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UNDISCLOSED RECORDING OF CONVERSATIONS BY PRIVATE ATTORNEYS

I. INTRODUCTION

The law reluctantly embraces the future. For example, a fundamental precept of American jurisprudence, the doctrine of *stare decisis*, commands the court to search precedent to determine the proper rule to apply in a given case. Society, on the other hand, welcomes the future and innovation.

Technological advances in the preservation of conversations tempt some attorneys to memorialize their conversations on tape. The capacity to preserve conversations is a tremendous power in a profession that deals with words and their meanings. Virtually every state recognizes the admissibility of sound recordings into evidence.¹ Indeed, a recorded statement has more evidentiary value than a written statement because it presents the speaker's exact words in his own voice, and retains his tone, inflection and emphasis.² In the past, private attorneys have recorded judges, other attorneys, clients, and witnesses. Because of the power of this evidence, bodies charged with the interpretation and enforcement of ethical rules have placed restrictions on private attorneys obtaining and using recordings. Courts have disciplined attorneys for secretly recording conversations; punishment has varied from private censure to disbarment. Virtually all the published opinions share a common distaste for eavesdropping.

This Note addresses the ethical implications of private counsel's procuring and using secret recordings. This Note also analyzes views on the employment of secret recordings by private lawyers reported in American Bar Association (ABA) ethical opinions, state ethical opinions, reported opinions of disciplinary proceedings against attorneys, and evidentiary rulings on the use of recordings made by private counsel in the context of litigation.³

1. See Annotation, *Admissibility of Sound Recordings in Evidence*, 58 A.L.R.2d 1024 (1958).

2. *State v. Reyes*, 209 Or. 595, 636, 308 P.2d 182, 196 (1957).

3. Specifically excluded from this discussion is the "prosecutorial exception" applied to government attorneys. The prosecutorial exception will be discussed only when it involves undisclosed recordings made by private counsel who represent a criminal defendant.

II. RECORDING THE COURT AND JUDICIARY

The ABA's informal opinion C-480 expressly allows an attorney to make a recording of a court proceeding.⁴ The opinion provides that the attorney who makes the recording must fully disclose to the court and opposing counsel his intent to record.⁵ When a lawyer fails to inform the court or opposing counsel that he is recording the proceeding, he violates his duty of candor and fairness in dealing with the court.⁶ The attorney's recording of the proceeding is a "material fact" that the attorney must disclose to the court and opposing counsel.⁷

In *People v. Selby*⁸ disciplinary proceedings were initiated against an attorney, Selby, for covertly recording a preliminary hearing and a meeting in the judge's chambers. The judge had overruled Selby's objections at the preliminary hearing, and as a result Selby refused to participate any further in the proceedings. The judge requested the prosecutor and Selby to come back to chambers to discuss the criminal charges filed against Selby's client. Selby later used a partial transcription of the conversation in a motion to disqualify the judge.⁹

Selby testified before the grievance committee that he recorded the proceedings and conversation because his arm had been in a cast and he had been unable to take notes. Selby also stated that the recorder was visible throughout the conference. However, both the judge and the prosecutor denied seeing the recorder during either the hearing proceedings or the conference in chambers.¹⁰ The court found Selby's justifications to be patently false. In its report, the grievance committee noted that Selby deliberately and willfully lied about his motives and the manner in which the recording was obtained.¹¹ The court observed that Selby's conduct violated the attorney's duty of candor and fairness because "[i]nherent 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 and fairness by which all attorneys are bound."¹² Thus, Selby's acts violated Colorado's

4. ABA Comm. on Professional Ethics and Grievances, Informal Op. C-480 (1961).

5. *Id.*

6. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102 (1980); CANONS OF PROFESSIONAL ETHICS Canon 22 (1956).

7. *See supra* note 6.

8. 198 Colo. 386, 606 P.2d 45 (1979).

9. *Id.* at 389, 606 P.2d at 46.

10. *Id.*

11. *Id.*

12. *Id.* at 390, 606 P.2d at 47. The court also cited *People ex rel. Attorney Gen. v. Ellis*, 101 Colo. 101, 70 P.2d 346 (1937); Colo. Bar Ass'n Ethics, Op. 22 (1962); and ABA Comm. on Professional Ethics and Grievances, Formal Op. 337 (1974).

DR 1-102(A)(4) and (6).¹³

Selby added to his improper conduct by distorting the content of the recording by using partial quotations taken out of context in his motion to disqualify the judge.¹⁴ This misrepresentation of fact violated Colorado's DR 7-102(A)(5).¹⁵ However, it is unclear from the opinion whether the attorney's improper use of the recording or the attorney's failure to inform the judge and prosecutor was the "misrepresentation of fact" that fell within the rule.

Selby subsequently was disbarred.¹⁶ It is difficult to determine the extent to which the court disciplined Selby solely for the act of making the recording. The attorney's misuse of the recording and his conduct after recording the conversation in chambers were cited as justification for the disciplinary action independent of the manner in which the recording was made.

If the facts in *Selby* are modified so that the only impropriety was the making of the recording, the holding implicates Sixth Amendment concerns.¹⁷ Assume Selby made the recording secretly and in the course of the conversation the judge made statements that, when taken in context, called for the judge's disqualification. An attorney who wishes to represent his client effectively should seek the judge's removal. If the lawyer files an affidavit and the judge denies the statements, a swearing contest develops. If the attorney then reveals the tape, both attorney and judge could be disbarred under the holding of *Selby*: the lawyer for taping the conversation and the judge for denying its contents. Although the true issue here is the conversation between the judge and the attorney, the system overlooks this dispute and instead focuses on the recording. The shift in emphasis to the recording interferes with the client's right to an impartial tribunal and his attorney's duty to his client.

This scenario is similar to the facts in *In re Warner*.¹⁸ In that case the South Carolina Supreme Court publicly reprimanded an attorney

13. "(A) A lawyer shall not: . . . (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. . . . (6) Engage in any other conduct that adversely reflects on his fitness to practice law." *Selby*, 198 Colo. at 389, 606 P.2d at 46.

14. *Id.* at 390, 606 P.2d at 47.

15. "(A) In his representation of a client, a lawyer shall not: . . . (5) Knowingly make a false statement of law or fact. . . . (8) Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule." *Id.* at 388, 606 P.2d at 46.

