

# ATTORNEY ETHICS ADVISORY COMMITTEE

**Thursday December 19, 2019**

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**No. 2 Update and possible action regarding Former State Bar Ethics Opinions**

o Op. 95-03

Committee member Hon. Kim Ortiz will present information at the meeting.

## Memorandum

To: Attorney Ethics Advisory Committee  
From: Hon. Kimberly H. Ortiz, Pima County Superior Court  
Date: October 22, 2019  
Re: State Bar Ethics Opinion 95-03: Whether to modify Arizona’s current position that unrevealed recording of opposing counsel, with narrow exceptions, involves deception not aligned with Arizona ethical standards

### History:

In 1994, the ABA issued Formal Opinion 337 and concluded that secretly recording conversations was unethical. The ABA Committee on Ethics and Professional Responsibility further concluded that secret recordings violated the prohibition of “conduct involving dishonesty, fraud, deceit, or misrepresentation” found in DR 1-102(A)(4) of the Model Code. The Model Rules of Professional Conduct preserves the prohibition found in DR 102(A)(4) in Model Rule 8.4(c).<sup>1</sup>

In 2001, the ABA issued Formal Opinion 01-422, which withdrew Formal Opinion 337.<sup>2</sup> Opinion 01-422 held that secretly recording a conversation, if lawful, is not *per se* unethical. In other words, lawyers in one-party consent states may secretly record conversations and remain ethical under the Model Rules unless lawyers lie about recording; conversely, no dispute exists that lawyers in all-party consent states may not secretly record conversations, because it would be *both* illegal and unethical.

### Current Status (as most recent 2012 Congressional Research Service Report R42649):

Two states (Colorado and South Carolina) have rejected Formal Opinion 01-422 since its release. Six states (**Arizona**, Idaho, Indiana, Iowa, Kansas, and Kentucky) have not withdrawn prior opinions that declared secretly recording conversations *per se* unethical.<sup>3</sup> In **Arizona Ethical Opinion 95-03**, the State Bar of Arizona concluded that secretly recording conversations with opposing counsel was unethical in violation of 8.4(c). The Committee recognized four necessary exceptions in a criminal law setting in Opinion 75-13, which it did not overrule or revisit as of February 1995.

Thirteen states (Alabama, Alaska, Hawaii, Minnesota, Missouri, Nebraska, New York, Ohio, Oregon, Tennessee, Texas, Utah, and Vermont) agree with Formal Opinion 01-422.

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<sup>1</sup> Vana, Allison, *Attorney Private Eyes: Ethical Implications of a Private Attorney’s Decision to Surreptitiously Record Conversations*, University of Illinois Law Review Vol. 2003, p. 1616.

<sup>2</sup> *Id.*

<sup>3</sup> Doyle, Charles, *Wiretapping, Tape Recorders, and Legal Ethics* (2012)

In four states (Maine, Mississippi, North Carolina, and Oklahoma), opinions in line with Formal Opinion 01-422, but issued before its release, have not been withdrawn or modified.<sup>4</sup>

Three states (Nebraska, New Mexico, and Minnesota) are ambivalent. Nebraska refers to full disclosure as the “better practice.” New Mexico states that the “prudent New Mexico Lawyer” hesitates to record without the knowledge of all parties. And Minnesota cautions that secretly recording client conversations “is certainly advisable” in certain circumstances.<sup>5</sup>

Eleven states have yet to announce a position in response to Formal Opinion 01-422 (Arkansas, Connecticut, Delaware, Georgia, Louisiana, Nevada, New Jersey, North Dakota, Rhode Island, West Virginia, and Wyoming).<sup>6</sup>

The Restatement of the Law Governing Lawyers agrees with Formal Opinion 01-422. Under the Restatement, lawyers can secretly record conversations without the other party’s consent “if that recording does not violate the law of the relevant jurisdiction.”<sup>7</sup> However, a majority of federal courts considering this issue follow Formal Opinion 337.<sup>8</sup> For example, federal courts generally find that the act of secretly recording conversations undermines any work-product protection that may have existed in the recording.<sup>9</sup> In 1983, the Eleventh Circuit in *Parrot v. Wilson* stated that although the conduct “violates no law, the Code of Professional Conduct imposes a higher standard than mere legality.”<sup>10</sup>

## **Conclusion**

States that reject Formal Opinion 01-422 argue the need for confidentiality and openness inherent in an attorney’s duty.<sup>11</sup> Further, attorneys have a heightened duty for openness in communications with the court; clients, witnesses, and judges rely on the confidentiality of their communications with attorneys.<sup>12</sup> For example, in *People v. Smith*, the Colorado Supreme Court held that policy considerations concerning criminal investigations, which allow attorneys to secretly record conversations, undermines the foundation of trust and confidentiality that is essential to the attorney-client

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Vana, Allison p. 1616

<sup>8</sup> *Id.* At 1642

<sup>9</sup> *Id.* At 1640

<sup>10</sup> *Id.* At 1641; 707 F.2d 1262, 1272 (11<sup>th</sup> Cir. 1983) (footnotes omitted).

<sup>11</sup> *Id.* At 1615

<sup>12</sup> *Id.*

relationship.<sup>13</sup> Arguably, a breach of this trust inhibits lawyers from effective representation, and perhaps also undermines the integrity of the system.<sup>14</sup>

In jurisdictions agreeing with Formal Opinion 01-422, an analysis requiring a “flexible and contextual approach” has traction.<sup>15</sup> For example, in *Netterville v. Mississippi*, the “context-of-the circumstances” test ascertains whether an attorney’s conduct rises to the level of dishonesty, fraud, deceit, or misrepresentation as governed by Model Rule 8.3(c).<sup>16</sup> States will look to factors giving rise to the recording and the context in which the recording was used. This is particularly useful for public policy reasons where a lawyer may be urged by law enforcement to record a conversation.<sup>17</sup> On the other hand, contextually categorizing ethical violations may create too many exceptions, but exceptions *already* exist in jurisdictions which follow Formal Opinion 377. For example, in Arizona Opinion 95-03, there are four exceptions. Furthermore, forty states are one-party consent states, including Arizona.

**Arizona’s** current Op. 95-03 essentially tells lawyers that they can abide by law (in a one-party consent state) but be unethical in application, with limited exceptions. Arizona can adopt Formal Opinion 01-422 and join the states that agree with Formal Opinion 01-422 and the Restatement of the Law Governing Lawyers, implementing a “context-of-the-circumstances” analysis of attorney conduct, or reject Formal Opinion 01-422 maintaining its long-held position that Arizona attorneys do not expect their opponent to be recording their conversations.

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<sup>13</sup> *Id.* At 1620; 778 P.2d 685, 686-87 (Colo. 1989).

<sup>14</sup> *Id.* At 1617

<sup>15</sup> *Id.* At 1632

<sup>16</sup> *Id.*; 397 So. 2d 878 (Miss. 1981) (adopting “context-of-the-circumstances” approach).

