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

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INTRODUCTION

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

While the underlying reasons for the disavowal vary from

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

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

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

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

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

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

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

I. The Need to Surreptitiously Record

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

1. The Misunderstanding Witness

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

2. Statements Made Out of Context

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

3. The Denying Witness

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

4. The Allegedly Bribed Witness

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

true.[7]

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

II. Federal Law of One-Party Consensual Recording

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

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

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

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

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

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

10. Title III defines "wire communication" as

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

Id. § 2510(1).

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

12. *Id.* § 2511(2)(d).

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

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

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

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

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

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

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

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

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

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

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

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

26. *Id.* at 746.

27. *Id.* at 749-50.

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

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

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

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28. *Id.* at 750.

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

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

III. State Law Concerning One-Party Consensual Recording

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

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

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

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

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

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

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

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

CORRECTION

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

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

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

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

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

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

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

IV. State Legislation v. The Quest For Truth

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

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

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

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

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

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

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

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

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

44. 401 U.S. at 225.

45. *Id.* at 226.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

76. ABA Informal Op. 1008 (1967).

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

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

79. *Id.*

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

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

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

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

> There may be extraordinary circumstances in which the Attorney General of the United States or the principal prosecuting attorney of a state or local government or law enforcement attorneys or officers acting under the direction of the Attorney General or such principal prosecuting attorneys might ethically make and use secret recordings if acting within the strict statutory limitations conforming to constitutional requirements. This opinion does not address such exceptions which would necessarily require examination on a case by case basis.[85]

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

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

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

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

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

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

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

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

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

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

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

89. *Id.* (emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VI. The Rationales Used to Prohibit Surreptitious Recording

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

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

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

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

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tain limitations. The opinion states:

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

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

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

107. *See supra* note 32.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VII. Are There Reasonable Alternatives to Surreptitious Recording?

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

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

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

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

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

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

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

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

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

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

VIII. Adverse v. Beneficial Effects of Surreptitious Recording

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

1. Possible Adverse Effects

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. *Beneficial Effects of Surreptitious Recording*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IX. The Proposed Rules and Surreptitious Recording

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

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

149. *Id.*

150. *Id.*

151. *Id.*

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

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

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

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

153. Officially entitled "Legal Background."

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

155. *Id.* at Commentary.

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

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

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

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

Conclusion

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

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

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

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

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

U.S. Department of Justice

United States Attorney
District of Alaska at Anchorage

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

Commercial: (907) 271-5071
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January 18, 1996

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

Attn: Richard Vitale

Re: House Bill 326

Dear Representative Parnell:

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

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

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

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

January 22, 1996

VIA FAX

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

Dear Representative Parnell:

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

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

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

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

Sincerely,

Diane J. Heard
Executive Director

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

January 22, 1996

VIA FAX

ALASKA BAR ASSOCIATION
ETHICS COMMITTEE

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

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

Dear Mr. Winfree:

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

1. <u>The Board's procedure</u>.

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

CORRECTION

THE FOLLOWING DOCUMENT(S)
HAVE BEEN REFILMED TO
ASSURE LEGIBILITY OR PAGINATION

U.S. Department of Justice

United States Attorney
District of Alaska at Anchorage

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

Very truly yours,

ROBERT C. BUNDY
United States Attorney

RCB:kjm
Attachment

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

January 22, 1996

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Sincerely,

Diane J. Heard
Executive Director

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January 22, 1996

VIA FAX

ALASKA BAR ASSOCIATION
ETHICS COMMITTEE

Dan Winfree, President
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510 L. St., Suite 602
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2. The Ethics Committee's previous actions.

