the Disciplinary Rules?" Key Food employees filed suit against Key Food alleging race discrimination. *Id.* After one of the plaintiffs asked her attorney whether it was legal to secretly record comments of Key Food's administrators, the attorney helped locate a private investigator who taught the employee how to make secret recordings. *Id.* The employee's secretly-made tape allegedly caught one of the administrators questioning whether an individual applying for a job "is a 'f*****g n****r,' whether she has dreadlocks and if she smells." *Id.* The court held that "the attorney's conduct, even had it involved more hands on participation than it actually did, should not be subject to condemnation under the disciplinary rules and does not warrant the extreme sanction of suppression or disqualification." *Key Food*, 758 N.Y.S.2d at 250. The court reasoned that a racial discrimination suit is the type of case in which secret recording is appropriate because without secret recording racial discrimination would be difficult, if not impossible, to prove. *Id.*

67. *Id.*

68. Gunter v. Va. State Bar, 385 S.E.2d 597 (Va. 1989).

69. *Id.* at 598–99. Mr. Zerkel retained Gunter to represent Zerkel when Zerkel was having marital difficulties; Gunter instructed a private investigator to install a device to

Court decided that the attorney's conduct was deceitful and therefore unethical.[70] In Virginia, it would be illegal to secretly record a telephone conversation without the consent of at least one party to the conversation unless Virginia were to recognize a spousal privilege that would allow one spouse to record conversations in the marital home. It appears that no reported decision from any Virginia court has ever considered whether there is such a spousal privilege. The husband's secret recording very likely may have been illegal.[71]

The Supreme Court of South Carolina decided in three cases that it was unethical for an attorney to secretly record a conversation. In the 1984 case of *In re Anonymous Member of South Carolina Bar*,[72] the Supreme Court of South Carolina held that the attorney had unethically secretly recorded a conversation with a witness to a car accident.[73] In *In re Warner*,[74] an attorney received a public reprimand for having a concealed tape recorder delivered to a client and directing the client to secretly record a conference with the judge.[75] In the 1991 case of *In re Anonymous Member of South Carolina Bar*,[76] the South Carolina Supreme Court held that the attorney was prohibited from secretly recording a conversation for any reason, even to take notes.[77]

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record all telephone calls at the Zerkel residence and without Mrs. Zerkel's knowledge. *Id.* The question considered by the Virginia Supreme Court was whether the secret recording of conversation by an attorney or at the attorney's direction violated the state ethics rules that prohibit an attorney from engaging in "conduct involving dishonesty, fraud, [or] deceit." *Id.* at 600. The court held that the practice was unethical because it was deceitful; Gunter's license was suspended for thirty days. *Id.* at 598.

70. *Gunter*, 385 S.E.2d at 600.

71. *See* CLIFFORD S. FISHMAN, WIRETAPPING AND EAVESDROPPING § 7.13 (2d ed. rev. vol. 2004) ("Consensual recording does not constitute surreptitious listening.").

72. *In re* Anonymous Member of S.C. Bar, 322 S.E.2d 667, 669 (S.C. 1984).

73. *Id.* at 669. An attorney's cousin retained the attorney to represent the cousin in a car accident. *Id.* at 668. The attorney secretly recorded a conversation with the driver of the other car; the attorney identifying himself as a cousin of the injured driver but not as an attorney. *Id.* The Supreme Court of South Carolina, in addition to deciding that the secret recording was unethical, found that the attorney's failure to identify himself as an attorney was unethical because it was a misrepresentation. *Id.* at 669.

74. *In re* Warner, 335 S.E.2d 90, 91 (S.C. 1985).

75. *Id.* at 91. The attorney, who was representing a client in a divorce case, gave the client a hidden tape recorder to record a conference with the judge in the case. *Id.* at 90. Apparently, the reason for recording the conference was to obtain evidence of judicial impropriety. *Id.*

76. *In re* Anonymous Member of S.C. Bar, 404 S.E.2d 513 (S.C. 1991).

77. *Id.* at 514. The issue in this case was "whether an attorney may utilize a recording

Following the 1991 case, the South Carolina Attorney General petitioned the Supreme Court of South Carolina to allow exceptions to the ban on secret attorney recording in criminal investigations.[78] The court held that "it is not unethical for an attorney to surreptitiously record any conversation when that recording is made with the prior consent of, or at the request of, an appropriate law enforcement agency in the course of a legitimate . . . investigation."[79]

The issue of whether attorneys should be allowed to secretly record conversations has generated much debate. The following section explores the reasons for allowing and prohibiting the practice.

IV. WHY DO SOME STATES PROHIBIT SECRET ATTORNEY RECORDING AND OTHER STATES ALLOW THE PRACTICE?

There are sound reasons to prohibit an attorney from secretly recording a conversation. One-fifth of the states criminalize the surreptitious recording of a private conversation; thus, in those states it would be unethical as well as illegal for an attorney to secretly record a conversation.[80] If one party to a telephone conversation made between persons in separate states records the conversation, and one of the parties is in a state that criminalizes secret recording, the party recording may be doing so illegally.

Moreover, the purpose of ethics rules is to promote high standards in the legal profession, and secret recording is contrary to this purpose. Secret recording violates basic ideals promoted by the ethics rules: justice, integrity, and fairness. A person whose conversation has been secretly recorded by an attorney may feel that the attorney has tricked the person by failing to inform the person that the conversation was being recorded. Consequently,

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device without prior knowledge and consent of all parties to the conversation, as an alternative means of taking notes." *Id.* The court held that an attorney was prohibited from secretly recording conversations. *Id.*

78. *In re* Att'y Gen.'s Petition, 417 S.E.2d 526, 526–27 (S.C. 1992).

79. *Id.* at 527.

80. *See* Carol M. Bast, *What's Bugging You? Inconsistencies and Irrationalities of the Law of Eavesdropping*, 47 DEPAUL L. REV. 837, 851 (1998) ("Every state, except Vermont, has some type of eavesdropping or wiretapping statute, as does the District of Columbia."); *see, e.g.*, Nissan Motor Co., Ltd. v. Nissan Computer Corp., 180 F. Supp. 2d 1089, 1097 (C.D. Cal. 2002) (finding that recording another attorney without consent regarding the progression of a case is both illegal in California and unethical).

secret recording would lessen confidence in attorneys. One cannot make an informed decision whether to discuss certain matters if one is not informed that the conversation is being recorded. A party may legitimately desire to record a conversation in anticipation of litigation. The party might be tempted to manipulate a potential witness into making statements favorable to the party's case if secret recording were allowed.

Additionally, recording a conversation with a client seems to run contrary to the attorney's duty of attorney-client confidentiality. For example, recorded information could be prejudicial to a client's case. If an opponent discovers that conversations have been secretly recorded, the recorded information may be forced to be disclosed to the disadvantage of the client.

Similarly, mediation is an example of the legal system trend to settle disputes without resorting to time-consuming and expensive litigation. An individual may be less willing to reveal information in connection with mediation if the individual suspects that the attorney is secretly recording the conversation. Opposing counsels are expected to have frank discussions that may lead to settlement. Open discussion may be inhibited, however, if attorneys are permitted to record conversations with opposing counsel.

Ethical standards generally exceed legal standards; simply because conduct is legal does not make that conduct ethical for an attorney. One reason for high ethics standards is to promote public confidence in attorneys and in the legal system. Even if not unethical, it is arguably unprofessional for an attorney to secretly record a conversation.

Even in those states where secret recording is not illegal, some consider secret recording a deceptive practice. Society views secret recording as a dishonest and deceitful activity, with the person who made the recording able to use the recorded statements if it helps the person's case and able to conceal the existence of the recording where it is a detriment. People assume that their conversations are not being recorded unless they have consented to being recorded and may feel a loss of dignity upon learning that they were recorded. Thus, prohibiting secret recording comports with present societal expectations. Two individuals speaking in a home, in a private office, or over the telephone expect privacy and do not expect that their conversation is being recorded. One does not expect that conversations are

routinely recorded and thus may be overly frank or emotional, and later regret something one said. People have the feeling that the purpose of a secret recording is to trick them into saying something they would not feel free to say had they known they were being recorded. They may feel threatened by the potential use of the recording to highlight minor inconsistencies between recorded statements and later statements, making them appear less than truthful.

A potential problem for the attorney who records is that, if the individual who is recorded feels a sense of outrage on learning of the recording, the individual may very well associate a bad motivation with the attorney's action. Even if the attorney simply took the pragmatic path by recording as the easiest way to gather evidence, without any thought of emotionally injuring the individual being recorded, the individual may very well ascribe to the attorney a desire to "embarrass, delay or burden" the individual, which is prohibited under Model Rule 4.4,[81] or the presence of "dishonesty, fraud, deceit or misrepresentation," which is prohibited under Rule 8.4(c).[82] Thus, the attorney who records runs the very real risk of being accused of violating ethics rules and of having the individual who was recorded attribute a bad motive to the attorney.

On the other hand, there are a number of reasons for permitting an attorney to secretly record a conversation. First, the majority of states and the federal government allow recording with one-party consent. The practice of recording conversations is widespread and many people anticipate that some conversations will be recorded. For example, customers calling businesses are routinely warned that the telephone call may be recorded. Technological advances make it easy to record conversations. The individual's expectation of privacy has decreased with technological advances that easily allow secret recording of conversations.

Second, there are many legitimate reasons for recording information, and recording has become a valuable investigative tool, especially when what was said is crucial. The recording memorializes the exact wording of the disclosure, as well as the context of the statement and the tone of the speaker. The

81. MODEL RULES OF PROF'L CONDUCT R. 4.4 (2007).
82. *Id.* R. 8.4(c).

interviewee suffers no greater loss of privacy if the interview is recorded than if it is not, and the interviewer may treat the interviewee with additional respect, knowing that the interview is recorded. Many times, the interviewee will never know that the interview was recorded and, generally, the recording will not be used unless a later statement differs materially from a recorded statement. However, a key witness may not consent to being interviewed if the interview is to be recorded.

More importantly, the recorded information may be the only evidence available to prove criminal or tortious activity, and in many instances what was said is crucial to a case. Thus, there are strong public policy reasons for allowing police officers to gather evidence of crime; namely, allowing defendants to be convicted of violating criminal statutes. There are also equally strong reasons for potential plaintiffs to gather evidence of torts, namely, to collect damages from those responsible for harm. For example, one of the essential elements of some crimes is a certain type of statement made by the defendant and, for those crimes, conviction may be almost impossible without reliable evidence of what the defendant said. Crimes based on these types of statements include extortion, bribery, and perjury, and a recording of the offending statement may be crucial to a conviction. By the same token, one of the essential elements of some torts is a certain type of statement made by the defendant. Without a recording of the offending statement, the plaintiff's description of what the defendant said may very well be disbelieved. Tortious activity based on these types of statements may include sexual harassment, race discrimination, and housing discrimination. Also, a recording may contain evidence necessary to impeach a witness.

In addition, recording provides reliable evidence if there is a dispute later as to what was said in a conversation.[83] Recording

83. Of course, the reliability of the recorded information assumes that the tape was properly made and has not been altered. The Court of Appeals for the Eighth Circuit has specified seven foundational requirements for admission of recorded information. The party seeking to use the recorded information as evidence must show that:

- the recording device was capable of taking the conversation now offered in evidence;
- the operator of the device was competent to operate the device;
- the recording is authentic and correct;
- changes, additions or deletions have not been made in the recording;
- the recording has been preserved in a manner that is shown to the court;

saves time for attorneys by allowing the attorney to record a conversation instead of taking notes. There may be little difference between a participant taking detailed notes of a conversation and recording the conversation, except that the recorded information is more accurate.

