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Wiretapping, Tape Recorders & Legal Ethics: Questions Posed by Attorney Involvement in Secretly Recording Conversation

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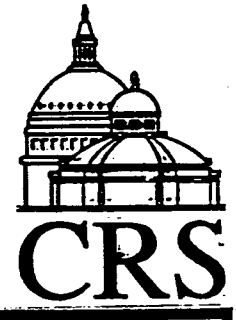

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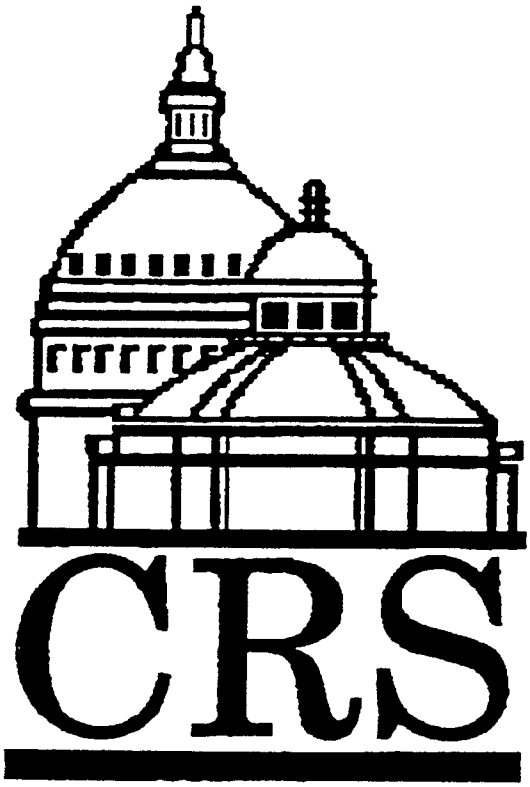

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Wiretapping, Tape Recorders & Legal Ethics: Questions Posed by Attorney Involvement in Secretly Recording Conversation

Summary

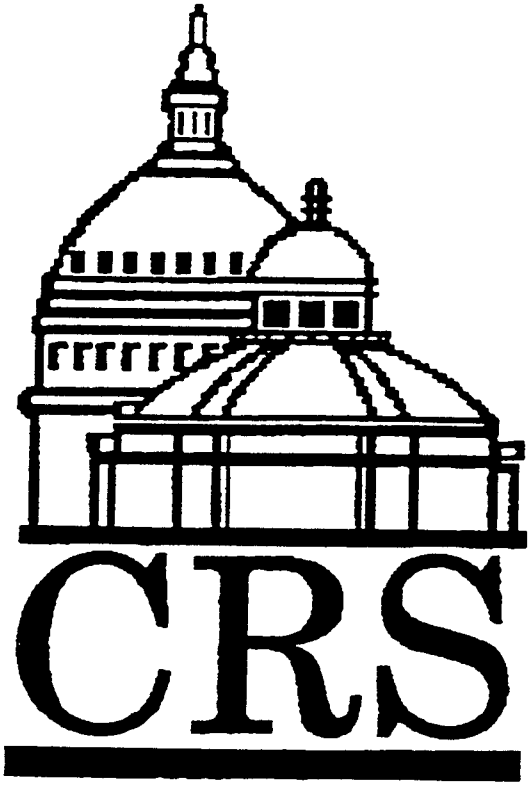
The lawfulness of wiretapping and electronic eavesdropping is the subject of federal law. Recently questions have arisen as to how this applies to attorneys. Surreptitiously recording telephone or face to face conversations without the consent of at least one party to the conversation is illegal and contrary to the ethical standards of the legal profession. In some states recording such conversations requires the consent of all parties to the conversation. Elsewhere, recording a conversation with the knowledge or consent of only one participant may be lawful but unethical.

The American Bar Association (ABA) concluded almost a quarter of a century ago that secretly recording a conversation without the knowledge or consent of all of the participants violated the ethical prohibition against engaging in conduct involving "dishonesty, fraud, deceit or misrepresentation." The ABA conceded, however, that law enforcement recording, conducted under judicial supervision, breached no ethical standard.

The opinions of the authorities responsible for regulation of the practice of law in the various states fall into three categories. Some agree with the ABA. Some agree with the ABA but have expended the circumstances under which recording is considered within ethical bounds. Some reject the ABA view.

Since the assessment of whether a particular recording offends ethical standards may well be determined by whether the tribunal considers all secret recording ethically repugnant (some do, some do not), the prudent lawyer avoids such recording fully aware that others may be allowed to record with impunity.

Summaries and excerpts from relevant state court and bar association ethics committee opinions are appended.



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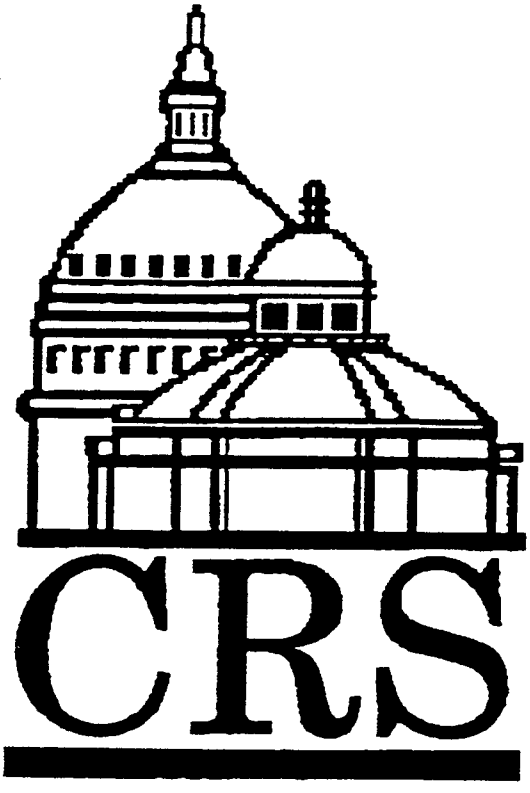

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Wiretapping, Tape Recorders & Legal Ethics: Questions Posed by Attorney Involvement in Secretly Recording Conversation

Has an attorney engaged in unprofessional conduct when he or she secretly records a conversation? The practice is unquestionably unethical when it is done illegally; it's status is more uncertain when it is done legally.