16. *Id.* at 390, 606 P.2d at 47. Although the punishment seems quite severe, Selby had many prior encounters with the disciplinary system in Colorado. Selby previously received two private reprimands, one public reprimand, and had been disbarred but reinstated after convincing the court he had rehabilitated himself. *Id.* at 387, 606 P.2d at 45.

17. The Sixth Amendment provides, in part, "the accused shall . . . have the assistance of counsel for his defense." U.S. Const. amend. VI.

18. 286 S.C. 459, 335 S.E.2d 90 (1985).

for sending a client into a family court judge's chamber to make a recording of a conference between the judge and the client.¹⁹ The court extended its prior prohibition against secretly recording an adversary or potential adversary²⁰ to include recording other attorneys and any other person.²¹

The attorney defended the charges of impropriety on the ground that his client had made statements that "required" him to attempt to gather "hard evidence" against the judge.²² The court rejected this justification and noted that the attorney had attempted, "at best, to take the law into his own hands and, at worst, to bring discredit upon the legal profession."²³ The court observed that the proper course of action was to report any knowledge of impropriety to the Judicial Standards Committee.²⁴ Thus, the court rejected a motive-based inquiry²⁵ in favor of a broad restraint against secret recordings of any kind.²⁶

III. RECORDING OTHER ATTORNEYS

Presence before a court, however, does not determine the impropriety of a recording. The ABA also disapproves of secret recordings between attorneys engaged in litigation.²⁷ Citing Canon 22,²⁸ the committee held that making a secret verbatim transcript of a conversation violates an attorney's obligation of candor and fairness in dealings with

19. *Id.* A private investigator supplied the recording device to the client. *Id.* at 460, 335 S.E.2d at 90. The fact that the attorney did not provide the recording equipment was immaterial because the attorney directed the client to use the equipment to record the conference with the judge. See ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1320 (1975); see *infra* note 50 and accompanying text.

20. See *In re Anonymous Member of the S.C. Bar*, 283 S.C. 369, 322 S.E.2d 667 (1934); see *infra* notes 77-80 and accompanying text.

21. *Warner*, 286 S.C. at 461, 335 S.E.2d at 91.

22. *Id.* The attorney also argued for mitigation on the grounds that the question was "novel." *Id.* The court did not refer to its prior holding that prohibited an attorney from recording adverse parties. See *infra* notes 77-80 and accompanying text. Thus, the court implied a distinction between the relationship of an attorney to a judge, from that of an attorney and a potential adversary.

23. *Id.* at 461, 335 S.E.2d at 91.

24. *Id.*

25. See *People ex rel. Attorney Gen. v. Ellis*, 101 Colo. 101, 70 P.2d 346 (1974) (Burke, J., dissenting); see *infra* note 65 and accompanying text.

26. "[L]awyers simply do not participate in any manner in the furtive recordings of judges in their chambers. It is equally reprehensible and impermissible for an attorney to secretly record another attorney or, indeed, another person. . . . We will not tolerate such conduct." *Warner*, 286 S.C. at 461-62, 335 S.E.2d at 91 (emphasis in original).

27. ABA Comm. on Professional Ethics and Grievances, Informal Op. 1009 (1967).

28. CANONS OF PROFESSIONAL ETHICS Canon 22 (1956). See also MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4 (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102 (1980).

other attorneys.²⁹

The ABA has condemned the interest of a disciplinary board investigator to monitor conversations between an attorney charged with misconduct and his client, even with the client's consent.³⁰ The ABA had resolved in an earlier opinion³¹ that preparing electronic recordings, although legal under federal law, violates a lawyer's duty "not [to] engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."³² The ABA concluded that recordings made by attorneys are proper only if all parties to the conversation know that the recording is being made. To do otherwise offends "the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession"³³

Assume, however, that the investigator suspects that the attorney is engaged in illegal activity with a client. Arguably, recording conversations that relate to illegal activities is ethical. Formal opinion 337 indicates, however, that secret electronic surveillance can be permitted only in extraordinary circumstances in which government lawyers act "within strict statutory limitations conforming to constitutional requirements."³⁴ The attorney-client privilege and the sanctity of the attorney-client relationship are fundamental concerns of the Sixth Amendment.³⁵ A lawyer must have an unimpeded flow of communication with his client in order to represent the client effectively. If the client suspects his attorney's office is being monitored, the client may withhold information.³⁶ The ABA's blanket prohibition against secret recordings of other private attorneys indirectly ensures the free flow of information which protects Sixth Amendment interests.

29. The committee did not address the legality or the wisdom of making the recording.

30. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1407 (1978).

31. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 337 (1974). See *infra* notes 42-49 and accompanying text.

32. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 337 (1974) (citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(4) (1969)). See also MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4(c) (1983).

33. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 337 (1974) (citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 9 (1969)).

34. *Id.*

35. See *United States v. King*, 536 F. Supp. 253, 263 (C.D. Cal. 1982), *overruled on other grounds*, *United States v. Zolin*, 842 F.2d 1135 (9th Cir. 1988), *aff'd in part, vacated in part*, 491 U.S. 554 (1989).

36. Similar Sixth Amendment concerns arise when a lawyer cooperates with government authorities investigating potential criminal activities of his client. See *infra* notes 99-111 and accompanying text.

IV. RECORDING THIRD PERSONS

In its seminal opinion³⁷ addressing the use of recorded conversations, the ABA condemned, as ethically improper, the admission into evidence of a covertly recorded conversation between a criminal defendant, his attorney, and an unrepresented codefendant. In this opinion, investigators made the recording while the defendant and codefendant were in custody. In the course of the conversation, the defendants made damaging admissions regarding their intentions to recant earlier statements. Moreover, the attorney counseled them on how to proceed should they escape from prison. The prosecutor wished to admit the recording into evidence at trial.