An attorney is also charged with the obligation to represent the client zealously.[84] It would seem that this obligation is not being met where the contents of a recording would make a significant difference in the results achieved for the client. A non-client who talks to an attorney should suspect that what the non-client says will not be kept in confidence and the conversation may very well be secretly recorded. When an attorney is taking a witness's statement, the witness might expect that the attorney may be recording the statement. An individual speaking with an attorney might reasonably expect that the conversation is being secretly recorded.

Finally, some have argued that criminal defense attorneys should be allowed to record conversations so as not to be put at a disadvantage where law enforcement attorneys are allowed to record conversations.[85] If law enforcement attorneys and criminal defense attorneys can secretly record conversations without their conduct being unethical, then other attorneys should be allowed to do the same thing.

As illustrated above, there has been a great deal of discussion over the years concerning whether an attorney should be allowed to secretly record a conversation. Currently, a change in wording between the Code and the Model Rules indicates that secret attorney recording is permissible. The Code previously directed that attorneys "[s]hould [a]void [e]ven the [a]ppearance of [p]rofessional [i]mpropriety"[86]—but the present form of the

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- the speakers are identified; and
- the conversation elicited was made voluntarily and in good faith, without any kind of inducement.

United States v. McMillan, 508 F.2d 101, 104 (8th Cir. 1974).

84. *See* MODEL RULES OF PROF'L CONDUCT pmbl. (2007) ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.").

85. *See* Ariz. Bar Ass'n Comm. on the Rules of Prof'l Conduct, Op. 90-02 (1990) ("The committee believes that a serious imbalance would be created by permitting law enforcement attorneys and their agents to [record conversations] without allowing defense attorneys to do the same.").

86. MODEL CODE OF PROF'L RESPONSIBILITY Canon 9 (1983).

Model Rules does not include this language. Even though ethics rules prohibit attorneys from engaging in deceptive practices, not all secret recording is deceptive. When secret recording is not deceptive, attorneys should not be treated differently from others. Only secret recording that is deceptive or that violates an ethics rule should be prohibited.

The ethics rules of most jurisdictions reflect the Model Rules in prohibiting attorney "conduct involving dishonesty, fraud, deceit or misrepresentation."[87] Although the term "deceit" is open to interpretation, classifying secret attorney recording as per se unethical sweeps too broadly. Even the ethics opinions expressing distaste for attorney recording recognize a number of instances for which there should be exceptions to the prohibition against attorney recording. In addition, just because attorney recording seems "unfair," "distasteful," or "offends our sense of honor and fair play" does not mean that it is unethical.[88] The flavor of a number of ethics rules is that while attorney recording is not favored—and in many instances may be unprofessional—it is not unethical.

Therefore, a complete ban on secret recording by attorneys is too inclusive, and the improper use of secret recording can be dealt with under other ethics rules. Attorney recording can be unethical if done in violation of ethics rules. For example, it would be unethical under Rule 4.4 of the Model Rules if recording is a "means that [has] no substantial purpose other than to embarrass, delay, or burden a third person."[89] Likewise, it would be unethical for an attorney who is recording a conversation to deny that the conversation is being recorded. It would also be unethical

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87. MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2007).

88. Me. Bar Ass'n Prof'l Ethics Comm'n, Op. 168 (1999). The opinion reasons:

> We do not believe that the language of the rule can be read so broadly as to proscribe conduct simply because we are of the view that it is "unfair" or "not nice," or is "dishonorable." Such a broad reading of the rule could conceivably sweep in an array of conduct that was thought to be distasteful or unfair, even if not fraudulent or dishonest. In our view we are not authorized to apply this rule so as to prohibit conduct that we did not like or which we think might, in the words of the New York committee, "inhibit" the "easy flow of communication." We do not have a charter authorizing us to declare conduct to be unethical simply because we believe that it "offends our sense of honor and fair play" or because it will inhibit communication.

Id.

89. MODEL RULES OF PROF'L CONDUCT R. 4.4 (2007).

to record a conversation in those jurisdictions that require all parties' consent. Lastly, recording a client may be unethical if it breaches an attorney's duty of loyalty.

This section showed that there are legitimate reasons for permitting and prohibiting secret attorney recording. The following section provides some background on federal and state wiretapping and eavesdropping statutes.

V. WIRETAPPING AND EAVESDROPPING STATUTES

The question of whether it is ethical for an attorney to record a conversation is set against the backdrop of federal and state wiretapping and eavesdropping statutes. Federal statutes and a majority of state statutes allow face-to-face and telephone conversations to be recorded so long as one party to the conversation consents.[90] A minority of states are all-party consent states, making it illegal to record a conversation unless all parties to the conversation consent to being recorded.[91] Vermont is the sole state without a wiretapping or eavesdropping statute.[92]

State statutes in California, Delaware, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, New Hampshire, Pennsylvania, and Washington make these jurisdictions all-party consent states;[93] however, court interpretation of the Michigan statutes allows a party to the conversation to record the conversation.[94] Connecticut statutes require all parties' consent to record a telephone conversation, but not a face-to-face conversation, while Oregon statutes require all parties' consent to

90. *See* Carol M. Bast, *What's Bugging You? Inconsistencies and Irrationalities of the Law of Eavesdropping*, 47 DEPAUL L. REV. 837, 837–39, 927–30 (1998) (discussing the varying federal and state laws dealing with recording conversations).

91. *Id.*

92. *Id.* at 851, 930.

93. *Id.* at 869 & n.313. State statutes in California, Illinois, and Washington allow a private participant to record a conversation without all-party consent if the conversation involves a crime. *Id.* at 869.

94. Carol M. Bast, *What's Bugging You? Inconsistencies and Irrationalities of the Law of Eavesdropping*, 47 DEPAUL L. REV. 837, 878–81 (1998). The Illinois Supreme Court had created a similar exception to the Illinois statute until the Illinois Legislature amended the statute to foreclose this interpretation. People v. Nestrock, 735 N.E.2d 1101, 1107 (Ill. App. Ct. 2000). In Maryland, one court had held that an individual could not be liable under the state statute unless the individual knew the action was illegal. The highest Maryland court has since abrogated that case law exception. Deibler v. State, 776 A.2d 657, 658–59 (Md. 2001).

record a face-to-face conversation but not a telephone conversation.[95]

A common exception in the federal and state wiretapping and eavesdropping statutes allows a police officer or a police informant who is a party to the conversation to record the conversation. Although limited in certain respects, the exception that allows a participant under color of law to record a conversation exists in all-party as well as one-party consent states.[96]

The following section examines whether attorney recording is ethical in the various states.

VI. IS SECRET ATTORNEY RECORDING ETHICAL?

As described in the previous section, some states criminalize the secret recording of private conversations unless all of the parties to the conversation have consented.[97] In states requiring all-party consent, secret attorney recording clearly would be unethical as well as illegal. For example, a Connecticut ethics opinion prohibits an attorney from secretly recording a conversation because such recording is illegal in Connecticut.[98]

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95. Carol M. Bast, *What's Bugging You? Inconsistencies and Irrationalities of the Law of Eavesdropping*, 47 DEPAUL L. REV. 837, 927–30 (1998). Delaware, formerly an all-party consent state, passed new statutes in 1999 making it a one party consent state. DEL. CODE ANN. tit. 11, §§ 2401–09 (2007).

96. Carol M. Bast, *What's Bugging You? Inconsistencies and Irrationalities of the Law of Eavesdropping*, 47 DEPAUL L. REV. 837, 843–44, 869–71, 927–30 (1998).

97. *Id.* at 927–30.

98. Conn. Bar Ass'n Comm. on Prof'l Ethics, Informal Op. 98-9 (1998).

> We address the question of whether it is ethical for a Connecticut lawyer to surreptitiously record within Connecticut his or her oral private telephone conversations, using a recording device.
>
> Connecticut General Statutes Section 52-570d makes it illegal and civilly actionabl[e] for any person to secretly record an oral private telephone communication by means of an instrument, device or equipment, except under certain delineated circumstances.
>
> "A lawyer's conduct should conform to the requirements of the law ...." Preamble, Rules of Professional Conduct. Thus, if a lawyer surreptitiously records in Connecticut his or her oral private telephone conversation, outside any statutory exception, it is unethical. Rule 8.4.
>
> Even when a recording is made within one of the statutory exceptions, it would violate Rule 4.4 if a lawyer made the recording for no substantial purpose other than embarrassing the other party; and it would violate Rule 8.4(c) if a lawyer was deceitful by representing that recording was not being made.

States in which recording is legal upon one-party consent have taken a number of positions on whether secret attorney recording is ethical. At opposite extremes, some states perceive secret attorney recording as unethical conduct, with extremely limited exceptions,[99] while other states view secret attorney recording as not unethical. A number of states have taken a position somewhere between the two extremes. These middle positions range from finding secret attorney recording unethical but allowing recording in certain situations, to directing that the attorney's actions be examined on a case by case basis, to stating that attorney recording is not unethical unless the attorney lies, to finding secret attorney recording unprofessional but not unethical.

Aside from the states requiring all-party consent,[100] states differ widely in their response to whether secret attorney recording is unethical. As more fully detailed below, twelve states and the District of Columbia[101] have decided that secret attorney recording is not unethical, nine states have declared that secret attorney recording is unethical except in certain circumstances, five states have decided that the question should be decided on a case by case basis, and thirteen states appear not to have decided the issue.

Thus, a dozen states take the position that secret recording by an attorney is not necessarily unethical; however, whether secret recording is unethical is highly dependant on the circumstances. The attorney's action of secret recording may be unethical if it

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Id.

99. No state takes an unqualified position that secret attorney recording is unethical.

100. Carol M. Bast, *What's Bugging You? Inconsistencies and Irrationalities of the Law of Eavesdropping*, 47 DEPAUL L. REV. 837, 869 (1998) (listing California, Delaware, Florida, Illinois, Maryland, Massachusetts, Montana, New Hampshire, Pennsylvania, and Washington as states that require all-party consent to recording). Connecticut requires all-party consent to a telephone conversation and Oregon requires all party consent to a face-to-face conversation. *Id.*

101. D.C. Bar Ass'n, Op. 229 (1992). The opinion states:

> A lawyer who tapes a meeting attended by him, his client, and representatives of a federal agency investigating his client commits no ethical violation, even if he does not reveal that a tape is being made, so long as the attorney makes no affirmative misrepresentation about the taping. The agency reasonably should not expect that the preliminary phase discussions are confidential. The agency also should expect that such discussions will be memorialized in some fashion by the investigated party's attorney and that the record made may be used to support a claim against the agency.

Id.

involves dishonesty, deceit, or misrepresentation or if the attorney lies about whether the conversation is being recorded. Alabama,[102] Alaska,[103] Kansas,[104] Maine,[105] Minnesota,[106]

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102. *See* Ala. Bar Ass'n, Op. 1983-183 (1984), *available at* http://www.alabar.org/ogc/fopDisplay.cfm?oneId=320 ("[A]bsent fraud or deceit, it is not unethical, per se, for an attorney who is a party to a conversation with any person to make a recording of the conversation without prior knowledge and consent of all the parties thereto.").

103. Alaska Bar Ass'n Ethics Comm'n, Op. 2003-1 (2003) ("[E]lectronic recording of a telephone conversation by a lawyer without the consent of the other participants to the conversation is not per se unprofessional conduct if the recording is not prohibited by law or regulation. Undisclosed recording may, however, be unethical if conducted under circumstances, or the recording is used in a manner, that is otherwise prohibited by the Rules of Professional Conduct.").

