

ALASKA LEGISLATURE COMMITTEE FILES 1995-1996 8672

8611 HOUSE JUDICIARY

ALASKA, 1964.

SIC CODE 1/	INDUSTRY	TOTAL	HOURS OF THE SHIFT DURING WHICH INJURY OCCURRED 2/										
			BEFORE WEEKDAY BEGIN	1ST HOUR	2ND HOUR	3RD HOUR	4TH HOUR	5TH HOUR	6TH HOUR	7TH HOUR	8TH HOUR	9TH HOUR	PERCENT OF TOTAL
TOTAL ALL INDUSTRIES- PUBLIC AND PRIVATE SECTORS.		10,777	85	184	213	256	1,029	664	419	793	825	1,637	2,556
PERCENT.....		100.0	.8	1.7	2.0	2.4	9.5	6.2	3.8	7.4	7.7	15.2	23.7
TOTAL PRIVATE SECTOR-ALL INDUSTRIES.		9,267	65	168	207	214	864	579	520	665	702	1,439	2,275
PERCENT.....		100.0	.7	1.8	2.2	2.3	9.3	6.2	5.6	7.2	7.6	15.6	24.6
AGRICULTURE, FORESTRY, AND FISHING.....		54	-	0	2	4	4	3	2	3	7	4	17
PERCENT.....		100.0	-	14.8	3.7	7.4	7.4	5.6	3.7	5.6	13.0	7.4	31.5
01 AGRICULTURAL PRODUCTION-CROPS.....		4	-	-	-	1	-	-	-	-	-	2	1
PERCENT.....		100.0	-	-	-	25.0	-	-	-	-	-	50.0	25.0
02 AGRICULTURAL PRODUCTION- LIVESTOCK.....		6	-	-	-	-	-	-	-	-	2	1	5
PERCENT.....		100.0	-	-	-	-	-	-	-	-	33.3	16.7	50.0
07 AGRICULTURAL SERVICES.....		21	-	4	1	1	2	2	1	2	2	1	5
PERCENT.....		100.0	-	19.0	4.8	4.8	9.5	9.5	4.8	9.5	9.5	4.8	23.8
08 FORESTRY.....		18	-	3	1	2	1	1	1	1	2	-	6
PERCENT.....		100.0	-	16.7	5.6	11.1	5.6	5.6	5.6	5.6	11.1	-	33.3
09 FISHING, HUNTING, AND TRAPPING.		5	-	1	-	-	1	-	-	-	1	-	2
PERCENT.....		100.0	-	20.0	-	-	20.0	-	-	-	20.0	-	40.0
MINING.....		515	4	21	34	33	36	31	14	29	59	128	146
PERCENT.....		100.0	.8	4.1	6.6	6.4	7.0	6.0	2.7	5.6	7.6	24.9	28.3
10 METAL MINING.....		37	1	-	3	6	2	1	-	3	5	6	10
PERCENT.....		100.0	2.7	-	8.1	16.2	5.4	2.7	-	8.1	13.5	16.2	27.0

SEE FOOTNOTES AT END OF TABLE.

No. 8732 P. 3

Feb. 1, 1965 2:00PM

ALASKA, 1964.

SIC CODE 1/	INDUSTRY	TOTAL	HOUR OF THE SHIFT DURING WHICH INJURY OCCURRED 2/										
			BEFORE HOLIDAY HOURS BEGAN	1ST HOUR	2ND HOUR	3RD HOUR	4TH HOUR	5TH HOUR	6TH HOUR	7TH HOUR	8TH HOUR	9TH HOUR	PERCENT OF TOTAL
TOTAL ALL INDUSTRIES- PUBLIC AND PRIVATE SECTORS.	10,777	25	686	712	756	1,029	664	619	725	635	1,657	2,528	
PERCENT.....	100.0	.3	6.4	6.5	6.9	7.5	6.2	5.7	7.4	7.7	15.2	23.7	
TOTAL PRIVATE SECTOR-ALL INDUSTRIES.	9,257	65	568	707	714	864	579	520	665	792	1,629	2,225	
PERCENT.....	100.0	.7	6.1	7.5	7.6	9.3	6.2	5.6	7.2	7.3	15.6	24.0	
AGRICULTURE, FORESTRY, AND FISHING.....	54	-	8	2	4	4	3	2	3	7	6	17	
PERCENT.....	100.0	-	14.8	3.7	7.4	7.4	5.6	3.7	5.6	13.0	7.4	31.5	
01 AGRICULTURAL PRODUCTION-CROPS..	4	-	-	-	1	-	-	-	-	-	2	1	
PERCENT.....	100.0	-	-	-	25.0	-	-	-	-	-	50.0	25.0	
02 AGRICULTURAL PRODUCTION-LIVESTOCK.....	6	-	-	-	-	-	-	-	-	2	1	5	
PERCENT.....	100.0	-	-	-	-	-	-	-	-	33.3	16.7	50.0	
07 AGRICULTURAL SERVICES.....	21	-	4	1	1	2	2	1	2	2	1	5	
PERCENT.....	100.0	-	19.0	4.8	4.8	9.5	7.5	4.0	9.5	9.5	4.8	23.3	
08 FORESTRY.....	18	-	3	1	2	1	1	1	1	2	-	6	
PERCENT.....	100.0	-	16.7	5.6	11.1	5.6	5.6	5.6	5.6	11.1	-	33.3	
09 FISHING, HUNTING, AND TRAPPING.	5	-	1	-	-	1	-	-	-	1	-	2	
PERCENT.....	100.0	-	20.0	-	-	20.0	-	-	-	20.0	-	40.0	
MINING.....	515	4	21	34	33	36	31	14	29	39	128	146	
PERCENT.....	100.0	.8	4.1	6.6	6.4	7.0	6.0	2.7	5.6	7.6	24.9	28.3	
10 METAL MINING.....	37	1	-	3	6	2	1	-	3	5	6	19	
PERCENT.....	100.0	2.7	-	8.1	16.2	5.4	2.7	-	8.1	13.5	16.2	27.0	

SEE FOOTNOTES AT END OF TABLE.

# Shift Workers See the Dawn of a New Era

*The '90s promise to be a decade of change for America's 20 million shift workers.*

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# Shift Workers See the Dawn of a New Era

*The '90s promise to be a decade of change for America's 20 million shift workers.*

By Jean Wallace

How would you like to spend a week in New York, followed by a week in London and a week in Tokyo, all expenses paid?

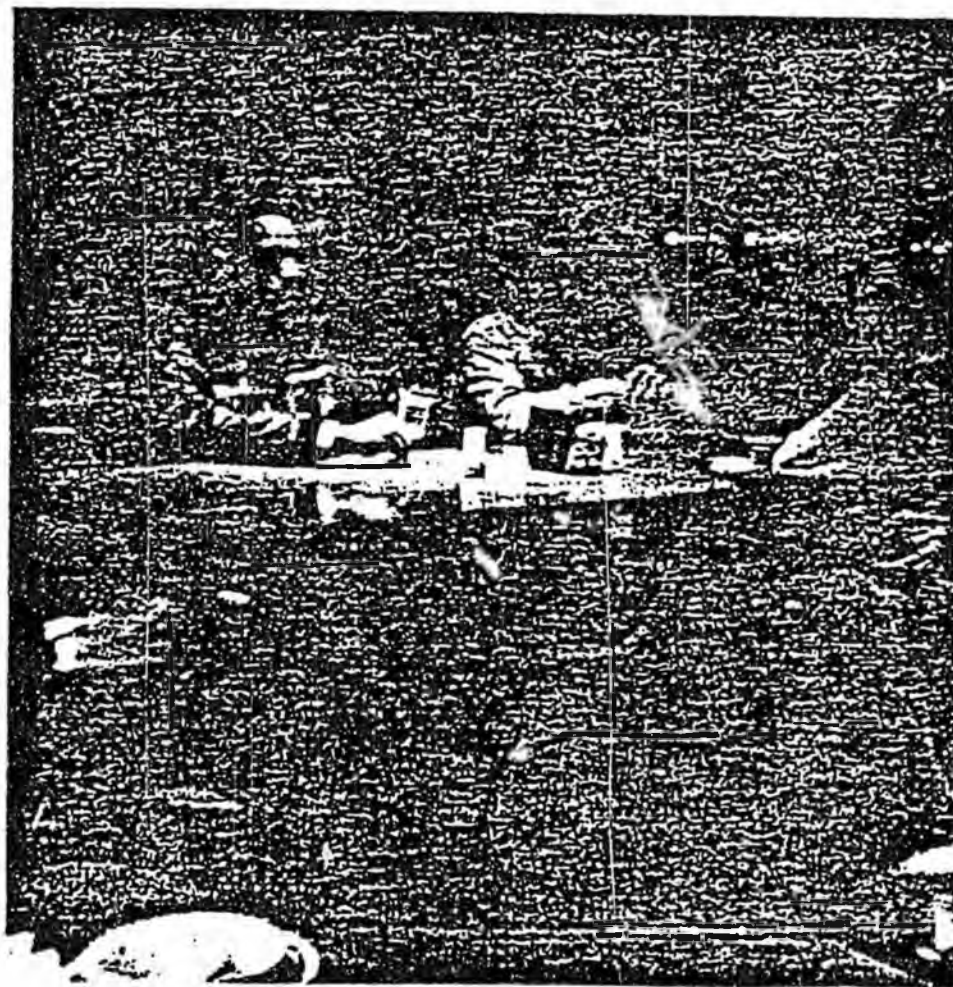
Sound good? There's a catch: You'll have to remain on this whirlwind tour indefinitely, perhaps for the rest of your career. You'll probably sleep poorly, suffer stomach troubles and feel cranky most of the time. And you'll be so preoccupied with hopping between time zones that you'll have little time or energy left for your family or social life.

