ATTORNEY PRIVATE EYES: ETHICAL IMPLICATIONS OF A PRIVATE ATTORNEY'S DECISION TO SURREPTITIOUSLY RECORD CONVERSATIONS

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Attorneys' surreptitious recording of conversations with clients, adverse parties, witnesses, judges, and other attorneys is a complicated and controversial ethical issue. It pits the convenience and security of individual lawyers against the integrity of the legal profession. In 1974, ABA Formal Opinion 337 strongly condemned the act of surreptitious recording by nongovernmental attorneys as unethical. Several states followed Formal Opinion 337's directive, allowing recordings only in limited circumstances. Other states chose not to strictly follow Formal Opinion 337's prohibition, but rather to examine a broad array of factors in determining whether or not an attorney's secret recording rose to the level of an ethical violation under the circumstances.

In 2001, the ABA issued Formal Opinion 01-422, withdrawing Formal Opinion 337, the basis for many jurisdictions' recording policies. Opinion 01-422 held that the act of surreptitiously yet lawfully recording a conversation is not inherently deceitful. Under Opinion 01-422, as long as local laws permit nonconsensual recording, the Model Rules generally will not be violated by recording conversations without the consent of other parties. Opinion 01-422 provides, however, that a lawyer cannot falsely state that he is not recording a conversation, and recommends against covertly recording a client.

This note analyzes different jurisdictions' approaches to the nonconsensual recording problem. These approaches range from the general embodiment of Formal Opinion 337's strict recording prohibition, in jurisdictions such as Colorado and South Carolina, to the broad "context of the circumstances" approach followed by Mississippi and similar approaches in Maine and Wisconsin ethics opinions. In addition to comparing the nuances of these jurisdictions, this note addresses the possible ramifications of Opinion 01-422. The author argues that Opinion 01-422 may be a step in the wrong direction, and may not sufficiently safeguard the integrity of the legal profession. Therefore, the author favors Formal Opinion 337's recording prohibition, allowing only a narrow exception for an attorney's recordings made under the guidance of law enforcement personnel in an ongoing criminal investigation.

> [N]o lawyer should record any conversation whether by tapes or other electronic device, without the consent or prior knowledge of all parties to the conversation.[1]

ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 337 (1974).

> 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.[2]

People v. Smith, 778 P.2d 685, 687 (Colo. 1989).

> Formal Op. 337 states unconditionally that secret tape recordings by attorneys other than prosecutors violate the ethical "obligation to be candid and fair." Truly, the abusive use of such tactics is distasteful and falls below the standards of professional conduct expected of lawyers. The categorical pronouncement of Formal Op. 337, however, goes too far.[3]

Attorney M. v. Mississippi Bar, 621 So. 2d 220, 224 (Miss. 1992).

> 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. *Formal Opinion 337 (1974) accordingly is withdrawn*.[4]

ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-422 (2001) (emphasis added).

I. INTRODUCTION

Imagine that you are a private attorney in trouble with the law. Police suspect you of engaging in drug transactions. You are given the choice of assisting in their investigation of other suspects or facing criminal charges. You agree to help. This requires you to covertly record your telephone conversations with a former client, now a suspect in the drug investigations. You check with your state attorney general's office to make sure that your private-eye activities do not violate the Code of Professional Responsibility. You receive clearance and begin your covert operations. Think you are safe from reprimand? Think again.[5]

In 1989, the Colorado Supreme Court held that these tactics violated a provision of the Code of Professional Responsibility barring "conduct involving dishonesty, fraud, deceit, or misrepresentation."[6] Noting that some jurisdictions have adopted a "prosecutorial exception"

1. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 337 (1974).

2. People v. Smith, 778 P.2d 685, 687 (Colo. 1989) (citing People v. Selby, 606 P.2d 45, 47 (Colo. 1979) (en banc)) (additional citation omitted).

3. Attorney M. v. Miss. Bar, 621 So. 2d 220, 224 (Miss. 1992).

4. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-422 (2001) (emphasis added).

5. These facts are based on *People v. Smith*, 778 P.2d 685.

6. *Id.* at 685–87 (concluding that the attorney's conduct violated DR 1-102(A)(4)).

based on public policy concerns, the court commented that the attorney in this case was a *private* lawyer.[7] Policy considerations that might otherwise justify allowing prosecuting attorneys to secretly record conversations as part of criminal investigations did not "permit private counsel to deal dishonestly and deceitfully with clients, former clients and others."[8] Any other holding could weaken the "trust and confidentiality" crucial to an effective attorney-client relationship.[9] Finally, the court emphasized that the attorney's actions were partially motivated "by a desire to reduce his own exposure to prosecution."[10] And there are more ways than one for a private attorney to find himself embroiled in an ethical battle over his covert recordings.

Recording conversations with a judge and another lawyer in the judge's chambers may be especially problematic.[11] In one case, a Colorado lawyer entered the courtroom for a preliminary hearing in his client's felony assault case.[12] Suffering from a fractured wrist, his arm in a cast, the lawyer was unable to write.[13] The hearing did not go well. After being overruled by the court on numerous objections to questions posed by the district attorney to prosecution witnesses, as well as other adverse rulings, the lawyer announced his intent to withdraw from "this so-called preliminary hearing."[14] He had no witnesses to call on his client's behalf.[15] Recess was called.[16] The judge requested that the attorneys join him in chambers for a conference about the subject matter of the hearing—the alleged assault.[17] During the conference, the judge informally commented on the reasons for preliminary hearings, and what constitutes an effective hearing.[18] Those words would later come back to haunt both the judge and the attorney.

Without consent, the lawyer secretly tape-recorded the informal conference in chambers.[19] Relying on portions of the judge's remarks, the lawyer later moved to disqualify the judge.[20] At an evidentiary hearing before the Supreme Court Grievance Committee, the lawyer first claimed that he used his recorder openly during both the informal conference and the preliminary hearing.[21] The judge and district attorney

7. *Id.* at 687.
8. *Id.*
9. *Id.*
10. *Id.*
11. *See* People v. Selby, 606 P.2d 45, 47 (Colo. 1979) (admonishing attorney who secretly recorded a conversation with a judge and another lawyer in judge's chambers).
12. *See id.* at 46.
13. *See id.*
14. *Id.*
15. *See id*.
16. *See id*.
17. *See id*.
18. *See id*.
19. *See id*. at 46–47.
20. *See id*. at 46.
21. *See id.*

denied this assertion.[22] The lawyer then used his fractured wrist as an excuse for the unauthorized recordings.[23] The Committee disagreed.[24] The attorney's misconduct, which included misusing the recording by distorting its content and deliberately lying about his use of the recording,[25] violated DR 1-102(A)(4)[26] and (A)(6),[27] as well as DR 7-102(A)(5)[28] and (A)(8)[29] of Colorado's Code of Professional Responsibility. Noting prior misconduct and the serious nature of the attorney's current misconduct, the Committee recommended that the lawyer be disbarred in Colorado.[30] The Colorado Supreme Court agreed with the Committee's conclusion that the covert taping, coupled with the attorney's subsequent distortion of portions of a transcript made of the recorded conversation, violated "standards of candor and fairness applicable to all lawyers admitted" in the state.[31] The court went on to admonish the lawyer in no uncertain terms.[32]

"A lawyer may not secretly record any conversation he has with another lawyer or person. Candor is required between attorneys and judges. Surreptitious recording suggests trickery and deceit. Particularly reprehensible is the unauthorized recording of the private, informal discussions with a judge in chambers."[33]

Emphasizing that the attorney's "misconduct in covertly recording the in-chambers conference was compounded by his use of partial quotations out of context," as well as his false testimony before the Grievance Committee and prior misconduct, the court ordered that the attorney be disbarred.[34]

Nearly twenty years later and several jurisdictions away, an Iowa attorney engaged in some secret recordings of his own.[35] Entering the chambers of another attorney who was also a part-time judge, the Iowa lawyer initiated conversations about a civil dispute in which the two at-

22. *See id.*

23. *See id.* at 47.

24. *See id.* (noting that "[t]he conflicting testimony was resolved by the Grievance Committee against the respondent" with its conclusion that the attorney "willfully and deliberately lied at the hearing" about his use of the recorder).

25. *See id*.

26. Proscribing "conduct involving dishonesty, fraud, deceit, or misrepresentation." *Id*. at 46 (quoting COLO. CODE OF PROF'L RESPONSIBILITY DR 1-102(A)(4) (1981)).

27. Prohibiting an attorney from "[e]ngag[ing] in any other conduct that adversely reflects on his fitness to practice law." *Id*. (quoting DR 1-102(A)(6)).

28. Providing that, in representing a client, an attorney "shall not . . . (5) Knowingly make a false statement of law or fact." *Id*. (quoting DR 7-102(A)(5)).

29. Providing that, in representing a client, an attorney "shall not . . . (8) Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule." *Id*. (quoting DR 7-102(A)(8)).

30. *See id*. at 47.

31. *Id*.

32. *See id*. (concurring in recommendation that the attorney be disbarred).

33. *Id.* (internal citations omitted).

34. *See id.*

35. *See* Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Plumb, 546 N.W.2d 215, 216 (Iowa 1996).

torneys once represented opposing sides.[36] Knowing at the time that his conduct was considered unethical, the attorney nevertheless tape-recorded the conversation to gather proof that he had not threatened the opposing counsel's former client in an earlier conversation with the attorney.[37] Noting that it was "especially troubling that [the lawyer] tape recorded a conversation with a judge in chambers,"[38] the Iowa Supreme Court nevertheless imposed only a public reprimand for lack of other aggravating factors.[39] Although the state bar association had issued an advisory opinion generally prohibiting secret recordings, the court took a more moderate approach requiring "proof the lawyer intended to deceive or mislead the one being recorded."[40] Here there was proof of intent to deceive, but any sanction more severe than a public reprimand was not warranted under the circumstances.[41]

Not every state is as strict as Colorado, or even Iowa with its more moderate approach, as to when secret recordings rise to the level of ethical violations. The Mississippi Supreme Court has held, for example, 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."[42] The test adopted by the Mississippi Supreme Court demonstrates recognition that "[e]thical complications arise not so much from surreptitious recordings *per se* as from the manner in which attorneys use them."[43] According to that court, American Bar Association (ABA) Formal Opinion 337 did not provide the flexibility needed in situations when covert recording might be justified, such as to protect the lawyer or his client from perjury.[44] Fast-forward to the present. If confronted with similar situations, would all of these courts decide the same? Maybe not.

This note explores the ethical and legal issues implicated when attorneys surreptitiously record conversations.[45] Such conduct may include

36. *See id.*

37. *See id.*

38. *Id.* at 217.

39. *See id.* at 218 (stating that in light of the attorney's "inexperience, and the relative harmlessness of the recording he secured," a public reprimand was appropriate).

40. *Id.* at 217 (citing Comm. on Prof'l Ethics & Conduct of the Iowa State Bar Ass'n v. Mollman, 488 N.W.2d 168, 171 (Iowa 1992)).

41. *See id.* at 217–18.

42. Attorney M. v. Miss. Bar, 621 So. 2d 220, 223 (Miss. 1992) (citing and quoting Netterville v. Miss. State Bar, 397 So. 2d 878, 883 (Miss. 1981)); *see also* Miss. Bar v. Attorney ST, 621 So. 2d 229, 232 (Miss. 1993) (citing *Attorney M.*, 621 So. 2d at 223–24).

43. *Attorney M.*, 621 So. 2d at 224.

44. *See id.*

45. For a detailed analysis of the issue as of 1991, see generally Ellen A. Mercer, Note, *Undisclosed Recording of Conversations by Private Attorneys*, 42 S.C. L. REV. 995 (1991) (discussing "the ethical implications of private counsel's procuring and using secret recordings"). Mercer's note provides a detailed analysis of the topic as of 1991, including case law, state ethics opinions, and ABA ethics opinions on the subject of attorney recording, in addition to Formal Opinion 337.

an attorney electronically recording her conversations with a client, adverse party, potential witness, fellow attorney, or judge. Or the attorney may persuade his client to record conversations with third parties for use in litigation. Part II outlines the background of the controversy, beginning with the issuance of ABA Formal Opinion 337 in 1974, which concluded that surreptitious recording by a private attorney was unethical,[46] and culminating with the issuance of Formal Opinion 01-422 in 2001, which withdrew Opinion 337.[47] Part III analyzes the approach taken by some state courts and bar associations, as well as federal courts, prior to the issuance of Formal Opinion 01-422. This part focuses on the reasons some courts gave for finding surreptitious recordings to be inherently deceitful or dishonest,[48] and the reasons why other courts adhered to a more flexible approach under which ethical violations were defined by the circumstances under which they arose.[49] In discussing various court opinions, the provisions of the states' ethics codes in effect at the time of the decision are cited. Whether those provisions have since been supplanted by a particular state's adoption of the Model Rules of Professional Conduct, for example, is beyond the scope of this note.[50] As of the date this note was written, at least one federal court has addressed the issue of surreptitious recording in the wake of Opinion 01-422.[51] Part III discusses that opinion,[52] as it may provide insight as to how courts will address the issue in the future. Part IV speculates as to the affect that Opinion 01-422 might have on cases decided under and relying on the prohibition of secret recordings in Opinion 337. Finally, this note advises

For an annotation and discussion of state court opinions addressing the propriety of covert taping, see Marjorie A. Caner, Annotation, *Propriety of Attorney's Surreptitious Sound Recording of Statements by Others Who Are or May Become Involved in Litigation*, 32 A.L.R. 5th 715 (1995).

46. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 337 (1974) (finding that, with limited potential exceptions for prosecuting or "law enforcement attorneys," "[t]he conduct proscribed in DR 1-102(A)(4) . . . clearly encompasses the making of recordings without the consent of all parties"); *see also* RONALD D. ROTUNDA, LEGAL ETHICS—THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 34-1.2 (2002–2003 ed.) (noting that in Opinion 337, issued soon after the Senate Watergate Committee's discovery that President Nixon "had created an elaborate taping system and had been secretly taping many of his oval office conversations," the ABA Ethics Committee found "that it was unethical for a lawyer to engage in secret tape recordings").

47. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-422 (2001) (withdrawing Formal Opinion 337).

48. *See, e.g.*, People v. Selby, 606 P.2d 45, 47 (Colo. 1979) (discussing ethical implications of secret recordings and finding that "*[i]nherent* in the undisclosed use of a recording device is an element of deception, artifice, and trickery") (emphasis added).

49. *See, e.g.*, *Attorney M.*, 621 So. 2d at 223–24 (expressing Mississippi's preference for a "context-of-the-circumstances" test over Formal Opinion 337).

50. This Note will, however, explore the difference between provisions of the ABA Model Code of Professional Responsibility, under which Formal Opinion 337 was decided, and whether comparable provisions exist under the Model Rules of Professional Conduct. *See infra* Part IV (discussing reasons provided in Formal Opinion 01-422 for withdrawing Opinion 337).

51. Nissan Motor Co. v. Nissan Computer Corp., 180 F. Supp. 2d 1089, 1093, 1096–97 (C.D. Cal. 2002) (stating that covert recording of a conversation with another lawyer "regarding the routine progression of litigation" is both illegal, violating a provision of the California Penal Code governing intentional, nonconsensual recording of a "confidential communication," and "inherently unethical").

52. *See infra* Part III.C.3.

the states to generally prohibit attorney secret recordings as unethical, and to clearly delineate the limited circumstances under which such conduct may be permissible.[53] Notwithstanding the withdrawal of Opinion 337, adoption of a flexible, case-by-case analysis may invite endless argument and hindsight speculation as to why an attorney's conduct was justified under the circumstances. A refusal to condemn secret recording as an ethical violation may have the inadvertent consequence of encouraging seemingly deceptive behavior.