104. Kan. Bar Ass'n Ethics Op. 96-9 (1997). The following is a journal's comment on the ethics opinion.

> The weight of authorities indicate absent statutes or other law to the contrary, the Model Rules do not per se prohibit attorneys from tape recording conversations of witnesses, clients or other persons without their knowledge or consent. Activities that might be ethical may not represent high standards of professionalism. The Model Rules do not make it dishonest to make such recordings, or have the client make such recordings at the attorney's direction. Nevertheless, the practice is fraught with peril and other Model Rules may be violated by the attorney, or by a client or agent if done on behalf of the attorney, if the recording otherwise violates the legal or property rights of another person.
>
> We believe secret tapings are unprofessional. Unprofessional conduct is to be avoided as much as is unethical conduct. In order to avoid such results, we suggest that clients and adversary counsel be advised, perhaps at the beginning of the matter, and in writing, that such recordings may occur from time to time . . . .
>
> Lawyers must act above-board with all persons at all times. If during a recorded conversation the other party asks if the conversation is being tape recorded, counsel must be truthful in counsel's response or MRPC 8.4(c)'s honesty requirements are implicated.

To Record or Not to Record, J. KAN. B. ASS'N 4 (Nov. 1997).

105. Me. Bar Ass'n Prof'l Ethics Comm'n, Op. 168 (1999) ("[W]e cannot find that electronically recording a conversation without the knowledge of the other participant(s) is *per se* prohibited by the text of the rule."). The commission added "the fact that the act of recording is not *per se* unethical still requires that the recording attorney's conduct must otherwise not be dishonest, fraudulent, deceitful or involve misrepresentation." *Id.*

106. Minn. Lawyers Prof'l Responsibility Bd., Op. 18 (1996) (repealed Apr. 18, 2002) (making it unethical for an attorney to secretly record a conversation). The Minnesota Lawyers Professional Responsibility Board repealed Opinion 18 because it "was doubtful about whether secret recording by itself continued to fall clearly within the deceit proscription of Rule 8.4(c)." Kenneth L. Jorgensen, *Opinion Barring Secret Recording of Conversations Is Repealed*, MINN. LAW., June 3, 2002, *available at* http://www.mncourts.gov/lprb/fc060302.html. The board cautioned that it is illegal to secretly record conversations in some states, that it is unethical to lie about whether a conversation is being recorded, and that it is inadvisable to secretly record a client's conversations. *Id.*

Mississippi,[107] Missouri,[108] North Carolina,[109] Oklahoma,[110] Tennessee,[111] Texas,[112] and Utah[113] are the twelve states that

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107. Miss. Bar Ass'n Ethics Comm., Op. 203 (1992) ("An attorney may ethically record telephone conversations of an opposing party without his knowledge or consent provided that such recording does not suggest dishonesty, fraud, deceit or misrepresentation and the information recorded is of the type one might reasonably expect to be taken down for future use."). *Id.*

108. An advisory opinion from the Missouri Bar provides:

> An attorney may record a conversation, to which the attorney is a party, without notifying the other parties to the conversation, unless other factors are present including, but not limited to: (1) laws prohibiting the recording in the jurisdiction in which the recording would occur, (2) the attorney states or implies that the conversation is not being recorded, or (3) the conversation involves a current client of the attorney.

Mo. Supreme Court Advisory Comm., Op. 123 (2006), *reprinted in Secret Electronic Recording of a Conversation with a Nonclient Is Not a Violation, Absent Other Circumstances*, 62 J. MO. B. 102 (2006).

109. N.C. Bar Ass'n Ethics Op. RPC 171 (1994). The opinion states:

> Inquiry:
> Is it unethical for an attorney to make a tape recording of a conversation with an opposing attorney regarding a pending case without disclosing to the opposing attorney that the conversation is being recorded?
> Opinion:
> No, it would not be a violation of the Rules of Professional Conduct. However, as a matter of professionalism, lawyers are encouraged to disclose to the other lawyer that a conversation is being tape recorded.

Id.

110. Okla. Adv. Op. 307 (1994). The opinion states:

> Whether recording without the knowledge or consent of the other party is deceptive and unethical is situation specific. While in most situations, recording will be permissible, some situations will dictate a different result. For example, if a lawyer by words or conduct entices someone into believing a conversation is confidential and for his or her ears only, yet the lawyer records the conversation and disseminates a transcription to others, then the lawyer has engaged in a deceptive practice. Moreover, a lawyer is bound to be truthful. Rule 8.4(c). Thus, if inquiry is made regarding tape recording, then the lawyer must be candid and truthful.

Id.

111. In *In re Tennessee Rules of Professional Conduct*, No. M2003-00354-SC-OT-RL (Tenn. Apr. 29, 2003), the Supreme Court of Tennessee amended the comment to Rule 4.4 and comment 5 to Rule 8.4, both of the Tennessee Rules of Professional Conduct. The comment to Rule 4.4 provides in part:

> [A] lawyer many not secretly record a conversation or the activities of another person if doing so would violate state or federal law specifically prohibiting such recording. Otherwise, this Rule does not prohibit secret recording so long as the lawyer has a substantial purpose other than to embarrass or burden the persons being recorded. It would be a violation of Rule 4.1 or Rule 8.4(c), however, if the lawyer stated falsely or affirmatively misled another to believe that a conversation or an activity was not

have decided that secret attorney recording is not unethical. In Alabama, Alaska, Kansas, Maine, Mississippi, Missouri, North Carolina, Oklahoma, Texas, and Utah, ethics opinions decide the issue, with the position also defined by case law in Alaska and Mississippi. On October 26, 2007, the Supreme Court of Alaska endorsed the state ethics opinion.[114] The Mississippi Supreme Court has spoken on this issue more than once. In one case, the Mississippi Supreme Court held that an attorney was permitted to secretly record a conversation;[115] however, in a later case, the Mississippi Supreme Court held that it was unethical for an attorney to lie when the person being recorded asked whether the conversation was being recorded.[116] An article in the *Maine Bar Journal* indicates that a sizable portion of Maine attorneys would

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being recorded. By itself, however, secret taping does not violate either Rule 8.4(c) (prohibition against dishonest or deceitful conduct) or Rule 8.4(d) (prohibition against conduct prejudicial to the administration of justice.).

Id. Comment 5 to Rule 8.4 provides: "The lawful secret or surreptitious recording of a conversation or the actions of another for the purpose of obtaining or preserving evidence does not, by itself, constitute conduct involving deceit or dishonesty." *Id.*

112. Tex. Comm. on Prof'l Ethics, Op. 575, 70 TEX. B.J. 265 (2006).

> The Texas Disciplinary Rules of Professional Conduct do not prohibit a Texas lawyer from making an undisclosed recording of the lawyer's telephone conversations provided that (1) recordings of conversations involving a client are made to further a legitimate purpose of the lawyer or the client, (2) confidential client information contained in any recording is appropriately protected by the lawyer in accordance with Rule 1.05, (3) the undisclosed recording does not constitute a serious criminal violation under the laws of any jurisdiction applicable to the telephone conversation recorded, and (4) the recording is not contrary to a representation made by the lawyer to any person.

Id.

113. Utah Ethics Comm. Op. 96-04 (1996). The opinion states in part:

> Recording conversations to which an attorney is a party without prior disclosure to the other parties is not unethical when the act, considered within the context of the circumstances, does not involve dishonesty, fraud, deceit or misrepresentation.
>
> . . . .
>
> . . . [I]t would be unethical for an attorney to fail to answer candidly if asked whether the conversation is being recorded.
>
> The lawyer's failure to identify himself, the client, or the purpose of the conversation could also constitute unethical misrepresentation.

Id.

114. State v. Murtagh, 169 P.3d 602, 617–19, 624 (Alaska 2007) (holding the provision of the Victims' Rights Act prohibiting secret recording of a victim or witness unconstitutional).

115. Attorney M v. Miss. Bar, 621 So. 2d 220 (Miss. 1992).

116. Miss. Bar v. Attorney ST, 621 So. 2d 229 (Miss. 1993).

favor some limit on secret attorney recording; however, the Maine Supreme Court has tabled the issue for the time being.[117] Until its repeal in 2002, a Minnesota ethics opinion generally prohibited secret attorney recording except in four circumstances.[118] The comments to the Tennessee Rules of Professional Conduct explicitly state that an attorney's secret recording of a conversation in and of itself is not unethical but the attorney's action may violate another Rule of Professional Responsibility.[119]

Oregon permits the secret recording of a telephone conversation with one party's consent, though it criminalizes secret recording of a face-to-face conversation without the consent of all parties.[120]

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117. Jeffrey A. Thaler, *An Attorney's Professional Responsibility for Non-Lawyer Staff and Consultants: Beware!*, 17 ME. B.J. 106, 108 (2002). Thaler reported that when an ethics committee proposed a rule banning secret attorney recording, "[t]he Supreme Court requested the Committee to gather more input from the bar." *Id.* Thaler then surveyed bar membership. "Although approximately 75 percent of the respondents wanted some form of prohibition of secret recordings, the Court has indefinitely tabled any such proposal." *Id.*

118. Minn. Lawyers Prof'l Responsibility Bd., Op. 18 (1996) (repealed Apr. 18, 2002). Opinion 18 had declared:

> It is professional misconduct for a lawyer, in connection with the lawyer's professional activities, to record any conversation without the knowledge of all parties to the conversation, provided as follows:
> 1. This opinion does not prohibit a lawyer from recording a threat to engage in criminal conduct;
> 2. This opinion does not prohibit a lawyer engaged in the prosecution or defense of a criminal matter from recording a conversation without the knowledge of all parties to the conversation;
> 3. This opinion does not prohibit a government lawyer charged with civil law enforcement authority from making or directing others to make a recording of a conversation without the knowledge of all parties to the conversation;
> 4. This opinion does not prohibit a lawyer from giving legal advice about the legality of recording a conversation.

Id.

119. TENN. RULES OF PROF'L CONDUCT R. 4.4 cmt. (2003).

120. *See* Or. Bar Ass'n Formal Op. 1999-156 (1999) (stating that recording without consent of all parties is a criminal act that is adverse to the attorney's ethical standards).

> The recording of a telephone or in-person conversation is subject to government regulation. *See, e.g.*, ORS 165.450(1)(a) (permitting the recording of telephone conversations to which the recorder is not a participant if at least one participant consents); ORS 165.540(1)(c) and (7) (prohibiting the recording of most private, in-person conversations unless all participants are informed); 18 U.S.C. § 2511(2)(c) and (d) (permitting the recording of phone conversations with the consent of a participant).
>
> An attorney who makes a recording in knowing disregard of statutory prohibitions to the contrary would be in violation of DR 7-102(A)(8), which prohibits an attorney

In contrast, nine states hold secret attorney recording to be generally unethical but provide for exceptions when secret attorney recording is permissible. These states are Arizona, Colorado, Idaho, Indiana, Iowa, Kentucky, New York, South Carolina, and Virginia. In a 1984 case, the Arizona Supreme Court disbarred an attorney for a number of ethics violations, one of which was secret recording.[121] The Colorado Supreme Court suspended an attorney from practice for two years for secretly recording a former client, even though the recording was done at the insistence of the Colorado Bureau of Investigation.[122] In another case the Colorado Supreme Court disbarred an attorney who had prior ethical violations when that attorney secretly recorded a judge in chambers and later mischaracterized what the judge had said.[123] The Iowa Supreme Court suspended an attorney for thirty days for secretly recording a former client at the behest of Federal Bureau of Investigation agents,[124] and issued a public reprimand to an attorney who secretly videotaped a judge in chambers.[125]

The exceptions in the nine states vary from state to state, with the most common exception allowing the prosecuting attorney or the defense attorney to secretly record conversations. Arizona,[126]

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from "knowingly engaging in other illegal conduct," even if a violation of DR 7-102(A) were not otherwise present. See also DR 1-102(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 to practice law."

If the substantive legal provisions do not prohibit a recording, however, and in the absence of conduct which would affirmatively lead an individual to believe that no recording would be made, Attorney may make a recording.

