69300-0

69300-0

No. 69300-0

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

JASON DILLON, an individual;
Plaintiff,

vs.

SEATTLE DEPOSITION REPORTERS, LLC, a Washington company; DAVIS WRIGHT TREMAINE, LLP, a Washington Company; JAMES GRANT and Jane Doe Grant, individually and the marital community composed thereof if any;
Defendants.

On Appeal from King County Superior Court
The Honorable Bruce Heller

APPELLANT'S REPLY BRIEF

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I. REPLY

This case is about whether the defendants' *conduct,* clandestine recording of witness interviews, violated the Privacy Act. It is *about the defendants' conduct* measured against the statute, not Mr. Dillon's. However, the opposition brief desperately tries to distract from a reasoned analysis of these weighty issues by trying to make it a referendum on Mr. Dillon's conduct and morality. Defendants construct an over the top hit piece on Mr. Dillon personally, one which is utterly irrelevant to the material legal issues. The opposition brief makes a persuasive case that Judge Martinez apparently didn't like Mr. Dillon or Mr. Dillon's former employer, whom Judge Martinez never met. They make a persuasive case that Judge Heller apparently didn't like Mr. Dillon either. Both points are utterly irrelevant to the legal issues. Whether or not the judges *liked* Mr. Dillon has absolutely nothing to do with whether or not the Privacy Act allows attorneys to secretly record telephone witness interviews in Washington State.

Again, this case is about whether or not it is legal in Washington for attorneys to secretly record witness interviews, period, and there aren't two sets of rules that apply, one for bad guys and one for good guys. Attorneys Grant and Keenan made the recordings so this case is about Grant's and Keenan's conduct. If Dillon made the recording, it would be

about his conduct.

The lead issue is whether the parties to the conversations believed they were "private" or not, at the time they had them. Here, the record establishes the fact that Grant and Keenan made the secret recording *after* they expressly agreed with Mr. Dillon that the conversations were private. Again, there aren't two sets of rules for agreements, one for agreements with likable witnesses which attorneys have to keep, and a different one for unlikeable people that attorneys don't have to keep. There is one rule that applies to everybody. Dillon expressly told Grant and Keenan that he would only speak to them if the conversations were private and confidential. CP 581: 6-18 and CP 582. Grant and Keenan expressly told Dillon that the conversation was private and confidential. CP 581: 19-582: 4 Then they engaged in the conversations. These facts are in the record and these facts alone were sufficient for a denial of the summary judgment motion. The opposition brief completely ignores these facts in the apparent hope that this Court will overlook them too.

After that agreement was expressly made, what Mr. Dillon said during those conversations (whether true or not), or why he said the things he said (his disputed motives), or what the defendants later did with the recordings of those conversations, are irrelevant to the issue of *whether the act of recording* those private conversations violated RCW 9.73.030.

A. The Opposition Brief Ignores the Simple Summary Judgment Analysis and Concedes the Fact that the Defendants Expressly Agreed, in Advance, that the Conversations were "Private and Confidential."

The opening brief presented a straightforward legal analysis. The first issue was simply whether Mr. Dillon presented evidence to the Superior Court sufficient to allow a jury to find that the conversations were "private." The opening brief correctly identified twelve (12) separate facts, all in the record, any one of which would have been sufficient to support a jury finding that the conversation was intended to be private. See Opening Brief, p. 27-32. Reviewing these facts and all reasonable inferences therefrom in a light most favorable to Mr. Dillon, as is the procedural mandate on summary judgment and this *de novo* review of the summary judgment order, the trial court clearly erred by granting summary judgment.

More specifically, the opposition brief does not dispute or even discuss any the following facts in the record. Beginning at Opening Brief p.28:

Fact 1: "Mr. Dillon told Ms. Keenan that he would only speak to Grant and Keenan if the telephone calls would be 'private and confidential.'" -**Unchallenged and conceded.**

Fact 2: "Ms. Keenan told Mr. Dillon that she and Mr. Grant would keep the conversations 'private and confidential.'" -**Unchallenged and**

conceded.

Fact 3: "'But for' the expressed DWT agreement to keep the conversations private and confidential, Mr. Dillon would not have engaged in the conversations in the first place." **-Unchallenged and conceded.**

Ignoring that predicate discussion entirely, the opposition brief begins at p. 22-23 offering several arguments about why the *content* of the interviews should determine the intent of the conversations, and that determination should be the exact opposite of the intent stated by the parties themselves before the interviews even started.

The defendants first argument is merely a repeat of the previously successful and erroneous blurring the distinction between *content of the conversation* and *the conversation itself.* The argument seems to be that any conversation that involves the transmission of *non-private content* from one participant to another immediately renders the *conversation itself* non-private. This is an obvious fallacy with no support in logic or law. People have private conversations all the time in which they intend are private conversations and which they reasonably believe are private conversations, in which they discuss non-private content. In fact, it is often the case that public content is privately discussed. These are private conversations and indeed the whether or not the content is also private is

often irrelevant to whether the conversation is private. If the rule were otherwise, then the universe of protected conversations would be radically reduced, perhaps to the point where only a subset of legally privileged conversations is protected. In any event, the confusion about this should be easy to cure once and for all with a moderate amount of mental lifting. The opening brief set out three examples (A-C) to make this point, at p.32-33. Hopefully this example can help drive the point home:

Example D: A three judge panel in the court of appeals is in the business of reviewing public case files and deciding questions of appeals. All the information the judges rely upon is in the public record in the form of briefs and testimony. After reading the briefs and the Court Record, the 3 judges meet privately to discuss the case. In that private meeting, they only discuss the publicly available material and their intent is to ultimately write a publicly disseminated opinion. Can one of the judges or somebody else listening in, secretly record the conversation with his or her Iphone app? Of course not. All the *content* discussed in the meeting is public information, but the *conversation* itself is private.

The opposition's second argument seems to suggest that the *fact finder* can factually infer that the fact that a stranger spoke to attorneys about litigation topics, or that Dillon knew that the attorneys were "making notes" should be sufficient for a fact finder to infer that the

conversation was not private. Opp. At p. 23. First of all, it is factually incorrect to suggest they were "strangers." Dillon met Grant and Keenan three months earlier when they took his deposition for a day. See Appendix A. Second, this is essentially asking the court to create a new "interview exception" to the Privacy Act for attorneys interviewing witnesses, one that would override an attorneys specific promise to keep an interview private. It would be a rule permitting lawyers to lie to witnesses to get them to talk, like these lawyers did. The legislature already created a specific interview exception, or presumption, for conversations with one group of people but it limited that to members of the press involved in news gathering activities. RCW 9.73.030(4). It chose not create a similar exception for "attorneys interviewing witnesses in the scope of their job as attorneys," which is essentially what the defendants are asking the court to create. This Court should not create an exception to the statute that the legislature did not write.

Third, a court at summary judgment is not supposed to be the fact finder, nor is it supposed to make reasonable inferences *against* the nonmoving party. Further, a witness who is speaking to attorneys about a case, in a witness interview, may well expect that the attorneys will take notes and use the information in the case, but he or she may also expect that when those attorneys promise at the outset and on the condition of

having the conversation in the first place that the conversation itself is private, the witness should be able to rely on that fact and a jury should certainly be able to find that fact at trial.

Next, the defendants ask this Court to create a *content based* common law exception to the Privacy Act where the content of the private conversation involves an alleged confession of a fraudulent scheme, or alleged destruction of evidence. This is an interesting argument. Setting aside for a moment the fact that there was no confession of fraud, nor was there any affirmative finding of fraud by Judge Martinez (despite the half dozen, incorrect factual statements in the Opposition Brief to the contrary), it raises a number of issues.

First, it raises the issue of whether the courts should be in the business of adding *content based* exceptions to a statute that the legislature did not add. Here, the legislature wrote two content-based exceptions to the Privacy Act: Conversations involving child molestation and drug trafficking. RCW 9.73.200, 210. It did not write one in for "fraud confessing," "spoliation confessing," or "saying bad things about a former employer- true or not." So the question is raised: Regardless of whether the content of the conversations is properly characterized as fraud confessing, should the Court create an exception to the Privacy Act that the legislature chose not to create?

Second, it raises the question of how was it that Mr. Grant and Ms. Keenan knew, in advance of the conversation, that Mr. Dillon was going to confess a fraud (again saving for later whether that was a proper characterization). They absolutely did not and could not have known. Nevertheless, they went to great lengths to set up the recording mechanisms in advance, anyway. They got Thad the court reporter prepositioned with his transcription machine, his tape recorder and computer, all set up in a room at the DWT firm. The defendants intended to record that conversation regardless of the content. They intended to do it secretly and they intended to do it despite their express agreement that it was a private conversation. This fact is extremely troublesome in the context of the broader ethical and legal practice issues in this case, because it suggests that there is (or at least was) an ongoing, apparently unbounded practice of clandestine recording going on at the DWT firm. Indeed, defendants were given the opportunity to clarify this practice in their opposition brief, but did not do so. Instead, they responded with diversion: 15 pages talking about how Mr. Dillon was a bad guy and Netlogix is a crooked company; 10 pages defending their practice of clandestine recording in this case; but, not a *single sentence* indicating they believe clandestine witness recording is impermissible; not a single sentence assuring the Court that they are not continuing this clandestine

recording practice in their firm.

Grant believed it was illegal to *tape record* that private conversation, which is why Mr. Grant alleges he was so quick to tell Thad to turn of the tape recorder. Grant believed it was a private conversation because he told Dillon it was and because he claimed a privilege over the entire recording. He just thought, erroneously, it was okay to record it with a live court reporter and transcription machine. He failed to read the Privacy Act closely before doing it. Now, after being caught, the defendants ask this Court to invent a new exception to the Privacy Act that retrospectively ratifies their past illegal conduct, one that will fundamentally undermine the Privacy Act and change an important aspect of how attorneys practice law in this state. The Court should decline the invitation.

B. The Clandestine Recording, Lying to the Witness, etc. was Unethical Conduct and is Admissible on the Liability Issue.

At p. 31, defendants argue that it is irrelevant whether they, as attorneys, lied to the witness or violated the rules of professional ethics with their clandestine recording program. Their argument is a thinly premised misstatement of law, namely "civil liability cannot be premised upon a violation of ethical rules," citing *Hizey v. Carpenter*, 119 Wn.2d 251, 261 (1992). Opp. Brf. at p. 31. However, this prohibition only

applies to legal malpractice cases.

> "In a malpractice case, an expert witness may not explicitly refer to the ethical rules, nor may the existence of the rules be revealed to the jury via instructions. *Hizey*, 119 Wn.2d at 254. But courts may consult and rely on the ethical rules for reasons other than to find malpractice liability, and where they have done so, the holdings in such pre-*Hizey* cases remain in full force and effect."

Benhke v. Ahrens, __ Wn.App. __ at p. 16-17 (Div. I, Dec.20, 2012 published).

Again, this case focuses on the conduct of the defendants because it was the defendants who recorded the conversations without consent, not Mr. Dillon. Further, it was the defendants, not Mr. Dillon who were subject to the rules of professional ethics; the rule that prohibits lying to witnesses; the rules that prohibit clandestine recordings of witness interviews. Defendants broke both these rules by lying to the witness and clandestinely recording the calls. Both events are admissible and may be considered by a jury because this is not a legal malpractice case so the *Hizey* prohibition does not apply.

