HB

314

Amendment 1

OK

Page 4, line 6: Delete "making the contact believes the person being contacted"

Amendment 2

Page 3, line 30: add another definition

"statement" means a written statement or an oral statement, but does not include a statement recorded in compliance with AS 12.61.120(d) and (e). OK

Bill drafter can reformat as appropriate

Amendment 3

A statement obtained from a victim or witness in violation of AS 12.61.120 or AS 12.61.125 is presumed inadmissible in a prosecution of the defendant. To overcome the presumption of inadmissibility, the defendant must prove by clear and convincing evidence that: OK

(1) the statement is reliable;
(2) similar evidence is unavailable from any other source; and
(3) failure to introduce the statement would substantially undermine the reliability of the fact-finding process and result in manifest injustice.

1) delete p 3 lines 20-23

2) add A3 where appropriate - "bill drafter's preference" and whether to add twice if needed

CS FOR HOUSE BILL NO. 314(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVES PARNELL, Robinson, Bunde, Elton

A BILL

FOR AN ACT ENTITLED

"An Act relating to domestic violence and to crime victims and witnesses; and amending Rule 613, Alaska Rules of Evidence."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* **Section 1.** AS 11.56.740(a) is amended to read:

(a) A person commits the crime of violating a domestic violence restraining order if [(1)] the person knowingly violates a provision of an order issued under AS 25.35.010(b) or 25.35.020

(1) restraining the person from communicating directly or indirectly with another;

(2) restraining the person from subjecting another to domestic violence;

(3) directing the person to vacate the home of another; or

(4) restraining the person from entering a propelled vehicle in the possession of or occupied by another [AND (2) AT THE TIME THE

RESTRAINING ORDER WAS ISSUED, THE COURT MADE A FINDING THAT THE PERSON HAD SUBJECTED ANOTHER TO DOMESTIC VIOLENCE].

* **Sec. 2.** AS 12.61.120(c) is amended to read:

(c) If **a defendant or** a person **acting on behalf of a defendant** [REPRESENTING THE DEFENDANT, INCLUDING THE DEFENDANT'S ATTORNEY OR A PERSON SPECIFIED BY THE COURT UNDER (b) OF THIS SECTION,] contacts the victim of an offense with which the defendant is **or could be** charged, the person shall clearly inform the victim

(1) of the person's identity and specific association with the defendant;

(2) that the victim does not have to talk to the person unless the victim wishes; and

(3) that the victim may have a prosecuting attorney or other person present during an interview.

* **Sec. 3.** AS 12.61.120 is amended by adding new subsections to read:

(d) If a defendant or a person acting on behalf of a defendant wishes to make a recording of statements of the victim of an offense with which the defendant is or could be charged, or of a witness, the person shall, before recording begins, obtain the consent of the victim or witness to record the statement by clearly informing the victim or witness (1) of the information set out in (c) of this section, (2) that the statement will be recorded if the victim or witness consents, and (3) that the victim or witness may obtain a transcript or other copy of the recorded statement upon request. When recording begins, the person making the recording shall indicate in the recording that the victim or witness has been informed as required by this subsection, and the victim or witness shall state in the recording that consent of the victim or witness to the recording has been given.

(e) If a victim or witness requests a transcript or other copy of a recorded statement taken under (d) of this section, the defense shall prepare the transcript or other copy and provide it to the person whose statement was recorded.

(f) In this section, "recording" means capturing a statement of a person, whether by magnetic tape or other electronic or electromagnetic means.

* **Sec. 4.** AS 12.61 is amended by adding new sections to read:

Sec. 12.61.125. VICTIMS AND WITNESSES OF SEXUAL OFFENSES. (a)

The defendant accused of a sexual offense, the defendant's counsel, or an investigator or other person acting on behalf of the defendant, may not

(1) notwithstanding AS 12.61.120, contact the victim of the offense or a witness to the offense if the victim or witness, or the parent or guardian of the victim or witness if the victim or witness is a minor, has informed the defendant or the defendant's counsel in writing or in person that the victim or witness does not wish to be contacted by the defense; a victim or witness who has not informed the defendant or the defendant's counsel in writing or in person that the victim does not wish to be contacted by the defense is entitled to rights as provided in AS 12.61.120;

(2) obtain a statement from the victim of the offense or a witness to the offense, unless.

(A) if the statement is taken as a recording, the recording is taken in compliance with AS 12.61.120; or

(B) if the statement is not taken as a recording, written authorization is first obtained from the victim or witness, or from the parent or guardian of the victim or witness if the victim or witness is a minor; the written authorization must state that the victim or witness is aware that there is no legal requirement that the victim or witness talk to the defense; a victim or witness making a statement under this subparagraph remains entitled to rights as provided in AS 12.61.120.

(b) A defendant who is the parent or guardian of a minor victim or witness may not provide the authorization required under (a) of the section.

(c) If an attorney, or a person acting on behalf of the defendant for an attorney, violates this section, the court shall refer the violation to the Disciplinary Board of the Alaska Bar Association as a grievance.

(d) In this section,

(1) "recording" has the meaning given in AS 12.61.120;

(2) "sexual offense" means a violation of AS 11.41.410 - 11.41.470.

Sec. 12.61.127. INADMISSIBILITY OF STATEMENTS TAKEN IN VIOLATION OF AS 12.61.120 or 12.61.125. A statement obtained from a victim or witness in violation of AS 12.61.120 or 12.61.125 is presumed inadmissible in a prosecution of the defendant. To overcome the presumption of inadmissibility, the

defendant must prove by clear and convincing evidence that

(1) the statement is reliable;

(2) similar evidence is unavailable from any other source; and

(3) failure to introduce the statement would substantially undermine the reliability of the fact-finding process and result in manifest injustice.

* **Sec. 5.** AS 12.61.900 is amended by adding new paragraphs to read:

(3) "person acting on behalf of a defendant" includes the defendant's attorney, an agent of the defendant or the defendant's attorney, or a person specified by the court under AS 12.61.120(b) or an agent of that person, but does not include the defendant;

(4) "witness" means a person contacted in connection with a criminal case because the person may have knowledge or information about the criminal case.

* **Sec. 6.** AS 12.61.127, added by sec. 4 of this Act, has the effect of amending Rule 613, Alaska Rules of Evidence, relating to impeachment of witnesses.

Rep Porter, Chair.
House Judiciary Cmte

Documents pertaining
to HB 314 from
Kevin McCoy - 1/22/95

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TAX ID NO. 92-0037388

April 27, 1994

Stephen J. Van Goor, Esq.
Alaska Bar Association
510 L Street, #602
Anchorage, AK 99501

Re: Draft Opinion re: tape recording of conversations

Dear Steve:

I enclose yet another draft of an Opinion regarding the undisclosed tape recording of conversations. I have tried to incorporate the comments of the various Committee members. I did not, however, attempt to specifically address possible different standards between an attorney seeking to gather "historical" information about a case, and an attorney engaged in "undercover" conduct. It seems to me that the basic principal is the same in either case: If the attorney's conduct is otherwise ethical under the Rules of Professional Conduct, there is nothing inherent about a legal tape recording that makes the attorney's conduct unethical.

I decided that the best way to deal with Kevin McCoy's request for an opinion dealing with tape recording of conversations in the criminal context was to prepare a second draft opinion which addresses the matter explicitly. The draft merely recites the logic in the main opinion, and states that the logic applies under the facts presented by Mr. McCoy.

I hope that this opinion comes closer to the sense of the Committee.

Very truly yours,

BURR, PEASE & KURTZ

Nelson G. Page

Enclosure
49vkk

DRAFT

ALASKA BAR ASSOCIATION ETHICS OPINION NO. 94-_____

UNDISCLOSED RECORDING OF CONVERSATIONS

The Committee has once again been asked to review its several opinions regarding undisclosed recording of conversations and the use of such tape recordings. Since 1978 the Committee has issued no less than four separate opinions on the subject. With the adoption of the new Alaska Rules of Professional Conduct, a further reevaluation is warranted.

In Ethics Opinion 78-1, the Committee adopted, without substantial comment, the position of the American Bar Association, as expressed in ABA Formal Opinion 337 (August 10, 1974). In that Opinion, the ABA concluded that tape recording of conversations without the consent or prior knowledge of all parties to the conversation violated the prescription of Canon 9 of the Code of Professional Responsibility that "a lawyer should avoid even the appearance of professional impropriety." The ABA also concluded that such recording was conduct "involving dishonesty, fraud, deceit, or misrepresentation" in violation of the prescriptions of DR 1-102(A)(4).

In 1983, the Committee, in Ethics Opinion 83-2, determined that Opinion 78-1 "continues in full force and effect." Again, there was little discussion of the basis for this determination.

In Ethics Opinion No. 91-4 the Committee, in reaffirming the rule, concluded that:

> [O]n balance, the recording of conversations without the consent of all parties was conduct which is likely to be viewed by society as conduct involving dishonesty or deceit, notwithstanding the prevalence of recording devices in today's society that are specifically designed to facilitate easy recording of telephone conversations and messages.

The Committee further concluded that this prohibition extended to an attorney's personal or private conduct, making the unacknowledged recording of conversations by an attorney acting in a private capacity similarly improper.

Finally, in Ethics Opinion 92-2, the Committee opined that a second attorney, innocent of any participation in the surreptitious recording of a conversation, could not use the recording for impeachment purposes at trial because "using the recording even without participating in its making involves attorney X in the 'conduct involving dishonesty, fraud, deceit, or misrepresentation.'"

On July 15, 1993, the new Alaska Rules of Professional Conduct became effective. Rule 4.1 provides that:

In the course of representing a client, a lawyer shall not knowingly:

(a) Make a false statement of material fact or law to a third person.

Rule 4.4 provides:

RESPECT FOR RIGHTS OF THIRD PERSONS: In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, nor use methods of obtaining evidence that violate the legal rights of such a person.

Rule 8.4 provides:

MISCONDUCT. It is professional misconduct for a lawyer to:

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

That this issue has been visited on so many different occasions, and is once again the subject of a request for

opinion, suggests the complex and difficult nature of the subject. A reevaluation of the standard is appropriate.

IS UNDISCLOSED TAPE RECORDING OF CONVERSATIONS INHERENTLY DECEITFUL?

Rule 4.4 permits the gathering of evidence and the investigation of matters by an attorney in any manner that is legal and which does not harass and unduly burden other persons. Under most circumstances, the tape recording of a conversation is legal, so long as one party to the conversation is aware of and consents to the recording. See AS 42.20.300(b). In those situations in which tape recording a conversation is legal, the only real objection is that tape recording without prior permission is deceitful or somehow a misrepresentation.

The Committee has in the past explicitly found that there is "a continuing expectation in the community that most conversations, whether in person or by telephone, are not likely to be recorded without the consent of the parties...." Opinion No. 91-4 at 2. Without disagreeing that this is the case, the question is whether such an expectation is reasonable today, and in all contexts, so that a blanket ban on recording

conversations is necessary. The Committee concludes that it is not.

Many if not all attorneys have found that an accurate record of a witness' statements is invaluable to preserve the witness' testimony, and to provide impeachment at trial. A blanket prohibition against tape recording conversations removes a very important and powerful truth-verifying mechanism, even in those circumstances where there is every reason to expect that some record of the conversation is being made.

For example, it seems reasonable that a hostile witness who agrees to speak with an attorney about a civil litigation matter will expect a record of the conversation to be made by the attorney. Is it deceitful if the record is a tape recording rather than handwritten notes? In the event of a dispute, the tape recording is likely to be a much more accurate and impartial measure of what occurred.

At least one jurisdiction has adopted this reasoning. In Attorney M v. Mississippi Bar, Mississippi Supreme Court No. 90-BA-632 (7/1/92), the Supreme Court of Mississippi held that the tape recording of a conversation between an attorney and a witness was not inherently fraud, deceit, or misrepresentation.

The Mississippi court's rationale was that the tape recording was simply an accurate and impartial means of verifying the substance of the conversation. The context, an attorney discussing a legal matter with a witness, was such that it was reasonable for the witness to assume that some kind of notes or other memorialization of the conversation would be made.

This reasoning has long been accepted in the criminal context. ABA Formal Opinion No. 337 acknowledges an exception for prosecuting attorneys in appropriate circumstances:

> 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.

Despite the limiting language in the Opinion, it has now become routine for law enforcement authorities to use surreptitious tape recordings as an investigative tool. At the

same time, a growing number of jurisdictions have recognized the inconsistency, both logically and in terms of basic fairness, in permitting a prosecutor to surreptitiously tape record interviews with witnesses, while prohibiting defense counsel from doing the same. As a result, these jurisdictions have concluded that, at least in the criminal justice context, an exception must also be made to permit defense counsel to surreptitiously tape record witness interviews. See, Opinion No. 90-02, Committee on Rules of Professional Conduct for the State of Arizona (March 16, 1990), Kentucky Bar Association Ethics Opinion No. E-279 (January 1984), Board of Professional Responsibility for the Supreme Court of Tennessee, Formal Ethics Opinion No. 86-F-14(a) (July 18, 1986).[1] In so concluding, the Arizona Supreme court reasoned:

> If there are no legal restrictions against one-party consensual recording, and law enforcement agents are additionally allowed to engage in such activities, then the criminal defense lawyer, in fulfilling his or her legal and ethical duties to zealously represent a client, must equally be permitted to develop important impeachment evidence through this

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[1] At least one court has found this disparity to be a denial of equal protection under the Constitution. Kirk v. State, 526 S. 2d 223, 227 (Louisiana 1988).

> method. The importance of preventing persons from twisting the truth may, depending on the circumstances, be necessary to the effective representation of a criminally accused client.

Opinion 90-02 at 5-6.

The Supreme Court of the State of Alaska has ruled that state prosecutors and their agents may not surreptitiously record conversations of third parties without first obtaining a warrant. State v. Glass, 583 P.2d 872, 875 (Alaska 1978). The court reasoned that the recording of such conversations was a "seizure" under the Fourth Amendment. The court also relied on Alaska's explicit recognition of a constitutional right to privacy.

Glass explicitly addresses the undercover activities of police agents. Subsequent Supreme Court opinions have made it clear that Glass applies only in limited circumstances. See Palmer v. State, 604 P.2d 1106 (Alaska 1978) (suspect under arrest need not be warned that his or her conversations or actions are being videotaped); City and Borough of Juneau v. Quinto, 684 P.2d 127 (Alaska 1984) (police officers may surreptitiously tape record conversations with persons during

investigatory stops or arrests.)[2] These cases suggest that, particularly in those instances in which the witness knows he is speaking to an attorney or investigator with whom there is no attorney-client relationship, there is no real basis for an "expectation of privacy" that a record of the conversation will not be made.

Given that tape recording of conversations in which at least one participant consents is legal in Alaska, and given that law enforcement personnel may engage in the tape recording of witnesses with minimal restrictions, there is little logical or equitable justification in the criminal context for a blanket rule prohibiting legal tape recording of conversations between defense counsel and third party witnesses. Similarly, if the tape recording of conversations is not inherently "deceitful" or a misrepresentation in the criminal context, it is difficult to see how it becomes so simply because the subject matter is a civil rather than a criminal matter.

In those situations in which a person is aware that the conversation is with an attorney or the attorney's agent who is seeking to gather information about a lawsuit or legal matter,

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[2] The Glass case applies to State prosecutorial activity only. It does not apply to federal investigations in Alaska.

there seems to be little basis for an interpretation that the substance of the conversation will not be memoralized. More troubling is the situation in which an attorney or investigator seeks to elicit comments or statements from a witness in situations in which the witness is unaware of the significance of the conversation, or of the identity of the other person involved. In these situations, the possibility of deceit or misrepresentation to the third party is greater. There is a concern that the attorney or investigator will elicit statements from a witness who is unaware of the significance of either the conversation or the context in which the statements will later be considered. However, to the extent that so-called "undercover" activity is otherwise ethical, there is nothing about tape recording conversations undertaken during such an otherwise permissible investigation that would cause the conduct to suddenly become unethical. Whether an attorney's conduct is deceitful in this situation would necessarily depend on the circumstances of the particular situation, not on whether the conversation is being tape recorded.

Concerns have been expressed that permitting tape recording of conversations will open the door to abuse. However, courts are well accustomed to reviewing and determining issues of authenticity, completeness, context and other questions of admissibility. There seems to be no reason

why the same principals cannot be applied to determining the admissibility of tape recorded information.

Removing the blanket prohibition from tape recording the conversations does not eliminate all ethical restrictions on the practice. There may be circumstances in which a secret recording of a conversation violates specific provisions of the Rules of Professional Conduct. For example, the prohibition in Rule 4.1 against "making false statements of material fact" would apply if a lawyer were asked by the other party to a conversation whether the conversation were being recorded. Under those circumstances, the attorney could not ethically deny the recording. Similarly, the prohibition in Rule 8.4 against conduct involving "dishonesty, fraud, deceipt or misrepresentation" would prohibit an attorney from using a recorded statement in a misleading way, or out of context. It would similarly be ethically improper for an attorney to attempt to record conversations with adverse parties or witnesses who are represented by counsel.

Accordingly, the Committee has determined that it is permissible for an attorney to make a tape recording of a conversation with a third party, assuming that the recording otherwise complies with the requirements of the Rules of Professional Conduct, and with state and federal law. It is not inherently deceitful or a misrepresentation for an attorney to fail to disclose that the conversation is being recorded.

ALASKA BAR ASSOCIATION ETHICS OPINION NO. 94-_____

UNDISCLOSED TAPE RECORDING OF CONVERSATIONS

IN CRIMINAL CASES

The Committee has been asked to address the question whether it is ethically proper for an attorney, or the attorney's agents, to surreptitiously tape record interviews of potential witnesses in a criminal case. The specific facts presented are that the attorney and his staff, retained to represent a defendant in a criminal matter, were accused of misconduct, including misrepresentations and an attempt to suborn perjury, by a witness contacted during the investigation prior to trial. Defense counsel would have tape-recorded the conversation for the purpose of being able to independently verify the substance of the conversation at a later time but for the Bar's previous opinions on the subject.

This issue was explored in Alaska Bar Association Opinion #94-____. It was concluded that there is nothing inherently unethical in recording conversations where one party to the conversation consents to the recording, so long as all other ethical and legal requirements are met:

> Given that tape recording of conversations in which at least one participant consents is legal in Alaska, and given that law enforcement personnel may engage in the tape recording of witnesses with minimal restrictions, there is little logical or equitable justification in the criminal context for a blanket rule prohibiting legal tape recording of conversations between defense counsel and third party witnesses.

This logic applies to the facts presented here.

For the reasons outlined in Opinion 94-___, it is not unethical for an attorney or the attorney's agent in a criminal matter to tape record a conversation with a witness where one party to the conversation consents, and the conversation otherwise complies with the requirements of the Rules of Professional Conduct and state and federal law.

Jan. Agenda

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PLEASE REPLY TO ANCHORAGE OFFICE

May 11, 1994

Kevin F. McCoy
Assistant Federal Defender
510 L Street, Suite 400
Anchorage, Alaska 99501

Dear Kevin,

On behalf of the Alaska Bar Association's Ethics Committee, I have been asked to respond to your letter of November 18 concerning the issue of whether interviews with prospective witnesses in criminal cases may be surreptitiously taped by defense counsel or their agents.

After considerable discussion, the Ethics Committee determined that it would not be appropriate to modify any of the earlier decisions on the subject. The Committee declined to adopt an opinion expressly approving surreptitious taping of prospective witnesses in criminal cases, though you and your staff are not precluded from taping prospective witnesses who are made aware of the identity of their interviewer and of the fact that they are being taped.

Very truly yours,

Richard B. Brown

RBB/crk
a:ethics.3

FEDERAL PUBLIC DEFENDER
for
THE DISTRICT OF ALASKA

Nancy Shaw
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November 18, 1993

Stephen J. Van Goor
Bar Counsel
Alaska Bar Association
P.O. Box 100279
Anchorage, Alaska 99510

Re: **Ethics Opinion Request**

Dear Mr. Van Goor:

Please accept this letter as a request for the Alaska Bar Association Ethics Committee and the Board of Governors to answer the following question:

> Is it ethically proper for an attorney, or the attorney's agents at his or her direction, to surreptitiously tape record interviews of potential witnesses in a criminal case?

The Board of Governors should issue an ethics opinion that responds affirmatively. Authorizing the surreptitious tape recording of witness statements by defense counsel in the limited context of criminal cases promotes the constitutionally guaranteed rights to confrontation, to compulsory process, and to effective assistance of counsel. It permits defense counsel to obtain impeachment material on the witness should the testimony of the witness be different at trial. It fosters the truth-finding function of the criminal trial and places defense counsel on equal footing with the prosecutor.[1] Finally, it protects defense counsel and his or her agent from allegations of impropriety.

[1] American Bar Association Opinion No. 337 (August 10, 1974), which is discussed below, authorizes the prosecutor and his or her agent to surreptitiously tape record witness interviews.

REASON FOR THIS REQUEST

Recently, the United States District Court for the District of Alaska appointed the Federal Public Defender Agency to represent an individual accused of a felony class offense.

The case was tried twice.

The prosecutor adopted a dual strategy. He both presented his evidence against the defendant at trial and made a variety of accusations of impropriety on the part of the Defender staff to the court. For example, he claimed that a secretary's 7:30 a.m. call to a witness to arrange the time of her testimony constituted harassment. The prosecutor said that the Defender investigator had represented himself to a witness as an agent of the FBI. He also told the judge that the investigator had encouraged a witness to offer false testimony. Fortunately, this last conversation occurred in the presence of the attorney, so there was no question about the directions given the witness by the investigator. The first trial lasted two weeks and the jury deadlocked after four additional days of deliberation.

When the parties convened for the retrial, the prosecutor exploited his allegations in a manner directly damaging to the defense effort. He proposed to introduce evidence of defense "misconduct" (the previously mentioned charge that the investigator had coaxed a witness to testify falsely), placing the attorney in the position of a witness on this issue. The Defender office was forced to withdraw as counsel.

The cost to the defendant was great. The second trial lasted three days, and the jury convicted the defendant after only three hours of deliberation.

Had the questioned conversations been recorded, the allegations of misconduct could have been promptly and finally disproved. If the witness himself were to have testified falsely, a tape recording would have provided an accurate record of the statements he made during the interview.

CURRENT ALASKA ETHICS OPINIONS

Although not directly on point, Alaska Bar Association Ethics Opinions 78-1, 83-2, 91-4 and 92-2 may preclude the Criminal Defense Bar from surreptitiously tape recording interviews with witnesses, even if such efforts are necessary to uncover evidence that exculpates the accused.[2]

These ethics opinions rely on American Bar Association Opinion No. 337 which is nearly 20 years old. Continued reliance on this opinion in the criminal law context subverts defense counsel's constitutionally mandated obligation to provide effective assistance of counsel and fails to promote the truth-finding function of a criminal trial. It also enables an unscrupulous prosecutor to disqualify effective defense counsel by alleging misconduct on the part of the defense. Most importantly, Opinion No. 337 does not reflect current Alaska law on the subject. For all of these reasons, Alaska's reliance on American Bar Association Opinion No. 337 in the limited context of criminal law matters should be reconsidered.

A.B.A. OPINION NO. 337 PERMITS SURREPTITIOUS TAPE RECORDING BY LAW ENFORCEMENT BUT NOT BY THE DEFENSE

At the outset, it is important to recognize that American Bar Association Formal Opinion No. 337 provides an investigative tool to the prosecution that it withholds from the defense. It provides that "[w]ith certain exceptions spelled out in this opinion, 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."

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[2] Alaska Bar Association Ethics Opinion No. 78-1 adopted American Bar Association Opinion No. 337 which prohibits surreptitious recording of conversations by all lawyers except prosecutors. Alaska Bar Association Ethics Opinion No. 83-2 endorsed Ethics Opinion No, 78-1 without analysis. Alaska Bar Association Ethics Opinion No. 91-4 held that an attorney acting in a personal capacity as a party to a family law matter could not surreptitiously record conversations with the other party to the dispute. Finally, Alaska Bar Association Ethics Opinion No. 92-2 held that an attorney could not ethically use a transcript of a telephone conversation which another attorney had surreptitiously recorded.

The exception referred to in Formal Opinion 337 authorizes the Attorney General for the United States and the principal prosecuting attorney of a state or local government in "extraordinary circumstances", or law enforcement acting at their direction, to make surreptitious tape recordings for use in criminal prosecutions.

ALASKA CITIZENS NO LONGER HAVE A REASONABLE EXPECTATION OF PRIVACY WHEN SPEAKING WITH A CRIMINAL DEFENSE INVESTIGATOR

Despite the limitation to extraordinary circumstances, it is now routine for law enforcement authorities to use surreptitious tape recording as an investigative tool. Prosecuting authorities in this state regularly use surreptitious tape recordings in criminal investigations. **Palmer v. State**, 604 P.2d 1106 (Alaska 1978), (holding that a suspect under arrest need not be warned that his or her conversations or actions are being video taped); **City and Borough of Juneau v. Quinto**, 684 P.2d 127 (Alaska 1984), (holding that police officers may surreptitiously tape record conversations with citizens during investigatory stops and arrests); **Stephan v. State**, 711 P.2d 1156 (Alaska 1985) (holding that unexcused failure to tape record custodial interrogations violates the due process provisions of the Alaska Constitution). The rationale for these holdings is that citizens do not have a reasonable expectation of privacy that their conversations will not be recorded in the context of a criminal investigation.

The same analysis now applies to defense counsel and his or her investigator. AS 12.61.120(c), enacted by the Alaska legislature in 1991, provides:

> If a person representing the defendant, including the defendant's attorney or a person specified by the court under (b) of this section [defendants unrepresented by counsel], contacts the victim of an offense with which the defendant is charged, the person shall clearly inform the victim
>
> > (1) of the person's identity and specific association with the defendant;
> >
> > (2) that the victim does not have to talk to the person unless the victim wishes; and
> >
> > (3) that the victim may have a prosecuting attorney or other person present during an interview.