The opinion conceded that the recording was legally admissible, "even though obtained by unlawful means."³⁸ Nevertheless, the committee believed that the prosecuting attorney's conduct gave the appearance of impropriety. Consequently, the committee determined it would be "professionally improper" for the prosecutor to seek admission of the tapes.³⁹

The committee placed special importance on the confidential nature of the intercepted communication and the need to encourage candor between the attorney and his client.⁴⁰ Formal opinion 150 subordinates concern for the substance of the conversation in favor of systemic vigilance for the integrity of the attorney-client relationship and the free flow of information.⁴¹

The most extensive opinion issued by the ABA that deals with secret recordings incorporates prior decisions of the committee and places a broad prohibition on undisclosed recordings by private attorneys. Formal opinion 337⁴² recognizes three classes of people that may be parties to a surreptitiously recorded conversation: clients, other at-

37. ABA Comm. on Professional Ethics and Grievances, Formal Op. 150 (1936).

38. *Id.*

39. *Id.*

40. The opinion does not discuss the effect of the unrepresented codefendant's presence on the privileged nature of the conversation. *See generally* 8 J. WIGMORE, WIGMORE ON EVIDENCE § 2311 (1961) (presence of a stranger to a conversation between an attorney and his client strips conversation of its privileged character). The committee noted that although the attorney represented only one defendant, he was advising both of them during the conversation. ABA Comm. on Professional Ethics and Grievances, Formal Op. 150 (1936).

41. The committee expressly censured the attorney for advising his client about what to do in the event of escape. The committee further stated that it would be equally unethical for the attorney to allow his client to swear that statements given to law enforcement officers were compelled when he knew from his client that the statements were made voluntarily. *Id.*

42. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 337 (1974).

torneys, and the public. The committee noted that it had addressed specifically the propriety of recording conversations with other attorneys⁴³ and clients.⁴⁴ The committee addressed the general issue of the propriety of making undisclosed recordings and determined that private attorneys may not ethically record conversations without full disclosure to all parties.⁴⁵

The committee reasoned that undisclosed recordings of third persons would be improper given the committee's prior opinions on the issue of secretly recording clients and other attorneys. Although federal⁴⁶ and state laws allow surreptitious recordings, an attorney must avoid any appearance of impropriety when dealing with the public.⁴⁷ Furthermore, an attorney is prohibited from engaging in fraudulent, dishonest, and deceitful conduct.⁴⁸ The committee decided that making secret recordings, even when legal, offends attorneys' ethical obligations and falls outside "conduct to which lawyers should aspire."⁴⁹

The committee subsequently extended formal opinion 337 to prohibit secret recordings made by an attorney's employee, client, or anyone else under the direction of the attorney.⁵⁰

Almost every state has determined that it is unethical for a lawyer to tape a conversation without full disclosure that a verbatim record is being made. Several states have adopted formal opinion 337 with little or no comment.⁵¹ Some state opinions prohibit surreptitious recordings

43. ABA Comm. on Professional Ethics and Grievances, Informal Op. 1009 (1967). See *supra* notes 27-29 and accompanying text.

44. ABA Comm. on Professional Ethics and Grievances, Informal Op. 1008 (1967). See *infra* notes 93-98 and accompanying text.

45. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 337 (1974).

46. Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2511 (1982) (requiring one party consent to the recording of a conversation if the recording is not being made by law enforcement officials); *In re Use of Recording Devices in Connection with Telephone Service*, 12 F.C.C. 1005, 1006-07 (requiring the use of a "beep tone" warning whenever a conversation is being recorded automatically), *modified*, 12 F.C.C. 1008 (1947), *modified* 57 F.C.C.2d 334 (1975).

47. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 9 (1980).

48. MODEL RULES OF PROFESSIONAL CONDUCT Rules 4.1, 8.4(c) (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(4) (1980).

49. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 337 (1974).

50. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1320 (1975) (barring recording by private investigator who is not an employee of the attorney but who is aiding in the preparation of the case).

51. See generally Dallas Bar Ass'n Op., 1981-5 (reported in [Ethics Opinions] Law. Man. on Prof. Conduct (ABA/BNA) 801:8403 (1984)); Haw. S. Ct. Disciplinary Bd., Formal Op. 30 (1988) (reported in [Manual] Law. Man. on Prof. Conduct (ABA/BNA) 901:2801 (April 26, 1989)); Ind. State Bar Ass'n, Op. 2-1975 (reported in O. MARU, DIGEST OF BAR ASSOCIATION ETHICS OPINIONS ¶ 8457 (Supp. 1975)); Minn. Lawyer's Professional Responsibility Bd., Op. 3 (1986) (reported in [Manual] Law. Man. on Prof. Conduct (ABA/BNA) 901:5025 (March 18, 1987)); Mo. Bar Ass'n, Informal Op. 7 (1978)

of anyone without full disclosure.⁵² Other state opinions have more limited application and prohibit a private attorney from recording other attorneys,⁵³ clients,⁵⁴ or other persons.⁵⁵ Only one state that has addressed the issue has determined that the surreptitious recording of “clients, witness, or other lawyers” is not unethical.⁵⁶

As observed earlier,⁵⁷ it often is difficult to determine whether the court abhors the act of recording or the circumstances surrounding the recording. In *People ex rel. Attorney General v. Ellis*⁵⁸ the defendant lawyer, Ellis, participated in the installation of microphones in the Colorado Governor’s office. The Attorney General alleged that Ellis had made the recordings in the context of representing a client, with the intent of “using improper means to influence legislation, and stirring up litigation”⁵⁹ Ellis admitted that he made the recordings, but denied the motive the Attorney General attributed to his actions.⁶⁰ Once Ellis admitted he had secretly monitored conversations in the Governor’s office, the Attorney General instituted an action to disbar

(reported in O. MARU, DIGEST OF BAR ASSOCIATION ETHICS OPINIONS ¶ 11807 (Supp. 1980)); Wis. State Bar Ass’n, Op. 75-3 (1975) (reported in O. MARU, DIGEST OF BAR ASSOCIATION ETHICS OPINIONS ¶ 10183 (Supp. 1975)).