Furthermore, members of the public have the right (1) to expect that attorneys will act ethical (2) to expect that attorneys will not lie to a witness and (3) to expect that attorneys will tell witnesses (or anybody else for that matter) that they intend to record a conversation before they do so. Regardless of whether Mr. Dillon was a bad guy or a good guy, as a

member of the public dealing with members of the Bar, it was fair to expect the attorneys were not lying when they said the conversations were private. If those attorneys deliberately lied and intended to just say that so they could get the witness talking, then their professional misconduct is relevant to the Privacy Act claim. The Bar license is not a license to ignore the law. The Bar license requires a higher standard, and that includes both telling the truth and not making clandestine recordings of witness interviews. The ethical implications of attorneys secretly recording conversations are not something to be taken lightly. It is a topic recently presented to Congress by the Congressional Research Service in an August 12, 2010 white paper titled "Wiretapping, Tape Recorders, and Legal Ethics: An overview of Questions Posed by Attorney Involvement in Secretly Recording Conversation. See Appendix B.

C. The Defendant Created a Schrodinger Cat[1]: A Conversation that is, at the Same Time, Both "Private" (to Support a Claim of Privilege) and "Non-Private" (to Avoid Coverage by the Privacy Act).

One of the toughest conundrums for the defendants is for them to

[1] Schrodinger's Cat refers to a paradox of quantum mechanics that suggests matter can exist in two opposite and contradictory states at the same time and place. It refers to an example commonly used to explain a principal that defies common sense, the observer's paradox. According to the example, the cat is simultaneously both alive and dead in the box at the same time. It is a principal of physics, not logical legal analysis. Legal analysis is supposed to resolve contradictions, not invent new ones.

explain how the conversations with Dillon were both a) private to support the privilege claim, but also b) not private so as to avoid the Privacy Act. They simply cannot be both at the same time.

Defendants first try to solve this by arguing that the recording was just a set of attorney notes, and attorney notes from a public meeting are privileged. They offer an example. In that example, the attorney writes his or her own thoughts and impressions, chooses what to write and what is not important, etc., all of which involves attorney judgment. In this example, the notes are the product of the attorney judgment and the notes are private, so the notes are privileged. The example does not work for recordings, however, because exact recordings are not attorney notes. Exact recordings are not the product of attorney judgment as to what to write down and what not to write. Everything is written so there is no attorney judgment, and without attorney judgment there is no privilege. That is, unless the conversation itself is private in its entirety. Indeed, that is exactly what Grant and Keenan told Mr. Dillon at the outset, that the conversations would be "private and confidential." Those private conversations were privileged because they were private, and not privileged if they weren't private. Grant knew what he said, he knew he told Dillon that they were private and confidential, and knowing this he made a proper claim of privilege over the recordings.

Altering the opposition's example slightly to reflect the facts of this case is helpful. Suppose the attorney was sitting in on a meeting with a court reporter and a transcription machine and the reporter took a verbatim record of the entire meeting. The attorney asks questions at the meeting, and the recording is not edited in any manner whatsoever. It is an exact, complete recording. No attorney judgment is exercised as to what to include or exclude from the recording because everything is recorded. Now, is *the meeting* private or public? If meeting is public, then the attorney cannot make a good faith claim of work product privilege over the recording, any more than he could over a recording of any public meeting. If the meeting is private, then the attorney might make a plausible claim of privilege, because he could argue that his choice of questions at the meeting were the product of his attorney judgment, and they were made in a private setting. But *the meeting itself* cannot be both public and private at the same time.

Here there were no attorney notes; there was no attorney judgment as to what to write down and what not to write, etc. There was no filter between the conversation and the recording so there was no attorney judgment involved in the filtering. There was a verbatim recording of two entire conversations. Either the conversations were private or not, they cannot be both. When Mr. Grant claimed the recordings of the

conversations were privileged, he was claiming they were private conversations because you cannot make a privilege claim over recording of a *public* meeting. Grant initially thought he was ok with this because of his erroneous belief that a transcription was not a "recording" under the Privacy Act. Later, when he discovered that a transcription was a recording under the Privacy Act, he was forced to reverse course and claim the entire conversation was not private. His problem was being stuck, on the record, making two directly contradictory claims about the same interviews. Thus the conundrum, how can the defendants defend their contradictory positions about the conversations with Dillon? How can the conversations be both private and non-private at the same time?

Apparently, the defendant's solution is to create a new rhetorical phrase to apply to the recordings: "verbatim notes of interview." This phrase "verbatim notes of interview," frequently repeated in the opposition brief in lieu of the word "recording," is the defendants' Schrodinger Cat: A recording of a conversation is two opposite things at the same time.

D. Collateral Estoppel Does Not Apply.

Judge Heller correctly rejected the collateral estoppel argument at summary judgment. As it did at the lower court, the defendants incorrectly articulated the law on collateral estoppel in the opposition brief.

The correct statement of controlling case law on the doctrine of collateral estoppel is *McDaniels v. Carlson*, 108 Wn.2d 299, (1987). The four elements are 1) issues are identical; 2) final judgment on the merits; 3) same parties or *privity*; 4) absence of injustice. *Id.* at 303. The party seeking to apply collateral estoppel bears the burden of showing *all four* elements apply. As was the case in *McDaniels*, here there is neither an 1) identically of issues nor 3) privity of parties.

1. The issues are not identical. "Collateral estoppel requires that the issue decided in the prior adjudication is identical with the one at hand." *Id* at 305. "Where an issue arises in two entirely different contexts, this requirement is not met." *Id* at 305. Further, collateral applies to "ultimate facts" and not to "evidentiary facts which are merely collateral to the original claim." *Id* at 305. Here, the findings by Judge Martinez fail on both counts. First, the issues were not identical because they arrive in two dramatically different procedural contexts. In the federal case, the court held a narrow evidentiary hearing on a spoliation issue, allowed only one witness (Mr. Dillon- Mr. Grant and Ms. Keenan were allowed to submit declarations but the Court would not permit their examination), and made an evidentiary ruling, on a more probable than not evidence standard. In this case, the issue of whether the conversations were private were considered on summary judgment, under a summary judgment standard.

In the summary judgment context, as opposed to the truncated evidentiary hearing context, all facts and reasonable inferences are viewed in a light most favorable to Mr. Dillon. Judge Martinez decidedly did not apply this standard. Second, the *fact* the defendants seek to apply the collateral estoppel doctrine to, namely whether the conversations were private or non-private, was not an "ultimate fact" in that Netlogix case. It was an "evidentiary fact" that was resolved by the court as a predicate to determining whether the content of the recordings were admissible on the ultimate issue, the spoliation. The reasoning of the Martinez order was something like this: The court found at the evidentiary hearing on a more probable than not basis that the conversation was not private, therefore the recording was admissible, and then the court found that the statements in the transcript by Mr. Dillon were true, from which the court determined there was spoliation of evidence. The "ultimate fact," which is on appeal and is still hotly disputed by Netlogix (which was not even allowed to testify at this hearing), was that Netlogix committed litigation misconduct, essentially. Whether the conversations Dillon had with the TMobile attorneys were private or not, was an evidentiary finding at an evidentiary hearing. "Evidentiary facts" are not subject to collateral estoppel. *McDaniels* at 258.

2. The parties are neither identical nor in acceptable privity. The privity requirement in collateral estoppel is based on the principle that "a stranger's rights cannot be determined in his absence from the controversy." *Id.* At 306. Exceptions to the strict privity requirement in collateral estoppel are "narrowly construed." *Id.* at 306.

There is no privity between a disgruntled ex-employee and a former employer. Once Mr. Dillon quit Netlogix in early August, 2010 there was no possibility of any privity of any sort between them. He was not an employee of Netlogix when the defendants recorded the conversations in August and September, 2010. Indeed, if he had been an employee at that time, the entire conversation could not have taken place due to *ex-parte* contact rules. Mr. Dillon was not a Netlogix owner and he was never a party to the *Netlogix v. TMobile* case.

Neither was there any privity in the federal court *process* itself. Netlogix was the party to *Netlogix v. TMobile* and was suing TMobile for breach of contract claims. Mr. Dillon had no claims against TMobile so there is no commonality or privity of claims. Mr. Dillon appeared in the *Netlogix v. TMobile* case as a non-party witness on his own behalf, with his own attorney, Mr. David Smith of the Garvey, Schubert firm. Mr. Smith did not represent Netlogix. Mr. Dillon had no rights under the civil rules to compel discovery or subpoena witnesses against him, or even

ask for such a thing from the court. Mr. Dillon had no right to submit briefing, proposed findings, etc. and no right to appeal. There was no privity between Mr. Dillon and Netlogix.

The privity cases cited by defendants are *res judicata* cases, not *collateral estoppel* cases and several conclude that there is no identity of parties even in that context. *Kuhlman v. Thomas*, 78 Wn.App. 115 (1995)(res judicata case where claims involving an employee *vis-a-vis* the third parties and the employer were essentially the same); *Feature Realty v. Kirkpatrick and Lockhart*, 161 Wn.2d 214 (2007)(2 dismissal rule applies in res judicata to malpractice defendant attorney and his law firm where both were parties to the case and claims against them were virtually identical); *Stevens County v. Futurewise*, 146 Wn.App. 493 (2008) (res judicata case where there was no identity of issues or parties); *Garcia v. Williams*, 63 Wn.App. 516 (1991)(res judicata case where there was no identity of issues or parties).

Hackler v. Hackler, 37 Wn.App. 791 (1984) is the only collateral estoppel case cited by defendants, and that case does not apply here. In *Hackler*, the case was about a property deed and the issue was whether the successor to the prior litigants, the person who obtained the total package of rights of the prior litigant, was in privity with the prior litigant. In that case, the successor to the deed claim had privity with the prior holder

because it was the exact same claim. The court held that he was because he was around at the time of the prior hearing and by virtue of being the successor in interest on a deed, was in privity. Here, Mr. Dillon is not the successor to the Netlogix claim against TMobile; he is an ex-employee who got mad at his prior boss said some incorrect things to his boss' opponents in a litigation that hurt his former boss in a lawsuit with a third party. That is not privity. The *Hackler* analysis has nothing to do with whether a disgruntled ex-employee is in privity with a prior employer.

E. The Anti-SLAPP Claims.

The following is protected under anti-SLAPP:

(2)(a): ...testimony and documents submitted to a court, etc.

(2)(b): ...testimony and documents submitted in connection with an issue under consideration by a court, etc.

(2)(c): ...testimony and documents likely to encourage public participation in legislative process, judicial process, etc.

(2)(d): ...statements made in an open public forum in connection with an issue of public concern, etc.

(2)(d): ...other lawful conduct...in furtherance of the constitutional right of free speech in connection with an issue of public concern or in furtherance of the exercise of the constitutional right of petition.