<sup>17</sup> *Id.* At 1615

**Statutory Survey: Secret Tape Recordings**

The below chart does not include corresponding ethical rules because of the general preservation of prohibiting “conduct involving dishonesty, fraud, deceit, or misrepresentation” in the Model Code. *Forty* states including the District of Columbia are one-party consent states. In these states, a person can legally record conversations to which he/she is a party without informing the other parties. *Ten* states are all-party or two-party consent states. These states require consent of *all* parties to a conversation.<sup>18</sup>

- **One Party Consent:** Alabama, Alaska, *Arizona*, Arkansas, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont<sup>19</sup>, Virginia, West Virginia, Wisconsin, Wyoming, District of Columbia,
- **All Party Consent:** California, Florida, Illinois, Massachusetts, Michigan, Montana, New Hampshire, Oregon, Pennsylvania, Washington

*Below is a table cataloguing each state and its corresponding consent statute, ethical opinion<sup>20</sup>, as well updated case law.*

<i>State</i>	<i>Statute</i>	<i>Consent</i>	<i>Ethical Opinion</i>	<i>Updated Case Law</i>
<i>Alabama</i>	AL Code § 13A-11-30 (definition), § 13A-11-31 (penalty)	One Party	Ala. Opinion 84-22 (1984); Alabama Bar Op. 83-183 (1983)	<i>Chandler v. State</i> , 680 So.2d 1018 (Ala.Crim.App.1996)
<i>Alaska</i>	AK Stat § 42.20.310 (definition), § 42.20.330 (penalty)	One Party	Alaska Bar Ass’n Eth.Comm. Ethics Opinions No. 92-2 (1992) and No. 91-4 (1991)	<i>Palmer v. State</i> , 604 P.2d 1106 (1979)
<i>Arizona</i>	AZ Rev Stat § 13-3005, § 13-3012 (definition & penalty), § 12-731 (civil damages)	One Party	Op. 95-03	<i>State v. Morrison</i> (App. Div.1 2002) 203 Ariz. 489, 56 P.3d 63

<sup>18</sup> Doyle, Charles, *Wiretapping, Tape Recorders, and Legal Ethics* (2012)

<sup>19</sup> There are no specific statutes in Vermont addressing interception of communications, but the state’s highest court has held that surreptitious electronic monitoring of communications in a person’s home is an unlawful invasion of privacy. *State v. Geraw*, 795 A.2d 1219 (Vt. 2002); *State v. Brooks*, 157 Vt. 490 (Vt. 1991)

<sup>20</sup> Twelve states (Florida, Georgia, Maryland, Massachusetts, Nevada, New Hampshire, Rhode Island, South Dakota, Washington, and West Virginia) omit ethical opinions that were not efficiently located as of this date.

<b>Arkansas</b>	AR Code § 5-60-120 (definition & penalty)	One Party	ETHICS OPINION NO. 2003-1; AK Eth. Op. 91 4, 1991 WL 786535 (June 5, 1991)	<i>King v. State</i> , 2019, 571 S.W.3d 476, 2019 Ark. 114
<b>California</b>	CA Penal Code § 632 (definition & penalty), § 637.2 (civil damages)	All Party	Formal Opinion NO. 1966-5	<i>Flanagan v. Flanagan</i> , 41 P.3d 575 (Cal. 2002), Cal. Pub. Util. Code Gen. Order 107-B(II)(A)
<b>Colorado</b>	CO Rev Stat § 18-9-303 (wiretapping definition & penalty), § 18-9-304 (eavesdropping definition & penalty)	One Party	Formal Opinion 112	<i>People v. Selby</i> , 606 P.2d 45, 47 (1979); <i>People v. Smith</i> , 778 P.2d 685, 686, 687 (Colo. 1989)
<b>Connecticut</b>	CT Gen Stat § 53a-187 (definition), § 53a-189 (penalty), § 52-570d (civil definition & damages)	One Party	Conn. Bar Ass'n.Eth. Op. 98-9; CT Eth.; Op. 94-30 (Conn.Bar.Assn.), 1994 WL 780847	<i>Washington v. Meachum</i> (1996) 680 A.2d 262, 238 Conn. 692;
<b>Delaware</b>	11 DE Code § 2402 (wiretapping definition & criminal penalty), § 2409 (wiretapping civil liability), § 1335 (privacy violation definition & penalty)	One Party	The DSBA Ethical Committee has not issued any opinions on the eavesdropping statute	<i>U.S. v. Vespe</i> , 389 F. Supp. 1359 (D. Del. 1975)
<b>Florida</b>	FL Stat § 934.03 (definition & penalties)	All Party		<i>Thompson v. State</i> , App. 5 Dist., 731 So.2d 819 (1999)
<b>Georgia</b>	GA Code § 16-11-62, § 16-11-66 (definitions), §	One Party		<i>Otto v. Box USA Group, Inc.</i> 177 F.R.D. 698, 699 (N.D. Ga. 1997); <i>State v.</i>

	16-11-69 (penalty)			<i>Madison</i> , 311 Ga.App. 31, 714 S.E.2d 714; <i>State v. Cohen</i> , 2017, 302 Ga. 616, 807 S.E.2d 861
<b>Hawaii</b>	HI Rev Stat § 803-42 (definition & penalty), § 803-48 (civil damages)	One Party	Haw. Formal Opinion No. 30 (1988)	<i>State v. Graham</i> , 1989, 70 Haw. 627, 780 P.2d 1103.
<b>Idaho</b>	ID Code § 18-6702 (definition & penalty), § 18-6709 (civil damages)	One Party	Idaho Ethics Committee (Formal Opinion 130) (1989)	<i>State v. Hensley</i> , 2008, 187 P.3d 1227, 145 Idaho 852
<b>Illinois</b>	720 ILCS § 5/14-2 (definition), § 5/14-4 (penalty), § 5/14-6 (civil damages)	All Party	IL Adv. Op. 18-01	<i>People v. Clark</i> , 6 N.E.3d 154 (Ill. 2014); <i>Poris v. Lake Holiday Property Owners Ass'n, Inc.</i> , App. 3 Dist.2012, 358 Ill.Dec. 393, 965 N.E.2d 464
<b>Indiana</b>	IN Code § 35-31.5-2-176 (definition), § 35-33.5-5-5 (penalty), § 35-33.5-5-4 (civil damages)	One Party	Indiana State Bar Ass'n Op. 1 (2000)	<i>Edwards v. State</i> , App.2007, 862 N.E.2d 1254
<b>Iowa</b>	IA Code § 727.8 (eavesdropping definition), § 808B.1 (wiretapping definition), § 808B.2 (definition & penalty), § 808B.8 (civil damages)	One Party	Iowa State Bar Association (Opinion 83-16) (1983)	<i>Iowa State Bar Association Committee on Professional Ethics v. Mollman</i> , 488 N.W.2d 168 (1992); <i>Iowa Supreme Court Bd. Of Prof'l Ethics &amp; Conduct v. Plumb</i> , 546 N.W.2d 215, 216 (Iowa 1996)