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

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

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

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

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

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

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

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

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

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

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

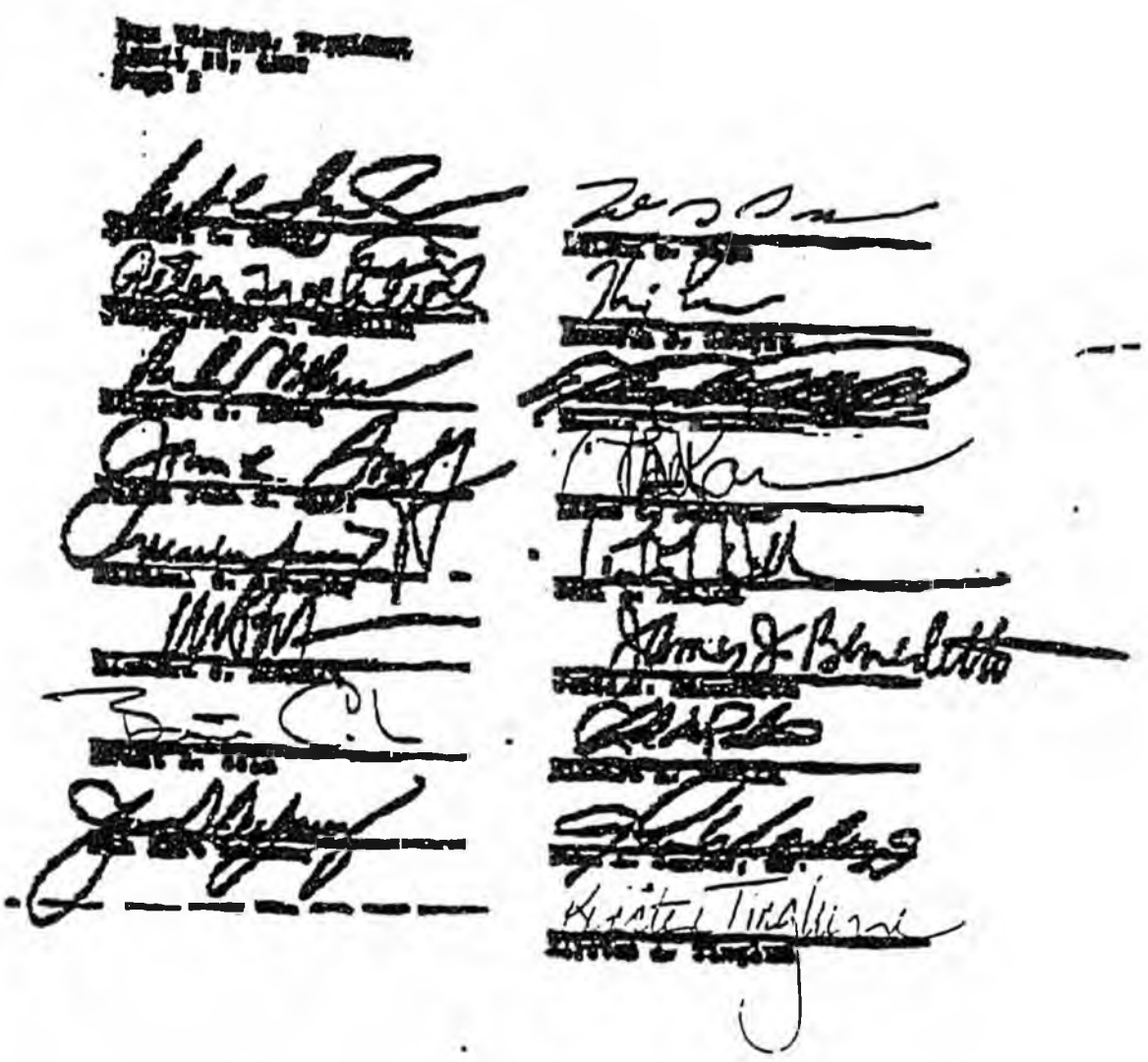
The Ethics Committee recognizes that reasonable persons can differ on the issues encompassed by the Board's opinion. However, those issues are of great importance not only to lawyers defending criminal suspects, but to the public at large, especially to victims and witnesses who are brought into the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

Very truly yours,

ALASKA BAR ASSOCIATION ETHICS COMMITTEE

Robert J. Mahoney

Robert J. Mahoney, Chair



* SEE FOLLOWING PAGE FOR NAMES LISTED

Robert C. Bundy

Judge Peter B. Froelich

Richard B. Brown

Judge John R. Lohff

Michael C. Geragnty

Richard D. Monkman

Brent R. Cole

Jan Hart DeYoung

Nelson G. Page

Kenneth D. Lougee

Thomas A. Matthews

Lance C. Parrish

Paul L. Dillon

James J. Benedetto

Richard A. Poulin

John A. Reeder, Jr.