A complaining witness who agrees to speak with a defense investigator after receiving the advisement prescribed by AS 12.61.120(c) has no more legitimate expectation of privacy than the citizen dealing with a police investigator. He or she knows that the details of the complaint will be aired in a public forum. The witness in a criminal case is similarly situated. Once a defense investigator and the client are identified, the witness knows that the matter under discussion is of public concern and will be decided in a setting open to the public. The witness has absolutely no expectation of privacy and, of course, knows or should know that he or she is subject to subpoena. Only accuracy is served by the surreptitious recording of a witness' statement. Both the tone and the content of the investigator's questions are preserved, along with the witnesses own words.

It is particularly important to recognize that witnesses in criminal cases often come from the criminal milieu. These witnesses will just as frequently have information that exculpates the accused. Because such individuals have unreliable attendance patterns and tend to suffer changes in recollection, recording allows for accurate preservation of their observations. Failure to permit surreptitious taping of interviews in such instances subverts defense counsel's obligation to give meaning to the compulsory process and confrontation provisions of the Federal and Alaska Constitution.

Finally, permitting defense counsel and his or her investigator to record such conversations protects against allegations of misconduct which are easy to make and hard to disprove. Recording insulates the investigator from the adversarial process; the recording, and not the character of the investigator, plays its proper role in the truth finding function of a criminal trial.

PERMITTING LAW ENFORCEMENT BUT NOT THE DEFENSE TO SURREPTITIOUSLY RECORD CONVERSATIONS VIOLATES EQUAL PROTECTION PRINCIPLES

A statutory or ethical scheme that permits prosecutors but not defense counsel to surreptitiously tape record witness interviews significantly disadvantages the accused in the adversarial process and violates the equal protection provisions of the Federal and the Alaska Constitution. **Cf. Kirk v. State**, 526 So.2d 223 (La. 1988) (holding that a statute that permitted the prosecution but not the defense in a criminal case to engage in surreptitious tape recording of conversations violated Federal and State Equal Protection provisions).

OTHER STATES AUTHORIZE CRIMINAL DEFENSE LAWYERS AND THEIR INVESTIGATORS TO SURREPTITIOUSLY TAPE RECORD WITNESS INTERVIEWS

A number of states have carved out a limited exception to the ethical prohibition against surreptitious tape recording by criminal defense attorneys and their agents. I have attached ethics opinions from the Committee on Rules of Professional Conduct for the State of Arizona, Opinion No, 90-02 (March 16, 1990) (Exhibit A), Kentucky Bar Association Ethics Opinion No. E-279 (January 1984) (Exhibit B), and the Board of Professional Responsibility for the Supreme Court of Tennessee, Formal Ethics Opinion No. 86-F-14(a) (July 18, 1986) (Exhibit C) for the Committee's review.

The opinion from Arizona is particularly thoughtful.

I have also enclosed a copy of Professor Abraham Abramivsky's Law Review Article advocating that criminal defense attorneys be permitted to surreptitiously tape record witness interviews in the limited context of criminal cases. Professor Abramivsky presents the argument in favor of a limited exception in criminal cases much more articulately than I. (Exhibit D)

CONCLUSION

For all of these reasons, I respectfully request that the Ethics Committee and the Board of Governors issue an ethics opinion authorizing the surreptitious recording of witnesses in criminal cases for the limited purpose of obtaining impeachment material in the event that the testimony of the witness at trial is different than in the interview.

If you have any questions, or if I can provide you or the committee with any additional information, please contact me.

Sincerely yours,

Kevin F. McCoy
Assistant Federal Defender

Enclosures

ALASKA BAR ASSOCIATION

MEMORANDUM

DATE: January 12, 1995

TO: Board of Governors

FROM: Steve Van Goor, Bar Counsel SVG

RE: Research Materials on Tape Recording Issue compiled by Nelson Page

Ethics Committee Chair Bob Mahoney has asked me to provide the enclosed research materials compiled by Nelson Page on the unconsented recording of conversations issue.

150.01/601/BC2817

P.O. Box 100279 • Anchorage, Alaska 99510-0279
907-272-7469 • Fax 907-272-2932

. trial, it follows from Rules 1.4(b)[6] that ... ocate-witness must inform his/her ... of this development and seek the ...ent's informed consent to the continued pre-trial representation. The client should understand the effect that withdrawal prior to trail will have, including the financial impact, if any, of retaining new counsel and the point at which new counsel should be retained. As with any withdrawal from employment, the advocate-witness is bound by the requirements of Rule 1.16(d).

Inquiry No. 91-10-38
Adopted: May 19, 1992

Opinion No. 229

Surreptitious Tape Recording by Attorney

• 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 ...eing made, so long as the attorney ...akes no affirmative misrepresentations ...bout 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.

Applicable Rule Provision

• Rule 8.4 (c) (Misconduct involving dishonesty, fraud, deceit, or misrepresentation)

Inquiry

The inquirer is employed in the inspector general's office of a federal agency. The agency was conducting a "formal administrative/employment investigation" concerning one of the agency's employees. The subject of the investigation was informed that no criminal ramifications would result from this investigation and had received a "non-prosecution assurance." The subject/employee chose to be represented by a member of the D.C. bar at an interview conducted by an investigator in the Inspector General's office.

The inquirer reports that, during the "preliminary phase" of the interview in which ground rules and guidelines for the participants were being explained, the interview was terminated. The inquirer ascribes this to the "disruptive actions" of the employee's attorney. No specific examples are given, but the inquirer seems to mean that the employee's attorney took a more adversarial approach to the "interview" than the agency thought appropriate.

The inquirer came to believe that the attorney had been surreptitiously tape recording the proceeding, including the informal "preliminary phase" of the meeting. The agency's investigator had agreed during the preliminary phase to tape the formal portion to follow, and the inquirer reports that a copy of this tape would have been provided to the subject/employee. The inquirer asks if surreptitious taping of the "preliminary phase" of such a proceeding is unethical.

Discussion

The Committee does not address questions of law outside the scope of the disciplinary rules. We assume for the purposes of this opinion that there was nothing illegal about the tape recording. We comment only on the legal ethics question involved in surreptitious tape recording in these circumstances.

In our Committee's Opinion 178, Attorney A gained permission from Attorney B to interview B's client as part of a criminal investigation. The Committee held that A's failure to disclose A's intention to record the interview meant that the consent obtained from Attorney B under DR 7-104(A)(1) was not a sufficiently informed one. The majority opined that the client would be "lulled into a false sense of security and confidentiality in the interview" because of having obtained the "shield and protect[ion]" of retaining an attorney and the attorney having consented to the interview. The opinion also said that the standard created by DR 1-102(A)(4) obligated Attorney A to inform Attorney B that the interview would be recorded.

Four concurring members of the Committee would have gone further and found the conduct to be "conduct involving dishonesty, fraud, deceit or misrepresentation" under DR 1-102(A)(4), now Rule 8.4(c). Four other members dissented, disagreeing on whether the witness was a party to the matter under DR 7-104(A)(1) and whether the conduct violated DR 1-102(A)(4).

No question concerning DR 7-104(A)(1) or its successor Rule 4.2 is involved here. This circumstance does not involve what was disclosed to an attorney in seeking permission to talk to his client. The agency representatives may be unaware that preliminary phase discussions are being taped. They, however, do not have any basis for being "lulled into a false sense of security and confidentiality" that their words will not be memorialized and used to support a claim against the agency.

In 1974, Opinion 337 of the American Bar Association Committee on Ethics and Professional Responsibility held that attorneys' taping of others was *per se* unethical in almost all circumstances.[1] The ABA Committee relied on Canon 9 of the Model Code of Professional Responsibility and the DR1-102(A)(4) prohibition on conduct involving dishonesty, fraud, deceit or misrepresentation. The broad holding of Opinion 337 has been criticized. Some states have elected to vary from the general rule stated in Opinion 337.

Ethics committees of several bars have excepted recording of witnesses by a criminal defense lawyer. Ariz. Bar Op. 90-02 (March 16, 1990); Ky. Op. E-279 (1984); Assn. of the City Bar of N.Y. 80-95 (undated); Tenn. Op. 86-F-14 (July 18, 1986). The Idaho bar recently opined that lawyers may not secretly record telephone conversations with other lawyers or potential witnesses but said it was permissible to record conversations

[6] Rule 1.4(b) states: "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the ...

[1] The only exception given by the ABA committee was:

> ...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. It should be stressed, however, that the mere fact that secret recordation in a particular instance is not illegal will not necessarily render the conduct of a public law enforcement officer in making such a recording ethical.

etween lawyer and client since these ere confidential. Idaho Op. No. 130 May 10, 1989) The Utah Bar has held awyers may record surreptitiously by lectronic or mechanical means communications with clients, witnesses, or other lawyers. (Utah Op. No.90, undated) A 1975 Arizona Opinion outlined four exceptions in vacating previous opinions staring an absolute ban on surreptitious tape recording.[2] Ariz. Op. No. 75-13 (June 11, 1975).

Although we do not necessarily concur with any of the preceding opinions, we, too, do not believe that a *per se* rule with respect to tape recording is appropriate. Rather, applicable circumstances should be evaluated to determine whether the particular conduct constitutes dishonesty, fraud, deceit or misrepresentation.

Here the agency expects to tape at least the formal part of the hearing and will supply participating attorneys with a copy. The agency has no reasonable expectation that any statements made during the preliminary or formal phase of the hearing are secret or confidential as to the employee. Absent affirmative misrepresentations about taping the proceedings, we see nothing unethical in an employee's attorney having done so.

We find this to be a different circumstance than when Attorney A in our Opinion 178 sought permission for an informal interview with Attorney B's client without telling Attorney B that he intended to tape the interview. The conduct of a bar member in recording preliminary discussions in the type of proceedings involved in this opinion may be a prudent protection for the client. Absent affirmative misrepresentations to the contrary, we see no deceit in taping in these circumstances because the inquiring agency has reason to believe that the employee and his or her attorney may memorialize all discussions in some fashion and use that record to support a claim against the agency.

Inquiry No. 91-12-50
Adopted: June 16, 1992

[2] These exceptions are: (a) utterances that are themselves crimes, *e.g.*, bribe offers, threats, extortion attempts and obscene calls; (b) a conversation to protect the attorney or his client from perjured testimony; (c) conversations with informants and or persons under investigation for self-protection; and (d) conversations "where specifically authorized by statute, court rule or court order."

Opinion No. 230

Assertion of Retaining Liens; Preservation of Confidences and Secrets of Trust Client in Dispute Between Former Co-trustee and Successor Trust.

• Effective January, 1991, Rule 1.8(i) prohibits an attorney from asserting a retaining lien as to the property of a client in his possession. An attorney whose client requests return of property in the attorney's possession after January, 1991 must return the property even if the attorney's initial assertion of a retaining lien respecting the property occurred prior to January, 1991 and therefore was proper under the District of Columbia Code of Professional Responsibility.

An attorney to a trust may not disclose confidential communications to a former trustee, over the objection of the current trustees, except as permitted by Rule 1.6.

Applicable Rules

• 1.16(d)(Termination of representation)
• 1.8(i) (Retention of client files)
• 1.6 (Preservation of client confidences and secrets)

Inquiry

In December, 1988, Inquirer was retained by one of two co-trustees ("Trustee A") to represent a trust located outside the District of Columbia. Inquirer served as counsel for the trust at the closing of a sale of real property, and was co-trustee under the promissory note securing the deferred purchase money deed of trust. Inquirer delivered copies of the closing documents, copies of two deferred purchase money promissory notes for $1.5 million and $100,000, and a copy of a $150,000 letter of credit to the Trust settlors and to another co-trustee ("Trustee B") of the trust.

In early 1989, after meeting the trust settlors, Inquirer concluded that he could no longer represent the trust. Inquirer orally advised the trust settlors as well as Trustee A and Trustee B of his intention to withdraw, and confirmed that decision in writing. Inquirer took appropriate steps to withdraw from all matters on behalf of the trust, including petitioning the District of Columbia Superior Court to permit him to withdraw as counsel for the trust in three other pending actions and drafting the papers necessary for his removal as trustee under the note securing the deed of trust in the real estate transaction.

Fees of approximately $14,000 due to the Inquirer remained unpaid by the trust. Inquirer asserted a lien against the client's files, including the original of the promissory notes and the letter of credit, and has refused several requests to turn over the files, pending satisfactory arrangements for payment. The most recent request for the files was made in January, 1992.

In June, 1991, Trustee B sought judicial instructions with respect to payment of $76,624.16 in legal fees due to five law firms, including Inquirer. Settlors of the trust then filed suit against Trustee B, claiming that Trustee B had breached its fiduciary duties, incurred unauthorized legal fees, mismanaged trust assets, and misused trust funds.

Apparently after Trustee B sought instructions from the court as to payment of the legal fees, the settlors terminated the trust and created a second trust, under which Trustee A and the settlors serve as co-trustees. The settlors assigned all of the assets of the initial rust to the successor trust.

Trustee B has advised Inquirer that his deposition may be taken in the pending litigation, and that it believes that information disclosed to Inquirer by Trustee A during the course of the professional relationship is not confidential as against Trustee B. Trustee A disagrees.

Discussion

Retaining lien.

The first question presented by the inquiry is whether assertion of a retaining lien is proper under the circumstances presented. Until January 1, 1991, the propriety of Inquirer's assertion of a retaining lien under the District of Columbia Code of Professional Responsibility was clear beyond any serious dispute.[1]

The District of Columbia Rules of Professional Conduct are no less clear, but require a contrary conclusion:

"In connection with any termination

[1] *See* Rule 5-103(A), District of Columbia Code of Professional Responsibility; Opinion 59 (undated); Opinion 90 (1980). *See generally* Opinion 107 (Oct. 27, 1981); Opinion 103 (1981). Indeed, the propriety of Inquirer's assertion of a retaining lien under the Code was confirmed by the Vice Chair of this Committee by letter dated September 14, 1989, and again by Assistant Bar Counsel in October 2, 1990, dismissing a complaint filed against the Inquirer in connection with his retention of the files.

IDAHO

FORMAL OPINION NO. 130

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."

The recording of telephone conversations is permitted by Federal Law, 18 U.S.C. § 2511, and Idaho Law, IC §§ 18-6701 et. seq. As long as one party to the conversation consents, a recordation may be made, without notice to any other participant in the conversation. Therefore, the recordation of a telephone conversation, in the manner prescribed by these statutes, would not be criminal conduct prohibited by IRPC 8.4(b). The Committee feels, however, that such recordation would nonetheless be a violation of IRPC 8.4(d) which states: "It is professional misconduct for a lawyer to: ... (d) engage in conduct that is prejudicial to the administration of justice; ... ."[1]

Judicial system philosophy has, particularly in the past fifty years, shifted from "litigation by ambush" to one of litigation after full disclosure. The purposes of the change have been to provide dispute resolution based on all of the relevant facts, to expedite litigation and to decrease the cost of litigation. This philosophy has been most apparent in the instigation and broadening of the rules of discovery.

Judicial philosophy also favors resolving disputes without a trial. This is promoted by the availability of information through use of discovery, pre-trial conferences and a change in the rules of evidence, which now exclude testimony regarding settlement negotiations to establish liability. The exclusion is based on the theory that cases are more likely to settle if a person does not have to be cautious about what is said during such negotiations.

---

[1] The Committee has also considered the application of IRPC 4.4 and 8.4(c). IRPC 4.4. prohibits the use of "methods of obtaining evidence that violate the legal rights ..." of third persons. IRPC 8.4(c) deems it ..."misconduct for a lawyer to: ...(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;... ." Although these rules may be applicable to the questions presented, the Committee has decided that IRPC 8.4(d) is sufficiently dispositive of the question.

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. People are arguably even more cautious with recordations than they are with written documents. With written documents, at least there is time to review the language and consider its consequences before signature. With conversations, there usually is much less, if any, opportunity to first reflect on what should be said and the consequences of the statments. The result is a less voluntary disclosure of information.

The failure of a free exchange of information forces a resort to the formal discovery processes. As every attorney knows, these processes take longer, cost the client more, and, in many cases, are less effective than a frank discussion. Decreasing the flow of information, which prolongs litigation and increases its costs violates judicial system philosophy, and therefore, can only be viewed as prejudicial to the administration of justice.

The Committee is cognizant of the arguments made for allowing recordation of telephone conversations of attorneys and witnesses. Recordation obviously makes it more difficult for either an attorney or a witness to change their statement. Also, if there is a misunderstanding, there is some record to determine what was said, and possibly meant. However, if the attorney is concerned a person will testify differently from what he says on the telephone, the attorney can either ask permission to record or inform the potential witness the conversation will be recorded. The attorney also has the options to take a deposition or do an in-person interview in the presence of a third party.

Regarding conversations with another attorney, a misunderstanding can be avoided by any of the simple expedients that most lawyers presently use. Examples of these are: a confirmation letter, stipulation or other writing memorializing the conversation. Lawyers, above all professionals, know that a written memorial of a transaction is best because it is done only after there has been an opportunity to reflect, and is also intended to embody the entire agreement, rather than being only a portion of protracted discussions.

Having addressed the issue of recording the conversations of prospective witnesses and another attorney, the Committee now addresses the inquiry regarding recordation of clients and members of the public. 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. As to "members of the public", a category so broad as to include all persons in all situations, the Committee cannot frame an opinion which is equally so all inclusive. Therefore, the Committee can only recommend that the attorney keep in mind the parameters set out in this Opinion.

Dated this 10th day of May, 1989.

Frank H. Hicks, Chairman

John K. Looze

Brian L. Ballard

Citation | Rank(R) | Database | Mode
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New York Law Journal

lume 210, Number 50

Friday, September 10, 1993

OPINION ALLOWS LAWYERS TO TAPE CALLS

By Matthew Goldstein

IN A BREAK with precedent, the New York County Lawyers' Association's ethics committee has concluded that an attorney may secretly record a telephone conversation with a client or another attorney without violating ethical precepts.

TEXT OF OPINION - PAGE 2

The County Lawyers' Committee on Professional Ethics, in its Opinion 696, rejected the reasoning of a 1974 New York State Bar Association ethics opinion which had strongly disapproved the covert taping of attorney telephone conversations in most circumstances.

While not advocating the practice of secretly taping calls, the County Lawyers' committee's opinion called the reasoning in N.Y. Ethics Opinion 328 "unpersuasive" and lacking in authority. The committee concluded that there is no specific provision in the state Lawyer's Code of Professional Responsiblity that precludes attorneys from taping their telephone calls.

The County Lawyers' opinion, released this week, similarly criticized a 1974 American Bar Association ethics opinion, which also had concluded that private attorneys should not tape their conversations.

'Elaborate Devices'

"Perhaps, in the past, secret recordings were considered malevolent because extraordinary steps and elaborate devices were required to accomplish such recordings," said the committee. "Today, recording a telephone conversation may be accomplished by the touch of a button, and we do not believe that such an act, in and of itself, is unethical."

However, the opinion warned that covert taping of telephone calls could raise serious "practical concerns" for lawyers. For instance, the committee noted that a taped conversation might be usable evidence at trial and that widespread taping might intimidate clients. It also said taping might cause lawyers not to speak honestly with one another.

Stephen J. Blauner, chairman of the County Lawyers' ethics committee, said the taping issue was "terribly controversial" and he expects the opinion to spark debate.

The 20-member committee issued its opinion in response to two inquiries from attorneys over the propriety of taping telephone conversations. Mr. Blauner said the opinion was approved by more than a majority of the committee.

"As a matter of professional ethics, we are not saying that you should do this," said Mr. Blauner, a partner with Milbank, Tweed, Hadley & McCloy. "If the bar believes the conduct the committee has approved of will lead to further criticism of the legal profession, then it might be an appropriate subject for the American Bar Association or the New York State Bar Association to consider."

State Bar's Stand

New York University Law Professor Deborah H. Schenk, chairwoman of the New York State Bar Association's Committee on Professional Ethics, said that based on a strict reading of the Code of Professional Responsibility, the decision in Opinion 696 is "not wholly irrational." However, she said the State Bar continues to oppose the secret taping of attorney telephone conversations and is unlikely to revisit the issue.

The state ethics opinion had relied heavily on the ambiguous language in Disciplinary Rule 1-102(A)(4), which prohibits attorneys from engaging in any conduct that involves "dishonesty, fraud, deceit or misrepresentation."

Both the State Bar and ABA ethics opinions permitted prosecutors, in limited circumstances, to secretly tape their telephone calls.

In New York, as in most states, a person can legally tape his own telephone conversations without the consent of the other party.

Following is the text of the opinion:

QUESTION 696

TOPIC: Secret recording of telephone conversations.

DIGEST: A lawyer may secretly record telephone conversations with third parties, provided one party to the conversation consents and the recording does not violate any applicable law or specific ethical rule.

CODE: DR 1-102(A)(4), DR 7-102(A)(5), DR 7-104(A)(1), DR 7-109(A).

Question

This Committee has received various inquiries from lawyers who wish to record their telephone conversations with third parties, including clients and other lawyers, without such third parties' knowledge and also to assist clients in secretly recording their telephone conversations with third parties.

We have been asked to address whether secretly recording such telephone conversations violates any provision of the Lawyer's Code of Professional Responsibility (1990) (the Code).

Opinion

Numerous bar associations have opposed lawyers' participation in secret recordings of telephone conversations on the ground that such conduct involves "dishonest, fraud, deceit or misrepresentation" within the meaning of DR 1-102(A)(4). See, e.g., ABA 337 (1974); 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 reasons 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 which 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 authorized by New York Penal Law ss250.00 and 250.05 (McKinney 1967), a party to a telephone conversation should reasonably expect the possibility that his or her conversation may be recorded. See N.Y. State 515 (1979) (permitting lawyer to counsel client about legality of client secretly recording conversation with third party).

In fact, the rule against secret recordings has been relaxed with respect to prosecutors and defense counsel involved in criminal investigations. See, e.g., N.Y. City 80-95. Prosecutors use secret recordings pursuant to Title III of the Omnibus Crime Control Streets Act of 1968, which specifically authorizes the use of secret recordings by the federal government where one party to the conversation has consented.

As well, normative standards change over time. Advertising, for example, was once considered to be unprofessional and, hence, unethical by this Committee. After the decision of the U.S. Supreme Court in Bates v. State Bar, 433 U.S. 350 (1977), however, most of the ethical strictures against advertising were removed. Similarly, former pronouncements that secret recordings by lawyers are inconsistent with standards of candor and fairness are no longer viable in today's day and age. Perhaps, in the past, secret recordings were considered malevolent because extraordinary steps and elaborate devices were required to accomplish such recordings. Today, recording a telephone conversation may be accomplished by the touch of a button, and we do not believe that such an act, in and of itself, is unethical.

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. DR 7-102(A)(5) provides, for example, that a lawyer may not "[k]nowingly make a false statement of law or fact." Accordingly, if 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. Similarly, DR 2-102(A)(4) states that a lawyer shall not engage in conduct involving misrepresentation. Thus, a lawyer may not use recorded statements out of context or in an otherwise misleading way.

As well, DR 7-104(A)(1) states that a lawyer shall not "[c]ommunicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so." DR 7-104(A)(1) requires a lawyer to make reasonable inquiry to determine whether a person with whom he wishes to communicate is represented by counsel in the matter. See, e.g., N.Y. State 607 (1990). It would be ethically improper under this disciplinary rule for an attorney to record or cause to be recorded any conversation with an adverse party or witness represented by counsel without that party's consent or prior knowledge.

We caution that the practice of secretly recording telephone conversations raises various practical concerns. For example, if it becomes commonplace for lawyers to record conversations with other lawyers, lawyers may become overly guarded in their oral communications, thus impeding the lawyering process. Lawyers may also incur unnecessary costs to clients if tapes are to be transcribed. As well, a client who discovers, after the fact, that his or her lawyer recorded their telephone conversation may feel betrayed and lose confidence in his or her lawyer. Finally, by recording a telephone conversation with a client or between a client and a third party, a lawyer may be creating discoverable evidence. This may result in an accompanying duty not to suppress such evidence. See DR 7-109(A).

These and other practical concerns may rise to the level of ethical problems inlight of a lawyer's duty to act competently, DR 6-101(A), and not to intentionally prejudice or damage a client during the course of the professional relationship. DR 7-101(A)(3). Thus, a lawyer should carefully consider the practical effect of secretly recording a telephone conversation before proceeding.

Conclusion

Subject to the caveats described above, a lawyer may secretly record telephone conversations with third parties, including other lawyers, provided one party to the conversation has consented and provided that such recording does not violate any applicable law or a specific ethical rule.

9/10/93 NYLJ 1, (col. 1)

END OF DOCUMENT

ALASKA BAR ASSOCIATION

MEMORANDUM

DATE: November 29, 1995

TO: Attorney General's Office
Office of Special Prosecutions and Appeals
District Attorney's Office, 1st Judicial District
District Attorney's Office, 2nd Judicial District
District Attorney's Office, 3rd Judicial District
District Attorney's Office, 4th Judicial District
Federal Public Defender Office
Alaska Public Defender Office
Office of Public Advocacy
Victims for Justice
Alaska Trial Lawyers Association
Alaska Network Domestic Assault
AWAIC
Anchorage Police Department
Alaska State Troopers
Ethics Committee Members
Editor, Alaska Bar Rag

FROM: Deborah O'Regan, Executive Director DOR

RE: Board of Governors Hearing on
Ethics Opinion 95-5, Undisclosed Tape Recording of
Conversations With Potential Witnesses in Criminal Cases

The Board of Governors of the Alaska Bar Association invites you to attend a public hearing on **Friday, January 12, 1996 at 2:30 p.m. in the Supreme Court Hearing Room, 5th Floor, Boney Memorial Courthouse, 303 K Street, Anchorage, AK** concerning Alaska Bar Association Ethics Opinion 95-5 , Undisclosed Tape Recording of Conversations with Potential Witnesses in Criminal Cases.