II. HISTORY

ABA Formal Opinion 337 (1974) provided 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."[54] Possible exceptions were provided for secret recordings made by the United States Attorney General, prosecuting attorneys, or "law enforcement attorneys or officers" following directions of the prosecuting lawyer or Attorney General.[55] Under "extraordinary circumstances," such attorneys "might ethically make and use secret recordings if acting within strict statutory limitations conforming to constitutional requirements."[56] Without addressing these exceptions, Opinion 337 called for a case-specific analysis if circumstances arose requiring their application.[57]

No specific provision of the Model Code of Professional Responsibility (Model Code), under which Formal Opinion 337 was issued, explicitly addressed surreptitious recording.[58] Rather, the ABA Committee on Ethics and Professional Responsibility concluded that secret recordings violated the prohibition of "conduct involving dishonesty, fraud, deceit, or misrepresentation" found in DR 1-102(A)(4) of the Model Code.[59] The Committee also noted that Canon 9 of the Model Code, which provided that "A Lawyer Should Avoid Even the Appearance of Professional Impropriety,"[60] generally "expresses . . . the standards of profes-

53. *See infra* Part IV. This approach is the opposite of that recommended by the ABA in Formal Opinion 01-422. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-422 (2001) (stating that the appropriate approach to legal covert taping "is not a general prohibition with certain exceptions, but a prohibition of the conduct only where it is accompanied by other circumstances that make it unethical").

54. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 337 (1974).

55. *See id.*

56. *Id*.

57. *See id.*

58. *See* ROTUNDA, *supra* note 46, § 34-1.2.

59. *See* Formal Op. 337 (stating that "conduct proscribed in DR 1-102(A)(4) . . . in the view of the Committee [on Ethics and Professional Responsibility] clearly encompasses the making of recordings without the consent of all parties"); *see also* MODEL CODE OF PROF'L RESPONSIBILITY DR 1-102(A)(4) (1981).

60. MODEL CODE Canon 9.

sional conduct expected of lawyers" in their dealings with others.[61] The import of Opinion 337 was that, with the possible exception for prosecuting lawyers, "it was unethical for a lawyer to engage in secret tape recordings, even if the recordings were not a violation of criminal law."[62]

Nine years after Formal Opinion 337's issuance, the ABA adopted the Model Rules of Professional Conduct (Model Rules).[63] Model Rule 8.4(c) preserves the prohibition found in DR 1-102(A)(4).[64] In 1994, a New Jersey district court rejected a plaintiff's argument that the court should disregard Opinion 337 because it was decided under the Model Code, whereas New Jersey had adopted the Model Rules.[65] Noting that Rule 8.4(c) contained the same prohibition forming part of the basis of Opinion 337, the court stated that "the message is the same whether it is expressed in the [Rules of Professional Conduct] or the Code of Professional Responsibility."[66] The plaintiff's argument, however, foreshadowed events to come.

On June 24, 2001, the ABA Ethics Committee issued Formal Opinion 01-422, withdrawing Formal Opinion 337.[67] Concluding "that the mere act of secretly but lawfully recording a conversation inherently is not deceitful," the Committee referenced three primary criticisms of Opinion 337.[68] First, the Committee noted that "the belief that nonconsensual taping of conversations is inherently deceitful, embraced by this Committee in 1974, is not universally accepted today."[69] The Committee referenced state statutes allowing recordings to be made without the consent of all parties to the conversation.[70] Second, the Committee noted that under some circumstances, "disclosure of the recording of a conversation may defeat a legitimate and even necessary activity."[71] Thus, some state bars and courts generally agreeing with Opinion 337 adopted exceptions to its sweeping prohibition.[72] Finally, Opinion 337 had been criticized for being inconsistent with the Model Rules, in part because the Rules do not contain the admonition found in the Code that a lawyer "'should avoid even the appearance of impropriety.'"[73]

61. Formal Op. 337; *see also* Charles W. Adams, *Tape Recording Telephone Conversations—Is It Ethical for Attorneys*?, 15 J. LEGAL PROF. 171, 173 (1990) (noting that Formal Opinion 337 was based in part on Canon 9 and DR 1-102(A)(4)).

62. ROTUNDA, *supra* note 46, § 34-1.2.

63. *See* MODEL RULES OF PROF'L CONDUCT (2001); *see also* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-422 (2001) (noting that the ABA adopted the Model Rules nine years after Formal Opinion 337 was decided).

64. *See* MODEL RULES R. 8.4(c); *see also* Formal Op. 01-422 ("The Model Code's prohibition against conduct involving deceit or misrepresentation was preserved in Model Rule 8.4(c) . . . .").

65. *See* Ward v. Maritz, Inc., 156 F.R.D. 592, 597 (D.N.J. 1994).

66. *Id*.

67. Formal Op. 01-422.

68. *Id.*

69. *Id.*

70. *See id.*

71. *Id.*

72. *Id.*

73. *Id.* (quoting MODEL CODE OF PROF'L RESPONSIBILITY (1981)).

The Committee addressed each of these three criticisms in turn, concluding with a new approach to secretly recorded conversations.

> 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*. Formal Opinion 337 (1974) accordingly is withdrawn. A lawyer *may not*, however, record conversations in violation of the law in a jurisdiction that forbids such conduct without the consent of all parties, nor falsely represent that a conversation is not being recorded. The Committee is divided as to whether a lawyer may record a client-lawyer conversation without the knowledge of the client, but agrees that it is inadvisable to do so.[74]

Thus, the Committee abandoned its "broad proscription" of nonconsensual recording as an ethical violation.[75]

Prior to June 2001, the approach embodied in Formal Opinion 337 had withstood the test of time.[76] The language of the opinion was clear.[77] Unauthorized recordings were generally wrong.[78] While perhaps not rising to the level of a legal violation, surreptitious recordings gave rise to serious ethical concerns under this approach.[79] A private attorney caught secretly recording a conversation had engaged in professional misconduct.[80]

Nearly three decades after its issuance, many states have followed Formal Opinion 337.[81] Lawyers who made covert recordings were often

74. *Id.* (emphasis added).

75. *Id.*

76. *See, e.g.*, Debra S. Katz, *Ethics Issues in Employment Law Practice: Use of Recorded Conversations with Clients, Witnesses, and Opposing Counsel*, SGO47 ALI-ABA 1143, 1145 (2001) [hereinafter Katz, *Ethics Issues*] (submitted by Robert B. Fitzpatrick) ("ABA Formal Opinion 337 has remained the foremost guide for jurisdictions evaluating attorney's ethics in recording conversations."). Katz also noted that "some jurisdictions have expanded the parameters of ethical behavior in attorneys recording conversations." *Id.*

77. *See* Formal Op. 337 (1974) (clearly stating that with the possible exception of prosecuting attorneys, "no lawyer should record any conversation . . . without the consent or prior knowledge of all parties to the conversation").

78. *See id.* (noting that DR 1-102(A)(4)'s proscription of conduct involving "dishonesty, fraud, deceit, or misrepresentation" included nonconsensual recordings).

79. *See, e.g.,* Gunter v. Va. State Bar, 385 S.E.2d 597, 600 (Va. 1989) (noting that "conduct may be unethical, measured by the minimum requirements of the Code of Professional Responsibility, even if it is not unlawful"). The *Gunter* court thus found it "immaterial" whether the secret recordings at issue violated any wiretapping statutes. *Id.*

80. *See supra* note 77; *see also* ROTUNDA, *supra* note 46, § 55-2.4 (stating that Opinion 337 had held "that a [private] lawyer's surreptitious tape recording . . . without the consent or prior knowledge of all parties involved is disciplinable").

81. *See, e.g.*, Adams, *supra* note 61, at 174 (noting that "[s]everal state supreme courts in jurisdictions where the tape recording of telephone conversations by parties is not unlawful have followed Formal Opinion 337"); Katz, *Ethics Issues, supra* note 76, at 1145 (stating that "ABA Formal Opinion 337 has remained the foremost guide for jurisdictions evaluating attorney's ethics in recording conversations"; collecting and discussing federal and state court opinions addressing "when an attorney may record conversations with clients, witnesses, and opposing counsel"); Mercer, *supra* note 45, at 1013–14 (noting that Opinion 337 is among those that "are so widely accepted that they set a true standard of conduct. . . . The overwhelming conclusion as established by the ethical opinions, disciplinary proceedings, and case law is that secret recording by nongovernment attorneys is not favored by Ameri-

held to have engaged in dishonest, fraudulent, deceitful, or misrepresentative conduct.[82] Disciplinary sanctions varied depending on the circumstances, with punishment ranging from disbarment[83] to a public reprimand.[84]

Some states generally following Formal Opinion 337's broad proscription of surreptitious recording have adopted safeguards for determining when covert taping truly rises to the level of an ethical violation.[85] The Iowa Supreme Court, for example, requires a showing that an attorney "intended to deceive or mislead the one being recorded" before it will find an ethical violation.[86] An attorney acting in a "purely personal" context when making his recording may escape ethical scrutiny.[87] Although Iowa "reserved any decision about blanket adoption" of its bar advisory opinion modeled after Opinion 337 and prohibiting secret recordings in all but a few circumstances,[88] these limited safeguards in prac-

can courts"); Richard J. Wegener, *Ethical Issues in the Distribution Context: Destruction of Evidence and Secret Recordings*, SG076 ALI-ABA 1131, 1144 (2002) [hereinafter Wegener, *Distribution Context*] (stating that the ABA approach in Opinion 337 is the majority rule); s*ee also* Anderson v. Hale, 159 F. Supp. 2d 1116, 1117 (N.D. Ill. 2001) (stating that a "clear majority of jurisdictions, and all the federal courts to consider this issue" agree that secretly recording conversations is "inherently deceitful," and citing Formal Opinion 337); People v. Selby, 606 P.2d 45, 47 (Colo. 1979) (citing Formal Opinion 337 for the proposition that lawyers who covertly record conversations engage in deceitful conduct).

It appears debatable whether Formal Opinion 337 does reflect a true majority approach. *Cf.* ROTUNDA, *supra* note 46, § 34-1.2 (stating that "[m]ost state *ethics opinions* appear to allow such secret tape recordings") (emphasis added) (citing RESTATEMENT OF LAW GOVERNING LAWYERS § 106 Reporter's Note, at 142 (Official Draft 2000)); *Report of the Ethics Committee*, 23 ENERGY L.J. 533 (2002) (noting that Formal Opinion 337's "per se prohibition . . . received mixed reviews from state and local bar committees. Many declined to adopt the prohibition.").

82. *See, e.g.*, Wegener, *Distribution Context*, *supra* note 81, at 1144 (noting that states following Opinion 337 "agree with the reasoning that attorneys who make secret tape recordings without the consent of the parties are engaging in conduct involving dishonesty, fraud, deceit or misrepresentation"); *see also Selby*, 606 P.2d at 47 ("Surreptitious recording suggests trickery and deceit."); Mercer, *supra* note 45, at 1014 ("Traditionally, the cases and ethical opinions have cited DR 1-102(A)(4) [proscribing dishonest, fraudulent, deceitful, or misrepresentative conduct] as prohibiting secret recording.").

83. *See, e.g., Selby*, 606 P.2d at 47 (disbarring an attorney with a history of misconduct after he secretly recorded an informal conference with judge and district attorney in chambers). The *Selby* court began its opinion by noting that nearly a decade before the current misconduct, the attorney had been disbarred for other misconduct, but was reinstated. *Id.* at 45. Given subsequent misconduct, however, presumably including the secret recordings at issue, the lawyer was "not rehabilitated morally and ethically so as to qualify him for readmission to the practice of law." *Id.*

84. *See, e.g.,* Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Plumb, 546 N.W.2d 215, 218 (Iowa 1996) (publicly reprimanding attorney for secretly recording conversations in chambers with a fellow attorney who was also a part-time judge).

85. *See, e.g.,* Comm. on Prof'l Ethics & Conduct of Iowa State Bar Ass'n v. Mollman, 488 N.W.2d 168, 170–73 (Iowa 1992) (noting that the Iowa State Bar Association's Committee on Professional Ethics and Conduct has issued a formal advisory opinion "modeled after" Formal Opinion 337, but reserving blanket adoption of the state bar association's opinion and instead requiring intent to mislead or deceive before finding an ethical violation).

86. *Plumb*, 546 N.W.2d at 217 (citing *Mollman*, 488 N.W.2d at 171).

87. *See id.*

88. *See id.*

tice do not change the result in most cases.[89] The attorney is often found to have violated the disciplinary rule prohibiting dishonest, deceitful, fraudulent, or misrepresentative conduct.[90] While the added safeguards indicate a departure from Formal Opinion 337's categorical denouncement of secret recording as unethical, the *outcome* of reported disciplinary actions in Iowa arguably places it among those jurisdictions that generally followed Formal Opinion 337.[91]

Among the reasons for prohibiting secret recordings, states that have generally followed Formal Opinion 337's approach often stress the need for confidentiality and openness in attorney-client communications.[92] Secretly recording conversations with a client jeopardizes the nature of this confidential relationship.[93] Recording conversations with a judge is particularly troublesome.[94] Addressing such conduct, the Colorado Supreme Court noted the heightened responsibility an attorney has for openness in her communications with the court.[95]

Other states have rejected Formal Opinion 337's sweeping prohibition of surreptitious recording, opting for a more flexible approach.[96] For example, rather than defining such conduct as per se unethical, the Mississippi Supreme Court employs a "context-of-the-circumstances" test.[97] Considering the context in which a secret recording occurs, an attorney is held to have committed an ethical violation only if her conduct rises "to the level of dishonesty, fraud, deceit or misrepresentation."[98] The act alone of secretly recording a conversation does not rise to this level.[99] Rather, the court considers the factors giving rise to the recording and the use to which it is put.[100] These jurisdictions are distinguishable be-

89. *See, e.g., id.* at 217–18 (finding that an attorney intended to deceive a fellow attorney who was also a part-time judge when recording their conversation and that conduct did not occur in a purely personal context); *Mollman*, 488 N.W.2d at 172–73 (finding violation of state code of professional responsibility but reserving "blanket adoption" of state bar association advisory opinion prohibiting all secret recordings by private attorneys without requiring intent to deceive).

90. *See, e.g., Plumb*, 546 N.W.2d at 216–17 (finding violation of DR 1-102(A)(4); finding "it especially troubling" that recording took place in judge's chambers); *Mollman*, 488 N.W.2d at 172–73 (finding violation of DR 1-102(A)(4)).

91. *See, e.g.*, ROTUNDA, *supra* note 46, § 34-1.2 & n.5 (citing *Mollman* as indication that Iowa "followed" Formal Opinion 337).

92. *See, e.g.*, People v. Smith, 778 P.2d 685, 687 (Colo. 1989) (stating that "trust and confidentiality" form basis of attorney-client relationship).

93. *See id.* (suggesting that holding policy considerations that support the "prosecutorial exception" to covert recording applicable to private attorneys would undermine the confidentiality and trust essential to the attorney-client relationship).

94. *See, e.g.*, People v. Selby, 606 P.2d 45, 47 (Colo. 1979) (discussing lawyer's duty of candor in dealing with the court).

95. *See, e.g.*, *id.*

96. *See, e.g.*, Attorney M. v. Miss. Bar, 621 So. 2d 220, 224 (Miss. 1992) (expressing a preference for a "context-of-the-circumstances" test over Formal Opinion 337).

97. *See id.*

98. *See id.* at 223 (citing Netterville v. Miss. State Bar, 397 So. 2d 878, 883 (Miss. 1981)).

99. *See id.* at 224 (noting that in certain situations "an attorney may be justified in making a surreptitious recording").

100. *See id.*

cause the flexible nature of their analysis of surreptitious recording increases the likelihood that the attorney will escape disciplinary sanctions.[101] Similarly, the Restatement of the Law Governing Lawyers does not adhere to Opinion 337's broad approach.[102] Rather, "the Restatement allows lawyers to make secret recordings of conversations with another person, without that person's consent to being recorded, *if* that recording does not violate the law of the relevant jurisdiction."[103]

Federal courts addressing the issue have adopted a proscription of their own in response to surreptitious recording. Regardless of whether the conduct is considered an ethical violation, federal courts generally find that the act of secret recording vitiates any work-product protection that may have existed in the recording.[104] Similar to state courts considering the issue, federal courts often reference Formal Opinion 337.[105]

The controversy among the states is significant. A great number side with the former ABA approach,[106] which has serious consequences for private attorneys in terms of both their investigation and preparation of cases, and their overall careers. Whether the ultimate sanction is a reprimand,[107] suspension,[108] or disbarment,[109] which generally turns on

101. *Compare* Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Plumb, 546 N.W.2d 215, 217–18 (Iowa 1996) (reserving adoption of state advisory opinion patterned after Opinion 337 and stating that "[i]t is not the use of recording devices, but the employment of artifice or pretense" that is troubling, but still finding ethical violation), *and* People v. Smith, 778 P.2d 685, 686–87 (Colo. 1989) (holding covert recording of former client as violating DR 1-102(A)(4)), *with Attorney M.*, 621 So. 2d at 224–25 (finding no violation of Model Rule 8.4 because lawyer's "conduct did not rise to the level of 'dishonesty, fraud, deceit, or misrepresentation'").