52. Alaska Bar Ass’n, Op. 83-2 (1983) (reported in [Ethics Opinions] Law. Man. on Prof. Conduct (ABA/BNA) 801:1201 (Jan. 23, 1985)); Colo. State Bar Ass’n, Op. 22 (1962) (reported in O. MARU, DIGEST OF BAR ASSOCIATION ETHICS OPINIONS ¶ 550 (1970)); Mich. State Bar Ass’n, Informal Op. 200 (n.d.) (reported in O. MARU, DIGEST OF BAR ASSOCIATION ETHICS OPINIONS ¶ 11603 (Supp. 1980)); N.Y. State Bar Ass’n, Op. 328 (1974) (reported in O. MARU, DIGEST OF BAR ASSOCIATION ETHICS OPINIONS ¶ 9088 (Supp. 1975)); Or. State Bar Ass’n, Op. 392 (1978) (reported in O. MARU, DIGEST OF BAR ASSOCIATION ETHICS OPINIONS ¶ 12658 (Supp. 1980)); Tex. State Bar Ass’n, Op. 392 (1978) (reported in O. MARU, DIGEST OF BAR ASSOCIATION ETHICS OPINIONS ¶ 12750 (Supp. 1980)).

53. Ariz. State Bar Ass’n, Op. 176A (1965) (reported in O. MARU, DIGEST OF BAR ASSOCIATION ETHICS OPINIONS ¶ 5923 (1970)); Cleveland Bar Ass’n, Op. 35 (1962) (reported in O. MARU, DIGEST OF BAR ASSOCIATION ETHICS OPINIONS ¶ 3591 (1970)); Los Angeles Bar Ass’n, Op. 272 (reported in O. MARU, DIGEST OF BAR ASSOCIATION ETHICS OPINIONS ¶ 515 (1970)); N.D. Bar Ass’n, Informal Op. 17 (1975) (reported in O. MARU, DIGEST OF BAR ASSOCIATION ETHICS OPINIONS ¶ 12506 (Supp. 1980)).

54. Cleveland Bar Ass’n, Op. 35 (1962) (reported in O. MARU, DIGEST OF BAR ASSOCIATION ETHICS OPINIONS ¶ 3591 (1970)).

55. Ariz. State Bar Ass’n, Op. 74-18 (1974) (reported in O. MARU, DIGEST OF BAR ASSOCIATION ETHICS OPINIONS ¶ 7620 (Supp. 1975)), *modified* by Ariz. State Bar Ass’n, Op. 75-13 (1975) (reported in O. MARU, DIGEST OF BAR ASSOCIATION ETHICS OPINIONS ¶ 7653 (Supp. 1975)) (recognizing four exceptions to the general ban on recordings for law enforcement); Philadelphia Bar Ass’n, Op. 61-6 (1961) (reported in O. MARU, DIGEST OF BAR ASSOCIATION ETHICS OPINIONS ¶ 4034 (1970)).

56. Utah State Bar Ass’n, Op. 90 (undated) (reported in [Manual] Law. Man. on Prof. Conduct (ABA/BNA) 901:8502 (Dec. 20, 1989)).

57. See *supra* notes 8-16 and accompanying text.

58. 101 Colo. 101, 70 P.2d 346 (1937).

59. *Id.* at 106, 70 P.2d at 348.

60. *Id.*

Ellis. The Colorado Supreme Court granted a summary suspension pending the outcome of criminal proceedings brought pursuant to the secret monitoring. The court characterized the attorney's conduct as "evil, shocking to all fine sensibilities, [and] violative of the American conception of the decencies, and potentially inimical to free government."⁶¹ The strong language underscores the target of the espionage, the Governor, rather than the actual recording.⁶²

The dissenting justice argued that the court should postpone the disciplinary determination until after the conclusion of the criminal proceedings.⁶³ However, the dissent similarly disapproved of the attorney's eavesdropping on the Governor's conversations.⁶⁴ Justice Burke suggested that a lawyer's motive and intent in making the recording should be analyzed and considered to mitigate discipline, particularly because the Attorney General charged Ellis with improper motive.⁶⁵

Ellis was readmitted to the bar on his petition for a final order.⁶⁶ The court noted that Ellis had been indicted on a misdemeanor charge of eavesdropping and found guilty by the petit jury. The court stressed that the wrong was infiltrating the statehouse, however, not covertly recording nonprivileged conversations.⁶⁷

The Colorado Supreme Court's most recent disciplinary action involving a private attorney engaged in undisclosed recording resulted in a public censure. In *People v. Wallin*⁶⁸ the lawyer represented an indi-

61. *Id.* at 103, 70 P.2d at 347.

62. The order calling for Ellis's initial disciplinary hearing stressed that he "wrongfully, lawfully, secretly and clandestinely . . . eavesdropp[ed] and sp[ie]d]" upon the Governor's private conversations and official deliberations. *Id.* at 102, 70 P.2d at 346-47.

63. *Id.* at 106, 70 P.2d at 348 (Burke, J., dissenting). Justice Burke noted that the criminal charges pending against the attorney required the state to prove that the motive in recording the conversation was to circulate "slanderous and mischievous tales." *Id.*

64. Justice Burke stated: "I share the common detestation of 'snooping.' . . . If [Ellis] did what he admits, plus all the Attorney General charges, and with the motives imputed, I think he should be disciplined, possibly disbarred, not because his actions would be illegal, but because they would be indecent, unworthy a lawyer." *Id.* at 107, 70 P.2d at 349.

65. *Id.*

66. *People ex rel. Attorney Gen. v. Ellis*, 103 Colo. 344, 86 P.2d 247 (1938). Ellis was restored to practice based solely on a prior decision readmitting another attorney who also had been suspended indefinitely for unlawful entry. *Id.* at 346, 86 P.2d at 247; see *People ex rel. Colo. Bar Ass'n v. Kelley*, 87 Colo. 88, 285 P. 767 (1980).

67. *Ellis*, 103 Colo. at 345, 86 P.2d at 247. The court noted that Ellis supplied the funds to purchase and install the recording equipment, supplied the funds to pay stenographers to transcribe the conversations, and bribed a janitor to obtain keys to the state house and offices inside the state house. *Id.* at 345-46, 86 P.2d at 247. Justice Burke concurred in the order, but stressed that the attorney had been cleared of "all personal interest and evil intent." *Id.* at 347, 86 P.2d at 248.