Both the Code of Professional Responsibility (DR 1-102(A)(3)) and the Model Rules of Professional Conduct (Rule 8.4(b)), models for the standards binding on members of the Bar in most jurisdictions, broadly condemn illegal conduct as unethical.[1] In the absence of an applicable exception, secretly recording either a telephone or face to face conversation is a violation of the Electronic Communications Privacy Act provisions that proscribe the use of an electronic or mechanical device to intercept wire, oral or electronic communications, 18 U.S.C. 2510, 2511.

Exceptions are available for judicially supervised, law enforcement interceptions under procedures dictated by the Act, 18 U.S.C. 2511(1). It is likewise "not unlawful" under the federal Act to record a conversation, as long as one of the parties to the conversation consents, regardless of whether the recording is accomplished by someone "acting under color of law" (the police) or someone "not acting under color of law" (everyone else), 18 U.S.C. 2511(2)(c), (d).

State law frequently follows a similar pattern — recording is outlawed subject to a one party consent exception for either the police or both the police and everyone else. Yet several states make unlawful what is "not unlawful" under federal law; they ban recording but are less forgiving of consent interceptions. In California, Delaware, Florida, Illinois, Kansas, Maryland, Massachusetts, Michigan, Montana, New Hampshire, Oregon, Pennsylvania, and Washington, some types of recording that are lawful as a matter of federal law are illegal as a matter of state law and consequently are unethical.[2]

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[1] Strictly speaking neither model includes all crimes. The Rules of Professional Conduct refer to any criminal act "that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects" and the Code of Professional Responsibility to conduct "involving moral turpitude." No one doubts inclusion of illegal wiretapping or electronic eavesdropping within the proscribed class in either case, *N.C. RPC 192* (1995); *Ore. State Bar Ass'n Formal Opinion 1991-74*; *Va. LEO #1324* (1990). Summaries or excerpts from state courts and state bar association ethics committees are appended.

[2] Some of these jurisdictions permit interception with one party consent for either telephone or oral communications but not both; some permit interception in criminal cases

In the remaining jurisdictions, recording that is lawful may nevertheless be unethical. Its status turns upon construction of the command that attorneys avoid "conduct involving dishonesty, fraud, deceit, or misrepresentation," DR 1-102(A)(4); Rule 8.4(c). Almost a quarter of a century ago, the ABA declared that the phrase "dishonesty, fraud, deceit or misrepresentation" includes recording a conversation without the consent of all of the parties to a conversation, even if the conduct is lawful, ABA *Formal Op. 337* (1974).[3] The Opinion conceded an exception for court-ordered interceptions.[4] Most jurisdictions to consider the question have concurred. In doing so, some recognize an expanded class of exceptions. And some disagree.

The convictions expressed by the Texas Professional Ethics Committee are typical of the states that follow the ABA approach:

> In February 1978, this Committee addressed the issue of whether an attorney in the course of his or her practice of law, could electronically record a telephone conversation without first informing all of the parties involved. The Committee concluded that, although the recording of a telephone conversation by a party thereto did not per se violate the law, attorneys were held to a higher standard. The Committee reasoned that the secret recording of conversations offended most persons' concept of honor and fair play. Therefore, attorneys should not electronically record a conversation without first informing that party that the conversation was being recorded.
>
> The only exceptions considered at that time were `extraordinary circumstances with which the state attorney general or local government or law enforcement attorneys or officers acting under the direction of a state attorney general or such principal prosecuting attorneys might ethically make and use secret recordings if acting within strict statutory limitations conforming to

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with one party consent but require the consent of all parties for interception by the general public or if the interception is unrelated to any of a list of statutory designated offenses. The "all party consent" states are noted in the Appendix.

[3] "The conduct proscribed in DR 1-102(A)(4), i.e., conduct which involves dishonesty, fraud, deceit or misrepresentation . . . clearly encompasses the making of recordings without the consent of all parties . . . [N]o lawyer should record any conversation whether by tapes or other electronic device, without the consent or knowledge of all parties to the conversation," *ABA Formal Op. 337*, at 3 (1974).

[4] "There may be extraordinary circumstances in which the Attorney General of the United States or the principal prosecuting attorney of a state or local government or law enforcement attorneys or officers acting under the direction of the Attorney General or such principal prosecuting attorneys might ethically make and use secret recordings if acting within strict statutory limitations conforming to constitutional requirements. This opinion does not address such exceptions which would necessarily require examination on a case by case basis" *id.*

Note that under federal law in effect at the time an application for judicially supervised wiretapping for law enforcement purposes required the approval of the Attorney General or principal prosecuting attorney of a state or political subdivision of a state, but law enforcement wiretapping with one party consent required no such approval, 18 U.S.C.2516, 2511 (1972 ed.).

> constitutional requirements,' which exceptions were to be considered on a case by case basis.
>
> . . . [T]his Committee sees no reason to change its former opinion. Pursuant to Rule 8.04(a)(3), attorneys may not electronically record a conversation with another party without first informing that party that the conversation is being recorded. Tex. Prof. Eth. Comm. Opinion No. 514 (1996).