Noticeably absent from this list is "the act of secretly recording

witness interviews, by lawyers, for their use in a private lawsuit." Secret recording for use in a private lawsuit is not speech, it is not a statement, and it is not an issue of public concern or the constitutional right of petition. Flag burning is constitutionally protected speech and petition, clandestine recording is not. Anti-SLAPP protects public speech and protest because they are necessary pillars of a free society. Wiretapping, secret recording, lying to witnesses to get them to talk angrily about their former bosses in order to get advantage in a lawsuit is criminal, dark, and ethical misconduct. There is a difference and the anti-SLAPP statute should not be interpreted so blindly as to miss that difference.

First off, the opposition brief mischaracterizes the *Netlogix, Akrie v. Tmobile, et. al.* case with Judge Andrus, as well as her order. In that case, Judge Andrus held that Netlogix lost on the merits because it did not have standing to bring the Privacy Act Claim, principally because Netlogix was not a party to the conversation.

On the anti-SLAPP issue, Judge Andrus observed that Netlogix pleaded that the offending act was the publication of the recorded conversations through the internet, emanating from the federal court file. In that sense, Judge Andrus concluded, the complaint addressed an RCW 4.24.525(2)(a) or (b) item, "...Any...written...document submitted...in a judicial proceeding..."

That is substantially different than this case, wherein Mr. Dillon only pleads narrowly and very specifically, that the offending conduct was the *act of recording* 2 conversations. He makes no allegations whatsoever about their subsequent use or nonuse in any proceedings. These things are irrelevant and unmentioned in the *Dillon complaint.* As such, the only grounds the defendants attacked the Dillon Complaint and considered by the Superior Court as anti-SLAPP were under RCW 4.24.525(**2**)(**e**), "...lawful conduct...in furtherance of the...right to petition." This was the precise grounds addressed by Judge Heller, and this was the argument presented by defendants in briefing and at oral argument.

As pointed out in the opening brief, however, the (2)(e) argument breaks down because the "right to petition" is not, as Judge Heller erroneously ruled, a synonym for "any judicial proceeding." The "right of petition" refers to the First Amendment US Constitutional right of petition the government for a redress of grievances. It does not apply here, because the clandestine recording of a witness interview by a couple of lawyers has nothing to do with somebody exercising their First Amendment right to petition the government for redress of grievances. It is stand alone, criminal conduct. The opening brief supports this argument with numerous legal authorities, none of which are contradicted by the opposition brief.

Instead, the opposition argues that the Court is not limited to the pleadings, which seems to be a suggestion that the court or an opposing party can go ahead and make up whatever facts it thinks appropriate to support an anti-SLAPP claim. Here, the Complaint was very clear to not address anything having to do with court filings or witness testimony- it had nothing to do with the mechanism of the public judicial process. It dealt only with the act of the recording. Defendants, however, want to essentially rewrite the complaint, add facts and add claims, then turn around and allege that those added claims are subject to anti-SLAPP.

Alternatively, and this is really what the defendants are asking, is that the defendants are claiming that they are entitled to make secret recordings of witness interviews, and this practice is protected by anti-SLAPP simply because it's part of their litigation strategy. What they are really arguing is that they can break any law or ethical rule, but so long as they are doing it in litigation, it is permissible and protected under anti-SLAPP. That is what they are really asking for here.

Defendants completely misunderstand the *Gerbosi* case. *Gerbosi v. Gaims,* 122 Cal.Rptr. 3d 73 (Cal.App. 2011). Their interpretation of *Gerbosi* gives them exactly what is described above; a blank check to break any law, so long as it's in furtherance of litigation. Defendants reading of *Gerbosi* would allow them to break any law in furtherance of

litigation, but when challenged, they could summarily force the victim to prove the entire criminal case conclusively, on day one, and without any discovery or the ability to depose or subpoena anybody. Who could possibly prove a case under those circumstances? Nobody. The net result would be a rule that makes lawyers free to break any law because the mere challenge would put the challenger to an impossible burden of proof, with an enormous financial penalty for failure. The defendants' interpretation of *Gerbosi* would virtually immunize attorneys from responsibility for criminal conduct committed in the course of litigation. As the defendants would interpret *Gerbosi*, every time an attorney secretly recorded a witness interview without consent, and the witness found out about it and brought an RCW 9.73.060 claim, that witness would expect an immediate anti-SLAPP counterclaim and motion; that witness would be forced to prove the entire Privacy Act violation claim on day 1 without any discovery, subpoena power, etc. and the penalty for not doing so would be $10,000 plus $70,000 attorney's fees (like in this case) for a single motion. If that's how this Court reads *Gerbosi*, then the Privacy Act is over. The hammer the legislature gave the victims in RCW 9.73.060 is dwarfed by the hammer of RCW 4.24.525 that the law firm will swing back at the victims of illegal recording. That's exactly what happened here, and that's exactly what these defendants are asking this Court to validate.

The defendants raise two additional grounds for their anti-SLAPP claim. First, they claim that protection under RCW 4.24.525(**2**)(**a**), protection for oral statements, written statements, and documents submitted in a legislative, executive or judicial proceeding. However, Mr. Dillon's complaint had absolutely nothing to anybody's submission of oral statements, written statements or documents in any proceeding at all. Mr. Dillon's complaint was very specific; it sought only statutory damages under RCW 9.73.060 for two instances of the *act of illegal recording private telephone conversations*. The complaint makes no reference of, and complains of no conduct related to, anything having to do with any filings in a judicial proceeding. RCW 4.24.525(**2**)(**a**) does not apply.

Second, defendants try to bootstrap their defense into RCW 4.24.525(**2**)(**b**), which protects oral statements, written statements, documents submitted in connection with an issue under consideration or review by a legislative, executive or judicial proceeding. This is not materially different than (2)(a), because the Dillon Complaint does not address it either. Again, the Dillon complaint only complains of the act of illegal recording. That act gives Mr. Dillon a right to statutory damages under RCW 9.73.060 and it is utterly irrelevant as to what the defendants chose to do with that illegal recording. They could stuff it in their collective shoes or file it with the US Supreme Court, either way it was an

illegal recording because it was private and there was no all-party consent. Either way Mr. Dillon is entitled to a damage claim under RCW 9.73.060 exactly as the Legislature intended because the anti-SLAPP law did not repeal the Privacy Act.

Signed and dated this 19th day of February, 2013.

Dennis Moran, WSBA #19999
William Keller, WSBA #29361

CERTIFICATE OF SERVICE

I swear under penalty of perjury that on February 19, 2013, 2 copies of the attached document was delivered to the Court of Appeals, Division 1, and served to all counsel of record.

/s/Marisa Testa

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APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON, AT SEATTLE

VOLCAN GROUP, INC., d/b/a NETLOGIX, a California corporation,
Plaintiff, vs.
T-MOBILE USA, INC., a Delaware corporation,
Defendant.
No. 2:10-cv-00711-RSM

VIDEOGRAPHED DEPOSITION UPON ORAL EXAMINATION
OF
JASON DILLON

9:01 a.m.
May 18, 2011
1201 Third Ave
Seattle, Washington

Margaret Walkky, CCR, RPR, RMR, CRR
Court Reporter, License No. 2540

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APPENDIX B

Wiretapping, Tape Recorders, and Legal Ethics: An Overview of Questions Posed by Attorney Involvement in Secretly Recording Conversation

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Summary

In some jurisdictions, it is unethical for an attorney to secretly record a conversation even though it is not illegal to do so. A few states require the consent of all parties to a conversation before it may be recorded. Recording without mutual consent is both illegal and unethical in those jurisdictions. Elsewhere the matter is more uncertain.

In 1974, the American Bar Association (ABA) opined that surreptitiously recording a conversation without the knowledge or consent of all of the participants violated the ethical prohibition against engaging in conduct involving "dishonesty, fraud, deceit or misrepresentation." The ABA conceded, however, that law enforcement recording, conducted under judicial supervision, might breach no ethical standard. Reaction among the authorities responsible for regulation of the practice of law in the various states was mixed. In 2001, the ABA reversed its earlier opinion and announced that it no longer considered one-party consent recording per se unethical when it is otherwise lawful.

Today, this is the view of a majority of the jurisdictions on record. A substantial number, however, disagree. An even greater number have yet announce to an opinion.

A sampling of the views of various bar associations in the question is attached. An earlier version of this report once appeared under the same title as CRS Report 98-250. An abridged version of this report is available without footnotes or attachment as CRS Report R42649, *Wiretapping, Tape Recorders, and Legal Ethics: An Abridged Overview of Questions Posed by Attorney Involvement in Secretly Recording Conversation.*

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Introduction

Has an attorney engaged in unethical conduct when he or she secretly records a conversation? The practice is unquestionably unethical when it is done illegally; its status is more uncertain when it is done legally. The issue is complicated by the fact that the American Bar Association (ABA), whose model ethical standards have been adopted in every jurisdiction in one form or another, initially declared surreptitious recording unethical per se and then reversed its position. Moreover, more than a few jurisdictions have either yet to express themselves on the issue or have not done so for several decades. A majority of the jurisdictions on record have rejected the proposition that secret recording of a conversation is per se unethical even when not illegal. A number endorse a contrary view, however, and an even greater number have yet to announce their position.

Background

Federal and state law have long outlawed recording the conversation of another.[1] Most jurisdictions permit recording with the consent of one party to the discussion, although a few require the consent of all parties to the conversation.[2]

Both the ABA's Code of Professional Responsibility (DR 1-102(A)(3)) and its successor, the Model Rules of Professional Conduct (Rule 8.4(b)), broadly condemn illegal conduct as unethical. They also censure attorney conduct that involves "dishonesty, fraud, deceit or misrepresentation."[3] In 1974, the ABA concluded in *Formal Opinion 337* that the rule covering dishonesty, fraud, and the like "clearly encompasses the making of recordings without the consent of all parties." Thus, "no lawyer should record any conversation whether by tapes or other electronic device, without the consent or prior knowledge of all parties to the conversation." The *Opinion* admitted the possibility that law enforcement officials operating within "strictly statutory limitations" might qualify for an exception.

Reaction to the *Opinion 337* was mixed. The view expressed by the Texas Professional Ethics Committee was typical of the states that follow the ABA approach:

> In February 1978, this Committee addressed the issue of whether an attorney in the course of his or her practice of law, could electronically record a telephone conversation without first informing all of the parties involved. The Committee concluded that, although the recording of a telephone conversation by a party thereto did not per se violate the law, attorneys were held to a higher standard. The Committee reasoned that the secret recording of conversations offended most persons' concept of honor and fair play. Therefore, attorneys should not electronically record a conversation without first informing that party that the conversation was being recorded.

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[1] Since the passage of the Omnibus Crime Control and Safe Streets Act in 1968, an increasing number of states have looked to the federal statute when drafting their statutes in the area: see generally CRS Report R41733, *Privacy: An Overview of the Electronic Communications Privacy Act*.

[2] *Id.* at 49 (Appendix B: Consent Interceptions Under State Law).

[3] ABA RULES OF PROFESSIONAL CONDUCT, Rule 8.4(c); ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 1-102(A)(4).