<b>Kansas</b>	KS Stat § 21-6101 (definition & penalty), KS Stat § 22-2518 (civil damages)	One Party	Kansas Bar Ass'n Ethics Op. 96-9 (Secret Tape Recordings of Other Persons by Attorneys and Clients) (August 11, 1997).	<i>Walls v. Int'l PaperCo.</i> 192 F.R.D. 294, 298-99 (D. Kan. 2000)
<b>Kentucky</b>	KY Rev Stat § .010 (definition), § .020 (penalty)	One Party	Kentucky Committee on Professional Ethics (Opinion E-289); Ky. Opinion E-279 (1984)	<i>Wilson v. Lamb</i> , 125 F.R.D. 142 (E.D.Ky. 1989)
<b>Louisiana</b>	LA Rev Stat § 15:1303 (definition & penalties), § 15:1312 (civil damages)	One Party	Op. 158, 12 La. B.J. 217 (1964)	<i>State v. Lilly</i> , App. 1 Cir.2012, 111 So.3d 45, 2012-0008 (La.App. 1 Cir. 9/21/12)
<b>Maine</b>	15 ME Rev Stat § 709 (definition), § 710 (penalty), § 711 (civil damages)	One Party	Maine Professional Ethics Commission of the Bd. of Overseers of the Bar Op. 168 (March 9, 1999)	<i>Griffin v. Griffin</i> (2014) Me., 92 A.3d 1144
<b>Maryland</b>	MD Cts & Jud Pro Code § 10-402 (definition & penalty), § 10-410 (civil damages)	One Party		<i>Malpas v. State</i> , 695 A.2d 588 (Md. Ct. Spec. App. 1997)
<b>Massachusetts</b>	MA Gen L Ch 272 § 99 (definition, penalty, civil damages)	All Party		<i>Commonwealth v. Hanedania</i> , 51 Mass. Ct. App. 64, 742 N.E.2d 1113 (2001)
<b>Michigan</b>	MI Comp L § 750.539c (definition & penalty), 750.539h (civil damages)	All Party	State Bar of Michigan Standing Committee on Professional and Judicial Ethics	<i>Sullivan v. Gray</i> , 117 Mich. App. 476 (1982)



			Informal Op. CI-200; State Bar of Michigan Standing Committee on Professional and Judicial Ethics Op. RI-309 (May 12, 1998).	
<b>Minnesota</b>	MN Stat § 626A.02 (definition & penalty), § 626A.13 (civil damages)	One Party	Minn.Law.Prof. Resp.Bd. Opinion No. 18 (1996)	<i>Wagner v. Wagner</i> , D.Minn.1999, 64 F.Supp.2d 895
<b>Mississippi</b>	MS Code § 41- 29-531 (definition), § 41- 29-533 (penalty), § 41-29-529 (civil damages)	One Party	NO. 203	<i>Mississippi Bar v. Attorney ST.</i> , 621 So.2d 229 (Miss. 1993) (context of the circumstances test); <i>Attorney M. v. Miss. Bar</i> , 621 So. 2d 220, 223 (Miss. 1992)
<b>Missouri</b>	MO Rev Stat § 542.402 (definition & penalty), § 542.418 (civil damages)	One Party	Mo. Advisory Comm. Op. Misc. 30 (1978); Missouri Bar Ass'n Ethics Op. 123 (3/8/06)	<i>State v. Barrett</i> (App. S.D. 2001) 41 S.W.3d 561
<b>Montana</b>	MT Code § 45-8- 213 (definition & penalty)	All Party		<i>State v. Coleman</i> , 1980, 189 Mont. 492, 616 P.2d 1090
<b>Nebraska</b>	NE Code § 86- 290 (definition & penalty), § 86- 297 (civil damages)	One Party	No. 06-07	<i>U.S. v. Tangeman</i> , 1994, 30 F.3d 950
<b>Nevada</b>	NV Rev Stat § 200.620, § 200.650 (definitions), § 200.690 (penalty & civil damages)	One Party		<i>Mclellan v. State</i> , 2008, 182 P.3d 106, 124 Nev. 263; Nevada also has a one-party consent statute, but the state Supreme Court has

			interpreted it as an all-party rule.
<b>New Hampshire</b>	NH Rev Stat § 570-A:2 (definition & penalty), § 570-A:11 (civil damages)	All Party	<i>New Hampshire v. Locke</i> , 761 A.2d 376 (N.H. 1999); <i>State v. Moscone</i> (2011) 161 N.H. 355, 13 A.3d 137
<b>New Jersey</b>	NJ Rev Stat § 2A:156A-3, § 2A:156A-4 (definition & penalty), § 2A:156A-24 (civil damages)	One Party	New Jersey Advisory Committee on Professional Ethics, Op. 680 <i>Ward v. Maritz, Inc.</i> , 156 F.R.D. 592 (D.N.J. 1994)
<b>New Mexico</b>	NM Stat § 30-12-1 (definition & penalty), § 30-12-11 (civil damages)	One Party	N.M. Opinion 1996-2 (1996) (members of the bar are advised that there are no clear guidelines and that the prudent attorney avoids surreptitious recording) <i>State v. Templeton</i> , 2007, 142 N.M. 369, 165 P.3d 1145.
<b>New York</b>	NY Penal L § 250.00, § 250.05 (definition & penalty)	One Party	New York State Bar Ass’n Committee on Professional Ethics Op. 328 (1974). 13. The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics Op. 80-95 (1981). 14. New York County Lawyers’ Ass’n Committee on Professional Ethics Op. 696 (Secret Recording of Telephone

			Conversations) (July 28, 1993).	
<b>North Carolina</b>	NC Gen Stat § 15A-287 (definition & penalty), § 15A-296 (civil damages)	One Party	N.C. RPC 171 (1994) (lawyers are encouraged to disclose to the other lawyer that a conversation is being tape recorded)	<i>Sea-Roy Corp. v. Sunbelt Equip. &amp; Rentals, Inc.</i> , 172 F.R.D. 179 (M.D.N.C. 1997)
<b>North Dakota</b>	N.D. Cent. Code § 12.1-15-02 (definition & penalty)	One Party	Informal Op. 17 (July 14, 1975)	<i>Anderson v. Hale</i> , 159 F. Supp. 2d 1116, 1117 (N.d. Ill. 2001)
<b>Ohio</b>	Ohio Rev Code § 2933.52 (definition & penalty), § 2933.52 (civil damages)	One Party	Ohio Bd.Com.Griev.Disp. Opinion No. 97-3 (1997)	<i>McDonald v. Burton</i> (Ohio App. 2 Dist., Montgomery, 12-02-2011) No. 24274, 2011-Ohio-6178, 2011 WL 6009611
<b>Oklahoma</b>	13 OK Stat § 13-176.3, § 13-176.4 (definition & penalty); REPEALED	One Party	Okla.Bar Ass'n Opinion 307 (1994) (a lawyer may secretly record his or her conversations without the knowledge or consent of other parties to the conversation unless the recording is unlawful or in violation of some ethical standard involving more than simply recording)	N/A
<b>Oregon</b>	OR Rev Stat § 165.540 (definition & penalty), §	One Party	Ore.State Bar Ass'n Formal Opinion No. 1991-74 (1991) (an attorney with one party consent may	<i>State v. Rainey</i> (2018) 431 P.3d 98, 294 Or.App. 284