For one in five American workers, life is much like this endless business trip around the globe. These are our nation's shift workers, the 20 million people whose jobs require them to work evenings or nights on a fixed or rotating basis. Though they may fly on airplanes only occasionally, the vast majority suffer from what health experts call "occupational jet lag."

Shift workers typically feel as bad or worse than jet-weary travelers because their work schedules put them out of phase with their natural rhythms of sleep and alertness, or worse. On the job, their productivity declines and their accident risk increases.

"What we have to recognize is that for many shift workers — not all, but many — shift work is really a nightmare," says Timothy H. Monk, Ph.D., director of the human chronobiology research program at Western Psychiatric Institute and Clinic in Pittsburgh. "If we can help even just a few of these people to cope, it'll be enormously worthwhile."

Researchers and consultants warn that the United States can no longer



afford to ignore the health-and-safety concerns of shift workers. "Shift workers literally make the difference between modern culture and the Dark Ages," says psychologist Marty Klein, Ph.D., the president of SynchroTech, a shift-work consulting firm in Lincoln, Neb. "Just try to imagine one 24-hour period without them. It would be anarchy," he says.

Shift workers keep modern society running around the clock. Long after

the 9-to-5 workers go home, shift workers provide fire and police protection, staff hospitals, man nuclear power plants, transport goods, and make it possible to order pizza or airline tickets at any hour.

Although we depend on them, American shift workers historically have been a neglected group. Government largely ignores them, and industry takes them for granted. Many countries, particularly those in the



Kodak's shift workers benefit from a modernized schedule that allows them more days off in exchange for longer workdays. Photo courtesy of Eastman Kodak Co.



Companies need to provide the same support services for shift workers as they do for day workers. These Du Pont shift workers enjoy the 24-hour employee cafeteria. Photo courtesy of George Widger/Du Pont Co. Chambers Works.

some federal involvement.

"Most of us who are experts in the area feel strongly that there should be some legislation regarding hours of work, particularly in sensitive occupations," he says. "We should indeed protect our shift workers, because many of them don't know what it's doing to them. In the same way that we don't allow people to manufacture asbestos, we should think not necessarily about banning shift work, but at least about curtailing and regulating it."

At present, neither Congress nor OSHA has plans for shift-work regulations. Last year's publication of the OTA report, "Biological Rhythms: Implications for the Worker," is seen as an important stride forward. The report summarizes the state of the art in shift-work research and outlines options for regulatory action.

One of OTA's key findings: Inadequate data collection exists of the effects of shift work on safety and health. "At this point, there's not enough good information to guide regulations," says David R. Liskowsky, project director for the report. "What we need now is an increased awareness of shift-work problems and how they can be addressed."

**Companies Respond to Wake-Up Call**  
Even without government interven-

tion, the future looks bright for at least some shift workers. In recent years, many companies have redesigned work schedules and re-educated employees in an effort to diminish the stress and danger of shift work.

One company on the leading edge of this change is the Eastman Kodak Co. in Rochester, N.Y. Since 1986, hundreds of Kodak shift workers have opted to switch to modernized schedules that allow them more days off in exchange for longer workdays. Kodak operations adopted a variety of 10-hour and 12-hour workdays. The most popular new schedule is the "fireman's schedule." Employees on this schedule work 12 hours per shift for four days (two day shifts, then two night shifts), followed by four days off.

Dennis McCullen, a worker in one of Kodak's paper-producing plants, says the fireman's schedule is nothing short of "fabulous." Because he works only two night shifts every eight days, McCullen, 40, finds it easier to recover from shift-work stress. Better yet, the new schedule provides more free time with his family and for favorite hobbies, such as woodworking and cross-country skiing.

McCullen is not the only Kodak employee who's enthusiastic about the 12-hour workday. In a company survey of those who had switched schedules, 77 percent said they were "satisfied" or "very satisfied" with it. In contrast, only 17 percent gave a favorable rating to Kodak's older rotating schedule of eight-hour shifts. On that schedule, a standard one in many industries, employees worked

European Community, have laws to protect shift-worker safety and health. The United States, however, is one of the few nations with no national shift-work policy. Out of 49 countries studied in a recent report on shift work by the U.S. Office of Technology Assessment, only five other nations had no national regulations of night or shift work: China, Canada, the Dominican Republic, Tunisia and Nigeria.

Monk, for one, would like to see

**MSHA STATISTICS FOR DISTRIBUTION OF INJURIES  
BY TIME INTO SHIFT (ALL REPORTABLE INJURIES)**

MSHA - U.S. UNDERGROUND MINES

	<u>1992</u>	<u>1/1/93 - 9/31/93</u>	<u>1/1/92 - 9/31/93</u>
Total Reportable Accidents Underground	998	685	1683
Less Those Not Reported By Hours Into Shift	(60)	(37)	(97)
Reportable Accidents By Time Into Shift	938	648	1586
<u>Accident Distribution</u>			
• 0 - 8 Hours	908	598	1506
• 8 - 10 Hours	11	34	45
• > 10 Hours	19	16	35
<u>Percent of Accidents</u>			
• 0 - 8 Hours	96.8%	92.3%	95.0%
• 8 - 10 Hours	1.2%	5.2%	2.8%
• > 10 Hours	2.0%	2.5%	2.2%

Report 1

MSHA/SHTC CM180 (FROGGIE)

METAL 1992

DATE PREPARED 12/15/93

CYCLE 122

SELECTION PERIOD - FROM MONTH 1 THROUGH MONTH 12

1992

PAGE 16

DISTRIBUTION OF INJURIES BY TIME INTO SHIFT-DEGREE= ALL INJS

TIME INTO SHIFT	<i>all reportable</i> UNDER GROUND	SURF AT UG	STRIP OPEN PIT	AUGER	CULM OTHER	DREDGE	IND. SHOP	MILL/P. PLANT	OFFICE	TOTAL
PRE-SHIFT	43	18	335	0	0	23	5	335	15	774
0000-0059	99	25	448	0	0	32	7	626	1	1238
0100-0159	141	15	497	0	0	32	4	562	10	1261
0200-0259	168	38	579	0	0	52	5	700	6	1538
0300-0359	133	27	499	0	0	44	8	468	5	1184
0400-0459	83	17	335	0	0	17	0	364	8	824
0500-0559	116	14	396	0	0	34	2	498	1	1061
0600-0659	85	17	478	0	0	28	1	510	7	1106
0700-0759	39	10	333	0	0	27	2	237	4	652
0800-0859	21	7	206	0	0	18	2	125	1	380
0900-0959	10	0	84	0	0	6	0	71	0	171
1000-1059	1	2	53	0	0	4	0	32	0	92
1100-1159	2	1	21	0	0	2	0	16	0	42
1200-1259	0	0	8	0	0	2	0	11	0	21
1300-1359	3	0	8	0	0	0	0	7	0	18
1400-1459	0	0	8	0	0	0	1	10	0	19
1500-1559	2	0	7	0	0	2	0	8	0	19
1600-1659	8	1	5	0	0	0	0	5	0	19
1700-1759	1	3	6	0	0	2	0	7	0	19
1800-1859	2	0	7	0	0	1	0	9	0	19
1900-1950	0	0	9	0	0	0	0	4	0	13
2000-2059	1	0	7	0	0	1	0	5	0	14
2100-2159	0	0	0	0	0	0	0	0	0	0
2200-2259	0	0	0	0	0	0	0	0	0	0
2300-2359	0	0	0	0	0	0	0	0	0	0
UNREPORTED	60	13	515	0	0	61	3	523	6	1181
TOTAL	998	198	4844	0	0	388	40	5133	64	11665

average 520 hours per person

Report 2

MSHA/SHTC CM180 (FROGGIE)