> The only exceptions considered at that time were "extraordinary circumstances with which the state attorney general or local government or law enforcement attorneys or officers acting under the direction of a state attorney general or such principal prosecuting attorneys might ethically make and use secret recordings if acting within strict statutory limitations conforming to constitutional requirements," which exceptions were to be considered on a case by case basis.
>
> ... [T]his Committee sees no reason to change its former opinion. Pursuant to Rule 8.04(a)(3), attorneys may not electronically record a conversation with another party without first informing that party that the conversation is being recorded. *Supreme Court of Texas Professional Ethics Committee Opinion No. 514* (1996).[4]

A second group of states—Arizona, Idaho, Kansas, Kentucky, Minnesota, Ohio, South Carolina, and Tennessee—concurred but with an expanded list of exceptions, for example, permitting recording by law enforcement personnel generally not just when judicially supervised;[5] or recording by criminal defense counsel;[6] or recording statements that themselves constitute crimes such as bribery offers or threats;[7] or recording confidential conversations with clients;[8] or recordings made solely for the purpose of creating a memorandum for the files;[9] or recording by a government attorney in connection with a civil matter;[10] or recording under other extraordinary circumstances.[11]

A third group of jurisdictions refused to adopt the ABA unethical per se approach. In one form or another the District of Columbia, Mississippi, New Mexico, North Carolina, Oklahoma, Oregon, Utah, and Wisconsin suggested that the propriety of an attorney surreptitiously recording his or her conversations where it was otherwise lawful to do so depended upon the other circumstances involved in a particular case.[12]

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[4] The states that appeared to share this view included Alabama, Alaska, Colorado, Hawaii, Iowa, Missouri, and Virginia. *Alabama Bar Association Opinion 1983-183* (1984); *Alaska Bar Association Ethic Committee Ethics Opinions No. 92-2 (1992)* and *No. 91-4* (1991); *People v. Smith*, 778 P.2d 685, 686, 687 (Colo.1989); *Hawaii Formal Opinion No. 30* (1988); *Iowa State Bar Association v. Mollman*, 488 N.W.2d 168, 169-70, 171-72 (Iowa 1992); *Missouri Supreme Court Advisory Committee Opinion Misc. 30* (1978); *Virginia State Bar Association Legal Ethics Opinions 1635* (1995) and *1324; Gunter v. Virginia State Bar*, 238 Va. 617,621-22,385 S.E.2d 597, 600 (1989).

[5] *State Bar of Arizona Committee on the Rules of Professional Responsibility Opinion No. 95-03* (1995); *Kentucky Bar Association Ethics Opinion KBA E-279* (1984); *Minnesota Lawyers Professional Responsibility Board Opinion No. 18* (1996); *Ohio Board of Commissioners on Grievances &. Discipline Opinion No. 97-3* (1997); *South Carolina Bar Ethics Advisory Committee Ethics Advisory Opinion 92-17* (1992); *Tennessee Board Professional Responsibility Formal Ethics Opinion No. 86- F-14(a)*(1986).

[6] *State Bar of Arizona Committee on the Rules of Professional Responsibility Opinion No. 95-03* (1995); *Kentucky Bar Association Ethics Opinion KBA E-279* (1984); *Minnesota Lawyers Professional Responsibility Board Opinion No. 18* (1996); *Ohio Board of Commissioners on Grievances &. Discipline Opinion No. 97-3* (1997); *Tennessee Board Professional Responsibility Formal Ethics Opinion No. 86- F-14(a)*(1986).

[7] *State Bar of Arizona Committee on the Rules of Professional Responsibility Opinion No. 95-03* (1995); *Tennessee Board Professional Responsibility Formal Ethics Opinion No. 86- F-14(a)*(1986).

[8] *Idaho State Bar Committee on Ethics and Professional Responsibility Formal Opinion 130* (1989); *Minnesota Lawyers Professional Responsibility Board Opinion No. 18* (1996).

[9] *Kansas Bar Association Opinion 96-9* (1997).

[10] *Minnesota Lawyers Professional Responsibility Board Opinion No. 18* (1996).

[11] *Ohio Board of Commissioners on Grievances &. Discipline Opinion No. 97-3* (1997).

[12] D.C. Opinion No. 229 (1992) (recording was not unethical because it occurred under circumstances in which the uninformed party should have anticipated that the conversation would be recorded or otherwise memorialized); (continued...)

In 2001, the ABA issued *Formal Opinion 01-422* and rejected *Opinion 337*'s broad proscription. Instead, *Formal Opinion 01-422* concluded that:

1. Where nonconsensual recording of conversations is permitted by the law of the jurisdiction where the recording occurs, a lawyer does not violate the Model Rules merely by recording a conversation without the consent of the other parties to the conversation.
2. Where nonconsensual recording of private conversations is prohibited by law in a particular jurisdiction, a lawyer who engages in such conduct in violation of that law may violate Model Rule 8.4, and if the purpose of the recording is to obtain evidence, also may violate Model Rule 4.4.
3. A lawyer who records a conversation without the consent of a party to that conversation may not represent that the conversation is not being recorded.
4. Although the Committee is divided as to whether the Model Rules forbid a lawyer from recording a conversation with a client concerning the subject matter of the representation without the client's knowledge, such conduct is, at the least, inadvisable.

Current Status

Where Recording Is Illegal Without All Party Consent

There seems to be no dispute that where it is illegal to record a conversation without the consent of all of the participants, it is unethical as well. Recording requires the consent of all parties in 10 states: California, Florida, Illinois, Massachusetts, Michigan, Montana, New Hampshire, Oregon, Pennsylvania, and Washington.[13]

(...continued)

Mississippi Bar v. Attorney ST., 621 So.2d 229 (Miss. 1993)(context of the circumstances test); NM Opinion 1996-2 (1996)(members of the bar are advised that there are no clear guidelines and that the prudent attorney avoids surreptitious recording); N C. RPC 171 (1994)(lawyers are encouraged to disclose to the other lawyer that a conversation is being tape recorded); Oklahoma Bar Association Opinion 307 (1994)(a lawyer may secretly record his or her conversations without the knowledge or consent of other parties to the conversation unless the recording is unlawful or in violation of some ethical standard involving more than simply recording); Ore. State Bar Ass 'n Formal Opinion No. 1991-74 (1991) (an attorney with one party consent may record a telephone conversation "in absence of conduct which would reasonably lead an individual to believe that no recording would be made"); Utah State Bar Ethics Advisory Opinion No. 96-04 (1996) ("recording conversations to which an attorney is a party without prior disclosure to the other parties is not unethical when the act, considered within the context of the circumstances, does not involve dishonesty, fraud, deceit or misrepresentation"); Wis. Opinion E-94-5 ("whether the secret recording of a telephone conversation by a lawyer involves 'dishonesty, fraud, deceit or misrepresentation' under SCR 20:8.4(c) depends upon all the circumstances operating at the time").

[13] CAL. PENAL CODE §§631, 632; FLA. STAT. ANN. §934.03; ILL. COMP. STAT. ANN. ch. 720, §§5/14-2, 5/14-3; MASS. GEN. LAWS ANN. ch. 272 §99; MICH. COMP. LAWS ANN. §750.539c; MONT. CODE ANN. §45-8-213; N.H. REV. STAT. ANN. § 570-A:2; ORE. REV. STAT. §165.540 (face to face conversations all party consent; telephone conversations one party consent); PA. STAT. ANN. tit.18, §5704; WASH. REV. CODE ANN. §9.73.030.

Lawful but Unethical

Only two states, Colorado and South Carolina, have expressly rejected the approach of the ABA's *Formal Opinion 01-422* since its release.[14] Yet a number of other states have yet to withdraw earlier opinions that declared surreptitious records ethically suspect: Arizona, Idaho, Indiana, Iowa, Kansas, and Kentucky.[15]

Not Unethical Per Se

A substantial number of states, however, agree with the ABA's *Formal Opinion 01-422* that a recording with the consent of one but not all of the parties to a conversation is not unethical per se unless it is illegal or contrary to some other ethical standard. This is the position of Alabama, Alaska, Hawaii, Minnesota, Missouri, Nebraska, New York, Ohio, Oregon, Tennessee, Texas, Utah, and Vermont.[16] Four other states—Maine, Mississippi, North Carolina, and Oklahoma—issued comparable opinions before the ABA's *Formal Opinion 01-422* was released and have never withdrawn or modified them.[17] Yet, even among those that now believe that secret recording is not per se unethical, some ambivalence seems to remain. Nebraska, for example, refers to full disclosure as the "better practice."[18] New Mexico notes that the "prudent New Mexico lawyer" hesitates to record without the knowledge of all parties.[19] Minnesota cautions that surreptitiously recording client conversations "is certainly inadvisable" except under limited circumstances.[20]

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[14] *Colorado Bar Association Ethics Committee, Ethics Opinion 112* (2003); *South Carolina Bar Ethics Advisory Committee Ethics Advisory Opinion 08-13* (2008).

[15] *State Bar of Arizona, Committee on the Rules of Professional Responsibility, Opinion No. 00-04 (2000); Idaho State Bar Committee on Ethics and Professional Responsibility Formal Opinion 130 (1991); Indiana State Bar Association, Legal Ethics Committee, Opinion No.1, 2000 (2000); Iowa Supreme Court Board of Professional Ethics and Conduct, Ethics Opinion 83-16 (1982),* aff'd, *Iowa Supreme Court Board of Professional Ethics and Conduct, Ethics Opinion 95-09 (1995); Kansas Bar Association Opinion 96-9 (1997); Kentucky Bar Association Ethics Opinions KBA E-289, KBA E-279 (1984).*

[16] *Alabama State Bar Disciplinary Commission Formal Opinion 1983-183 (as modified); Alaska Bar Association Ethics Committee, Ethics Opinion No. 2003-1 (2003); Hawaii Formal Opinion No. 30 (1988)(per se opinion)(no longer in effect); Minnesota Lawyers Professional Responsibility Board Repeal of Opinion No. 18 (repealing earlier per se opinion); Missouri Supreme Court Advisory Committee, Formal Opinion 123 (2006); Nebraska Ethics Advisory Opinion for Lawyers No. 06-07(2006); Association of the Bar of City of New York, Formal Opinion No. 2003-02 (2004); Ohio Board of Commissioners on Grievances & Discipline Opinion No. 2012-1 (2012); Oregon State Bar Association Formal Opinion No. 2005-156 (2005);* TENN. R. PROF. COND. Rule 8.4, cmt.[6]; *Supreme Court of Texas Professional Ethics Committee Opinion No. 575 (2006); Utah State Bar Ethics Advisory Opinion No. 02-05 (2002); In re PRB,* 187 Vt. 35, 989 A.2d 523 (2009).

[17] *Maine Board of Overseers of the Bar, Professional Ethics Commission, Opinion No. 168 (1999); Mississippi Bar v. Attorney ST.*, 621 So.2d 229 (Miss. 1993); *North Carolina State Bar Ethics Opinion RPC 171 (1994); Oklahoma Bar Association Ethics Opinion No. 307 (1994).*

[18] *Nebraska Ethics Advisory Opinion for Lawyers No. 06-07*(2006)(It is the opinion of this Committee that, while the better practice for attorneys is to disclose or obtain consent prior to recording a conversation, attorneys are not per se prohibited from ever recording conversations without the express permission of all other parties to the conversation").

[19] *New Mexico Ethics Advisory Committee, Formal Ethics Advisory Opinion 2005-03* (2005)("Despite the withdrawal of ABA Formal Opinion 337, the Committee believes that the prudent New Mexico lawyer will still be hesitant to record conversations without the other party's knowledge").