Id. (footnote omitted).

121. *See In re* Wetzel, 691 P.2d 1063, 1072 (Ariz. 1984) (determining "surreptitious" recordings by an attorney to be an ethical violation).

122. *See* People v. Smith, 778 P.2d 685, 687 (Colo. 1989) (deciding that an attorney violated the legal ethics code by secretly recording a former client at the insistence of the Colorado Bureau of Investigation).

123. *See* People v. Selby, 606 P.2d 45, 47 (Colo. 1979) (disbarring an attorney for secretly videotaping a judge for use as evidence in seeking to disqualify the judge).

124. *See* Comm. on Prof'l Ethics & Conduct of the Iowa State Bar Ass'n v. Mollman, 488 N.W.2d 168, 171 (Iowa 1992) (asserting that secretly videotaping was a misrepresentation, and deceitful, in violation of ethical rules).

125. *See* Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Plumb, 546 N.W.2d 215, 218 (Iowa 1996) (declaring an ethical violation where an attorney secretly videotaped former opposing counsel).

126. *See* Ariz. Bar Ass'n Comm. on the Rules of Prof'l Conduct, Op. 95-03 (1995)

Colorado,[127] and New York[128] allow recording by either the

(prohibiting an attorney from secretly recording another attorney and recognizing exceptions to the rule); Ariz. Bar Ass'n Comm. on the Rules of Prof'l Conduct, Op. 75-13 (1975) (recognizing four exceptions when an attorney can secretly record a conversation). The first exception is that an attorney may surreptitiously record "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." Ariz. Bar Ass'n Comm. on the Rules of Prof'l Conduct, Op. 75-13 (1975). The second exception is that an attorney may "secretly record a conversation in order to protect himself, or his client, from harm that would result from perjured testimony." *Id.* The third exception relates to criminal investigations, allowing "a prosecutor, or a police officer or investigator working directly with or under the supervision of the prosecutor, to secretly record conversations with informants and/or persons under investigation simply as a matter of self-protection." *Id.* However, this exception "does not authorize secret recordings for the purpose of obtaining impeachment evidence or inconsistent statements." *Id.* The fourth exception is that "secret recordings would be proper where specifically authorized by statute, court rule, or court order." *Id.*

Another Arizona opinion broadened the third exception to allow recording for impeachment purposes in addition to broadening the criminal law exceptions to allow a criminal defense attorney to secretly record a conversation. Ariz. Bar Ass'n Comm. on the Rules of Prof'l Conduct, Op. 90-02 (1990). Opinion 95-03 recognizes that the Opinion 75-13 exceptions were broadened by Opinion 90-02 and prohibits an attorney from secretly recording another attorney.

> This opinion [90-02] broadened the conclusions of Opinion 75-13 in two respects. First, it stated that Opinion 75-13's distinction, in a criminal law setting, "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." Second, we extended the criminal law enforcement exceptions of Opinion No. 75-13 to lawyers retained to represent criminal defendants.

Ariz. Bar Ass'n Comm. on the Rules of Prof'l Conduct, Op. 95-03 (1995).

127. Colo. Bar Ass'n Ethics Comm., Op. 112 (2003). The opinion states the general rule: "Because surreptitious recording of conversations or statements by an attorney may involve an element of trickery or deceit, it is generally improper for an attorney to engage in surreptitious recording even if the recording is legal under state law." *Id.* The opinion recognizes two exceptions to this general prohibition against an attorney secretly recording conversations: "(a) in connection with actual or potential criminal matters, for the purpose of gathering admissible evidence; and (b) in matters unrelated to a lawyer's representation of a client or the practice of law, but instead related exclusively to the lawyer's private life." *Id.*

128. N.Y. State Bar Ass'n Comm'n on Prof'l Ethics Op. 515 (1979); N.Y. State Bar Ass'n Comm'n on Prof'l Ethics Op. 328 (1974). Opinion 328 made secret recording by an attorney unethical except in "extraordinary circumstances." N.Y. State Bar Ass'n Comm'n on Prof'l Ethics Op. 328 (1974); *see also* H.L. Hayden Co. of N.Y. v. Siemens Med. Sys., Inc., 108 F.R.D. 686, 690 n.5 (C.D.N.Y. 1985) (questioning the possibility of attorney involvement in secret recording by clients). Opinion 515 clarified the earlier opinion by stating "lawyers engaged in a criminal matter, representing the prosecution or a defendant, may ethically record a conversation with the consent of one party except where the purpose is to commit a criminal, tortious or injurious act." N.Y. State Bar Ass'n Comm'n on Prof'l Ethics Op. 515 (1979); *see also* Miano v. AC & R Adver., Inc., 148

prosecution or the defense in criminal matters. Indiana,[129] Iowa,[130] and Kentucky adopted ABA Opinion 337 and allow recording by attorneys for the government.[131] In addition, Kentucky, like Arizona, Colorado, and New York, allows recording by criminal defense attorneys.[132] South Carolina[133] and Virginia[134] allow an attorney to secretly record a conversation

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F.R.D. 68, 83 (S.D.N.Y. 1993) (determining that Formal Opinion 515 would find a pre-litigation secret recording taken by client with attorney's knowledge ethical so long as attorney was not assisting, directing, or participating in the secret recording).

129. Ind. Ethics Op. 1 (2000). The 2000 opinion prohibits an attorney from secretly recording another attorney because it "does not uphold the respect for the legal system that is called for in the Preamble and other rules" and it is "fundamentally deceitful and dishonest." *Id.* The secret recording "cuts directly to the core of the relationship between counsel and will have a chilling effect on discussions between them." *Id.* In addition, the surreptitiously made recordings "violate standards of fairness, they undercut the need for candor in the legal profession and would inhibit the flow of communication in presumably private conversations among counsel." *Id.* A 1975 New York opinion had adopted ABA Opinion 337, which generally prohibited an attorney from secretly recording a conversation, except for a limited exception for prosecuting attorneys. Ind. Ethics Op. 2 (1975); *see also* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 337 (1974) (explaining that extraordinary circumstances may arise in which secret recordings are a necessary option for government attorneys).

130. Iowa Ethics Op. 83-16 (1982). The opinion adopted ABA Opinion 337, which generally prohibited an attorney from secretly recording a conversation, except for a limited exception for prosecuting attorneys. *Id.* (citing ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 337 (1974)) (allowing for exceptions to the general prohibition in extraordinary circumstances). In support of the general ban on secret recording, the opinion included the following reasoning:

> While the law is not clear or uniform as to recording by lawyers of conversations of "other persons," it is difficult to make a distinction in principle. If undisclosed recording is unethical when the party is a client or a fellow lawyer, should it not be unethical if the recorded person is a layperson? Certainly the layperson will not be likely to perceive the ground for distinction.

Id.

131. Ky. Ethics Op. E-279 (1984) (adopting ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 337 (1974)) (prohibiting an attorney from secretly recording a conversation, except for a limited exception for prosecuting attorneys). The Kentucky opinion allows a criminal defense attorney to record witnesses in a criminal case. *Id.*

132. *Id.*

133. S.C. Bar Advisory Ethics Op. 92-17 (1992) (relying on South Carolina Supreme Court decisions to prohibit an attorney from secretly recording a conversation except "when an attorney records a conversation made with the prior consent or at the request of an appropriate law enforcement agency in the course of a legitimate criminal investigation").

134. Va. Legal Ethics Op. 1738 (2000). The opinion states:

> [T]he committee is of the opinion that Rule 8.4 does not prohibit a lawyer engaged in a criminal investigation or a housing discrimination investigation from making

if involved in criminal investigation. Other exceptions are particular to individual states. In addition to the exception for criminal matters, Colorado allows attorneys to secretly record conversations in their private lives.[135] Idaho allows an attorney to secretly record a conversation with a client.[136] In addition to the exception for criminal matters, Virginia allows an attorney to secretly record a conversation involving a housing discrimination investigation or "involving threatened or actual criminal activity when the lawyer is a victim of such threat."[137]

New York is an interesting example of a state in which the basic question of whether an attorney can secretly record a conversation has been decided by the New York State Bar Association, a voluntary statewide bar association, and two other voluntary bar

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otherwise lawful misrepresentations necessary to conduct such investigations. The committee is further of the opinion that it is not improper for a lawyer engaged in such an investigation to participate in, or to advise another person to participate in, a communication with a third party which is electronically recorded with the full knowledge and consent of one party to the conversation, but without the knowledge or consent of the other party, as long as the recording is otherwise lawful. Finally, the committee opines that it is not improper for a lawyer to record a conversation involving threatened or actual criminal activity when the lawyer is a victim of such threat.

The committee recognizes that there may be other factual situations in which the lawful recording of a telephone conversation by a lawyer, or his or her agent, might be ethical. However, the committee expressly declines to extend this opinion beyond the facts cited herein and will reserve a decision on any similar conduct until an appropriate inquiry is made.

Id.

135. Colo. Bar Ass'n Formal Ethics Op. 112 (2003).

136. *Taping Conversations: 1991 Opinion #130 Said "No" but in What Situations Does This Apply?*, ADVOC., Aug. 1994, at 24, 24 (reprinting Idaho State Bar Ethics Comm., Op. 130 and seeking comments on the subject of surreptitious recording). Opinion 130 stated that it would be unethical for an attorney to secretly record a conversation with another attorney or with a witness because it would restrain settlement discussions, compel more formal discovery, and force more parties to trial; thus, secret recording would be "prejudicial to the administration of justice." *Id.* The distinction between recording an opponent and a client allowed an attorney to record conversations with a client. "[A]ll 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." *Id.* at 25. The opinion reached no conclusion as to whether it would be ethical for an attorney to secretly record a member of the public. *Id.*

137. Va. Legal Ethics Op. 1738 (2000); *see also* United States v. Smallwood, 365 F. Supp. 2d 689, 698 n.17 (E.D. Va. 2005) (considering ethics opinions in deciding whether a secret recording was unethical but indicating such opinions are non-binding authority).

associations, both based in New York City. As explained above, the New York State Bar Association allows secret attorney recording, but only in criminal matters by the prosecuting attorney and the defense attorney.[138] In 1993, the New York County Lawyers' Association issued an opinion that secret attorney recording was not "deceitful per se," although the attorney's action may be unethical if it is misleading or the attorney lies about whether the conversation is being recorded.[139] In 2004, the Association of the Bar of the City of New York issued an opinion stating that although "undisclosed recording entails a sufficient lack of candor and a sufficient element of trickery as to render it ethically impermissible as a routine practice," secret recording is permissible "if the lawyer has a reasonable basis for believing that disclosure of the taping would significantly impair pursuit of a generally accepted societal good."[140]

Hawaii,[141] Michigan,[142] New Mexico,[143] Ohio,[144] and

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138. N.Y. State Bar Ass'n Comm'n on Prof'l Ethics Op. 515 (1979); N.Y. State Bar Ass'n Comm'n on Prof'l Ethics Op. 328 (1974).

139. N.Y. County Lawyers' Ass'n Ethics Op. 696 (1993).

140. Ass'n of the Bar of the City of N.Y. Formal Ethics Op. 2003-2 (2004).

141. Laureen K.K. Wong, *Disciplinary Counsel's Report*, 1995 HAW. B.J. 18, 18 (modifying Formal Ethics Opinion 13 from the Hawaii State Bar Association).

> The Board hereby rescinds its prior determination that all non-consensual tape recordings by a lawyer are unethical. Thus, a lawyer may record or cause to be recorded any conversation, whether by tape or other electronic device, without the consent or prior knowledge of all parties to the conversation, as allowed by law. The Board notes that while the non-consensual tape recording by a lawyer is no longer considered unethical per se, the underlying ethical considerations still remain in effect, and a lawyer's creation and/or use of such tape recordings may still be violative of one or more provisions of the Hawaii Rules of Professional Conduct. Such conduct is subject to a case by case review.