METAL 1993

DATE PREPARED 11/15/93

CYCLE 050

SELECTION PERIOD - FROM MONTH 1 THROUGH MONTH 9

1993

PAGE 16

DISTRIBUTION OF INJURIES BY TIME INTO SHIFT-DEGREE ALL INJS

TIME INTO SHIFT	UNDER GROUND	SURF AT UG	STRIP OPEN PIT	AUGER	CULM OTHER	DREDGE	INO. SHOP	MILL/ P. PLANT	OFFICE	TOTAL
PRE-SHIFT	25	17	211	0	0	15	5	249	10	532
0000-0059	85	11	332	0	0	25	2	441	6	902
0100-0159	78	10	339	0	0	22	6	427	2	884
0200-0259	105	23	412	0	0	32	6	440	5	1023
0300-0359	82	11	334	0	0	30	7	361	6	831
0400-0459	56	12	215	0	0	23	1	242	0	549
0500-0559	51	16	245	0	0	26	2	347	2	729
0600-0659	48	13	322	0	0	27	3	341	2	756
<i>SHA</i> 0700-0759	28	9	228	0	0	16	1	166	2	450
0800-0859	25	5	138	0	0	11	0	78	2	259
0900-0959	9	3	83	0	0	0	0	57	0	152
<i>SHA</i> 1000-1059	4	3	28	0	0	3	0	32	0	70
1100-1159	0	2	19	0	0	2	0	5	0	28
1200-1259	2	0	6	0	0	0	0	7	0	15
1300-1359	1	0	9	0	0	0	0	6	0	16
1400-1459	0	1	0	0	0	0	0	1	0	2
1500-1559	3	0	6	0	0	1	0	5	0	15
1600-1659	2	0	6	0	0	1	1	11	1	22
1700-1759	2	0	5	0	0	0	0	8	0	15
1800-1859	0	0	5	0	0	0	0	4	0	9
1900-1950	2	0	10	0	0	0	0	3	0	15
2000-2059	0	0	1	0	0	3	0	4	0	8
2100-2159	0	0	0	0	0	0	0	0	0	0
2200-2259	0	0	0	0	0	0	0	0	0	0
2300-2359	0	0	0	0	0	0	0	0	0	0
UNREPORTED	37	5	323	0	0	22	2	383	6	718
TOTAL	685	141	3277	0	0	259	36	3618	44	8060

Post-It™ brand fax transmittal memo 7671 # of pages 2

To: <i>Don Filipek</i>	From: <i>CANDY</i>
Co. <i>M&amp;P</i>	Co. <i>M&amp;P</i>
Dept.	Phone #
Fax #	Fax #

Report 3

MSHA-DNIS: CM935LA  
CYCLE: 92-122

PART50 MASTER FILE REPORT OF SELECTED INFORMATION FOR  
METAL/NONMETAL  
CLOSED FILES

PAGE: 1  
PROCESS DATE: 02/18/94  
AND TIME: 03:05:57

THE FOLLOWING IS A LIST OF REQUESTED SEARCH SELECTIONS

SELECTION NUMBER	FIELD CODE	FIELD VALUE	DATA ELEMENT
01		MINE FILE 0500790 4800639	MINE-ID(S)

- SUBUNITS REPORTED: ALL SUBUNITS

EMPLOYMENT FIGURES, INJURY COUNTS, AND INCIDENCE RATES FOR 1992

MINE-ID	** EMPLOYMENT **		FATALITIES		***** NEEDLS *****						** NDLS **		TOT INJS	
	EMPLS	EMPL HRS	DEG 01 NBR RATE	DEG 02 NBR RATE	DEG 03 NBR RATE	DEG 04 NBR RATE	DEG 05 NBR RATE	ALL HFOIS NBR RATE	DEG 06 NBR RATE	DEGS 01-06 NBR RATE	DEGS 01-06 NBR RATE			
0500790	517	995,847	-	1 0.20	3 0.60	-		12 2.41	16 3.21	8 1.61	24 4.02			
4800639	336	774,331	-	-	6 1.55	3 0.77	1 0.26	10 2.58	3 0.77	13 3.36				
TOTAL	853	1,770,178	-	1 0.11	9 1.02	3 0.34	13 1.47	26 2.94	11 1.24	37 4.18				

TOTAL MINES MATCHING REQUESTED FIELD VALUES: 2  
TOTAL MINES REQUESTED: 2

MSHA-DHHS: CM935LA  
 CYCLE: 93-070

PART50 MASTER FILE REPORT OF SELECTED INFORMATION FOR  
 METAL/NONMETAL  
 CURRENT FILES (PRELIMINARY DATA)

(Report 4)  
 PAGE: 1  
 PROCESS DATE: 02/10/94  
 AND TIME: 03:06:07

THE FOLLOWING IS A LIST OF REQUESTED SEARCH SELECTIONS

SELECTION NUMBER	FIELD CODE	FIELD VALUE	DATA ELEMENT
01		MINE FILE 0500790 4800639	MINE-ID(S)

- SUBUNITS REPORTED: ALL SUBUNITS

EMPLOYMENT FIGURES, INJURY COUNTS, AND INCIDENCE RATES FOR 1993

MINE-ID	** EMPLOYMENT **		FATALITIES		***** NFDLS *****						** NDLs **		TOT INJS	
	EMPLS	EMPL HRS	DEG 01 NBR RATE	DEG 02 NBR RATE	DEG 03 NBR RATE	DEG 04 NBR RATE	DEG 05 NBR RATE	ALL NFDLS NBR RATE	DEG 06 NBR RATE	DEGS 01-06 NBR RATE	DEGS 01-06 NBR RATE			
0500790	489	827,037	-	-	7 1.69	2 0.48	5 1.21	14 3.38	12 2.90	26 6.28				
4800639	330	761,983	-	-	7 1.84	-	2 0.52	9 2.36	4 1.05	13 3.41				
TOTAL	827	1,589,020	-	-	14 1.76	2 0.25	7 0.88	23 2.09	16 2.01	39 4.91				

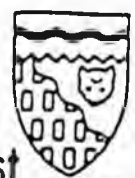
TOTAL MINES MATCHING REQUESTED FIELD VALUES: 2  
 TOTAL MINES REQUESTED: 2

801-322-8100

2/16/94

- Sample - 72 - attachments (3, 4, 5)

REGULATIONS REGISTER



Northwest Territories Canada Filed

I certify that the within instrument was registered in the Regulations Register on the 20th day of January, 1987 under registration number R-CC2-87

Registrar of Regulations Northwest Territories.

MINING SAFETY ACT

The Commissioner of the Northwest Territories, pursuant to subsections 6(1) and 16(5) of the Mining Safety Act, and every enabling power, orders as follows:

1. The Salmita Mine Exemption Regulations, established by instrument numbered R-065-86, are amended by adding immediately after section 3 the following section:

"4.(1) In this section, "worker" means only a diamond driller employed by Germac Enterprises Ltd.