Kirsten A. Tinglum

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

VG 4-27-95

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

Formal Opinion 337 **August 10, 1974**

With certain exceptions spelled out in this opinion, no lawyer should record any conversation whether by tapes or other electronic device, without the consent or prior knowledge of all parties to the conversation.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Canons 1, 4, 7 and 9, and Ethical Considerations all clearly express axiomatic norms for attorney conduct. Each in the view of the Committee supports the conclusion that lawyers should not make recordings without consent of all parties. Ethical Considerations EC 1-5, EC 4-4, EC 4-5, EC 7-1, EC 9-2 and EC 9-6 all state in various ways the conduct to which lawyers should aspire. None would condone such conduct. The conduct proscribed in DR 1-102 (A)(4), *i.e.*, conduct which involves dishonesty, fraud, deceit or misrepresentation in the view of the Committee clearly encompasses the making of recordings without the consent of all parties. With the exception noted in the last paragraph, the Committee concludes that no lawyer should record any conversation whether by tapes or other electronic device, without the consent or prior knowledge of all parties to the conversation.

There may be extraordinary circumstances in which the Attorney General of the United States or the principal prosecuting attorney of a state or local government or law enforcement attorneys or officers acting under the direction of the Attorney General or such principal prosecuting attorneys might ethically make and use secret recordings if acting within strict statutory limitations conforming to constitutional requirements. This opinion does not address such exceptions which would necessarily require examination on a case by case basis. It should be stressed, however, that the mere fact that secret recordation in a particular instance is not illegal will not necessarily render the conduct of a public law enforcement officer in making such a recording ethical.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FISCAL NOTE

STATE OF ALASKA
1995 LEGISLATIVE SESSION

BILL NO. HB 314

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

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

COMPONENT SERIAL NO. 43

EXPENDITURES/REVENUES: (Thousands of Dollars)

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

FUND SOURCE: (Thousands of Dollars)

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

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

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary.)

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

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

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

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FISCAL NOTE

STATE OF ALASKA
1995 LEGISLATIVE SESSION

BILL NO. HB 314

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

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

COMPONENT SERIAL NO. 1631

EXPENDITURES/REVENUES: (Thousands of Dollars)

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

FUND SOURCE: (Thousands of Dollars)

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

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

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary.)

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

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

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

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9-LS1091\F
Luckhaupt/Lauterbach
1/22/96

CS FOR HOUSE BILL NO. 314( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

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

A BILL

FOR AN ACT ENTITLED

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

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

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

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

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

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

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

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

New Text Underlined [DELETED TEXT BRACKETED]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FISCAL NOTE

STATE OF ALASKA
1996 LEGISLATIVE SESSION

BILL NO. CSHB 314 (JUD)

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

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

COMPONENT SERIAL NO. 1631

EXPENDITURES/REVENUES: (Thousands of Dollars)

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

FUND SOURCE: (Thousands of Dollars)

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

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

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary.)

There is no fiscal impact to the Public Defender Agency.

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

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

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FISCAL NOTE

STATE OF ALASKA
1996 LEGISLATIVE SESSION

BILL NO. CSHB 314 (JUD)

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

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

COMPONENT SERIAL NO. 43

EXPENDITURES/REVENUES: (Thousands of Dollars)

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

FUND SOURCE: (Thousands of Dollars)

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

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

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary.)

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

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

Phone: 274-1684
Date: _____

Approved by Commissioner: Mark Bover
Agency: Department of Administration

Date: 1/31/96

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HB

316

9-LS1013\K
Ford
2/16/96

Rep. Porter

CS FOR HOUSE BILL NO. 316(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVE MULDER

A BILL

FOR AN ACT ENTITLED

"An Act relating to civil liability for false claims and improper allegations or defenses in civil practice; amending Rules 13(e) and 37, Alaska Rules of Civil Procedure; and providing for an effective date."