The states that appear to share this view include Alabama, Alaska, Colorado, Hawaii, Iowa, Missouri, and Virginia.[5] Thus far, the federal courts also seem to be in accord.[6]

A second group of states — Arizona, Idaho, Kansas, Kentucky, Minnesota, Ohio, South Carolina, and Tennessee — concur but with an expanded list of exceptions, e.g., permitting recording by law enforcement personnel generally not just when judicially supervised,[7] or recording by criminal defense counsel,[8] or recording statements that themselves constitute crimes such as bribery offers or threats,[9] or recording confidential conversations with clients,[10] or recordings made solely for the purpose of creating a memorandum for the files,[11] or recording by a government attorney in connection with a civil matter,[12] or recording under other extraordinary circumstances.[13]

A third group of jurisdictions have refused to adopt the ABA unethical per se approach. In one form or another the District of Columbia, Mississippi, New Mexico, North Carolina, Oklahoma, Oregon, Utah and Wisconsin suggest that the

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[5] *Ala. Opinion 84-22* (1984); *Alaska Bar Ass'n Eth.Comm. Ethics Opinions No. 92-2 (1992) and No. 91-4* (1991); *People v. Smith*, 778 P.2d 685, 686, 687 (Colo. 1989); *Haw. Formal Opinion No. 30* (1988); *Iowa State Bar Ass'n v. Mollman*, 488 N.W.2d 168, 169-70, 171-72 (Iowa 1992); *Mo.Advisory Comm. Op. Misc. 30* (1978); *Va. LEO #1635* (1995), *Va. LEO #1324*; *Gunter v. Virginia State Bar*, 238 Va. 617, 621-22, 385 S.E.2d 597, 600 (1989).

[6] *Parrott v. Wilson*, 707 F.2d 1262 (11th Cir. 1983); *Moody v. IRS*, 654 F.2d 795 (D.C. Cir. 1981); *Ward v. Maritz, Inc.*, 156 F.R.D. 592 (D.N.J. 1994); *Wilson v. Lamb*, 125 F.R.D. 142 (E.D.Ky. 1989); *Haigh V. Matsushita Electric Corp.*, 676 F.Supp. 1332 (E.D.Va. 1987).

[7] *Ariz. Opinion No. 95-03* (1995); *Ky.Opinion E-279* (1984); *Minn.Law.Prof. Resp.Bd. Opinion No. 18* (1996); *Ohio Bd.Com.Griev.Disp. Opinion No. 97-3* (1997); *S.C. Ethics Advisory Opinion 92-17* (1992); *Tenn.Bd.Prof.Resp. Formal Ethics Opinion No. 86-F-14(a)* (1986).

[8] *Ariz. Opinion No. 95-03* (1995); *Ky.Opinion E-279* (1984); *Minn.Law.Prof.Resp.Bd. Opinion No. 18* (1996); *Ohio Bd.Com.Griev.Disp. Opinion No. 97-3* (1997); *Tenn.Bd.Prof.Resp. Formal Ethics Opinion No. 86-F-14(a)* (1986).

[9] *Ariz. Opinion No. 95-03* (1995); *Tenn.Bd.Prof.Resp. Formal Ethics Opinion No. 86-F-14(a)* (1986).

[10] *Idaho Formal Opinion 130* (1989); *Minn.Law.Prof.Resp.Bd. Opinion No. 18* (1996)

[11] *Kan.Bar Ass'n Opinion 96-9* (1997).

[12] *Minn.Law.Prof.Resp.Bd. Opinion No. 18* (1996).

[13] *Ohio Bd.Com.Griev.Disp. Opinion No. 97-3* (1997).

position that the propriety of an attorney surreptitiously recording his or her conversations where it is lawful to do so depends upon the other circumstances involved in a particular case.[14]

In New York, the question of whether an attorney's surreptitiously recording conversations is ethically suspect is determined by locality.[15] There is general agreement that an attorney may advise his or her clients of the circumstances under which surreptitious recording is lawful, but that an attorney may not use a client, agent or any other individual to evade any ethical limitation to which the attorney is subject.

In several jurisdictions, the question of whether lawful recording is per se unethical has yet to arise. Elsewhere the hold of precedent of either persuasion may prove unsure for a simple reason. There is no rational consistency between the per se rule and its exceptions; between the reason why one party consent should be lawful and why it should be unethical. They represent two irreconcilable schools of thought with the outcome of any given case determined by the predilection of the tribunal. The prudent lawyer avoids surreptitious recording, aware that in similar circumstances others may be allowed to indulge with impunity.[16]

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[14] *D.C. Opinion No. 229* (1992) (recording was not unethical because it occurred under circumstances in which the uninformed party should have anticipated that the conversation would be recorded or otherwise memorialized); *Mississippi Bar v. Attorney ST.*, 621 So.2d 229 (Miss. 1993)(context of the circumstances test); *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); *N.C. RPC 171* (1994)(lawyers are encouraged to disclose to the other lawyer that a conversation is being tape recorded); *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); *Ore.State Bar Ass'n Formal Opinion No. 1991-74* (1991) (an attorney with one party consent may record a telephone conversation "in absence of conduct which would reasonably lead an individual to believe that no recording would be made"); *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"); *Wis.Opinion E-94-5* ("whether the secret recording of a telephone conversation by a lawyer involves 'dishonesty, fraud, deceit or misrepresentation' under SCR 20:8.4(c) depends upon all the circumstances operating at the time").

[15] Compare, *Ass'n of the Bar of City of N.Y. Formal Opinion No. 1995-10* (1995)(secret recording is per se unethical), with, *N.Y.County Lawyer's Ass'n Opinion No. 696* (1993)(secret recording is not per se unethical).

[16] "[T]he prudent lawyer should probably act as if just about everything said over the phone while practicing law may well end up on tape. Likewise, any lawyer who undertakes to record a conversation should take extreme care to ensure demonstrable compliance with the ethical requirements governing this practice", Gilbreath & Cukjati, *Tape Recording of Conversations: Ethics, Legality and Admissibility*, 59 TEXAS BAR JOURNAL 951, 954 (1996).

Appendix

Alabama: *Ala. Opinion 84-22* (1984): Neither a lawyer nor anyone acting on his behalf may record a conversation with a witness or a potential defendant without the consent or prior knowledge of all parties to the conversation.

Alaska: *Alaska Bar Ass'n Eth.Comm. Ethics Opinion No. 92-2* (1992): "An attorney may not ethically use a transcript of a telephone conversation with knowledge that another attorney surreptitiously recorded it because the use involves the attorney in the conduct that made the original act of recording unethical under DR 1-102(A)(4)."