(2) Notwithstanding subsection 16(1) of the Act, a worker may remain or be permitted to remain underground in the mine for more than eight but not more than twelve hours in any consecutive twenty-four hours and for seven days a week, if no more than two workers are underground in the mine at any one time.

(3) The twelve hours referred to in subsection (2) must be computed from the time the worker arrives at and returns to the shaft collar or portal.

(4) This section shall cease to have effect on the 31st day of March, 1987."

Dated at Yellowknife this 20th day of January, 1987.

John H. Parker, Commissioner of the Northwest Territories.



ROCKY MOUNTAIN DISTRICT  
Metal/Nonmetal Mine Safety & Health  
Salt Lake City Subdistrict  
Federal Building, Drawer 10042  
Helena, MT 59626 0042

FEB 19 1987

February 17, 1987

MEMORANDUM FOR: Whom It May Concern

FROM: Virgil A. Cain, Supervisory Mine Safety & Health Inspector  
Helena, Montana Field Office *Virgil A. Cain*

SUBJECT: Working Hours

This letter deals with the working hours of employees. About five years ago one large mine in my area changed from the eight hours a day, five days a week with two days off to a four day a week, ten hours a day. On the eight hours a day, five days a week, the company had quite a few lost time accidents. After the change to ten hour shifts, four days a week, this company went five months without any accidents and compiled one of the best mining accident records for its size of any mine I have ever had any dealings with.

Just recently this same mine under new management went back to a eight hour day, five days a week and the lost time accidents increased five to six hundred percent. This change has affected the moral of the workers, plus taking away some of their family time.

I am talking about a mine working upto three hundred employees. So what I am really saying, ten hour shifts don't hurt anyone as long as the moral and the time spent with the family plays a big part in the employees work habits and cuts down on accidents.

The Alaska Legislature should repeal the statutory eight-hour limit on underground mining shifts

The following points should be considered with regard to the request that you repeal A. S. 23.10.405 through 415.

First, this statute is not wage and hour legislation and has nothing whatsoever to do with ensuring that mine workers will be compensated properly. Those legal requirements are contained in other sections of the code.

The statutory language to be repealed has been on the books in Alaska unchanged since 1917. There are no annotations behind these statutory provisions, giving rise to the implication that they have never been construed by the courts. Since there has been very little underground mining in Alaska since World War II, it is not surprising that these sections have not received much attention in recent history.

Section 405 of the act indicates that mining is "injurious to health and dangerous to life and limb." Even if this were true in 1917, many giant strides have been taken since that time to make underground mining a safe profession. For one thing, the federal government has virtually pre-empted the field of underground mine safety with the Federal Mine Safety and Health Act of 1977 (P.L. 95-164). That Act granted to the Secretary of Labor broad authority to regulate conditions underground through the Mine Safety and Health Administration or MSHA. MSHA is a very good watchdog on all underground operations, and MSHA inspectors have made frequent visits to the Greens Creek mine as well as all other underground operations which have been worked on over the past several years. MSHA inspectors are required by law to make their inspections without warning. This requirement, of course, is designed to make mine operators function at a high level of safety at all times, which is very positive.

Mining today is a safer occupation than it was 70 years ago. It is no more dangerous to work ten or twelve hours at a shift underground than it would be to work at any other occupation which involves the use of heavy equipment.

The Greens Creek Mine hopes to be operating within the year with two ten-hour shifts per day underground. If it cannot, because of the existing

requirements of law, employ the miners more than eight hours per shift, it will in effect lose a half shift of production every day even though the costs of transportation and mobilization of each shift will remain the same. The economics of the mine will be severely reduced by such a loss. Clearly, two ten-hour shifts per day is the most economical way to proceed.

The workers at Greens Creek will also prefer the opportunity to work four ten-hour shifts per week rather than five eights, because they will have to spend less time in transit to and from their place of work. In discussing this with the Laborers Union, they have not identified any substantive reason why this statute should not be repealed.

The Alaska Department of Labor Division of Occupational Safety and Health has indicated that it does not enforce this law at this time.

An outright repeal of all three of these sections is requested because although the Greens Creek Mine will probably be the first major underground mine to come on line in Alaska, it may be followed rather quickly by others, and the considerations which dictate their management practices may be different from those of Greens Creek. In order to encourage others, it is recommended that the management of mining companies have the maximum reasonable flexibility in scheduling work shifts underground.

We have had informal discussions with the State Departments of Commerce and Economic Development, Labor, and Natural Resources. No objections by any of those agencies have been identified to us at this time.

It is hoped that this law can be changed during this legislative session because Greens Creek would like to be up and running before the next legislative session convenes. It would be helpful to have this bill adopted this session if for no other reason than to send a clear signal to the world that Alaska supports the efforts of those mining companies like Greens Creek which are trying to get an environmentally sound and socially responsible foothold in the state. In order for the legislation to be most effective, it will have to proceed through the legislature rapidly.

REPORT

OF THE

Territorial Mine Inspector

TO THE

Governor of Alaska

FOR THE

YEAR 1917

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REPORT OF TERRITORIAL MINE INSPECTOR

work, was the going wage. This can be partly traced to the large number of men employed by the Alaska Road Commission on the interior wagon roads and the construction of the Government railroad, where the pay was more certain, although lower, large numbers of laboring men being attracted to the railroad construction towns of Nenana and Anchorage, where the number of idle men was noticeable.

There were three strikes by those employed in the mining industry during the year. Early in June the miners in the Willow Creek District demanded an increase in wages from \$3.50 per day and board to \$4 per day and board. The Willow Creek Mines Company, operating the Gold Bullion Mine, was the only company in the district to grant the request of the miners; the other mines continued operations without experiencing any difficulty in getting all the labor needed.

On June 16 the miners working at the mines of the Kennecott Copper Corporation at Kennecott, demanded that they be paid a flat rate of \$4.50 a day and board, instead of the sliding scale then in force at that mine, the miners agreeing to accept the old scale of \$3.75 and \$4.25 per day and pay \$1.25 per day for board upon the price of copper dropping below 18 cents per pound; upon the company refusing this offer the men quit in a body and established a company McCarthy, which contained about 220 men. Better living conditions were also demanded by the men.

The schedule of wages used as a base rate by the Kennecott Copper Corporation, which became effective January 1, 1917, in the mining department was as follows:

Shift Bosses .....	\$5 25
Compressormen .....	4 75
Holstmen .....	4 60
Miners .....	4 25
Trammers (main level) .....	4 25
Powdermen .....	4 25
Ship Tenders .....	4 25
Timber Boss .....	4 75
Timberman .....	4 25
Timberman Helpers .....	3 75
Pipe and Trackmen .....	4 50
Pipe, Truck and General Repairmen .....	4 25
Pipe and Track Helpers .....	3 75
Tramway Operator Shift Boss .....	4 25
Tramway Men .....	3 75

Shaft miners and muckers and miners working in a raise at a distance of over 25 feet, measured vertically from its starting point on the level below, will receive 50 cents per shift above base rates here given during the period of such employment only.

All men to work 8 hour shifts, except those working on a monthly basis.

Board \$1.25 a day; hospital, 10 days or under, 10 cents per day hospital fee; over ten days \$2 per month for single men, calendar month; men with families \$3 per month.

The system of payment before the strike was a base rate as above stated, with an added bonus. The bonus rate adopted January 1, 1917, was as follows:

The standard rate of wages as a base rate will prevail when the average price of copper during the previous month was under 18 cents per pound

REPORT OF TERRITORIAL MINE INSPECTOR

When the average price of copper is 18 cents and under 22 cents per pound, each employee engaged upon daily wage basis will receive a bonus of 25 cents a day.

The raise in the bonus continuing on this rate for every 5 cents per pound raise in copper, the employee receiving a bonus of 25 cents a day additional.

All employees employed by the month shall receive a bonus of 10 cents to exceed \$15 per month.

After the men had struck, the company offered a new schedule of rates for bonus, which was as follows:

Effective June 16, 1917, the standard wage scale will continue as the base rate and will prevail when the average price of copper for the previous month is under 15 cents per pound.

When the average price of copper is 15 cents and under 18 cents per pound, each employee engaged upon a daily wage basis will receive a bonus of 25 cents per day.