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

* Section 1. AS 09.65 is amended by adding a new section to read:

Sec. 09.65.190. CIVIL LIABILITY FOR FALSE CLAIMS AND IMPROPER PRACTICE. (a) A person may not

(1) knowingly or recklessly file, or cause to be filed, a civil complaint, answer, or other civil pleading that contains false or misleading allegations or material misstatements of fact;

(2) sign a civil pleading before making reasonable inquiry and determining that, to the best of the signer's knowledge, information, and belief, each claim, defense, and allegation contained in the pleading is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification,

or reversal of existing law; or

(3) interpose, in a civil action, a claim, defense, or allegation for an improper purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(b) If the court determines that a party to a civil action has intentionally made a false statement of a material fact in connection with the prosecution or defense of a civil action, the court shall enter judgment against the party making the false statement on the issue to which the false statement relates. If the civil action involves multiple claims and the false statement does not apply to all claims, the judgment required under this section shall apply only to those claims to which the false statement relates.

(c) A person who is injured by a violation of (a) of this section may bring an action for compensatory damages. However, if the injury is the result of an act or omission of a

(1) party, then the action shall be asserted in the same action in which the injury arose; and

(2) nonparty, then the action shall be asserted in a separate action commenced after entry of final judgment in the action in which the injury arose.

(d) A person who, on the person's own behalf or as a representative of a party, takes part in the initiation, defense, continuation, or procurement of a civil action against another is subject to civil liability for compensatory and punitive damages if the person acts

(1) without probable cause on a claim or defense; or

(2) primarily for a purpose other than that of securing the proper adjudication of a claim or defense involved in the civil action.

(e) An action to recover damages under (c) of this section may be pled by a party to a civil action but may not be considered by the jury unless the person bringing the action or defense is the prevailing party on the claim in question.

(f) A person may not bring a civil action to recover damages under (d) of this section unless the person is the prevailing party and final judgment has been entered in the civil action described in (d) of this section.

* **Sec. 2.** AS 09.65.190(a), as enacted by sec. 1 of this Act, has the effect of amending Rule 13(e), Alaska Rules of Civil Procedure, by giving a person injured by a violation of AS 09.65.190(a) the right to file a claim for compensatory damages after serving a pleading.

* **Sec. 3.** AS 09.65.190(b), added by sec. 1 of this Act, has the effect of amending Rule 37, Alaska Rules of Civil Procedure, by requiring the court to enter judgment against a party making an intentional material false statement.

* **Sec. 4.** SEVERABILITY. Under AS 01.10.030, if any provision of this Act, or the application of a provision of this Act to any person or circumstance is held invalid, the remainder of this Act and the application to other persons shall not be affected.

* **Sec. 5.** This Act takes effect immediately under AS 01.10.070(c).

9-LS1013\G
Ford
2/9/96

CS FOR HOUSE BILL NO. 316(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVE MULDER

A BILL

FOR AN ACT ENTITLED

"An Act relating to civil liability for false claims and improper allegations or defenses in civil practice; amending Rule 37, Alaska Rules of Civil Procedure; and providing for an effective date."

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

* Section 1. AS 09.65 is amended by adding a new section to read:

Sec. 09.65.190. CIVIL LIABILITY FOR FALSE CLAIMS AND IMPROPER PRACTICE. (a) A person may not

(1) knowingly or recklessly file, or cause to be filed, a civil complaint, answer, or other civil pleading that contains false or misleading allegations or material misstatements of fact;

(2) sign a civil pleading before making reasonable inquiry and determining that, to the best of the signer's knowledge, information, and belief, each claim, defense, and allegation contained in the pleading is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification,

or reversal of existing law; or

(3) interpose, in a civil action, a claim, defense, or allegation for an improper purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(b) A person who is injured by a violation of (a) of this section may bring an action for compensatory and punitive damages. However, if the injury is the result of an act or omission of a

(1) party, then the action shall be asserted in the same action in which the injury arose; and

(2) nonparty, then the action shall be asserted in a separate action commenced after entry of final judgment in the action in which the injury arose.