102. ROTUNDA, *supra* note 46, § 34-1.2.

103. *Id*. (citing RESTATEMENT OF THE LAW GOVERNING LAWYERS § 106 cmt. b (Official Draft 2000)).

104. *See, e.g.*, Parrott v. Wilson, 707 F.2d 1262, 1272 (11th Cir. 1983) (holding that "whatever work product privilege might have existed was vitiated by counsel's clandestine recording of conversations with witnesses") (footnotes omitted); Otto v. Box USA Group, Inc., 177 F.R.D. 698, 701 (N.D. Ga. 1997) (finding "that plaintiff unwittingly vitiated any work-product protection that would have attached to her taped conversation with a witness because she did so clandestinely"); *see also* 10 FEDERAL PROCEDURE, LAWYER'S EDITION § 26:141 (2002) (noting that an attorney's surreptitious recording of her conversations with a witness, without obtaining prior consent or "active encouragement and support" of a client's similar behavior, "vitiates whatever work product protection may have existed"); Marguerita B. Dolatly, Note, *Creating Evidence: Ethical Concerns, Evidentiary Problems, and the Application of Work Product Protection to Audio Recordings of Nonparty Witnesses Secretly Made by Attorneys or Their Agents*, 22 RUTGERS COMPUTER & TECH. L.J. 521, 521–22, 526 (1996) (discussing whether the covert recording of a nonparty witness by an attorney or his agent are covered by the work-product doctrine; noting that such "protection may be vitiated by unprofessional or unethical behavior of an attorney or party").

105. *See, e.g.*, Chapman & Cole v. Itel Container Int'l, 865 F.2d 676, 686 (5th Cir. 1989) (finding that surreptitious recording "implicitly waives the protection of the work product doctrine because it violates the American Bar Association's Model Rules of Professional Conduct") (citing *Parrott*, 707 F.2d at 1270–72, which referenced Formal Opinion 337); *Parrott*, 707 F.2d at 1271 (citing Formal Opinion 337 for the proposition that the "recording of conversations of witnesses without their consent is unethical"); Grimes v. United States, 4 Cl. Ct. 205, 206 (1983) (referencing Formal Opinion 337 and asserting that an attorney's surreptitious recording done "in the performance of his duties . . . is a violation of ethical standards").

106. *See supra* note 81.

107. *See, e.g.,* Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Plumb, 546 N.W.2d 215, 218 (Iowa 1996) (issuing public reprimand).

whether the attorney has engaged in previous or additional misconduct,[110] the resulting stigma may be great. Public policy concerns may justify the lawyer's conduct, especially when he is urged by law enforcement to record a conversation.[111]

Against these public policy concerns, the nature and integrity of the profession must be considered. Lawyers are held to high standards of professional responsibility.[112] Clients, witnesses, and judges rely on the confidentiality of their communications with counsel.[113] Any breach of this trust may jeopardize the ability of the lawyer to provide effective representation, and ultimately call into question the integrity of the system.[114] Flexible approaches seem preferable at a glance. Defining ethical violations by the context in which they arise, however, may create too many exceptions to the notion that surreptitious recording is dishonest. In light of the recent withdrawal of Formal Opinion 337, it remains uncertain whether courts that have relied upon that Opinion will now hold that lawful surreptitious taping only becomes unethical based upon attendant circumstances,[115] possibly opening the door for such covert conduct to the detriment of the legal profession.

108. *See, e.g.*, People v. Crews, 901 P.2d 472, 475 (Colo. 1995) (issuing a two-year suspension based on "extensive pattern of neglect of client matters"; also finding ethical violation based on surreptitious recording).

109. *See, e.*g., People v. Selby, 606 P.2d 45, 47 (Colo. 1979) (disbarring attorney with history of professional misconduct who had presently engaged in "grave misconduct" by taping a judge in chambers, distorting the content of the tape, and providing false testimony to disciplinary authorities).

110. *See supra* notes 108–09.

111. *Cf.* People v. Smith, 778 P.2d 685, 687 (Colo. 1989) (rejecting attorney's arguments that his conduct should not be deemed unethical because he acted pursuant to requests of law enforcement).

112. *See, e.g.,* Anderson v. Hale, 159 F. Supp. 2d 1116, 1117 (N.D. Ill. 2001) ("Attorneys, as officers of the court, are held to a particularly high standard of candor."); Gunter v. Va. State Bar, 385 S.E.2d 597, 600 (Va. 1989) ("A higher standard is imposed on lawyers by the Code of Professional Responsibility, many parts of which proscribe conduct which would be lawful if done by laymen.").

113. *See, e.g.*, *Smith*, 778 P.2d at 686–87 (commenting that the secret recording of conversations with a former client would likely not have occurred but for the fact that the attorney "relied upon the trust and confidence placed in him" because of the former attorney-client relationship); *Selby*, 606 P.2d at 47 (prohibiting lawyer from secretly recording conversations with other lawyers, judges, or persons and stating that without "mutual trust and confidence between a judge and a lawyer" the judicial system will be "frustrated").

114. Several commentators have discussed the impact of secret recording on the integrity of the profession. *See, e.g.*, Adams, *supra* note 61, at 180 (arguing that "the public's awareness that attorneys are allowed to tape record telephone conversations with witnesses secretly and advise their clients to do likewise may tarnish the profession's image"); Stanley S. Arkin, *Attorneys, Tape Recorders and Perfidy*, N.Y. L.J., Apr. 14, 1994, at 3 (arguing that "[s]ecret tape recording can undermine the trust and good faith so important to the legal process . . . there is potentially an air of dishonesty and deception surrounding secret recordings"); Seth M. Schwartz, *Taping Telephone Calls: It's Legal, But Is It Ethical*?, N.Y. ST. BAR J., Feb. 1994, at 33 (arguing that the act of secret recording "can only undermine, not enhance, public confidence in the integrity of the profession").

115. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 01-422 (2001) (recommending a prohibition of lawful recording by attorneys "only where it is accompanied by other circumstances that make it unethical").

III. ANALYSIS

A. States That Generally Have Followed the Approach Embodied in Formal Opinion 337: Broad Prohibition of Surreptitious Recording

State courts have held that attorneys who secretly record conversations have engaged in unethical conduct warranting sanction.[116] The ultimate punishment may vary depending on the circumstances of the case, including the nature of the conversation recorded and any prior or additional misconduct, but the general prohibition remains the same.[117] A common theme emerging is a heavy emphasis on the nature of the attorney's relationship with others, including former clients, courts, and other attorneys.[118] The lawyer is responsible for engaging in open and honest communications.[119] Secretly recording conversations may breach the trust and confidence essential to the attorney-client relationship[120] and mandated in an attorney's dealings with the court.[121] The following analysis considers opinions of some states following this approach and their policy reasons for finding an ethical violation. As of the time of this writing, it remains uncertain what impact Formal Opinion 01-422 will have on future cases arising in these states.

1. Colorado

Colorado has imposed sanctions on attorneys who made secret recordings in various settings, "adopt[ing] the position of" Formal Opinion

116. *See infra* Part III.A (discussing state court opinions finding ethical violations where attorneys engaged in covert taping); *see also* Wegener, *Distribution Context*, *supra* note 81, at 1144 (stating that the position of Formal Opinion 337, that surreptitious taping violates Model Rule 8.4(c), is the "majority rule").

117. *See, e.g.,* People v. Crews, 901 P.2d 472, 475 (Colo. 1995) (imposing a two-year suspension for various ethical violations, including the secret recording of a telephone conversation with the attorney's former wife known to be represented by an attorney; noting an "extensive pattern of neglect of client matters" in imposing a lengthy suspension); *Selby*, 606 P.2d at 47 (disbarring attorney in light of prior misconduct and serious nature of current misconduct; prohibiting the secret recording of a conversation with a district attorney and a judge); Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Plumb, 546 N.W.2d 215, 217–18 (Iowa 1996) (condemning the secret recording of a conversation with a judge and imposing a public reprimand given the lawyer's "inexperience" and the "relative harmlessness of the recording he secured"; noting that sanctions in similar covert taping cases often depended on the circumstances).

118. *See, e.g.*, *Smith*, 778 P.2d at 686–87 (discussing nature of attorney-client relationship); *Selby*, 606 P.2d at 47 (commenting on the relationship between judges and lawyers).

119. *See, e.g., Selby*, 606 P.2d at 47 (discussing lawyer's duty of "candor and fairness in all of his dealings with a court").

120. *See, e.g., Smith,* 778 P.2d at 687 (discussing the "trust and confidentiality that is essential to the attorney-client relationship" while holding that attorney's secret recordings of former client violated DR1-102(A)(4)).

121. *See, e.g., Selby*, 606 P.2d at 47 (noting that "[c]andor is required between attorneys and judges," while finding an ethical violation when an attorney secretly recorded a conversation with a judge in chambers).

337.[122] While the misconduct at issue in the Colorado cases often exceeds the act of surreptitious recording,[123] the Colorado Supreme Court's frequent use of broad language criticizing covert taping places it within jurisdictions that adhere to Opinion 337.

An attorney's covert recording of a telephone conversation with a represented party in a divorce matter led to a finding of an ethical violation.[124] In *People v. Crews*, the Colorado Supreme Court imposed a two-year suspension on an attorney after finding multiple violations of the Model Code and Model Rules.[125] One violation involved the attorney's secret recording of his own telephone conversation with his former wife, whom he knew to be represented by counsel, during divorce proceedings.[126] After his wife filed a petition for dissolution of marriage, the attorney convinced her to ask her attorney to withdraw from the proceedings.[127] Upon later resuming representation of the wife and after entry of final orders in the dissolution, the opposing counsel filed a request for an investigation of the attorney.[128] Responding to that request, the lawyer provided the recorded conversation, made without knowledge or consent from his former wife at a time when the lawyer knew that she was represented.[129] The attorney admitted that his conduct violated Model Rule 8.4(c)'s prohibition of "conduct involving dishonesty, fraud, deceit or misrepresentation."[130] The attorney's "pressure and interference" also violated DR 7-104(A)(1) and Rule 4.2, which prohibit an attorney from communicating about the subject matter of the representation with a party that he knows is represented, unless that party's lawyer has given

122. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-422 n.9 and accompanying text (citing *Selby* in support of statement that "[c]ourts . . . in a number of states have adopted the position" of Opinion 337).

123. Discussing the ethical implications of secret recordings, one commentator noted that "it often is difficult to determine whether the court abhors the act of recording or the circumstances surrounding the recording." Mercer, *supra* note 45, at 1002. Mercer argued that reported decisions of disciplinary matters "are often complicated by facts unrelated to the act of recording." *Id.* at 1014. In *Selby*, for example, it was noted that the lawyer's "misuse of the recording and his conduct after recording . . . were cited as justification for the disciplinary action independent of the manner in which the recording was made." *Id.* at 997.

While the Colorado Supreme Court undoubtedly was troubled by circumstances attendant to the recording, the court's broad language that an attorney "may not secretly record any conversation he has with another lawyer or person" suggests that the act of recording did trouble the court independent of the attendant circumstances. *See Selby*, 606 P.2d at 47. Those surrounding circumstances provided further reason for imposing sanctions, but the court's sweeping language suggests an overall prohibition of the *act* of nonconsensual taping. As Mercer later noted in her conclusion, "[c]ourts historically characterize the secret recording of conversations as deceitful, tricky, and unfair." Mercer, *supra* note 45, at 1014. Mercer also noted that "courts and ethical committees state that the *act* of recording without full disclosure violates ethical duties." *Id.* (emphasis added).

124. *See* People v. Crews, 901 P.2d 472, 475–76 (Colo. 1995).

125. *Id.*

126. *See id.* at 475.

127. *See id.*

128. *See id.*

129. *See id.*

130. *See id.*

prior consent.[131] The attorney's misconduct extended beyond surreptitious taping and prohibited communications with his former wife. The court also disciplined the attorney for misconduct in other matters, and imposed the two-year suspension because of an "extensive pattern of neglect of client matters," a history of discipline, and other aggravating factors.[132]

Secretly recording telephone conversations with a former client can be similarly problematic. In *People v. Smith*, the Colorado Supreme Court held that an attorney's act of secretly recording his conversations with a former client at the request of the State's Bureau of Investigation violated a provision of Colorado's Code of Professional Responsibility.[133] In clear terms, the court expressed its disapproval of surreptitious recording.[134] "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."[135] The court then held that the attorney's acts violated DR 1-102(A)(4)'s proscription of dishonest, deceitful, fraudulent, or misrepresentative conduct.[136]

This holding was adopted despite the lawyer's arguments that his actions should be excepted from ethical scrutiny.[137] He had acted at the request of law enforcement officials who had asked him to assist in their investigation of third parties for drug-related activities.[138] The officers had threatened to press criminal charges against the attorney for his own suspected drug use and sales if he refused to cooperate.[139] The lawyer first verified with the state attorney general's office that his conduct would not violate the Code of Professional Responsibility, then recorded conversations with a former client.[140] The lawyer also wore a microphone allowing law enforcement officers to listen as he purchased drugs from the former client.[141] Noting that the lawyer was a private attorney, the court declined to comment on a "prosecutorial exception to the general rule that the standards for prohibiting deceit, dishonesty and fraud preclude attorneys from surreptitiously recording communications with clients and others."[142]

> We do not agree that the above-described policy considerations [concerning criminal investigations] permit private counsel to deal

131. *See id*.
132. *See id.*
133. *See* People v. Smith, 778 P.2d 685, 686–87 (Colo. 1989).
134. *See id.* at 687.
135. *Id.* (citations omitted).
136. *See id.*
137. *See id.*
138. *See id.* at 686.
139. *See id.*
140. *See id.*
141. *See id.*
142. *Id.* at 687 (citing Formal Opinion 337) (additional citations omitted).