Id.

142. Mich. Ethics Op. RI-309 (1998). "Whether a lawyer may ethically record conversations without the consent or prior knowledge of the parties involved is situation specific, not unethical per se, and must be determined on a case by case basis." *Id.*; *see also* Katherine Maher, *Tale of the Tape: Lawyers Recording Conversations*, 15 PROF'L LAW. 10, 10 & n.11 (2004) (indicating that Michigan determines the ethical nature of the act on a case by case basis).

143. N.M. Advisory Op. 1996-2 (1996). The opinion states:

> In considering whether to engage in the secret recording of a conversation with a potential witness, the lawyer is presented with a number of ethical and practical questions. Will the act of recording likely lead to a controversy which could make the lawyer a witness, for example by making the lawyer's conduct or alleged misconduct an issue? Did the lawyer make any false statement to get the witness to talk? Did the

lawyer fail to disclose something obvious, fail to make clear the lawyer's role or position in the litigation? Is the witness represented by counsel, or likely to be represented by counsel, in connection with the litigation? Did the lawyer do or say anything which might mislead the witness? Did the lawyer's actions trick or coerce the witness in any way?

There may be circumstances in which a lawyer, consistent with the lawyer's duties and obligations, may be justified in making a secret recording of a conversation or an interview. If the lawyer determines that a secret recording is otherwise justified, the lawyer, must observe professional obligations, must disclose the secret recording whenever a failure to do so would be untruthful or misleading, and must respond honestly if questioned about the recording of a conversation.

It does not necessarily follow from the fact that the secret recording of conversations is lawful, that the making of secret recordings by or at the direction of an attorney is ethical. The Rules of Professional Conduct impose high standards of honesty and integrity on lawyers. The opinions of other bar committees dealing with the subject reflect great difficulty in deciding the extent to which otherwise lawful conduct may not be permitted within the scope of ethical rules applicable to lawyers. There are no clear guidelines when a lawyer may engage in the making of secret recordings, and the prudent lawyer should probably avoid it entirely. If a lawyer does engage in the making of secret recordings, special attention must be paid to the lawyer's ethical obligations at all stages in the making, disclosure and use of the secret recordings.

Id.; *see also* Katherine Maher, *Tale of the Tape: Lawyers Recording Conversations*, 15 PROF'L LAWYER 10, 10 n.13 (2004) (observing that the opinion stated there was a lack of clear guidelines for lawyers and that to determine if a lawyer's behavior is ethical, one must consider the lawyer's behavior in different stages of the act). A later opinion quoted approvingly from Opinion 1996-2 and stated: "The Rules of Professional Conduct preclude the secret recording of a witness interview by a lawyer, or anyone acting under the lawyer's control, if such a recording would involve deceiving the witness either by commission or omission." N.M. Advisory Op. 2005-3 (2005).

144. *See* Ohio Ethics Op. 97-3 (1997) (citing exceptions to surreptitious recordings).

Valid exceptions to prohibition on surreptitious recording include: prosecuting and law enforcement attorney exception (which applies to criminal law enforcement activity conducted in accordance with statutory, judicial, or constitutional authority); criminal defense attorney exception (which permits zealous representation to protect constitutional rights of a criminal defendant); and extraordinary circumstances exception (which might include attorneys' needs to defend themselves or their clients against wrongdoing by another). However, with these exceptions the burden would be upon each individual attorney to justify why the facts and circumstances surrounding the surreptitious recording did not violate DR 1-102(A)(4).

Although the accurate recall of information is important to attorneys in providing legal representation, this on its own does not persuade the Board to condone the routine use of surreptitious recordings in the practice of law. For those who wish to use taping as a way of assisting the memory, consent may be obtained. The fact that an attorney wants to hide the recording from the other person suggests a purpose for the recording that is not straightforward. Recordings made with the consent of all parties to the communication are consistent with the ideals of honesty and fair play, whereas recordings made by clandestine or stealthy means suggest otherwise.

Wisconsin[145] have decided that the issue concerning whether secret attorney recording is unethical should be decided on a case by case basis. The tenor of the ethics opinions from those states is that, while secret recording by an attorney is not per se unethical, the context of the recording may mean that the attorney has violated an ethics rule. The recording situations are fact-intensive

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Id.; *see also* Ohio State Bar Ass'n v. Stern, 817 N.E.2d 14, 18–19 (Ohio 2004) (showing difficulty in applying the exceptions to the generally unethical act of secret attorney recording).

145. Wis. Ethics Op. E-94-5 (1994). The opinion states:

> The State Bar of Wisconsin Professional Ethics Committee believes that the Rules of Professional Conduct do not support a blanket interpretation that generally either permits or prohibits secret recording by lawyers of telephone conversations. Whether the secret recording of a telephone conversation by a lawyer involves "dishonesty, fraud, deceit or misrepresentation" under SCR 20:8.4(c) depends upon all of the circumstances operating at the time. This determination is highly fact intensive and numerous factors are involved, including the prior relationship of the parties, statements made during the conversation, whether threatening or harassing prior calls have been made and the intended purpose of the recording. In this latter connection, it should be noted that section 968.31(2)(c) of the Wisconsin Statutes implicitly prohibits secret recordings "for the purpose of committing any criminal or tortious act . . . or for the purpose of committing any other injurious act." The secret recording of telephone conversations also may violate the Attorney's Oath, which requires lawyers to "abstain from all offensive personality."
>
> Different standards apply when the other party involved is a client. The fiduciary duties owed by a lawyer to a client and the duty of communication under SCR 20:1.4 dictate that statements made by clients over the telephone not be recorded without advising the client and receiving consent to the recording after consultation. Similarly, the secret recording of telephone conversations with judges and their staffs is generally impermissible. Courts are responsible for determining when and how a record should be made of activities in the court. Moreover, the Attorney's Oath requires lawyers to "maintain the respect due to courts of justice and judicial officers."
>
> Even in circumstances in which secret recording of telephone calls is permissible, lawyers should be very cautious in deciding whether to do so. In some circumstances, a recording of a telephone conversation may constitute "material having potential evidentiary value" that the attorney has an obligation to preserve or turn over to a prosecutor or opponent in litigation under SCR 20:3.4. In addition, the secret recording of telephone calls is offensive to many persons and may harm the attorney's reputation when such conduct is discovered.
>
> The foregoing considerations prohibit the routine secret recording of telephone conversations by lawyers and law offices. Whether any particular telephone call may permissibly be recorded depends upon the circumstances of that particular call. Thus, routine secret recording would almost certainly violate the Rules of Professional Conduct.

Id. (citations omitted).

and the burden may be on the attorney who secretly recorded to show that the attorney's conduct was not unethical.

The greatest number of states has not decided the issue. These states are Arkansas, Delaware, Georgia, Louisiana, Nebraska, Nevada, New Jersey, North Dakota, Rhode Island, South Dakota, Vermont, West Virginia, and Wyoming. The absence of a decision in these states may mean a variety of things. A state may not have issued an ethics opinion because secret attorney recording is not unethical, it may not have issued an ethics opinion because the issue had not been raised, or, it may not have issued an ethics opinion because the issue is adequately addressed in the state's ethics rules.

A few federal courts have considered whether an attorney who secretly recorded a conversation could claim that the conversation was protected from disclosure under the work product doctrine. Those courts found that where an attorney had secretly recorded a conversation, the attorney lost the protection of the work product doctrine because the conduct was unprofessional.[146] Another federal court found that protection of the work product doctrine was lost for a conversation that a client had secretly recorded on the advice of the attorney.[147]

Another issue has been whether it was ethical for an attorney to advise a client on the legality of secretly recording a conversation.

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146. *See* Otto v. Box U.S.A. Group, Inc., 177 F.R.D. 698, 701 (N.D. Ga. 1997) (discussing the effects of secretly recording witness interviews on the work-product doctrine).

> Secretly taped interviews with witnesses are considered unethical and do damage to the adversarial system, regardless of whether the attorney or the client operates the tape recorder. As the work-product doctrine protects documents and recordings in an effort to preserve a balanced and fair adversarial process, logic and simple fairness cannot permit the work-product privilege to be used to shield such damage. In an effort to preserve this balance, the Court finds that plaintiff unwittingly vitiated any work-product protection that would have attached to her taped conversation with a witness because she did so clandestinely.

Id.; *see also* Sea-Roy Corp. v. Sunbelt Equip. & Rentals, Inc., 172 F.R.D. 179, 184–85 (M.D.N.C. 1997) ("As a matter of policy and prudential construction, this Court determines that Rule 26(b)(3) requires a recording party to inform the person being recorded at the time of the recording in order to qualify the statement for work product protection.").

147. Ward v. Maritz Inc., 156 F.R.D. 592 (D.N.J. 1994). The court found that "[t]he unprofessional behavior of plaintiff's attorneys in counseling Ward to surreptitiously record conversations, during one of which she denied that the recording was taking place, should abrogate the protection of the work product doctrine." *Id.* at 598.

The states that have spoken on the issue allow an attorney to advise the client whether the action would be legal because the advice amounts to interpreting a statute. Arizona,[148] Iowa,[149] Mississippi,[150] New York,[151] and Texas[152] allow an attorney to advise a client on the legality of secretly recording a conversation. The question posed in Iowa involved domestic abuse cases. Owing

148. Ariz. Bar Ass'n Comm. on the Rules of Prof'l Conduct, Op. 2000-04 (2004). "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." *Id.*

149. Iowa Ethics Op. 98-28 (1999). The opinion, in its entirety, states:

> TAPE RECORDING: ADVISING CLIENT
> Opinion: Question has arisen as to the propriety of attorneys advising clients who are protected by court orders in domestic abuse cases that they may record contacts initiated by defendants in violation of such orders without telling the defendant or obtaining consent.
>
> It is the opinion of the Board that the Iowa Code of Professional Responsibility for Lawyers does not prohibit such conduct and it is believed that such advice may be given to clients provided they are parties to the conversation.

Id.; *see also* Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Plumb, 546 N.W.2d 215 (Iowa 1996) (deciding that a lawyer who secretly recorded a conversation with a lawyer—who was also a part-time judge—in the judge's chambers warranted only a public reprimand, because to find an ethics violation would require proof of the lawyer's intent to deceive or mislead the unknowing party).

150. Miss. Ethics Op. 203 (1992). The opinion advises that an attorney may not counsel a client to secretly record a conversation if the recording would be illegal. However, an attorney may "discuss the legal consequences of any proposed course of conduct with a client and assist the client to make a good faith effort to determine the validity, scope, meaning or application of the law." *Id.*; *see also* Netterville v. Miss. Bar, 397 So. 2d 878, 883 (Miss. 1981) (determining that a lawyer's surreptitious recording of a telephone conversation with a stockholder in a case against a corporation did not rise to the level of "dishonesty, fraud, deceit or misrepresentation," as the stockholder should reasonably have assumed that the conversation might be recorded).

151. *See* N.Y. State Bar Ass'n Ethics Op. 515 (1979) (addressing a situation where an attorney's client asks for legal advice on secretly recording a conversation).

> But counsel asked to advise concerning the legality of participant monitoring is not limited to restating the law; counsel can, of course, explain to the client whether in the particular context such monitoring is appropriate, having regard to its purpose, the parties involved, the time and place, the extent and nature of the conversation likely to be recorded, possible harmful social consequences and other pertinent considerations. If, for example, the client's purpose is to record a conversation with an employee who previously confessed to wrongdoing in order to gather incriminating evidence in convincing form, counsel may urge on the client that such conduct, although legal, might be unfair and might, indeed, infringe on the employee's rights.

Id.