The Board is interested in comments both in support of and against this Ethics Opinion. A copy of the opinion is enclosed for your convenience.

Please give me a call if you have any questions.

G:\DS\BC1\BD95-5HRG.DOC

P.O. Box 100279 • Anchorage, Alaska 99510-0279
907-272-7469 • Fax 907-272-2932

ALASKA BAR ASSOCIATION
ETHICS OPINION 95-5

Undisclosed Tape Recording Of Conversations With Potential Witnesses In Criminal Cases

The Board of Governors has been asked to determine whether it is ethically proper for a criminal defense attorney, or the criminal defense attorney's agent, to surreptitiously tape record interviews with potential witnesses when representing a person accused of a criminal offense.

The specific facts presented are that the attorney and her investigator, appointed to represent a defendant in a criminal matter, were accused of misconduct, including misrepresentations and an attempt to suborn perjury, by a witness contacted during the course of the defense investigation prior to trial. But for the Alaska Bar Association's prior ethics opinions, defense counsel would have instructed her investigator to surreptitiously tape-record the interview to independently verify the substance of the conversation at trial.

After a thorough review of the question presented, the Board concludes that criminal defense counsel retained or appointed to defend a person accused of a crime may surreptitiously tape record interviews with potential witnesses in the criminal cases provided the attorney or the investigator acting at the direction of the attorney clearly informs the potential witness of the interviewer's identity and specific association with the accused.[1/]

DISCUSSION

The traditional prohibition against surreptitious tape recording of conversations by attorneys began when the American Bar Association adopted ABA Formal Opinion No. 337 on August 10, 1974. This ethics opinion prohibited surreptitious tape recordings of witness interviews by all lawyers except

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[1/] Under most circumstances, the tape recording of a conversation is legal so long as one party to the conversation consents. See AS 42.20.300(b). Under this opinion, law enforcement attorneys and their agents retain the exclusive right to surreptitiously record interviews without disclosing their agent's association with law enforcement pursuant to State v. Glass, 583 P.2d 872 (Alaska 1978), modified, 596 P.2d 10 (Alaska 1979).

prosecutors. In the past, the Alaska Bar Association relied on this opinion to forbid all lawyers from surreptitiously recording conversations with witnesses except prosecutors.[2]

The Board now concludes that ABA Formal Opinion No. 337 no longer justifies a prohibition against surreptitiously recording interviews of potential witnesses by defense counsel in criminal cases for two reasons. First, it seems unfair that law enforcement agencies can routinely record conversations with witnesses surreptitiously but agents of the defense cannot. Second, witnesses with testimony relevant to an alleged crime have a reduced expectation of privacy that their conversations will not be recorded by prosecutors or by defense counsel.

I. AUTHORIZING SURREPTITIOUS RECORDING BY PROSECUTORS BUT NOT DEFENSE COUNSEL IS FUNDAMENTALLY UNFAIR

At the outset, it is important to recognize that American Bar Association Formal Opinion No. 337 authorized use of an investigative tool by the prosecution that it expressly withheld from counsel for the accused. The opinion provided that "[w]ith certain exceptions . . . 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."

The exception referred to in Formal Opinion No. 337 authorized the Attorney General for the United States and the principle prosecuting attorney of a state or local government in "extraordinary circumstances," or law enforcement acting at their direction, to make surreptitious tape recordings for use in criminal proceedings.

Notwithstanding the limitation to "extraordinary circumstances," it is now commonplace for law enforcement

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[2] Alaska Bar Association Ethics Opinion No. 78-1 adopted American Bar Association Formal Opinion No. 337. Alaska Bar Association Ethics Opinion No. 83-2 endorsed Ethics Opinion No. 78-1 without analysis. Alaska Bar Association Ethics Opinion No. 91-4 held that an attorney acting in a personal capacity as a party to a family law matter could not surreptitiously record conversations with the other party to the dispute. Finally, Alaska Bar Association Ethics Opinion No. 92-2 held that an attorney could not ethically use a transcript of a telephone conversation which another attorney had surreptitiously recorded.

authorities to use surreptitious tape recordings as an investigative tool. Indeed, a growing number of jurisdictions have recognized the inconsistency, both logically and in terms of basic fairness, in permitting a prosecutor to surreptitiously tape record interviews with witnesses, while prohibiting defense counsel from doing the same.

As a result, these jurisdictions have determined that, at least in the criminal justice context, an exception must also be made to permit defense counsel to surreptitiously tape record witness interviews. See Opinion 90-02, Committee on Rules of Professional Conduct for the State of Arizona (March 16, 1990) (providing that recording of witness conversations by criminal defense attorneys or their agents is ethically permissible either for the purpose of protecting against perjury or for the purpose of obtaining impeachment material should the testimony of the witness be different at trial); Kentucky Bar Association Ethics Opinion No. E-279 (January 1984) (concluding that it is ethically proper for an attorney representing a person accused in a criminal case to secretly record witnesses in the criminal proceeding); Board of Professional Responsibility for the Supreme Court of Tennessee, Formal Ethics Opinion No. 86- F-14(a) July 18, 1986) (concluding that 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 that one party to the conversation consents to the recording).[3]

The Board finds reasoning offered by the Committee on Rules of Professional Conduct for the State of Arizona to be particularly persuasive.

> If there are no legal restrictions against one-party consensual recording, and law enforcement agents are additionally allowed to engage in such activities, then the criminal defense lawyer, in fulfilling his or her legal and ethical duties to zealously represent a client, must equally be permitted to develop important

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[3] At least one court has found the disparity between prosecutors and defense counsel to constitute a violation of equal protection provisions of the Constitution. Kirk v. State, 526 S.2d 223, 227 (Louisiana 1988).

> impeachment evidence through this method. The importance of preventing persons from twisting the truth may, depending on the circumstances, be necessary to effective representation of a criminally accused client.

Opinion 90-02 at 5-6.

The Arizona Committee concluded:

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

Id.

In Alaska, law enforcement agencies regularly use surreptitious tape recordings in criminal investigations. See Palmer v. State, 604 P.2d 1106 (Alaska 1978) (holding that a suspect under arrest need not be warned that his or her conversations or actions are being videotaped); City and Borough of Juneau v. Quinto, 684 P.2d 127 (Alaska 1984) (holding that police officers may surreptitiously tape record conversations with citizens during investigatory stops and arrests); Stephan v. State, 711 P.2d 1156 (Alaska 1985) (holding that unexcused failure to tape record custodial interrogations violates the due process provisions of the Alaska Constitution).

The rationale for each of these holdings is that Alaska citizens do not have a reasonable expectation of privacy that their conversations will not be recorded in the context of criminal investigations conducted by Alaska law enforcement.

II. ALASKA NO LONGER RECOGNIZES AN EXPECTATION OF PRIVACY THAT CONVERSATIONS OF WITNESSES IN CRIMINAL CASES WILL NOT BE SURREPTITIOUSLY RECORDED

This same analysis now applies to defense counsel and his or her investigator. AS 12.61.120(c), enacted by the Alaska Legislature in 1991, provides:

> If a person representing the defendant, including the defendant's attorney or a person specified by the court under (b) of this section [defendants not represented by

> counsel], contacts the victim of an offense with which the defendant is charged, the person shall clearly inform the victim
>
> (1) of the person's identity and specific association with the defendant;
>
> (2) that the victim does not have to talk to the person unless the victim wishes; and
>
> (3) that the victim may have a prosecuting attorney or other person present during the interview.

A complaining witness who agrees to speak with a defense investigator after receiving the advisement prescribed by AS 12.61.120(c) has no more legitimate expectation of privacy than the citizen dealing with a police investigator. He or she knows or should know that the details of the complaint will be aired in a public forum.

The witness in a criminal case is similarly situated. Once a defense investigator and the client are identified, the witness knows or should know that the matter under discussion is of public concern and will be decided in a forum open to the public. The witness has absolutely no expectation of privacy and, of course, knows or should know that he or she is subject to subpoena. Only accuracy is served by the surreptitious recording of a witness' statement. Both the tone and the content of the investigator's questions are preserved along with the witnesses own words.

Any danger that defense counsel might take a witness' statements out of context to gain an unfair advantage in criminal litigation is foreclosed by Lowery v. State, 762 P.2d 457, 468 (Alaska App. 1988) (holding that if defense counsel uses an investigator's report to impeach a witness at trial, the prosecutor may request and defense counsel is required to disclose the entire report (or recording) to the state.) See also Alaska Rule of Evidence 613(b)(2) ("In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request shall be shown or disclosed to opposing counsel.")

CONCLUSION

The practicalities of the present day criminal justice system are inconsistent with any continued prohibition against surreptitious recordation of potential witnesses by defense

counsel. Because it is now common practice for law enforcement agencies to surreptitiously record interviews and/or conversations in criminal investigations, the Board believes that is unfair to permit investigators of law enforcement agencies and their agents to use this investigative tool without allowing investigators for the defense.

Moreover, the Board believes that a potential witness in a criminal case no longer has a reasonable expectation of privacy that his or her comments about matters related to the prosecution or defense of the case will not be surreptitiously recorded.

For all of these reasons, the Board concludes that the recording of witness interviews by criminal defense counsel or their agents does not violate Alaska Disciplinary Rules, provided the attorney or the investigator acting at the direction of the attorney informs the witness of the interviewer's identity and specific association with the accused.[4]

Adopted by the Board of Governors on March 17, 1995.

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[4] Removing the blanket prohibition from tape recording by criminal defense practitioners does not eliminate all ethical restrictions on the practice. There may be circumstances in which a secret recording of a conversation violates specific provisions of the Rules of Professional Conduct. For example, the prohibition in Rule 4.1 against "making false statements of material fact" would apply if a lawyer were asked by the other party to a conversation whether the conversation were being recorded. Under those circumstances, the criminal defense attorney could not ethically deny the recording. Similarly, the prohibition in Rule 8.4 against conduct involving "dishonesty, fraud, deceit or misrepresentation" would prohibit a criminal defense attorney from using a recorded statement in a misleading way. Moreover, the Board does not intend by this opinion to authorize surreptitious recordings of conversations with either opposing counsel or the accused.

OPINION NO. 90-02
March 16, 1990

FACTS:

The retained investigator for the public defender service in county X wishes to tape record an interview with a potential witness in a criminal case without the knowledge of that witness. The purpose of this surreptitious tape recording is to obtain impeachment material on the witness should the testimony of the witness be different at the trial than in the interview.

QUESTION:

Is it ethically proper for an attorney or the attorney's agents at his or her direction to surreptitiously tape record interviews of potential witnesses in a criminal case?

ETHICAL RULES CITED:

Arizona Rules of Professional Conduct, Supreme Court Rule 42, 17A A.R.S.:

ER 3.1. Meritorious Claims and Contentions:

. . . A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

ER 4.1. Truthfulness in Statements to Others:

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by ER 1.6.

ER 4.3. Dealing with Unrepresented Person:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

ER 4.4. Respect for Rights of Third Persons:

In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

ER 8.4. Misconduct:

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another;

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

*****

RELEVANT PRIOR OPINIONS:

1. Opinion No. 176A, dated September 21, 1965 - One attorney should not record surreptitiously a telephone conversation with another attorney to be later played back to his client.

2. Opinion No. 74-18, dated August 6, 1974 - An attorney may not surreptitiously record a conversation with a witness, potential witness or potential adverse party. (Vacated by Opinion No. 75-13 of June 11, 1975.)

3. Opinion No. 74-35, dated November 5, 1974 - The committee opined, following its Opinion No. 74-18, that a county attorney or deputy county attorney cannot ethically cause or encourage police or other investigators to surreptitiously tape record a conversation with a witness or potential defendant. (Vacated by Opinion No. 75-13 of June 11, 1975).

4. Opinion No. 75-13, dated June 11, 1975 - The committee opined, modifying and vacating its Opinions Nos. 74-18 and 74-35, that the previous absolute prohibition against surreptitious tape recording should be subject to four exceptions permitting a lawyer to secretly record:

(a) "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";

(b) ". . . a conversation in order to protect himself, or his client, from harm that would result from perjured testimony. In this category, however, it is important to note that the purpose of the secret recording is solely to provide a shield for the lawyer, or his client, and that this exception does not authorize secret recordings for the purpose of obtaining impeachment evidence or inconsistent statements.";

(c) "conversations with informants and/or persons under investigation simply as a matter of self-protection."; and

(d) conversations, etc., "where specifically authorized by statute, court rule or court order."

OPINION:

The use of surreptitious tape recording by attorneys in Arizona is a question of interest to all criminal law practitioners, given the present realities of law enforcement practices. Unless the right to privacy restricts all surreptitious recording, the use of such devices should not be forbidden to the criminal defense bar.

Within Arizona (contrary to the law in some other jurisdictions), there appears to be no state or local prohibition against surreptitiously recording conversations where one party to that conversation agrees to such recording. A.R.S. § 13-3005(A)(2). Under federal law, surreptitious recording of conversations with one party consenting is also legal (18 U.S.C. § 2510 et seq.), although a long-standing Federal Communications Commission regulation forbids such recordings unless adequate notice is given to all parties by the use of an automatic tone warning device. Taped conversations obtained in violation of this FCC regulation have been held not to prohibit the introduction of such tapes. Battaglia v. United States, 349 F.2d 556, 559 (9th Cir. 1965), cert. denied, 382 U.S. 955 (1965). The surreptitious recording of conversation appears to be legal in relation to in-person and telephonic conversations. Additionally, there is no question that both parties in a criminal case are entitled to interview potential witnesses. Rule 15, Arizona Rules of Criminal Procedure. For these reasons, the "legal rights" of a third person would not appear to be violated by surreptitiously tape recording an interview of a witness.

The prior Arizona ethics decisions on this subject matter were based on the Ethical Considerations and Disciplinary Rules in effect in this state prior to the substantial revisions made by Arizona Supreme Court Order on September 7, 1984, effective February 1, 1985. These provisions -- DR 1-102(A)(4) (prohibition against engaging in conduct

involving dishonesty, fraud, deceit, or misrepresentation) and Canon 9 (avoidance of even the appearance of professional impropriety) -- can no longer provide the basis for prohibiting surreptitious recording of interviews. The ethical admonition to avoid the appearance of impropriety no longer is specifically included in the 1985 Rules. Although the pre-1985 Disciplinary Rule 1-102(A)(4) is substantially continued in Ethical Rule 8.4(c), the addition of new Ethical Rule 4.4 that a lawyer shall not use "methods of obtaining evidence that violate the legal rights" of third persons seems, by implication, to allow the legal surreptitious recordation of statements of witnesses. C. Wolfram, Modern Legal Ethics, Section 12.4.4, pp. 649-650 (1986).

The practicalities of the present day criminal justice system seem to be inconsistent with any continued prohibition against surreptitious recordation of a witness. More specifically, it is common practice for law enforcement agencies to surreptitiously record interviews and/or conversations in criminal investigations. The committee believes that a serious imbalance would be created by permitting law enforcement attorneys and their agents to use this device without allowing defense attorneys to do the same. Indeed, at least one court has found that this disparity constitutes an impermissible denial of equal protection of the law. Kirk v. State, 526 So. 2d 223, 227 (La. 1988). Additionally, ethics committees in other states which have recently considered this problem have concurred that fairness and the Sixth Amendment to the United States Constitution allow defense attorneys or their agents to surreptitiously tape record witnesses to the same extent accorded law enforcement personnel. See, Kentucky Opinion E-279, January, 1984; Tennessee Ethics Opinion 86-F-14(a), July 18, 1986.

It is also very common for both parties in a criminal proceeding to have an investigator or other third party present during interviews for the sole or substantial purpose of enabling the third person to testify to the substance of the conversations should the subject of the interview testify inconsistently. Obtaining the presence of an investigator or other third person at interviews to act as an impeachment witness at trial is an encouraged practice. During the interview, there is no requirement that the witness be warned of possible incrimination, the need for counsel, or notice that the investigator/third person may testify as an impeachment witness at trial should the witness testify inconsistently.[1]

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[1] The ABA Standards relating to the Administration of Criminal Justice (Second Edition), states, in pertinent part:

(Footnote continued on next page.)

There is a distinction between investigator interviews and surreptitious taping in that, in the former case, the person being interviewed is more likely to infer that what he is saying to the investigator may be taken down for later use. However, the practical considerations in favor of taping, whether by the attorney or his investigator, lie in the greater accuracy of this method.

Considering the Rules of Professional Conduct currently in effect and the realities of present day practices, we must broaden the sentiment expressed in our prior Opinion No. 75-13 that an ethical prohibition against the surreptitious recording of witness interviews in a legal manner cannot be established as a blanket rule. That opinion sought to limit surreptitious recordation to "rare cases where the attorney has first satisfied himself that there are compelling facts and circumstances justifying the use of a secret recording". While we agree that it is a worthy practice to protect the privacy rights of Arizona citizens by prohibiting surreptitious recording, or limiting surreptitious recording of witnesses to instances where there are compelling circumstances, that is a matter which more properly must be addressed by the Arizona legislature or the Arizona Supreme Court in its interpretation of the Arizona Constitution. If there are no legal restrictions against one-party consensual recording, and law enforcement agents are additionally allowed to engage in such activities, then the criminal

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(Footnote continued from previous page.)

Section 4-4.3 Relations with Prospective Witnesses

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"b) It is not necessary for the lawyer or the lawyer's investigator, in interviewing a prospective witness, to caution the witness concerning possible self-incrimination and the need for counsel.

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"d) Unless the lawyer for the accused is prepared to forego impeachment of a witness by the lawyer's own testimony as to what the witness stated in an interview or to seek leave to withdraw from the case in order to present such impeaching testimony, the lawyer should avoid interviewing a prospective witness except in the presence of a third person."

The ABA standards have not yet been adopted or approved by the Arizona Supreme Court, but we find them persuasive on this issue.

defense lawyer, in fulfilling his or her legal and ethical duties to zealously represent a client, must equally be permitted to develop important impeachment evidence through this method. The importance of preventing persons from twisting the truth may, depending on the circumstances, be necessary to the effective representation of a criminally accused client. Therefore, the distinction drawn in our Opinion No. 75-13 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. The result of our present opinion seems in perfect accord with our Opinion No. 75-13 because a surreptitious recording would ordinarily be used only when the witness, under oath, makes a statement contrary to the tape-recorded testimony, in possible violation of the perjury and/or false swearing statutes. See, A.R.S. §§ 13-2702 et seq.

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

BOARD OF PROFESSIONAL RESPONSIBILITY
OF THE
SUPREME COURT OF TENNESSEE

FORMAL ETHICS OPINION 86-F-14(a)

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 Disciplinary Rule 1-102(A) of the Code of Professional Responsibility.

Ethics Opinions 81-F-14 and ABA 337 have been construed to exempt prosecutors and to allow them to utilize secret recordings in conducting criminal investigations where one party to the conversation has consented. The practical effect of this interpretation of the ethics opinions is the imposition of an ethical prohibition on the use of secret recordings by defense lawyers in criminal cases, thus depriving them of an investigative tool available to the prosecution.

The use of evidence is geared toward eliciting the truth. Truth is absolute and takes no sides. The defense should be given the same opportunity to assume its attainment.

We recognize that secret recordings are a desirable tool in detecting and proving crime; and, that our legal tradition guarantees the fullest protection to a criminally accused.

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.

Secret recordings of lawyers, clients, witnesses, or other persons in civil matters is in violation of DR 1-102(A)(4) of the Code and prohibited.

FORMAL ETHICS OPINION 81-F-14 is hereby expressly rescinded.

This 18th day of July, 1986.

William R. Willis, Chmn.	W. J. Flippin	Cecil D. Branstetter
G. Wilson Horde, V-Chmn.	Henry H. Hancock	Michael E. Callaway
Jerry C. Colley	Charles T. Herndon	Edwin C. Townsend

APPROVED AND ADOPTED BY THE BOARD

OPINION NO. 203
OF THE MISSISSIPPI BAR
RENDERED OCTOBER 30, 1992

PRACTICE OF LAW: MAINTAINING THE INTEGRITY OF THE PROFESSION: *An attorney may ethically record telephone conversations of an opposing party without his knowledge or consent provided that such recording does not suggest dishonesty, fraud, deceit or misrepresentation and the information recorded is of the type one might reasonably expect to be taken down for future use.*

PRACTICE OF LAW: *An attorney may not ethically advise a client to secretly record conversations between parties if this would violate a criminal statute.*

PRACTICE OF LAW: *An attorney may ethically use telephone conversations secretly taped by his client without his knowledge to the extent permitted by law.*

The Ethics Committee of The Mississippi Bar has been requested to render an opinion on the following factual scenario:

1) Attorney A is receiving a series of threatening and harassing telephone calls from Attorney B who was formerly opposing counsel in a lawsuit. Under what circumstances can A ethically record these conversations, with and without B's knowledge or consent?
2) Attorney Y represents Jane Doe in a domestic case. Doe indicates that her husband frequently uses their home telephone to call his girlfriend. Doe asks for Attorney Y's advise about "bugging" the telephone and recording her husband's conversation. Under what circumstances may Attorney Y ethically advise the client to secretly record conversations between third parties without their knowledge or consent?
3) Client Doe describes the same facts as in No. 2 except that she informs Attorney Y that she has already recorded several conversations between her husband and his girlfriend without his knowledge or consent and without the knowledge of Attorney Y. What are Attorney Y's ethical obligations in so far as the use of these recordings as evidence, using information therefrom to further investigate the case and using the recordings as part of settlement negotiations?

1.
RECORDING CONVERSATIONS WITH THIRD PARTIES

The general rule governing the surreptitious tape recording of conversations was established by the Mississippi Supreme Court in *Netterville v. Mississippi State Bar*, 397 So.2d 878 (Miss.1981). In that case, the Court determined that such tape recordings are not unethical when the act, considered within the context of the circumstances, does not rise to the level of dishonesty, fraud, deceit or misrepresentation. 397 So.2d at 883. Specifically, the Court held that secret recordings are not per se unethical if the information requested [by the attorney during the telephone conversation] is of such a nature as to reasonably import to the person called the probability, if not certainty, it would be taken down in some manner for future use. *Id.*

More recently, in *Attorney M v. The Mississippi Bar*, ___ So.2d ___, No.90-BA-0632 (decided July 1, 1992, not yet reported), the Court stated:

> Generally speaking, an attorney is not ethically bound to keep the confidences of any person other than his client. Absent some express or implicate assurance to the contrary, a person who speaks to an attorney with whom he has no attorney/client relationship must realize that his statements are subject to publication.

Slip Op. at 5. The Court went on to state that such recordings do not per se violate Rules 8.4 (conduct involving dishonesty, fraud, deceit or misrepresentation or conduct prejudicial to administration of justice).

The Committee is of the opinion that at a minimum, the lawyer should fairly identify himself, his representation and his purpose, and should refrain from making false or misleading statements concerning whether the conversation is being recorded. Although the Committee does not condone or recommend the surreptitious recording of telephone conversations with third parties, it is not unethical to do so within the limits set forth above.

2.
ADVISING A CLIENT TO SECRETLY RECORD TELEPHONE CONVERSATIONS

The legality *vel non* of recording telephone conversations is a question of criminal law and the Committee expresses no opinion on whether the facts presented would result in violation of a criminal statute. To the extent the secret tape recording of conversations by the client of her spouse's conversations violates any criminal law or statute, the lawyer would be prohibited from advising the client to engage in such activity. Rule 1.2 governs this situation and provides:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that a lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist the client to make a good faith effort to determine the validity, scope, meaning or application of the law.

In fact, if the attorney did advise the client to commit an illegal act, it would not only run afoul of Rule 1.2, but would also constitute a violation of Rule 8.4 which makes it an act of professional misconduct for an attorney to violate the rule or to knowingly assist or induce another to do so or do so through the acts of another. If the client proposes this course of conduct, the attorney should discuss the consequences of committing such an act with the client and advise the client as to its possible illegality.

To the extent the facts presented are not in violation of a criminal law or statute, it is the opinion of the Committee that the attorney may ethically advise the client to make the proposed tape recordings.

3.
USE OF SECRETLY OBTAINED RECORDINGS OF TELEPHONE CONVERSATIONS

The use of tapes secretly obtained by the client without the attorney's knowledge is essentially an evidentiary matter. Although the Supreme Court has stated that "the value of most tape recordings in ferreting out truth is beyond question, and this Court has observed that the admission of such records into evidence is sometimes 'fully justified' ", *National Life & Accident Insurance Co. v. Miller*, 484 So.2d 329, 338 (Miss.1985), the Committee is of the opinion that this question is one of law as opposed to ethics.

As to whether the attorney may make use of information contained in the tapes to further investigate the case or in settlement negotiations, it is the opinion of the Committee that such information may be used for these purposes. Rules 1.1 and 1.3 require an attorney to zealously represent his client and to prepare a case with thoroughness. Once again, the Committee expresses no opinion on the extent to which such materials may be used for evidentiary purposes, if any.

OPINION NO. 204
OF THE MISSISSIPPI BAR
RENDERED OCTOBER 30, 1992

CONFLICT OF INTEREST--ATTORNEY REPRESENTING GUARDIAN OF MINOR WARDS: *It is improper for an attorney who represents a guardian of minor wards to file a complaint against the guardian for the guardian's inability to account for Social Security payments received by the guardian during the guardianship.*

The Ethics Committee of The Mississippi Bar has been requested to render an opinion on the following question:

> May an attorney who represents a guardian of minor children file a complaint against the guardian for inability to account for Social Security payments received during the guardianship when the attorney has discussed this matter with the guardian?