> dishonestly and deceitfully with clients, former clients and others. To hold otherwise would fatally undermine the foundation of trust and confidentiality that is essential to the attorney-client relationship in the context of civil as well as criminal proceedings.[143]

Although the attorney no longer represented the client whom he recorded, the court found it likely that the conduct would not have occurred had the attorney "not relied upon the trust and confidence" his former client felt toward him due to their previous attorney-client relationship.[144] Additional ethical violations were found based on the attorney's illegal purchase of cocaine, use of the drug, and revealing of information communicated by his client in confidence.[145] The court also emphasized that the attorney's cooperation with law enforcement officials was partly motivated "by a desire to reduce his own exposure to prosecution."[146] In light of various mitigating factors, including treatment for his prior drug problem, a successful legal practice in Massachusetts, and contributions to the legal field in that state, the Colorado court determined that disbarment "would constitute too severe a sanction" and imposed a two-year suspension from the practice of law, instead.[147]

Ten years earlier in *People v. Selby*, the Colorado Supreme Court condemned an attorney who secretly recorded a conversation in chambers with a judge and a district attorney.[148] Referencing ABA Formal Opinion 337, the court declared that "[a] lawyer may not secretly record any conversation he has with another lawyer or person. Candor is required between attorneys and judges. Surreptitious recording suggests trickery and deceit."[149] Finding it "[p]articularly reprehensible" that the attorney recorded an informal conversation with a judge in chambers, the court noted that "a lawyer has a very special responsibility for candor and fairness in all of his dealings with a court."[150] Compounding the attorney's behavior was the fact that he had used portions of the recording out of context in moving to disqualify the judge, as well as the attorney's false statements before disciplinary authorities.[151] The court noted that its Grievance Committee had concluded, based on prior misconduct and the serious nature of the misconduct at bar, that the lawyer "lack[ed] the

143. *Id.*
144. *Id.* at 686.
145. *Id*.
146. *Id.* at 687.
147. *See id*. at 687–88. In his dissenting opinion, however, Justice Erickson argued that the sanction imposed "should not be less than disbarment." *Id.* at 688 (Erickson, J., dissenting). Erickson argued that the attorney "breached the confidential attorney-client relationship and participated in drug transactions in such a manner as to bring disrespect and a dishonor to the legal profession." *Id.*
148. People v. Selby, 606 P.2d 45 (Colo. 1979).
149. *Id.* at 47 (citations omitted).
150. *Id.*
151. *Id*.; *see also* Mercer, *supra* note 45, at 996–97, 1014 (discussing *Selby* and the difficulty in deciphering "the extent to which the court disciplined Selby solely for the act of making the recording"; subsequently noting the tendency of courts generally to "state that the act of recording without full disclosure violates ethical duties").

essential moral and ethical qualities of character to continue in the practice of law."[152] The court ordered the lawyer disbarred.[153]

Finally, Colorado has also treated conduct involving the secret recording of conversations with a witness as an ethical violation.[154] In *People v. Wallin*, the Colorado Supreme Court found that an attorney's surreptitious recording of a telephone conversation with a witness in a burglary case constituted "unethical conduct."[155] In addition to the covert taping, the attorney had behaved unethically by attempting to encourage the witness to provide false statements to police and attempting to establish an attorney-client relationship to protect an incriminating conversation with the witness from disclosure.[156] The court determined, in part, that the attorney's acts violated the prohibition against "'conduct involving dishonesty, fraud, deceit, or misrepresentation'" found in DR 1-102(A)(4).[157] Finding that the attorney did not personally benefit from his acts, had no prior disciplinary record, recognized the severity of his conduct, and was relatively inexperienced, the court imposed a public censure.[158]

The common theme emerging from these Colorado decisions is the heightened responsibility for openness and honesty placed upon an attorney.[159] Former clients maintain trust and confidence in the attorney.[160] Current clients rely on the lawyer not to engage in dishonest behavior.[161] Courts and opposing counsel similarly expect openness and fair conduct from the attorney.[162] Even when the recording does not involve a client, an ethical violation may arise if the lawyer secretly records someone he knows to be represented in an ongoing dispute between himself and that person.[163] The covert recording of conversations is considered "conduct

152. *Selby*, 606 P.2d at 47.

153. *See id.*

154. *See* People v. Wallin, 621 P.2d 330, 331 (Colo. 1981).

155. *See id.* at 330–31.

156. *See id*.

157. *See id*. at 331 (quoting COLO. CODE OF PROF' RESPONSIBILITY DR 1-102(A)(4) (1981)).

158. *See id.* at 331–32.

159. *See, e.*g., People v. Smith, 778 P.2d 685, 687 (Colo. 1989) (finding that "trust and confidentiality" are crucial to an attorney-client relationship); People v. Selby, 606 P.2d 45, 47 (Colo. 1979) (finding that "candor and fairness" and "mutual trust and confidence" are necessary in attorney contacts with the court).

160. *See, e.g., Smith,* 778 P.2d at 686–87 (finding that an attorney making a secret recording "relied upon the trust and confidence" that a former client placed in him).

161. *See, e.g., id.* at 687 (finding that allowing a private attorney "to deal dishonestly and deceitfully with clients, former clients, and others" would undermine the "trust and confidentiality" at the heart of the attorney-client relationship).

162. *See, e.g.*, *Selby*, 606 P.2d at 47 (ruling that a lawyer cannot surreptitiously record conversations with judges or other attorneys and discussing the necessary "mutual trust and confidence between a judge and a lawyer").

163. *See* People v. Crews, 901 P.2d 472, 475 (Colo. 1995) (finding violation of Colorado's version of Model Rule 8.4(c)).

involving dishonesty, fraud, deceit, or misrepresentation."[164] While attendant circumstances may make the misconduct all the more reprehensible,[165] the Colorado courts' strong language in condemning surreptitious recording suggests a broad, general pronouncement of the conduct as unethical, in line with Formal Opinion 337.[166] A seemingly solid excuse, such as the fact that law enforcement personnel requested and directed the secret recordings, does not change the fact that an ethical violation has occurred.[167]

2. Iowa

The Iowa Supreme Court has taken a strong yet qualified position against secret recordings[168] for many of the same policy reasons cited by the Colorado Supreme Court.[169] In *Committee on Professional Ethics and Conduct of the Iowa State Bar Ass'n v. Mollman*, an attorney agreed to wear a hidden microphone, allowing Federal Bureau of Investigation (FBI) agents to record and monitor a conversation he had with a friend and former client being investigated on drug charges, in exchange for a more lenient sentence for his own conduct.[170] Attorney Mollman was charged in part with violating DR 1-102(A)(4).[171] Although the Iowa Supreme Court agreed that Mollman had violated the disciplinary rule,[172] it adopted an approach somewhat modified from that promoted by Formal Opinion 337.[173] The court first noted that the ethics committee had found that Mollman violated its Formal Advisory Opinion 83-16, "modeled after ABA Formal Opinion 337" and generally prohibiting all non-

164. *See, e.g., Smith,* 778 P.2d at 686–87 (finding attorney's conduct violated DR 1-102(A)(4) and commenting that secret recording "involves elements of deception and trickery"); People v. Wallin, 621 P.2d 330, 331(Colo. 1981) (holding that nonconsensual recording violates DR 1-102(A)(4)).

165. *See supra* note 123 (discussing one commentator's argument that circumstances surrounding the taping in surreptitious recording cases make it difficult to determine whether it is those circumstances or the very act of covert taping that bother the court).

166. *See, e.g.*, *Smith*, 778 P.2d at 687 (stating that "[t]he undisclosed *use* of a recording device necessarily involves elements of deception and trickery") (emphasis added); *Selby*, 606 P.2d at 47 ("*Inherent in the undisclosed use* of a recording device is an element of deception, artifice, and trickery which does not comport with the high standards of candor and fairness by which all attorneys are bound.") (emphasis added).

167. *See Smith*, 778 P.2d at 687 (rejecting attorney's argument that his conduct did not fall within the purview of DR 1-102(A)(4) because he made his secret recordings at the request of law enforcement).

168. *See* Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Plumb, 546 N.W.2d 215, 217 (Iowa 1996) (requiring "proof that the lawyer intended to deceive or mislead the one being recorded" before finding a violation) (citing Comm. on Prof'l Ethics & Conduct of Iowa State Bar Ass'n v. Mollman, 488 N.W.2d 168, 171 (Iowa 1992)).

169. *See id.* at 217–18 (finding intent to deceive and noting that it was "especially troubling that Plumb tape recorded a conversation with a judge in chambers") (citing *Selby*, 606 P.2d at 47) (additional citation omitted).

170. *See Mollman*, 488 N.W.2d at 169–70.

171. *See id.* at 170.

172. *See id.* at 172.

173. *See id.* at 172–73.

consensual recordings.[174] The court stated that Opinion 83-16 "is premised on the view that [attorney surreptitious recording] is inherently deceptive" and thus violates DR 1-102(A)(4), as well as various Iowa Ethical Considerations.[175] The court stated, however, that since "the language of the advisory opinion exceeds the scope of the rule by applying to *any* recording of conversations, whether or not intended by a lawyer to be deceptive or misleading, we reserve our decision about its blanket adoption."[176]

Four years later, the Iowa Supreme Court reaffirmed the rule laid down in *Mollman*.[177] Confronted with a lawyer's covert recording of a conversation with a fellow attorney and part-time judge, the court held that the attorney had violated the state's code of professional responsibility and issued a public reprimand in light of mitigating factors.[178] In *Iowa Supreme Court Board of Professional Ethics & Conduct v. Plumb*, the court noted that it had previously "reserved any decision about blanket adoption of Formal Opinion 83-16 out of concern that the language of the advisory opinion exceeds the scope of the disciplinary rule underlying it, DR 1-102(A)(4)."[179] The court continued to require "proof the lawyer intended to deceive or mislead the one being recorded."[180] The court noted that "[i]t is not the use of recording devices, but the employment of artifice or pretence, that truly poses a threat to the trust which is the bedrock of our professional relationships."[181] In addition, the court noted that a lawyer acting in a "purely personal" context may escape scrutiny.[182]

Despite its seemingly more guarded approach, the *Plumb* court found an ethical violation.[183] Attorney Plumb represented his family members in a dispute with Mike Wells.[184] Wells was initially represented by James Cleverley, Jr., an attorney who—at the time of the covert recording—was also an alternate associate judge and part-time magistrate.[185] During a visit to Cleverley's office, Plumb purportedly "threatened to have Wells 'set up' on a drug deal" if he did not avoid the

174. *See id.* at 170–71.
175. *Id.* at 171.
176. *Id.* at 172–73.
177. *See* Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Plumb, 546 N.W.2d 215, 217 (Iowa 1996); *see also* Katz, *Ethics Issues, supra* note 76, at 1148 (stating that the "*Plumb* court reaffirmed *Mollman*, stating that using a recording device was not in itself problematic; rather, the use posed a threat to trust when the lawyer employed 'artifice or pretense'") (citing *Plumb*, 546 N.W.2d at 217).
178. *See Plumb*, 546 N.W.2d at 217–18.
179. *Id.* at 217 (citing *Mollman*, 488 N.W.2d at 172–73).
180. *Id.* (citing *Mollman*, 488 N.W.2d at 171).
181. *Id.*
182. *See id.* (citing *Mollman*, 488 N.W.2d at 171).
183. *See id.* at 216 (finding "adequate proof" of a violation of DR 1-102(A)(4)).
184. *See id.*
185. *See id.*

family.[186] Cleverley sent a letter to Wells, warning him of the threats, then withdrew from the case.[187] In an effort to prove that he had not made the alleged threats, Plumb went to Cleverley's chambers and secretly recorded a conversation that Plumb initiated regarding the letter.[188] Plumb later admitted knowing that his conduct was unethical at the time of the recording.[189]

The *Plumb* court first found that Plumb's conduct had not occurred during a "purely personal transaction" because the attorney was representing his family members at the time.[190] Plumb also had the requisite intent to deceive Cleverley, the other party to the conversation.[191] Analogizing to *Mollman*, the court stated that Plumb had "violated the 'fundamental honesty' required of all lawyers in order to 'save his own skin.'"[192] Citing the Colorado court's opinion in *Selby*, the Iowa court found it "especially troubling that Plumb tape recorded a conversation with a judge in chambers."[193] Nevertheless, because "the severity of the sanction" in other covert recording cases depended upon the attendant circumstances, the court only imposed a public reprimand.[194] Mitigating factors included the fact that the part-time judge was not a client and did not depend on Plumb for legal advice.[195] Plumb was attempting to exculpate himself rather than inculpate the part-time judge.[196] Plumb had only been practicing in Des Moines for a short time, and the recordings he obtained were relatively harmless.[197]

While Iowa's requirement that "the lawyer intend[] to deceive or mislead the one being recorded"[198] differs from Colorado's more general condemnation of secret recordings,[199] the Iowa Supreme Court's imposition of sanctions in *Mollman*[200] and *Plumb*[201] suggests that the result is of-

186. *Id.*
187. *See id.*
188. *See id.*
189. *See id.*
190. *See id.* at 217.
191. *See id.* at 218.
192. *Id.* (citing and quoting Comm. on Prof'l Ethics & Conduct of Iowa State Bar Ass'n v. Mollman, 488 N.W.2d 168, 171 (Iowa 1992)).
193. *Id.* at 217 (citing People v. Selby, 606 P.2d 45, 47 (Colo. 1979) for the proposition that other courts have been troubled by covert taping of judges) (additional citations omitted).
194. *See id.* at 218.
195. *See id.*
196. *See id.*
197. *See id.*
198. *See id.* at 217 (citing Comm. on Prof'l Ethics & Conduct of Iowa State Bar Ass'n v. Mollman, 488 N.W.2d 168, 171 (Iowa 1992)).
199. *See, e.g.*, People v. Smith, 778 P.2d 685, 687 (Colo. 1989) ("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.") (citing People v. Selby, 606 P.2d 45, 47 (Colo. 1979)) (additional citation omitted); *Selby*, 606 P.2d at 47 ("*Inherent* in the undisclosed use of a recording device is an element of deception, artifice, and trickery . . . .") (emphasis added).
200. *See Mollman*, 488 N.W.2d at 173 (imposing thirty-day suspension).
201. *See Plumb*, 546 N.W.2d at 218 (issuing public reprimand).

ten the same. Arguably, any time an attorney fails to disclose that he is taping a conversation, he intends at least to mislead the person that he is recording.[202] Even without formally adopting Formal Opinion 83-16, the Iowa Supreme Court is arguably more likely to impose sanctions than courts that have explicitly rejected Formal Opinion 337,[203] placing it within those jurisdictions that have generally followed Opinion 337.[204]

3. South Carolina

Like Iowa, South Carolina has qualified its otherwise strong prohibition of surreptitious recording.[205] In 1992, the South Carolina Supreme Court addressed a petition from the attorney general asking the court to amend a ruling made one year earlier.[206] In *In re Attorney General's Petition*, the court addressed its 1991 decision that had "reaffirmed prior rulings that it was unethical for an attorney to record a conversation with another person without the prior knowledge and consent of all parties to the conversation."[207] According to the petition before the court, the blanket condemnation of secret recordings caused "ethical dilemmas" for lawyers in certain situations.[208] For instance, a lawyer may need to secretly record information or threats received anonymously over the telephone.[209] In addition, a government attorney may need to wear a "wire" to secretly record persons trying to bribe the lawyer.[210] Finally, a lawyer under criminal investigation may desire to "cooperate with law enforcement authorities in part by secretly recording conversations with other individuals."[211]

In response, the South Carolina Supreme Court held that "it is not unethical for an attorney to surreptitiously record any conversation when that recording is made with the prior consent of, or at the request of, an appropriate law enforcement agency in the course of a legitimate criminal investigation."[212] This holding is arguably more moderate than Colorado's approach.[213] In *People v. Smith*, a Colorado court sanctioned a private attorney for making secret recordings at the request of law en-

202. *See* Schwartz, *Taping Telephone Calls*, *supra* note 114, at 33 (arguing that "the element of secrecy makes covert recordings inherently deceptive. . . . There would appear to be no reason for secrecy other than the concern that disclosure would affect the substance of a telephone conversation.").

203. *See infra* Part III.B.1 (discussing Mississippi cases).

204. *See supra* note 91.

205. *See In re* Attorney General's Petition, 417 S.E.2d 526, 527 (S.C. 1992) (holding that an attorney could ethically engage in secret recording in limited situations).

206. *See id.* at 526 (noting that the court was petitioned to amend its ruling issued in *In re* Anonymous Member of the S.C. Bar, 404 S.E.2d 513 (S.C. 1991)).

207. *Id.* at 526 (citing generally *In re* Warner, 335 S.E.2d 90 (S.C. 1985)); *In re* Anonymous Member of the S.C. Bar, 322 S.E.2d 667 (S.C. 1984)).

208. *See Attorney General's Petition*, 417 S.E.2d at 526–27.

209. *See id.* at 526.

210. *See id.*

211. *Id.* at 527.

212. *Id.*

213. *See supra* Part III.A.1 (discussing Colorado cases).

forcement authorities.[214] The Colorado lawyer was suspected of engaging in drug-related activities.[215] Applying the holding of *In re Attorney General's Petition*, the making of such recordings arguably would not constitute an ethical violation because it was done "at the request of" law enforcement during "a legitimate criminal investigation."[216]

South Carolina's 1992 opinion qualified its holding handed down one year earlier in *In re Anonymous Member of the South Carolina Bar*.[217] In *In re Anonymous*, the court was asked generally whether a lawyer could "tape record a conversation without the knowledge and consent" of all its participants.[218] Specifically, the issue involved the propriety of nonconsensual recording as an alternative to note-taking.[219] The court acknowledged the difficulties a lawyer confronts when participating in a conversation, while simultaneously taking accurate notes.[220] Nevertheless, the court reaffirmed its rule requiring "prior knowledge and consent of all parties to the conversation" before an attorney can record any portion thereof.[221] The court clarified that this rule would apply regardless of the purpose for which the tape is made.[222] "Henceforth, this rule shall be applied irrespective of the purpose(s) for which such recordings were made, the intent of the parties to the conversation, whether anything of a confidential nature was discussed, and whether any party gained an unfair advantage from the recordings."[223] In reaching its conclusion, the court cited a prior case in which it had relied on Formal Opinion 337 to find an ethical violation for surreptitious recording.[224]

In the 1980s, South Carolina confronted the issue of secret recordings in various settings.[225] As in Colorado,[226] an attorney was involved in the covert recording of a conversation with a judge.[227] Unlike the Colorado attorney, the South Carolina attorney used his client to

214. People v. Smith, 778 P.2d 685, 686 (Colo. 1989).

215. *See id.* at 686.