	133.739 (civil damages)		record a telephone conversation “in absence of conduct which would reasonably lead an individual to believe that no recording would be made”); Or. State Bar Op. 1999-56 (1999)	
<b>Pennsylvania</b>	18 PA Cons Stat § 5703, § 5704 (definition & penalty), § 5725, § 5747 (civil damages)	All Party	Philadelphia Bar Ass'n., Eth. Op. 90-21 (Dec. 1990)	<i>Lane v. CBS Broad., Inc.</i> , 612 F. Supp. 2d 623, 636-637 (E.D. Pa. 2009)
<b>Rhode Island</b>	RI Gen L § 11-35-21 (definition & penalty), § 12-5.1-13 (civil damages)	One Party		<i>Walden v. City of Providence</i> , R.I., 596 F.3d 38 (2010)
<b>South Carolina</b>	SC Code § 17-30-20, § 17-30-30 (definition & penalty), § 17-30-135 (civil damages)	One Party	S.C. Ethics Advisory Opinion 92-17 (1992); SC Adv. Op. 91-14 (July 1991)	<i>In re Attorney General's Petition</i> , 417 S.E.2d 526, 527 (S.C. 1992); <i>In re Anonymous Member of the S.C. Bar</i> , 404 S.E.2d 513 (S.C. 1991)
<b>South Dakota</b>	SD Codified L § 23A-35A-20 (definition & penalty)	One Party		<i>Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc.</i> , 144 F. Supp. 2d 1147 (D.S.D. 2001); <i>State v. Woods</i> , 1985, 361 N.W.2d 620
<b>Tennessee</b>	TN Code § 39-13-601, § 39-13-604 (definitions), § 39-13-602 (penalty), § 39-13-603 (civil damages)	One Party	Tenn.Bd.Prof.Resp. Formal Ethics Opinion No. 86-F-14(a) (1986).	<i>Lawrence v. Lawrence</i> , 2010, 360 S.W.3d 416; <i>U.S. v. Scaife</i> , 1984, 749 F.2d 338
<b>Texas</b>	Tex. Penal Code § 16.02 (definition &	One Party	Supreme Court of Texas	<i>Smith v. WNA Carthage, L.L.C.</i> , 200 F.R.d. 576, 578-79

	penalty), Tex. Civ. Prac. & Rem. Code § 123.004 (civil damages)		Professional Ethics Committee Op. 392 (Feb. 1978); Supreme Court of Texas Professional Ethics Committee Opinion Number 514 (1996)	
<b>Utah</b>	UT Code § 77-23a-4 (definition & penalty; civil damages), § 77-23b-8 (civil damages)	One Party	Utah State Bar Ethics Advisory Opinion No. 96-04 (1996) (“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>State v. Erickson</i> , 1986, 722 P.2d 756
<b>Vermont</b>	N/A	N/A	N/A	N/A
<b>Virginia</b>	VA Code § 19.2-62 (definition & penalty), § 19.2-69 (civil damages)	One Party	Virginia Legal Ethics Op. 1324 (Representing a Client Within the Bounds of the Law: Attorney Obtaining Non-Consensual Tape Recordings from Client) (Feb. 27, 1990); Virginia Legal Ethics Op. 1448 (Advising Client/Potential Civil	<i>Gunter v. Virginia State Bar</i> , 385 S.E. 2d 597, 622 (Va. 1989); <i>Haigh V. Matsushita Electric Corp.</i> , 676 F.Supp. 1332 (E.D.Va. 1987)

			Plaintiff to Record Oral Conversation with Unrepresented Potential Civil Defendant) (January 6, 1992); Virginia. Legal Ethics Op. 1635 (Attorney’s Tape Recording Telephone Conversation When Not Acting in Attorney Capacity) (February 7, 1995); Virginia Legal Ethics Opinion 1738 (Attorney Participation in Electronic Recording Without Consent of Party Being Recorded) (April 13, 2000).	
<i>Washington</i>	WA Rev Code § 9.73.030 (definition), § 9.73.080 (penalty), § 9.73.060 (civil damages)	All Party		<i>State v. Bliss</i> (2015) 191 Wash.App. 903, 365 P.3d 764
<i>West Virginia</i>	WV Code § 62-1D-3 (definition & penalty), § 62-1D-12 (civil damages)	One Party		<i>State v. Mullens</i> , 2007, 650 S.E.2d 169, 221 W.Va. 70
<i>Wisconsin</i>	WI Stat § 968.31 (definition, penalty, & civil damages)	One Party	Wis.Opinion E-94-5 (“whether the secret recording of a telephone conversation by a lawyer involves dishonesty, fraud,	<i>State v. Turner</i> (App. 2014) 854 N.W.2d 865, 356 Wis.2d 759

			deceit or misrepresentation' under SCR 20:8.4(c) depends upon all the circumstances operating at the time").	
<i>Wyoming</i>	WY Stat § 7-3-702 (definition & penalty)	One Party		<i>Pearson v. State</i> , 2003, 70 P.3d 235
<i>District of Columbia</i>	DC Code § 23-542 (definition & penalty), § 23-554 (civil damages)	One Party	D.C. Bar's Legal Ethics Committee Op. 229 (Surreptitious Tape Recording By Attorney) (June 16, 1992);	<i>Moody v. IRS</i> , 654 F.2d 795 (D.C. Cir. 1981)



# State Bar of Arizona Ethics Opinions

**95-03: Tape Recording; Opposing Counsel**

2/1995

The secret tape recording of a telephone conversation with opposing counsel involves an element of deceit and misrepresentation. As such, the surreptitious tape recording of a telephone conversation with opposing counsel does not comport with Arizona ethics standards. This opinion specifically does not overrule or revisit prior opinions 75-13 and 90-02. [ER 8.4]

## **FACTS AND QUESTION PRESENTED[1]:**

The inquiring attorney asks whether it is ethically permissible for a lawyer surreptitiously to tape record a telephone conversation with opposing counsel.

## **RELEVANT ETHICAL RULES**

### **E.R. 8.4      Misconduct:**

It is professional misconduct for a lawyer to:

\* \* \*

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

## **OPINION**

The secret tape recording of telephone conversations by lawyers has received widespread attention by courts and ethics committees. This Committee has addressed the issue on several occasions over the past 30 years.

Opinion 176A, issued by the Committee on September 21, 1965, addressed the precise question presented by the inquiring attorney: is it ethical for one lawyer to secretly tape record a telephone conversation with opposing counsel? Opinion 176A concluded that such conduct violated the ethical rules that applied to Arizona lawyers in 1965:



[I]t must be recognized that lawyers, in conversing with one another on behalf of their respective clients, do so with the assurance that each of them is entitled to receive the other's utmost trust and confidence until the converse is shown. This is true whether the conversation is concerned with negotiations looking toward settlement, discussion of their respective positions, or any other matter in which their clients have an interest.