Alaska Bar Ass'n Eth.Comm. Ethics Opinion No. 91-4 (1991): "The Committee has been asked to review Ethics Opinion 78-1, which held it was unethical for an attorney to record a telephone conversation in which the attorney participated without the consent of the other party and advises whether that opinion was applicable to an attorney who is party to a family law matter, acting in a personal capacity.

". . . [T]he Committee is of the opinion that the findings and assumptions of the American Bar Association Committee expressed in ABA Formal Opinion 337 remain valid today: that a failure to give notice of the recording of a conversation to all parties is the equivalent of a representation that the conversation is not being recorded, and is thus deceitful in violation of DR 1-102(A)(4).

"With regard to actions taken by a lawyer in a personal rather than professional capacity, the scope of DR 1-102(A)(4) is viewed as extending beyond actions in a professional capacity and extends to the lawyer's person or private conduct which reflects on honesty or character."

Arizona: *Ariz. Opinion No. 95-03* (1995): "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 against perjury. 3. A prosecutor or police officer may secretly record a conversation during the course of a criminal investigation. 4. The opinion recognized `that secret recording would be proper where specifically authorized by statute, court rule, or court order.' . . .

"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 ways. 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 . . .

"We conclude that the secret tape recording of a telephone conversation with opposing counsel involves an element of deceit and misrepresentation . . . Attorneys do not expect that their opponent is recording a telephone conversation."

Colorado: *People v. Smith*, 778 P.2d 685, 686, 687 (Colo. 1989): "In May of 1984, the respondent agreed to perform undercover activities of the Colorado Bureau of Investigation (CBI) with respect to an investigation of the complaining witness. Upon advice of an assistant state attorney general, CBI representatives requested that the respondent record telephone conversations secretly. After obtaining assurances from a member of the attorney general's office that such conduct would not violate the Code of Professional responsibility, the respondent agreed . . .

". . . The undisclosed use of a recording device necessarily involves elements of deception and trickery which do not comport with the high standards of candor and fairness to which all attorneys are bound. We conclude that these acts violated the provisions of DR1-102(A)(4).

"The respondent asserts that his conduct should be deemed an exception to these ethical considerations because he was acting under the direction of and pursuant to the advice of law enforcement officials . . . The respondent, however, was a private attorney, not a prosecuting attorney."

California: Recording face to face or telephone conversations is a crime under California law, Cal.Pen.Code §§631-632.7. There is no general one party consent exception, although there are exceptions for law enforcement, Cal.Pen.Code §§633, 633.1, and for recording conversations related to extortion, kidnapping, bribery and felonies involving violence, Cal.Pen.Code §633.5.

Delaware: Recording face to face or telephone conversations is a crime under Delaware law, Del.Code Ann. tit.11 §1336. There is a one party consent exception for those acting under color of law (police officers), but not for others, *Id.* Commission of "a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects" constitutes professional misconduct under the Delaware Rules of Professional Conduct, Rule 8.4(b).

District of Columbia: *D.C. Opinion No. 229* (1992): "A lawyer who tapes a meeting attended by him, his client, and representatives of a federal agency investigating his client commits no ethical violation, even if he does not reveal that a tape is being made, so long as the attorney makes no affirmative misrepresentations about the taping. The agency reasonably should not expect that the preliminary phase discussions are confidential. The agency also should expect that such discussions will be memorialized in some fashion by the investigated party's attorney and that the record made may be used to support a claim against the agency."

Florida: Recording face to face or telephone conversations is a crime under Florida law, Fla.Stat.Ann.§834.03. There is a one party consent exception for those acting under color of law (police officers), and a general all party consent exception of those not acting under color of law, *Id.* The Florida Rules of Professional Conduct declare that a lawyer shall not ". . . commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects," Rule 8.4(b).

Hawaii: *Haw. Formal Opinion No. 30* (1988): "Inquiry has been made concerning the ethical propriety of the electronic recording by a lawyer of a conversation between the lawyer and another person without that person's prior knowledge and consent. . .

". . . [E]ven if such conduct is not illegal, it offends the traditional high standard of fairness and condor which should characterize the practice of law and must be deemed improper, except in the special situations mentioned below . . .

"Therefore no lawyer should record or cause to be recorded any conversation, whether by taps or other electronic device, without the consent or prior knowledge of all parties to the conversation.

"There may be extraordinary circumstances in which secret recordings of conversations by lawyers are rendered permissible, such as where, for example, sanctioned by express statutory or judicial authority. This opinion is not directed toward such exceptions, each of which must be considered on its own merits."

Idaho: *Idaho Formal Opinion 130* (1989): "The Committee has been asked to answer the question of whether it is a violation of the Idaho Rules of Professional Conduct to record a telephone conversation without notifying the other party or parties that the conversation is being recorded. Particular attention is directed to instances involving conversations with clients, opposing counsel, potential witnesses, and members of the public . . .

"It is the opinion of the Committee that undisclosed recordation of communications between attorneys, or an attorney and a potential witness does not encourage the judicial system's objectives. People are more cautious, and therefore less candid in their discussions, when they know, or believe their conversations are being recorded . . .

". . . As to clients, all conversations between an attorney and the client are confidential, which every client has a right to expect and require. Therefore, the recordation of such a conversation should not impede the candid discussions between the client and the attorney."

Illinois: Recording face to face or telephone conversations is a crime under Illinois law, Ill.Comp.Stat.Ann. ch.720 §5/14-2. There are law enforcement exemptions, but there is no general one party consent exemption, Ill.Comp.Stat.Ann. ch. 720 §5/14-3. The Illinois Rules of Professional Conduct declare that a lawyer "shall not . . . commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects," Rule 8.4(a)(3).