216. *See Attorney General's Petition*, 417 S.E.2d at 527.

217. *In re* Anonymous Member of the S.C. Bar, 404 S.E.2d 513 (S.C. 1991).

218. *Id.* at 513.

219. *See id.* at 514.

220. *See id; see also* Katz, *Ethics Issues, supra* note 76, at 1147 (arguing that the "attorney's conduct was understandable, because of the difficulty of taking accurate and thorough notes while participating in a conversation").

221. *See Anonymous Member of the S.C. Bar,* 404 S.E.2d at 514 (citations omitted).

222. *See id.*

223. *Id.*

224. *See id.* at 513 (citing *In re* Anonymous Member of the S.C. Bar, 322 S.E.2d 667 (S.C. 1984)).

225. *See In re* Warner, 335 S.E.2d 90, 90–91 (S.C. 1985) (confronting a client who secretly recorded conversation with a judge and whose attorney participated in plan); *Anonymous Member of the S.C. Bar*, 322 S.E.2d at 668 (involving a lawyer who recorded a telephone conversation with the other driver in auto accident involving his client).

226. *See* People v. Selby, 606 P.2d 45, 46–47 (Colo. 1979) (involving a lawyer who secretly recorded a conversation with a judge in chambers).

227. *See Warner*, 335 S.E.2d at 90.

complete the task.[228] In *In re Warner*, an attorney schemed with his client in a divorce case "to first entrap, then record [the client's] conference with a family court judge."[229] The attorney arranged for the client to carry a recording device hidden in a briefcase into her conference with the judge, and also provided her with a small recorder.[230] Noting that it "will not tolerate such conduct,"[231] the court found the attorney guilty of violating DR 1-102's prohibition of "conduct involving dishonesty, fraud, deceit or misrepresentation."[232] In strong language, the court condemned not only the attorney's conduct but also secret recordings in general.[233] "Upon oral argument Complainant's counsel succinctly commented that lawyers simply do not participate in any manner in the furtive recording of judges in their chambers. It is *equally* reprehensible and impermissible for an attorney to secretly record another attorney or, indeed, another person."[234] In light of the absence of any prior disciplinary action against the attorney, the court issued a public reprimand.[235]

One year earlier, the South Carolina Supreme Court relied heavily on Formal Opinion 337 to address what it called "a question of first impression in South Carolina."[236] Specifically, the court addressed "whether an attorney may tape record a conversation without the knowledge and consent of all parties to the conversation."[237] In *In re Anonymous Member of the South Carolina Bar*, the court privately reprimanded an attorney hired to investigate an automobile accident for covertly recording a telephone conversation with the driver of the other vehicle.[238] The attorney did not identify himself as such when asked by the other driver about his identity.[239] The attorney later attempted to use the recording during a deposition of that driver.[240] The court first held that the attorney's failure to identify himself as a lawyer violated DR 1-102(A)(4).[241]

In addressing the covert taping issue, the court stated that Formal Opinion 337 declared that "a lawyer's secret recording of a conversation does constitute professional misconduct."[242] Citing in particular two Colorado decisions, the South Carolina court found that most jurisdic-

228. *See id.*
229. *See id*.
230. *See id.*
231. *Id.* at 91.
232. *See id.* at 90.
233. *See id.* at 91.
234. *Id.*
235. *See id.*
236. *See In re* Anonymous Member of the S.C. Bar, 322 S.E.2d 667, 669 (S.C. 1984).
237. *Id.*
238. *See id.* at 668–69.
239. *See id.* at 668.
240. *See id.*
241. *See id*. at 669.
242. *Id.*

tions reach the same result when addressing the issue.[243] Thus, the court held that "an attorney is guilty of misconduct under DR 1-102(A)(4) where a recording is made of a conversation with an adversary or a potential adversary without the knowledge and consent of all parties to the conversation."[244] The court issued a private reprimand in light of the novelty of the issue.[245]

Recently, South Carolina tackled the propriety of an attorney's recording of conversations, from his home telephone, in which he was not always a participant.[246] In *In re Nester*, a lawyer "attached a voice activated tape recorder" to a home telephone, secretly recording *every* incoming and outgoing call over many weeks.[247] During "domestic litigation" between him and his "estranged wife," the attorney failed to disclose the tapes in discovery.[248] The court held that the lawyer's conduct violated multiple provisions of South Carolina's Rules for Lawyer Disciplinary Enforcement, as well as its Rules of Professional Conduct.[249] In particular, the attorney's acts violated the rule prohibiting "conduct involving dishonesty, fraud, deceit or misrepresentation."[250] The court then issued a public reprimand based on the attorney's lack of prior misconduct and acknowledgment of the impropriety of his actions.[251]

South Carolina exemplifies the approach embodied in Formal Opinion 337.[252] "In South Carolina, lawyers cannot surreptitiously tape, period."[253] This statement must be qualified with the limited exception adopted in 1992 for certain recordings made under the guidance of law enforcement during criminal investigations.[254] As acknowledged in Formal Opinion 01-422, however, South Carolina generally follows Opinion 337.[255]

243. *See id.* (citations omitted).
244. *Id.*
245. *See id.*
246. *See In re* Nester, 541 S.E.2d 538, 539 (S.C. 2001).
247. *See id.* at 539.
248. *See id.*
249. *See id.*
250. *See id.*
251. *See id.*
252. *See, e.g.*, John Freeman, *Client Taping*, S.C. LAW., Apr. 12, 2001, at 12 (stating that South Carolina's "Supreme Court has told us time and time again, that surreptitious taping by lawyers is unethical, period") (citations omitted).
253. *Id.* at 13.
254. *See In re* Attorney General's Petition, 417 S.E.2d 526, 527 (S.C. 1992).
255. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-422 (2001) (including South Carolina in a footnote supporting its statement that "[c]ourts . . . in a number of states have adopted" Opinion 337's approach).

4. Virginia

Virginia may provide an additional example of a jurisdiction adopting a broad approach to surreptitious recording,[256] although a recent ethics opinion from that state has placed some doubt on the extent of its prohibition.[257] In 1989, the Virginia Supreme Court addressed attorney-authorized secret recordings in *Gunter v. Virginia State Bar*.[258] Attorney Gunter had been retained by Jack Zerkel, a man suspecting his wife of adultery.[259] Gunter told his client "that it would not be improper" to place a recording device on a home telephone to monitor his wife's calls.[260] Gunter authorized a private investigator to install the device, which tracked calls for one month.[261] The wife later learned about the recording device from a memorandum that the attorney sent to her husband.[262] Gunter was charged with violating DR 1-102(A)(4).[263]

The court began by noting that the Model Code imposes a "higher standard" on attorneys, prohibiting certain acts that would be permissible if done by a nonattorney.[264] The court went a step further in its emphasis on this heightened standard of attorney conduct.[265]

> The traditions of professionalism at the bar embody a level of fairness, candor, and courtesy higher than the minimum requirements of the Code of Professional Responsibility . . . . [C]onduct may be unethical, measured by the minimum requirements of the Code . . . even if it is not unlawful. It is therefore immaterial whether the conduct complained of . . . violates the wiretapping laws . . . .[266]

The court cited Formal Opinion 337, but noted that the Opinion encompasses situations where an attorney secretly records conversations in which he also participates.[267] In this case, the attorney was not a participant to the conversations, thus the court "expressly refrain[ed]" from deciding whether a lawyer's recording of a conversation in which he participated would violate DR 1-102(A)(4).[268] The court then declared, however, that "the recordation, by a lawyer or by his authorization, of conversations between third persons, to which he is not a party, without

256. *See, e.*g., Wegener, *Distribution Context*, *supra* note 81, at 1144 (placing Virginia among those states that follow the "majority rule" embodied in Formal Opinion 337); *see also* Me. State Bar Ass'n Prof'l Ethics Comm'n, Op. 168 (1999) (citing Gunter v. Va. State Bar, 385 S.E.2d 597 (Va. 1989) for the proposition that Virginia is among those states that have "joined in [the] view" that secret recording is unethical).

257. *See* Va. Legal Ethics Opinion 1738 (2000).

258. *See Gunter*, 385 S.E.2d at 598–99.

259. *See id.* at 598.

260. *See id.* at 599.

261. *See id.* at 598–99.

262. *See id.* at 599.

263. *See id.* at 598

264. *See id.* at 600.

265. *See id.*

266. *Id.*

267. *See id.*

268. *See id.*

the consent or prior knowledge of each party" did fall within the purview of DR 1-102(A)(4).[269] Affirming a thirty-day suspension,[270] the court held that the recording authorized by Gunter "was more than a departure from the standards of fairness and candor which characterize the traditions of professionalism. . . . [I]t was deceitful conduct proscribed by DR 1-102(A)(4)."[271]

Virginia's approach is more limited than that espoused in Formal Opinion 337. A Virginia ethics opinion noted that *Gunter* had only addressed the propriety of *attorney-authorized* recordings, as opposed to situations where the lawyer also participated in the conversation.[272] In Legal Ethics Opinion 1738, the Virginia ethics committee expressed its view that *Gunter* should be limited to its facts.[273] Additionally, ABA Formal Opinion 01-422 noted that Virginia had previously condemned covert taping, citing *Gunter* and several Virginia ethics opinions, but also noted the state's more moderate position in Opinion 1738.[274] Opinion 1738, issued in 2000, provides that nonconsensual recording is not an ethical violation "when done for the purpose of a criminal or housing discrimination investigation."[275] The Virginia ethics committee noted that the lawful surreptitious taping of telephone conversations might also be ethical in other unspecified situations.[276] In Opinion 1738, the Virginia ethics committee expressed concern that the expansion of *Gunter* by some of its earlier opinions had created a "categorical ban" that might be undesirable because an "unqualified prohibition" would overlook justifiable covert taping for law enforcement purposes.[277] The Committee noted that Opinion 337 included a "law enforcement exception."[278] The covert taping deemed in the Virginia ethics opinion not to rise to the level of an ethical violation is only a slight extension of the exception in Opinion 337. While Opinion 1738 does suggest the possibility of additional departures from the broad approach taken in ABA Opinion 337, it remains to be seen how far the Virginia Supreme Court and the state's ethics committee will go in holding that secret recording is not itself unethical.

269. *Id.*
270. *See id.* at 598, 600.
271. *Id.* at 600.
272. *See* Va. Legal Ethics Op. 1738 (2000).
273. *See id*.
274. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-422 (2001).
275. *See id.*; *see also* Va. Legal Ethics Op. 1738.
276. *See* Va. Legal Ethics Op. 1738.
277. *Id*.
278. *See id*.

B. States Departing from Formal Opinion 337: A Flexible, Contextual Approach to Covert Recording

Other states have clearly rejected Formal Opinion 337's broad pronouncement of covert recording as unethical, opting for a flexible, contextual approach to such conduct.[279] Mississippi exemplifies this position.[280] The Mississippi Supreme Court adopted a "context-of-the-circumstances" test to determine whether an attorney's conduct truly rises to the level of an ethical violation.[281] With the withdrawal of Opinion 337 and the ABA Committee on Ethics and Professional Responsibility's response to criticisms of that Opinion,[282] states following this flexible approach may have additional support for their position.

1. Mississippi

In *Netterville v. Mississippi State Bar*, the Mississippi Supreme Court solidified its preference for an approach different from that espoused in Formal Opinion 337.[283] A plaintiff's attorney in a products liability action allegedly recorded a telephone conversation with a former stockholder of the corporate defendant.[284] Without the stockholder's knowledge, the attorney's secretary, listening in, took shorthand notes and later transcribed the conversation.[285] The Complaints Committee of the Mississippi State Bar found the nonconsensual recording of a potential witness to constitute "unprofessional conduct" and issued a private reprimand.[286] The attorney appealed.[287]

After citing Formal Opinion 337, upon which the Committee had relied, the court adopted a different approach.[288] The court found that "when considered within the context of the circumstances then existing," the attorney was not guilty of dishonest, fraudulent, deceitful, or misrepresentative conduct.[289] Specifically, the court noted that the evidence had

279. *See, e.g.*, Wegener, *Distribution Context*, *supra* note 81, at 1144 ("A minority of jurisdictions reason that secret taping alone does not constitute dishonesty, fraud, deceit or misrepresentation per se.") For additional discussion of relevant Mississippi cases, see Caner, *supra* note 45 (summarizing various Mississippi Supreme Court decisions addressing the issue of surreptitious recordings); Katz, *Ethics Issues, supra* note 76, at 1149–51 (same).

280. *See* Wegener, *Distribution Context*, *supra* note 81, at 1144–45 (placing Mississippi in the "minority" that have not followed the per se approach of Opinion 337); *see also* Attorney M. v. Miss. Bar, 621 So. 2d 220, 223–24 (Miss. 1992) (expressing preference for a "context-of-the-circumstances" test over Formal Opinion 337).

281. *See Attorney M.*, 621 So. 2d at 223–24; Netterville v. Miss. State Bar, 397 So. 2d 878, 883 (Miss. 1981) (adopting and applying "context-of-the-circumstances" approach).

282. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-422 (2001).

283. *See Netterville,* 397 So. 2d at 882–83.

284. *See id.* at 879–81.

285. *See id.* at 881–82.

286. *See id.* at 881.

287. *See id.* at 879.

288. *See id.* at 882–83.