The raise in the bonus continuing on this rate for every 3 cents per pound raise in the price of copper, the employee receiving 25 cents a day added bonus.

Men employees on a monthly basis will receive a bonus of \$4 per month for each 25 cent change in the bonus for employees on a daily basis.

Bonuses to all other employees on a monthly basis will be fixed by special agreement.

In each and every case the bonus for the current month will be determined by the average selling price of electrolytic copper as given in the Engineering & Mining Journal quotations for the preceding month.

After almost a month of bickering and trying to agree upon a basis of settlement, without coming to any agreement, the company sent men to Cordova and Anchorage, who secured enough men to take the place of those that went out on the strike, thus proving that labor could be procured in the Territory, even under those conditions, which is usually difficult of accomplishment.

At the Ellamor mine the men did not demand any advance in wage but demanded of the management that they discharge the foreman within twenty-four hours or they would all walk out. The demand was signed by 28 of the hundred men employed at the mine. The manager that evening (June 25), before the 24 hours had elapsed, posted a notice to the effect that the mine would be closed until July 7 for repairs to the machines. The 28 men that signed the agreement drew the money coming to them and left the camp the evening of the 25th. The mine resumed work as soon as the repairs were completed, the foreman having left in the meantime.

The eight-hour law, as amended, covering all underground mining, was generally observed throughout the Territory. The ten-hour scale of wages (\$5 per day and board for eight hours' work) was maintained in the underground placer mines.

A general eight-hour law, applicable to all wage and salary earners in the Territory, was passed by the Alaska Legislature, session of 1917, in response to a referendum submitted to the people at the general election of 1916, the referendum having been adopted by an overwhelming majority. The law became effective January 1, 1918. This law will not effect the mining industry to any great extent, as the quartz mines and underground placer mines are already operated under an eight-hour law. It will, however,

# REPORT OF TERRITORIAL MINE INSPECTOR

## LAWS PASSED AT THE THIRD REGULAR SESSION

### of the TERRITORIAL LEGISLATURE

#### re MINING

- | Ch. | No.      | TITLE                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
|-----|----------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 4   | H. B. 3  | An Act to declare employment in underground coal mines, underground lode mines; underground placer mines; in underground coal, lode or placer workings; and in all other underground mines, or workings of any kind or nature whatsoever, to be injurious to health and dangerous to life and limb. To regulate and limit the hours of employment in said occupations; to declare the violation thereof a misdemeanor, and to provide penalties for the violation thereof, and repealing all acts and parts of acts in conflict herewith to the extent of such conflict.                              |
| 17  | H. B. 31 | An Act to provide for the erection of cabins and shelter along traveled roads and trails and the equipment of such cabins, making it a crime to remove such cabin or any portion thereof, or any articles contained therein, prescribing the penalty for such offense and declaring an emergency.                                                                                                                                                                                                                                                                                                     |
| 31  | S. B. 24 | An Act providing a relief fund for the rescuing and relief of persons lost while prospecting, boating, hunting or otherwise, in the Territory of Alaska, and declaring an emergency therefor.                                                                                                                                                                                                                                                                                                                                                                                                         |
| 36  | S. B. 2  | An Act to provide for the construction, maintenance and protection of public roads, bridges, trails and ferries and property pertaining to public roads in the Territory of Alaska, to provide funds, regulations and penalties; to carry the provisions and purposes of this act into effect; to provide for the appointment of a Territorial Board of Road Commissioners and defining their duties; to provide for a Board of Divisional Road Commissioners for the First, Second, Third and Fourth judicial divisions in the Territory of Alaska and for other purposes; and declare an emergency. |
| 44  | S. B. 36 | An Act to amend chapter 71 of the 1915 Session Laws of Alaska, entitled, "An Act relating to the measure and recovery of compensation of injured employees in the mining industry of this Territory, and compensation to designated beneficiaries where such injuries result in death, defining and regulating the liability of employers to their employees in connection with such industry, and repealing all Acts and parts of Acts in conflict with this Act."                                                                                                                                   |
| 51  | H. B. 26 | An Act to establish the office of mine inspector; to prescribe the duties, powers, qualifications and compensation thereof; to regulate the operation of mines in the Territory of Alaska; to provide for the health and safety of mine workers in the Territory; to declare the violation of any of the provisions hereof a misdemeanor and prescribing punishment therefor; repealing chapter 72 of the 1913 Session Laws of Alaska, and Chapter 69 of the 1915 Session Laws of Alaska.                                                                                                             |
| 55  | H. B. 33 | An Act to regulate and limit the hours of employment for all wage and salary earners in the Territory of Alaska, to declare the violation thereof a misdemeanor and to prescribe punishment therefor.                                                                                                                                                                                                                                                                                                                                                                                                 |
| 57  | H. B. 59 | An Act defining the rights of locators of mining claims over the waters of any rivers or creeks on which such claims may be staked and the rights of locators of water rights on creeks and rivers in the Territory of Alaska.                                                                                                                                                                                                                                                                                                                                                                        |
| 62  | S. B. 16 | An Act for the establishment of the Alaska Agricultural College and School of Mines, in accordance with the provisions of the Act of Congress, approved March 4, 1916, and to grant a charter to the Alaska Agricultural College and School of Mines.                                                                                                                                                                                                                                                                                                                                                 |
| 74  | S. B. 29 | An Act to amend sections 1 and 2 of chapter 76, Laws of Alaska, 1916, entitled "An Act to establish a system of taxation create revenue and provide for collection thereof for the Territory of Alaska, and for other purposes," and to amend an act entitled "An Act to establish a system of taxation, create revenue and provide for collection thereof for the Territory of Alaska, and for other purposes," approved May 1, 1913, and declaring an emergency, approved April 29, 1918.                                                                                                           |

propriated become available immediately upon the passage and approval of this act.

Approved April 14, 1917.

## CHAPTER 4.

### AN ACT

(H. B. 3)

To declare ~~employment in underground coal mines~~; underground lode mines; underground placer mines; in underground coal, lode or placer workings; and in all other underground mines, or workings of any kind or nature whatsoever, to be injurious to health and dangerous to life and limb. To regulate and ~~limit the hours of employment in~~ said occupations; to declare the violation thereof a misdemeanor, and to provide penalties for the violation thereof, and repealing all acts and parts of acts in conflict herewith to the extent of such conflict.

Be it enacted by the Legislature of the Territory of Alaska:

Section 1. Employment in underground coal mines, underground lode mines, underground placer mines, in underground coal, lode or placer workings, and in all other underground mines or workings of any kind or nature whatsoever, is hereby declared to be injurious to health and dangerous to life and limb.

Declares all underground employment dangerous.

Section 2. That the period of employment of any person in underground coal mines, underground lode mines, underground placer mines, underground coal, lode or placer workings, and in all other underground mines, or workings of any kind or nature whatsoever, shall not exceed eight (8) hours within any twenty-four (24) hours, except on such days as change of shift is made, excluding, however, any intermission of time for lunch or meals, or otherwise going to, or from the place where the work is actually carried on, whether going to or coming from the place of work be in going on, or off shift, or in going to, or returning from meals or lunch. It being the intention of this act to limit the hours of employment in any twenty-four (24) hours to eight (8) hours of actual

Limitation upon hours of work.

labor at the face, or other place or places where the work or labor to be done is actually performed; except in case of emergency, where life or property is in imminent danger, the period may be extended during the continuance of such emergency.

Penalty.

Section 3. Any person, persons, body corporate, general manager, foreman or employer, who shall employ, or cause to be employed any person or persons in violation of the provisions of this Act, shall be deemed guilty of a misdemeanor, and upon a first conviction shall be punished by a fine of not less than One Hundred Dollars (\$100.00), nor more than Five Hundred Dollars (\$500.00), or by imprisonment in the Federal Jail, not less than Sixty (60) days, nor more than Six (6) months; or by both fine and imprisonment. Upon a second conviction within the meaning of this act as hereinafter set forth, the punishment shall be imprisonment in the Federal Jail not less than Sixty (60) days, nor more than One (1) year.

Penalty 2nd conviction.