In the facts presented, the attorney states that he has represented the guardian in a Chancery Court minor's guardianship. It has been discovered that the guardian has received and spent Social Security funds belonging to the children and cannot account for the funds. The attorney has discussed this matter with the guardian. Despite the attorney's attempt to withdraw from the case, the Chancellor has ordered the attorney to file a complaint against the guardian. The attorney wants to know if he may ethically do it.

An attorney who represents a guardian is the attorney for the guardian and not the attorney for the ward. In *Hutton v. Gwin*, 188 Miss.763, 195 So.486 (1940), the Supreme Court of Mississippi held that attorney fees incurred in representing the guardian of a minor's estate are the guardian's personal obligations and are not an obligation of the minor's estate itself, except where the Court has ordered that the guardian may be reimbursed his attorney's fees in accordance with Mississippi Code Annotated, Section 93-13-79 (1972). The attorney's duties and loyalty are owed to the guardian and not to the wards of the guardianship.

In view of the attorney/client relationship between the guardian and the guardian's attorney and the privileged communication which the attorney says he has acquired from his client on the subject matter of the proposed complaint, the Ethics Committee is of the opinion that Rules 1.6(a) and 1.7(a) of the Mississippi Rules of Professional Conduct prohibit the attorney from filing the complaint against his client.

Rule 1.6(a) of the MRPC says that:

> A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for

Philip KIRK, Jr. and his attorney, C. Frank Holthaus
v.
STATE of Louisiana.

No. 87-CA-2586.

Supreme Court of Louisiana.

May 26, 1988.

Citizen who had been indicted in federal court on five counts of mail fraud, and his attorney, brought suit seeking declaration that statute which prohibited them from recording confidential communications with witnesses, while permitting state to record such conversations, was unconstitutional. The Nineteenth Judicial District Court, Parish of East Baton Rouge, Joseph Keogh, J., held statute unconstitutional. The State appealed. The Supreme Court, Lemmon, J., held that: (1) challenge to constitutionality of statute was not mooted by citizen's acquittal on federal mail fraud charges under exception for cases capable of repetition, yet evading review, and (2) statute which prohibited criminal defendant from obtaining evidence by electronic recording of conversations while permitting prosecution to obtain such evidence by same method violated constitutional right to equal protection of law under both State and Federal Constitutions.

Affirmed.

Watson, J., concurred in result, with observation.

Dennis, J., concurred in result with reasons.

[1] CONSTITUTIONAL LAW ⇐ 46(1)
92k46(1)
Constitutionality of criminal statute prohibiting private citizens from recording confidential communications without consent of all parties, while permitting identical recordings when done by law enforcement agents was issue "capable of repetition, yet evading review," and thus challenge to statute was not mooted when citizen who wished to use such confidential recordings as part of his defense to federal mail fraud charges was acquitted of those charges; exception to mootness doctrine was also applicable because citizen's attorney, who was party to challenge, might be faced with identical problem in representing other clients and should not be required to violate law and undergo criminal prosecution as his sole means of seeking relief. LSA-R.S. 14:322.1.

[2] CONSTITUTIONAL LAW ⇐ 250.5
92k250.5
Statute which prohibited private citizens from obtaining evidence by electronic recording of conversations without consent of all parties, while permitting state to obtain such evidence by same method, in the absence of any reasonable basis or governmental interest supporting distinction, violated criminal defendant's constitutional right to equal protection of law under both Federal and State Constitutions, by hampering ability to present best evidence of interviews with potential witnesses. LSA-R.S. 14:322.1; LSA-Const. Art. 5, § 5(D); U.S.C.A. Const.Amend. 14.

[2] TELECOMMUNICATIONS ⇐ 492
372k492
Statute which prohibited private citizens from obtaining evidence by electronic recording of conversations without consent of all parties, while permitting state to obtain such evidence by same method, in the absence of any reasonable basis or governmental interest supporting distinction, violated criminal defendant's constitutional right to equal protection of law under both Federal and State Constitutions, by hampering ability to present best evidence of interviews with potential witnesses. LSA-R.S. 14:322.1; LSA-Const. Art. 5, § 5(D); U.S.C.A. Const.Amend. 14.

*224 William J. Guste, Jr., Atty. Gen., Rene Salomon, Asst. Atty. Gen., for appellant.

C. Frank Holthaus, Baton Rouge, for appellee.

Thomas L. Lorenzi, Godwin, Roddy, Lorenzi, Watson & Sanchez, Lake Charles, Rebecca L. Hudsmith, Shreveport, Keith B. Nordyke, Nordyke & Denlinger, Baton Rouge, John Wilson Reed, New Orleans, amicus curiae for plaintiffs-appellees.

LEMMON, Justice.

The State of Louisiana has invoked this court's appellate jurisdiction to seek review of a judgment of the trial court which declared La.R.S. 14:322.1 to be unconstitutional. La. Const. art. V, § 5(D).

This action began with a petition for a declaratory judgment and injunctive relief filed by Philip Kirk, Jr., who had been indicted in federal court on five counts of mail fraud, and by C. Frank Holthaus, Kirk's attorney in the criminal proceeding. In connection with the federal court litigation, plaintiffs wished to record interviews with potential witnesses, but were prevented by La.R.S. 14:322.1 (Acts 1986, Nos. 96 and 97) from doing so without the consent of all parties to the confidential communications. Plaintiffs sought to enjoin law enforcement authorities from using the statute to seek criminal sanctions against them for recording confidential communications during their investigation in the criminal case. To establish the need to record the conversations, plaintiffs alleged that the witnesses (all of whom were adverse to defendant) would not speak freely if they were aware of the recording. Plaintiffs challenged the statute on equal protection grounds, noting that the prosecutor already had in his possession recorded confidential communications between defendant and these witnesses taken without defendant's consent.

The trial judge denied a temporary restraining order, but promptly conducted a hearing on the merits of the declaratory judgment action, ultimately ruling that La.R.S. 14:322.1 is unconstitutional. Hence this appeal.

La.R.S. 14:322.1 makes unlawful and punishes as a misdemeanor the intentional eavesdropping upon or recording of a confidential communication without the consent of all parties, but the criminal statute is expressly inapplicable to law enforcement agencies and their authorized agents. [FN1]

FN1. La.R.S. 14:322.1 provides as follows: "A. It shall be unlawful for any person, intentionally and without the consent of all parties to a confidential communication, to eavesdrop upon or record such confidential communication by means of any electronic amplifying or recording device, whether such communication is carried on among such parties in the presence of one another or by means of a telegraph, telephone, or other device. "B. For the purposes of this Section the following definitions shall apply: "(1) 'Person' means any individual, business association, partnership, corporation, or other legal entity, including any individual acting or purporting to act for or on behalf of any government or subdivision thereof, whether federal, state, or local, but shall not mean an individual known by all parties to a confidential communication to be recording such communication. "(2) 'Confidential communication' means any communication carried on in such circumstances as may reasonably indicate that any party to such communication desires it to be confined to such parties, but excludes a communication made in a public gathering or in any legislative, judicial, executive, or administrative proceeding open to the public, or in any other public circumstance in which the parties to the communication may reasonably expect that the communication may be recorded. "(3) 'Eavesdropping' means the intentional listening to or recording of a confidential communication, either by human ear or with the aid of any electronic listening device, without a valid search warrant, by a person without the consent of all the persons to the communication. "C. Except as proof in any prosecution for violation of this Section, no evidence obtained as a result of eavesdropping upon or recording a confidential communication in violation of this Section shall be admissible in any judicial, administrative, legislative, or other proceeding. "D. This Section shall not apply to the following: "(1) To any public utility or public utility holding company or any subsidiary thereof engaged in the business of providing gas, electric, or communications services and facilities, or the officers, employees, or agents thereof, when the acts otherwise prohibited herein are for the purpose of construction, maintenance, conduct, or operation of the services and facilities of such public utility. "(2) To the use of any instrument, equipment, facility, or service furnished and used pursuant to the tariffs of such a public utility company. "(3) A law enforcement agency or any of its authorized agents. "(4) To any corporation or other business entity engaged in the provision of products or services to the public, or the officers, employees, or agents thereof, when the acts otherwise prohibited herein are for the purpose of service quality control or for educational, training, or research purposes and such acts are performed with the consent of one party to the communication being intercepted. "E. (1) Whoever commits the crime of criminal eavesdropping on or recording of confidential communications shall be fined not more than five hundred dollars or imprisoned for not more than six months, or both. "(2) The provisions of R.S. 14:322.1(E)(1) shall not apply to any person

transmitting a conversation to protect human life or to any person recording a conversation in which he is the victim of a verbal conversation which is obscene, harassing, or threatening." (emphasis added)

*225 At the hearing plaintiffs presented an experienced criminal investigator who testified that even cooperative witnesses, upon being told that an interview is being recorded, become hesitant to make statements, and that adverse witnesses invariably refuse to do so. On the basis of this evidence Kirk presented the following argument in favor of his right to make the recordings: the charges in federal court were based on an alleged scheme between him and employees of Photon, Inc. to defraud the corporation; the Photon employees had actually devised the scheme and were the only witnesses to the alleged scheme; the Photon employees had recorded conversations with him at the behest of government investigators; and recording of conversations by him or his investigator with the same Photon employees was critical to his entrapment defense. Kirk contended that it was fundamentally unfair to allow the prosecutor to tape conversations and to prohibit him from doing so when the true content of those conversations would be a crucial credibility issue at trial.

[1] In reasons for judgment, the trial judge suggested that the Legislature may validly prohibit the recording of confidential communications without the consent of all parties, but concluded that this statute, by banning only those recordings done by private citizens while permitting those done by law enforcement agents, created an arbitrary and unreasonable classification prohibited by the equal protection clauses of *226 both the federal and state constitutions. [FN2]

FN2. The trial judge issued his ruling in this case on the first day of the federal criminal trial. Because that trial resulted in an acquittal, a member of this court raised the question in oral argument whether the appeal in this case is moot. The issue in this case is one that may elude appellate review if mootness is declared because the criminal trial took place before the review process brought the matter to the state's highest court. While a case normally must remain justiciable throughout the appellate process, some cases are not mooted by subsequent events if the issue is "capable of repetition, yet evading review". Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515, 31 S.Ct. 279, 283, 55 L.Ed. 310 (1911); Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2757 (2d ed. 1983). The legal issue in this case is the type which may be raised again and again by attorneys and their clients, but may never reach this court before the trial of the matter for which the taped communication is sought. Furthermore, the lawyer, who personally or through an investigator interviews the witnesses, is the one against whom this criminal statute operates. Since he will be faced with the identical problem in representing other clients, he should not be required to violate the law and undergo a criminal prosecution as his sole means of seeking relief. Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973); see also In re P.V.M., 424 So.2d 1015 (La.1982). We therefore decline to dismiss the appeal as moot.

[2] In State v. Reeves, 427 So.2d 403 (La.1982), this court held on rehearing that the government's recording of the defendant's confidential conversation with an informer, taken with only the consent of the informer, was not an unreasonable invasion of privacy and did not violate the defendant's rights under the federal and state constitutions. The majority was persuaded to a great extent by the prosecutor's argument that since the informer's testimony regarding the content of the conversation would unquestionally have been admissible at trial, the informer's electronic recording of that conversation (which completely and infallibly preserved the conversation so as to eliminate any credibility dispute) should likewise be admissible. The court emphasized:

"Society seeks to foster truth, not to suppress it. The presence of the electronic transmitter has but one effect. Instead of the informant committing the conversation to memory, a machine tapes each and every sentence of the communication. The machine notes the inflection of the voices and the context in which remarks are made. If the defendant speaks innocently, his own words will exculpate him. However, if he implicates himself, the recordings prevent him from denying his participation in the conversation. Surely, society would not consider reasonable an expectation of privacy which would result in a

more inaccurate version of the events in question."

Id. at 418.

The Legislature, in enacting La.R.S. 14:322.1, preserved the prosecutor's right to obtain and use the "dynamite" evidence of a recorded conversation which the speaker is virtually powerless to deny, but prohibited the accused from obtaining and using a recorded conversation with a witness for the prosecution. Of course, the accused can still present testimonial evidence of the content of such a conversation, but the impact and quality of such testimony pales in comparison to a verbatim recording of the same conversation. [FN3] Moreover, testimonial evidence is subject to every aspect of human frailty, such as bias, failure of recall and the like.

FN3. This court recognized the significance of such evidence in State v. Trahan, 475 So.2d 1060 (La.1985). In reversing the conviction because the trial judge excluded from the jury a taped conversation between the victim's husband and the defendant's father, allegedly concerning the victim's husband's attempted extortion, the court stated: "The tape stands in this case as objective evidence of a conversation, of an effort toward a transaction relevant to the credibility ... of important witnesses in this case."

La.R.S. 14:322.1 therefore establishes a classification which discriminates against the accused in a criminal case with regard to the obtaining and use of the best evidence of a conversation. In this respect the statute clearly disserves the quest for truth. However, this is not the test for denial of equal protection. The appropriate inquiry is whether there is an appropriate governmental interest suitably furthered by the classification created by the governmental *227 action in question. Sibley v. Board of Supervisors of Louisiana State University, 477 So.2d 1094 (La.1985).

There is no apparent governmental interest which is furthered by the classification which permits prosecutors to obtain and use this type of superior evidence that criminal defendants are prohibited from obtaining. Nor has the Attorney General in this case pointed out any such government interest. Indeed, this situation is similar to the one in Wardius v. Oregon, 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973), a case challenging a state law which required criminal defendants to disclose alibi witnesses to the prosecutor without imposing reciprocal obligations upon the prosecutor, in which the Court pointed out:

"[I]n the absence of a strong showing of state interests to the contrary, discovery must be a two-way street. The State may not insist that trials be run as a 'search for truth' so far as defense witnesses are concerned, while maintaining 'poker game' secrecy for its own witnesses. It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State. Nor does the State suggest any significant governmental interests which might support the lack of reciprocity."

Id. at 475-76, 93 S.Ct. 2212-13.

It is as fundamentally unfair to prohibit a criminal defendant from obtaining evidence by electronic recording of conversations when the prosecutor is free to obtain such evidence by the same method, at least in the absence of any reasonable basis for the distinction. Inasmuch as La.R.S. 14:322.1 violates a criminal defendant's constitutional right to equal protection of the law under both the federal and state constitutions, the statute cannot stand.

Accordingly, the judgment of the trial court declaring the unconstitutionality of La.R.S. 14:322.1 is affirmed.

WATSON, J., concurs in the result but observes that the case was moot when decided by the trial court, Kirk having been found not guilty prior to judgment being signed.

DENNIS, J., concurs in the result with reasons.

DENNIS, Justice, concurring.

I respectfully concur in the result for different reasons. A person's "communications" are specifically protected by the state constitution against unreasonable searches, seizures or "invasions of privacy." La. Const.1974, Art. 1, § 5. Conseuqently, the framers and voters who wrote and adopted that charter intended that interceptions of

private conversations should not be conducted without a warrant issued upon probable cause, particularly describing the communication to be invaded and the lawful purpose or reason for the interception. Id. Therefore, the statute before us in this case is patently unconstitutional because it attempts to authorize state law enforcement officials to freely engage in invasions of private communications without a warrant or probable cause. See State v. Reeves, 427 So.2d 403, 421-428 (La.1982), (dissenting opinion). Because I would strike the statute on these grounds alone I would not reach the equal protection analysis used by the majority. —

Furthermore, this case forcefully demonstrates that the fears of the dissenters in State v. Reeves, supra, are coming true. We now have taken several benighted steps down the totalitarian road. Because of this court's misinterpretation of the right to privacy article in Reeves, we allow state officials to electronically eavesdrop at will, without probable cause, and without warrants, on our citizen's private communications. At the same time, as the present case demonstrates, we have created a situation in which it is now impossible for the legislature to enact laws protecting citizens from unlimited electronic surveillance by other private citizens. Sadly and ironically, this Orwellian scenario is happening in a state whose constitution is one of the few which specifically purports to protect "communications" *228 from unreasonable searches, seizures, or invasions of privacy.

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TULANE LAW REVIEW

VOLUME 57 NOVEMBER 1982 NUMBER 1

SURREPTITIOUS RECORDING OF WITNESSES IN CRIMINAL CASES: A QUEST FOR TRUTH OR A VIOLATION OF LAW AND ETHICS?*

ABRAHAM ABRAMOVSKY**

INTRODUCTION

During the course of their careers most defense lawyers will encounter the "turncoat" witness. The following scenario is illustrative of the problem. Smith is indicted for murder. Jones, a witness to the homicide, either contacts or is approached by Darrow, Smith's attorney, to discuss the case. During the course of the conversation, Jones, although unwilling to give a signed statement, unequivocally absolves Smith of the murder. Prior to Smith's trial, however, Jones is indicted for several narcotics sales. At Smith's trial, Jones not only declines to testify on behalf of the defendant, but becomes the prosecution's "star" witness against him. On cross-examination, Jones steadfastly denies making any statements to defense counsel absolving the defendant.

While the underlying reasons for the disavowal vary from

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* I would like to extend my appreciation to Dennis Cammarano, Joy Peltz, and David Vaida, Fordham Law School, for their assistance in research and editing.

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self-interest to pressure from the prosecution, the result is often the same: the defense is unable to meaningfully impeach the "turncoat" witness. To counteract this situation, defense lawyers have been tempted to record and thereby preserve these statements for cross-examination. Although this practice is clearly legal under federal law,[1] and is sanctioned by the majority of states,[2] bar association grievance committees throughout the country have concluded that its utilization is unethical.[3] As a result, a defense attorney often is faced with a Hobson's choice. On the one hand, he must represent his client zealously within the bounds of the law.[4] In those states where one-party consensual recording[5] is legal, its product, the taped statement, is clearly admissible. Even where one-party consent recording is prohibited by state law, recent Supreme Court decisions indicate that illegally obtained evidence may be admissible for impeachment purposes.[6] In fact, the use of the recorded statement at trial may constitute the difference between a guilty verdict and an acquittal. Thus, to comply with the requirement of zealous representation, the lawyer should record the witness' statement. By surreptitiously taping a witness, however, the attorney subjects himself to possible disciplinary proceedings.

It is the thesis of this article that surreptitious recording of witnesses by criminal defense lawyers is ethical when the purpose of the recording is to provide a means of impeachment should a witness disavow his prior favorable statements at trial. Section I discusses the possible benefits to defense attorneys and their clients resulting from surreptitious recording of potentially adverse witnesses. Section II examines federal case and statutory law authorizing one-party consensual recording. Section III analyzes the statutory law of the various states, concluding that while some states follow federal law in authorizing one-party consensual recording, others are more restrictive than federal law. Some states as yet have not taken a position on the matter.

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1. *See infra* notes 9-12 and accompanying text.
2. *See infra* note 32 and accompanying text.
3. *See, e.g.*, ABA Comm. on Professional Ethics, Formal Op. 337 (1974); *see also infra* notes 64-110 and accompanying text.
4. This criterion is required by both the ABA Model Code of Professional Responsibility Canon 7 (1980) and the Model Rules of Professional Conduct (Final Draft 1981).
5. *See infra* text accompanying notes 11 & 12.
6. *See infra* notes 40-56 and accompanying text.

Section IV argues that to the extent state statutes prohibit one-party consensual recording, such statutes are vitiated by recent Supreme Court cases emphasizing the importance of impeachment in furthering the quest for truth at a criminal trial — even if the impeachment evidence is obtained illegally.

In Section V, the current position of ethics committees on surreptitious recording by attorneys is analyzed. Many state ethics committees have opined that surreptitious recording by defense attorneys is unethical either as a result of a state law prohibition or, even in the absence of legal prohibition, as a result of stricter requirements placed upon defense attorneys. These states thus present the defense attorney with a Hobson's choice of unethical activity on the one hand, and failure to present important impeachment evidence on the other. Section VI critically considers the rationales relied upon by ethics committees in prohibiting surreptitious recording by defense attorneys.

Section VII analyzes whether, in light of the ethical prohibitions, a defense attorney has reasonably effective alternatives to surreptitious recording. It is concluded that surreptitious recording is an extremely effective tool for the defense attorney and his client, and that no alternative methods of impeachment are as effective. Section VIII weighs the decided advantages of surreptitious recording against the possible adverse effects to the trial process and to potential witnesses, finding that the benefits to the defendant and to the fact-finding process in general far outweigh any anticipated adverse effect.

Finally, Section IX explores whether the Hobson's choice currently faced by attorneys, in states whose ethics committees have prohibited surreptitious recording, will be alleviated by the passage of the Proposed Model Rules of Professional Conduct. The Proposed Model Rules do not specifically address the problem, thus leaving defense attorneys in a quandary as to how far they can go to protect the interests of their client.

I. The Need to Surreptitiously Record

A variety of situations exist in which a consensual recording could be instrumental in ascertaining the truth at trial. In ascending order of damage to a defendant, the following events may occur:

1. The Misunderstanding Witness

Prior to trial, when interviewed by defense counsel, the witness absolutely absolves the defendant by stating that another individual known to him has committed the offense. At trial, testifying for the prosecution, the witness implicates the defendant. When questioned about his pre-trial statements, the witness admits to having had a conversation with counsel but claims that he misunderstood counsel's questions. The introduction of the taped conversation into evidence permits the jury to determine whether the witness was confused at the time of the interview, or whether he simply changed sides at trial.

2. Statements Made Out of Context

The facts are unchanged, except that the witness testifies that while he understood the questions in the pre-trial interview, the statements alluded to by counsel on cross-examination are out of context. The admission of the taped conversation into evidence would dispel this contention. Unless the prosecution challenges the integrity of the tape, the witness' testimony may be discredited in whole or in part by the jury.

3. The Denying Witness

In this version, the witness not only testifies adversely to the interests of the defendant, but on cross-examination, when asked about absolving statements he made prior to trial, steadfastly denies that he has ever spoken to counsel. The taped conversation's introduction would severely discredit the witness.

4. The Allegedly Bribed Witness

In this scenario, the turncoat witness admits making certain favorable statements, but alleges that he was bribed by defense counsel. This is the most damaging scenario, since the witness not only implicates the defendant but impugns the integrity of defense counsel before the jury. The introduction of the entire taped conversation could assist counsel in impeaching the witness. The length of the conversation and the nature and wording of the statements could convince the jury that the statements made at the lawyer's office were spontaneous, voluntary, and

true.[7]

While in all four examples counsel could cross-examine the witness without benefit of the taped conversation, the recording clearly would enhance the possibility of impeachment,[8] thereby substantially facilitating the quest for truth.

II. Federal Law of One-Party Consensual Recording

Title III of the Omnibus Crime Control and Safe Streets Act of 1968[9] is a comprehensive statutory scheme enacted by Congress for the purpose of protecting the privacy of wire[10] and oral communications.[11] While Congress was concerned with the surreptitious interception of communications, the statute explicitly omits from its ambit one-party consensual recordings by private citizens:

> It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.[12]

In exempting one-party consensual recordings, Congress codified existing case law. Beginning in 1952 with the landmark

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7. In addition, the tape would be most important if criminal prosecution or disciplinary proceedings were initiated against counsel.

8. *See generally* 3 J. Weinstein & M. Berger, Weinstein's Evidence § 607[09] (1981); Fenner, *Handling the Turncoat Witness Under the Federal Rules of Evidence*, 55 Notre Dame Law. 536 (1980).

9. 18 U.S.C. §§ 2510-2513, 2515-2520 (1976).

10. Title III defines "wire communication" as

> any communication made in whole or in part through the use of facilties for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications.

Id. § 2510(1).

11. "Oral communication" is defined as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." *Id.* § 2510(2).

12. *Id.* § 2511(2)(d).

case of *On Lee v. United States*,[13] the United States Supreme Court has consistently upheld the legality and constitutionality of such recordings. In *On Lee*, Chin Poy, an acquaintance and former employee of the petitioner, entered his laundry and engaged him in conversation. Unbeknownst to On Lee, his longtime friend had turned informant and was wired for sound. The conversation, which included a number of incriminating statements concerning narcotics transactions, was transmitted to an undercover agent stationed outside the laundry. In sustaining the petitioner's conviction, the Court rejected his claim that Chin Poy had committed a trespass because consent to his entry was obtained by fraud, and dismissed as "verg[ing] on the frivolous" the further contention that the agent standing outside the laundry "was a trespasser because by these aids he overheard what went on inside."[14] The Court concluded that: "Petitioner was talking confidentially and indiscreetly with one he trusted, and was overheard. This was due to aid from a transmitter and receiver, to be sure, but with the same effect on his privacy as if [the law enforcement agent] had been eavesdropping outside an open window."[15]

On Lee was followed by *Rathbun v. United States*.[16] In *Rathbun*, the Court held that the interception of conversations via the use of a telephone extension with the consent of one of the parties did not violate section 605 of the Federal Communications Act of 1934.[17] In what later would be termed the "risk analysis" theory, the Court stated that "[e]ach party to a telephone conversation takes the risk that the other party may have an extension telephone and may allow another to overhear the conversation. When such takes place there has been no violation of any privacy of which the parties may complain."[18] Finally, in *Lopez v. United States*,[19] the petitioner attempted to bribe an IRS agent. Pursuant to his superior's instructions "to play along with the scheme,"[20] the agent met the petitioner in the latter's

13. 343 U.S. 747 (1952).
14. *Id.* at 752.
15. *Id.* at 753-54.
16. 355 U.S. 107 (1957).
17. 48 Stat. 1103 (1934) (codified at 47 U.S.C. § 605 (1976)).
18. 355 U.S. at 111.
19. 373 U.S. 427 (1963).
20. *Id.* at 430.

office and recorded his bribe offers by means of a concealed recorder. In upholding Lopez's conviction, the Court rejected the contention that the agent had misrepresented himself and hence illegally had "seized" his words. The Court stated:

> [T]his case involves no "eavesdropping" whatever in any proper sense of that term. The Government did not use an electronic device to listen in on conversations it could not otherwise have heard. Instead, the device was used only to obtain the most reliable evidence possible of a conversation in which the Government's own agent was a participant and which that agent was fully entitled to disclose.[21]

After the enactment of Title III, the Supreme Court decided two cases involving consensual recording. In *United States v. White*,[22] respondent's incriminating statements were recorded by a government informant and overheard by federal narcotics agents. The informant was not produced at trial. Nevertheless, the testimony of the "eavesdropping" agents was admitted into evidence and led to respondent's conviction. The Supreme Court affirmed the conviction by a vote of 5-3, with Justice Brennan concurring in result only. The Court stated:

> Concededly a police agent who conceals his police connections may write down for official use his conversations with a defendant and testify concerning them, without a warrant authorizing his encounters with the defendant and without otherwise violating the latter's Fourth Amendment rights. . . . For constitutional purposes, no different result is required if the agent instead of immediately reporting and transcribing his conversations with defendant, either (1) simultaneously records them with electronic equipment which he is carrying on his person, . . . (2) or carries radio equipment which simultaneously transmits the conversations either to recording equipment located elsewhere or to other agents monitoring the transmitting frequency . . . . If the conduct and revelations of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations made by the agent or by others from transmissions received from the agent to whom the defendant is talking and whose trustworthiness the defendant necessarily risks.[23]

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21. *Id.* at 439.
22. 401 U.S. 745 (1971).
23. *Id.* at 751 (citations omitted).