289. *Id.* at 883.

not sufficiently established that the conversation was actually recorded.[290] Additionally, there was no ethical violation because "the information requested [from the potential witness] was of such a nature as reasonably to import to the person called the probability, if not certainty, that it would be taken down in some manner for future use."[291] The attorney made the calls to secure names and addresses.[292] The court noted that in situations "where a caller requests data or information, the person called reasonably should expect" that the information will be "take[n] down."[293] The court then held that the attorney had not engaged in misconduct.[294]

More than a decade later, Mississippi relied on the *Netterville* approach to hold that an attorney's secret recording of telephone conversations with a doctor who was also a possible codefendant did not amount to an ethical violation.[295] In *Attorney M. v. Mississippi Bar*, Attorney M. represented the plaintiff in a medical malpractice suit.[296] Uncertain which of two doctors, if either, was responsible for his client's harm, the attorney called "Dr. C" for information about his client's condition when she left Dr. C's care.[297] The attorney contemplated joining Dr. C as a codefendant.[298] Attorney M. recorded two conversations without informing the doctor or obtaining his consent.[299] Dr. C stated that he had assumed his words were being recorded but did not know until after the fact, when Attorney M. sent a letter disclosing that one of the conversations had been recorded.[300] The Complaint Tribunal's findings included a violation of Rule 8.4(c)'s proscription of "conduct involving dishonesty, fraud, deceit or misrepresentation."[301]

In reversing the Tribunal, the Mississippi Supreme Court noted that while it had "made several favorable references to Formal Op. 337," the court had "never formally adopted it."[302] Rather, *Netterville* had "established a rule considerably broader than the one set out by the ABA."[303] The court then expressed its preference for the *Netterville* approach over Formal Opinion 337.[304] First, the court noted that *Netterville* "applies equally to all attorneys, regardless of their niche in the practice of law," while Opinion 337 includes a possible exception for prosecuting attor-

290. *Id.*
291. *Id.*
292. *See id.* at 880–82.
293. *Id.* at 882.
294. *Id.* at 883.
295. *See* Attorney M. v. Miss. Bar, 621 So. 2d 220 (Miss. 1992).
296. *See id.* at 221.
297. *See id.* at 221–22.
298. *See id.* at 222.
299. *See id.* at 221–22.
300. *See id.* at 222.
301. *See id.*
302. *Id.* at 223 (footnote omitted).
303. *Id.*
304. *Id.*

neys.[305] The *Attorney M.* court found "no principled basis for a rule under which it is ethical for a prosecuting attorney to surreptitiously record conversations with potential adverse witnesses but unethical for other attorneys to do the same thing."[306] Any lawyer, prosecuting or otherwise, is generally only required to "keep the confidences" of his client.[307]

The Mississippi Supreme Court did express some disapproval of secret recordings. Noting that "the abusive use of such tactics is distasteful and falls below the standards of professional conduct expected of lawyers," the court nevertheless found that Formal Opinion 337's "categorical pronouncement . . . goes too far."[308] In support of this conclusion, the court noted that an attorney's act of covertly recording may sometimes "be justified."[309] An attorney might covertly record "to protect himself or his client from the effects of future perjured testimony."[310] If a lawyer's recording is used as "blackmail or to otherwise gain unfair advantage," however, such conduct is unethical.[311] "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."[312]

Applying the "context-of-the-circumstances" approach, the court held that "Attorney M.'s conduct did not rise to the level of 'dishonesty, fraud, deceit or misrepresentation.'"[313] As in *Netterville*, the information that the attorney had requested over the telephone was "indisputably 'of such a nature as reasonably to import'" to the doctor the likelihood "'that it would be taken down in some manner for future use.'"[314] Also, Dr. C assumed he was being recorded.[315] During one of the calls, Attorney M. had said that he "wished" to tape a statement.[316] There was also no suggestion that Attorney M. wanted to use the tapes for "any improper purpose."[317]

In his concurring opinion, Justice Robertson offered additional policy reasons supporting the court's holding.[318] Beginning by noting that he "found Attorney M.'s conduct offensive until I thought about it,"[319] Robertson indicated that the nature of the profession might necessitate

305. *Id.*
306. *Id.*
307. *See id.* at 224.
308. *Id.*
309. *See id.*
310. *Id.*
311. *Id.*
312. *Id.*
313. *Id.*
314. *Id.*
315. *See id.* at 225.
316. *See id.*
317. *See id.*
318. *See id.* at 228 (Robertson, J., concurring).
319. *Id.*

recordings.[320] "Lawyers live on the telephone and in due course talk often to third persons. . . . That he does this and that he remembers what he is told is vital to the lawyer's competence in his undertaking."[321] A lawyer who could *verbatim recollect* a conversation would not have engaged in dishonest conduct.[322] Yet, because most lawyers lack such a memory, they often take notes during the conversation or dictate memos to their files immediately thereafter, without disclosing their conduct.[323] Disclosure would not be expected because the general public "should realize" that a lawyer "intends to act on what he is told, should it be legally relevant."[324] As recorded conversations are more accurate than handwritten notes, "[a] rational, fair-minded and candid third person should delight that the lawyer recorded what he said. . . . Recordings should breed confidence, a security from later distortion."[325] So long as the attorney discloses "his identity, his representation, and his purposes" and *truthfully answers when asked* if he is making a recording, his conduct should be tolerated.[326]

One year later, an attorney violated one of Justice Robertson's suggested requirements by expressly denying to a potential witness that he was recording their conversation.[327] This outright denial was enough for the court in *Mississippi Bar v. Attorney ST* to find an ethical violation.[328]

Attorney ST represented a defendant in an assault case.[329] Following the conclusion of the prosecution's case, the judge told the attorney during a recess that "the prosecution had a problem proving its case."[330] Yet, ten days later, Attorney ST's client was convicted.[331] The judge told the attorney during a telephone conversation that the city's police chief and various other city officials "were 'after' his client," the client could have been convicted of more serious charges, and he should not file an appeal.[332] The client then brought a civil rights action in federal court against the city and certain officials.[333] Responding to a summary judgment motion, Attorney ST filed an affidavit disclosing his recorded conversations with the judge and police chief.[334] At one point, the chief had asked, "You ain't taping me, are you?"[335] Attorney ST falsely replied,

320. *See id.*
321. *Id.*
322. *See id.*
323. *Id.*
324. *Id.*
325. *Id.*
326. *Id.*
327. *See* Miss. Bar v. Attorney ST, 621 So. 2d 229, 231 (Miss. 1993).
328. *Id.* at 233 (finding a violation of Mississippi Rule of Professional Conduct 4.1).
329. *Id.* at 231.
330. *Id.*
331. *Id.*
332. *Id.*
333. *Id.*
334. *Id.*
335. *Id.*

"No, no."[336] The attorney had recorded the conversations to prove that his client's prosecution was politically motivated.[337] He had denied the recording to safeguard his client's interest, because "he knew he was about to hear the truth" from the chief.[338]

The Mississippi Supreme Court began its analysis by citing its holding in *Attorney M.* "that, under certain circumstances, an attorney may tape a conversation with a potential party opponent without his knowledge or consent."[339] The court reiterated the *Netterville* "context-of-the-circumstances" approach and its "preference for a broader test than that espoused by Formal Op. 337."[340]

Applying the "context-of-the-circumstances" test, the court noted that Attorney ST was "acting to protect his client's interests" and that under *Attorney M.*, his action might be "justified."[341] Nevertheless, the lawyer "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."[342]

> An attorney is not a private detective or secret agent; he is not acting as an undercover police officer; rather, he is first and foremost an attorney, and his truthfulness must be above reproach. When asked point-blank whether he is mechanically reproducing a conversation, his answer must be truthful. To respond otherwise vitiates all rules of professional conduct.[343]

The court found that the attorney's conduct violated Rule 4.1, which prohibits a lawyer while representing a client from "knowingly . . . mak[ing] a false statement of material fact to a third person."[344] The fact that the conversations were being recorded was material and had to be truthfully disclosed once the third party asked.[345] In light of the "spontaneous" nature of the lawyer's conduct, meant to "protect his client and uncover the truth," the court issued a private reprimand.[346]

Attorney M.'s holding was further sanctioned in 1994, when the Mississippi Supreme Court again held "that surreptitious taping of telephone conversations do [sic] not violate the rules of professional conduct."[347] In

336. *Id.*
337. *See id.* at 231–32.
338. *Id.* at 232.
339. *Id.* (citing Attorney M. v. Miss. Bar, 621 So. 2d 220 (Miss. 1992)).
340. *Id.* (citing *Attorney M.*, 621 So. 2d at 223; quoting Netterville v. Miss. State Bar, 397 So. 2d 878, 883 (Miss. 1981)).
341. *Id.* at 232–33.
342. *Id.* at 233 (emphasis added).
343. *Id.*
344. *Id.* (quoting MISS. RULES OF PROF'L CONDUCT R. 41 (2001)).
345. *Id.* In his concurring opinion, Justice Banks emphasized this requirement. "Here we take the position that it is not unethical to tape surreptitiously but that, if the victim is astute (cautious, suspicious, fearful) enough to ask, the fact of taping must be disclosed." *Id.* at 234 (Banks, J., concurring).
346. *Id.* at 233.
347. Attorney L.S. v. Miss. Bar, 649 So. 2d 810, 814 (Miss. 1994) (citing Attorney M v. Miss. Bar, 621 So. 2d 220 (Miss. 1992)).

Attorney L.S. v. Mississippi Bar, Attorney L.S. recorded telephone conversations with a juror and alternate juror following a medical malpractice case.[348] Before the jury's verdict, the judge had prohibited the lawyers from contacting jurors without his permission.[349] Attorney L.S. misrepresented to the jurors that he had obtained the court's permission to make the calls.[350] The Mississippi Bar Complaint Tribunal issued a thirty-day suspension, finding multiple violations of the state's Rules of Professional Conduct.[351] Following the hearing before the complaint tribunal, *Attorney M.* was decided.[352]

The Mississippi Supreme Court found that in light of *Attorney M.*, the portion of the tribunal's judgment regarding the secret recording was inapplicable.[353] "This Court has since the conclusion of the tribunal hearing removed surreptitious taping of telephone conversations from the category of attorney misconduct and that portion of the Tribunal's opinion is no longer applicable."[354] Drawing an analogy to *Attorney ST*,[355] the court issued a private reprimand for Attorney L.S.'s conduct in contacting jurors against a court order and misrepresenting to them that he had permission to make the calls.[356] The conduct could "be construed as a bad judgment call intended to protect [Attorney L.S.'s] client and uncover jury misconduct."[357] Attorney L.S. may have misunderstood the judge's order because of a hearing problem and fatigue he suffered the day the order was read.[358] The attorney tried to contact the judge before calling the jurors.[359] He "apologized and turned over the tapes" when the judge confronted him.[360]

While the Mississippi Supreme Court found violations in both *Attorney L.S.* and *Attorney ST,* those violations were based on conduct that included misrepresentations.[361] The focus was not on the act of secretly recording, which precedent had held did not constitute a per se ethical violation.[362] Rather, the attorney in each case was sanctioned for ex-

348. *Id.* at 810.
349. *Id.*
350. *Id.*
351. *Id.* at 810–11.
352. *Id.* at 811.
353. *See id.* at 815; *see also id.* at 814 (stating that, given the holding in *Attorney M.*, "the major component of the Tribunal's finding under Rule 8.4 no longer exists as a violation").
354. *Id.* at 815.
355. *See id.* at 814–15 (discussing the conduct of the lawyer in Miss. Bar v. Attorney ST, 621 So. 2d 229 (Miss. 1993) and comparing to this case).
356. *Id.* at 815.
357. *Id.*
358. *Id.*
359. *Id.*
360. *Id.*
361. *See id.*; Miss. Bar v. Attorney ST, 621 So. 2d 229, 233 (Miss. 1993).
362. *See Attorney L.S.*, 649 So. 2d at 815 (noting that the Mississippi Supreme Court had "removed surreptitious taping of telephone conversations from the category of attorney misconduct"); *Attorney ST*, 621 So. 2d at 232 (noting that an attorney's surreptitious recording is not always impermissible under Mississippi Supreme Court precedent).

pressly denying his actions when asked by the other party to the conversation,[363] or contacting jurors against a court order and misrepresenting to them that his calls were court-approved.[364] The aforementioned Mississippi cases are distinguishable from the court opinions discussed in part III.A because, with the exceptions just noted, attorneys that engaged in surreptitious taping have escaped discipline.

2. Maine and Wisconsin

While Mississippi case law sets forth that state's position on attorney secret recordings,[365] Maine and Wisconsin are among the states that take a similar flexible approach in state bar opinions.[366] Bar opinions in these states explicitly provide that the act of surreptitiously recording a conversation does not itself constitute an automatic ethical violation.[367]

Maine determined in 1999 that an attorney does not automatically violate its Bar Rules by "tape-recording telephone conversations, including those with clients and opposing counsel, without informing those parties that such secret recording was being done."[368] An attorney asked the state bar whether such conduct would violate its rules, leading to the issuance of Opinion Number 168.[369] In that Opinion, the state bar's Professional Ethics Commission decided that the Maine Bar Rules, including the rule against dishonest, fraudulent, deceitful, or misrepresentative conduct, "do not per se prohibit the practice."[370] Nevertheless, "whether such conduct is deceptive or unethical may actually depend upon the precise facts and circumstance of each particular case."[371] While "recording is not per se unethical . . . the recording attorney's conduct must otherwise not be dishonest, fraudulent, deceitful or involve misrepresentation."[372]

In 1995, an attorney posed a similar question to the State Bar of Wisconsin Professional Ethics Committee.[373] Asked as to whether a lawyer could record statements during a telephone conversation without the knowledge and consent of the other party, the Committee issued an ethics opinion differing from the ABA's prior approach.[374] The Committee

363. *See Attorney ST*, 621 So. 2d at 233.
364. *See Attorney L.*S., 649 So. 2d at 815.
365. *See supra* Part III.B.1 (discussing Mississippi cases).
366. *See* Me. State Bar Ass'n Prof'l Ethics Comm'n, Op. 168 (1999); *Department Ethics Opinions E-94-5: Recording Telephone Calls Without Disclosure or Consent*, 68 WIS. LAW. 32 (1995) [hereinafter *Department Ethics Opinions*].
367. *See supra* note 366.
368. *See* J. Scott Davis, *Bar Counsel's 1999 Annual Report*, 15 ME. B.J. 202, 206 (2000) [hereinafter *Annual Report*] (summarizing Opinion 168); *see also* Me. Bar Op. 168.
369. *See Annual Report*, *supra* note 368, at 206.
370. *Id.*
371. *See id*.
372. Me. Bar Op. 168.
373. *See Department Ethics Opinions*, *supra* note 366, at 32.
374. *See id.*

began by citing ABA Formal Opinion 337 and noting that ethics opinions among the states varied on the issue of nonconsensual recordings.[375] Using language similar to that used under the contextual approach followed in Mississippi,[376] the Committee stated 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."[377] Instead, the determination of whether such a recording "involves 'dishonesty, fraud, deceit or misrepresentation' . . . depends upon all of the circumstances operating at the time."[378] This determination is case-specific.[379]

Factors to consider in determining whether a secret recording rises to the level of proscribed conduct include the parties' previous relationship, any statements made during the taped conversation, whether previous "threatening or harassing" calls had been made, as well as "the intended purpose of the recording."[380]

The Committee drew a distinction in cases where an attorney records a conversation with a client or a judge and her staff.[381] Given the fiduciary nature of the attorney-client relationship, knowledge and consent of the client being recorded are required.[382] Secret recordings with a judge and her staff are "generally impermissible."[383] Even if the recording is permissible, the Committee cautioned that the material may be discoverable.[384] Thus, the attorney "should be very cautious" in determining whether to record.[385] Finally, any "*routine* secret recording would almost certainly violate the Rules of Professional Conduct."[386]

Maine and Wisconsin may be characterized as states following the flexible, contextual approach because of their explicit preference for an analysis of the circumstances under which a recording was made, leading to a greater potential for finding no ethical violation.[387] Rather than finding a lawyer's conduct in making a secret recording to be inherently de-

375. *Id.*
376. *Id.* (stating that whether a secret recording constitutes an ethical violation depends on "the circumstances operating at the time").
377. *Id.*
378. *Id.*
379. *Id.*
380. *Id.*
381. *Id.*
382. *Id.*
383. *Id.*
384. *Id.*
385. *Id.*
386. *Id.* (emphasis added).
387. *See Department Ethics Opinions*, *supra* note 366, at 32 ("Whether any particular telephone call may permissibly be recorded depends upon the circumstances of that particular call."); *Annual Report, supra* note 368, at 206 (summarizing Maine Bar Opinion 168 as holding that whether secretly recording a conversation is unethical depends upon "the facts and circumstances of each particular case").

ceptive, the circumstances under which the recording was made should be analyzed.[388]

C. Federal Courts

Federal courts considering the issue of nonconsensual attorney recordings "side with" states that have followed Formal Opinion 337.[389] In general, federal courts often find the act of surreptitious recording to vitiate any work-product protection that may otherwise have existed in the recording itself.[390] These courts often cite Formal Opinion 337 in reaching their conclusions.[391] This subpart will briefly explore some of the federal court opinions addressing the issue.[392]

1. Attorney-Recorded Conversations

Setting the stage for later opinions, the Eleventh Circuit in *Parrott v. Wilson* held that "whatever work product privilege that might have existed [in taped conversations] was vitiated by counsel's clandestine recording of conversations with witnesses."[393] In *Parrott*, a mother brought a § 1983 civil rights action against two deputy marshals and other county officials after one marshal shot and killed her son during an attempted eviction from a house rented by a third party.[394] The deputy who fired the shot claimed self-defense.[395] The plaintiff's counsel then secretly recorded telephone conversations with two witnesses who had been outside of the house on the day of the shooting.[396] After learning about the recordings, the defendants moved to compel their production.[397] The plaintiff claimed work-product privilege in the tapes.[398]

The Eleventh Circuit began by citing precedent to support its conclusion that clandestine recording could vitiate work-product protection.[399] In *Moody v. IRS*, the D.C. Circuit held that "at least in some circumstances, a lawyer's unprofessional behavior may vitiate the work