[20] *Minnesota Lawyers Professional Responsibility Board Repeal of Opinion No. 18, Minnesota Lawyer (June 3, 2002)*("[A]lthough it may not be unethical to record client conversations, except in very limited circumstances (e.g., client is making threats to the lawyer) it is certainly inadvisable to do so without disclosure").

Although the largest block of states endorses this view, whether it is a majority view is uncertain because a number of jurisdictions have apparently yet to announce a position, for example, Arkansas, Connecticut, Delaware, Georgia, Louisiana, Nevada, New Jersey, North Dakota, Rhode Island, West Virginia, and Wyoming.

Exceptions

Lying

Besides Rule 8.4's prohibition on unlawful, fraudulent, deceptive conduct, the Code of Professional Conduct also condemns making a false statement of material fact or law.[21] As a consequence even when surreptitious recording is not considered a per se violation, it will be considered unethical if it also involves a denial that the conversation is being recorded or some similar form of deception.[22]

Evidence Gathering

While illegality and false statements exist as exceptions to a general rule that permits surreptitious recording, evidence gathering is an exception to a general rule that prohibits such recordings. The earlier ABA opinion conceded a possible exception when prosecuting attorneys engaged in surreptitious recording pursuant to court order.[23] Various jurisdictions have expanded the exception to include defense attorneys as well as prosecutors.[24] Some have included use in the connection with other investigations as well.[25]

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[21] ABA CODE OF PROF. COND. Rule 4.1(a)("In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person"); see also ABA CODE OF PROF. COND. Rule 8.4(b),(c)("It is professional misconduct for a lawyer to ... (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; [or] (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation").

[22] *ABA Formal Opinion 01-422* [3]("A lawyer who records a conversation without the consent of a party to that conversation may not represent that the conversation is not being recorded"); *Alaska Bar Association Ethics Committee, Ethics Opinion No. 2003-1* (2003)("Absent conduct reflecting actual misrepresentations, deceit, or fraud when taping the conversation ... an attorney does not act unethically by recording a conversation with a third party without disclosure of such recording"); *Maine Board of Overseers of the Bar, Professional Ethics Commission, Opinion No. 168* (1999)("However, the fact that the act of recording is not per se unethical still requires that the recording attorney's conduct must otherwise not be dishonest, fraudulent, deceitful or involve misrepresentation"); *Minnesota Lawyers Professional Responsibility Board Repeal of Opinion No. 18, Minnesota Lawyer (June 3, 2002)*("Moreover, lawyers who falsely deny recording conversations will be subject to discipline under Rules 4.1 and 8.4(c)"); *Mississippi Bar v. Attorney ST.*, 621 So.2d 229 (Miss. 1993)("We find, however, that Attorney ST stepped over the line in violation of the Mississippi Rules of Professional Conduct when he blatantly denied, when asked, that he was taping the conversations.... Attorney ST's actions therefore violate the very precepts of Rule 4.1"); see also, *Nebraska Ethics Advisory Opinion for Lawyers No. 06-07*(2006); *Oklahoma Bar Association Ethics Opinion No.* 307 (1994); *Oregon State Bar Association Formal Opinion No. 2005-156* (2005); *Supreme Court of Texas Professional Ethics Committee Opinion No. 575* (2006); *In re PRB*, 187 Vt. 35, 43, 989 A.2d 523, 528 (2009).

[23] *ABA Formal Opinion No. 337.*

[24] E.g., *State Bar of Arizona, Committee on the Rules of Professional Responsibility, Opinion No. 95-03* (1995)("... [W]e extended the criminal law enforcement exceptions of Opinion No. 75-13 [relating to recording by prosecutors in connection with a criminal investigation] to lawyers retained to represent criminal defendants); *Colorado Bar Association Ethics Committee, Ethics Opinion 112* (2003)("The Committee believes that, assuming that relevant law does not prohibit the recording, there are two categories of circumstances in which attorneys generally should be ethically permitted to engage in surreptitious recording or to direct surreptitious recording by another: (a) in connection with actual or potential criminal matters, for the purpose of gathering admissible evidence"); *Kentucky Bar Association* (continued...)

Other Exceptions

Other circumstances thought to permit a lawyer to record a conversation without the consent of all of the parties to the discussion in one jurisdiction or another include instances when the lawyer does so in a matter unrelated to the practice of law;[26] or when the recorded statements themselves constitute crimes such as bribery offers or threats;[27] or when the recording is made solely for the purpose of creating a memorandum for the files;[28] or when the "the lawyer has a reasonable basis for believing that disclosure of the taping would significantly impair pursuit of a generally accepted societal good."[29]

(...continued)

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

[25] E.g., *District of Columbia Bar Opinion No. 229* (1992)("A lawyer who tapes a meeting attended by him, his client, and representatives of a federal agency investigating his client commits no ethical violation, even if he does not reveal that a tape is being made, so long as the attorney makes no affirmative misrepresentations about the taping"); *Virginia State Bar Association Legal Ethics Opinion 1738* (2000)(" [T]he committee is of the opinion that Rule 8.4 does not prohibit a lawyer engaged in a criminal investigation or a housing discrimination investigation from making otherwise lawful misrepresentations necessary to conduct such investigations. The committee is further of the opinion that it is not improper for a lawyer engaged in such an investigation to participate in, or to advise another person to participate in, a communication with a third party which is electronically recorded with the full knowledge and consent of one party to the conversation, but without the knowledge or consent of the other party, as long as the recording is otherwise lawful").

[26] *Colorado Bar Association Ethics Committee, Ethics Opinion 112* (2003)("The Committee believes that, assuming that relevant law does not prohibit the recording, there are two categories of circumstances in which attorneys generally should be ethically permitted to engage in surreptitious recording or to direct surreptitious recording by another ... (b) in matters unrelated to a lawyer's representation of a client or the practice of law, but the lawyer's private life"); *South Carolina Bar Ethics Advisory Committee Ethics Advisory Opinion 08-13* (2008)("[T]he Committee advises that surreptitious recording by a lawyer is ethically permissible only when a) the lawyer is not acting as a lawyer, as a public official, or in any other position of trust and b) such recording is not otherwise prohibited by law"); *District of Columbia Bar Opinion No. 323* (2004)("The Virginia Standing Committee on Legal Ethics recently recognized the parallel between law enforcement and intelligence activity in an opinion that is consistent with our views. In Va. Legal Ethics Opinion 1738 (2000), the Virginia Standing Committee considered whether the ethical rule prohibiting non-consensual tape recording then in effect in Virginia applied to law enforcement undercover activities. The Virginia Standing Committee concluded that it did not.... The reasoning is equally persuasive to this Committee").

[27] *State Bar of Arizona Committee on the Rules of Professional Responsibility Opinion No. 95-03* (1995).

[28] *Kansas Bar Association Opinion 96-9* (1997); *South Carolina Bar Ethics Advisory Committee Ethics Advisory Opinion 08-13* (2008)("... While representing a client, a lawyer may not surreptitiously record any conversation, subject to certain law enforcement related exceptions.... recording of anonymous threats received over the telephone, recording of anonymous information received over the telephone, recording attempts to bribe the recording attorney, and cooperating with law enforcement in a legitimate criminal investigation"); *Virginia State Bar Association Legal Ethics Opinion 1738* (2000)(" Finally, the committee opines that it is not improper for a lawyer to record a conversation involving threatened or actual criminal activity when the lawyer is a victim of such threat").

[29] *Association of the Bar of City of New York, Formal Opinion No. 2003-02* (2004).

Attachment

What follows are excerpts or summaries from opinions of the various bar associations that address the issue of whether members of the bar may record a conversation without the consent of each of the participants.

Alabama

Alabama State Bar Disciplinary Commission Formal Opinion 1983-183: "In issuing the opinion heretofore published in the May, 1984, Alabama Lawyer as a precedent we relied primarily upon Formal Opinion 337 (1974) of the American Bar Association Committee on Ethics and Professional Responsibility. Upon reconsideration we conclude that there is no provision of the Code of Professional Responsibility of the Alabama State Bar which directly precludes an attorney who is one of the conversants from recording conversations as described herein. One member of the Disciplinary Commission respectfully dissents and is of the opinion that an attorney's recording of such conversations without the knowledge and consent of all parties thereto in and of itself constitutes 'deceit" [DR 1-102(a)(4)]. In issuing this modification, the Disciplinary Commission expresses its intent that this opinion is to be strictly construed."

Alabama State Bar Disciplinary Commission Formal Opinion 1983-183(1984)(reprinted in *Alabama Lawyer* (May, 1984)(reconsidered and modified as noted above)): "It is unethical for an attorney or his investigator or other person acting on behalf of an attorney to make recordings of conversations with clients, other attorneys, witnesses or other without prior knowledge and consent of all parties to the conversation.

Alaska

Alaska Bar Association Ethics Committee, Ethics Opinion No. 2003-1 (2003): "In summary, the Committee is of the opinion that, while the better practice may be for attorneys to disclose or obtain consent prior to recording a conversation, attorneys are not per se prohibited from ever recording conversations without the express permission of all other parties to the conversation. Absent conduct reflecting actual misrepresentations, deceit, or fraud when taping the conversation, or circumstances in which the taping violated existing law or infringed on a specific court defined privacy right, an attorney does not act unethically by recording a conversation with a third party without disclosure of such recording."

Alaska Bar Association Ethics Committee Ethics Opinion No. 92-2 (1992)(withdrawn and replaced by Ethics Opinion No. 2003-1 above): "An attorney may not ethically use a transcript of a telephone conversation with knowledge that another attorney surreptitiously recorded it because the use involves the attorney in the conduct that made the original act of recording unethical under DR 1-102(A)(4)."

Alaska Bar Association Ethics Committee Ethics Opinion No. 91-4 (1991)(withdrawn and replaced by Ethics Opinion No. 2003-1 above): "The Committee has been asked to review Ethics Opinion 78-1, which held it was unethical for an attorney to record a telephone conversation in which the attorney participated without the consent of the other party and advises whether that opinion was applicable to an attorney who is party to a family law matter, acting in a personal capacity.

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

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

Arizona

State Bar of Arizona, Committee on the Rules of Professional Responsibility, Opinion No. 00-04 (2000): "We hasten to add that, while an attorney may advise a client about the client's right to surreptitiously tape record conversations, the attorney may not participate in the surreptitious tape recording of a conversation, except as permitted by our prior opinions. Further, even if a client does not raise the issue of surreptitious tape recording, the attorney may on the attorney's own initiative advise the client about the client's right to surreptitiously tape record conversations under Arizona law. Finally, attorneys may not sue third parties to tape record conversations which an attorney ethically cannot tape record under the prior opinions of the Committee."

State Bar of Arizona, Committee on the Rules of Professional Responsibility, Opinion No. 95-03 (1995): "Opinion 75-13 first adopted the following general rule concerning the ethical propriety of secretly recording conversations: 'We are of the opinion that it is improper for a lawyer to record by tape recorder or other electronic device any conversation between the lawyer or other person, or between third persons, without the consent or prior knowledge of all parties to the conversation. This prohibition likewise precludes a lawyer from doing directly through a non-lawyer agent what he may not himself do.'