Iowa: *Iowa State Bar Ass'n v. Mollman*, 488 N.W.2d 168, 169-70, 171-72 (Iowa 1992): "FBI agents offered Mollman immunity from prosecution if he would set up a cocaine `buy' from Johnson, [his former client and long-time friend]. He was unwilling to prompt Johnson to deliberately break the law. Moreover, he thought that such a buy would mischaracterize Johnson as a dealer when, in fact, he believed Johnson had a drug problem and would secure cocaine for Mollman merely out of friendship.

"Mollman did agree, however, to wear a concealed body microphone so that federal agents could monitor and record a conversation with Johnson. The pretext for the conversation was Mollman's and Johnson's concern that several mutual friends had been subpoenaed to testify before a grand jury. Armed with a script written by federal agents, Mollman suggested that he and Johnson get their stories

straight about their past drug usage. This intentionally incriminating conversation, and Mollman's secret recording of it, took place in Johnson's home . . .

"The committee charged Mollman with violating the following provisions of the Iowa Code of Professional Responsibility: DR 1-102(A)(4) . . . DR 4-101(B)(lawyer shall not knowingly reveal the confidence or secret of a client or use them to lawyer's own advantage) . . . In addition, the committee alleged that Mollman's conduct violated the committee's formal advisory opinion 83-16 which provides 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.' This rule adopted in 1982 and modeled after ABA Formal Opinion 337, makes such recordings unethical even if legal under federal law . . .

"Beyond this proof of deceitful conduct, the committee sought to prove that Mollman violated formal opinion 83-16. As noted earlier, the opinion outlaws any surreptitious recording of conversations by lawyers . . . Not all recordings, however, are necessarily banned: There may be extraordinary circumstances in which the Attorney General of the United States or the principal prosecuting attorney of state or local government or law enforcement attorneys or officer acting under the direction of the Attorney General or such principal prosecuting attorneys might ethically make and use secret recordings if acting within strict statutory limitations conforming to constitutional requirements . . .

"Mollman does not contest the wisdom or spirit of formal opinion 83-16 on appeal. He merely claims that because he acted 'under the direction of' federal prosecutors, he should benefit form the rule's exception. The commission was not so convinced, and neither are we.

"First, the plain language of the rule limits its exception to 'law enforcement attorneys or officers' It makes no room for private citizens acting as government agents as Mollman describes himself . . . Second, the rule itself declines to make the exception automatic . . . Examining the exception in light of the present case, we are unable to justify its application."

Kansas: Recording face to face or telephone conversations is a crime under the laws of Kansas, Kan.Stat.Ann. §§21-4001, 21-4002. The telephone prohibition is subject to a one party consent exception, Kan.Stat.Ann. §21-4002; the prohibitions applicable to recording face to face conversations are not, Kan.Stat.Ann. §21-4001. The ethical status of recording face to face conversations is covered by the Kansas Rules of Professional Conduct declaring that a lawyer shall not . . . commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, Rule 8.4. The ethical status of recording telephone conversations is the subject of Kan.Bar.Ass'n Opinion 96-9 (1997).

Kan.Bar.Ass'n Opinion 96-9 (1997): A lawyer inquired as to any ethical objections to his recording all telephone calls made from or received in his office for purposes of internal office management. He does not intend to inform those outside of his office of the practice. Even assuming such recording is legal, the practice of surreptitiously recording telephone conversations is considered offensive to the traditional high standards of fairness and candor that must characterize the practice of law. It is unprofessional for lawyers to secretly record conversations — except with the consent of all parties — that are to be used for any purpose other than an accurate recital in memoranda to the files.

Kentucky: *Ky.Opinion E-279* (1984): An attorney who is not representing a client in a criminal case may not record conversations with witnesses, opposing counsel, clients, judges, or the public at large without the prior knowledge or consent of all parties to the conversation. In a criminal case, however, both defense and prosecution may record with the consent of one party to the conversation.

Ky. Opinion E-289 (1984): An attorney may not suggest that a client secretly record telephone conversations for use in a civil matter. The Code proscribes an attorney surreptitiously recording conversations directly or indirectly without the consent of all parties.

Michigan: Recording face to face or telephone conversations is a crime under Florida law, Mich.Comp.Laws Ann. §§750.539c; 750.540. There is a law enforcement exception, Mich.Comp.Laws Ann. §§750.539g, but no general one party consent exception, *Id.* The Michigan Rules of Professional Conduct declare that a lawyer shall not . . . commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, Rule 8.4(b).

Minnesota: *Minn.Law.Prof.Resp.Bd. Opinion No. 18* (1996): "It is professional misconduct for a lawyer, in connection with the lawyer's professional activities, to record any conversation without the knowledge of all parties to the conversation, provided as follows: 1. This opinion does not prohibit a lawyer from recording a threat to engage in criminal conduct; 2. This opinion does not prohibit a lawyer engaged in the prosecution or defense of a criminal matter from recording a conversation without the knowledge of all parties to the conversation; 3. This opinion does not prohibit a government lawyer charged with civil law enforcement authority from making or directing others to make a recording of a conversation without the knowledge of all parties to the conversation; 4. This opinion does not prohibit a lawyer form giving legal advice about the legality of recording a conversation."

Mississippi: *Mississippi Bar v. Attorney ST.*, 621 So.2d 229 (Miss. 1993): An attorney recorded telephone conversations with a judge and chief of police whom the attorney believed had prosecuted and convicted his client based on personal animus rather than evidence of crime. The attorney lied to the chief of police who asked if the conversation was being recorded before beginning.

"In Attorney M v. Mississippi State Bar, 621 So.2d 220 (Miss. 1992), we held that, under certain circumstances, an attorney may tape a conversation with a potential party opponent without his knowledge or consent. In that case, Attorney M taped a series of conversations with a doctor who had treated a patient who later became a plaintiff in a malpractice action against another physician. Although the doctor assumed the conversations were taped, he did not know until he received a letter so indicating from Attorney M.