388. *See supra* note 366.
389. Wegener, *Distribution Context*, *supra* note 81, at 1144.
390. *See supra* note 104.
391. *See supra* note 105.
392. For a discussion of various federal court opinions addressing the issue, *see* Katz, *Ethics Issues*, *supra* note 76. For an in-depth discussion of whether secret recordings of conversations with nonparty witnesses done by an attorney, client, or agent upon the attorney's request vitiates work-product protection, see Dolatly, *supra* note 104. Dolatly argues that "[i]llicit tape recording, whether done by a client, an agent of the attorney at counsel's behest, or by counsel, is the kind of deceptive practice that the work product privilege was intended to avoid." *Id*. at 550.
393. Parrott v. Wilson, 707 F.2d 1262, 1272 (11th Cir. 1983) (footnotes omitted).
394. *Id.* at 1264.
395. *See id.* at 1265–66.
396. *Id.* at 1271.
397. *Id.*
398. *Id.*
399. *Id.* (citing Moody v. IRS, 654 F.2d 795, 799–801 (D.C. Cir. 1981)).

product privilege."[400] According to *Parrott*, the *Moody* court had found that the work-product privilege is meant to "protect the integrity of the adversary process."[401] On this reasoning, "it would be improper to allow an attorney to exploit the privilege for ends that are antithetical to that process."[402]

The *Parrot* court proceeded to discuss the ethical implications of secret recordings.[403] Although the conduct "violates no law, the Code of Professional Conduct imposes a higher standard than mere legality."[404] Citing Formal Opinion 337 and the ABA's subsequent refusal to reconsider its opinion, the court stated that the ABA had "ruled that the recording of conversations of witnesses without their consent is unethical."[405] The court went on to hold that any potential work-product privilege had been vitiated.[406]

Also drawing on Formal Opinion 337 for support, the Eastern District of Pennsylvania found a possible ethical violation stemming from an attorney's secret recording.[407] In *Roe v. Operation Rescue*, the defendants' counsel secretly recorded a telephone conversation between himself and the plaintiff's attorney without her prior knowledge or consent.[408] In a brief opinion, the court found that the attorney's conduct "represent[ed] a lack of both professional and common courtesy."[409] Given the potential ethical violation, the court forwarded its opinion to state disciplinary authorities.[410]

In 1983, the United States Claims Court was more explicit in its finding of an ethical violation.[411] In *Grimes v. United States*, counsel for the plaintiff, a civilian worker discharged from his employment with the Army for insubordination, secretly recorded a hearing on the Govern-

400. *Moody*, 654 F.2d at 800; s*ee also* Dolatly, *supra* note 104, at 526–27 (discussing *Moody* and three factors mentioned by the court for use in determining whether disclosure of potential work product would be an appropriate response to an attorney's unethical behavior). For a discussion of the application of *Moody* to cases involving surreptitious recording of conversations with witnesses, see G. Michael Halfenger, Comment, *The Attorney Misconduct Exception to the Work Product Doctrine*, 58 U. CHI. L. REV. 1079, 1084–85 (1991).

401. *Parrott*, 707 F.2d at 1271 (citing *Moody*, 654 F.2d at 800).

402. *Id.* (citing *Moody*, 654 F.2d at 800).

403. *Id.*

404. *Id.* (footnote omitted).

405. *Id.* (citing ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 337 (1974) and Informal Op. 1320 (1975)) (footnote and additional citation omitted).

406. *Id.* at 1272; *see also* Chapman & Cole v. Itel Container Int'l, 865 F.2d 676, 686 (5th Cir. 1989) (citing *Parrott* in support of its statement that "the clandestine taping of a telephone conversation implicitly waives the protection of the work product doctrine because it violates the American Bar Association's Model Rules of Professional Conduct") (citation omitted). As in *Parrott*, the attorney in *Chapman & Cole* recorded a conversation with a witness. *See id.* at 680.

407. *See* Roe v. Operation Rescue, No. CIV.A.88-5157, 1989 WL 66452, at *3 (E.D. Pa. June 19, 1989).

408. *Id.*

409. *Id.*

410. *Id.*

411. *See* Grimes v. United States, 4 Cl. Ct. 205, 206 (1983).

ment's motion to dismiss.[412] The attorney participated in the hearing via telephone.[413] The court ordered him to transmit copies of any unauthorized recordings, made in *any* case before the court, to the clerk.[414] Citing Formal Opinion 337, the court expressed its disapproval of the attorney's conduct.[415] "Surreptitious recording of telephone calls is, at the very least, a grave discourtesy to the other participants in the conversation. When the recording is done by an attorney in the performance of his duties, it is a violation of ethical standards."[416] The court also emphasized that the attorney had taped court proceedings without permission, potentially damaging "the integrity of the official record" and contravening a requirement that recordings by anyone other than the official reporter require leave of court on a finding of good cause.[417]

The Northern District of Illinois recently considered the propriety of an attorney's conduct in secretly recording his telephone conversations with various third party witnesses.[418] The lawyer and his recorder were located in New York.[419] At least some of the witnesses had called from Illinois.[420] A magistrate judge had previously concluded that the conduct was unethical under a Local Rule that barred "dishonesty, fraud, deceit or misrepresentation."[421] The magistrate also determined that the attorney's conduct was unethical under a Local Rule providing that "a lawyer shall not . . . use methods of obtaining evidence that violate the legal rights of [another] person."[422] In making this determination, the magistrate had referenced the Illinois Eavesdropping Act,[423] which the attorney violated by taping telephone conversations without consent of the other party to the conversation.[424]

In reviewing the magistrate's findings, the Northern District of Illinois framed the key issue as "whether recording a phone conversation without so disclosing is inherently deceitful."[425] After mentioning a "split of authority" on the issue and stating that "[a] clear majority of jurisdictions, and all the federal courts to consider this issue" have agreed with the approach taken by Formal Opinion 337, the court "found the majority position better reasoned."[426] Ordering an end to the nonconsensual recordings, the court then required disclosure of the tapes in accordance

412. *Id.* at 205–06.
413. *Id.* at 206.
414. *Id.* at 206–07.
415. *See id.*
416. *Id.* at 206 (citing ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 337 (1974)).
417. *Id.* (citations omitted).
418. *See* Anderson v. Hale, 159 F. Supp. 2d 1116, 1117 (N.D. Ill. 2001).
419. *Id.* at 117.
420. *Id.*
421. *Id.* (quoting N.D. ILL. R. 83.58.4(a)(4)).
422. *Id*. (quoting N.D. ILL. R. 83.54.4).
423. 720 ILL. COMP. STAT. 5/14-1 to -9 (2000).
424. *See* Anderson v. Hale, 202 F.R.D. 548, 558–59 (N.D. Ill. 2001).
425. *Hale*, 159 F. Supp. 2d at 1117.
426. *Id.*

with the magistrate's order granting the plaintiff's motion to compel disclosure.[427] The court also stated its accord with the magistrate's reasoning.[428]

Part of that reasoning included reliance on both Formal Opinion 337 and *Parrott*.[429] In his opinion in *Anderson v. Hale*, the magistrate judge initially noted that "[u]nethical conduct . . . vitiates the protection otherwise afforded under the work-product doctrine."[430] Here, the plaintiff alleged that secret attorney recordings violated a Local Rule reflecting the language of Model Rule 8.4(c) and therefore vitiated the work-product doctrine and the magistrate agreed.[431] After noting that the "majority" approach adheres to Formal Opinion 337, the magistrate followed suit.[432] "[A]n attorney who surreptitiously records conversations with witnesses in civil cases engages in inherently deceitful conduct in violation of Local Rule 83.58.4(a)(4)."[433] Given the "unique position attorneys hold in society as officers of the court," individuals have a reasonable expectation that their conversations with lawyers will not be recorded.[434] And "public confidence in the legal system," essential to the administration of justice, requires attorneys to behave ethically.[435] According to the magistrate, by secretly recording his conversations with witnesses, the attorney had engaged in "unethical conduct," thus vitiating any possible work-product privilege and requiring disclosure of the tapes.[436] The magistrate found an independent basis for holding that any possible work-product protection otherwise afforded the tapes was vitiated. Because the attorney "violated the Illinois eavesdropping statute and thereby transgressed [a local court rule] by violating the rights of third persons," any work-product protection that might have arisen was lost.[437]

The district court's analysis was careful to distinguish between application of its rules and an overall characterization of the attorney as unethical, which the court was unwilling to make.[438] In discussing the magistrate's opinion, the district court noted that the "ethical question" posed was "difficult," and that the court was applying its rules rather than judging the attorney's "character."[439] The district court noted that the attorney "could have reasonably believed that his conduct was per-

427. *See id.* at 1118.
428. *See id.*
429. *See Hale*, 202 F.R.D. at 554–55.
430. *Id.* at 554 (citing Parrott v. Wilson, 707 F.2d 1262, 1271–72 (11th Cir. 1983)) (additional citations omitted).
431. *See id.* at 555 (citing N.D. ILL. R. 83.58.4(a)(4)).
432. *See id.* at 555–58.
433. *Id.* at 556.
434. *Id.*
435. *See id.*
436. *Id.* at 558.
437. *Id*. at 559.
438. *See* Anderson v. Hale, 159 F. Supp. 2d 1116, 1118 (N.D. Ill. 2001).
439. *See id.*

missible."[440] Although this belief was incorrect, and the attorney's behavior had violated the aforementioned rules, the court's "rejection of his position does not equate to an indictment as an unethical person."[441] The court nevertheless found the position embodied in Formal Opinion 337, viewing "surreptitious recording by attorneys inherently deceitful," as the "better reasoned" view.[442]

2. Client Recordings

Federal courts have extended the general condemnation of secret recordings to cases where the *client*, rather than the attorney made the tape recording.[443] In *Haigh v. Matsushita Electric Corp. of America*, the plaintiff himself surreptitiously recorded conversations with fifty-eight individuals.[444] Counsel had not directed the plaintiff to make the recordings.[445] The plaintiff delivered the tapes to his attorney within a few days after each conversation, however, and the attorney used them to draft his complaint and requests for discovery.[446] Responding to the defendants' motion to compel production of the tapes, the plaintiffs argued that work-product protection applied.[447]

The Virginia district court considered two issues regarding the tapes.[448] The court first determined that the work-product privilege *would* apply to the tapes.[449] The court then held, however, that the privilege had been vitiated.[450] Although the plaintiff's counsel had not instructed him "to initiate or continue taping conversations, the old adage 'actions speak louder than words' comes to mind."[451] Attorney and client "fell into a pattern," lasting for nine months and involving fifty-eight recorded conversations, whereby the client surrendered his tapes to counsel "almost immediately" for the attorney's use.[452] The court stated that it "would not be so troubled if it were faced with a situation where a party, in his exuberance over pending litigation, pursued such a course of conduct and delivered a handful of tapes to his counsel."[453] Then, the attorney would have merely acquiesced.[454] "There is a point, however, where acquiescence ceases to be passive and noncommittal, and becomes

440. *Id*.
441. *Id*.
442. *See id*. at 1117.
443. *See infra* Part III.C.2.
444. Haigh v. Matsushita Elec. Corp. of America, 676 F. Supp. 1332, 1356 (E.D. Va. 1987).
445. *Id.*
446. *Id.* at 1357.
447. *See id.* at 1356–57.
448. *See id.* at 1357 (stating the issues).
449. *Id.*
450. *Id.*
451. *Id.* at 1358–59.
452. *Id.* at 1359.
453. *Id.*
454. *Id.*

active encouragement and affirmative support."[455] That point had been reached.[456] The court ordered production of the recordings.[457]

A similar pattern of attorney-client conduct in procuring secret recordings arose in a 1997 case before a North Carolina district court.[458] In *Sea-Roy Corp. v. Sunbelt Equipment & Rentals*, a client secretly recorded conversations with witnesses or potential witnesses over a three-year period, resulting in eighty-five tapes.[459] The attorney had not suggested that his client make the recordings.[460] Responding to the defendants' argument that "unprofessional attorney conduct can constitute grounds to vitiate the work product protection," the court cited a number of cases adopting that position, which had relied on the Model Rules and also discussed Formal Opinion 337.[461]

The North Carolina court then rejected the plaintiffs' argument that the Model Rules were inapplicable because the *client* was responsible for the covert recording.[462] According to the court, "the lack of attorney initiation does not insulate the client when there is later attorney involvement with the secret recordings."[463] Plaintiffs' lawyer "was or should have been aware of the situation" given the "sheer number" of tapes and the three-year period over which they were made.[464] The attorney generated transcripts from the tapes.[465] Thus, "there was sufficient attorney involvement and knowledge to subject the client's conduct to attorney ethics rules."[466] While a state ethics opinion provided that the act of secretly recording a conversation with a lawyer regarding a pending matter did not violate the Model Rules, that opinion was "somewhat ambiguous" in light of its further statement that lawyers should disclose such conduct "'as a matter of professionalism.'"[467] Because the plaintiff failed to disclose to the other parties that the conversation was being recorded, the tapes lost their work-product protection.[468]

Other federal courts have reached similar results when an attorney encourages her client to hit the record button. In *Bogan v. Northwestern Mutual Life Insurance Co.*, a New York district court found that a plaintiff's secret tapes of interviews with third parties were discoverable.[469]

455. *Id.*
456. *Id.*
457. *Id.* at 1359–60.
458. *See* Sea-Roy Corp. v. Sunbelt Equip. & Rentals, Inc., 172 F.R.D. 179 (M.D.N.C. 1997).
459. *Id.* at 181–82.
460. *Id.* at 182.
461. *See id.* at 182–83 (citations omitted).
462. *See id.* at 183.
463. *Id.*
464. *Id.*
465. *Id.*
466. *Id.* (citations omitted).
467. *Id.* at 183–84 (citing RPC 171 (1994)).
468. *Id.* at 185.
469. Bogan v. Northwestern Mut. Life Ins. Co., 144 F.R.D. 51, 52 (S.D.N.Y. 1992) (following magistrate judge's ruling requiring production of tapes).

"Even if the tapes were prepared in connection with the litigation, attorney involvement in encouraging taping of this type raises questions of legal ethics justifying, at the least, provision of the tapes to the adversary so that any relevant issues can be explored."[470] Among the policy concerns articulated, the court noted that allowing "one-sided secret taping of potential witnesses without discovery" could lead to blackmail of the witness or "surprise introduction of the tapes at trial."[471] A "mild" discovery remedy would protect against such potentially prejudicial effects.[472]

Following a detailed analysis of several cases, including *Bogan* and *Haigh*,[473] a New Jersey district court similarly held that work-product protection was vitiated by attorney-sanctioned recordings.[474] In *Ward v. Maritz, Inc*., the plaintiff, Ward, covertly recorded telephone conversations with nonparty witnesses regarding the working environment giving rise to her sexual harassment lawsuit.[475] Ward made the calls from her lawyer's office after seeking his advice.[476] When one of the third parties asked, Ward denied that she was taping the conversation.[477]

As a threshold matter, the court found that the recordings did constitute work-product under Rule 26(b)(3), having been made in anticipation of litigation and proposed by Ward's counsel.[478] The court went on to hold that the protection otherwise afforded had been vitiated.[479] Although Formal Opinion 337 was decided under the Model Code, and New Jersey adopted the Model Rules, the court determined that Opinion 337 and the cases relying upon it could provide guidance.[480] Both the Model Code and the Model Rules contained the proscription against dishonest, fraudulent, deceitful, or misrepresentative conduct that Opinion

470. *Id.* at 53 (footnote omitted).

471. *Id.* at 56.

472. *See id. But see* H.L. Hayden Co. of N.Y., Inc. v. Siemens Med. Sys., Inc., 108 F.R.D. 686 (S.D.N.Y. 1985). In *Hayden*, the court denied the defendant's motion to compel production of secretly taped conversations between the plaintiff and nonparty witnesses. *Id.* at 691. While the tapes could constitute work-product, the defendant had not established "substantial need" for the tapes and an inability "to obtain their substantial equivalent" without "undue hardship." *Id.* at 690 (citing FED. R. CIV. P. 26(b)(3)). Because defendant's attorney was "on friendly terms" with one of the third parties, having represented him at his deposition, he could—and likely had—learned about the conversations from that third party. *Id.* The defendant also might have been able to obtain the tapes by having the third party request them from the plaintiffs under Rule 26(b)(3). *Id.* at 691. The motion to compel was "unnecessary." *Id.* In a footnote, the court noted an issue that

> may have to be addressed at a later time: the ethical ramifications of an attorney, who is not himself permitted to record a conversation with a third party without that third party's consent, directing his client to do so and the effect of such a circumstance on work product protection.