Since *White* was a plurality opinion, some believed that the constitutionality of consensual recording was uncertain.[24] Any doubt, however, was resolved by the Court in *United States v. Caceres*.[25] In *Caceres*, respondent on repeated occasions offered a "personal settlement"[26] of five hundred dollars to an IRS agent if he would resolve his audit favorably. On three different occasions, the agent wore a concealed radio transmitter which enabled other agents to monitor and record the bribe offers. On two of these occasions, however, the agent failed to secure the appropriate IRS authorization to record the conversations. As a result, the Court was faced with the issue of whether these two tape recordings and the testimony of the agents who monitored the conversations should be excluded because IRS regulations were violated. By a vote of 7-2, the Court held that since "the [IRS] was not required by the Constitution or by statute to adopt any particular procedures or rules before engaging in consensual monitoring and recording,"[27] the regulation would not be enforced. On the issue of whether Cacares had a reasonable expectation of privacy which required the government to obtain a search warrant, the Court reiterated its holdings in *Rathbun* and *Lopez*, stating:

> In *Lopez* . . . we held that the Fourth Amendment provided no protection to an individual against the recording of his statements by the IRS agent to whom he was speaking. In doing so, we repudiated any suggestion that the defendant had a "constitutional right to rely on possible flaws in the agent's memory, or to challenge the agent's credibility without being beset by corroborating evidence that is not susceptible of impeachment," concluding instead that "the risk that petitioner took in offering a bribe to [the IRS agent] fairly included the risk that the offer would be accurately reproduced in court, whether by faultless memory or mechanical recording." The same analysis was applied in *United States v. White* . . . to

24. The dissenters in *White* (Justices Douglas, Harlan, Marshall, and Brennan) contended that the use of a radio transmitter without obtaining a search warrant violated the respondent's reasonable expectation of privacy. Justices Harlan and Marshall, however, distinguished third-party consensual recording from first-party consensual recording maintaining that a search warrant is necessary for the former but not the latter. Thus, Harlan and Marshall would have overruled *On Lee* but not *Lopez*, while Brennan and Douglas would have overruled both.

25. 440 U.S. 741 (1979).

26. *Id.* at 746.

27. *Id.* at 749-50.

> consensual monitoring and recording by means of a transmitter concealed on an informant's person, even though the defendant did not know that he was speaking with a Government agent . . . .[28]

Thus, the Court sanctioned one-party consensual recording on two independent grounds. First, under the risk analysis rationale utilized in *Lopez*, the Court demonstrated an unwillingness to afford fourth amendment protection to criminal conversations. When a person divulges incriminating information to another, he simply bears the risk of disclosure by that person. Second, under what can be labeled the accurate reproduction rationale, the Court discerned no constitutional difference between a person reducing to writing the content of a conversation and actually recording it.

In all of these cases, the defendants at least arguably possessed an expectation of privacy and had the requisite standing to assert this contention. However, in the case of surreptitious one-party consensual recording of witnesses, both the expectation of privacy and standing to assert such a claim are clearly lacking. Because these witnesses are not subject to prosecution as a result of the recorded statements, they are precluded from asserting any illegality as to the obtaining of the statements.[29] Moreover, in the case of taping by defense counsel, the requisite state action is lacking.[30] One-party consensual recording of witnesses by attorneys, therefore, presents no constitutional problem. The issue still to be determined, however, is whether such conduct violates state legislation and, if so, whether concomitantly it violates the ethical standards of various state bar associations.

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28. *Id.* at 750.

29. *See, e.g.*, United States v. Reynolds, 449 F.2d 1347, (9th Cir.) *cert. denied*, 408 U.S. 924 (1971). The court held that a witness in a grand jury proceeding is not a "party aggrieved" under 18 U.S.C. § 3504 (1970) and therefore cannot "seek to suppress, or refuse to testify about, evidence unlawfully obtained." *Id.* at 1350. Additionally, the court concluded that the fourth amendment does not confer standing on a witness. *Id.* at 1351. *See generally* Comment, *Intercepted Communications: "Just Cause" for Refusing to Answer the Questions of the Grand Jury*, 29 U. Miami L. Rev. 334 (1975).

30. *See generally* Burdeau v. McDowell, 256 U.S. 465, 475-76 (1921); United States v. Kelly, 529 F.2d 1365, 1371 (8th Cir. 1976). *Accord* Bellnier v. Lund, 438 F. Supp. 47, 51-52 (N.D.N.Y. 1977).

III. State Law Concerning One-Party Consensual Recording

While one-party consensual recording is clearly sanctioned by federal law,[31] state legislation concerning its legality is varied. To date nineteen states and the District of Columbia adhere to the federal rationale allowing one-party consensual recording.[32] Thirteen states ordinarily prohibit this practice.[33]

In Massachusetts, for example, it is a crime for anyone to record a conversation without the consent of the participant.[34] Violation of this provision is punishable by imprisonment of up to five years and a $10,000 fine. The law does not contain an exception for an attorney to engage in surreptitious recording. Thus, surreptitious recording of an adverse witness by an attorney would subject him to a felony conviction. Similarly, section 632(a) of the California Penal Code[35] provides that it is a crime to intentionally and without the consent of all parties eavesdrop upon or record a confidential communication whether it is done in each other's presence or by telephone. The term "confidential

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31. *See supra* notes 9-12 and accompanying text.

32. Alaska Stat. § 42.20.310 (1981); Ariz. Rev. Stat. Ann. § 13-3005(2) (1978); Colo. Rev. Stat. §§ 18-9-303 to -304 (1978); Conn. Gen. Stat. §§ 53a-187 to -189 (1981); D.C. Code Encycl. § 23-542 (West 1967); Ga. Code Ann. § 26-3006 (1973); Hawaii Rev. Stat. § 711-1111 (1976); Idaho Code §§ 18-6701 to -6702 (Supp. 1982); Iowa Code Ann. § 727.8 (West 1979); Ky. Rev. Stat. Ann. § 526.010 (Baldwin 1975); La. Rev. Stat. Ann. §§ 15:1302- :1303 (West 1981); Me. Rev. Stat. Ann. tit. 15, §§ 709, 712 (1980 & Supp. 1981-82); Minn. Stat. Ann. § 626A.02(2)(d) (West Supp. 1982); Neb. Rev. Stat. §§ 86-701, 86-702(2)(c) (1976); Nev. Rev. Stat. § 200.620(1)(a) (1981); N.J. Stat. Ann. § 2A:156A-4(d) (West Supp. 1982-83); N.Y. Penal Law § 250.00(1)-(2) (McKinney 1980); Okla. Stat. Ann. tit. 21, § 1757 (West Supp. 1980-81); Va. Code § 19.2-62(2)(b) (1975); Wis. Stat. Ann. § 968.31(2)(c) (West 1971 & Supp. 1981-82).

33. Cal. Penal Code § 632 (Deering Supp. 1982); Del. Code Ann. tit. 11, § 1335(4) (1979); Fla. Stat. Ann. § 934.03 (West 1973 & Supp. 1982); Ill. Ann. Stat. ch. 38, § 14-2 (Smith-Hurd 1979); Kan. Stat. Ann. § 21.4001 (1981); Md. Cts. & Jud. Proc. Code Ann. §§ 10-401 to -402 (1980); Mass. Ann. Laws ch. 272, §§ 99(b)(4) & 99(c) (Michie/Law Co-op. 1980); Mich. Comp. Laws Ann. § 750.539(c) (1968); Mont. Code Ann. § 45-8-213 (1981); N.H. Rev. Stat. Ann. §§ 570-A:1, -A:2 (1974 & Supp. 1981); Or. Rev. Stat. §§ 165.535—.540 (1981); Pa. Cons. Stat. Ann. § 5703 (Purdon Supp. 1982-83); Wash. Rev. Code Ann. § 9.73.030 (1977 & Supp. 1982).

States without any legislation on the matter include Alabama, Arkansas, Indiana, Mississippi, Missouri, New Mexico, North Carolina, North Dakota, Ohio, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, West Virginia, and Wyoming.

34. *See* Mass. Ann. Laws ch. 272, § 99(b)(4) (Michie/Law Co-op. 1980). Other states which permit law enforcement officials to record surreptitiously with one-party consent are California, Florida, Michigan, New Hampshire, Oregon, Pennsylvania, and New Mexico.

35. Cal. Penal Code § 632(a) (Deering Supp. 1982).

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N.J. Stat. Ann. § 2A:156A-4(d)
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communication" is defined as "communication carried on in such circumstances as may reasonably indicate that any party to such communication desires it to be confined to such parties."[36] A recording in violation of this law is inadmissible in any judicial or administrative proceeding. The maker of such a recording is subject to a prison term of one year and a fine of up to $2500. In addition, the possibility exists that such conduct would violate section 6106 of the California Business and Professions Code[37] and could result in suspension or disbarment.

The legislation of some of the proscribing states, however, contains some limited exceptions. For example, Maryland law provides:

> [Ordinarily] [i]t is unlawful for any person to wilfully intercept, endeavor to intercept or procure any other person to intercept or endeavor to intercept any wire or oral communication . . . . [However,] [i]t is lawful under this subtitle for an investigative or lawful enforcement officer acting in a criminal investigation or any other person acting at the prior direction and under the supervision of an investigative or law enforcement officer to intercept a wire or oral communication in order to provide evidence of the commission of the offenses of murder, kidnapping, gambling, robbery, [arson], bribery, extortion or dealing in controlled dangerous substances, or any conspiracy to commit any of these offenses, where the person is a party to the communication or one of the parties to the communication has given prior consent to the interception.[38]

The statute allows an officer or employee of a communication common carrier to provide information, facilities, or technical assistance to law enforcement officers who lawfully may surreptitiously record. In addition, surreptitious recording is permitted by an officer or employee of a communication common carrier when he is "engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of the communication."[39]

The rest of the states, while not proscribing surreptitious recording via their penal laws, have not yet declared their posi-

36. *Id.* at (c).
37. Cal. Bus. & Prof. Code § 6106 (Deering 1976).
38. Md. Cts. & Jud. Proc. Code Ann. §§ 10-402(a)(1), (c)(2) (1980).
39. *Id.* at (c)(1)(i).

tion. Thus, the issue to be determined is whether a defense lawyer in one of the proscribing or nonenacting states is precluded like everyone else from recording. Or, alternatively, whether an attorney exception exists based upon the recent line of Supreme Court cases permitting impeachment even on the basis of illegally obtained evidence.

IV. State Legislation v. The Quest For Truth

There is little doubt that affording a prosecutor the opportunity to surreptitiously record a suspect, or permitting a defense attorney to secretly record a favorable witness who subsequently "turns," substantially enhances the opportunity for meaningful and effective cross-examination. Moreover, such a policy clearly comports with recent Supreme Court decisions enhancing the parameters of impeachment to include questions based upon illegally obtained evidence as well as valid but surreptitiously obtained evidence.

The forerunner of this rationale was the Court's decision in *Walder v. United States*.[40] In 1950, the defendant Walder was indicted for the purchase and possession of a grain of heroin. Pursuant to his motion, the trial court suppressed the evidence on the ground that it was obtained during an unlawful search. The suppression of the evidence resulted in the dismissal of the case. Two years later Walder was indicted for unrelated violations of the narcotics laws. At trial on direct examination, Walder testified that he had never purchased, sold, or possessed narcotics. On cross-examination, he reiterated his assertions that he never possessed narcotics. In an effort to discredit Walder, the police officer who participated in the unlawful search testified that Walder had been arrested for possession of heroin. The trial judge admitted the evidence over objection for the sole purpose of impeaching the defendant's credibility. Affirming Walder's conviction, the Court held that while the prosecution could not utilize evidence obtained in violation of a defendant's fourth amendment rights in their case in chief, under certain circumstances such evidence could be used to impeach a defendant's credibility. The Court stated: '[T]here is hardly justification for letting [a] defendant affirmatively resort to perjurious

40. 347 U.S. 62 (1954).

testimony in reliance on the Government's disability to challenge his credibility."[41]

After an eight-year hiatus, the Court in *Harris v. New York*[42] further elaborated upon the circumstances where illegally obtained evidence could be used by the prosecution. The Court concluded that under certain circumstances evidence obtained in violation of a defendant's fifth amendment rights could be used to impeach him at trial. Harris was arrested for twice selling heroin to an undercover agent. After his arrest but prior to interrogation, he was given three of the four *Miranda* warnings.[43] At trial Harris took the stand in his own behalf and denied one of the alleged transactions. The prosecution did not introduce any of his statements in their case in chief, but employed the unlawfully obtained admissions during cross-examination to impeach his credibility. Affirming the petitioner's conviction, the Court recognized that his impeachment, unlike that in *Walder*, bore directly on the crimes charged.[44] Nevertheless, the Court sanctioned the utilization of the unlawfully obtained evidence, stating: "[t]he shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances."[45] The Court's rationale was that "[t]he impeachment process here undoubtedly provided valuable aid to the jury in assessing petitioner's credibility, and the benefits of this process should not be lost."[46]

In *Oregon v. Haas*,[47] the *Harris* rationale was expanded further. Respondent Haas was indicted for burglary stemming from

41. *Id.* at 65 (footnote omitted).

42. 401 U.S. 222 (1971). *See generally* Dershowitz & Ely, Harris v. New York: *Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 Yale L.J. 1198 (1971).

43. Harris was not told that if he could not afford an attorney one would be appointed for him free of charge.

44. 401 U.S. at 225.

45. *Id.* at 226.

46. *Id.* at 225. Possible detrimental effects on police deterrence were also considered. *See* Abramovsky & Capra, *Use of Illegally Obtained Evidence for Impeachment Purposes*, 8 Search & Seizure L. Rep. 133, 135 (1981): "The Supreme Court presumed that the pursuit for truth, as embodied in the impeachment process, outweighed any 'speculative possibility that impermissible police conduct will be encouraged' by failure to exclude illegally obtained evidence for impeachment purposes" (quoting Harris v. New York, 401 U.S. 222, 225 (1971)).

47. 420 U.S. 714 (1975).

the theft of bicycles from two residential garages. Upon arrest the defendant was properly advised of his rights. A brief interrogation ensued during which he admitted the thefts. En route to the site where one of the bicycles was hidden, the respondent stated that he "was in a lot of trouble,"[48] and asked to call his attorney. The arresting officer replied that he would be permitted to call the lawyer "as soon as we get to the office."[49] Following this conversation, Haas directed the officers to a location where one of the bicycles was found and pointed out the residences from which the bicycles were taken. As in *Harris*, the prosecution did not utilize the contents of this conversation in its case in chief. At trial Haas took the stand and testified that he did not see the bicycles being taken by his friends, and that he did not know where the residences in question were located. The prosecution attempted to impeach his credibility by calling the arresting officer to recount the conversation which occurred on the way to the station. At the request of the defense counsel, the trial judge advised the jury that the defendant's statements could be used for impeachment purposes only, and not as proof of guilt. The defendant was convicted and appealed. The Supreme Court affirmed, holding that the impeaching material would provide valuable assistance in assessing the defendant's credibility. In arriving at its holding, the Court stated: "We are, after all, always engaged in a search for truth in a criminal case so long as the search is surrounded with the safeguards provided by our Constitution."[50]

In 1980 the Court decided two more cases which further expanded the *Harris-Haas* rationale. In *United States v. Havens*,[51] the respondent, an attorney, arrived at Miami airport from Peru. A customs search of his colleague, McLeroth, uncovered cocaine sewn into a makeshift pocket in a T-shirt McLeroth was wearing. After a brief interrogation during which McLeroth implicated Havens, he was arrested and his luggage searched without a warrant. While the search did not uncover any narcotics, it did yield a T-shirt from which a piece had been

48. *Id.* at 715.
49. *Id.* at 715-16.
50. *Id.* at 722.
51. 446 U.S. 620 (1980). *See generally* Spector & Foster, *Swords, Shields, and the Quest for Truth in the Trial Process: The Road From Constitutional Standards to Evidentiary Havens*, 33 Okla. L. Rev. 520 (1980).

cut. The piece matched the one sewn to McLeroth's T-shirt. Due to the unlawfulness of the search, however, the seized T-shirt was suppressed. At trial McLeroth, who had pleaded guilty and agreed to cooperate with the prosecution, testified that Havens had supplied him with the altered T-shirt and had sewn the pocket to the shirt. Havens acknowledged that cocaine was taped to McLeroth's body, but denied that he had engaged in any illegal activity. On cross-examination, the prosecution called attention to these answers, and then asked the defendant whether he had sewn the pockets on McLeroth's shirt. Respondent denied having sewn the pockets and, in addition, denied having a T-shirt with missing pieces that was seized from his luggage. After rebuttal testimony was offered by the government, the T-shirt was admitted into evidence over objection. The jury was instructed that the rebuttal evidence was to be considered by them only in assessing the defendant's credibility. Havens was convicted and appealed. The Supreme Court affirmed, holding:

> In terms of impeaching a defendant's seemingly false statements with his prior inconsistent utterances or with other reliable evidence available to the government, we see no difference of constitutional magnitude between the defendant's statements on direct examination and his answers to questions put to him on cross-examination that are plainly within the scope of the defendant's direct examination. Without this opportunity, the normal function of cross-examination would be severely impeded . . . .[52]

Thus, the Court found that a "flat rule" permitting impeachment of statements only on direct examination "misapprehends the underlying rationale of *Walder*, *Harris*, and *Haas*."[53] As in *Havens*, the rationale in upholding the use of illegally obtained evidence by the prosecution is "the importance of arriving at the truth in criminal trials, as well as the defendant's obligation to speak the truth in response to proper questions."[54] Weighing the competing interests, the Court concluded that the deterrent effect of the exclusionary rule is outweighed by the maintenance of the integrity of the fact-finding goals of the criminal trial.

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52. 446 U.S. at 627.
53. *Id.* at 625.
54. *Id.* For a general discussion of the use of illegally obtained evidence as the basis of impeachment questions, see Abramovsky & Capra, *supra* note 46.

In *Anderson v. Charles*,[55] the defendant Charles was arrested while driving a stolen car. After receiving his *Miranda* warnings, Charles told the arresting officers that he had stolen the auto from a particular intersection in Ann Arbor, Michigan. On direct examination at trial, the defendant testified that he took the auto from a different location. The Supreme Court upheld the prosecution's use of the prior statement to impeach the defendant on cross-examination on the ground that the prosecutor was merely seeking "to elicit an explanation for a prior inconsistent statement."[56]

In light of the preceding cases, it follows *a fortiori* that a defense attorney be permitted to impeach a prosecution witness' testimony on cross-examination based upon his prior inconsistent statements recorded by the attorney. This contention applies both to those jurisdictions where one-party consensual recordings are legal and to those where they are prohibited by state law.

In states which permit one-party consent recording, the troublesome constitutional issues of the *Harris-Hass-Havens* rationale are not even reached. Unlike the situation encountered in the above-mentioned cases, the evidence is legally obtained. While the ethical propriety of utilizing the recorded statements is debatable, its evidentiary use is clearly sanctioned. Regarding those states which do not permit one-party consensual recording, the rationale espoused by the cases should not preclude a defense attorney from gathering and utilizing recorded statements to impeach a prosecution witness upon cross-examination.

Recent Supreme Court cases sanction the use of illegally obtained evidence to impeach a defendant. The employment of evidence illegally obtained by the defense, therefore, should be allowed as a means to impeach prosecution witnesses, so long as the use of the evidence is geared toward eliciting the truth. Since truth is absolute and takes no sides, the defense should be given the same opportunity to assure its attainment through all reasonable means. It would be anomalous if a defendant in a criminal trial could not impeach the prosecution's witnesses through substantially the same means, and to the same extent

55. 447 U.S. 404.
56. *Id.* at 409.

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that the prosecution can impeach the defendant. Since the prosecution can challenge the criminal defendant's veracity by the use of illegally obtained prior inconsistent utterances,[57] a defendant should have the right to challenge the veracity of the prosecution's witnesses through the use of previously recorded statements, without regard to whether the statements were obtained in violation of a state's eavesdropping statute.

Referring to a criminal defendant, the Court in *Harris* held that "[t]he shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances."[58] This statement applies with equal force to a witness who does not have the benefit of the *Miranda* shield and who is not asserting a defense. With respect to a criminal defendant, the Court noted that the need to ascertain the truth was of a higher order than the means utilized to gather impeachment material. The same rationale applies to impeaching a key prosecution witness in a criminal trial. At no point may a witness be permitted to perjure himself, thereby perverting the adjudicatory process in its search for truth. The obtaining of the prior recorded statement in violation of state law is of secondary importance to the attainment of one of the most fundamental goals of a judicial system—truth.

The Court in *Havens* balanced the deterrent effect of the exclusionary rule against the societal interest in eliciting the truth. It concluded that "[t]he incremental furthering of those ends [i.e., law enforcement within constitutional constraints] by forbidding impeachment of the defendant who testifies was deemed insufficient to permit or require that false testimony go unchallenged, with the resulting impairment of the integrity of the factfinding goals of the criminal trial."[59] Moreover, in *Harris* the Court held that "[a]ssuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief."[60] Similarly, an attorney is precluded from using prior recorded statements in the defense case in chief. Concomitantly, however, the societal interest in

57. *See* C. McCormick, Law of Evidence §§ 34, 47 (2d ed. 1972).
58. 401 U.S. at 226.
59. 446 U.S. at 627.
60. 401 U.S. at 225.

eliciting the truth outweighs any expectation of privacy of a witness that his conversation would not be recorded.

Finally, the impeachment material obtained by a lawyer via a recorded statement is more reliable than the impeachment material sanctioned by the Court. In *Harris*, *Haas*, and *Anderson*, the unlawfully obtained admissions were obtained during custodial interrogation, a time when a defendant is under great psychological pressure in an alien and hostile environment. The reliability of these statements, therefore, is inherently suspect. Nevertheless, these statements were permitted to be used to impeach. In comparison, conversations between an attorney and a witness usually do not take place in a coercive environment. A witness at the time of the recording, albeit surreptitious, is not under compulsion to speak; nor is he held against his will. The conversation usually takes place in the lawyer's office or in a location which is convenient to the witness. Thus, a witness' statements to an attorney are inherently more reliable than a criminal defendant's utterances to a police officer.

V. The Current Position of Ethics Committees Concerning the Utilization of Surreptitious Recording

In those states which have enacted legislation concerning consensual recording, ethics committees have either comported with state law prohibitions[61] or have been more restrictive than state law requires. For example, in Colorado,[62] Michigan,[63] New York,[64] and Texas,[65] where legislation permits one-party consensual recording, the ethics committees prohibit either all or some attorneys[66] from surreptitiously recording adverse witnesses. In jurisdictions which have not proscribed surreptitious recording, ethics committees have not taken a formal position on whether attorneys will be permitted to record adverse witnesses.[67] In

61. N.Y. City Bar Op. 80-95 (1981), *discussed in* N.Y.L.J. Oct. 13, 1981, at 1.

62. Colo. Bar Op. 22 (1962), *digested in* O. Marie, Digest of Bar Association Ethics Opinions 75 (1970) [hereinafter cited as Marie].

63. Mich. Bar Op. 201 (1966), *reprinted in* 46 Mich. St. B.J. 29 (1967).

64. N.Y. State Bar Op. 328 (1974), *reprinted in* 46 N.Y. St. B.J. 303 (1974).

65. Tex. Bar Op. 392 (1978), *reprinted in* 41 Tex. B.J. 580 (1978).

66. *See supra* note 34, which enumerates those state statutes with a prosecutor's exception.

67. States which have not as of yet specifically addressed the issue include Alabama, Arkansas, Connecticut, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Minnesota, Missouri, New Jersey, North Carolina, North Dakota,

these jurisdictions a lawyer finds himself in the unenviable position of not knowing whether his recording of witnesses would be approved, at least tolerated, or would result in disciplinary action by the state's ethics committee.

Concern by ethics committees over the propriety of surreptitious recordings by attorneys dates back to at least 1942. In 1942, the New York City Bar Association Ethics Committee was faced with the issue of whether a lawyer who surreptitiously records another lawyer could introduce the recordings into evidence. The committee concluded that "there would be no impropriety in [the attorney] offering them into evidence, notwithstanding the manner in which they were obtained, which this committee deems clearly unethical."[68] Fifteen years later the same committee ruled that the offering of such a recording into evidence constitutes unethical practice.[69] In general, during the 1950s, depending on the forum, the practice of surreptitious recording ranged from being absolutely prohibited to being explicitly permitted. Consequently, while the New York City Bar Association consistently ruled that surreptitious recording was unethical,[70] relying primarily on Canon 22 of the Model Code of Professional Responsibility,[71] the Los Angeles Bar Association[72] and the Texas Ethics Committee[73] approved consensual recording without qualification.[74]

Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, Virginia, Wisconsin, and Wyoming.