"In Attorney M, we revisited our opinion in Netterville [v. Mississippi State Bar, 397 So.2d 878 (Miss. 1981)], wherein we held "that surreptitious tape recording is not unethical when the act, `considered within the context of the circumstances then existing' does not rise to the level of dishonesty, fraud, deceit or misrepresentation." 621 So.2d. at 233, quoting Netterville, 397 So.2d at 883. In so ruling, we expressed our preference for a broader test than that espoused by Formal Op. 337 . . . Accordingly, we found in Attorney M that:

> Under certain circumstances, for example, an attorney may be justified in making a surreptitious recording in order to protect himself or his client from

> the effects of future perjured testimony. On the other hand, an attorney who uses a secret recording for blackmail or to otherwise gain unfair advantage has clearly committed an unethical — if not — illegal act. Ethical complications arise not so much from surreptitious recordings per se as from the manner in which attorneys use them. The Netterville context-of-the-circumstances test contemplates this distinction; Formal Op. 337 does not. 621 So.2d at 224

Looking at the context of the circumstances, we are of the opinion that Attorney ST was acting to protect his client's interests in surreptitiously taping the telephone conversations with the judge and the police chief. Pursuant to our decision in Attorney M, this action may well be justified and cannot be found unethical.

"We find, however, that Attorney ST stepped over the line in violation of the Mississippi Rules of Professional Conduct when he blatantly denied, when asked, that he was taping the conversations . . . Attorney ST's actions therefore violate the very precepts of Rule 4.1. As the Rule states: In the course of representing a client, a lawyer shall not knowingly: a. make a false statement of material fact to a third person."

Missouri: *Mo.Advisory Comm. Op. Misc. 30* (1978): "QUESTION: Can an attorney ethically record a conversation with any person, without prior knowledge of that person?

"ANSWER: No. The Committee adopts ABA Op. 337 . . . This of course excepts those actions carried on by law enforcement agencies under control of court orders."

Montana: Recording face to face or telephone conversations is a crime under Montana law unless all the parties consent, Mont.Code Ann.§45-8-213. The Montana Rules of Professional Conduct declare that a lawyer shall not . . . commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects," Rule 8.4(b).

New Hampshire: Recording face to face or telephone conversations is a crime under the laws of New Hampshire, N.H.Rev.Stat.Ann.§570-A:2. There are law enforcement and communications carrier exceptions, but there is no one party consent exception, *Id.* The New Hampshire Rules of Professional Conduct declare that a lawyer shall not . . . commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, Rule 8.4(b).

New Mexico: Recording a telephone conversation is a crime under the law of New Mexico, N.M.Stat.Ann. §30-12-1. The prohibition is subject to a one party consent exception, *Id.* There is no New Mexico statute that outlaws recording a face to face conversation.

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.

New York: *Ass'n of the Bar of City of N.Y. Formal Opinion No. 1995-10* (1995): "May a lawyer tape record a telephone or in-person conversation with an adversary attorney without informing that attorney that the conversation is being taped?

"The inquirer wishes systematically to tape record conversations between herself and opposing counsel without advising opposing counsel that the conversations are being recorded. She asks whether secretly recording conversations in this way

complies with applicable ethical rules. Although the inquirer does not specify whether the conversations she seeks to record will be by telephone or in person, our conclusion is the same in either case. We answer the inquiry in the negative . . .

"Our opinion is based solely on the facts set forth above and is limited to the context of attorney-attorney taping. We express no opinion as to whether the Committee might, in the future, reach a different conclusion upon the submission of an inquiry involving different facts or extenuating circumstances."

N.Y.County Lawyer's Ass'n Opinion No. 696 (1993); "Numerous bar associations have opposed lawyers' participation in secret recordings of telephone conversations on the ground that such conduct involves "dishonesty, fraud, deceit or misrepresentation" within the meaning of DR 1-102(A)(4). See, e.g., ABA 337; N.Y. State 328 (1974). In fact, this Committee stated that `[t]he tape recording of a telephone conversation between two attorneys, whom the Committee assumes are adversaries, by one of the participants for future use in pending prospective litigation is underhanded and deceptive and fails to satisfy the standards of Canon 22 [of the Canons of Professional Ethics (1908) requiring that all acts of a lawyer be characterized by candor and fairness], and, consequently is unethical and nonprofessional.' N.Y. County 552 (1967).

"Both ABA 337 and N.Y. State 328 prohibit secret recordings unless sanctioned by express statutory or judicial authority. The ABA opinion, while citing various state ethics opinions, provides no independent reason for the prohibition. Likewise, the N.Y. State opinion provides no independent reason for prohibiting secret recordings, but rather relies on such concepts as `elemental fairness.' We find such reliance unpersuasive for reason articulated by the New York City ethics committee:

> [W]e do not believe that ethical committees are free to determine what conduct is unfair or lacking in candor in a vacuum. Unlike more explicit ethical prohibitions, concepts like candor and fairness take their content from a host of sources — articulated and unarticulated — which presumably reflect a consensus of the bar's or society's judgments. Without being unduly relativistic, it is nevertheless possible that conduct that is considered unfair or even deceitful in one context may not be so considered in another. N.Y. City 80-95 (1981).

"We believe that the secret recording of a telephone conversation, where one party to the conversation has consented, cannot be deceitful per se. Since such conduct [is lawful under New York and federal law], a party to a telephone conversation should reasonably expect the possibility that his or her conversation may be recorded . . .

"It should be noted that there may be circumstances in which a secret recording would violate specific provisions of the Code and thus would be ethically improper. . . [I]f a lawyer is asked by the other party to the conversation whether the discussion is being recorded, the lawyer may not falsely assert that the conversation is not being recorded."

North Carolina: *N.C. RPC 192* (1995): "A lawyer may not listen to an illegal tape recording made by his client nor may he use the information on the illegal tape recording to advance his client's case."

N.C. RPC 171 (1994): "Is it unethical for an attorney to make a tape recording of a conversation with an opposing attorney regarding a pending case, without disclosing to the opposing attorney that the conversation is being recorded?

"No, it would not be a violation of the Rules of Professional Conduct. However, as a matter of professionalism, lawyers are encouraged to disclose to the other lawyer that a conversation is being tape recorded."