(c) A person who, on the person's own behalf or as a representative of a party, takes part in the initiation, defense, continuation, or procurement of a civil action against another is subject to civil liability for compensatory and punitive damages if the person acts

(1) without probable cause on a claim or defense; or

(2) primarily for a purpose other than that of securing the proper adjudication of a claim or defense involved in the civil action.

(d) A person may not bring a civil action to recover damages under (c) of this section unless the person is the prevailing party and final judgment has been entered in the civil action described in (c) of this section.

(e) A party to a civil action who intentionally makes a material, false statement of fact in connection with the prosecution or defense of a civil action shall have liability entered against them on the claim in which the statement was made.

(f) A party to a civil action who knowingly or recklessly files a civil complaint, answer, or other civil pleading that contains false or misleading allegations or material misstatements of fact or interposes a claim, defense, or allegation for an improper purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation, is subject to civil liability for compensatory damages.

(g) An action to recover damages under (b) and (c) of this section may be pled by a party to a civil action but may not be considered by the jury unless the person

bringing the action or defense is the prevailing party on the claim in question.

* **Sec. 2.** AS 09.65.190(e), added by sec. 1 of this Act, has the effect of amending Rule 37, Alaska Rules of Civil Procedure, by requiring the court to enter judgment against a party making an intentional material false statement.

* **Sec. 3.** SEVERABILITY. Under AS 01.10.030, if any provision of this Act, or the application of a provision of this Act to any person or circumstance is held invalid, the remainder of this Act and the application to other persons shall not be affected.

* **Sec. 4.** This Act takes effect immediately under AS 01.10.070(c).

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES

CHAIR,
LEGISLATIVE COUNCIL

CO-CHAIR,
HOUSE SPECIAL COMMITTEE
ON MILITARY AND
VETERANS' AFFAIRS

CHAIR,
MILITARY AFFAIRS FOR
ANCHORAGE CAUCUS

REPRESENTATIVE ELDON MULDER
DISTRICT 23 MULDOON-FT. RICHARDSON

SPONSOR STATEMENT

CS for HB 316

House Bill 316 requires parties to law suits to be truthful and responsible in their pleadings. This bill discourages false statements in litigation and encourage responsibility by all parties and their attorneys. It requires more careful and focused preparation and presentation of pleadings.

This bill creates an obligation for litigants and attorneys to make reasonable efforts to insure that claims have a probability of succeeding. If the claim is knowingly or recklessly false, both the attorney and the party can be assessed damages.

HB 316 requires attorneys and their clients to research their claims to assure they are factually supported before filing a suit. This bill will help eliminate "boiler plate" pleadings in law suits and encourage responsible and focused pleadings. "Boiler plate" pleadings include everything anyone could ever imagine could have happened rather than focusing on those specific issues that actually happened. These extraneous pleadings are expensive to work through and are most often thrown out. They simply cause one party to expend significant dollars to pare the filing down to the real issues.

Many suits are often times cheaper to settle than litigate, regardless of their merit. This bill does not affect suits filed in good faith. It will, however, have a significant deterrent effect on those without merit. A system that allows deceit to be rewarded must be changed.

ALASKA STATE CAPITOL; JUNEAU, AK 99801-1182 • PHONE (907) 465-2647 • FAX (907) 465-3518
716 W. 4TH AVENUE; ANCHORAGE, AK 99501-2133 • PHONE (907) 258-8193 • FAX (907) 258-5511

This bill assigns financial responsibility to those who file suits without probable cause, those who provide false information, those who want to use claims and cross claims to cloud the issues and those who want to go on unsuccessful fishing trips. This is not why we have and support a judicial system.

A jury will make the determination whether the information presented was intentional and material. If honest errors are made, there will be no problem. I believe that the jury can make these decisions and that the deterrent effect of this bill will apply to those cases that are inappropriate without inhibiting the filings of cases believed to have merit.