. . .

The employment of recording devices as indicated in the factual situation submitted, tends to undermine this foundation of respect and confidence and has the further damaging effect of weakening the entire structure of our profession. It is therefore the opinion of the Committee that a lawyer, while engaged in a telephone conversation with another lawyer, should not record the conversation without first informing him of such intention.

In Opinion 74-18, issued on August 6, 1974, the Committee considered whether a lawyer could secretly record a conversation with a witness, potential witness, or potential adverse party. We concluded that such conduct would violate DR 1-102, which, like our present rule 8.4(d), proscribed conduct involving dishonesty, fraud, deceit, or misrepresentation:

It is the considered opinion of the Committee that an attorney may not manually, electronically, or mechanically record conversations with or verbal communications of a potential witness, witness, or potential adverse party without first advising the person that the communication or conversation is being electronically, manually, or mechanically recorded for reproduction at a later time.... What we have here condemned as unethical is the misrepresentation by a lawyer in omitting to advise the witness, the potential witness, or the potential party of the present use of such a device.

Two months later, in Opinion 74-35, we held that this rule applied to lawyers engaged in criminal investigations. We also noted that the rule prevented a lawyer from employing an investigator to surreptitiously record such a conversation. See Opinion 74-35. Thus, as of October 1974, this Committee had found the secret tape recording of telephone conversations to be unethical in virtually all circumstances.

The Committee changed this opinion only seven months later. In Opinion 75-13, issued June 11, 1975, the Committee overruled and vacated Opinions 74-18 and 74-35, holding that the secret recording of telephone conversations may be ethical in some situations. This change was brought about by ABA Formal Opinion 337, which, although holding that it generally is unethical for a lawyer surreptitiously to record telephone conversations, also recognized that such recordings are warranted in certain law enforcement situations. Upon learning of this ABA opinion the Committee consulted with a number of Arizona attorneys engaged in both criminal and civil practice. On the basis of these consultations and the ABA opinion, the Committee reversed its previous position and issued Opinion 75-13.

Opinion 75-13 first adopted the following general rule concerning the ethical propriety of secretly recording conversations:

We are of the opinion that it is improper for a lawyer to record by tape recorder or other electronic device any conversation between the lawyer or other person, or between third persons, without the consent or prior knowledge of all parties to the conversation. This prohibition likewise precludes a lawyer from doing directly through a non-lawyer agent what he may not himself do.

Opinion 75-13 then recognized that there are certain necessary exceptions to this rule. Four were identified:

1. An attorney secretly may 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."

2. A lawyer may "secretly record a conversation in order to protect himself, or his client, from harm that would result from perjured testimony."

3. "In many areas of criminal investigations, for example, narcotics and fraud, it will be necessary for 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." The opinion noted that this exception "does not authorize secret recordings for the purpose of obtaining impeachment evidence or inconsistent statements."

4. The opinion recognized "that secret recordings would be proper where specifically authorized by statute, court rule, or court order."

After identifying these exceptions, Opinion 75-13 noted that they would apply only in rare cases, and again emphasized the general rule:

we emphasize the general prohibition announced, rather than the exceptions. Secret recordings will be warranted only in rare cases where the attorney has first satisfied himself that there are compelling facts and circumstances justifying the use of a secret recording.

The Committee most recently considered this subject in Opinion 90-02, dated March 16, 1990. This opinion 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. Our conclusion was stated in these words:

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

Thus, the undisclosed tape recording of conversations has been a subject of substantial consideration and discussion by previous members of this Committee. Against this historical background, we now address whether a lawyer's secret tape recording of a telephone conversation with opposing counsel would violate our present ethical rules.

Rule 8.4(d) prohibits "conduct involving dishonesty, fraud, deceit or misrepresentation." These words are not precisely defined in the rules and potentially cover a wide array of conduct, but they nonetheless are elements, and should be elements, of Arizona's modern ethical rules for lawyers.

We conclude that the secret tape recording of a telephone conversation with opposing counsel involves an element of deceit and misrepresentation. Despite the proliferation of modern recording devices and advancements in technology, it still is not common to record ordinary-course conversations between legal professionals. Attorneys do not expect that their opponent is recording a telephone conversation. On the contrary, attorneys normally expect that such recording is not occurring. The

deceit and misrepresentation lies in the recording attorney's failure to disclose the fact that he or she is recording and preserving the statements of the other attorney for some purpose beyond the conversation.

Consider the intentions of an attorney who secretly records a telephone conversation with opposing counsel. Why does the recording attorney not disclose that the conversation is being taped? -- precisely because disclosure would defeat the recording attorney's purpose: to capture his or her opponent on tape, making a statement that would not be made if the taping were revealed. This objective is inherently deceptive. It succeeds only if the other lawyer assumes, incorrectly, that the conversation is not being recorded and therefore speaks more forthrightly than he or she would if the recording were disclosed. Secretly recording conversations with opposing counsel thus contains an element of deception and trickery that flies in the face of the high ethical standard established by ER 8.4(d).

This conclusion accords with the majority of committees and courts that have addressed the question. In Formal Opinion 337, the ABA Committee on Ethics and Professional Responsibility concluded that surreptitious tape recording of conversations is "conduct which involves dishonesty, fraud, deceit, or misrepresentation." This same conclusion was reached by the ABA in Informal Opinions Nos. 1008 and 1009. Similar conclusions have been reached by the Iowa State Bar Association (Opinion 83-16), the Supreme Court of Iowa (Iowa State Bar Association Committee on Professional Ethics v. Mollman, 488 N.W.2d 168 (1992)), the Kentucky Committee on Professional Ethics (Opinion E-289), and the Idaho Ethics Committee (Formal Opinion 130). The Supreme Court of Colorado made the point in these words: "Inherent in the undisclosed use of a recording device is an element of deception, artifice, and trickery which does not comport with the high standards of candor or fairness by which all attorneys are bound." People v. Selby, 606 P.2d 45, 47 (1979).

We are aware that the Committee on Profession Ethics of the New York County Lawyers' Association has concluded that secretly recording telephone conversations is not unethical because it "may be accomplished by the touch of a button" and is sufficiently commonplace that "a party to a telephone conversation should reasonably expect the possibility that his or her conversation may be recorded." Opinion 696, dated June 21, 1993. But whatever accuracy this opinion may have in describing practices elsewhere, it does not accurately describe them here. Members of the Committee believe that lawyers in Arizona do not expect that opposing counsel is surreptitiously recording their telephone conversation. The unrevealed recording therefore continues, at least in this State, to involve an element of deception that does not comport with Arizona ethical standards.