"Opinion 75-13 then recognized that there are certain necessary exceptions to this rule. Four were identified: 1. An attorney secretly may record 'an utterance that is itself a crime, such as an offer of a bribe, a threat, an attempt to extort, or an obscene telephone call.' 2. A lawyer may secretly record a conversation in order to protect against perjury. 3. A prosecutor or police officer may secretly record a conversation during the course of a criminal investigation. 4. The opinion recognized 'that secret recording would be proper where specifically authorized by statute, court rule, or court order.' ...

"The Committee most recently considered this subject in Opinion 90-02, dated March 16, 1990. This opinion broadened the conclusions of Opinion 75-13 in two ways. First, it stated that Opinion 75-13's distinction, in a criminal law setting, 'between surreptitious recording to protect against perjury (which the opinion permitted) and surreptitious recording for impeachment purposes (which the opinion prohibited) does not appear to have any basis in the present Rules of Professional Conduct.' Second, we extended the criminal law enforcement exceptions of Opinion No. 75-13 to lawyers retained to represent criminal defendants....

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

California

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

Colorado

Colorado Bar Association Ethics Committee, Ethics Opinion 112 (2003): "Because surreptitious recording of conversations or statements by an attorney may involve an element of trickery or deceit, it is generally improper for an attorney to engage in surreptitious recording even if the recording is legal under state law. For the same reason, a lawyer generally may not direct or even authorize an agent to surreptitiously record conversations, and may not use the 'fruit' of such improper recordings. However, where a client lawfully and independently records conversations, the lawyer is not required to advise the client to cease its recording, nor to decline to use the lawfully and independently obtained recording.

"The Committee believes that, assuming that relevant law does not prohibit the recording, there are two categories of circumstances in which attorneys generally should be ethically permitted to engage in surreptitious recording or to direct surreptitious recording by another: (a) in connection with actual or potential criminal matters, for the purpose of gathering admissible evidence; and (b) in matters unrelated to a lawyer's representation of a client or the practice of law, but the lawyer's private life."

People v. Smith, 778 P.2d 685, 686, 687 (Colo. 1989): "In May of 1984, the respondent agreed to perform undercover activities of the Colorado Bureau of Investigation (CBI) with respect to an investigation of the complaining witness. Upon advice of an assistant state attorney general, CBI representatives requested that the respondent record telephone conversations secretly. After obtaining assurances from a member of the attorney general's office that such conduct would not violate the Code of Professional responsibility, the respondent agreed.... The undisclosed use of a recording device necessarily involves elements of deception and trickery which do not comport with the high standards of candor and fairness to which all attorneys are bound. We conclude that these acts violated the provisions of DRI-102(A)(4).

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

District of Columbia

District of Columbia Bar Opinion No. 323 (2004): "The Virginia Standing Committee on Legal Ethics recently recognized the parallel between law enforcement and intelligence activity in an opinion that is consistent with our views. In Va. Legal Ethics Opinion 1738 (2000), the Virginia Standing Committee considered whether the ethical rule prohibiting non-consensual tape recording then in effect in Virginia applied to law enforcement undercover activities. The Virginia

Standing Committee concluded that it did not.... The reasoning is equally persuasive to this Committee."

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

Florida

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

Hawaii

Hawaii Formal Opinion No. 30 (1988) (this opinion is no longer listed among those currently in effect by the Disciplinary Board of the Hawaii Supreme Court): "Inquiry has been made concerning the ethical propriety of the electronic recording by a lawyer of a conversation between the lawyer and another person without that person's prior knowledge and consent.... [E]ven if such conduct is not illegal, it offends the traditional high standard of fairness and condor which should characterize the practice of law and must be deemed improper, except in the special situations mentioned below.... Therefore no lawyer should record or cause to be recorded any conversation, whether by taps or other electronic device, without the consent or prior knowledge of all parties to the conversation. There may be extraordinary circumstances in which secret recordings of conversations by lawyers are rendered permissible, such as where, for example, sanctioned by express statutory or judicial authority. This opinion is not directed toward such exceptions, each of which must be considered on its own merits."

Idaho

Idaho State Bar Committee on Ethics and Professional Responsibility Formal Opinion 130 (1991): "The Committee has been asked to answer the question of whether it is a violation of the Idaho Rules of Professional Conduct to record a telephone conversation without notifying the other party or parties that the conversation is being recorded. Particular attention is directed to instances involving conversations with clients, opposing counsel, potential witnesses, and members of the public. The recording of telephone conversations is permitted by Federal Law ... and by Idaho Law.... As long as one party to the conversation consents, a recordation may be made, without notice to any other participant in the conversation. Therefore, the recordation of a telephone conversation, in the manner prescribed by these statutes would not be criminal conduct prohibited by IRPC 8.4(b). The Committee feels, however, that such recordation would nonetheless be a violation IRPC 8.4(d) which states: It is

professional misconduct for a lawyer to: ... (d) engage in conduct that is prejudicial to the administration of justice.... It is the opinion of the Committee that undisclosed recordation of communications between attorneys, or an attorney and a potential witness does not encourage the judicial system's objectives. People are more cautious, and therefore less candid in their discussions, when they know, or believe their conversations are being recorded.

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

Illinois

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

Indiana

Indiana State Bar Association, Legal Ethics Committee, Opinion No.1, 2000 (2000), RES GESTAE 39 (March 2000): "... Although it is not illegal in the state of Indiana to tape record another person without that person's knowledge, it is unethical for an attorney to do this to another attorney in the context of a pending legal matter without informing him first."

Indiana State Bar Association, Legal Ethics Subcommittee, Formal Opinion No.2, 1975 (1975), RES GESTAE 234 (July 1975): "... It is therefore our opinion that it would be improper for an attorney to record any conversation, whether by tapes or other electronic device, without the consent or prior knowledge of all parties to the conversation. The only exception to this rule might occur under the circumstances described in the last paragraph above quoted [relating to recording for law enforcement purposes]."

Iowa

Iowa Supreme Court Board of Professional Ethics and Conduct, Ethics Opinion 98-28 (1999): "Question has arisen as to the propriety of attorneys advising clients who are protected by court orders in domestic abuse cases that they may record contacts initiated by defendants in violation of such orders without telling the defendant or obtaining consent.

"It is the opinion of the Board that the Iowa Code of Professional Responsibility for Lawyers does not prohibit such conduct and it is believed that advice may be given clients provided they are parties to the conversation."

Iowa Supreme Court Board of Professional Ethics and Conduct, Ethics Opinion 95-09 (1995): "The Board is of the opinion that Formal Opinion 83-16 is correct and it hereby is reaffirmed."

Iowa Supreme Court Board of Professional Ethics and Conduct, Ethics Opinion 83-16 (1982): "With certain exceptions spelled out in this opinion [relating to recording for purposes of law

enforcement investigations], 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."

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

"Mollman did agree, however, to wear a concealed body microphone so that federal agents could monitor and record a conversation with Johnson. The pretext for the conversation was Mollman's and Johnson's concern that several mutual friends had been subpoenaed to testify before a grand jury. Armed with a script written by federal agents, Mollman suggested that he and Johnson get their stories straight about their past drug usage. This intentionally incriminating conversation, and Mollman's secret recording of it, took place in Johnson's home.... The committee charged Mollman with violating the following provisions of the Iowa Code of Professional Responsibility: DR 1-102(A)(4) ... DR 4-101(B)(lawyer shall not knowingly reveal the confidence or secret of a client or use them to lawyer's own advantage) ... In addition, the committee alleged that Mollman's conduct violated the committee's formal advisory opinion 83-16 which provides that ' no lawyer should record any conversation whether by tapes or other electronic device, without the consent or prior knowledge of all parties to the conversation.' This rule adopted in 1982 and modeled after ABA Formal Opinion 337, makes such recordings unethical even if legal under federal law....

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

"Mollman does not contest the wisdom or spirit of formal opinion 83-16 on appeal. He merely claims that because he acted 'under the direction of federal prosecutors, he should benefit form the rule's exception. The commission was not so convinced, and neither are we. First, the plain language of the rule limits its exception to 'law enforcement attorneys or officers' It makes no room for private citizens acting as government agents as Mollman describes himself.... Second, the rule itself declines to make the exception automatic.... Examining the exception in light of the present case, we are unable to justify its application."

Kansas

Kansas Bar Association Opinion 96-9 (1997): " A lawyer inquired as to any ethical objections to his recording all telephone calls made from or received in his office for purposes of internal office management. He does not intend to inform those outside of his office of the practice. Even assuming such recording is legal, the practice of surreptitiously recording telephone conversations is considered offensive to the traditional high standards of fairness and candor that must characterize the practice of law. It is unprofessional for lawyers to secretly

record conversations except with the consent of all parties—that are to be used for any purpose other than an accurate recital in memoranda to the files."

Kentucky

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

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

Maine

Maine Board of Overseers of the Bar, Professional Ethics Commission, Opinion No. 168 (1999): "We conclude, therefore, that, however much we would like to do so, we cannot find that electronically recording a conversation without the knowledge of the other participant(s) is per se prohibited by the text of the rule.... However, the fact that the act of recording is not per se unethical still requires that the recording attorney's conduct must otherwise not be dishonest, fraudulent, deceitful or involve misrepresentation."

Massachusetts

Massachusetts outlaws the recording without the consent of all parties to the conversation or when done for certain law enforcement purposes, MASS. GEN. LAWS ANN. ch. 272, §99. The Massachusetts Rules of Professional Conduct state that that it is unethical for a lawyer to commit a criminal act that "reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects," MASS. R. PROF. COND. 8.4(b).

Michigan

Michigan Bar Association, Ethics Opinion RI-309 (1998): "Under Michigan law, it is not a violation of the Michigan eavesdropping statutes, MCL 750.539 et seq., for a participant in a conversation to secretly record that conversation without the consent of the other participants.... The committee believes that ABA Formal Opinion 337 is over broad, and the rationale which supported its statement some twenty-four years ago has weakened. Whether a lawyer may ethically record a conversation without the consent or prior knowledge of the parties involved is situation specific, not unethical per se, and must be determined on a case by case basis."

Minnesota

Minnesota Lawyers Professional Responsibility Board Repeal of Opinion No. 18, Minnesota Lawyer (June 3, 2002): "Lawyers should be aware that secret recording is illegal in some

states and therefore prohibited by Rule 4.4. Moreover, lawyers who falsely deny recording conversations will be subject to discipline under Rules 4.1 and 8.4(c). And finally, although it may not be unethical to record client conversations, except in very limited circumstances (e.g., client is making threats to the lawyer) it is certainly inadvisable to do so without disclosure."

Minnesota Lawyers Professional Responsibility Board Opinion No. 18 (1996)(repealed 2002): "It is professional misconduct for a lawyer, in connection with the lawyer's professional activities, to record any conversation without the knowledge of all parties to the conversation, provided as follows: 1. This opinion does not prohibit a lawyer from recording a threat to engage in criminal conduct; 2. This opinion does not prohibit a lawyer engaged in the prosecution or defense of a criminal matter from recording a conversation without the knowledge of all parties to the conversation; 3. This opinion does not prohibit a government lawyer charged with civil law enforcement authority from making or directing others to make a recording of a conversation without the knowledge of all parties to the conversation; 4. This opinion does not prohibit a lawyer from giving legal advice about the legality of recording a conversation."