68. 621 P.2d 330 (Colo. 1981).

vidual charged with burglary. At Wallin's instigation, the client called the victim, Daines, and asked him not to identify the stolen items, which had been recovered from a local pawn shop. The client then urged Daines to contact Wallin directly. Daines notified the police, who advised him to call Wallin and secretly record the conversation.⁶⁹

Daines and Wallin discussed the burglary twice by telephone. Wallin suggested that Daines drop the investigation and that Daines hire Wallin to preserve confidentiality under the attorney-client privilege. A grievance was filed based on these recordings. Sometime after filing, Wallin called Daines to discuss the disciplinary action, and surreptitiously recorded their conversation.⁷⁰

The court determined that Wallin's recording of the telephone conversation with Daines violated Disciplinary Rule 1-102(A)(4).⁷¹ This case was complicated by the clearly improper content of the lawyer's conversations with the victim. However, the court considered as mitigating factors the attorney's lack of experience⁷² and that the attorney did not personally benefit from the misconduct.⁷³

A party does not have to disclose expressly to another party that a conversation is being recorded. In *Netterville v. Mississippi State Bar*⁷⁴ the Mississippi Supreme Court refused to discipline an attorney alleged to have made a recording of a conversation with a witness. Netterville represented a plaintiff in a products liability claim against a corporation. In an effort to schedule depositions with stockholders, the attorney contacted a stockholder who was a potential witness and obtained the names and addresses of other stockholders the attorney wished to depose. Although the attorney denied that he recorded the conversation, he admitted that a secretary monitored and transcribed the conversation in shorthand.⁷⁵

The court determined that the attorney had not engaged in unethical conduct because the nature of the conversation must have put the other party on notice that the information was being recorded in some manner. *Netterville* appears to allow a nonmechanical⁷⁶ transcription

69. *Id.* at 331.

70. *Id.*

71. DR 1-102(A)(4) provides in pertinent part that "A lawyer shall not . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(4) (1980).

72. The attorney had been practicing for approximately three years but had been a solo practitioner for less than one year. Wallin had handled only one prior felony. *People v. Wallin*, 621 P.2d 330, 331-32 (1981).

73. *Id.*

74. 397 So. 2d 878 (Miss. 1981).

75. *Id.* at 880-81.

76. The court distinguished *J.C. Penney Co. v. Blush*, 356 So. 2d 590 (Miss. 1978), *see infra* notes 129-30 and accompanying text, by noting that insufficient evidence ex-

of a conversation when the other party knows or should know that the information is being preserved.

The South Carolina Supreme Court issued a private reprimand to a lawyer who recorded a telephone conversation with a potential adversary.⁷⁷ The attorney, who represented a family member who had been involved in an automobile accident, contacted the other driver in the collision and secretly recorded their conversation. Moreover, the attorney identified himself as merely his client's cousin and not as an attorney. The attorney sought to use the recording two years later at the driver's deposition.⁷⁸

The hearing panel concluded that making the recording did not constitute professional misconduct. The court disagreed and held that an attorney violates DR 1-102(A)(4) when he makes "a recording of a conversation with an adversary or a potential adversary without the knowledge and consent of all parties to the conversation."⁷⁹ The court implied that although the attorney's behavior demanded a harsher punishment than that imposed, the court would be lenient because of the novelty of the question.⁸⁰

The South Carolina Supreme Court has placed a strict ban on the secret recording of any conversation, regardless of the purpose for which the recording was made. In *In re Anonymous Member of the South Carolina Bar*⁸¹ the attorney argued that the secret recording was merely "an alternative means of taking notes"⁸² and the recording was not used to gain an unfair advantage over the other parties to the conversation.

Noting that the issue had been presented to the court on two prior occasions,⁸³ the court reaffirmed its prior holdings that "an attorney shall not record a conversation or any portion of a conversation of any person whether by tape or other electronic device, without the prior

isted to establish that the attorney in this case had recorded the conversation. *Netterville*, 397 So. 2d at 883. In addition, the court noted that the *J.C. Penney* decision dealt with the attorney's dual role as an advocate and a witness. *Id.*

77. *In re Anonymous Member of the S.C. Bar*, 283 S.C. 369, 322 S.E.2d 667 (1984).

78. *Id.* at 371, 322 S.E.2d at 668.

79. *Id.* at 372, 322 S.E.2d at 669. The court adopted the panel's recommendation that failure to identify oneself as an attorney constitutes "conduct involving misrepresentation." *Id.* at 371, 322 S.E.2d at 669.

80. *Id.*; c.f. *In re Warner*, 286 S.C. 459, 335 S.E.2d 90 (1985) (despite the novel question, the court publicly reprimanded a lawyer for instructing a client to record a conversation secretly with a family court judge). See *supra* notes 18-26 and accompanying text.

81. — S.C. —, 404 S.E.2d 513 (1991).

82. *Id.* at —, 404 S.E.2d at 514.

83. See *In re Warner*, 286 S.C. 459, 335 S.E.2d 90 (1985); *In re Anonymous Member of the S.C. Bar*, 283 S.C. 369, 322 S.E.2d 667 (1984).

knowledge and consent of all parties to the conversation.”⁸⁴ The court stated that this rule would be applied “irrespective of the purpose(s) for which such recordings were made, the intent of the parties to the conversation, whether anything of a confidential nature was discussed, and whether any party gained an unfair advantage from the recordings.”⁸⁵

Unlike the court in *Netterville*,⁸⁶ the South Carolina Supreme Court clearly has rejected the notion that a party may be given notice that a recording is being made based on the content of the conversation. In addition, this case appears to have none of the complicated facts of the prior cases presented to the South Carolina Supreme Court, and thus makes clear that it is the act of secretly recording which is the evil, and not the use to which the recording is put.

In *Gunter v. Virginia State Bar*⁸⁷ the Virginia Supreme Court suspended an attorney for thirty days because he advised his client to record conversations secretly. The attorney represented the husband in a divorce proceeding in which the husband suspected his wife of adultery. The husband authorized the recording of conversations in his home and, at the direction of the attorney, placed a recording device on the telephone. The recordings did not produce any evidence of adultery, but the lawyer obtained information about the legal advice given to the wife by her attorney. When the wife learned that her telephone conversations had been monitored, she brought a criminal charge against the attorney, alleging violation of the state wiretap statute. The trial court acquitted the attorney.⁸⁸

The court found that even though the lawyer was not guilty of any criminal violation under state law, his actions were dishonest and deceitful, and violated DR 1-102(A)(4).⁸⁹ The court observed that the Virginia Code of Professional Responsibility imposes a higher standard of conduct on attorneys than merely avoiding criminal activity. The court did not decide whether it would have been improper for the lawyer to record a conversation to which he was a party.⁹⁰ Accordingly, the court's holding extends only to conversations recorded by third persons but authorized by the attorney.