As noted in the historical discussion at the beginning of this opinion, our Committee previously has recognized several exceptions to an absolute ban on secret tape recording -- exceptions that arise in the field of criminal law and most often would apply to an attorney's conversations with non-lawyers. The question posed by the

inquiring attorney does not require us to revisit these exceptions, nor are we inclined to do so on our own account. Because the exceptions identified in Opinions 75-13 and 90-02 were not explained on the basis of their being non-deceptive, some members of the Committee have questioned whether those exceptions are consistent with the general conclusion stated above. It is not necessary to address that question in full at this time, but we note that the expectations of parties involved in criminal conduct, criminal law proceedings, or criminal investigations may be such that the deception inherent in secretly recording conversations does not arise. We also note that the compelling societal interests which give rise to many of our criminal laws and procedures, and the complex and sometimes difficult principles of due process and equal protection, may give rise to considerations that supersede the principles addressed in this opinion. For this reason, the Committee articulates a general principle that will apply to conversations between opposing counsel without revisiting or overruling the exceptions established in Opinions 75-13 and 90-02.

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[1] Formal Opinions of the Committee on the Rules of Professional conduct are advisory in nature only and are not binding in any disciplinary or other legal proceedings. © State Bar of Arizona 1995

# AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 01-422

June 24, 2001

## Electronic Recordings by Lawyers Without the Knowledge of All Participants

*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. Formal Opinion 337 (1974) accordingly is withdrawn. 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. 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.*

### 1. Introduction

In Formal Opinion 337,<sup>1</sup> this Committee stated that with a possible exception for conduct by law enforcement officials, a lawyer ethically may not record any conversation by electronic means without the prior knowledge of all parties to the conversation.<sup>2</sup> The position taken in Opinion 337 has been criticized by a number of state and local ethics committees, and at least one commentator has questioned whether it survives adoption of the Model Rules of Professional Conduct.<sup>3</sup> The Committee has reexamined the issue and now rejects the broad proscription stated in Opinion 337. We also describe certain circumstances in which nonconsensual taping of conversations may violate the Model Rules.

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 non-consensual recording of conversations in investigations of criminal activity, dis-

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1. Formal Opinion 337 (August 10, 1974), in FORMAL AND INFORMAL ETHICS OPINIONS (ABA 1985), at 94.

2. In Informal Opinion 1320 (May 2, 1975) (Reconsideration of Formal Opinion 337), *id.* at 193, the Committee declined to reconsider its view and additionally opined that a lawyer may not ethically direct an investigator to tape record a conversation without the knowledge of the other party.

3. C. WOLFRAM, MODERN LEGAL ETHICS (1986) §12.4.4.

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This opinion is based on the Model Rules of Professional Conduct and, to the extent indicated, the predecessor Model Code of Professional Responsibility of the American Bar Association. The laws, court rules, regulations, codes of professional responsibility, and opinions promulgated in the individual jurisdictions are controlling.

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY, 541 North Fairbanks Court, 14th Floor, Chicago, Illinois 60611-3314 Telephone (312)988-5300 CHAIR: Donald B. Hilliker, Chicago, IL □ Loretta C. Argrett, Washington, DC □ Jackson M. Bruce, Jr., Milwaukee, WI □ William B. Dunn, Detroit, MI □ James W. Durham, Philadelphia, PA □ Mark I. Harrison, Phoenix, AZ □ Daniel W. Hildebrand, Madison, WI □ William H. Jeffress, Jr., Washington, DC □ M. Peter Moser, Baltimore, MD □ CENTER FOR PROFESSIONAL RESPONSIBILITY: George A. Kuhman, Ethics Counsel; Eileen B. Libby, Associate Ethics Counsel

criminatorial practices, and trademark infringement.<sup>4</sup> 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.

## 2. Reasons for Abandonment of the General Prohibition Stated in Opinion 337

Formal Opinion 337 was decided under the Code of Professional Responsibility, which incorporated the principle that a lawyer “should avoid even the appearance of impropriety.”<sup>5</sup> That admonition was omitted as a basis for professional discipline nine years later in the ABA’s adoption of the Model Rules of Professional Conduct. Opinion 337 further stated, however, that “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.”<sup>6</sup> The Model Code’s prohibition against conduct involving deceit or misrepresentation was preserved in Model Rule 8.4(c),<sup>7</sup> and thus we must consider whether that conclusion by the Committee in Opinion 337 is correct under the Model Rules.

Reception by state and local bar committees of the principle embraced by Opinion 337 has been mixed.<sup>8</sup> Courts and committees in a number of states have adopted the position of the opinion.<sup>9</sup> The State Bar of Michigan Standing

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4. The subject is discussed thoughtfully in David B. Isbell & Lucantonio 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 (Summer 1995). The ethics of supervising investigators who use “pretext” techniques to gather information, often accompanied by secret electronic recording of conversations with their subjects, also is discussed in *Apple Corps. Ltd. v. International Collectors Society*, 15 F.Supp.2d 456, 475-76 (D. N.J. 1998).

5. Prior to Opinion 337, the Committee had interpreted Canon 22 of the ABA Canons of Professional Ethics, which stated that a lawyer’s conduct “should be characterized by candor and fairness,” to proscribe surreptitious taping of a court proceeding of conversations with clients, and of conversations with other lawyers. See Informal Decision C-480 (Attorney’s Use of Recording Device for Court Proceedings) (December 26, 1961), in 1 INFORMAL ETHICS OPINIONS, at 81 (ABA 1975); Informal Opinion 1008 (Lawyer Tape Recording Telephone Conversation of Client Without Client’s Knowledge) (October 25, 1967), in 2 INFORMAL ETHICS OPINIONS, at 180 (ABA 1975); Informal Opinion 1009 (Lawyer Tape Recording Telephone Conversation with Lawyer for Other Party) (October 25, 1967), *id.* at 182.

6. FORMAL AND INFORMAL ETHICS OPINIONS (1985), at 96.

7. Model Rule 8.4(c) provides that it is professional misconduct for a lawyer to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”

8. Ethics opinions on the subject prior to 1990 are discussed in Mark Koehn, Note, *Attorneys, Participant Monitoring and Ethics: Should Attorneys Be Able to Surreptitiously Record their Conversations?*, 4 GEO. J. LEGAL ETHICS 403 (1990).

9. See *Matter of Anonymous Member of So. Carolina Bar*, 404 S.E.2d 513, 513 (S.C. 1991); *People v. Selby*, 606 P.2d 45, 47 (Colo. 1979); Supreme Court of Texas Professional Ethics Committee Op. 392 (Feb. 1978).