ALASKA ACADEMY OF TRIAL LAWYERS

Analysis of HB 316/SB 184
Civil Liability for False Claims and Improper Practice

HB 316/SB 184 presumably seeks to discourage frivolous or malicious litigation. The goal is salutary, but the bill is overly broad and will, itself, have the effect of fostering unnecessary litigation. The court already has a mechanism (Rule 11) to impose sanctions on litigants and attorneys who file pleadings that are not both (1) well grounded in fact, and (2) warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. Section (a)(2) of the bill mirrors the existing language in Rule 11, and does not appear to add anything.

There are several problems with the remainder of the bill. First, Section (a)(1) prohibits a person from "knowingly or recklessly" filing a pleading with false or misleading allegations. The words "knowingly and recklessly" are misplaced. Everyone knowingly "files" pleadings. It is hard to imagine how someone could accidentally file a pleading. Presumably, the legislation's intent is to prohibit filing a pleading which "knowingly or recklessly" makes false or misleading allegations. As written, the section makes no sense.

Even if the language in Section (a)(2) were corrected, it is unworkably overbroad. In any lawsuit, either the plaintiff's or defendant's pleadings contain allegations or defenses which, ultimately, are proved to be untrue. Only one side wins a case. This bill will simply invite "follow-up" litigation, every time a case has been concluded, in which the successful party will allege that the unsuccessful party knowingly or recklessly asserted their position. Taken to its logical conclusion, we could then have a <u>second</u> follow-up case in which the prevailing party in the <u>first</u> follow-up case sues the loser, alleging that he or she knowingly or recklessly filed false pleadings in that action. And, on and on.

Section (c) attempts to rewrite the law on the civil tort of malicious prosection. Currently a litigant in a malicious prosecution claims has to prove: (1) that the claim was asserted without probable case; <u>and</u> (2) that it was asserted for an improper purpose. The legislation seeks to break these two elements into the disjunctive, rather than the conjunctive, and permit a civil claim for wrongful prosecution on the basis of either (1) <u>or</u> (2), but does not require both. Why? Easing the requirements for a malicious prosecution claim presumably is intended to deter and scare off potential litigants. A lot of good claims likely will be deterred along with some bad ones, however.

The legislature should be careful about enacting legislation that closes the courthouse doors to litigants. To be sure, most defendants believe that they are wrongfully sued and, indeed, many are. The system already has at least three mechanisms in place to deter wrongful litigation: (1) the awarding of attorney's fees to the prevailing party; (2) the sanction provisions of the existing Rule 11; and (3) the existing civil cause of action for malicious prosecution. It is very doubtful that these existing tools are insufficient. The effect of this bill is to hold a gun to the head of litigants and their counsel; if they fail to prevail they face the likelihood of being sued in a second action for having sought relief in the first. There is questionable wisdom in fostering "follow-up" litigation in which the only dispute is how well someone behaved in another lawsuit. We should be trying to reduce, not increase, the workload of the courts.

[redacted]USE COMMITTEE REPO[redacted]

erred: April 21, 1995 FURTHER REFERRALS:

Committee Action: 2/19/96

ICIARY Committee considered: HB 316

BILL NO. 316 CIVIL LIABILITY FOR IMPROPER LAWSUIT

relating to civil liability for false claims and improper allegations or defenses in civil practice; and g for an effective date."

ends it be replaced
following committee substitute CSHB 316 (JUD) [4 the same title
[ ] a new title

tional referral to _____ Committee
ched amendment(s)

TS: _____ Letter of Intent

CHES NEW FISCAL NOTE(s): (Dept) APPROVES PREVIOUS: (Dept/Date)

al note(s) _____ [ ] fiscal note(s) _____

o fiscal note(s) Courts [ ] zero fiscal note(s) _____

ING WITH RECOMMENDATIONS	DP	DNP	NR	AM
Brian E. Porter	✓			
[illegible]	✓			
[illegible]			X	
[illegible]	✓			
[illegible]	✓			
[illegible]	✓			
[illegible]	✓			

D. Nichols

Robert A. Mintz

CARR
GOTTSTEIN
PROPERTIES

550 W. 7th Avenue, Suite 1540 Anchorage, AK 99501
telephone (907) 278-2277 facsimile (907) 272-3695

Alaska State Legislature
HOUSE OF REPRESENTATIVES

Official Business

State Capitol
Juneau, AK 99801-1182

To: Legislative Legal

From: Rep. Porter, Chair.
House Jud. Committee

Date: January 6, 1996

Please incorporate the attached two (2) page memo to HB 316. Once incorporated, please refer HB 316 as CS HB 316 (JUD).