Mississippi

Mississippi Bar v. Attorney ST., 621 So.2d 229 (Miss. 1993): "[T]he Mississippi State Bar filed a formal complaint ... for surreptitiously taping two telephone conversations with an acting City Judge and one with the City Police Chief, and for telling the Chief he was not recording their conversation when, in fact he was.... In *Attorney M v. Mississippi State Bar*, 621 So.2d 220 (Miss. 1992), we held that, under certain circumstances, an attorney may tape a conversation with a potential party opponent without his knowledge or consent. In that case, Attorney M taped a series of conversations with a doctor who had treated a patient who later became a plaintiff in a malpractice action against another physician. Although the doctor assumed the conversations were taped, he did not know until he received a letter so indicating from Attorney M.

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

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

"Looking at the context of the circumstances, we are of the opinion that Attorney ST was acting to protect his client's interests in surreptitiously taping the telephone conversations with the judge and the police chief. Pursuant to our decision in Attorney M, this action may well be

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

Missouri

Missouri Supreme Court Advisory Committee, Formal Opinion 123 (2006): "An attorney may record a conversation, in which the attorney is a party, without notifying the other parties to the conversation, unless other actors are present including, but not limited to: (1) laws prohibiting the recording in the jurisdiction in which the recording would occur, (2) the attorney states or implies that the conversation is not being recorded, or (3) the conversation involves a current client of the attorney.... If the recording is of a conversation with a current client, the attorney must give some notice to the client that the attorney is, or may be, recording the conversation."

Missouri Supreme Court Advisory Committee, Misc. Opinion 30 (1978)(withdrawn): "QUESTION: Can an attorney ethically record a conversation with any person, without prior knowledge of that person?

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

Montana

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

Nebraska

Nebraska Ethics Advisory Opinion for Lawyers No. 06-07(2006): "It is the opinion of this Committee that, while the better practice for attorneys is to disclose or obtain consent prior to recording a conversation, attorneys are not per se prohibited from ever recording conversations without the express permission of all other parties to the conversation. Absent conduct reflecting actual misrepresentation, deceit or fraud when taping a conversation, or circumstances in which the taping violated existing law or infringed upon a specific court-defined privacy right, attorney does not act unethically by recording a conversation with a third party without disclosure of such recording."

New Hampshire

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

New Mexico

New Mexico Ethics Advisory Committee, Formal Ethics Advisory Opinion 2005-03 (2005): "The Rules of Professional Conduct preclude the secret recording of a witness interview by a lawyer, or anyone acting under the lawyer's control, if such a recording would involve deceiving the witness either by commission or omission.... Despite the withdrawal of ABA Formal Opinion 337, the Committee believes that the prudent New Mexico lawyer will still be hesitant to record conversations without the other party's knowledge ... In doing so, the Committee does not mean to opine that under no circumstances would the practice be permissible."

New Mexico Ethics Advisory Committee, Formal Ethics Advisory Opinion 1996-2 (1996): Members of the bar are advised that there are no clear guidelines and that the prudent attorney avoids surreptitious recording.

New York

Association of the Bar of City of New York, Formal Opinion No. 2003-02 (2004): "N.Y. City 80-95 and 95-10 are modified. A lawyer may tape a conversation without disclosure of that fact to all participants if the lawyer has a reasonable basis for believing that disclosure of the taping would significantly impair pursuit of a generally accepted societal good. However, undisclosed taping entails a sufficient lack of candor and a sufficient element of trickery as to render it ethically impermissible as a routine practice."

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

"The inquirer wishes systematically to tape record conversations between herself and opposing counsel without advising opposing counsel that the conversations are being recorded. She asks whether secretly recording conversations in this way whether the conversations she seeks to record will be by telephone or in person, our conclusion is the same in either case. We answer the inquiry in the negative.... Our opinion is based solely on the facts set forth above and is limited to the context of attorney-attorney taping. We express no opinion as to whether the Committee might, in the future, reach a different conclusion upon the submission of an inquiry involving different facts or extenuating circumstances."

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

"Both ABA 337 and N.Y. State 328 prohibit secret recordings unless sanctioned by express statutory or judicial authority. The ABA opinion, while citing various state ethics opinions, provides no independent reason for the prohibition. Likewise, the N.Y. State opinion provides no

independent reason for prohibiting secret recordings, but rather relies on such concepts as 'elemental fairness.' We find such reliance unpersuasive for reason articulated by the New York City ethics committee: [W]e do not believe that ethical committees are free to determine what conduct is unfair or lacking in candor in a vacuum. Unlike more explicit ethical prohibitions, concepts like candor and fairness take their content from a host of sources—articulated and unarticulated—which presumably reflect a consensus of the bar's or society's judgments. Without being unduly relativistic, it is nevertheless possible that conduct that is considered unfair or even deceitful in one context may not be so considered in another. N.Y. City 80-95 (1981).

"We believe that the secret recording of a telephone conversation, where one party to the conversation has consented, cannot be deceitful per se. Since such conduct [is lawful under New York and federal law], a party to a telephone conversation should reasonably expect the possibility that his or her conversation may be recorded.... It should be noted that there may be circumstances in which a secret recording would violate specific provisions of the Code and thus would be ethically improper.... [I]f a lawyer is asked by the other party to the conversation whether the discussion is being recorded, the lawyer may not falsely assert that the conversation is not being recorded."

New York State Bar Association, Committee on Professional Ethics, Opinion 515 (1979): "... In N.Y. State [Op.] 328 (1974) we concluded that except in special situations it is improper for a lawyer engaged in private practice to record electronically a conversation with another attorney or any other person without first advising the other party. We said that even if secret electronic recording of a conversation with one party's consent is not illegal, it offends the traditional standards of fairness and candor that should characterize the practice of law."

North Carolina

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

North Carolina State Bar Ethics Opinion RPC 171 (1994): "Is it unethical for an attorney to make a tape recording of a conversation with an opposing attorney regarding a pending case, without disclosing to the opposing attorney that the conversation is being recorded? No.... However, as a matter of professionalism, lawyers are encouraged to disclose to the other lawyer that a conversation is being tape recorded."

Ohio

Ohio Board of Commissioners on Grievances &. Discipline Opinion No. 2012-1 (2012): " A surreptitious or secret, recording of a conversation by a Ohio lawyer is not a per se violation of Prof. Cond. R. 8.4(c)(conduct involving dishonesty fraud, deceit, or misrepresentation) if the recording does not violate the law of the jurisdiction in which the recording took place.... Although surreptitious recording is not inherently unethical, the acts associated with a lawyer's surreptitious recording may constitute a violation of Prof. Cond. R. 8.4(c) or other Rules of Professional Conduct. As a basic rule, Ohio lawyers should not record conversations with clients without their consent.... and Ohio lawyers should also refrain form nonconsensual recordings of conversations with persons who are prospective clients ..."

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

Oklahoma

Oklahoma Bar Association Ethics Opinion No. 307 (1994): Surreptitious recording is not per se unethical. A lawyer may secretly record his or her conversations without the knowledge or consent of other parties to the conversation unless the recording is unlawful or in violation of some ethical standard involving more than simply recording (e.g., lying about whether conversation is being recorded).

Oregon

Oregon State Bar Association Formal Opinion No. 2005-156 (2005): "Oregon law allows one party to a telephone conversation to record the conversation without notice to or consent of the other person. However, in-person conversations may not be recorded unless all persons participating know or have notice that the conversation is being recorded. A lawyer who makes a recording in knowing disregard of statutory prohibitions to the contrary would be in violation of Oregon PRPC 3.3(a)(5), which prohibits a lawyer from knowingly engaging in illegal conduct. See also Oregon RPC 8.4(a)(2), which makes it professional misconduct for a lawyer to '[c]ommit a criminal act that reflects adversely on the lawyer's honest, trustworthiness or fitness as a lawyer in other respects.' If the substantive law does not prohibit a recording, however, and in the absence of conduct that would affirmatively lead a person to believe that no recording would be made, the lawyer may make the recording."

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

Pennsylvania

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

South Carolina

South Carolina Bar Ethics Advisory Committee Ethics Advisory Opinion 08-13 (2008): "... While representing a client, a lawyer may not surreptitiously record any conversation, subject to certain law enforcement related exceptions.... recording of anonymous threats received over the telephone, recording of anonymous information received over the telephone, recording attempts to bribe the recording attorney, and cooperating with law enforcement in a legitimate criminal investigation. As noted in *Anonymous II*, the Court in *Anonymous I* relied primarily on ABA Formal Opinion 337 ... and each South Carolina opinion since has relied in turn on *Anonymous I*. Formal Opinion 337, however ... was ultimately withdrawn in 2001 by ABA Formal Opinion 01-422. South Carolina has not correspondingly withdrawn its prohibition.... [T]he Committee advises that surreptitious recording by a lawyer is ethically permissible only when a) the lawyer is not acting as a lawyer, as a public official, or in any other position of trust and b) such recording is not otherwise prohibited by law."

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

"The Court's single exception to these rules applies when an attorney records a conversation made with the prior consent or at the request of an appropriate law enforcement agency in the course of a legitimate criminal investigation.... [W]hile Warner can be read narrowly only to prohibit an attorney from assisting a client to secretly record conversations with a judge which would then be used to prove judicial misconduct, Warner can also be read broadly to prohibit an attorney from counseling or assisting anyone to secretly record any conversation with anyone. Until Warner is clarified, this area remains uncertain and the prudent course would seem to be to give Warner a broad reading."

South Dakota

Midwest Motor Sports v. Arctic Cat Sales, Inc., 347 F.3d 693, 698-99 (8th Cir. 2003): Appellate court upholds sanctions imposed on attorneys for conduct unethical under South Dakota Rules of Professional Conduct involve inappropriate contact with a represented party witness and surreptitious recording of witness statements while posing as a customer.

"Although the violations of Rule 4.2 alone would be sufficient to impose the evidentiary sanctions at issue here, they are further justified by the specific circumstances surrounding those violations. While there is no evidence that Arctic Cat's counsel directly contacted Becker or 'Bill,' the Model Rules of Professional Conduct prohibit a lawyer from violating the Rules 'through the acts of another.' Model Rules of Prof'l Conduct R. 8.4(a). Mohr's interviews took place under false and misleading pretenses, which Mohr made no effort to correct. Not only did

Mohr pose as a customer, he wore a hidden device that secretly recorded his conversations with Becker and 'Bill.'

"Model Rule 8.4(c) prohibits 'conduct involving dishonesty, fraud, deceit or misrepresentation.' The district court found that Mohr's conduct in making secret recordings of his conversations with Becker and 'Bill' necessarily involved deceit or misrepresentation. In reasoning that it is unethical for an attorney or investigator to record conversations without the consent of the other party, the district court relied on cases from other jurisdictions and on the ABA Committee on Ethics and Professional Responsibility's Formal Opinion 337 (1974) ('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.').

"After the district court issued its opinion, the ABA published a new Formal Opinion which reverses its position in Formal Opinion 337 and states that a lawyer who electronically records a conversation without the knowledge of the other party or parties to the conversation does not necessarily violate the Model Rules of Professional Conduct. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 422 (2001). The ABA advised that '[a] lawyer may not, however, record conversations in violation of the law in a jurisdiction that forbids such conduct without the consent of the parties, nor falsely represent that a conversation is not being recorded.' Id. The laws of South Dakota permit recording by one party to a conversation without the knowledge or consent of the other party. South Dakota v. Braddock, 452 N.W.2d 785, 788 (1990).