68. N.Y. City Bar Op. 624 (1942), *reprinted in* Opinions of the Committees on Professional Ethics of the Association of the Bar of the City of New York (1956).

69. N.Y. City Bar Op. 832 (1957), *digested in* Marie, *supra* note 62, at 334.

70. N.Y. City Bar Op. 836 (1958), *digested in* Marie, *supra* note 62, at 335; N.Y. City Bar Op. 832 (1957), *digested in id.*, at 334; N.Y. City Bar Op. 813 (1956), *digested in id.*, at 332.

71. The contention that consensual recording may be legal was dismissed as follows: "To the extent tape recording or monitoring the telephone conversation of another without his knowledge is legal, it nevertheless would constitute a violation of Canon 22 in the opinion of the committee." N.Y. City Bar Op. 836 (1958), *digested in* Marie, *supra* note 62, at 335.

72. L.A. Bar Op. 182, *reprinted in* 39 L.A.B.B. 70 (1951), *superseded by* L.A. Bar Op. 272, *reprinted in* 39 L.A.B.B. 405 (1964).

73. Tex. Bar Op. 84, *reprinted in* 16 Tex. B.J. 701 (1953). The Texas opinion addressed the following question: "Would it be a violation of the Canons of Ethics for a lawyer to record a telephone conversation without advising the person conversing with him that a record is being made?" The answer: "The members of the committee are unanimously of the opinion that the above described conduct would *not* be a violation of the Canon of Ethics" (emphasis added).

74. In 1978, Opinion 84 was overruled by Opinion 392.

In the 1960s, all the grievance committees that considered the question of surreptitious recordings by attorneys found the practice to be unethical. The prohibition against recording applied whether the party recorded was a lawyer,[75] a client,[76] or any other person.[77] The best example of this blanket prohibition is contained in an opinion of the Committee on Professional Ethics of the State Bar of California.[78] In that opinion, the California Committee not only found surreptitious recording by attorneys in private practice unethical but concluded that they knew "of no reason why the ethical rules applicable to attorneys in private practice should not apply to attorneys in government service, whether they be district attorneys, attorneys general, city attorneys, county counsel, or other public officials."[79]

In 1974 the American Bar Association Committee on Ethics and Professional Responsibility concluded that "no lawyer should record any conversation whether by tapes or other electronic devices, without the consent or prior knowledge of all the parties to the conversation."[80] The rationale most often advanced to support the conclusion is that surreptitious recording violates Disciplinary Rule 1-102(A) of the Code of Professional Responsibility[81] which prohibits conduct involving dishonesty, fraud, deceit, or misrepresentation. In addition, Canon 9 of the Code, which provides that a lawyer should avoid even the appearance of impropriety, has also been cited in support of the proposition.[82]

Additional support for the prohibition is garnered from opinions issued by the ABA. Some exceptions to the prohibition, however, can be found. While ABA Formal Opinion 337 seems to

75. ABA Comm. on Professional Ethics, Informal Op. 1009 (1967); Mich. Bar Op. 201 (1966); L.A. Comm. on Professional Ethics, Bar Op. 272, *reprinted in* 39 L.A.B.B. 405 (1964).

76. ABA Informal Op. 1008 (1967).

77. Cal. Bar Op. 1966-5 (1966); La. Bar Op. 158, *reprinted in* 12 La. B.J. 217 (1964); Clev. Bar Op. 36 (1962), *digested in* Marie, *supra* note 62, at 396.

78. Cal. Bar Op. 1966-5 (1966), *reprinted in* 41 Cal. St. B.J. 351 (1966).

79. *Id.*

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

81. Model Code of Professional Responsibility DR 1-102(A) (1979) [hereinafter cited as the Code].

82. *Id.* Canon 9. Opponents to consensual recording by attorneys may also rely on other provisions in the Code, for example: Canons 1, 4, 7, 9; ECs 4-4, 4-5, 7-1, 9-2.

apply to all lawyers,[83] in fact it contains a "prosecution exception."[84] The opinion provides:

> 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 the 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.[85]

Apparently the ABA "prosecution exception" was premised on the contention that in certain investigations surreptitious recording is essential to combat crime. While the ferreting out of crime is a highly desirable and necessary social goal, a defendant's fundamental constitutional right to confront witnesses who testify against him is just as vital. Situations will arise where meaningful and effective impeachment will be wholly dependent on the introduction of prior inconsistent statements. The introduction of prior recorded statements is an extremely effective way to cross-examine. While other techniques are available,[86] none possesses the impact or the accuracy of a recorded statement.

The ABA's prohibition on surreptitious recordings by defense attorneys has been adopted by many state and local ethics

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83. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 337 (1974). The opinion states that "no lawyer should record."

84. *See supra* note 34 and accompanying text.

85. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 337 (1974). It should be noted, however, that in the investigation of many major cases, especially narcotics and corruption prosecutions, the utilization of surreptitious recording has become the rule rather than the exception. Consequently, the "prosecution exception" is no longer the aberration it once may have been. Its pervasive use today makes it the exceptional major case where the practice is not utilized. In recognition of this fact, the Preamble to Mass. Ann. Laws, ch. 272 § 99 (Michie/Law Co-op. 1980) states: "[B]ecause organized crime carries on its activities through layers of insulation and behind a wall of secrecy, government has been unsuccessful in curtailing and eliminating it. Normal investigative procedures are not effective. . . . Therefore, law enforcement officials must be permitted to use modern methods of electronic surveillance. . . ."

86. The lawyer can, for example, testify regarding conversations had with the witness.

committees.[87] For example, as early as 1962 the Ethics Committee of the State of Colorado differentiated between consensual and surreptitious recording by attorneys:

> Great advances in the availability and effectiveness of various kinds of recording devices have been made in recent years. Most attorneys use some type of recording device routinely in their offices and such devices are often helpful in taking and preserving conversations and statements by clients, potential witnesses, and others. Insofar as these devices permit a more efficient utilization of an attorney's time, their use should be encouraged.
>
> There is, however, a significant distinction from an ethical standpoint between the open and acknowledged use of such device by an attorney on the one hand, and secret, concealed, and undisclosed use on the other hand. Where an attorney discloses that he is recording a conversation, he is in effect, asking the other persons present for their consent to such procedure. A person so advised has the option of having his words recorded or of saying nothing. No such option is accorded one whose words are recorded without his knowledge. Despite the increasing frequency with which various recording devices are used in our society, we believe that the large majority of persons would not suspect that a conversation with an attorney was being surreptitiously recorded. Moreover, one reason for an attorney intentionally not disclosing that a particular conversation or statement is being recorded may be a belief that the person whose conversation is being recorded would choose his words more carefully, or speak less freely, or not at all, if such knowledge were imparted to him.
>
> Consequently, there is inherent in the undisclosed use of a recording device under these circumstances an element of deception, artifice, or trickery which falls below the standard of candor and fairness which attorneys are bound to uphold.[88]

Most importantly, the Committee concluded its opinion by stating: "The fact that in some instances the statements secretly recorded are those of potentially adverse witnesses *in no way* alters our opinion."[89]

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87. *E.g.*, Ind. Bar Op. 2, *reprinted in* 19 Res Gestae 234 (1975); Mich. Bar Inf., June 19, 1975; Wis. Bar Op. 75-3, *reprinted in* 48 Wis. B.B. 61 (1975); Ky. Bar Op. E-98, *reprinted in* 39 Ky. Bench & B. 29 (1975).

88. Colo. Bar Op. 22 (1962), *digested in* Marie, *supra* note 62, at 75.

89. *Id.* (emphasis added).

Several months prior to the issuance of ABA Opinion 337, the New York State Bar Association concluded that it was improper for an attorney engaged in private practice to record electronically a conversation with another person prior to putting that person on notice that the conversation was being recorded.[90] In arriving at this conclusion, the State's Bar Ethics Committee stated that surreptitious recording "offends the traditional standards of fairness and candor that should characterize the practice of law."[91] Like its ABA counterpart, the committee reached this conclusion even though New York law specifically sanctions one-party surreptitious consensual recording.[92] Furthermore, the ABA's "prosecution exception" is apparently applicable in New York. In *People v. Holman*,[93] the court held that the prohibition against surreptitious recording is restricted to attorneys engaged in private practice and is not applicable to prosecutors.[94]

The prosecution exception, however, has been explicitly rejected in other jurisdictions. For example, the Ethics Committee of the California State Bar decided that surreptitious recording by any attorney is unethical.[95] The committee specifically stated that it knew "of no reason why the ethical rules applicable to attorneys in private practice should not apply to attorneys in public practice, whether they be district attorneys, attorneys general, city attorneys, county counsel or other public officials."[96] In 1978 Texas adhered to the New York rationale when in Texas Opinion 392 it specifically provided:

> While the recording of a conversation either by telephone or in person is not a violation of law if done with the consent of one party to the conversation, even though done without knowledge or consent of the other party . . . nevertheless at-

90. N.Y. State Bar Op. 328 (1974), *reprinted in* 46 N.Y. St. B.J. 303 (1974).
91. *Id.*
92. N.Y. Penal Law § 250.00, .05 (McKinney 1980).
93. 78 Misc. 2d 613, 356 N.Y.S.2d 958 (N.Y. Sup. Ct. 1974).
94. *Id.* at 615, 356 N.Y.S.2d at 961. *Holman* involved a situation where the prosecution surreptitiously taped a conversation between the defendant, his attorneys and members of the District Attorney's Office. The court held Opinion 328 of the Committee on Professional Ethics was inapplicable "in view of the fact that [the prosecutor] was not in private practice and was in fact a law enforcement officer conducting, in the main, an on-the-record interview with a potential defendant." *Id.*
95. Cal. Bar. Op. 1966-5 (1966), *reprinted in* 41 Cal. St. B.J. 351 (1966).
96. *Id.*

> torneys are held to a higher standard by Canons 1 and 9. The secret recording of conversations offends the sense of honor and fair play of most people. Normally, therefore, no attorney should electronically record a conversation with another party, without first informing that party that the conversation is being recorded.[97]

Other jurisdictions have adopted a more conciliatory position. For example, the Committee on Rules of Professional Conduct of the State Bar of Arizona held that, while ordinarily lawyers should not resort to surreptitious recordings, situations will arise where its use is both necessary and proper.[98] Consequently, in Arizona any lawyer is permitted to record an utterance which is itself a crime. Such utterances include bribe offers, attempted extortions, and obscene telephone calls.[99] Accordingly, an attorney may tape a conversation to protect himself or his client from perjured testimony.[100] During the course of certain investigations, the prosecutor or one of his subordinates may also surreptitiously record informants or putative defendants.[101] Remarkably, however, neither a prosecutor who is recording targets of an investigation nor a defense attorney who tapes what he believes to be perjured testimony may use the recordings for purposes of impeachment. The opinion states that "[i]t is important to note that the purpose of the secret recording is solely to provide a shield for the lawyer or his client and that this exception does not authorize secret recordings for the purpose of obtaining im-

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97. Tex. Bar Op. 392 (1978), *reprinted in* 41 Tex. B.J. 580 (1978). It should be noted, however, that in dictum the opinion contains a limited prosecution exception: "There may be, however, extraordinary circumstances in which the State Attorney General or local government or law enforcement attorneys acting under the direction of the Attorney General or such principal prosecuting attorneys might ethically make and use secret recordings if acting within strict statutory limitations conforming to constitutional requirements." *Id.*

98. Ariz. Bar Op. 75-13 (1975), *digested in* Marie (1975 Supp.), *supra* note 62, at 74.

99. It should be noted that a prosecutor or other government attorney is more likely to be the recipient of such calls than a lawyer engaged in private practice.

100. Ariz. Bar Op. 75-13 (1975), *digested in* Marie (1975 Supp.), *supra* note 62, at 74.

101. *Id.* The opinion states: "In many areas of criminal investigation, for example, narcotics and fraud, it will be necessary for a prosecutor, or a police officer or investigator working directly with or under the supervision of the prosecution to secretly record conversations with informants and/or persons under investigation simply as a matter of self-protection."

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peachment evidence or inconsistent statements."[102] It is unclear why the members of the committee precluded a prosecutor who obtains an admission from a putative defendant from using it to impeach him if he lies on the stand. Nor is it clear why a defense attorney cannot employ conflicting statements to discredit a lying or vacillating witness during cross-examination. The most effective way a lawyer can discredit perjurious or other misleading testimony is by exposing its inconsistency. The ability of a prosecutor to impeach a lying, vacillating, or otherwise untruthful defendant would enhance the opportunity to convict the guilty. At the same time, affording a defendant the opportunity to meaningfully and effectively confront those who testify against him would substantially enhance the integrity of the adjudicatory process.

The only recent opinion that specifically sanctions surreptitious recording by defense attorneys was rendered by the New York City Bar Association's Committee on Professional and Judicial Ethics.[103] The committee stated:

> While we continue to fully endorse the general proposition that lawyers ought not to participate in making secret recordings, we believe that the ethical rule as applied in the criminal area must take into account society's judgment, reflected in legislation, that secret recordings are a desirable tool in detecting and proving crime. We believe that a necessary corrollary, compelled by fairness and our legal tradition which guarantees the fullest protections to a criminally accused, allows similar investigative tools to be available to lawyers who have undertaken the defense of a person being investigated for, or charged with a crime.[104]

This opinion was rendered by a committee of the New York City Bar Association. The state-wide grievance committee in New York, the Ethics Committee of the State Bar Association, concluded in 1974 that surreptitious recordings by defense lawyers were unethical. It remains to be seen whether the Ethics Committee will follow the lead of the New York City Bar Association or maintain its position in line with ABA Opinion 337 prohibiting surreptitious recording.[105]

102. *Id.*
103. N.Y. City Bar Op. 80-95 (1981), *discussed in* N.Y.L.J., Oct. 13, 1981, at 1.
104. *Id.*
105. Moreover, it should be noted that N.Y. City Bar Opinion 80-95 contains cer-

VI. The Rationales Used to Prohibit Surreptitious Recording

Ethics committees prohibiting surreptitious recording by attorneys traditionally have relied upon Disciplinary Rule 1-102(A), which provides:

> A lawyer shall not:
> (1) Violate a Disciplinary Rule.
> (2) Circumvent a Disciplinary Rule through actions of another.
> (3) Engage in illegal conduct involving moral turpitude.
> (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
> (5) Engage in conduct that is prejudicial to the administration of justice.
> (6) Engage in any other conduct that adversely reflects on his fitness to practice law.[106]

It is contended that reliance on this Rule is ordinarily misplaced since it does not explicitly proscribe surreptitious recording of adverse witnesses by defense lawyers. In those states which permit surreptitious recording,[107] the attorney's conduct might not be characterized as illegal. Consequently the "illegal conduct" provisions of DR 7-102(A)(7) and (8), which prohibit engaging in or assisting illegal conduct, are inapplicable. Even in states which prohibit surreptitious recording, resort to this technique by defense lawyers for impeachment purposes only should be permissible by the *Harris-Havens* rationale.[108]

In addition, the practice of surreptitious recording should not be defined as fraudulent, deceitful, or involving misrepresen-

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tain limitations. The opinion states:

> Since defense counsel often has to act before an indictment . . . we believe that counsel may make or cause such recordings to be made while his or her client is under investigation by a grand jury. In addition, if counsel has reasonable grounds to believe that an investigation is about to be commenced, the recording may be made. Care must be taken, however, in such fields as antitrust and securities law, where criminal and civil sanctions may be applicable to the same conduct. The mere possibility of a criminal prosecution is not enough. Counsel must have reasonable grounds to believe that a criminal investigation is about to be commenced by law enforcement authorities.

N.Y.L.J., Oct. 13, 1981, at 6.

106. The Code, *supra* note 81, at DR 1-102.

107. *See supra* note 32.

108. *See supra* notes 42-54 and accompanying text.

tation. Traditionally fraud has been defined as "[a]n intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right."[109] Misrepresentation is defined as "any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts."[110] Deceit is defined as "[a] fraudulent and deceptive misrepresentation, artifice, or device, used . . . to deceive and trick another . . . to the prejudice and damage of the party imposed upon."[111] An examination of these definitions reveals that they are inapplicable to most instances of surreptitious recordings. In the ordinary consensual recording situation, neither a misstatement of fact nor injury proximately caused thereby is present. Defense counsel does not assure a witness that he is not being recorded, nor ordinarily does any damage befall the witness. Usually all that may occur as a result of the recording is the subjecting of the witness to meaningful cross-examination if he "turns."

Moreover, cases interpreting DR 1-102(A) and DR 7-102(A) have demonstrated that for liability to attach, the lawyer's conduct must involve an intentional misstatement of fact or some other intentional misconduct. For example, in *In re Sedor*,[112] the censured lawyer made false allegations in an affidavit. In *In re Conti*,[113] the lawyer directed his secretary to forge his clients' signatures onto a recorded deed in order to facilitate the sale of the clients' property in their absence. In *In re Vogel*,[114] contrary to the express terms of an agreement, the lawyer collected his fees from funds held in escrow.[115] Because consensual recording of witnesses does not involve any misstatement, nor any intentional misrepresentation of fact, the practice does not fall within

109. Black's Law Dictionary 594 (rev. 5th ed. 1979). *See also* Goldstein v. Equitable Life Assur. Soc'y, 160 Misc. 364, 289 N.Y.S. 1064 (City Ct. N.Y. 1936).

110. A. P. Landis, Inc. v. Mellinger, 116 Pa. Super. 167, 175 A. 745, 746 (1934) (quoting Restatement of Contracts § 470 (1932)). This definition has been adopted by Black's Law Dictionary 903 (rev. 5th ed. 1979).

111. Black's Law Dictionary 365 (rev. 5th ed. 1979). *See also* People v. Chadwick, 143 Cal. 116, 76 P. 884, 886 (1904).

112. 73 Wis. 2d 629, 245 N.W.2d 895 (1976).

113. 75 N.J. 114, 380 A.2d 691 (1977).

114. 382 A.2d 275 (D.C. App. 1978).

115. In *In re* Donohoe, 90 Wash. 2d 173, 580 P.2d 1093 (1978), a lawyer who was a candidate for judicial office deliberately made false statements about the incumbent judge.

the purview of DR 1-102(A). DR 1-102(A)(4) would be applicable only if the recording contained or was made pursuant to a misstatement of fact such as an assurance that the conversation would not be recorded or that its contents would not be used in a court of law.[115]

If the above analysis is correct, ethics committees have objected to consensual recording not because it technically violates DR 1-102, but because of its appearance of impropriety. Thus, the issue to be resolved is why the committees have not explicitly relied on Canon 9, which provides that "a lawyer should avoid even the appearance of impropriety."[117] Apparently the reason is that courts have been reluctant to apply Canon 9, absent a showing that a reasonable probability exists that an impropriety occurred.[118] The argument that the practice of surreptitious recording creates the appearance of impropriety in the eyes of the public may not even be tenable according to other provisions of the Code. For example, the Code provides:

> While a lawyer should guard against otherwise proper conduct that has a tendency to diminish public confidence in the legal system or in the legal profession, his duty to clients or to the public should never be subordinate merely because the full discharge of his obligation may be misunderstood or may tend to subject him or the legal profession to criticism.[119]

Even assuming, *arguendo*, that both DR 1-102(A) and Canon 9 were technically applicable, it is contended that these provisions would present a defense lawyer with a Hobson's choice. Canon 7 of the Code of Professional Responsibility provides that "[a] lawyer should represent a client zealously within the bounds of the law."[120] Ethical Consideration 7-26 suggests that "[a] lawyer should . . . present any admissible evidence his client desires to have presented unless he knows . . . that such testimony or evidence is false, fraudulent, or perjured."[121] DR 7-

116. *See supra* note 106 and accompanying text.
117. The Code, *supra* note 81, at Canon 9 (1979).
118. *See, e.g.*, Woods v. Covington County Bank, 537 F.2d 804 (5th Cir. 1976); Sapienza v. Hayashi, 57 Hawaii 289, 554 P.2d 1131 (1976); Higgins v. Advisory Comm. on Professional Ethics, 73 N.J. 123, 373 A.2d 372 (1977). *See generally* Note, *Appearance of Impropriety As the Sole Ground for Disqualification*, 31 U. Miami L. Rev. 1516 (1977).
119. The Code, *supra* note 81, at EC 9-2 (1979).
120. *Id. supra* note 81, at Canon 7.
121. *Id.* at EC 7-26.

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101(A)(1) mandates that "A lawyer shall not intentionally . . . fail to seek lawful objectives of his client through reasonably available means permitted by law and the disciplinary rules."[122] Since surreptitious consensual recording is legal and since the recording, if made, is admissible in evidence, what should counsel do? Should he record, thereby affording his client the best defense under the law, or should he be guided by his own self-interest of avoiding any disciplinary repercussions pursuant to DR 1-102(A)?

The situation faced by counsel is somewhat analogous to that faced by defense counsel in *Maness v. Meyers*.[123] In *Maness*, petitioner, a lawyer, was held in contempt for advising his client during a civil case to refuse to produce materials demanded by a subpoena *duces tecum* on the ground that the materials sought may tend to incriminate his client. In reversing the conviction, the Supreme Court stated that "[i]f performance of a lawyer's duty to advise a client that a privilege is available exposes a lawyer to the threat of contempt for giving honest advice it is hardly debatable that some advocates may lose their zeal for forthrightness and independence."[124] Similarly, although a defense lawyer knows that impeachment material is essential for meaningful confrontation, he would hesitate to produce the recording in court if his doing so would raise the possibility of censure, suspension, or disbarment. The American Bar Association Project on Standards for Criminal Justice, cited with approval by Chief Justice Burger in *Maness v. Meyers*, discusses the dilemma such a situation would pose for a lawyer:

> [T]he duties of a lawyer to his client are to represent his legitimate interests, and considerations of personal and professional advantage should not influence his advice or performance. . . . A lawyer cannot be timorous in his representation. Courage and zeal in the defense of his client's interest are qualities without which one cannot fully perform as an advocate.[125]

Given this tradition, and given that the Code can be construed either in favor of or against surreptitious recording, it is sug-

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122. *Id.* at DR 7-101(A)(1).
123. 419 U.S. 449 (1975).
124. *Id.* at 466.
125. ABA Project on Standards for Criminal Justice, The Defense Function § 1.6 (Approved Draft 1971), *quoted in* Maness v. Meyers, 419 U.S. at 466-67 n.67.

gested that, pursuant to the spirit of the Code itself, defense counsel should resolve all doubts in favor of his client and resort to surreptitious recording if he feels in good faith that the utilization of such a recording would enhance his cross-examination.[126]

VII. Are There Reasonable Alternatives to Surreptitious Recording?

Prior to concluding that surreptitious recording is essential to effective cross-examination and thereby to the quest for truth in a criminal trial, an analysis must be undertaken to determine whether other reasonable, less controversial alternatives are available.

Written statements are the first possible alternative. Ordinarily, the way to preserve a statement given by a witness for use at trial is to reduce it to writing. The writing may take the form of an affidavit, or of a simple statement either written or signed by the witness. This simple procedure, however, is often either unavailable or tactically unsound in the context of a criminal case. Many witnesses to criminal acts are either illiterate or barely literate. As a result, they are unable to give a written statement. At best, they can subscribe or initial a statement which purports to contain their observations, and is written by a lawyer or his private detective. Such a statement is susceptible to impeachment by the prosecution on the grounds that it is either incomplete or tailored to meet the needs of the defense. More importantly, the statement is subject to complete or partial renunciation by the witness for a variety of reasons.[127]

The second alternative is a recording made with the consent of the witness. This mechanism presents problems as well. People are naturally wary of being recorded. Thus, what otherwise would be a free and uninhibited recounting of events becomes a cautious and restrained conversation.[128] Because of this lack of

126. *See* the Code, *supra* note 81, at EC 7-4 (1979). For cases construing this provision, see Tool Research & Eng'g Corp. v. Henigson, 46 Cal. App. 3d 675, 683-84, 120 Cal. Rptr. 291, 297-98 (Cal. Ct. App. 1975); *In re* Corace, 390 Mich. 419, 213 N.W.2d 124, 132 (1973).

127. *See supra* notes 7-8 and accompanying text.

128. The authors of recent N.Y. City Bar Op. 80-95 (1981) noted this fact when they stated that "persons being recorded might tend to be more cautious or self-protective or even reluctant to have conversations, if they knew they were being taped."

spontaneity, even a truthful statement tends to be of a sort unlikely to incur criticism or retribution in the future. It is precisely for this reason that such a statement loses much of its impeachment value if a witness "turns." The usual reluctance to be taped is even more prevalent in the context of a criminal investigation. The principal reasons for this reluctance are, first, fear of retribution from either the defendant or the police and the prosecution, and second, self-interest, or the belief that one can only lose by "getting involved." Many witnesses to serious criminal acts are either themselves tangentially involved or know who is involved in the *res gestae* of the defense. In neither case would they be willing to have their thoughts on the subject recorded for posterity. Moreover, many witnesses are either criminals themselves or live in the periphery of criminal activity. They quickly learn that the authorities do not approve of witnesses who testify on behalf of those they have indicted. This realization, coupled with a negative attitude toward courts and trials makes the cooperation of these witnesses unlikely. This unwillingness to cooperate is particularly acute in more serious cases where the potential of retribution by a notorious defendant or frustrated law enforcement authorities would be greater.