152. Tex. Comm. on Prof'l Ethics, Op. 514, 59 TEX. B.J. 181 (1996).

to the particular public policy considerations in such cases, it is unclear if an attorney can advise a client concerning secret recording in other areas.[153] A Kentucky ethics opinion prohibits an attorney from suggesting that a client secretly record a conversation; however, the opinion allows an attorney to advise a client on the legality of the client secretly recording a conversation so long as the attorney does not violate any other ethics rule.[154] South Carolina prohibits an attorney from advising a client to secretly record a conversation,[155] but allows an attorney to advise a client on the legality of surreptitiously recording a conversation.[156] In Texas, the attorney can advise the client as to the legality of secretly recording a conversation, but the attorney may not suggest to the client that the client take an action that would be unethical for the attorney to take directly.[157] In Colorado, it is unclear whether an attorney may advise a client on the legality of secret recording, but the attorney may not direct others to secretly record; however, an attorney may use a recorded conversation where the client made the recording independent of

153. Iowa Ethics Op. 98-28 (1999).

154. *See* Ky. Legal Ethics Op. E-289 (1984) (quoting at length from New York State Bar Association Ethics Opinion 515 (1979)).

155. S.C. Bar Advisory Ethics Op. 91-14 (1991). The question posed to the South Carolina Bar Ethics Advisory Committee concerned whether an attorney could advise the client in a divorce action to secretly record the client's conversation with the spouse. The committee stated that the attorney could not do that and later included the following broad language in the opinion: "[N]o attorney should record, cause to be recorded, counsel a client to record or assist a client to record any conversation without the consent or prior knowledge of all parties to the conversation." *Id.* Thus, it is clear that an attorney may not advise a client in a divorce action to secretly record the client's conversation with a spouse. Because of the broad language, the prohibition on recording may extend to other types of legal matters. *Id.*

156. S.C. Bar Advisory Ethics Op. 92-17 (1992) (differentiating between an attorney interpreting a statute and instructing a client to secretly record a conversation).

157. *See* Tex. Comm. on Prof'l Ethics, Op. 514, 59 TEX. B.J. 181 (1996) (providing when it would be ethical for a lawyer to have his client secretly record a conversation). The ethics opinion states in relevant part:

> An attorney, however, may not circumvent his or her ethical obligations by requesting that clients secretly record conversations to which the attorney is a party. Under these circumstances, the attorney would be ethically required to advise the other parties of the electronic recording, in advance. An attorney may not solicit the aid of his or her clients to undertake an action that the attorney is ethically prohibited from undertaking.

Id.

any direction of the attorney.[158]

ABA Formal Opinion 01-422[159] did not address whether it was ethical for an attorney to advise a client on the legality of secretly recording a conversation. In addition, the opinion expressly avoided the often related issue of whether an attorney could play a role in an investigation that gathered facts through secretly recording conversations:

> The Committee does not address in this opinion the application of the Model Rules to deceitful, but lawful conduct by lawyers, either directly or through supervision of the activities of agents and investigators, that often accompanies nonconsensual recording of conversations in investigations of criminal activity, discriminatory practices, and trademark infringement.[160]

However, the ABA committee that authored Formal Opinion 01-422 seemed concerned about secretly recording conversations as part of an investigation. The committee stated: "We conclude that the mere act of secretly but lawfully recording a conversation inherently is not deceitful, and leave for another day the separate question of when investigative practices involving misrepresentations of identity and purpose nonetheless may be ethical."[161] The Kansas Bar Association has voiced a similar concern and emphasized that an attorney must carefully supervise employees and investigators.[162] A Missouri ethics opinion prohibits an

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158. Colo. Bar Ass'n Ethics Comm., Op. 112 (2003) (instructing attorneys on what advice they can give clients on making and using secret recordings).

> [A] lawyer generally may not direct or even authorize an agent to surreptitiously record conversations, and may not use the 'fruit' of such improper recordings. However, where a client lawfully and independently records conversations, the lawyer is not required to advise the client to cease its recording, nor to decline to use the lawfully- and independently-obtained recording.

Id.

159. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-422 (2001).

160. *Id.*

161. *Id.* (emphasis added).

162. Kan. Bar Ass'n Ethics Op. 96-9 (1997) (alerting attorneys that they may be liable for their employees' and agents' tactics when they secretly record conversations).

> [A] law firm is charged with assuring that if such tactics are used by independent contractors that they are used according to the ethics of the profession. Investigators cannot use the tapes or their content to harass or intimidate witnesses. Private investigators as agents for their employer sometimes record conversations for the accuracy of their reports back to their principals. We would hope that such recordings are made with the consent of the recorded party. However, this does not

attorney from having an agent or investigator secretly record a conversation.[163] A Virginia ethics opinion recognizes that "the conduct of undercover investigators and discrimination testers acting under the direction of an attorney involves deception and deceit."[164] Even so, the committee notes that "information would not be available by other means and ... an important and judicially-sanctioned social policy would be frustrated."[165] For that reason, the opinion concluded that the state ethics rules allow an attorney to advise third parties on the use of secret recordings in criminal and housing discrimination investigations.[166]

One step an attorney contemplating secretly recording a conversation should take is to review any ethics opinion applicable in their jurisdiction. The following section addresses the authoritativeness of ethics opinions.

VII. HOW AUTHORITATIVE ARE ETHICS OPINIONS?

The prior section reviewed state positions on whether secret attorney recording is unethical. Many states taking a position on this issue have done so through ethics opinions; only a few states have case law on the issue. An attorney usually contemplates secretly recording a conversation when the attorney suspects that

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always happen. Unless the attorney expressly instructs employees or independent contractors not to use such tactics, the attorney is responsible for such secret tapings.

Id.

163. Mo. Advisory Op. 970022 (2006). The opinion answered the following question:

QUESTION: May Attorney or Attorney's investigator take a taped statement from an unrepresented party or witness in a case without the knowledge of that party or witness?
ANSWER: It would be a violation of Rule 4-8.4(c), for Attorney to tape record a conversation without the other party's knowledge and consent. This is true whether Attorney tapes the conversation personally or through a representative or agent such as an investigator.

Id.

164. Va. Legal Ethics Op. 1738 (2000).

165. *Id.*

166. *Id.*

[I]t is not improper for a lawyer engaged in such an investigation to participate in, or to advise another person to participate in, a communication with a third party which is electronically recorded with the full knowledge and consent of one party to the conversation, but without the knowledge or consent of the other party, as long as the recording is otherwise lawful.

Id.

someone in the conversation will make a statement that would be beneficial to the client if preserved. Perhaps the client has a legitimate business reason for using the information or there is a public policy reason for doing so. In many states, all the attorney has to rely on in determining whether the attorney can secretly record the conversation is a state ethics opinion.

Ethics opinions are advisory in many states, including Arizona,[167] Colorado,[168] Ohio,[169] South Carolina,[170] and Wisconsin.[171] In Minnesota, "an attorney is not subject to professional discipline solely for violating a [Lawyers Professional Responsibility] Board opinion" without having violated a provision of the Minnesota Rules of Professional Conduct.[172] One author noted that the Lawyers Professional Responsibility Board was reviewing its opinions in light of the Minnesota Supreme Court holding that "an attorney cannot be disciplined simply on a violation of an opinion of the Lawyers Responsibility

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167. Ariz. Bar Ass'n Comm. on the Rules of Prof'l Conduct, Op. 95-03 (1995). "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." *Id.*

168. Colo. Bar Ass'n Ethics Comm., Op. 22 (1962) (addendum 1995). "Formal Ethics Opinions are issued for advisory purposes only and are not in any way binding on the Colorado Supreme Court, the Presiding Disciplinary Judge, the Attorney Regulation Committee, or the Office of Attorney Regulation Counsel and do not provide protection against disciplinary actions." *Id.* (emphasis removed).

169. Ohio Ethics Op. 97-3 (1997). The opinion states:

> Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office.

Id.; *see* Ohio State Bar Ass'n v. Stern, 817 N.E.2d 14, 18–19 (Ohio 2004) (refusing to adopt Ohio Ethics Opinion 97-3 despite agreeing with the principles of the ethics opinion).

170. S.C. Bar Advisory Ethics Op. 91-14 (1991). The opinion states: "Upon request by a SC Bar member, the Ethics Advisory Committee has rendered this opinion on the ethical propriety of contemplated conduct. This committee is not the disciplinary authority over attorneys in this state. Such authority is the SC Supreme Court." *Id.*

171. Wis. Ethics Op. E-94-5 (1994) ("Opinions and advice are limited to the facts presented, are advisory only and are not binding on the courts, the Board of Attorneys Professional Responsibility or members of the State Bar of Wisconsin.") (emphasis removed).

172. Charles B. Bateman, *Opinions of the Lawyers Board*, BENCH & B. MINN., Nov. 2002, at 12; *see also In re* Admonition Issued in Panel File No. 99-42, 621 N.W.2d 240, 245 (Minn. 2001) (stating that the violation of a Board opinion by itself does not lead to professional discipline).

Board."[173]

Although ethics opinions may offer some guidance, a court asked to adopt an ethics opinion may refuse to do so. For example, an Iowa ethics opinion prohibits an attorney from secretly recording conversations.[174] The single exception is for law enforcement attorneys, but that exception applies only in "extraordinary circumstances."[175] Two Iowa Supreme Court decisions have refused to adopt the opinion. In *Committee of Professional Ethics & Conduct of the Iowa State Bar Ass'n v. Mollman*,[176] the court found the opinion to be broader than the ethics rule. The court refused to adopt the opinion because it made all secret attorney recordings unethical rather than limiting unethical behavior to secret recording "involving dishonesty, fraud, deceit, or misrepresentation."[177] In *Iowa Supreme Court Board of Professional Ethics & Conduct v. Plumb*,[178] the Iowa Supreme Court again refused to adopt the opinion because of its breadth, opining that secret recording by an attorney must involve deceit or misrepresentation for the recording to be unethical.[179]

Similarly, in 2004 in *Ohio State Bar Ass'n v. Stern*, [180] the Supreme Court of Ohio refused to adopt Ohio Ethics Opinion 97-3, perhaps because of the particular facts of the case.[181] The court agreed with the principles of the ethics opinion, which generally viewed secret attorney recording as unethical, but declined to follow the ethics opinion;[182] on the other hand, the court did not accept the opportunity to establish its own rules

173. Charles B. Bateman, *Opinions of the Lawyers Board*, BENCH & B. MINN., Nov. 2002, at 12. The referenced Minnesota Supreme Court opinion is *In re Westby*, 639 N.W.2d 358, 368 (Minn. 2002).

174. Iowa Ethics Op. 83-16 (1982). "[N]o lawyer should record any conversation whether by tapes or other electronic device, without the consent or prior knowledge of all parties to the conversation." *Id.*

175. *Id.*

176. Comm. on Prof'l Ethics & Conduct of the Iowa State Bar Ass'n v. Mollman, 488 N.W.2d 168 (Iowa 1992).

177. *Id.* at 170, 172–73.

178. Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Plumb, 546 N.W.2d 215 (Iowa 1996).

179. *Id.* at 217–18 (deciding that the specific instance of secret recording in this case was unethical).

180. Ohio State Bar Ass'n v. Stern, 817 N.E.2d 14 (Ohio 2004).

181. *Id.* at 18–19.