Committee on Professional and Judicial Ethics initially agreed with Opinion 337,<sup>10</sup> but later found that the ethics of nonconsensual recording should be considered on a case-by-case basis.<sup>11</sup> The New York State Bar adopted a *per se* rule condemning nonconsensual recordings,<sup>12</sup> while the New York City Bar recognized exceptions to that position in the case of prosecutors and defense counsel in criminal investigations.<sup>13</sup> The New York County Bar more recently opined that recording of a conversation without the consent of the other party is not, in and of itself, unethical.<sup>14</sup>

In Virginia, a series of opinions condemned nonconsensual recordings by or at the direction of lawyers,<sup>15</sup> but the latest opinion on the subject found such conduct not to be unethical when done for the purpose of a criminal or housing discrimination investigation. The Virginia Standing Committee on Legal Ethics noted there may be other factual situations in which the same result would be reached.<sup>16</sup> Oklahoma, Utah, and Maine have rejected the broad prohibition of Opinion 337, saying that nonconsensual recordings by lawyers are not unethical unless accompanied by other deceptive conduct.<sup>17</sup> The District of Columbia also found a *per se* rule inappropriate,<sup>18</sup> and Kansas has found surreptitious recording by lawyers to be “unprofessional,” but not unethical.<sup>19</sup>

Criticism of Opinion 337 has occurred in three areas. First, the belief that non-consensual taping of conversations is inherently deceitful, embraced by this Committee in 1974, is not universally accepted today. The overwhelming majori-

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10. State Bar of Michigan Standing Committee on Professional and Judicial Ethics Informal Op. CI-200 (interpreting the Code of Professional Responsibility).

11. State Bar of Michigan Standing Committee on Professional and Judicial Ethics Op. RI-309 (May 12, 1998).

12. New York State Bar Ass’n Committee on Professional Ethics Op. 328 (1974).

13. The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics Op. 80-95 (1981).

14. New York County Lawyers’ Ass’n Committee on Professional Ethics Op. 696 (Secret Recording Of Telephone Conversations) (July 28, 1993).

15. *Gunter v. Virginia State Bar*, 385 S.E. 2d 597, 622 (Va. 1989); Virginia Legal Ethics Op. 1324 (Representing a Client Within the Bounds of the Law: Attorney Obtaining Non-Consensual Tape Recordings From Client) (Feb. 27, 1990); Virginia Legal Ethics Op. 1448 (Advising Client/Potential Civil Plaintiff to Record Oral Conversation With Unrepresented Potential Civil Defendant) (January 6, 1992); Virginia Legal Ethics Op. 1635 (Attorney’s Tape Recording Telephone Conversation When Not Acting in Attorney Capacity) (February 7, 1995).

16. Virginia Legal Ethics Opinion 1738 (Attorney Participation In Electronic Recording Without Consent Of Party Being Recorded) (April 13, 2000).

17. Maine Professional Ethics Commission of the Bd. of Overseers of the Bar Op. 168 (March 9, 1999); Utah State Bar Ethics Advisory Op. Committee No. 96-04 (July 3, 1996); Oklahoma Bar Ass’n Op. 307 (March 5, 1994).

18. D.C. Bar’s Legal Ethics Committee Op. 229 (Surreptitious Tape Recording By Attorney) (June 16, 1992).

19. Kansas Bar Ass’n Ethics Op. 96-9 (Secret Tape Recordings of Other Persons by Attorneys and Clients) (August 11, 1997).



ty of states permit recording by consent of only one party to the conversation.<sup>20</sup> Surreptitious recording of conversations is a widespread practice by law enforcement, private investigators and journalists, and the courts universally accept evidence acquired by such techniques.<sup>21</sup> Devices for the recording of telephone conversations on one's own phone readily are available and widely are used. Thus, even though recording of a conversation without disclosure may to many people "offend a sense of honor and fair play,"<sup>22</sup> it is questionable whether anyone today justifiably relies on an expectation that a conversation is not being recorded by the other party, absent a special relationship with or conduct by that party inducing a belief that the conversation will not be recorded.<sup>23</sup>

Second, there are circumstances in which requiring disclosure of the recording of a conversation may defeat a legitimate and even necessary activity. For that reason, even those authorities that have agreed with the basic proposition of Opinion 337 have tended to recognize numerous exceptions. The State Bar of Arizona, for example, listed four exceptions to the ethical prohibition for such things as documenting criminal utterances (threats, obscene calls, etc.); documenting conversations with potential witnesses to protect against later perjury; documenting conversations for self-protection of the lawyer; and recording when "specifically authorized by statute, court rule or court order."<sup>24</sup> Other ethics committees have excepted recordings by criminal defense lawyers, reasoning that the commonly accepted "law enforcement exception" otherwise would give prosecutors an unfair advantage.<sup>25</sup> Exceptions also have been recognized for "testers" in investigations of housing discrimination and trademark infringement.<sup>26</sup> And the Ohio Supreme Court, although finding nonconsensual recordings by lawyers generally impermissible, has noted an exception for "extraordinary circumstances" as well as for investigations by prosecutors and criminal defense lawyers.<sup>27</sup>

A degree of uncertainty is common in the application of rules of ethics, but an ethical prohibition that is qualified by so many varying exceptions and such frequent disagreement as to the viability of the rule as a basis for professional discipline, is highly troubling. We think the proper approach to the question of legal but nonconsensual recordings by lawyers is not a general prohibition with certain

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20. See *infra* note 30 and accompanying text.

21. *E.g.*, Richardson v. Howard, 712 F.2d 319, 321 (7th Cir. 1983); Miano v. AC & R Advertising Inc., 148 F.R.D. 68, 88-89, *aff'd*, 834 F.Supp. 632 (S.D. N.Y. 1993).

22. Maine Op. 168, *supra* note 17.

23. As discussed in Part 5, *infra*, the client-lawyer relationship may create a justifiable expectation that the lawyer will not record a client's conversation without the knowledge of the client.

24. Arizona Op. No. 75-13 (June 11, 1975).

25. See, *e.g.*, Board of Professional Responsibility of the Supreme Court of Tenn. Formal Ethics Op. 86-F-14(a) (July 18, 1986); Kentucky Bar Ass'n Op. E-279 (Jan. 1984).

26. Virginia Legal Ethics Op. 1738, *supra* note 16.

27. Supreme Court of Ohio Board of Commissioners on Grievances and Discipline Op. 97-3 (June 13, 1997).

exceptions, but a prohibition of the conduct only where it is accompanied by other circumstances that make it unethical.

The third major criticism of Opinion 337 has been that whatever its basis under the Canons and the Model Code, it is not consistent with the approach of the Model Rules. The Model Rules do not contain the injunction of the Model Code that lawyers “should avoid even the appearance of impropriety.” Furthermore, unlike the Canons or the Code, the Model Rules deal directly with “respect for rights of third persons” in Rule 4.4. That rule proscribes only “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.”

If a lawyer records a conversation with no substantial purpose other than to embarrass or burden a third person, the lawyer has violated Model Rule 4.4. But there seems no reason to treat recording of conversations any differently in this respect from other methods of gathering evidence.<sup>28</sup> The Committee believes that to forbid obtaining of evidence by nonconsensual recordings that are lawful and consequently do *not* violate the legal rights of the person whose words are unknowingly recorded, would be unfaithful to the Model Rules as adopted.