A second conviction within the meaning of this act, shall be a conviction for a violation of this act committed within a period of Two (2) years after a previous conviction of the same person, persons, body corporate, general manager, foreman or employer for a violation of this act. All other convictions within the meaning of this act shall be first convictions. Every day's violation of the provisions of this act shall constitute a separate offense.

Effect partial invalidity.

Section 4. Should it be adjudicated that any portion, section, or part of any section of this act, is unconstitutional or otherwise invalid for any reason, an adjudication of invalidity of such portion, section, proviso or part of any section of this act shall not effect the validity of the act as a whole or any other part thereof.

Repeal.

Section 5. All acts and parts of acts in conflict with this act are hereby repealed to the extent of such conflict.

Emergency declared.

Section 6. An emergency is hereby declared to exist,

mills, chlorination processes, cyanide processes, is hereby declared to be injurious to health and dangerous to life and limb.

Eight hour day therein

Sec. 2. That the period of employment of workmen in underground workings, underground mines, stamp mills, and roller mills, open cut workings, chlorination processes, cyanide processes, and at coke ovens shall not exceed ~~eight (8)~~ hours within any twenty-four (24) hours, except on such days as change of shift is made; excluding, however, any intermission of time for lunch or meals, and excluding also the time required in descending to and ascending from, or otherwise going to or from the place where the work is actually carried on, whether going to or coming from the place of work be in going on or off shift, or in going to or returning from meals or lunch; it being the intention of this act to limit the hours of employment in any twenty-four (24) hours to eight hours of actual labor at the face or other place or places where the work or labor to be done is actually performed; except in case of emergency where life and property is in imminent danger or in case of urgent necessity, the period may be extended during the continuance of such emergency or urgent necessity, providing, however, that this act applies to metalliferous lode mining only.

Exceptions

See also 1917-p3  
amended 1915. See Laws 1915 p 6

Penalty

Sec. 3. Any person, persons, body corporate, general manager or employer who shall violate, or cause to be violated, any of the provisions of this act, shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than one hundred (\$100.00) dollars or more than five hundred (\$500.00) dollars, or by imprisonment in the federal jail not less than ninety (90) days nor more than six (6) months; or by both fine and imprisonment. Every day's violation of the provisions of this act shall constitute a separate offense.

Sec. 4. If it shall be adjudicated that any portion, section, or part of any section of this act, is unconstitu-

tional and invalid for any reason, an adjudication or invalidity of such portion, section, proviso or part of any section of this act shall not affect the validity of the act as a whole or any part thereof.

Approved, April 24, 1913.

CHAPTER 30.

(S. B. NO. 21.)

AN ACT making it a felony to take, remove or conceal any ore, mineral, amalgam, precipitates, concentrates or other mineral-bearing substance from any mine, sampler, smelter, concentrating mill, chlorination mill, cyanide mill, or other reduction works, with intent to steal the same or to defraud the owner thereof, and providing a penalty therefor.

Be it enacted by the Legislature of the Territory of Alaska:

Section 1. If any person shall take, remove or conceal any ore, or mineral, or amalgam, or precipitates, or concentrates, or other mineral-bearing substance, from any mine, sampler, smelter, concentrating mill, chlorination mill, cyanide mill, or other reduction works, with the intent to steal the same or to defraud the owner thereof, such person shall be deemed guilty of grand larceny, and upon conviction shall be punished by imprisonment in the penitentiary not less than one year nor more than ten years.

Taking etc., with intent to steal, felony

Sec. 2. All acts and parts of acts in conflict with this act are hereby repealed.

Approved, April 24, 1913.

criminal procedure for said District," be amended to read as follows:

"Sec. 178.—What Time May Be Appointed.—That the time appointed for pronouncing judgment must be at least three days after the verdict, if the court intends to remain in session so long, or if not, as remote time as can reasonably be allowed; but in no case can the judgment be given except by the consent of the defendant, in less than six hours after the verdict."

Approved, April 21, 1913.

CHAPTER 27.

(H. D. NO. 67.)

AN ACT to amend Section One Hundred and Sixty-nine of the Code of Criminal Procedure of Alaska. (Compiled Laws of Alaska, Sec. 2278.)

Be it enacted by the Legislature of the Territory of Alaska:

Section 1. That Section One Hundred and Sixty-nine of Title Two, Chapter Seventeen, of the Act of March 3, 1899, entitled "An Act to define and punish crimes in the District of Alaska and to provide a Code of Criminal Procedure for said District," be amended to read as follows:

Sec. 169.—Motion for New Trial.—That a motion for a new trial with the affidavits, if any, in support thereof shall be filed within two days after the rendition of the verdict or other decision sought to be set aside. When the adverse party is entitled to oppose the motion by counter affidavits, he shall file the same within one day after the filing of the motion. The motion shall be heard and determined during the term, unless the court continues the same for advisement or want of time to hear it.

Approved, April 21, 1913.

CHAPTER 28.

(H. D. NO. 69.)

AN ACT to provide a penalty for inciting another to commit a crime.

Be it enacted by the Legislature of the Territory of Alaska:

Section 1. That whoever shall wilfully and knowingly solicit, incite or induce another to commit any act declared to be a misdemeanor in this Territory, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than \$500.00 or by imprisonment in the federal jail for not more than six months, or by both such fine and imprisonment.

Approved, April 21, 1913.

CHAPTER 29.

(S. B. NO. 1.)

AN ACT to declare ~~employment in underground mines~~, applied to metalliferous lode mining only, underground workings, open cut workings, open pit workings, smelters, reduction works, stamp mills, roller mills, concentrating mills, chlorination processes, cyanide processes, to be injurious to health and dangerous to life and limb. To regulate and limit the hours of employment in said occupations; to declare the violation thereof a misdemeanor and to provide penalties for the violation thereof.

Be it enacted by the Legislature of the Territory of Alaska:

Section 1. Employment in underground mines, underground workings, open cut, open pit workings, smelter, reduction works, stamp mills, roller mills, concentratin

amended 1915 - see laws 1913 - see also 1917-1918 P. 6

Secs. 1 + 2 of this chapter amended 1915  
see laws 1915  
" 1917  
see also 1917

## CHAPTER 7.

(S. B. NO. 6.)

AN ACT to establish the number of hours to constitute a day's work on all Territorial and municipal construction or such work done by contract or sub-contract, and providing penalties for its violation.

*Be it enacted by the Legislature of the Territory of Alaska:*

eight hour day  
public work

Section 1. Hereafter, **eight hours in any calendar day, shall constitute a day's work on any work done for the Territory or any municipality within the Territory, subject to the following conditions:**

Sec. 2. All work done by contract or sub-contract on any building or improvements, or work on roads, bridges, streets, alleys or buildings for the Territory or any municipality within the Territory, shall be done under the provisions of this Act;—Provided, that in cases of extraordinary emergency such as danger to life or property, the hours for work may be extended. And for this purpose this Act is made a part of all contracts, sub-contracts or agreements for work done for the Territory or any municipality within the Territory.

penalty to sub-  
contract

Sec. 3. Any contractor, sub-contractor, or agent of contractor or sub-contractor, foreman or employer, who shall violate the provisions of this Act, shall be deemed guilty of misdemeanor, and upon conviction thereof shall be fined in a sum not less than fifty dollars nor more than five hundred dollars, or with imprisonment for a period of not less than ten days nor more than ninety days, or both such fine and imprisonment.

penalty

Approved, April 18, 1913.

## CHAPTER 8.

(S. B. NO. 19.)

AN ACT to regulate the purchase of ore.

*Be it enacted by the Legislature of the Territory of Alaska:*

Section 1. Any person, copartnership, association or corporation in the actual and peaceable possession of any mining claim, under claim or color of title, and engaged in the mining, shipment and treatment, or sale of ores therefrom, shall, as to all persons purchasing such ore or ores in good faith and without notice as herein provided, of the title or claim of title, or ownership of any other person, copartnership, association or corporation thereto shall be deemed to be the lawful owner or owners of such ore or ores.