84. *Anonymous Member*, — S.C. at —, 404 S.E.2d at 514.

85. *Id.* at —, 404 S.E.2d at 514.

86. 397 So. 2d 878 (Miss. 1981).

87. 238 Va. 617, 385 S.E.2d 597 (1989).

88. *Id.* at 620, 385 S.E.2d at 599.

89. The court did not address whether the attorney's conduct violated the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2521 (1988).

90. Indeed, it was on this basis that the court distinguished ABA Comm. on Ethics and Professional Responsibility, Formal Op. 337 (1974). *Gunter*, 283 Va. at 622, 385 S.E.2d at 600.

The *Gunter* court objected to the use the attorney made of the recordings rather than the act of recording. The attorney used the recordings to get information to aid his client in settlement negotiations.⁹¹ The court characterized Gunter's efforts as an attempt to ensnare an adversary.⁹² Because the attorney displayed an utter disregard for the confidential nature of the wife's conversations, the court found that the punishment was justified.

V. RECORDING CLIENTS

The ABA also disapproves of a lawyer's secretly recording telephone conversations between himself and his client. The attorney must inform the client that a verbatim record of their conversation is being made.⁹³ According to the ABA, secretly recording a client creates problems both because the attorney made the recording and because the attorney may disclose the substance of the recording.⁹⁴ The lawyer has an obligation to maintain the confidences of his client,⁹⁵ and to deal with clients candidly and fairly.⁹⁶ According to the ABA, making verbatim records of conversations requires both disclosure to the client and preservation of attorney-client confidences.⁹⁷

Informal opinion 1008 may extend to more than the recording of conversations because it condemns "verbatim records" of conversations without full disclosure to the other party. The phrase "verbatim record" encompasses more than the mechanical reproduction of sound

91. *Gunter*, 283 Va. at 620, 385 S.E.2d at 599.

92. *Id.* at 622, 385 S.E.2d at 600.

93. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1008 (1967).

94. *Id.*

95. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1980); CANONS OF PROFESSIONAL ETHICS Canon 37 (1956). The committee noted that exceptions may exist to the attorney-client privilege which may or may not make the recording "legally appropriate or legally not appropriate." ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1008 (1967).

96. The committee cited two former decisions that impose a duty of fairness in dealings with clients: ABA Comm. on Professional Ethics and Grievances, Formal Op. 7 (1925) (an attorney should avoid misstatement in letter to collect fees from a client), and ABA Comm. on Professional Ethics and Grievances, Informal Op. 262 (unpublished) (an attorney should not attempt to enforce a statute of limitations when a client seeks repayment of money loaned to the attorney). In addition, the committee cited ABA Comm. on Professional Ethics and Grievances, Informal Op. 1009 (1967), which recognized that it is improper to record another attorney secretly. See *supra* notes 27-29 and accompanying text.

97. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1008 (1967).

and could comprise any method by which the conversation is preserved.⁹⁸

In several cases, private attorneys have agreed to record conversations with their clients at the request of law enforcement officials.⁹⁹ In *United States v. Ofshe* the Eleventh Circuit Court of Appeals rejected a defendant's Sixth Amendment claim that his attorney's cooperation with the federal government violated his constitutional rights.¹⁰⁰ The defendant's attorney collaborated with the Assistant United States Attorney in order to "diminish his own criminal responsibility"¹⁰¹ when he discovered that he was a target of a federal corruption investigation. The attorney agreed to provide the government with information about Ofshe's subsequent criminal conduct. The court rejected Ofshe's constitutional claim because Ofshe suffered no prejudice in his criminal defense.¹⁰² Also, the court was satisfied that confidential information obtained by the attorney was sufficiently protected.¹⁰³ The court held that, although the attorney's conduct was reprehensible, it was not sufficiently outrageous to warrant dismissing the indictment. However, the court assumed the district judge would refer the matter to the Attorney Registration and Disciplinary Commission.¹⁰⁴

The Colorado Supreme Court reached a similar conclusion in *People v. Smith*.¹⁰⁵ The court suspended an attorney who aided law enforcement officers by recording confidential communications with a former client. Smith, the attorney, had agreed to cooperate after his arrest for simple possession of cocaine. Smith argued that his conduct should be an exception to the ethical considerations because he was acting at the direction of law enforcement personnel. The court rejected his argument and observed that Smith was a private, not a prosecuting, attorney and so he could not benefit from the prosecutorial

98. For example, it is unclear whether a verbatim record of part of a conversation in the form of notes made by the attorney would be prohibited. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1008 (1967) bars a third person's unrevealed shorthand recording of the conversation. See *Netterville v. Mississippi State Bar*, 397 So. 2d 878 (Miss. 1981); see also *supra* notes 74-76.

99. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 337 (1974) recognizes an exception to its general prohibition of secret recordings in favor of law enforcement officers. Formal opinion 337 parallels the law enforcement exception enunciated in the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 (1988).

100. 817 F.2d 1508 (11th Cir.), *cert. denied*, 484 U.S. 963 (1987).

101. *Id.* at 1511.

102. *Id.* at 1516.

103. *Id.* The attorney general took pains to protect privileged attorney-client conversations and did not discover any defense strategy. *Id.*

104. *Id.* at 1516 n.6.

105. 778 P.2d 685 (Colo. 1989).

exception.¹⁰⁶

When a private attorney participates in the investigation of his client by secretly recording conversations with his client, ethical considerations regarding conflicts of interest develop beyond those embodied in rules of professional conduct.¹⁰⁷ The incentive to cooperate often results from an arrest or criminal investigation of the attorney. A conflict of interest arises when a lawyer agrees to record his conversations with clients in exchange for leniency in his own case. The attorney must fully disclose his interest and actions to the client to cure the conflict. The attorney thereafter may continue representation only with the client's consent.¹⁰⁸

Moreover, a lawyer has an obligation to maintain client confidences.¹⁰⁹ An attorney breaches his duty by secretly recording conversations with his client for the benefit of the government. The justification for the duty to maintain client confidences lies in the importance of the attorney's ability to communicate fully and frankly with his client.¹¹⁰ This principle would be severely undermined if an attorney could secretly cooperate with the government's investigation of a criminal defendant who also is a client.