Another possible alternative is to permit counsel's agents or employees, such as private investigators, to record the conversation. This practice would be analogous to the procedures used by the prosecution since, in the ordinary case, it is a law enforcement agent or an informant rather than the prosecuting attorney who actually records the conversation. There is precedent for such an alternative. The New York State Bar Association, which in 1974 prohibited surreptitious recording by counsel, concluded in 1979 that counsel could advise but not participate in the making of such recordings.[129] This alternative is unacceptable for at least two reasons. First, the prosecution would have a substantial edge over defendants. In the overwhelming number of cases, defendants cannot afford the services of a private investigator. Even those who could would have the investigator subjected to the "hired gun" model of cross-examination. Any experienced prosecutor would attempt to undermine the credibility of the investigator by suggesting that since he has been employed by defense counsel on other occasions and was

129. N.Y. State Bar Op. 515 (1979), *reprinted in* 52 N.Y. St. B.J. 162 (1980).

paid to obtain the recording, he would tape only those statements favorable to the defense. The status of undercover agents and detectives as interested witnesses, because they constantly testify for the prosecution, is often forgotten. Unlike private investigators, they are viewed as objective civil servants whose job is to combat crime. Second, this alternative removes the restraining influence of a lawyer's supervision.[130]

VIII. Adverse v. Beneficial Effects of Surreptitious Recording

Even if surreptitious recording of adverse witnesses is shown to be beneficial to a defendant in conducting his defense, a balancing test must be undertaken to determine whether its benefits outweigh any possible adverse effects its use poses to the adjudicatory process.

1. Possible Adverse Effects

The possibility of the falsification of evidence poses problems for the adjudicatory process. Falsification is "the deliberate alteration of a tape so as to change either the audibility or the meaning of the recorded material."[131] There are four basic types of falsification: deletion, obscuration, transformation, and synthesis. The first two methods suppress information; the last two create untrue or unreliable information. There is no question that the possibility of falsification is present in cases of surreptitious recording. The problem, however, is no more serious than when consent for the taping is obtained. Nor is falsification more likely because a recording was made by or at the request of defense counsel. A contrary conclusion would have to rest on a presumption that defense lawyers as a class are less truthful and

130. On the one hand, N.Y. State Bar Opinion 515 supplies a practical solution to a defense attorney's quandary. On the other hand, it seems to address recordings which have taken place without the presence of an attorney. This is undesirable. Criminal defendants fighting for high stakes may well be willing to take steps with recordings or to press detectives to do things which are wrong. Prosecutors are required by the courts and by ethical requirements to exercise some restraint on partisan detectives and agents. The same should apply to defense counsel. Abuses will remain on both sides, but the answer is not simply to let only laymen manage recording for the defense without any professional responsibility for defense counsel except to offer the resulting tapes in evidence.

131. Nat'l Comm'n for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance, Comm'n Studies 222 (1976).

less law abiding than their colleagues across the aisle who utilize this tactic as a matter of course. Even the most zealous prosecutor would find this a difficult theory to prove.

The problem of falsification also exists with the more traditional methods of memorializing a witness' statement. For example, signed statements may be forged or altered. More likely still is the possibility that an illiterate or semi-literate witness will sign a paper which purports to be his statement which, in fact, is subtly changed to aid the defendant's case. Even a witness of ordinary intelligence and reading ability is not likely to ponder every word before signing a statement. Hence, if alterations or deletions will take place, they are no more likely to occur in a taping context than in instances where more traditional methods are utilized.

The potential for selective recording presents a problem as well. This occurs where only the beneficial portions of the interview are recorded, thereby producing an out-of-context statement favorable to a defendant. Again, while this possibility exists, it is not likely to occur on a widespread basis. Ordinarily, defense counsel would not know when the unwanted portions of the statement would be made. To delete these portions, he would have to resort to sophisticated manipulation of the recording machine or engage in masterful splicing techniques. Neither of these possibilities seem probable. Should they occur, the prosecution could, by the testimony of expert witnesses, demonstrate these manipulations to the jury.

Recorded statements could be the basis for blackmail or other unlawful purposes. The possibility of blackmail, however, is at best slight. If our criminal justice system has any credibility, the presumption must be that the overwhelming number of defense counsel would not engage in such practice. In those cases where recordings are exploited for unlawful purposes, the penal sanctions available for conviction of extortion or harassment, coupled with disciplinary proceedings, would adequately deal with the offender.

The possibility exists that the revelation of the recorded testimony in court would incur the ire of certain persons associated with the case, thereby endangering the health and welfare of the witness. This, however, is no different from a witness being called by the prosecution and asked to testify against notori-

ous defendants. Prosecuting authorities often rely on former confederates of defendants to testify against them. The potential for harm has not precluded the prosecution from summoning witnesses or from utilizing their recorded statements. Thus, it should not be the rationale for prohibiting defense attorneys from using recorded statements. Invasion of privacy is sometimes given as the reason for prohibiting one-party consensual recording. At least in those jurisdictions which permit consensual recording, however, there is no valid claim for an expectation of privacy. A party to a conversation bears the risk that the conversation will be recorded by or pursuant to the authorization of the other party.[132] In jurisdictions prohibiting consensual recording, the failure to prosecute the witness for his statements precludes him from asserting that his expectation of privacy has been breached. Thus, invasion of privacy is not a valid reason for disallowing surreptitious recording.

Taping, if permitted, could be exploited by too-frequent use. While the sanctioning of surreptitious recording will increase its incidence, it is doubtful whether the increase would be so great as to have a noticeable effect. Undoubtedly, there are those who will argue that once the practice becomes widely known, witnesses will stop talking to defense counsel, thereby ultimately lessening the possibility of obtaining any statements from them. This outcome is unlikely. Just as *On Lee* and its progeny[133] did not stop offenders from speaking to others about their criminal activities, the practice of surreptitious recording is unlikely to deter the majority of witnesses from conversing with defense counsel.

Some argue that surreptitious recording perpetrates a fraud upon the witness. As discussed above, when counsel engages in surreptitious recording, he is not lying to or otherwise actively misrepresenting facts to the witness. He simply is not disclosing the fact of the recording. This omission does not come within the ambit of fraud.[134]

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132. For the proposition that no constitutional prohibitions against consensual recording exist, see Greenwalt, *The Consent Problem in Wiretapping and Eavesdropping: Surreptitious Monitoring with the Consent of a Participant in a Conversation*, 68 Colum. L. Rev. 189, 203 (1968).

133. *See supra* notes 13-21 and accompanying text.

134. *See, e.g.*, Swinton v. Whitinsville Sav. Bank, 311 Mass. 677, 42 N.E.2d 808 (1942).

Lawyers are well-advised to avoid the appearance of impropriety. Whether an investigative procedure is perceived by the public as improper often depends on whether its utilization is sanctioned by the judiciary. For example, the pervasive use of surreptitious recording and photographing by the FBI in the ABSCAM investigations[135] has by and large withstood any public outcry. While the entrapment issue has been raised, *i.e.*, whether the targets of the investigation were predisposed to receive bribes,[136] the use of surreptitious recording has not been attacked. This is due to the perceived legality of the practice by law enforcement agents. Likewise, once surreptitious recording of adverse witnesses by defense counsel is judicially approved, its appearance of impropriety, if in fact it exists, will dissipate.

2. *Beneficial Effects of Surreptitious Recording*

Protection of fundamental constitutional rights will result from the approved use of surreptitious recording. Counsel is only as effective as the evidence he has on his side. The ability to impeach a prosecution witness by his prior statements greatly enhances the effectiveness of counsel, not only during cross-examination but in the preparation of the case.[137] Moreover, when a witness is confronted at trial with the assertion that he has made a prior inconsistent statement, the response is often either outright denial or some accusation of duress or duplicity on the part of counsel. Attacks on the integrity of counsel often reduce his effectiveness. First, the jury may begin to wonder whether there may be some truth in the allegations. Second, the defense attorney may, consciously or subconsciously, begin to defend himself as much as or more than his client. The introduction of the tape recording would expose the witness as a perjurer by permitting the jury to hear for themselves what transpired between counsel and the witness at the time the statement was recorded.[138]

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135. ABSCAM (Arab Scam) involved an investigation of federal legislators in an attempt to determine their susceptibility to corruption.

136. *See* United States v. Jannotti, 501 F.Supp. 1182, 1187-1203 (E.D. Pa. 1980), *rev'd*, 673 F.2d 578 (3d Cir. 1982).

137. *See* S. Krantz, Right to Counsel in Criminal Cases: The Mandate of Argersinger v. Hamlin (1976); *see also* Herring v. New York, 422 U.S. 853 (1975).

138. In addition to enhancing the lawyer's effectiveness at the time of the trial, the recording could serve as a shield against unfounded disciplinary complaints. A lawyer accused of obtaining a statement by duress, deceit, or coercion could readily defend him-

The right of a defendant to summon witnesses in his own behalf is obviously a fundamental right.[139] Yet, before summoning a witness, defense counsel is often faced with the possibility that due to changing circumstances a witness may "turn." The availability of a prior recorded statement enables the attorney to take the chance that if the witness "turns" after he takes the stand or refuses to testify unless subpoenaed, he can move to have him declared a hostile witness and impeach him with the recorded statement. But for the surreptitiously recorded statement, the attorney would have to seriously consider foregoing the testimony of crucial witnesses.

The availability of surreptitiously recorded statements will substantially enhance the elimination of perjury at trials. First, the awareness that such statements could be used on cross-examination would deter a witness from testifying falsely. Second, if he does testify falsely, the jury would become aware of the falsehood by listening to the prior recorded statement.

The existence of a recorded statement will also conserve judicial resources. Prior to trial, a prosecutor who is made aware of and listens to the taped statements may come to the realization that his "star" witness is lying and dismiss the charges. Although the prosecutor may not be fully convinced that his witness is lying, he would nevertheless realize that the witness' credibility could be severely impeached at trial. This realization may well result in the offer of a guilty plea acceptable to the defendant.[140] Moreover, unless an attorney decides to forego testimony concerning his conversation with a turncoat witness, he would have to take the stand on his client's behalf. This would ordinarily necessitate his withdrawal from the case,[141] which would in turn necessitate the retention or appointment of new counsel, thereby protracting and delaying the proceedings. Use

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self by introducing the taped conversation. Moreover, in recent years lawyers have been indicted on charges ranging from obstruction of justice, in that they endeavored to influence the testimony of witnesses, to participation in racketeering activity. The ability to present to the jury exactly what was said by whom would greatly assist the lawyer in vindicating himself.

139. For a discussion of the sixth amendment right to compulsory process, see Washington v. Texas, 388 U.S. 14 (1967). *See also* Chambers v. Mississippi, 410 U.S. 284 (1973) (decided on due process grounds); Fed. R. Crim. P. 17.

140. *See generally* Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 Yale L.J. 1179 (1975).

141. *See* the Code, *supra* note 81, at DR 5-102, EC 5-9, 5-10.

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of the recording would save the criminal justice system valuable resources which could be allocated to other cases.

The United States Supreme Court in the past decade has held repeatedly that the goal of adjudication in criminal cases is the ascertainment of truth.[142] The utilization of surreptitious recording aids in achieving this goal by preventing a witness from lying on the stand with impunity. Concomitantly, absent deliberate falsification, no more accurate method exists for the preservation of an entirely impromptu pre-trial statement than its surreptitious recording. Absent the use of a recording, the attorney or a member of his staff would have to rely on memory or notes concerning the conversation.

Surreptitious recording by law enforcement agents at the behest of prosecuting authorities is commonplace.[143] The practice is especially prevalent in major cases.[144] In the past 25 years, this technique has been responsible for the conviction of some of America's most celebrated defendants.[145] In the last three years, this technique has been employed in almost every major prosecution.[146] Permitting the prosecution to rely on this method, while precluding the defense either directly or indirectly from its use,[147] derogates from the fundamental fairness to be afforded a defendant in a criminal trial.

It is arguable that permitting prosecuting attorneys to surreptitously record, while disciplining defense attorneys for the same practice, violates the latter's constitutional rights to due process and equal protection. It is true that a state has a legitimate interest in preventing fraudulent and deceitful practices by

142. *See supra* notes 47, 53. *See generally* Fishman, *The Interception of Communications Without a Court Order: Title III, Consent, and the Exception of Privacy*, 51 St. John L. Rev. 41 (1976).

143. N.Y. City Bar Op. 80-95 (1981) states: "Prosecutors traditionally have used, and continue to use, secret recordings in conducting criminal investigations."

144. Surreptitious recordings were used in major narcotics prosecutions such as United States v. Barnes, 604 F.2d 121 (2d Cir. 1979), as well as ABSCAM, *supra* note 135. As a matter of fact, surreptitious recording by prosecutors and law enforcement agents in these types of cases is probably the norm rather than the exception.

145. The list includes United States v. Hoffa, 367 F.2d 698 (7th Cir. 1966), *vacated on other grounds*. 387 U.S. 231 (1967).

146. *E.g.*, United States v. Scotto, 641 F.2d 47 (2d Cir. 1980); United States v. Barnes, 604 F.2d 121 (2d Cir. 1979); *cert. denied*, 101 S.Ct. 3109 (1981); and ABSCAM, *supra* note 135.

147. This can be achieved via the chilling effect of possible censure or disbarment.

attorneys. An argument could be made, therefore, that a state, through its grievance committee, could prohibit surreptitious recording of witnesses by all attorneys in all cases. However, a rule which permits recording by prosecutors but prohibits defense attorneys from engaging in the same practice penalizes an attorney not for the quality and nature of his act, but for utilizing it on the "wrong" side of the adversary process. Assuming, *arguendo*, that preventing even the appearance of fraudulent and deceitful practices by defense attorneys is a legitimate state interest, that interest pales by comparison with a defendant's right to effective assistance of counsel, due process, and the right of confrontation.

IX. The Proposed Rules and Surreptitious Recording

The thesis of this article is at least equally applicable to the final draft of the Model Rules of Professional Conduct.[148] While the proposed rules do not specifically address the issue of surreptitious recording of adverse witnesses, the problem is tangentially covered in Rules 4.4[149] and 8.4.[150] Rule 4.4, entitled "Respect for Rights of Third Persons," provides in relevant part: "In representing a client a lawyer shall not . . . use methods of obtaining evidence that violate the legal rights of [a third person]."[151] In a preliminary draft, the cases cited by the Kutak Commission as relevant did not include any cases concerning surreptitious recording.[152] In its notes on the rule,[153] the Com-

148. Model Rules of Professional Conduct Rules 4.4, 8.4 (Final Draft 1981) [hereinafter cited as Model Rules].

149. *Id.*

150. *Id.*

151. *Id.*

152. The Kutak Commission cited the following cases: People v. Ellis, 101 Colo. 101, 70 P.2d 346 (1937) (the installation of transmitting devices in the office of the Governor of Colorado by an attorney pursuant to an espionage conspiracy); Markham v. Markham, 272 So. 2d 813 (Fla. 1973) (evidence obtained by wiretap of marital home by husband); Florida Bar v. McGaghren 171 So. 2d 371 (Fla. 1965) (attorney failed to act upon learning that his client planned to entrap his wife in an adulterous act to obtain a favorable divorce settlement); Lucas v. Ludwig, 313 So. 2d 12 (La. App. 4th Cir. 1975) (knowing of a legitimate landlord-tenant dispute, the tenant's attorney accused the landlord of theft, causing police to enter the landlord's home); *In re* Chadsey, 141 A.D. 458, 126 N.Y.S. 456, *aff'd*, 201 N.Y. 572, 95 N.E. 1124 (1911) (attorney threatened a third party with scandal and prosecution to obtain possession of letters which incriminated his client); Tennessee Bar Ass'n v. Freemon, 50 Tenn. App. 567, 362 S.W.2d 828 (1961) (attorney representing husband in a divorce action participated in scheme to entrap wife in adulterous act); *In re* Knight, 129 Vt. 428, 281 A.2d 46 (1971) (scheme to compromise

mission, quoting ABA Standards,[154] stated: "The use . . . of wiretaps, electronic surveillence devices and other prohibited means . . . [is] a serious threat to personal privacy . . . . A recent study recommends the use of professional standards . . . as a necessary adjunct to other forms of control."[155] Thus, at least in those states generally proscribing surreptitious recording, the proposed rules would not appear to sanction the surreptitious recording of adverse witnesses by defense counsel. Furthermore, by quoting ABA Standards section 4.2, the Commission may have been indicating that surreptitious recordings by lawyers in the future would be subject to greater scrutiny by ethics committees. Consequently, the Hobson's choice faced by counsel in light of Rule 4.4 is perhaps even greater than that encountered by him under the current ABA Code.

On the other hand, the Disciplinary Rule most often cited by opponents of surreptitious recording has been DR 1-102(A)(4) which provides that "[a] lawyer shall not . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."[156] Proposed Model Rule 8.4, entitled "Misconduct," which is the rule most analogous to DR 1-102(A), is substantially narrower in the scope of conduct it covers: "It is professional misconduct for a lawyer to: (1) commit a criminal or fraudulent act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."[157] It is essential to note that any references to deceit or misrepresentation are omitted from the rule. Equally important, fraud is defined as "conduct having a purpose to deceive and not merely negligent misrepresentation *or failure to apprise another of relevant information.*"[158] In light of this definition, it is arguable that Rule 8.4 would not be applied against lawyers who have surreptitiously

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wife in divorce action). *See also In re* Macy, 109 Kan. 1, 196 P. 1095 (1921) (attorney filed fictitious and unfounded actions for improper purposes); Obser v. Adelson, 96 N.Y.S.2d 817 (N.Y. Sup. Ct. 1949), *aff'd*, 276 A.D. 999, 95 N.Y.S.2d 757 (N.Y. App. Div. 1950) (attorney violated Appellate Division rule prohibiting an attorney from communicating or settling with an adverse party, known to him to be represented by counsel and without the latter's consent).

153. Officially entitled "Legal Background."

154. ABA Project on Standards for Criminal Justice, The Defense Function § 4.2 (Approved Draft 1971).

155. *Id.* at Commentary.

156. *See* the Code, *supra* note 81, at DR 1-102(A)(4).

157. Model Rules, *supra* note 148, at Rule 8.4.

158. *See* Model Rules, *supra* note 148, Terminology, at 6 (emphasis added).

recorded an adverse witness when interviewing him. Failure to apprise a witness that he is being recorded does not constitute fraud as defined by the rules. This, coupled with the omission of the terms "deceit" and "misrepresentation," may indicate that only those lawyers who surreptitiously record in jurisdictions which specifically proscribe surreptitious recording should be concerned with the possibility of disciplinary action. Nevertheless, the rule's failure to specifically address the issue will continue to make surreptitious recording a risky practice.

Conclusion

Surreptitious recording of adverse witnesses by defense lawyers should be permitted so long as the purpose of the recording is to impeach the witness at trial. The benefits of surreptitious recording, such as enhancing a defendant's right to effective assistance of counsel and the right to summon witnesses on his own behalf, far outweigh the possible detriments the practice may cause.

Those states which currently prohibit any surreptitious recording should enact an attorney exemption allowing both prosecuting and defense attorneys to obtain such impeachment material. This exemption would be in conformity with the *Harris-Haas-Havens* rationale that the goal of eliciting the truth is paramount in a criminal trial.

In those states (and in federal prosecutions) where surreptitious recording is lawful, defense attorneys should no longer be precluded by grievance committees from taking advantage of this highly effective and necessary practice. A defense attorney is required by the Code of Professional Responsibility to represent his client zealously within the bounds of the law. No longer should he be faced with the Hobson's choice that the employment of a procedure likely to enhance meaningful confrontation and effective assistance of counsel could result in his censure, suspension, or disbarment.

Nor should a dichotomy exist between the prosecution and the defense in the utilization of surreptitious recording. Resort to this effective investigatory tool should be equally available to both sides of the adversary process. Recording a witness' statement would enhance the deterrence and impeachment of per-

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jured testimony on both sides. Thus, an adjudication in our criminal courts would indeed constitute a quest for truth.

U.S. Department of Justice

United States Attorney
District of Alaska at Anchorage

Federal Building & U.S. Courthouse
222 West 7th Avenue, #9, Room 253
Anchorage, Alaska 99513-7567

Commercial: (907) 271-5071
Fax Number: (907) 271-3224

January 18, 1996

The Honorable Sean R. Parnell
House of Representatives
Alaska State Legislature
State Capitol
Juneau, Alaska 99801-1182

Attn: Richard Vitale

Re: House Bill 326

Dear Representative Parnell:

This is to convey my office's enthusiastic support for House Bill 326, which will protect victims and witnesses from deceptive acts by representatives of criminal defendants. Victims of crime, particularly victims of sexual assault and other crimes of violence, are forced to suffer enough at the hands of not only the perpetrator of the crime, but also the criminal justice system because of the many demands placed on them in the adjudicatory process. It is particularly inappropriate to subject these victims to the additional indignity of allowing defendant's representatives to tape record their comments without their knowledge.

Witnesses are also often ill-used by the criminal justice system in the adjudicatory process. They, like victims, are often traumatized by the criminal acts they have witnessed. They also deserve the dignity of fair treatment by the representatives of the defendant.

Moreover, it is difficult enough to get witnesses to come forward with accounts of criminal activity without the additional impediment of reducing their privacy rights. A recent Ethics Opinion adopted by the Alaska Bar Association's Board of Governors over the unanimous objection of the Bar's Ethics Committee, allows criminal defense lawyers and their investigators to surreptitiously tape record conversations with victims and other witnesses. The Board of Governors stated in the opinion that victims and witnesses in criminal cases have a reduced expectation of privacy. We believe this sends absolutely the wrong message to those who might be willing to come forward to reveal criminal activity to the authorities. A copy of the Ethics Committee's objection to the Board of Governor's rule is attached.

We seek an amendment to HB 326. We ask that the bill's language make clear that the prohibition from surreptitious tape recording applies to defendants and their representatives in all courts of the State - District, Superior and Federal Courts. We also suggest that the statute make it clear that conversations recorded in violation of the statute are not admissible in evidence on behalf of the defendant for any purpose.

Very truly yours,

ROBERT C. BUNDY
United States Attorney

RCB:kjm
Attachment

Alaska Women's Resource Center
111 W. 9th Avenue • Anchorage, Alaska 99501 • (907) 276-0528 • Fax: (907) 278-8944

January 22, 1996

VIA FAX

Representative Sean Parnell
State Capitol, Room 505
Juneau, AK 99801-1182

Dear Representative Parnell:

I am writing to you regarding House Bill No. 326. This bill is crucial to the fair treatment of victims of crimes. As you know, the components of this Bill include:

> Defendants or persons acting on behalf of defendants who wish to speak to victims to clearly inform the victim of their identity and association with the defendant;
>
> The victim does not have to talk to that person unless the victim wishes; and
>
> The victim may have a prosecuting attorney or other person present during and interview.

The rights of victims are crucial to the enforcement process. Only an informed victim can fully and fairly participate in the proceedings which determine the degree of guilt or innocence of the alleged perpetrator.

The Alaska Women's Resource Center supports House Bill No. 326 as an integral part of the law enforcement process.

Sincerely,

Diane J. Heard
Executive Director

Alaska Women's Resource Center
111 W. 9th Avenue • Anchorage, Alaska 99501 • (907) 276-0528 • Fax: (907) 278-8944

January 22, 1996

VIA FAX

ALASKA BAR ASSOCIATION
ETHICS COMMITTEE

Dan Winfree, President
Alaska Bar Association
Board of Governors
510 L. St., Suite 602
Box 100279
Anchorage, Alaska 99501

Re: Alaska Bar Association ethics opinion regarding undisclosed tape recording of conversations with potential witnesses in criminal cases

Dear Mr. Winfree:

After extended discussion at our April 6, 1995, meeting, the Ethics Committee of the Alaska Bar Association unanimously requests that the Board of Governors reconsider its decision of March 17, 1995, adopting an ethics opinion allowing undisclosed recording of conversations with potential witnesses by criminal defense lawyers and their agents. We seek reconsideration for two reasons: (1) the unusual and problematic procedure by which the proposed opinion was considered by the Board; and (2) the possibility that the Board misinterpreted the Ethics Committee's actions in responding to previous Board direction.

1. The Board's procedure.

The Board's agenda did not serve to alert interested persons that the matter of a proposed opinion on the subject of surreptitious taping would be considered. Yet the Board considered, and ultimately adopted, an opinion which had not been provided to the Ethics Committee for review or comment and which was proposed by a lawyer who had a direct interest in the result. Such a procedure diminishes the value of the scholarship and debate which ensure consistency and quality in the Bar's Ethics Opinions. Indeed, the procedure used by the Board in this instance deprived it of the benefit of the detailed review of the issue conducted by the Ethics Committee over the last several years. The surreptitious tape recording of Alaska citizens by officers of the court is not a matter that should be decided after a brief debate in the midst of a crowded agenda, but deserves the deliberate consideration that the Ethics Committee has given it over the years.

2. The Ethics Committee's previous actions.

The Ethics Committee's determination in its February 2, 1995, meeting to postpone indefinitely any further consideration for change in the existing opinions was not a decision to avoid the issue. Instead, it was a determination that existing authority stated the right result; no purpose would be served by drafting another opinion.

It cannot be overemphasized that our position on the question of surreptitious recording was reached after many months of debate and detailed examination of the issue. Among the many views presented and rigorously examined and debated were those expressed in the Board's opinion. They were, however, ultimately rejected by the Committee. While the purpose of this request for reconsideration is not to present a detailed exposition of the arguments in opposition to the position that the Board took in its opinion, our many months of consideration of the issues leads us to make the following comments on some of the more striking features of the Board's opinion.