182. *Id.* "[B]ased on the totality of the circumstances, we decline to focus on that opinion as a definitive guide for resolution of this particular case." *Id.* at 19.

concerning secret attorney recording.[183]

VIII. IS THERE A TREND TOWARD ALLOWING SECRET ATTORNEY RECORDING?

This section examines whether there is a trend toward allowing secret attorney recording. As shown in Appendix A, nine states consider secret attorney recording unethical because recording with less than all-party consent is illegal, thirteen states have not

183. *Stern*, 817 N.E.2d at 19. "[W]e have considerable misgivings about using this case to adopt definitive principles, with exceptions and rules of burden of proof, relative to surreptitious taping." *Id.*

In *Stern*, Stephen M. Stern was a prosecuting attorney investigating criminal allegations against Mary and Gary Smith. *Id.* at 15. Mary filed a grievance against Stern with the Ohio Office of Disciplinary Counsel (ODC). *Id.* Stern secretly videotaped his meeting with two investigators from ODC and lied when asked whether he was recording the meeting. Stern "had suffered serious multiple head injuries in a bicycle accident" four months prior to the meeting, which injuries later resulted in Stern being totally disabled. *Id.* at 15–16. The grievance did not result in disciplinary charges against Stern; Stern never used the videotape. Stern's successor discovered the existence of the tape, and the ODC filed a grievance against Stern concerning the secret recording. *Id.* at 21.

Because of the circumstances, the authorities were divided on whether Stern should be disciplined: the local bar association dismissed the grievance; the panel of the Ohio State Bar Association Ethics Committee, which investigated the charge, recommended that the charge be dismissed (with one panel member recommending public discipline); the Board of Commissioners on Grievances and Discipline recommended to the Supreme Court of Ohio that Stern be publicly reprimanded; a four-person majority of the court dismissed the charge against Stern; and the chief justice wrote a dissenting opinion joined by two justices. Ohio State Bar Ass'n v. Stern, 817 N.E.2d 14, 15, 17–18, 22 (Ohio 2004).

In his defense, Stern relied on the prosecutor and extraordinary circumstance exceptions to opinion 97-3. *Id.* at 16. The court found fault with applying the two exceptions to opinion 97-3, given the facts. As to the first exception the court explained, "[i]f we were to give unconditional approval to [Stern's] actions in this situation, we could be opening the door to parties advocating unwarranted and possibly even ludicrous extensions of our reasoning to other situations." *Id.* at 19. As to the second exception, the court reasoned that "[e]ven assuming that the circumstances . . . might be 'extraordinary,' . . . there is still the question of why [Stern] could not simply have acknowledged that he was making the tape when asked, rather than denying it." *Id.*

The court stated that the three significant factors in its decision were that Stern was involved in legitimate criminal investigations involving the Smiths and the Smiths attempted to curtail the investigations by filing the grievance against Stern. Stern had been the unjust target of ODC investigations in the 1980s, and Stern had suffered a serious head injury prior to the secret videotaping. *Id.* at 19–21. The dissenting opinion stated that Stern should have been publicly reprimanded and cautioned that the majority opinion could be interpreted to mean "that if a lawyer believes a complaint has been filed against him or her for politically motivated reasons, the lawyer is justified in expressly misrepresenting an important fact to those we have entrusted to investigate the complaint." *Stern*, 817 N.E.2d at 22 (Moyer, C.J., dissenting).

considered the issue, twelve states do not consider secret recording by an attorney unethical, nine states consider secret recording by an attorney unethical but recognize exceptions, and five states consider whether secret attorney recording is ethical or unethical on a case by case basis. Thus, just over one-half of the states have spoken on the issue and allow secret attorney recording, at least in some circumstances. These states hold a wide range of opinions, which might be characterized either as allowing or generally disallowing secret attorney recording, depending on the opinion. Perhaps this is the reason ethics opinions regarding secret attorney recording have been characterized inconsistently.

Ethics committees and state bar associations have characterized the ethics opinions in other states in wildly different ways to support their positions. For example, in 1992 the Alaska Bar Association Ethics Committee stated: "The ethical prohibition against surreptitious recording of telephone conversations is almost universally followed."[184] In 1995, the State Bar of Arizona stated: "This conclusion [to prohibit secretly recording conversations of opposing counsel] accords with the majority of committees and courts that have addressed the question."[185] On the other hand, a 1996 New Mexico ethics opinion found no clear majority position: "The question has been considered by a number of state and local committees, and a review of the opinions discloses a variety of different, and inconsistent conclusions."[186] In 2001, a federal court stated that the majority view was to find secret recording of a conversation of a witness with an attorney to be unethical.[187]

Because ABA ethics opinions are so influential, ABA Formal Opinion 01-422 may signal a trend toward allowing an attorney to secretly record a conversation. The Third Restatement of the Law Governing Lawyers is in accord with the ABA opinion.[188] A comment to the Restatement permits attorneys to secretly record conversations but "only when compelling need exists to obtain

184. Alaska Bar Ass'n Ethics Comm'n, Op. 92-2 (1992) (withdrawn Jan. 24, 2003).

185. Ariz. Bar Ass'n Comm. on the Rules of Prof'l Conduct, Op. 95-03 (1995).

186. N.M. Advisory Op. 1996-2 (1996).

187. Anderson v. Hale, 202 F.R.D. 548, 556 (N.D. Ill. 2001). That court also stated that every federal court to consider whether secret attorney recording was unethical relied on Formal Opinion 337. *Id.* at 555.

188. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 106 cmt. B (2000).

evidence otherwise unavailable in an equally reliable form."[189] As noted above, Alaska, Minnesota, Missouri, Tennessee, and Texas were influenced by ABA Formal Opinion 01-422 in changing their ethics opinions to allow secret attorney recording.[190] On October 27, 2006, the Council of the Virginia State Bar approved new comments 6 through 10 to Virginia Ethics Rule 8.4, which would allow an attorney to secretly record a conversation unless the recording would be illegal, would involve fraud or misrepresentation, or would violate an individual's rights.[191] The former comments discouraged an attorney from recording another attorney or a client.[192] The Supreme Court of Virginia invited public comment on the proposed comments through December 8, 2007.[193]

The following section examines the purposes of attorney ethics rules and the fit between the rules and the issue of whether it is ethical for an attorney to secretly record a conversation.

IX. ANALYSIS

What are the purposes of attorney ethics rules? The Preamble to the ABA Model Rules of Professional Conduct states: "A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."[194] First, ethics rules protect the interests of clients, safeguard the integrity of the legal system, and encourage high standards of attorney conduct. At times, the three purposes of ethics rules may conflict. This conflict is recognized in the preamble to the Model Rules: "Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living."[195]

189. *Id.*

190. *See supra* notes 23–27, and accompanying text.

191. Virginia State Bar, The Virginia Supreme Court Is Seeking Public Comment on a Proposed Amendment to Rule 8.4 of the Rules of Professional Conduct, http://www.vsb.org/site/regulation/proposed-amendment-to-the-comments-of-rule-84-of-the-rules-of-professional (last visited May 15, 2008).

192. *Id.*

193. *Id.*

194. MODEL RULES OF PROF'L CONDUCT pmbl. (2002 ed.).

195. *Id.*

Second, the legal profession is self-regulating and ethics rules provide a framework for evaluating licensed attorneys. An attorney who violates an ethics rule is subject to discipline. One of the purposes of the ABA promulgating the Model Rules was to encourage attorneys to police themselves and avoid regulation by state legislatures or by Congress. Intrusion by a legislature may happen if the public were to lose confidence in the bench and bar's ability to regulate attorneys.

In furtherance of these purposes, some ethics opinions contain an unqualified ban on secret attorney recording, while other opinions allow secret attorney recording without exception. These opinions are fairly easy to administer because the opinions set forth a bright line dividing permissible from impermissible conduct. In a jurisdiction with a ban on secret attorney recording, an attorney who secretly records a conversation has performed an unethical act. One would think that in a jurisdiction in which secret attorney recording is not per se unethical, an attorney need not worry about being disciplined for secretly recording a conversation. However, the attorney could be disciplined for some other reason related to the recording. For example, the attorney could be disciplined if the attorney lies when asked by one of the parties to the conversation if the conversation is being recorded; if the attorney's conduct involves fraud, deceit, or misrepresentation; or if the attorney violates an individual's rights. A person who takes offense at being secretly recorded could easily claim that the attorney's conduct involves fraud, deceit, or misrepresentation.

Other ethics opinions provide a number of exceptions irrespective of whether the general rule prohibits or allows secret attorney recording. For example, a New Mexico ethics opinion includes a number of questions the attorney might consider:

> Will the act of recording likely lead to a controversy which could make the lawyer a witness, for example by making the lawyer's conduct or alleged misconduct an issue?
>
> Did the lawyer make any false statement to get the witness to talk?
>
> Did the lawyer fail to disclose something obvious, fail to make clear the lawyer's role or position in the litigation?
>
> Is the witness represented by counsel, or likely to be represented by counsel, in connection with the litigation?
>
> Did the lawyer do or say anything which might mislead the witness?

Did the lawyer's actions trick or coerce the witness in any way?[196]

The opinion concluded that the "prudent lawyer should ... avoid [secret recording] entirely."[197]

Ohio created three exceptions to the ban on attorneys secretly recording conversations. The first two exceptions allow government attorneys engaged in enforcing criminal statutes and criminal defense attorneys to secretly record conversations. The third exception allows secret recording in extraordinary circumstances. These extraordinary circumstances "might include attorneys' needs to defend themselves or their clients against wrongdoing by another."[198] With each exception, the burden is on the attorney to justify the need for secret recording.[199]

Attorneys across the country do not agree on what is ethical and what is unethical on the issue of whether an attorney is permitted to secretly record a conversation. The differing approaches to this issue evidence the lack of consensus. What is the touchstone of ethical behavior when secret recording is concerned? Ethics rules should be based on norms commonly held by the community. Ethics rules record community-held beliefs and require future compliance with these beliefs. Consequently, the rules should guide an attorney in determining the limits of professional conduct; they should promote zealous representation of the client while at the same time prohibiting unfair or overreaching conduct.

Most attorneys police themselves by trying to conform to the state's disciplinary rules; many times an attorney may contact the state bar association ethics division to obtain an opinion as to whether planned conduct is ethical. In particular, confusion over whether secret attorney recording is unethical makes self-policing difficult, if not impossible.

Ethics opinions from a number of states direct that whether secret attorney recording is unethical will be decided on a case by case basis. These opinions offer little guidance to the attorney who believes that the only way to zealously represent the client is by secretly recording offending comments. Moreover, the advisory nature of ethics opinions is problematic in that the

196. N.M. Advisory Op. 1996-2 (1996).
197. *Id.*
198. Ohio Ethics Op. 97-3 (1997).
199. *Id.*

attorney does not know whether secret recording is ethical until a disciplinary case has been brought and decided. Few states have case law that makes secret attorney recording unethical.

Whether secret attorney recording is unethical may hinge on whether the action is illegal. Determining whether recording with the consent of one party to the conversation is legal is not particularly easy. Even in those states with statutes requiring all-party consent, there are statutory and case law exceptions to the all-party consent requirement. Interstate telephone calls present an additional problem. Recording with only one-party consent may be illegal if all party consent is required in either one of the states in which a party to the conversation is located.

Unfortunately, this uncertainty may lead to noncompliance. Disciplinary rules should put an attorney on notice of the conduct to be avoided; the rules should provide guidance. Disciplinary rules that are vague and overbroad create problems. Secret attorney recording is hampered in those situations in which there is a legitimate reason for the recording. An attorney who secretly records a conversation may be brought up on disciplinary charges even though this was not the intent of the state bar association. This may be because the recording occurred in a situation not envisioned by the state bar, or a situation in which the bar would have crafted an exception had the bar considered it.

Ideally, an attorney should be able to predict whether intended conduct is unethical. Difficulty in predicting whether intended conduct is unethical may lead to an attorney refraining from engaging in conduct not forbidden by the disciplinary rule, even if this would lead to less than zealous representation of the client. Another attorney may risk breaking the rule and being disciplined where the benefits flowing to the client are substantial.