The attorney-client privilege belongs to the client and only the client can waive the privilege.¹¹¹ When an attorney cooperates with law enforcement officials he waives the privilege without his client's consent. This result clearly is inconsistent with the concept that the privilege belongs to the client.

VI. THE CRIMINAL DEFENDANT EXCEPTION

Several states recognize exceptions to the general ban on secret recordings when private attorneys defend criminal defendants. The Kentucky Bar Association justified the exception on the grounds of protecting the defendant's Sixth and Fourteenth Amendment rights.¹¹²

106. *Id.* at 687.

107. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(A) (1980).

108. *See supra* text accompanying note 101.

109. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(B) (1980). Despite this obligation, both standards allow an attorney to reveal his client's intent to commit a crime, as well as information necessary to prevent the crime. The exception applies solely to inchoate crimes, however, and not to the investigation of the client's prior criminal conduct.

110. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 comment (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-1 (1980).

111. *See* C. WOLFRAM, MODERN LEGAL ETHICS § 6.4.1 (1986).

112. Ky. Bar Ass'n, Op. E-279 (1984) (reported in [Ethics Opinions] Law. Man. on Prof. Conduct (ABA/BNA) 801:3909 (Jan. 23, 1985)).

A government prosecutor may gather and seek the admission of secretly recorded conversations made by the defendant. Conversely, a private attorney cannot secretly record conversations, but simply may present testimony on behalf of his client. A recording preserves the conversation in its original form and therefore cannot be impeached on the grounds of poor memory, bias, or prejudice. Live testimony, however, suffers all of these weaknesses. Thus, the defendant is unable to rebut state evidence with the same quality of evidence as the government offers. This limitation may offend notions of fundamental fairness guaranteed by the Fourteenth Amendment. The committee also stressed the attorney's duty to represent his client competently and zealously.¹¹³

The New York City Bar Association also recognizes the permissibility of secret recordings by private attorneys engaged to represent criminal defendants.¹¹⁴ The committee extended the exception to secret recordings made prior to indictment if the attorney has reasonable grounds to believe his client is under investigation. Although the committee did not give its reasons for reaching this conclusion, the extension is not based on the Sixth Amendment because the Sixth Amendment does not apply to the preindictment phase.¹¹⁵ One party must consent to the recording pursuant to the Omnibus Crime Control and Safe Streets Act of 1968.¹¹⁶

The Ethics Committee of the Board of Professional Responsibility of the Tennessee Supreme Court also allows secret recordings by private attorneys engaged to represent criminal defendants, even in the preindictment phase.¹¹⁷ However, Tennessee confines the use of recordings to impeachment of potentially adverse witnesses at trial.

Tennessee also allows the recording of a statement when the statement itself is "a felonious crime."¹¹⁸ The problem with this exception is that it would be difficult to record the statement unless the attorney already was engaged in recording the conversation. If the statement is not made, the attorney has exceeded the terms of the exception. The Ethics Committee probably envisioned a motive analysis of the record-

113. *Id.*; see also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101, DR 7-101 (1980).

114. New York City Bar Ass'n, Op. 80-95 (1980) (reported in [Ethics Opinions] Law. Man. on Prof. Conduct (ABA/BNA) 801:6318 (1984)).

115. See *Kirby v. Illinois*, 406 U.S. 682 (1972) (no right to counsel prior to indictment or the filing of formal charges).

116. 18 U.S.C. § 2511 (1988). See *supra* note 46.

117. Ethics Comm. of the Bd. of Professional Responsibility of the Tenn. Supreme Court, Op. 86-F-14(a) (1986) (reported in [Manual] Law. Man. on Prof. Conduct (ABA/BNA) 901:3101 (Nov. 11, 1987)).

118. *Id.*

ing based on the intent of the attorney who makes the recording, to determine whether the recording falls within the exception.

At least one state specifically prohibits attorneys representing criminal defendants from authorizing or assisting clients to record secretly telephone conversations with co-defendants.¹¹⁹ Attorneys also may not request the police to record conversations. The opinion should be read narrowly, however, because the facts reveal the attorney's client had admitted his guilt. If applied literally, the opinion has serious implications that pertain to the plea bargaining process. Many defense attorneys encourage their clients to cooperate with authorities investigating other crimes in exchange for leniency. The opinion does not raise or address the constitutional implications of prohibiting the criminal defense attorney from secretly recording conversations.¹²⁰

VII. COUNSELLING CLIENTS REGARDING SECRET RECORDING

As previously noted, ABA informal opinion 1320 prohibits attorneys from using third persons to record secretly conversations that the attorneys could not ethically record without making full disclosure.¹²¹ Several states have wrestled with the extent to which an attorney may counsel a client about recording conversations when the client requests advice. Serious First and Fourteenth Amendment problems may arise if the state intrudes upon the attorney-client relationship by interfering with the free flow of information between the parties.

An attorney may not counsel or assist his client to engage in illegal activity.¹²² However, in the absence of a state law that requires full disclosure prior to recording, if one party consents to the secret recording the client acts within the law when he makes a secret recording.¹²³

119. Va. State Bar Ass'n, Op. 848 (1986) (reported in [Manual] Law. Man. on Prof. Conduct (ABA/BNA) 901:8712 (Dec. 20, 1989)).

120. See *Gunter v. Virginia State Bar*, 238 Va. 617, 385 S.E.2d 597 (1989) and see *supra* notes 87-93 and accompanying text. The Virginia Supreme Court refused to rule on the validity of the prosecutorial exception.

121. See *supra* note 50 and accompanying text.

122. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4 (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(8), DR 7-102(A)(5) (1980).

123. See Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2511(c) (1988). See also Ass'n of the Bar of the City of New York, Op. 683 (1945) (reported in O. MARU, DIGEST OF BAR ASSOCIATION ETHICS OPINIONS ¶ 317 (1970)). The New York opinion warns that an attorney should not advise or participate in a client's attempt to get evidence of a spouse's infidelity by placing a dictaphone in the home. Such conduct is illegal after the passage of the Omnibus Crime Control and Safe Streets Act of 1968 because the dictaphone would record conversations without the consent of any party to the conversation. Assisting the client in illegal conduct patently violates ethical standards.