Thank you

To: Tom

Copy of bills Jana
you
Dani

S 184 (L&C)
(L&C)
(Jud)

9-LS1013\C

expands to other party

HOUSE BILL NO. 316

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - FIRST SESSION

BY REPRESENTATIVE MULDER

Introduced: 4/21/95
Referred: Judiciary

A BILL

FOR AN ACT ENTITLED

"An Act relating to civil liability for false claims and improper allegations or defenses in civil practice; and providing for an effective date."

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

*** Section 1.** AS 09.65 is amended by adding a new section to read:

Sec. 09.65.190. CIVIL LIABILITY FOR FALSE CLAIMS AND IMPROPER PRACTICE. (a) A person may not

(1) knowingly or recklessly file, or cause to be filed, a civil complaint, answer, or other civil pleading that contains false or misleading allegations or material misstatements of fact;

(2) sign a civil pleading before making reasonable inquiry and determining that, to the best of the signer's knowledge, information, and belief, each claim, defense, and allegation contained in the pleading is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; or

(3) interpose, in a civil action, a claim, defense, or allegation for an improper purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(b) A person who is injured by a violation of (a) of this section may bring an action for compensatory and punitive damages.

(c) A person who, on the person's own behalf or as a representative of a party, takes part in the initiation, defense, continuation, or procurement of a civil action against another is subject to civil liability for compensatory and punitive damages if the person acts

(1) without probable cause on a claim or defense; or and (c.l.)

(2) primarily for a purpose other than that of securing the proper adjudication of a claim or defense involved in the civil action.

(d) A person may not bring a civil action to recover damages under (c) of this section unless the person is the prevailing party and final judgment has been entered in the civil action described in (c) of this section.

* Sec. 2. This Act takes effect immediately under AS 01.10.070(c).

MEMO

HOUSE BILL NO. 316
IN THE LEGISLATURE OF THE STATE OF ALASKA
NINETEENTH LEGISLATURE - FIRST SESSION

RAM 1/18/96 revision

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(3) interpose, in a civil action, a claim, defense, or allegation for an improper purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(b) A person who is injured by a violation of (a) of this section may bring an action for compensatory and punitive damages:

(1) <u>if the injury is perpetrated by a party, then the claim for redress shall be asserted in the same action in which the injury arose, and</u>

(2) if the injury is perpetrated by a non-party, then the claim for redress shall be asserted in a separate action commenced after entry of final judgment in the action in which the injury arose.

(c) A person who, on the person's own behalf or as a representative of a party, takes part in the initiation, defense, continuation, or procurement of a civil action against another is subject to civil liability for compensatory and punitive damages if the person acts

(1) without probable cause on a claim or defense; or

(2) primarily for the purpose other than that of securing the proper adjudication of a claim or defense involved in the civil action.

(d) A person may not bring a civil action to recover damages under (c) of this section unless the person is the prevailing party and final judgment has been entered in the civil action described in (c) of this section

(e) "any party to a civil action who intentionally makes a material, false statement of fact in connection with the prosecution or defense of a civil action shall have liability entered against them on the claim in which the statement was made."

(f) "any party to a civil action who knowingly or recklessly files a civil complaint, answer, or other civil pleading that contains false or misleading allegations or material misstatements of fact or interposes a claim, defense, or allegation for an improper purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation is subject to civil liability for compensatory damages.

(g) "the action to recover damages under sections (e) and (b) may be pled by any party to a civil action but shall not be considered by the jury unless the person bringing the action or defense is the prevailing party on the claim in question."

*** Section 2.** This Act takes effect immediately under AS 01.10.070(c).

*** Section 3.** The provisions of this Act are severable and the invalidity of any one section or sub-section or portion thereof shall not affect the validity of the remainder.