Attorney ethics rules are designed to protect the public and to ensure that attorney conduct meets an adequate level of professionalism. As such, attorneys are disciplined when they do not comply with the ethics rules. Attorney discipline serves to deter the unprofessional conduct of the offending attorney and to send a warning to other attorneys that they may be disciplined for engaging in similar conduct. The legal system depends on the integrity of its attorneys and judges. Attorneys are also considered officers of the court. Generally, conduct mandated by a legal ethics code is higher than that required by criminal statutes.

An allegation that an attorney has engaged in unethical conduct is serious for the attorney. Obviously, sanctioning an attorney for unethical conduct is even more serious. The prohibition against secret attorney recording lacks a strong and stable foundation except in those states requiring all-party consent. The foundation is shaky for a number of reasons. The prohibition against secret attorney recording has generally been drawn from ethics rules prohibiting "dishonest" and "deceitful" conduct. To interpret dishonest or deceitful conduct as including secret attorney recording is a very broad reading of the ethics rule. Some would say that it is an overly broad interpretation of the rule. One can see by the many state positions on secret attorney recording that there is a wide divergence of opinion on the issue. In fact, heated debate is ongoing in a number of states. In many states an attorney runs a risk when secretly recording a conversation crucial to the client. The attorney cannot predict whether secret attorney recording is ethical or unethical. This unpredictability stems from the fact that many states have not spoken on the issue and many other states have ethics opinions that are advisory at best.

The purpose of attorney discipline rules should be to direct attorney behavior away from unseemly conduct and toward conduct that promotes the integrity of the legal system. However, the broad language of the ethics rule invites a court to interpret the rule at the judge's discretion.

A hard-line approach that prohibits secret attorney recording does not allow recording even in situations in which sound public policy should allow collection of such information. Several states have taken a case by case approach to secret attorney recording. It would seem that prudent attorneys would not dare to secretly record a conversation for fear of breaching the state ethics rule. An attorney on a lower moral plane may take the chance, hoping either that no one will discover a conversation has been secretly recorded or that the ethics rule will be interpreted to allow it.

In many states, severe sanctions may be imposed on an attorney even though the attorney has no notice and it is not clear that secret attorney recording is unethical. This is especially true in states that have not spoken on whether secret attorney recording is unethical and in states that take a case by case approach to determining whether secret attorney recording is unethical. A state could decide to discriminatorily enforce the state ethics rules

against an attorney secretly recording a conversation.

X. CONCLUSION

A complete ban on secret attorney recording is overbroad because there are many legitimate reasons for recording a conversation. Even Formal Opinion 337 recognized that government attorneys in criminal cases should be allowed to secretly record conversations upon one-party consent. States have recognized that criminal defense attorneys should also be allowed to secretly record conversations; otherwise, they would be placed at a distinct disadvantage compared with government attorneys who are allowed to record such conversations.

Strong public policy arguments support an attorney's ability to secretly record a conversation in certain situations. An attorney should be able make a secret record of a conversation to gather evidence of a crime. For example, Virginia allows an attorney to advise clients on secret recording in criminal and housing discrimination investigations. Those types of cases might be almost impossible to prove without secret recording. There are legitimate reasons for allowing secret recording to gather evidence of tortious activities, such as employment discrimination, sexual harassment, and trademark infringement. Secret recording may gather evidence useful for impeachment.

Many potentially unethical actions related to secret attorney recording can be dealt with by other ethics rules. For example, an attorney who lies when asked whether a conversation is being recorded can be disciplined under the ethics rule prohibiting dishonesty.

Permitting an attorney to secretly record a conversation does not mean that an attorney necessarily should secretly record conversations on a routine basis. Secret recording can create unanticipated problems for the attorney. The questions included in the New Mexico ethics opinion illustrate difficulties that may be associated with secret attorney recording. An ethics opinion might alert attorneys to special concerns raised by secret recording, as does the New Mexico ethics opinion.

Case law provides a number of situations in which attorneys have had disciplinary charges brought against them related to secret recording. Two common threads are attorneys secretly recording clients or former clients, and attorneys recording judges.

The attorney-client relationship and the attorney-judge relationship are special ones. Allowing an attorney to secretly record a conversation with a client or former client or a judge would seem contrary to the purposes of the ethics rules.

One of the basic tasks an attorney performs is to discuss an action contemplated by the client and advise the client on the legality and advisability of the action. It is anomalous for an attorney to be allowed to advise a client on the legality of the client's proposed action in most instances, yet not allow such advice where a client is contemplating secretly recording a conversation.

To promote the purposes of the ethics rules, the attorney should be given clear guidelines on whether it is ethical to secretly record a conversation. The purposes of the ethics rules are best served if the rules allow secret attorney recording where not illegal and when not in violation of other ethics rules. If advisable, the ethics rules could make exceptions prohibiting an attorney from secretly recording a client or former client and a judge.

XI. APPENDIX A

Summary of Opinions on Surreptitious Recording

ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-422 (2001).	Surreptitious recording is not per se unethical unless illegal or if the attorney falsely states that the conversation is not being recorded.
RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 106 cmt. B (2000).	Attorneys may surreptitiously record only if a compelling need exists.
Not Unethical.	Alabama, Alaska, Kansas, Maine, Minnesota, Mississippi, Missouri, North Carolina, Oklahoma, Oregon (for telephone conversations), Tennessee, Texas, Utah, and the District of Columbia.
Generally Unethical.	Arizona, Colorado, Idaho, Indiana, Iowa, Kentucky, New York, South Carolina, and Virginia.
Two-Party Consent Required.	California, Connecticut (for telephone conversations), Florida, Illinois, Maryland, Massachusetts, Montana, New Hampshire, Oregon (for face-to-face conversations), Pennsylvania, and Washington.
No Position.	Arkansas, Connecticut (for face-to-face conversations), Delaware, Georgia, Louisiana, Nebraska, Nevada, New Jersey, North Dakota, Rhode Island, South Dakota, Vermont, West Virginia, and Wyoming.
Evaluate on a Case by Case Basis.	Hawaii, Michigan, New Mexico, Ohio, and Wisconsin.

States Where Surreptitious Recording Is Not Unethical

Jurisdiction	Exceptions	Opinions/Rules
Alabama	Unethical if fraud or deceit involved.	Ala. Bar Ass'n, Op. 1983-183 (1984).
Alaska	Unethical if prohibited by other professional rules.	Alaska Bar Ass'n Ethics Comm'n, Op. 2003-1 (2003) (relying on ABA Formal Opinion 01-422).
District of Columbia		D.C. Bar Ass'n, Op. 229 (1992).
Kansas		Kan. Bar Ass'n Ethics Op. 96-9 (1997).
Maine	Unethical if prohibited by other professional rules.	Me. Bar Ass'n Prof'l Ethics Comm'n, Op. 168 (1999) (rejecting ABA Formal Op. 337).
Minnesota	Four exceptions, now repealed.	Minn. Lawyers Prof'l Responsibility Bd., Op. 18 (1996) (repealed Apr. 18, 2002) (relying on ABA Op. 01-422).
Mississippi	Unethical if fraud or deceit involved.	Miss. Bar Ass'n Ethics Comm., Op. 203 (1992).
Missouri	Unethical if fraud or deceit involved.	Mo. Supreme Court Advisory Comm., Op. 123 (2006), *reprinted in Secret Electronic Recording of a Conversation with a Nonclient Is Not a Violation, Absent Other Circumstances*, 62 J. MO. B. 102 (2006) (relying on ABA Formal Op. 01-422).
North Carolina		N.C. Bar Ass'n Ethics Op. RPC-171 (1994).
Oklahoma		Okla. Bar Ass'n, Op. 307 (1994) (rejecting ABA Formal Op. 337).
Tennessee		TENN. RULES OF PROF'L RESPONSIBILITY R. 4.4 cmt., 8.4 cmt. 5 (2003) (relying on ABA Formal Op. 01-422).
Texas		Tex. Comm. on Prof'l Ethics, Op. 575, 70 TEX. B.J. 265 (2006) (relying on ABA Formal Op. 01-422).
Utah		Utah Ethics Comm. Op. 96-04 (1996) (rejecting ABA Formal Op. 337).

States Where Surreptitious Recording Is Unethical, Except in Certain Situations

Jurisdiction	Exceptions	Opinions/Rules
Arizona	Four exceptions in Op. 75-13.	Ariz. Bar Ass'n Comm. on the Rules of Prof'l Conduct, Op. 2000-04 (2000); Ariz. Bar Ass'n Comm. on the Rules of Prof'l Conduct, Op. 95-03 (1995); Ariz. Bar Ass'n Comm. on the Rules of Prof'l Conduct, Op. 90-02 (1990); Ariz. Bar Ass'n Comm. on the Rules of Prof'l Conduct, Op. 75-13 (1975).
Colorado	Criminal matters or private matters of the attorney.	Colo. Bar Ass'n Ethics Comm., Op. 112 (2003) (rejecting ABA Formal Op. 01-422).
Idaho	Recording one's client.	Idaho State Bar Ethics Comm., Op. 130 (1991), *reprinted in Taping Conversations: 1991 Opinion #130 Said "No" but in What Situations Does This Apply?*, ADVOC., Aug. 1994, at 24.
Indiana	Prosecuting attorneys in extraordinary circumstances.	Ind. Ethics Op. 1 (2000); Ind. Ethics Op. 2 (1975).
Iowa	Government attorneys.	Iowa Ethics Op. 98-28 (1999); Iowa Ethics Op. 95-09 (1995); Iowa Ethics Op. 83-16 (1982).
Kentucky	Criminal defense attorneys recording witnesses.	Ky. Ethics Op. E-289 (1984); Ky. Ethics Op. E-279 (1984).
New York	Extraordinary circumstances or in criminal matters.	N.Y. State Bar Ass'n Comm'n on Prof'l Ethics Op. 515 (1979); N.Y. State Bar Ass'n Comm'n on Prof'l Ethics Op. 328 (1974).
South Carolina	Recording another attorney is permissible if the attorney is not a client or representing a client.	S.C. Bar Advisory Ethics Op. 92-17 (1992); S.C. Bar Advisory Ethics Op. 91-14 (1991); S.C. Bar Advisory Ethics Op. 83-01 (1983).
Virginia	Criminal investigations or housing discrimination investigations.	Va. Legal Ethics Op. 1738 (2000).

States Requiring Two-Party Consent to Record Surreptitiously

Jurisdiction	Limitations	Opinions/Rules
California		
Connecticut	Only applies to telephone conversations; no position for face-to-face conversations.	Conn. Bar Ass'n Comm. on Prof'l Ethics, Informal Op. 98-9 (1998).
Florida		
Illinois		
Maryland		
Massachusetts		
Montana		
New Hampshire		
Oregon	Only applies to face-to-face conversations; secret recording of telephone conversations is not per se unethical.	Or. Bar Ass'n Formal Op. 1999-156 (1999).
Pennsylvania		
Washington		

States Expressing No Position About Ethics of Surreptitious Recording

Arkansas, Delaware, Georgia, Louisiana, Nebraska, Nevada, New Jersey, North Dakota, Rhode Island, South Dakota, Vermont, West Virginia, and Wyoming.

States Evaluating Surreptitious Recording on a Case by Case Basis

Jurisdiction	Opinions/Rules
Hawaii	*Modification of Formal Opinion No. 30*, HAW. B.J., Nov. 1995, at 18.
Michigan	Mich. Ethics Op. RI-309 (1998).
New Mexico	N.M. Advisory Op. 2005-3 (2005); N.M. Advisory Op. 1996-2 (1996); N.M. Advisory Op. 1988-6 (1988).
Ohio	Ohio Ethics Op. 97-3 (1997).
Wisconsin	Wis. Ethics Op. E 94-5 (1994).