Therefore, no explicit authority arises in the ethical rules that restrains an attorney from advising his client on the legality or illegality of secret recordings, provided the client, or someone else who is a party to the conversation, consents. Indeed, "[a] lawyer is required to give an honest opinion about the legal consequences that appear likely to result from a client's conduct."¹²⁴

Several ethics committees adopted a compromise between the need for attorneys to advise clients regarding legal implications of secret recordings and the legal profession's historical distaste for secret recordings. For example, the New York State Bar Association permits attorneys to counsel clients in certain circumstances regarding the secret recording of conversations to which clients are parties.¹²⁵ Likewise, the Kentucky Bar Association has stated that if a client inquires about the legality of a recorded conversation, the attorney may advise the client of the legal consequences involved and the propriety of the recording.¹²⁶ The opinion expressly prohibits the attorney from suggesting that the client secretly record conversations with other people, even conversations to which the client is a party.¹²⁷

VIII. THE ADMISSIBILITY OF SECRET RECORDINGS MADE BY PRIVATE COUNSEL IN THE CONTEXT OF LITIGATION

If an attorney records a conversation without disclosure to the other parties, the question arises whether the attorney is permitted to use the recording to represent his client. The Mississippi Supreme Court has held that these recordings are generally admissible. In addressing this issue, the court did not consider ethical issues to determine the recording's admissibility.¹²⁸

In *J.C. Penney, Inc. v. Blush*¹²⁹ the attorney for the plaintiff tried to introduce a recorded conversation between himself and a defense witness. The witness discovered that the conversation had been recorded when he took the stand to testify at trial. The witness claimed

124. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 comment (1983).

125. N.Y. State Bar Ass'n, Op. 515 (1979) (reported in O. MARU, DIGEST OF BAR ASSOCIATION ETHICS OPINIONS ¶ 433 (Supp. 1980)). The opinion does not discuss the circumstances under which counseling is proper.

126. Ky. Bar Ass'n, Op. E-289 (1984) (reported in [Ethics Opinions] Law. Man. on Prof. Conduct (ABA/BNA) 801:3910 (Jan. 23, 1985)). The opinion expressly provides that the attorney does not need to confine his explanation to legal considerations.

127. *Id.*

128. *Wilkins v. Bancroft*, 248 Miss. 622, 160 So. 2d 93 (1964). At trial, the plaintiff introduced a tape recording made by a machine placed in the defendant's office by a private investigator. *Id.* at 627, 160 So. 2d at 95.

129. 356 So. 2d 590 (Miss. 1978).

the recording had been altered. The attorney took the stand to testify that the tape had not been altered and subsequently argued to the jury the issue of his own credibility. The court cautioned the lawyer about the use of the recording on retrial, and noted that an attorney should avoid "the dual role of an attorney testifying as a witness in a case in which he also [is] actively engaged in representing one of the parties."¹³⁰ Although the court addressed the impropriety of the recording, it emphasized the attorney's role as a witness as the true evil.

In a later case, *National Life & Accident Insurance Co. v. Miller*,¹³¹ the Mississippi Supreme Court affirmed the trial court's ruling on the admissibility of a taped conversation between the plaintiff and the defendant's insurance agent. The plaintiff's attorney had recorded the conversation secretly. The court noted that although it did not approve of the attorney's actions in making the recording,¹³² it was not reversible error to admit the recording at trial because the defendant's agent admitted the conversation and its contents.¹³³

Miller appears to limit the holding of *Blush* to cases in which the attorney is called to testify about the accuracy of the recording. *Miller* establishes a rule of admissibility based on a party's stipulation or admission that the recording is an accurate rendition of the conversation. In other words, admissibility does not depend on the propriety of the recording itself. Rather, the test for admission is whether the attorney will have to engage in further inappropriate conduct to seek its introduction. If this is the standard, a conversation to which the attorney was not a party seems to be admissible for any purpose under this rule because in no event would the attorney be called on to testify about the accuracy of the recording.

IX. CONCLUSION

Ethical opinions are merely advisory and are not binding on courts. Ethical opinions generally are rendered based on a set of facts submitted to a bar association and may not reflect the feelings of the judges who ultimately decide on the propriety of an attorney's conduct. However, some opinions, such as ABA formal opinion 337, are so widely accepted that they set a true standard of conduct. The reported

130. *Id.* at 594. The court cites ABA Comm. on Ethics and Professional Responsibility, Formal Op. 337 (1974) for the proposition that "no 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.*

131. 484 So. 2d 329 (Miss. 1985).

132. The telephone call was placed and the recording was made from the attorney's office. *Id.* at 331.

133. *Id.* at 338.

decisions of disciplinary actions indicate how particular courts will treat a similar case, but these decisions are often complicated by facts unrelated to the act of recording. In addition, the language used by the court to chastise the attorney is often more severe than the punishment imposed.

The overwhelming conclusion as established by the ethical opinions, disciplinary proceedings, and case law is that secret recording by nongovernment attorneys is not favored by American courts. Courts historically characterize the secret recording of conversations as deceitful, tricky, and unfair. An attorney may interview a witness, subsequently write a memorandum of the conversation, and later testify about the contents of the conversation. Therefore, it is not the repetition of the content of the conversation that is impermissible. Rather, the courts and ethical committees state that the act of recording without full disclosure violates ethical duties.

Traditionally, the cases and ethical opinions have cited DR 1-102(A)(4) as prohibiting secret recordings. The rule condemns "conduct involving dishonesty, fraud, deceit, or misrepresentation."¹³⁴ This rule applies to any conduct in which an attorney engages, even outside the scope of his professional duties. Taken to their logical conclusions, the ethical opinions and cases prohibit attorneys from secret recordings even in a nonprofessional capacity.

When considered in context, the true justification for prohibiting recordings lies in the relationship between attorneys, their clients, the judicial system, and the public at large. There appears to be a public perception that one can tell an attorney anything and it will not be repeated. Although this is not necessarily true, it would be a breach of public confidence if attorneys began recording their conversations with the public and replaying them at their whim. Because attorneys normally deal in an adversarial situation, there is a certain amount of inhibition in the flow of communication between attorneys and the court. If secret recordings were allowed, it would further complicate an already difficult communication system.

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134. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(4) (1980). *See also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4(c) (1983).