### 3. Nonconsensual Recording In Violation of State Law

Federal law permits recording of a conversation by consent of one party to the conversation.<sup>29</sup> Some states, however, prohibit recordings without the consent of all parties, usually with an exception for law enforcement activities and occasionally with other exceptions.<sup>30</sup> Violation of such laws is a criminal offense, and may subject the lawyer to civil liability to persons whose conversations have been recorded secretly.<sup>31</sup> A lawyer who records a conversation in the practice of law in violation of such a state statute likely has violated Model Rule 8.4(b) or 8.4(c) or both. Further, because the state statute creates a right not to have one’s conversations recorded without consent, nonconsensual recordings of conversations for the purpose of obtaining evidence would violate Model Rule 4.4’s proscription

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28. Similarly, if a lawyer falsely states that a conversation is not being recorded, the lawyer likely has violated Model Rule 4.1’s prohibition against knowingly making false material statements of fact to third persons, but again there seems no reason to treat the subject of nonconsensual recording differently from any other conduct when it is not accompanied by misrepresentations to third persons.

29. 18 U.S.C. § 2511(2)(d).

30. According to a 1998 law review note surveying state statutes, twelve states at that time prohibited recording without consent of both parties to the conversation: California, Connecticut, Delaware, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, New Hampshire, Pennsylvania and Washington. Stacy L. Mills, Note, *He Wouldn’t Listen to Me Before, But Now . . . : Interspousal Wiretapping and an Analysis of State Wiretapping Statutes*, 37 BRANDEIS L.J. 415, 429 and nn. 126, 127 (Spring 1998). Oregon law permits recording of telephone conversations, but not in-person conversations, with one party’s consent. Or. Rev. Stat. § 165.540 (1999).

31. See *Kimmel v. Goland*, 51 Cal. 3d 202, 212 (Cal. 1990), holding that a lawyer is not immune from tort liability for transcribing conversations recorded by a client in violation of California’s two-party consent statute.

against using “methods of obtaining evidence that violate the legal rights of [a third] person.”<sup>32</sup>

A lawyer contemplating nonconsensual recording of a conversation should, therefore, take care to ensure that he is informed of the relevant law of the jurisdiction in which the recording occurs.

#### **4. False Denial That a Conversation is Being Recorded**

That a lawyer may record a conversation with another person without that person’s knowledge and consent does not mean that a lawyer may state falsely that the conversation is not being recorded. To do so would likely violate Model Rule 4.1, which prohibits a lawyer from making a false statement of material fact to a third person. The distinction has been recognized by the Mississippi Supreme Court, which held in *Attorney M. v. Mississippi Bar*<sup>33</sup> that nonconsensual recording of conversations by lawyers generally is not a violation of ethical rules, but then held in *Mississippi Bar v. Attorney ST*<sup>34</sup> that a lawyer who falsely denied to a third person that he was recording their telephone conversation had violated the proscription of Rule 4.1 against false statements of material fact in the course of representing a client.

#### **5. Undisclosed Recording of Conversations With Clients**

When a lawyer contemplates recording a conversation with a client without the client’s knowledge, ethical considerations arise that are not present with respect to non-clients.<sup>35</sup> Lawyers owe to clients, unlike third persons, a duty of loyalty that transcends the lawyer’s convenience and interests. The duty of loyalty is in part expressed in the Model Rules requiring preservation of confidentiality and communication with a client about the matter involved in the representation. Whether the Model Rules that define and implement these duties permit a lawyer to record a client conversation without the client’s knowledge is a question on which the members of this Committee are divided. The Committee is unanimous, however, in concluding that it is almost always advisable for a lawyer to inform a client that a conversation is being or may be recorded, before recording such a conversation.<sup>36</sup>

Clients must assume, absent agreement to the contrary, that a lawyer will memorialize the client’s communication in some fashion. But a tape recording that captures the client’s exact words, no matter how ill-considered, slanderous or profane, differs from a lawyer’s notes or dictated memorandum of the conversa-

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32. That conclusion does not, of course, apply to lawyers engaged in law enforcement whose activities are authorized by state or federal law.

33. 621 So. 2d 220, 223-24 (Miss. 1992).

34. 621 So. 2d 229, 232-33 (Miss. 1993).

35. “A fundamental distinction is involved between clients, to whom lawyers owe many duties, and non-clients, to whom lawyers owe few duties.” THE RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, ch. 2, topic 1, Introductory Note, at 125 (2000).

36. A lawyer may satisfy the need to inform a client that their conversations are or may be recorded by advising the client, at the outset of the representation or any later time, that the lawyer may follow this practice.

tion. If the recording were to fall into unfriendly hands, whether by inadvertent disclosure or by operation of law,<sup>37</sup> the damage or embarrassment to the client would likely be far greater than if the same thing were to happen to a lawyer's notes or memorandum of a client conversation.

Recordings of conversations may, of course, serve useful functions in the representation of a client. Electronic recording saves the lawyer the trouble of taking notes, and ensures an accurate record of the instructions or information imparted by a client. These beneficial purposes may weigh in favor of recording conversations, but they do not require that the recording be done secretly.

The relationship of trust and confidence that clients need to have with their lawyers, and that is contemplated by the Model Rules, likely would be undermined by a client's discovery that, without his knowledge, confidential communications with his lawyer have been recorded by the lawyer. Thus, whether or not undisclosed recording of a client conversation is unethical, it is inadvisable except in circumstances where the lawyer has no reason to believe the client might object, or where exceptional circumstances exist. Exceptional circumstances might arise if the client, by his own acts, has forfeited the right of loyalty or confidentiality. For example, there is no ethical obligation to keep confidential plans or threats by a client to commit a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm. Nor is there an ethical obligation to keep confidential information necessary to establish a defense by the lawyer to charges based upon conduct in which the client is involved. Those members of the Committee who believe that the Model Rules forbid a lawyer from recording client conversations without the client's knowledge nonetheless would recognize exceptions in circumstances such as these.

### **Conclusion**

In summary, our conclusions are as follows:

1. Where nonconsensual recording of conversations is permitted by the law of the jurisdiction where the recording occurs, a lawyer does not violate the Model Rules merely by recording a conversation without the consent of the other parties to the conversation.
2. Where nonconsensual recording of private conversations is prohibited by law in a particular jurisdiction, a lawyer who engages in such conduct in violation of that law may violate Model Rule 8.4, and if the purpose of the recording is to obtain evidence, also may violate Model Rule 4.4.

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37. Though a client-lawyer conversation ordinarily will be privileged, there are numerous ways in which disclosure of the recording might nevertheless later be compelled by law, as in a situation where the client is held to have waived the privilege, or where a court finds the crime-fraud exception is applicable. Further, when a recording is made of an officer of a client corporation, the recording may become the property of an unfriendly successor in the case of a bankruptcy, receivership, or hostile takeover.

3. A lawyer who records a conversation without the consent of a party to that conversation may not represent that the conversation is not being recorded.
4. Although the Committee is divided as to whether the Model Rules forbid a lawyer from recording a conversation with a client concerning the subject matter of the representation without the client's knowledge, such conduct is, at the least, inadvisable.