"Nevertheless, conduct that is legal may not be ethical. The ABA suggests that nonconsensual recordings be prohibited 'where [the recording] is accompanied by other circumstances that make it unethical.' ABA Comm. on Ethic and Prof'l Responsibility, Formal Op. 01-422. Mohr's unethical contact with Becker and 'Bill' combined with the nonconsensual recording presents the type of situation where even the new Formal Opinion would authorize sanctions.

"The duty to refrain from conduct that involves deceit or misrepresentation should preclude any attorney from participating in the type of surreptitious conduct that occurred here. As Mohr's deposition testimony makes clear, his covert recordings were conducted with Arctic Cat's attorneys' knowledge and approval. In addition, there is evidence in the record that the course of conduct by Mohr was not only ratified by Arctic Cat's counsel, but that it was directed by them. Arctic Cat's attorneys admit that the intent behind Mohr's retention was to determine whether Elliott was continuing to sell and service Arctic Cat snowmobiles in order to rebut Elliott's damages expert at trial."

Tennessee

TENNESSEE RULES OF PROFESSIONAL CONDUCT

Rule 8.4 Misconduct

"It is professional misconduct for a lawyer to:

"(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

"(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;

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

"**Comment**

* * *

"[6] The lawful secret or surreptitious recording of a conversation or the actions of another for the purpose of obtaining or preserving evidence does not, by itself, constitute conduct involving deceit or dishonesty. *See* RPC 4.4."

Tennessee Board Professional Responsibility Formal Ethics Opinion No. 86-F-14(a) (1986): "Request has been made for reconsideration and clarification of Formal Ethics Opinion 81-F-14 concerning recording of conversations by criminal defense attorneys without the knowledge of all parties to the conversation. Formal Ethics Opinion 81-F-14 adopted ABA Formal Opinion 337 ruling that secret recording of conversations by an attorney constitutes conduct involving dishonesty, fraud, deceit or misrepresentation in violation of DR 1-102(A) of the Code of Professional Responsibility ... There is no ethical impropriety in secretly recording potentially adverse witnesses in criminal cases for the purpose of providing a means of impeachment in a criminal trial, provided one party to the communication has consented and provided such recording does not violate any law. Further, any lawyer may record an utterance which is itself a felonious crime, including bribe offers and attempted extortions, provided one party to the communication has consented and provided such recording does not violate any law."

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

Texas

Supreme Court of Texas Professional Ethics Committee Opinion No. 575 (2006): "The Texas Disciplinary Rules of Professional Conduct do not prohibit a Texas lawyer from making an undisclosed recording of the lawyer's telephone conversations provided that (1) recordings of conversations involving a client are made to further a legitimate purpose of the lawyer or the client, (2) confidential client information contained in an recording is appropriately protected by the lawyer in accordance with Rule 1.05, (3) the undisclosed recording does not constitute a serious criminal violation under the laws of any jurisdiction applicable to the telephone conversation recorded, and (4) the recording is not contrary to a representation made by the lawyer to any person. Opinions 392 and 514 are overruled."

Utah

Utah State Bar Ethics Advisory Opinion No. 02-05 (2002): "What are the ethical considerations for a government lawyer who participates in a lawful covert governmental operation, such as a law enforcement investigation of suspected illegal activity or an intelligence gathering activity, when the covert operation entails conduct employing dishonesty, fraud, misrepresentation or

deceit? ... We conclude that the mere act of secretly but lawfully recording a conversation inherently is not deceitful, and leave for another day the separate question of when investigative practices involving misrepresentation of identity and purpose nonetheless may be ethical.

Utah State Bar Ethics Advisory Opinion No. 96-04 (1996): "Recording conversations to which an attorney is a party without prior disclosure to the other parties is not unethical when the act, considered within the context of the circumstances, does not involve dishonesty, fraud, deceit or misrepresentation ... The act of taking notes during a conversation or dictating a memo to the file regarding a conversation should to be considered differently from actually recording it within the limitations discussed in this Opinion. One basis for allowing attorneys to record conversations is founded in the same reasoning stated in *[United States v.] White,* [401 U.S. 745, 753 (1971)] 'An electronic recording will many times produce a more reliable rendition of what a defendant has said than will the unaided memory of a police agent.' An attorney's ability to recall information from conversations is important to his competence in undertaking an action.... [A] number of issues that have arisen in other jurisdictions illustrate circumstances where the act of undisclosed recording of a conversation by an attorney would violate an ethical rule. For example, it would be unethical for an attorney to fail to answer candidly if asked whether the conversation is being recorded.... A lawyer's failure to identify himself, the client, or the purpose of the conversation could also constitute unethical misrepresentation."

Vermont

In re PRB, 187 Vt. 35, 43, 989 A.2d 523, 528 (2009): Criminal defense attorneys interviewed and recorded the conversation of a potential witness. During the course of the telephone interview, the attorneys denied that the conversation was being recorded. The Vermont Supreme Court held that conduct violated Rule 4.1 of the Rules of Professional Conduct which prohibits attorneys from making false statements of material fact in the representation of a client. The Court concluded, however, that under the circumstances the attorneys did not violate Rule 8.4(c) which prohibits dishonest, fraudulent, and deceitful conduct, since it read the Rule to reach only such conduct that is "so egregious that it indicates that the lawyer charged lacks the moral character to practice law."

Virginia

Virginia State Bar Association Legal Ethics Opinion 1814 (2011): "In LEO 1765, the Committee extended LEO 1738's list of exceptions to include lawful use of non-consensual recording performed by federal lawyers as part of the federal government's intelligence work.... The Committee opines that when a Criminal Defense Lawyer or an agent acting under their supervision uses lawful methods, such as undisclosed tape-recording, as part of his/her interviewing witnesses or preparing his/her case, those methods cannot be seen as reflecting adversely on his/her fitness to practice law; therefore, such conduct will not violate the prohibition in Rule 8.4(c).

"The committee further opines that when a Criminal Defense Lawyer or an agent acting under his/her supervision uses lawful methods, such as undisclosed tape-recording, as part of his/her interviewing witnesses or preparing his/her case, the lawyer or his/her agent must assure that the unrepresented third party is aware of the lawyer or agent's role."

Virginia State Bar Association Legal Ethics Opinion 1802 (2010): "In both of the above examples [clients seek advice on the secret use of records to gather evidence relating to sex abuse and hostile work environment], the Committee faces situations in which the client has asked the lawyer for his or her opinion on how to address the client's legal problem. The proposed undisclosed recording is not only lawful, but could very well be the only means by which the client may obtain relevant information. Nothing that the lawyer has suggested or recommended to the client violates the legal rights of the person whose statements are to be recorded.... The Committee believes that the circumstances presented in both examples are easily distinguishable from and stand in stark contrast to the illegal wiretapping case presented in Gunter. Both examples are situations that require the lawyer to weigh the competing ethical obligations of a lawyer's duties to third parties against those owed to the client.

Virginia State Bar Association Legal Ethics Opinion 1738 (2000): "[T]he ethics opinions issued by this committee to date do not recognize *any* circumstances that would allow an attorney to secretly tape record his or her conversations with another or direct another to do so. The committee concludes that its prior opinions sweep too broadly and therefore they are overruled to the extent they are inconsistent with this opinion.... [T]he committee is of the opinion that Rule 8.4 does not prohibit a lawyer engaged in a criminal investigation or a housing discrimination investigation from making otherwise lawful misrepresentations necessary to conduct such investigations. The committee is further of the opinion that it is not improper for a lawyer engaged in such an investigation to participate in, or to advise another person to participate in, a communication with a third party which is electronically recorded with the full knowledge and consent of one party to the conversation, but without the knowledge or consent of the other party, as long as the recording is otherwise lawful. Finally, the committee opines that it is not improper for a lawyer to record a conversation involving threatened or actual criminal activity when the lawyer is a victim of such threat.

"The Committee recognizes that there may be other factual situations in which the lawful recording of a telephone conversation by a lawyer, or his or her agent might be ethical. However, the committee expressly declines to extend this opinion beyond the facts cited therein and will reserve a decision on any similar conduct until an appropriate inquiry is made."

LEO 1738 was written in the shadow of *Gunter v. Virginia State Bar*, 238 Va. 617, 385 S.E.2d 597 (1989). *Gunter*, noting ABA Formal Opinion 337, held "that 'recordation, by a lawyer or by his authorization, of conversations between third persons, *to which he is not a party*, without the consent or prior knowledge of each party to the conversation, is conduct involving dishonesty, fraud, [or] deceit under DR 1-102(A)(4).' *Gunter v. Virginia State Bar* did not address whether it is unethical for an attorney to tape record a telephone conversation *in which the attorney is a participant*, if the other party to that conversation is unaware that it is being recorded," LEO 1738, at 2-3 (emphasis in the original).

LEO 1738 also described its earlier opinions, "overruled to the extent they are inconsistent" with LEO 1738, *id.* at 3. LEO 1217 (1989), involving attorney's surreptitious recording of a conversation of opposing counsel, "concluded that even though such a recording may be permissible under Virginia or federal law, it may nevertheless be improper under DR1-102(A)(4) if there are additional facts which would make such recording dishonest, fraudulent, deceitful or a misrepresentation," LEO 1738 at 2. Two subsequent opinions, LEO 1324 (1990) and LEO 1448, "concluded that even if non-consensual tape recordings are not illegal, a lawyer may not participate in such activity nor advise a client to do so," LEO 1738 at 2. "Finally, the committee applied the holding LEO 1324 and LEO 1448 to prohibit an

attorney acting only as an officer or agent of a corporation [rather than as an attorney] from tape recording a conversation between the attorney and a former employee of corporation with[out] the employee's knowledge or consent. Legal Ethics Opinion 1635 (1995)," LEO 1738 at 2.

Washington

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

Wisconsin

Wisconsin State Bar Professional Ethics Committee Formal Opinion E-94-5(1994): "The State Bar of Wisconsin Professional Ethics Committee believes that the Rules of Professional Conduct do not support a blanket interpretation that generally either permits or prohibits secret recording by lawyers of telephone conversations. Whether the secret recording of a telephone conversation by a lawyer involves 'dishonesty, fraud, deceit or misrepresentation' under SCR 20:8.4(c) depends upon all the circumstances operating at the time. This determination is highly fact intensive and numerous factors are involved, including the prior relationship of the parties, statements made during the conversation, whether threatening or harassing prior calls have been made and the intended purpose of the recording. In this latter connection, it should be noted that section 968.31(2)(2) of the Wisconsin Statutes implicitly prohibits secret recordings 'for the purposes of committing any criminal or tortious act ...or for the purpose of committing any other injurious act.' The secret recording of telephone conversations also may violate the Attorney's Oath, which requires lawyers to 'abstain from all offensive personality.' SCR 20:8.4(g) and 40.15; Disc.Proc. Against Beaver, 181 Wis. 2d 12, 510 N.W.2d 129 (1994).

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

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

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

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