Ohio: *Ohio Bd.Com.Griev.Disp. Opinion No. 97-3* (1997): "[T]his Board advises that an attorney in the course of legal representation should not make surreptitious recordings of his or her conversations with clients, witnesses, opposing parties, opposing counsel, or others without their notification or consent. The act of surreptitious recording by attorneys may violate DR 1-102(A)(4) unless the act when considered in the context of the circumstances does not rise to the level of dishonesty, fraud, deceit, or misrepresentation. The burden would be upon each individual attorney to justify on a case by case basis why the facts and circumstances surrounding the surreptitious recording did not violate DR 1-102(A)(4). Recognized exceptions to the prohibition on surreptitious recording include the prosecuting and law enforcement attorney exception; the criminal defense attorney exception; and the extraordinary circumstances exception."

Oklahoma: *Okla.Bar Ass'n Opinion* 307 (1994): Surreptitious recording is not per se unethical. 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 (e.g., lying about whether conversation is being recorded).

Oregon: *Ore.State Bar Ass'n Formal Opinion No. 1991-74* (1991): Oregon permits recording telephone conversations with one party consent, but requires the consent of all parties to record face to face conversations. An attorney may not engage in illegal conduct and therefore may not record a face to face conversation, but with one party consent he or she may record a telephone conversation "in absence of conduct which would reasonably lead an individual to believe that no recording would be made."

Pennsylvania: Recording face to face or telephone conversations is a crime under Pennsylvania law, Pa.Stat.Ann. tit.18 §5703. There are law enforcement exemptions, but there is no general one party consent exemption, Pa.Stat.Ann. tit.18 §5703. The Pennsylvania Rules of Professional Conduct declare that a lawyer shall not . . . commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects," Rule 8.4(b).

South Carolina: *S.C. Ethics Advisory Opinion 92-17* (1992): "Rule of Professional Conduct 8.4(d) states that '[i]t is professional misconduct for a lawyer to . . . [e]ngage in conduct involving dishonest, fraud, deceit, or misrepresentation.' The South Carolina Supreme Court has construed this language to preclude an attorney from recording any conversation or portion of a conversation without the prior knowledge and consent of all parties to the conversation, irrespective of the purpose for which the recording is made. In re Anonymous, 404 S.E. 2d 513 (S.C. 1991). The Court has also held that the language of Rule 8.4(d) precludes an attorney from engaging in a scheme to entrap and secretly record a Family Court Judge who is allegedly involved in judicial misconduct. In re Warner, 335 S.E.2d 90 (S.C. 1985).

"The Court's single exception to these rules applies when an attorney records a conversation made with the prior consent or at the request of an appropriate law enforcement agency in the course of a legitimate criminal investigation . . .

"[W]hile Warner can be read narrowly only to prohibit an attorney from assisting a client to secretly record conversations with a judge which would then be used to prove judicial misconduct, Warner can also be read broadly to prohibit an attorney from counseling or assisting anyone to secretly record any conversation with anyone. Until Warner is clarified, this area remains uncertain and the prudent course would seem to be to give Warner a broad reading."

Tennessee: *Tenn.Bd.Prof.Resp. Formal Ethics Opinion No. 86-F-14(a)* (1986): "Request has been made for reconsideration and clarification of Formal Ethics Opinion 81-F-14 concerning recording of conversations by criminal defense attorneys without the knowledge of all parties to the conversation.

"Formal Ethics Opinion 81-F-14 adopted ABA Formal Opinion 337 ruling that secret recording of conversations by an attorney constitutes conduct involving dishonesty, fraud, deceit or misrepresentation in violation of DR 1-102(A) of the Code of Professional Responsibility . . .

"There is no ethical impropriety in secretly recording potentially adverse witnesses in criminal cases for the purpose of providing a means of impeachment in a criminal trial, provided one party to the communication has consented and provided such recording does not violate any law.

"Further, any lawyer may record an utterance which is itself a felonious crime, including bribe offers and attempted extortions, provided one party to the communication has consented and provided such recording does not violate any law."

Cleckner v. Dale, 719 S.W.2d 535, 537 n.1 (Tenn.App. 1986) "Dale recorded this telephone conversation without Cleckner's knowledge or consent. The practice of tape recording any private conversation without the consent or prior knowledge of all parties to the conversation is a violation of the Code of Professional Responsibility, See A.B.A. Comm. on Ethics and Professional Responsibility, Formal Op. 337 (1974)) and Tenn.Bd. of Professional Responsibility, Formal Op. 81-F-14 (1981). An attorney's use against a client of a clandestine recording of a conversation with the client is also a violation of Tenn.S.Ct.Rule 8, EC 4-5."

Texas: *Tex.Prof.Eth.Comm. Opinion No. 514* (1996): "In February 1978, this Committee addressed the issue of whether an attorney in the course of his or her practice of law, could electronically record a telephone conversation without first informing all of the parties involved. The Committee concluded that, although the recording of a telephone conversation by a party thereto did not per se violate the law, attorneys were held to a higher standard. The Committee reasoned that the secret recording of conversations offended most persons' concept of honor and fair play. Therefore, attorneys should not electronically record a conversation without first informing that party that the conversation was being recorded.

"The only exceptions considered at that time were `extraordinary circumstances with which the state attorney general or local government or law enforcement attorneys or officers acting under the direction of state attorney general or such principal prosecuting attorneys might ethically make and use secret recordings if acting within strict statutory limitations conforming to constitutional requirements,' which exceptions were to be considered on a case by case basis.

". . . [T]his Committee sees no reason to change its former opinion. Pursuant to Rule 8.04(a)(3), attorneys may not electronically record a conversation with another party without first informing that party that the conversation is being recorded.

"This brings us to the issue of whether an attorney can ethically advise a client to electronically record a telephone conversation to which the client is a party, without first informing all other parties involved. Both Texas and Federal law permit a party to a conversation to tape record that conversation without first informing the other parties that the conversation is being recorded. An attorney is required to provide his or her client with both an accurate statement of the law, and an honest opinion of the consequences likely to result form a particular course of conduct. . .