Posses-  
claim  
to be

Sec. 2. Any person who, or copartnership, association or corporation which shall in good faith and in the usual course of business and without notice, as hereinafter provided, purchase and obtain delivery of any ore or ores from any person, copartnership, association or corporation in possession of the mines, mining claim or claims, from which such ore or ores shall have been mined or extracted, shall be deemed the owner or owners of such ores except as herein provided; and he or they shall not be liable to, or subject to any action at law or in equity, for the recovery of the same or the value thereof by any person, copartnership, association or corporation who or which may thereafter be adjudged to be the owner or owners of such mine, mines, mining claim or claims.

Not to  
to per-  
there  
judge-  
owner

Sec. 3. If any person, copartnership, association or corporation shall be or shall claim to be the owner or owners, or entitled to the possession or enjoyment of any mine, mines, mining claim, claims or premises, then in the possession of some other person, copartnership, association or corporation claiming to be the owner or owners or entitled to the possession thereof, and mining, shipping or treating or selling the ore therefrom, may, if he, they,

Liabil-  
purch-  
ore cost

transport them as soon as possible to Portland, where it may be of them soon recover. If these detention hospitals were utilized those committed to them were detained there under medical observation and given proper medical treatment, it is possible that they would soon recover and be discharged, thus avoiding the high cost of transportation to the contract hospital and the cost of their maintenance at that institution. These detention hospitals were authorized by act of Congress, approved June 25, 1910, and cost with the equipment \$25,000.

### LABOR CONDITIONS.

There was an excess of labor in nearly all industrial sections of Alaska during the fiscal year. Despite many warnings given by Government officials and others through the public press the influx of men seeking work was almost continuous. In part this influx was stimulated by the beginning of construction work on the Government railroad at Anchorage on Cook Inlet. However, up to that time, a considerable amount of labor has been absorbed in railroad work, while mining and prospecting afforded employment for others. The mines of southeastern Alaska give employment to a large number of men, and the number so employed is constantly being increased. It is expected that the opening of some of the coal fields in Alaska will greatly extend the volume of mining operations throughout the Territory through the furnishing of coke and cheap fuel for industrial use. The fishing industry the present season gave employment to the usual number of men; in this industry many Indians, Chinese, Japanese and other aliens are employed.

The Territorial legislature at its recent session passed an 8-hour law for all workers in lode and placer mines; and during the past summer in the Ruby and Fairbanks mining districts labor strikes resulted in some of the placer mines, when the employees attempted to reduce the wage scale which had been paid for a 12-hour day. In the Fairbanks district the difficulty was soon adjusted, however, and the men returned to work. In the Ruby district the difficulty has continued without settlement. An 8-hour law was already generally in force in the lode mines of the Territory. The wage scale paid to placer miners in the Fairbanks and Ruby districts during the summer season prior to the passage of the 8-hour law was \$5 per day. In the Nome district no reduction of the wage scale followed the enforcement of the 8-hour law. Wage scales in other parts of the Territory have remained practically stationary during the year. The scale of wages paid in lode mines in coastal Alaska is from \$3 to \$3.50 per day.

### ALASKA GAME LAW.

There are many peculiarities in the Alaska game law which render it unsuited in many respects to local and climatic conditions in the different geographical divisions of the Territory. For instance, in the interior regions the open season for waterfowl does not begin until September 1, and by that time migratory birds have either started on their flights or are about to do so. Efforts to have the law changed so that the season should open on August 15 have thus far been

trial purposes, by which it is claimed power can be produced cheaply than by the employment of fuel oil, should greatly increase coal production and consumption. With the opening of the fields of Alaska there should begin an industrial era in the Territory in which the building of smelters for the treatment of copper and other refractory ores should play an important part. The opening of these fields, too, should mean the use of Alaska coal by the Federal Government for naval and other purposes on the Pacific coast and the establishment of one or more coaling stations in the Territory. The numerous tests, naval and other, that have been made of Alaska coal in recent years, have established its value not only for naval, but practically for all other purposes for which coal may be required.

### LABOR CONDITIONS.

The supply of labor during the greater part of the fiscal year was fully equal to the demand, except in the closing months of the year when the demand for mechanics of various kinds and for workmen on railroad construction was greater than the supply. The demand for miners has also been greater than during the previous year. A strike of laborers and artisans employed on the construction of the Government railroad at Anchorage occurred during the early spring. Increased wages were asked for and work was partially suspended pending an adjustment of the matters involved. A board of conciliation and mediation, appointed by the President, proceeded to Anchorage, where an exhaustive investigation was conducted. The board recommended an increase in the various wage scales, and men returned to work. There has been no difficulty experienced since and the wisdom of settling the strike in an amicable manner has been warmly commended. No other labor troubles of importance have been reported elsewhere in the Territory. In some of the mining districts increases of wages have been reported, also a decrease in the working hours of men employed in surface work about the mines. In the placer mining districts of interior Alaska the wage scale is \$5 per day and board for an 8-hour day. The Territorial legislature, session of 1915, passed a law constituting eight hours a day's work in all the lode and placer mines. This has been generally observed, except in a few cases in the placer mining districts where some of the employers of labor have evinced a disposition to disregard it. Suit has been begun in the fourth judicial division to test the legality of the act.

An act providing for an expression by the electors of the Territory as to whether they are in favor or are not in favor of a general eight-hour day for all wage and salary earners, was passed by the Alaska Legislature at its last session, for submission at the general election in November, 1916. The act also provides that, if the question is decided in the affirmative, the legislature shall at its next session pass such acts as may be necessary to cause such expression of the wishes of the electors to become effective.

In some of the fishing sections of the Territory the usual number of men have not been employed by the cannery operators because of a slack season for salmon, the run of this fish having been greatly below the normal, especially in southeastern Alaska. In this industry many

## UNITED STATES COMMISSIONERS

The judges of the district courts should be as far removed as possible from politics and political influences, if the courts are to retain the respect and confidence of the people. A step in this direction would be the taking of appointments of United States commissioners out of the hands of the judges and vesting the appointing power elsewhere. The democratic way would be the election of United States commissioners, who are also ex officio justices of the peace, coroners, and probate judges, directly by the people of the various governing precincts.

## LABOR CONDITIONS.

Alaska is suffering from a shortage of labor in nearly every section, and in some it has become pronounced during the past spring and summer. This is especially true of southeastern Alaska, where the great low-grade lode mines are severely handicapped in their operation of mines and mills by reason of the lack of sufficient labor to conduct these enterprises. As a result, gold production has been curtailed to a considerable extent and this condition will prevail until a sufficient supply of labor can be procured. Many of the miners employed throughout the Territory have gone to the copper-mining States of the West, attracted thither by the better wages paid there by the operators of copper mines, the price of copper having largely advanced owing to war conditions. It was expected that the close of the salmon-fishery season would relieve the mine labor situation to some extent, but this does not seem to have been the case.

A strike of miners employed by the Kennecott Copper Corporation in the Copper River Basin occurred in June of this year, owing to the demand of the men for an increase in the wage scale. The strike, however, was not of long duration and many of the men returned to work, partially through the efforts of a representative of the Department of Labor who visited Kennecott for the purpose of adjusting the strike difficulties. There was also a labor strike on the part of some of the men employed in the construction of the Government railroad at Nenana, but it was of short duration, the differences having been satisfactorily and speedily adjusted.

A general eight-hour law, applicable to all wage and salary earners in the Territory, will become effective on January 1, 1918. This law was passed by the Alaska legislature, session of 1917, in response to a referendum submitted to the people at the general election of 1916, the referendum having been adopted by an overwhelming majority. The governor of the Territory, however, is "given the power to suspend or modify restrictions contained in the law when such shall be requested by the Council of National Defense or the Secretary of the Interior, and such modification or suspension, when made, shall be continued for a specified period and not longer than the duration of the present war, or during the continuance of any future war with a foreign power."

## COMMISSION OF CRIME.

In the annual report of this office for the fiscal year 1916 reference was made to the commission of capital crimes, especially in the remote regions of the Territory, and it was stated that in many cases

Bill No. House Bill 162  
Title "An Act relating to work in  
underground mines and workings."

Date March 11, 1987

Contact: Tom Stuart  
465-4870

Eileen Plate  
465-2700

House Bill 162 proposes to extend the maximum number of hours a person may be employed in an underground mine to ten hours per day. Current law restricts such work to eight hours per day.