First, the Alaska public will be surprised to learn that persons who happen to witness or be victimized by crime have a reduced expectation of privacy when approached by a criminal defense lawyer or investigator. Whatever the expectations of privacy other States allow their citizens, the Alaska Supreme Court has held that the right of privacy guaranteed by the Alaska Constitution protects Alaskans' expectations that their conversations will not be tape recorded without their consent. State v. Glass, 583 P.2d 872 (Alaska 1978). It is only when a person is under arrest or lawfully stopped by an identified police officer that the Court has held those expectations to be unreasonable. See, Palmer v. State, 604 P.2d 1106 (Alaska 1979)(arrest); City and Borough of Juneau v. Quinto, 684 P.2d 127 (Alaska 1984)(lawful investigatory stop by a uniformed police officer). The Board's opinion would limit citizens' expectations of privacy far more than has the Alaska Supreme Court. This limitation seems particularly inappropriate in light of the recent amendment to the Alaska Constitution that, among other things, recognizes the right of crime victims "to be treated with dignity, respect and fairness during all phases of the criminal and juvenile justice process..." Article I, Sec 24 of the Alaska Constitution.

Moreover, this limitation on the right to privacy makes distinctions that are difficult to explain. How is it that a person who witnessed an event that may result in civil liability retains privacy rights unavailable to the person who witnessed a

similar event that results in an investigation of possible criminal charges? [1]

Second, we are unaware of any evidence that the prosecution engages in surreptitious recording of witness interviews. The Committee heard of no instance in which State or federal prosecutors, or their agents, surreptitiously recorded witness interviews as an "investigative tool." To the extent the Board's opinion assumes they do, that assumption is false.[2] Thus, the Board's limitation on the privacy expectations of witnesses and victims attempts to level a playing field that is not tilted. State prosecutors must obtain judicial authorization in the form of a "Glass Warrant" to surreptitiously record conversations; it is only identified police officers who can surreptitiously record without specific judicial authorization, and only then when a person is under arrest, the subject of a lawful investigative stop or when an officer is responding to a request for immediate assistance in a fast-breaking situation such as a domestic violence call. Federal agents are not known to surreptitiously record witness interviews. This lack of evidence that witness interviews are being surreptitiously recorded by the prosecution was one factor that led the Ethics Committee to maintain the current balance between citizens' privacy expectations and the needs of criminal defense attorneys.

Finally, the Board's opinion does little to enhance truth finding. If, as required by the opinion, the interviewer clearly informs the witness of the interviewer's identity and specific association with the accused, then it would seem rare indeed that

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[1] The Board's opinion does not seem to require that a criminal case actually have been filed to allow surreptitious recording of potential witnesses. This, of course, will result in a situation in which one side in a civil case may be able to surreptitiously record witnesses under the guise of preparation for the defense of a potential criminal case while the other side (often the injured party) will not be able to do the same.

[2] Indeed, under current authority a prosecutor would be engaged in unethical behavior were the prosecutor to surreptitiously record a witness interview as the Board's opinion would now allow defense counsel to do. The "extraordinary circumstances" justifying undisclosed recording by prosecutors or their agents referred to in American Bar Association Formal Opinion No. 337 do not include surreptitious recording of routine witness interviews.

a witness so advised would agree to give a statement, but decline to allow it to be taped. On the other hand, particularly because the Board's opinion does not seem to require that the advisement of the witness occur on tape, the opportunity exists for abuse. Intentionally or inadvertently, the interviewer's statements of identity and interest may be unclear to the witness, or be so abbreviated that the witness gains little meaningful information about the true nature of the situation. For example, a witness may think the "P.D." means "police department" when the investigator is from the public defender. Also, while obvious to those working within the system, the term "Office of Public Advocacy" or "OPA" will likely not mean much to the average witness or victim.

Moreover, it must be remembered that the current rules of discovery require that recorded witness statements taken by the prosecution must be given to the defense, particularly when they are exculpatory. See, Rule 16, Alaska Rules of Criminal Procedure; Rule 16, Federal Rules of Criminal Procedure; 18 U.S.C. § 3500 (Jencks Act); Brady v. Maryland, 373 U.S. 83 (1963). In contrast to the rules in civil cases, the defense in criminal cases does not have to disclose recorded statements unless they are used at trial. Thus, recorded statements that may bolster the credibility of prosecution witnesses or impeach the credibility of defense witnesses will likely be suppressed by the defense. While this state of affairs may be constitutionally required in some instances, see, e.g. Scott v. State, 519 P 2d 774 (Alaska 1974)(mandatory disclosure of witness statements violates accused's privilege against self-incrimination), it limits the value of surreptitious recording by the defense as an aid to truth finding.

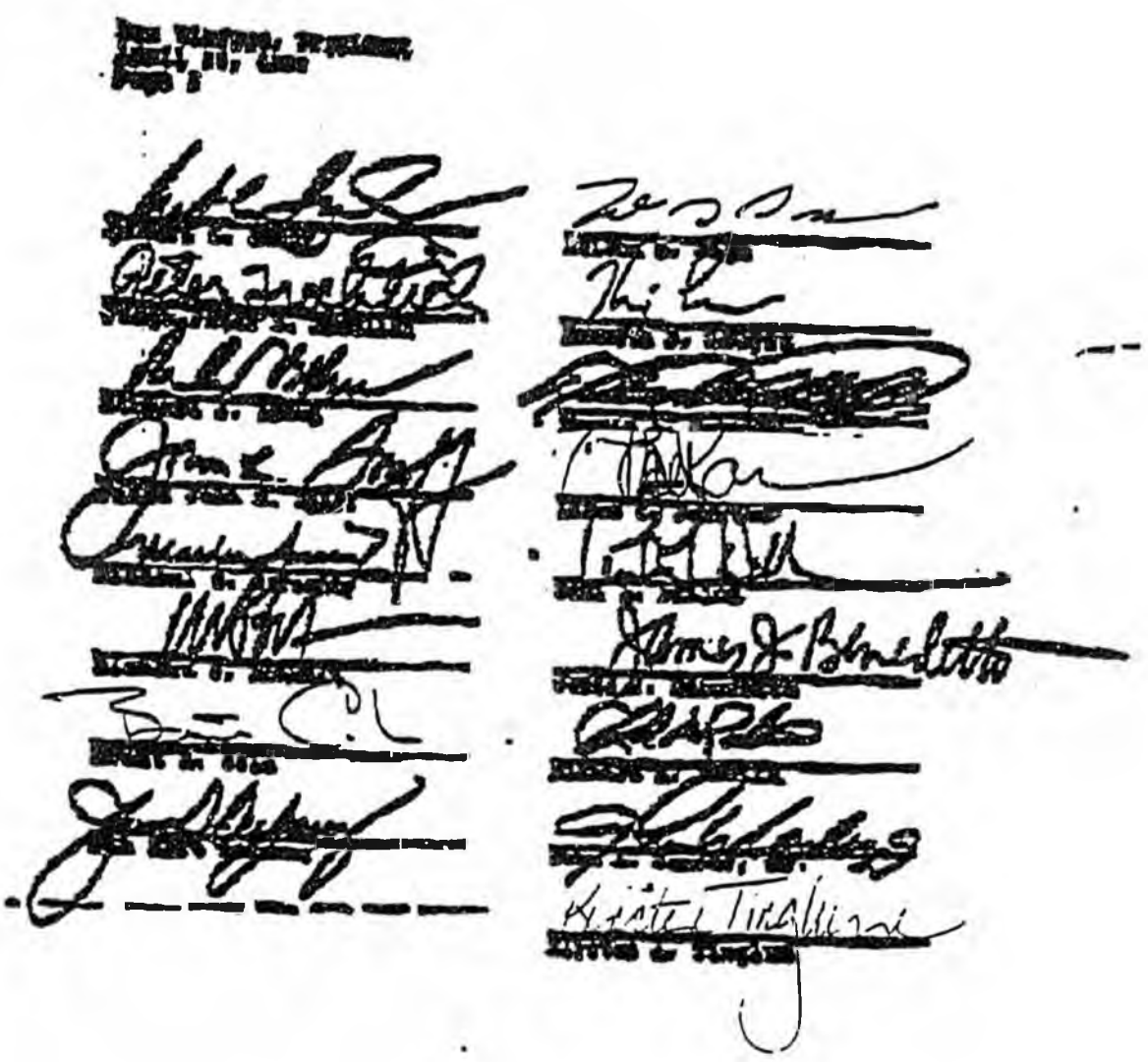
The Ethics Committee recognizes that reasonable persons can differ on the issues encompassed by the Board's opinion. However, those issues are of great importance not only to lawyers defending criminal suspects, but to the public at large, especially to victims and witnesses who are brought into the justice system. The Committee believes that many of those issues need to be examined in greater depth. Accordingly, the Ethics Committee unanimously requests the Board to reconsider its decision adopting the ethics opinion regarding undisclosed tape recording of conversations with potential witnesses in criminal cases.

Very truly yours,

ALASKA BAR ASSOCIATION ETHICS COMMITTEE

Robert J. Mahoney

Robert J. Mahoney, Chair



* SEE FOLLOWING PAGE FOR NAMES LISTED

Robert C. Bundy

Judge Peter B. Froelich

Richard B. Brown

Judge John R. Lohff

Michael C. Geragnty

Richard D. Monkman

Brent R. Cole

Jan Hart DeYoung

Nelson G. Page

Kenneth D. Lougee

Thomas A. Matthews

Lance C. Parrish

Paul L. Dillon

James J. Benedetto

Richard A. Poulin

John A. Reeder, Jr.

Kirsten A. Tinglum

* ROGER HOLL'S NAME INADVERTENTLY OMITTED FROM SIGNATURE PAGE. HOWEVER HE WAS CONTACTED TO SIGN LETTER. BUT HAS BEEN APPARENTLY UNABLE TO COME TO THE BAR OFFICE TO SIGN IT.

VG 4-27-95

code to find that its provisions regarding lawyers who engage in fraud, deceit, misrepresentation, or illegal conduct involving moral turpitude do not apply to them when they are acting as individuals or as public servants.

Formal Opinion 337 **August 10, 1974**

With certain exceptions spelled out in this opinion, 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.

Code of Professional Responsibility: Canons 1, 4, 7 and 9; Disciplinary Rule 1-102 (A)(4); and Ethical Considerations 1-5, 4-4, 4-5, 7-1, 9-2 and 9-6.

Recent technical progress in the design and manufacture of sophisticated electronic recording equipment and revelations of the extent to which such equipment has been used in government offices and elsewhere make it desirable to issue a Formal Opinion as to the ethical questions involved.

Attorneys may desire to record conversations to which the following three classes of persons may be party:

(a) Clients;
(b) Other attorneys with whom they deal;
(c) The public, including but not limited to, witnesses and public officials.

These would include conversations in which the attorney was not himself a party.

No prior Formal Opinion has been issued which deals directly with the problem. Informal Opinions have addressed the issue only in part.

Formal Opinion 150, issued in 1936, held that a prosecuting attorney could not ethically use a recording of conversation between defense attorney and his client in evidence in the prosecution of the defendant even though such recording was legally admissible at the time of the opinion. The Committee based its holding in part on the duty of attorneys in public employ to avoid the appearance of impropriety. The opinion also stresses the nature of the intercepted conversation (between the accused and his counsel) as to which the attorney and client were entitled to confidentiality.

Informal Opinion No. C-480, issued in 1961, requires disclosure to the court and opposing counsel before using a recording device in court.

Informal Opinion No. 1008, issued in 1967, holds that a lawyer may not make a recording of a conversation with a client without previous disclosure.

Informal Opinion 1009, issued on the same day, makes a similar ruling as to conversation with an attorney for the other party. This opinion cites Opinion 201 of the Michigan Ethics Committee, Henry S. Drinker *Legal Ethics*, page 197, and New York City Committee, Opinions 848 and 290.

So far as clients and other attorneys are concerned, the prior Informal Opinions make the conclusion clear. Attorneys must not make recordings without the consent of these parties to the conversation.

A survey of state opinions listed in the *Digest of Bar Association Ethics Opinions* reveals the same pattern with only one opinion to the contrary: Texas Opinion 84, issued in November of 1953 and published without comment in 16 TEXAS BAR JOURNAL 701 (1953). A recent New York State Bar Association Opinion (Opinion 328 issued 3-18-74) holds it unethical for a lawyer engaged in private practice to record conversations with any persons without their consent.

Authority as to recording by lawyers of conversations of "other persons," except for the New York Opinion just rendered, is scant, and the legal position less clear. Federal and state laws and FCC regulations are in conflict[1] and do not settle the ethical questions involved.

Two California bar opinions, (Los Angeles Opinion 272 and California State Bar Association Opinion 1966-5) held that because of the public policy adopted by the FCC in requiring the use of the "beep tone" in order to inform all parties that a recording is being made, and because a telephone user who violates FCC regulations may be enjoined from such practice or may have his telephone service disconnected, it would be unethical for an attorney to record a telephone conversation without the use of a warning device.

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

At least by analogy to Formal Opinion 150, secret recording by attorneys of conversations of *any persons* is unethical even though legal under federal law.

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1. *Federal Law.* It is not a federal offense to make secret recordings of conversations without disclosure. Sections 2510-20 of the Omnibus Crime Control and Safe Streets Act of 1968 were adopted specifically for the purpose of clarifying the existing law governing the interception of wire and oral communications. Section 2511 provides:

"It shall not be unlawful under this Chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the

Present Canon 9 of the Code of Professional Responsibility, *A Lawyer Should Avoid Even the Appearance of Professional Impropriety*, expresses in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession, for all attorneys.

DR 1-102(A)(4) of the Code of Professional Responsibility states that, "A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." This disciplinary rule is substantially equivalent to, but somewhat broader than, Canon 22 of the former Canons of Ethics which imposed on an attorney an obligation to be candid and fair "before the Court and with other lawyers." Informal Opinions C-480, 1008, and 1009 rely on Canon 22.

Canons 1, 4, 7 and 9, and Ethical Considerations all clearly express axiomatic norms for attorney conduct. Each in the view of the Committee supports the conclusion that lawyers should not make recordings without consent of all parties. Ethical Considerations EC 1-5, EC 4-4, EC 4-5, EC 7-1, EC 9-2 and EC 9-6 all state in various ways the conduct to which lawyers should aspire. None would condone such conduct. The conduct proscribed in DR 1-102 (A)(4), *i.e.*, conduct which involves dishonesty, fraud, deceit or misrepresentation in the view of the Committee clearly encompasses the making of recordings without the consent of all parties. With the exception noted in the last paragraph, the Committee concludes 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.

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. It should be stressed, however, that the mere fact that secret recordation in a particular instance is not illegal will not necessarily render the conduct of a public law enforcement officer in making such a recording ethical.

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communication, or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act . . . (or) any other injurious act." 18 U.S.C.A. §2511.

Special provision is made for the recording of privileged communications in §2517 (4) which states:

"No otherwise privileged wire or oral communication intercepted in accordance with or in violation of the provisions of this Chapter shall lose its privileged character."

As interpreted by the Supreme Court in *U.S. v. White*, 401 U.S. 745 (1971), §2510-20 of the Omnibus Crime Control Act permits a participant in a conversation to record a conversation and to use a device for transmitting the conversation to a third party, or may consent to letting a third party use a device to overhear the conversation. The Court stated that:

> "Our opinion is currently shared by Congress and the Executive Branch, Title III Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 212, 18 U.S.C. §2510 et seq., and the American Bar Association. Project on Standards for Criminal Justice Electronic Surveillance §4.1 (Approved Draft 1971)."

This statement is vulnerable in that it equates the very broad provision of §2510-20 with the ABA Project, §4.1, which pertains only to the use of electronic surveillance by law enforcement officers.

Furthermore, §5.11 of the ABA Project recommended that "no order should be permitted authorizing or approving the overhearing or recording of communications over a facility or in a place primarily used by licensed physicians, licensed lawyers ... unless an additional showing as provided in §5.10 is made."

However, the Court in *White* distinguished and refused to overrule *Katz v. U.S.*, 389 U.S. 347, which in effect required a search warrant before the F.B.I. could intercept a telephone conversation.

Since only four justices joined in the reasoning of the plurality opinion, the question cannot be considered closed so far as police cases are concerned.

2. *State Laws.* The majority of states follow federal law as to participant recording of conversations, but at least ten states require the consent of all parties to the recording and impose civil and criminal penalties for violation.

3. *FCC Regulations.* The FCC Regulations, in effect since 1948, require telephone carriers to file tariffs with the Commission to the effect that:

1. Adequate notice be given to all parties that their conversation is being recorded.
2. That such notice be given by the use of an automatic tone warning device.
3. That the tone warning device be furnished, installed and maintained by the telephone company along specified technical guidelines. 11 FCC 1033, 1050, 12 FCC 1005, 1008 (1947).

These regulations are directed toward the telephone carriers, and do not make recording a criminal offense. However, the telephone companies are legally bound by the regulations which reflect the public policy adopted by the Commission concerning the tape recording of private conversations.

A carrier found in violation of the regulations is subject to a fine of $500 for each day of continued violation, and an attorney who fails to use a "beep tone" device, is subject to the discontinuance of his telephone service for violation of the telephone company's tariff. There is no evidentiary sanction against the introduction at trial of recordings obtained without the use of the "beep tone" device. *Battaglia v. U.S.*, 349 F.2d 556 (9th Cir. 1965), *cert. denied* 382 U.S. 955 (1966).

The position of the FCC is also indicated by its issuance of an order forbidding the use by private citizens of radio devices, which must be licensed by the Commission, to overhear or record conversations unless all parties to the conversation have given their consent. 31 F.R. 3397 (1966).

FISCAL NOTE

STATE OF ALASKA
1995 LEGISLATIVE SESSION

BILL NO. HB 314

Revision Date:
Title: "An Act relating to the crime of violating a domestic violence restraining order."
Sponsor: Rep. Parnell
Requestor: (H) JUD

Department Affected: Administration
BRU: Office of Public Advocacy
Component: Office of Public Advocacy

COMPONENT SERIAL NO. 43

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING EXPENDITURES	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES	0	0	0	0	0	0
CHANGE IN REVENUES ( )	0	0	0	0	0	0

FUND SOURCE: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
OTHER						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY 95) cost: $ -0-

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary.)

There is no fiscal impact to the Office of Public Advocacy.

Prepared by: Brant McGee, Director
Division: Office of Public Advocacy
Phone: 274-1684
Date:

Approved by Commissioner: Mark Boyer
Agency: Department of Administration
Date: 5/5/95

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FISCAL NOTE

STATE OF ALASKA
1995 LEGISLATIVE SESSION

BILL NO. HB 314

Revision Date:
Title: "An Act relating to the crime of violating a domestic violence restraining order."
Sponsor: Representative Parnell
Requestor:

Department Affected: Administration
BRU: Public Defender Agency
Component: Public Defender Agency

COMPONENT SERIAL NO. 1631

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING EXPENDITURES	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
CHANGE IN REVENUES ( )	0.0	0.0	0.0	0.0	0.0	0.0

FUND SOURCE: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
OTHER						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY 95) cost: $ 0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary.)

This bill has no fiscal impact on the Public Defender Agency.

Prepared by: John B. Salemi, Director
Division: Public Defender Agency
Phone: (907) 264-4412
Date:

Approved by Commissioner: Mark Boyer
Agency: Department of Administration
Date: 5/5/95

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Luckhaupt/Lauterbach
1/22/96

CS FOR HOUSE BILL NO. 314( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES PARNELL, Robinson, Bunde, Elton

A BILL

FOR AN ACT ENTITLED

"An Act relating to domestic violence and to crime victims and witnesses; and amending Alaska Rule of Evidence 613."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* **Section 1.** AS 11.56.740(a) is amended to read:

(a) A person commits the crime of violating a domestic violence restraining order if [(1)] the person knowingly violates a provision of an order issued under AS 25.35.010(b) or 25.35.020

(1) restraining the person from communicating directly or indirectly with another;

(2) restraining the person from subjecting another to domestic violence;

(3) directing the person to vacate the home of another; or

(4) restraining the person from entering a propelled vehicle in the possession of or occupied by another [AND (2) AT THE TIME THE

New Text Underlined [DELETED TEXT BRACKETED]

RESTRAINING ORDER WAS ISSUED, THE COURT MADE A FINDING THAT THE PERSON HAD SUBJECTED ANOTHER TO DOMESTIC VIOLENCE].

* **Sec. 2.** AS 12.61.120(c) is amended to read:

(c) If **a defendant or** a person **acting on behalf of a defendant** [REPRESENTING THE DEFENDANT, INCLUDING THE DEFENDANT'S ATTORNEY OR A PERSON SPECIFIED BY THE COURT UNDER (b) OF THIS SECTION,] contacts the victim of an offense with which the defendant is **or could be** charged, the person shall clearly inform the victim

(1) of the person's identity and specific association with the defendant;

(2) that the victim does not have to talk to the person unless the victim wishes; and

(3) that the victim may have a prosecuting attorney or other person present during an interview.

* **Sec. 3.** AS 12.61.120 is amended by adding new subsections to read:

(d) If a defendant or a person acting on behalf of a defendant wishes to make a recording of statements of the victim of an offense with which the defendant is or could be charged, or of a witness, the person shall, before recording begins, obtain the consent of the victim or witness to record the statement by clearly informing the victim or witness (1) of the information set out in (c) of this section, (2) that the statement will be recorded if the victim or witness consents, and (3) that the victim or witness may obtain a transcript or other copy of the recorded statement upon request. When recording begins, the person making the recording shall indicate in the recording that the victim or witness has been informed as required by this subsection, and the victim or witness shall state in the recording that consent of the victim or witness to the recording has been given.

(e) If a victim or witness requests a transcript or other copy of a recorded statement taken under (d) of this section, the defense shall prepare the transcript or other copy and provide it to the person whose statement was recorded.

(f) In this section, "recording" means capturing a statement of a person, whether by magnetic tape or other electronic or electromagnetic means.

* **Sec. 4.** AS 12.61 is amended by adding a new section to read:

Sec. 12.61.125. VICTIMS AND WITNESSES OF SEXUAL OFFENSES. (a) The defendant accused of a sexual offense, the defendant's counsel, or an investigator or other person acting on behalf of the defendant, may not

(1) notwithstanding AS 12.61.120, contact the victim of the offense or a witness to the offense if the victim or witness, or the parent or guardian of the victim or witness if the victim or witness is a minor, has informed the defendant or the defendant's counsel in writing or in person that the victim or witness does not wish to be contacted by the defense; a victim or witness who has not informed the defendant or the defendant's counsel in writing or in person that the victim does not wish to be contacted by the defense is entitled to rights as provided in AS 12.61.120;

(2) obtain a statement from the victim of the offense or a witness to the offense, unless, ~~a written authorization is first obtained from the victim or witness, or from the parent or guardian of the victim or witness if the victim or witness is a minor; under this paragraph,~~

~~(A) a victim or witness is entitled to rights as provided in AS 12.61.120; and~~

~~(B) the written authorization must state that the victim or witness is aware that there is no legal requirement that the victim or witness talk to the defense.~~

(b) A statement obtained from a victim or witness in violation of (a)(2) of this section is inadmissible in a proceeding involving the prosecution of the defendant for the sexual offense unless the court finds that failure to admit the statement will constitute manifest injustice.

(c) ~~(b)~~ A defendant who is the parent or guardian of a minor victim or witness may not provide the authorization required under (a) of the section.

(d) ~~(c)~~ If an attorney, or a person acting on behalf of the defendant for an attorney, violates this section, the court shall refer the violation to the Disciplinary Board of the Alaska Bar Association as a grievance.

(e) ~~(d)~~ In ~~this section~~, "sexual offense" means a violation of AS 11.41.410 - 11.41.470.

* **Sec. 5.** AS 12.61.900 is amended by adding new paragraphs to read:

(3) "person acting on behalf of a defendant" includes the defendant's attorney, an agent of the defendant or the defendant's attorney, or a person specified by the court under AS 12.61.120(b) or an agent of that person, but does not include the defendant;

(4) "witness" means a person contacted in connection with a criminal case because the person ~~making the contact believes the person being contacted~~ may have knowledge or information about the criminal case.

* **Sec. 6.** AS 12.61.125, added by sec. 4 of this Act, has the effect of amending Alaska Rule of Evidence 613, relating to impeachment of witnesses.

FISCAL NOTE

STATE OF ALASKA
1996 LEGISLATIVE SESSION

BILL NO. CSHB 314 (JUD)

Revision Date:
Title: "An Act relating to domestic violence and to crime victims and witnesses . . . ."
Sponsor: Rep. Parnell
Requestor: (H) JUD

Dept. Affected: Administration
BRU: Public Defender Agency
Component: Public Defender Agency

COMPONENT SERIAL NO. 1631

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES	0	0	0	0	0	0
CHANGE IN REVENUES ( )	0	0	0	0	0	0

FUND SOURCE: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
OTHER						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY 96) cost: $ -0-

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary.)

There is no fiscal impact to the Public Defender Agency.

Prepared by: John Salemi, Director
Division: Public Defender Agency
Phone: 264-4400
Date:

Approved by Commissioner: Mark Boyer
Agency: Department of Administration
Date:

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STATE OF ALASKA
1996 LEGISLATIVE SESSION

BILL NO. CSHB 314 (JUD)

Revision Date: _____
Title: "An Act relating to domestic violence and to crime victims and witnesses...."
Sponsor: Rep. Parnell
Requestor: (H) JUD

Dept. Affected: Administration
BRU: Office of Public Advocacy
Component: Office of Public Advocacy

COMPONENT SERIAL NO. 43

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES	0	0	0	0	0	0
CHANGE IN REVENUES ( )	0	0	0	0	0	0

FUND SOURCE: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
OTHER						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY 96) cost: $ -0-

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary.)

There is no fiscal impact to the Office of Public Advocacy.

Prepared by: Brant McGee, Public Advocate
Division: Office of Public Advocacy

Phone: 274-1684
Date: _____

Approved by Commissioner: Mark Bover
Agency: Department of Administration

Date: 1/31/96

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