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

Utah: *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 . . .

". . . The act of taking notes during a conversation or dictating a memo to the file regarding a conversation should to be considered differently from actually recording it within the limitations discussed in this Opinion.

"One basis for allowing attorneys to record conversations is founded in the same reasoning stated in [*United States v.] White*, [401 U.S. 745, 753 (1971)] 'An electronic recording will many times produce a more reliable rendition of what a defendant has said than will the unaided memory of a police agent.' An attorney's ability to recall information from conversations is important to his competence in undertaking an action. . . .

". . . [A] number of issues that have arisen in other jurisdictions illustrate circumstances where the act of undisclosed recording of a conversation by an attorney would violate an ethical rule.

"For example, it would be unethical for an attorney to fail to answer candidly if asked whether the conversation is being recorded . . . A lawyer's failure to identify himself, the client, or the purpose of the conversation could also constitute unethical misrepresentation."

Virginia: *Va. LEO #1635* (1995): "The committee has previously opined that even if non-consensual tape recording of telephone conversations is not prohibited by Virginia or federal law, a lawyer's engaging in such conduct . . . would be improper and violative of DR 1-102(A)(4), LEO #1324 citing Gunter v. Virginia State Bar, 238 Va. 617 (1989)." *Va. LEO #1324* (1990): Wife-client secretly recorded her husband's telephone conversations. Upon learning of his client's conduct, the attorney properly instructed her to stop. An attorney's participation in illegal wiretapping would be improper and in violation of DR 1-102(A)(3). Even if the recording was lawful, DR 1-102(A)(4) prohibits an attorney from engaging or assisting in such conduct.

Gunter v. Virginia State Bar, 238 Va. 617, 621-22, 385 S.E.2d 597, 600 (1989): An attorney employed a private detective to wiretap and record the conversations of the wife of a client the attorney represented in a domestic relations matter. Although the attorney's client was aware of the recording, his wife was not. The attorney was subsequently tried and acquitted for conspiracy to violate the Virginia wiretap statute.

"The Bar relies upon Formal Opinion 337 of the American Bar Association's Committee on Ethics and Professional Responsibility (1974), which condemned as a violation of DR 1-102(A)(4) the recordation by a lawyer of any conversation without the consent or prior knowledge of all parties to the conversation, subject only to exceptions in favor of law enforcement officers. The Bar also cites cases from a number of sister jurisdictions which have considered the question and with near unanimity, have come to the same conclusion. The ABA Opinion, as well as the cited decisions of other courts, however, embrace the recordation by a lawyer of conversations to which he is a party, a circumstance not present in the case before us. We are not called upon to decide whether that conduct violates DR 1-102(A)(4), and we expressly refrain from deciding that question as well.

"There remains the question whether the recordation, by a lawyer or by his authorization, of conversations between third persons, to which he is not a party, without consent or prior knowledge of each party to the conversation, is `conduct involving dishonesty, fraud, [or] deceit' under DR 1-102(A)(4). We have no hesitancy in giving an affirmative answer to that question . . . The surreptitious recordation of conversations authorized by Mr. Gunter in this case was an 'underhand practice' designed to 'ensnare' an opponent. It was more than a departure from the standards of fairness and candor which characterize the traditions of professionalism. We hold that it was deceitful conduct proscribed by DR 1-102(A)(4)."

Washington: Recording telephone conversations is a crime under Washington law, Wash.Rev.Code Ann. §§9.73.030, 9.73.080. There are law enforcement exceptions, but there is no general one party consent exemption, Wash.Rev.Code Ann. §§9.73.030. The Washington Rules of Professional Conduct declare that a lawyer "shall not . . . commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects," Rule 8.4(b).

Wisconsin: *Wis.Opinion E-94-5* (1994): Recording telephone calls without disclosure or consent. The State Bar of Wisconsin Professional Ethics Committee believes that the Rules of Professional Conduct do not support a blanket interpretation that generally either permits or prohibits secret recording by lawyers of telephone conversations. Whether the secret recording of a telephone conversation by a lawyer involves `dishonesty, fraud, deceit or misrepresentation' under SCR 20:8.4(c) depends upon all the circumstances operating at the time. This determination is highly fact intensive and numerous factors are involved, including the prior relationship of the parties, statements made during the conversation, whether threatening or harassing prior calls have been made and the intended purpose of the recording. In this latter connection, it should be noted that section 968.31(2)(2) of the Wisconsin Statutes implicitly prohibits secret recordings "for the purposes of committing any criminal or tortious act . . . or for the purpose of committing any other injurious act." The secret recording of telephone conversations also may violate the Attorney's Oath, which requires lawyers to "abstain from all offensive personality." SCR 20:8.4(g) and 40.15; Disc.Proc. Against Beaver, 181 Wis. 2d 12, 510 N.W.2d 129 (1994)

"Different standards apply when the other party involved is a client. The fiduciary duties owed by a lawyer to a client and the duty of communication under SCR 20:1.4 dictate that statements made by clients over the telephone not be recorded without advising the client and receiving consent to the recording after consultation. similarly, the secret recording of telephone conversations with judges and their staffs is generally impermissible. Courts are responsible for determining when and how a record should be made of activities in the court. Moreover, the Attorney's Oath requires lawyers to maintain the respect due to courts of justice and judicial officers. SCR 20:8.4(g).

"Even in circumstances in which secret recording of telephone calls is permissible, lawyers should be very cautious in deciding whether to do so. In some circumstances, a recording of a telephone conversation may constitute material having potential evidentiary value that the attorney has an obligation to turn over to a prosecutor or opponent in litigation under SCR 20:3.4. In addition, the secret recording of telephone calls is offensive to many persons and may harm the attorney's reputation when such conduct is discovered.

"Routinely recording of all calls would almost certainly violate the Rules of Professional Conduct."