Recognizing that the eight hour limitation was mandated many years ago, and that technological advances since that time may have diminished some of the hazards associated with working underground, the Department of Labor is not opposed to some relaxation of the limitation if a review of the work environment indicates it will not detract from the overall well-being of workers. The Department feels, however, that any expansion of underground work hours should be evaluated on a case-by-case basis and only permitted if it is determined that the employment practices and work conditions of a particular mining operation are conducive to such an expansion and that the well-being of the workers is assured.

1984 injury and illness statistics for the mining industry as a whole reflect that nearly 35% of Alaska's time loss injuries and illnesses occurred after eight hours of work; and that over 22% of the time loss injuries in non oil and gas related mining occurred after eight hours of work. Although these statistics are not reflective of underground mining activities per se, they are indicative of the hazards inherent in mining operations and, therefore, underscore the need to very carefully approach expanded work hours for underground mining.

Accordingly, while the Department does not support the across-the-board relaxation of the eight-hour limitation provided in House Bill 162, it would endorse a variance provision to permit underground work for up to ten hours if it is determined that it is in the best interest of the employer and Alaska's mine workers.

The following amendments to House Bill 162 would accomplish this as well as clarify the existing law:

1. Amend Sec. 2, lines 19-23, to read:

than eight hours in 24 hours, except on a day when a change of shift is made, excluding, however, an intermission of time for meals, and the time [OR OTHERWISE GOING TO OR FROM THE PLACE WHERE THE WORK IS ACTUALLY CARRIED ON, WHETHER IN GOING ON OR OFF SHIFT, OR IN] going to or returning from meals.

This amendment would merely clarify the existing law which is designed to regulate only time spent underground.

POSITION DATED/Department of Labor

# FISCAL NOTE

**STATE OF ALASKA**  
**1996 LEGISLATIVE SESSION**

**BILL NO.** HB 311

Revision Date: \_\_\_\_\_  
 Title: An Act repealing limitation on hours  
may be employed in a mine  
 Sponsor: Representative Vezey  
 Requestor: House Labor and Commerce

Department Affected: Labor  
 BRU: Labor Standards & Safety  
 Component: Occupational Safety  
and Health  
**COMPONENT SERIAL NO.** 970

**EXPENDITURES/REVENUES:** (Thousands of Dollars)

OPERATING	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL</b>						
----------------	--	--	--	--	--	--

<b>CHANGE IN REVENUE</b>						
<b>FUND SOURCE #</b>						

**FUNDING:** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipt						
1006 GF/MHTIA						
Other						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

**POSITIONS:**

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY96) impact: \$ 0.0

**ANALYSIS:** (Attach a separate page if necessary)

HB 311 would repeal the limitation on the hours a person may be employed in a mine. Current law allows a person to perform work not more than 8 hours within any 24 hour period under ground.

Prepared by: Al Dwyer, Director Phone: 269-4914  
 Division: Labor Standards and Safety Division Date: 1/23/96  
 Approved by Commissioner: Tom Cashen, Commissioner  
 Agency: Department of Labor Date: 1/23/96

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**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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

26 (d) In this section,

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

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

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

1 defendant must prove by clear and convincing evidence that  
2 (1) the statement is reliable;  
3 (2) similar evidence is unavailable from any other source; and  
4 (3) failure to introduce the statement would substantially undermine the  
5 reliability of the fact-finding process and result in manifest injustice.

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

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

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

13 \* Sec. 6. AS 12.61.127, added by sec. 4 of this Act, has the effect of amending Rule 613,  
14 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. 97-0037388

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

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).<sup>1</sup> 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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<sup>1</sup> 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.)<sup>2</sup> 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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<sup>2</sup> 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 memorialized. 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, deceit 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.

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  
Federal Public Defender

510 L Street, Suite 400  
Anchorage, AK 99501

(907) 271-2277/FAX (907) 271-2271

---

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.<sup>1</sup> Finally, it protects defense counsel and his or her agent from allegations of impropriety.

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<sup>1</sup> 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.

Stephen J. Van Goor  
November 18, 1993  
Page 2

### 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.<sup>2</sup>

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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<sup>2</sup> 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).

Stephen J. Van Goor  
November 18, 1993  
Page 6

**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.

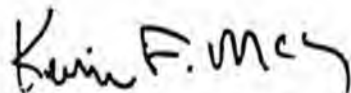
I have also enclosed a copy of Professor Abraham Abramivsky's Law Review Article advocating that criminal defense attorneys be permitted to surreptitiously tape record witness interviews in the limited context of criminal cases. Professor Abramivsky presents the argument in favor of a limited exception 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**  
**A S S O C I A T I O N**

**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

trial, it follows from Rules 1.4(b)<sup>6</sup> that the advocate-witness must inform his/her client of this development and seek the client's informed consent to the continued pre-trial representation. The client should understand the effect that withdrawal prior to trial 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 taping is being made, so long as the attorney makes no affirmative misrepresentations about the taping. The agency reasonably should not expect that the preliminary phase discussions are confidential. The agency also should expect that such discussions will be memorialized in some fashion by the investigated party's attorney and that the record made may be used to support a claim against the agency.

#### 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 taping 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 protection" 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.<sup>1</sup> 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

<sup>1</sup> 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 recording 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.

<sup>6</sup> 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

between lawyer and client since these were confidential. Idaho Op. No. 130 (May 10, 1989) The Utah Bar has held lawyers may record surreptitiously by electronic 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 stating an absolute ban on surreptitious tape recording.<sup>2</sup> 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

<sup>2</sup> 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. Settlers 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 trust 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.<sup>1</sup>

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

"In connection with any termination

<sup>1</sup> 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; ... ."

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.

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<sup>1</sup> 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 statements. 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.

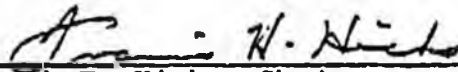
The Committee is cognizant of the arguments made for allowing recordation of telephone conversations of attorneys and witnesses. Recordation obviously makes it more difficult for either an attorney or a witness to change their statement. Also, if there is a misunderstanding, there is some record to determine 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.

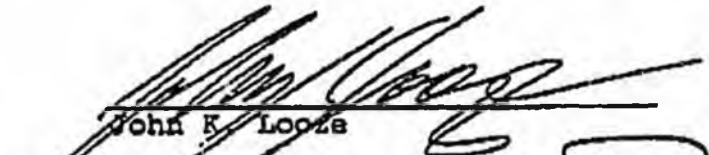
Regarding conversations with another attorney, a misunderstanding can be avoided by any of the simple expedients that most lawyers presently use. Examples of these are: a confirmation letter, stipulation or other writing memorializing the conversation. Lawyers, above all professionals, know that a written 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.

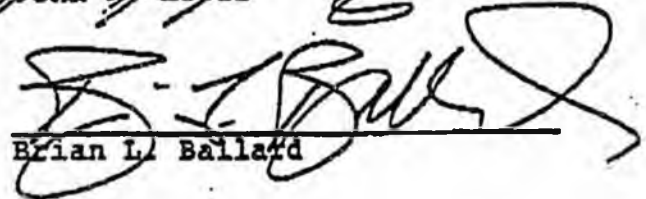
Having addressed the issue of recording the conversations of prospective witnesses and another attorney, the Committee now addresses the inquiry regarding recordation of clients and members of the public. As to clients, all conversations between an attorney and the client are

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 E. Hicks, Chairman

  
\_\_\_\_\_  
John K. Looze

  
\_\_\_\_\_  
Brian L. Ballard

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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 Responsibility 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.

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"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

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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 in light 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)

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**ALASKA BAR**  
**A S S O C I A T I O N**

**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 

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:\DSBC\18D95-3HRG.DCC

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.<sup>11</sup>

**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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<sup>11</sup>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.<sup>12/</sup>

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 for 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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<sup>12/</sup>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).<sup>23/</sup>

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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<sup>23/</sup>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.<sup>4/</sup>

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

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<sup>4/</sup>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;

\*\*\*\*\*

(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.<sup>1</sup>

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<sup>1</sup> 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)

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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.

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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 advice 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 3. 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 *Huron 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 unquestionably 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. Consequently, 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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