Id. at 690 n.5. Decided seven years later, *Bogan* may have been that "later time."

473. *See* Ward v. Maritz, Inc., 156 F.R.D. 592, 595–96 (D.N.J. 1994).

474. *Id.* at 598.

475. *Id.* at 593.

476. *Id.*

477. *Id.*

478. *Id.* at 597.

479. *Id.*

480. *See id.*

337 applied to nonconsensual recordings.[481] The court also noted that otherwise ethical conduct might vitiate the work-product privilege.[482] Therefore, even if the attorney's conduct in encouraging the recordings did not violate the Model Rules, "the secret tape recording vitiated the work product rule."[483]

The emphasis upon attorney encouragement of client recordings appears significant. A Kansas district court distinguished cases holding that work-product protection had been vitiated by covert taping as dependent upon attorney involvement in the client's conduct.[484] "The fact the tapes were surreptitiously recorded is of no consequence where it is not alleged that the party's attorney either recommended or encouraged the recording."[485]

At least one court, however, has held work-product protection abrogated when an attorney was entirely uninvolved in his client's recordings.[486] In *Smith v. WNA Carthage*, a Texas district court granted the defendant's motion to compel production of tapes made by the plaintiff in an employment discrimination case before she contacted counsel.[487] The recorded conversations were between the plaintiff and personnel of the defendant-company.[488] The court rejected the plaintiff's argument that, because her lawyer "was not involved in making the recordings," work-product protection should apply.[489] According to the court, "[s]ecretly taped interviews with witnesses are considered unethical, and do damage to [the adversary] system, regardless of whether the attorney

481. *See id.*

482. *Id.*

483. *Id.* at 598; *see also* Otto v. Box USA Group, Inc., 177 F.R.D. 698, 699 (N.D. Ga. 1997) (finding that any work-product protection otherwise available was vitiated when a plaintiff secretly taped a conversation with a witness). In *Otto*, the plaintiff taped the conversation shortly *before* hiring counsel. *Id.* She then argued that rules proscribing secret recordings do not "apply to the layperson who is preparing for an imminent lawsuit." *Id.* at 700. The court disagreed. *See id*. at 701. If the plaintiff had proceeded *pro se*, she would have been bound by ethics rules. *Id.* There was no reason to create an exception, allowing her to covertly record a witness prior to hiring counsel. *Id.* While the attorney was "not blameworthy for the secretly-made tapes . . . by accepting the tapes and contemplating their use, the attorney comes dangerously close to 'acquiescence'" in his client's conduct, which other courts held vitiated the work-product doctrine. *Id.* "Secretly taped interviews with witnesses are considered unethical and do damage to the adversarial system, regardless of whether the attorney or the client operates the tape recorder." *Id.*

484. Walls v. Int'l Paper Co., 192 F.R.D. 294, 298–99 (D. Kan. 2000).

485. *Id.* at 299. For a further extension of the proscription against secret recordings, see Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc., 144 F. Supp. 2d 1147 (D.S.D. 2001). In *Midwest Motor Sports*, a South Dakota district court found an ethical violation based upon an investigator's nonconsensual taping at the direction of defense attorneys. *See id.* at 1159. In a footnote, the court stated that "[e]ven if acts are not prohibited by state law, that does not mean that investigators or clients can do what lawyers themselves cannot do because of ethical limitations." *Id.* at 1159 n.3.

486. *See* Smith v. WNA Carthage, L.L.C., 200 F.R.D. 576, 578–79 (E.D. Tex. 2001).

487. *See id*. at 579.

488. *See id*. at 577.

489. *Id*. at 578.

or the client operates the tape recorder."[490] The court noted that the act of covertly recording coworkers undermines the rationale of work-product protection—promotion of the "'broader public interests in the observance of law and administration of justice.'"[491]

3. Prediction for the Future?

One recent federal court decision may provide an indication of how courts will react to surreptitious recording in the wake of Formal Opinion 01-422. In *Nissan Motor Co., Ltd. v. Nissan Computer Corp*., a California district court found "that it is inherently unethical for an attorney to record a conversation with another attorney regarding the routine progression of litigation without the other party's knowledge or consent."[492] In *Nissan*, defense counsel told counsel for the plaintiffs that he planned on recording future telephone conversations between the lawyers because opposing counsel allegedly misrepresented his statements from earlier conversations.[493] Opposing counsel objected to such recordings and then applied to the court for an order barring this conduct.[494]

Without determining whether any recordings were in fact made, the court ordered defense counsel to cease both threatening to tape conversations as well as any actual taping.[495] Citing *People v. Selby* as "instructive,"[496] the court noted that surreptitious recording "seriously impedes relations between counsel, and exerts a chilling effect on the normal flow of communication between opposing parties."[497] It is noteworthy that the court also found "that the recordation of conversations between counsel in the normal course of litigation, without consent" violated a provision of the California Penal Code regarding nonconsensual recording of communications.[498] As the court noted, Formal Opinion 01-422 indicated "that a lawyer may not . . . record conversations in violation of the law in a jurisdiction that forbids such conduct without the consent of all parties, nor falsely represent that a conversation is not being recorded."[499] Because the covert recording violated a state statute, even under Formal

490. *Id*. (citing Chapman & Cole v. Itel Container Int'l B.V., 865 F.2d 676, 686 (5th Cir. 1989) and Otto v. Box USA Group, Inc., 177 F.R.D. 698, 701 (N.D. Ga. 1997)) (internal citation and additional citation omitted).

491. *Id*. (citing and quoting Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)).

492. Nissan Motor Co., Ltd. v. Nissan Computer Corp., 180 F. Supp. 2d 1089, 1097 (C.D. Cal. 2002).

493. *See id*. at 1091.

494. *See id*. at 1090–92.

495. *See id*. at 1092, 1097.

496. *Id*. at 1096 n.5 (citing People v. Selby, 606 P.2d 45 (Colo. 1979)).

497. *Id*. at 1097.

498. *Id*.

499. *Id*. at 1096 (citing ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-422 (2001)).

Opinion 01-422 the attorney's conduct would be unethical.[500] The *Nissan* court's reference to *Selby* and the Colorado Supreme Court's broad language condemning secret recording, however, may indicate a continued broad, general condemnation of surreptitious recording, regardless of its legality under statutory law of the relevant jurisdiction.

In their willingness to hold the work-product doctrine vitiated by covert recordings[501] and their frequent references to Formal Opinion 337,[502] federal courts addressing the issue of secret recordings have basically followed the broad, general prohibition embodied in Formal Opinion 337. Although some do not explicitly find an ethical violation, the act of nonconsensual recording has been held to vitiate any potential work-product protection in the recordings.[503]

IV. RESOLUTION

> The transgression of this attorney was fortunately minor. What is serious, and what I respectfully submit will be read with dismay by judges and lawyers who every day uphold the honor and dignity of our profession is the fact that a majority of this Court finds nothing unethical about it.[504]

This statement, made by Justice Hawkins in his 1992 dissent to the Mississippi Supreme Court's opinion in *Attorney M. v. Mississippi Bar*, may have foreshadowed a debate that is yet to come. In 1974, Formal Opinion 337 set forth in clear terms a general position regarding attorneys who secretly record their conversations with others.[505] Outside of a possible exception for prosecuting attorneys, secret recording fell within the purview of the prohibition against "conduct involving dishonesty, fraud, deceit, or misrepresentation" found in DR 1-102(A)(4) of the Model Code.[506] Many state courts followed this approach.[507] Federal courts also frequently cited this Opinion in finding the act of secretly recording to vitiate work-product protection.[508] But Formal Opinion 337 is gone. On June 24, 2001, the ABA issued Formal Opinion 01-422, concluding "that the mere act of secretly but lawfully recording a conversation inherently *is not* deceitful."[509] Therefore, if local laws permit nonconsensual recording, "a lawyer does not violate the Model *Rules* merely

500. *See* Formal Op. 01-422.
501. *See supra* note 104 and accompanying text.
502. *See supra* note 105 and accompanying text.
503. *See, e.g.,* Ward v. Maritz, Inc., 156 F.R.D. 592, 598 (D.N.J. 1994) (finding work-product doctrine vitiated regardless of whether the Rules of Professional Conduct had been violated).
504. Attorney M. v. Miss. Bar, 621 So. 2d 220, 227–28 (Miss. 1992) (Hawkins, J., dissenting).
505. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 337 (1974).
506. *See id.*
507. *See supra* note 81 and accompanying text.
508. *See supra* notes 389–91 and accompanying text.
509. Formal Op. 01-422 (2001) (emphasis added).

by recording a conversation without the consent of the other parties to the conversation."[510]

The impact of Formal Opinion 01-422 on states following Opinion 337 has yet to be felt. For states that have adopted and continue to follow the Model Code, under which Opinion 337 was decided, the withdrawal of that Opinion and the implication that the Opinion has not "survive[d] adoption of the Model Rules"[511] may have little import. On the other hand, some of the general policy reasons supporting the withdrawal of Opinion 337, and the criticisms of the approach it advocated, may cause even Model Code jurisdictions to rethink their positions. With Justice Hawkins's words in mind, the unfortunate result might be that a majority of courts and state bars "find[] nothing unethical"[512] about the act of secretly recording.

This note recommends that states generally prohibit secret recordings as unethical, and clearly delineate the circumstances under which such conduct might be permissible. As the South Carolina Supreme Court found in *In re Attorney General's Petition*, there may be circumstances under which an attorney's covert recording is justified.[513] These include when "an attorney, himself the subject of a criminal investigation, wishes to cooperate with law enforcement authorities in part by secretly recording conversations with other individuals."[514] By allowing for such conduct, courts can avoid inequitable results. The imposition of sanctions on an attorney acting under the guidance of law enforcement personnel may seem too extreme.[515] A "context-of-the-circumstances" approach like that adopted by the Mississippi Supreme Court,[516] however, may open the door to too much hindsight analysis. Endless arguments about why an attorney's conduct was justified under the circumstances could lead to a number of holdings in which no sanctions are imposed. The approach under Opinion 337 generally recognized secret recording as an ethical violation.[517]

510. *Id.* (emphasis added).

511. *See id.* (noting that "at least one commentator has questioned whether [Opinion 337] survive[d] adoption of the Model Rules of Professional Conduct").

512. *See supra* note 504 and accompanying text.

513. *See In re* Attorney General's Petition, 417 S.E.2d 526, 527 (S.C. 1992) (holding that "it is not unethical for an attorney to surreptitiously record any conversation when that recording is made with the prior consent of, or at the request of, an appropriate law enforcement agency in the course of a legitimate criminal investigation"; describing four situations where this holding would apply).

514. *Id*.

515. Such a result arguably occurred in People v. Smith, 778 P.2d 685, 685–86, 688 (Colo. 1989), where the court suspended for two years an attorney who secretly recorded conversations with a former client at the request of law enforcement during a drug investigation. The suspension was imposed for various ethical violations, including secret recording. *See id.* at 686–87.

516. *See* Attorney M. v. Miss. Bar, 621 So. 2d 220, 223–24 (Miss. 1992) (describing and expressing preference for a "context-of-the-circumstances" test previously adopted by the court).

517. *See supra* note 46 and accompanying text; *see also supra* Part III.A (discussing states that have generally followed the approach embodied in Formal Opinion 337).

The issue now is whether states that have followed Formal Opinion 337 will continue to adhere to this position. Courts such as those in Colorado[518] and South Carolina[519] drew on the language of Opinion 337 for support. For example, in holding that an attorney "may not secretly record any conversation he has with another lawyer or person" and stating that "[s]urreptitious recording suggests trickery and deceit," the Colorado high court cited Opinion 337.[520] South Carolina noted that Opinion 337 held "that a lawyer's secret recording of a conversation does constitute professional misconduct. A majority of American Jurisdictions seem to reach the same conclusion when ruling on the issue."[521] Those jurisdictions may hold otherwise in the wake of Opinion 01-422. While ABA "Formal Opinions do not carry precedential weight, courts look to them for guidance in interpreting the Model Rules."[522] Courts that previously relied on Formal Opinion 337 for such guidance in disciplining attorneys who covertly record may change their views in light of the recent withdrawal of that Opinion.

Formal Opinion 01-422 provides three primary criticisms of Formal Opinion 337, listed as reasons for abandoning that opinion.[523] The first is that "the belief that nonconsensual taping of conversations is inherently deceitful . . . is not universally accepted today."[524] Many state statutes allow recordings to be made without the consent of all the parties.[525] According to the Opinion, covert recording "is a widespread practice by law enforcement, private investigators and journalists," with courts routinely accepting as evidence the results of these methods.[526] "Devices" for taping conversations on an individual's own telephone "readily are available and widely are used," making it "questionable" whether one can justifiably believe that their conversation is not being recorded "absent a special relationship with or conduct by" the other party that would indicate otherwise.[527]

Language from one court, however, provides a strong policy argument for why these very factors should not provide sufficient reason for allowing secret recordation. "A higher standard is imposed on lawyers by the Code of Professional Responsibility, many parts of which proscribe conduct which would be lawful if done by laymen. . . . [C]onduct

518. *See, e.g.,* People v. Selby, 606 P.2d 45, 47 (Colo. 1979) (citing Formal Opinion 337 in ruling that a lawyer cannot "secretly record") (additional citations omitted).

519. *See, e.g., In re* Anonymous Member of the S.C. Bar, 322 S.E.2d 667, 669 (S.C. 1984) (citing Formal Opinion 337 in finding a violation of DR 1-102(A)(4)).

520. *Selby*, 606 P.2d at 47 (additional citations omitted).

521. *Anonymous Member of the S.C. Bar*, 322 S.E.2d at 669.

522. Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc., 144 F. Supp. 2d 1147, 1159 (D.S.D. 2001) (citations omitted).

523. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-422 (2001).

524. *Id.*

525. *See id.*

526. *Id.*

527. *Id*.

may be unethical . . . even if it is not unlawful."[528] Thus, it is also "immaterial whether [the act of secret recording] violates the wiretapping laws."[529] Although this statement refers to the Model Code, an emphasis on the *professional obligations* of an attorney, as distinguished from other professionals, should dictate that the same policy concerns apply regardless of whether a state follows the Model Rules or the Model Code. Although the court's holding was limited to attorney-authorized recordings,[530] the above-quoted language nevertheless provides a strong reason for generally prohibiting secret recordings. As one commentator has argued, while covert taping "can be done at the push of a button . . . secret tape recording by attorneys undermine[s] traditional notions of lawyers and professionalism . . . ."[531] Those "traditional notions" are undermined regardless of whether secret recording has become commonplace in modern society.[532]

Language such as the above quotation from the Virginia Supreme Court provides a strong policy argument for a broad, general prohibition of secret recording.[533] Although state statutes may allow one party to record a conversation without the consent of another, and although secret recording may be common among journalists and others,[534] there is something different about an *attorney* who covertly tapes.[535] The very exis-

528. Gunter v. Va. State Bar, 385 S.E.2d 597, 600 (Va. 1989).

529. *Id.*

530. *See id.*; *see also supra* Part III.A.4 (discussing Virginia's position on surreptitious recording as espoused in *Gunter* and subsequent Virginia ethics opinion taking a limited view of that case and also providing that, in certain situations, covert taping would not constitute an ethical violation).

531. *See* Arkin, *supra* note 114, at 33; s*ee also* Schwartz, *supra* note 114, at 32 (arguing that "secretly recording a telephone conversation may be as easy as stealing candy from a baby. But it hardly follows . . . that such conduct is forthright and ethical merely because it is simple to effectuate."). A federal magistrate judge, rejecting the proposition that the public's "understanding of right and wrong should change with technology," cited comments by Arkin and Schwartz regarding the propriety of secret taping. *See* Anderson v. Hale, 202 F.R.D. 548, 557 (N.D. Ill. 2001) (citations omitted). Regardless of technological changes, the judge noted that "attorneys are held to a higher standard." *Id.* (citation omitted).

532. *Cf.* Arkin, *supra* note 114, at 33 (urging that "attorneys should know better than to use this convenient technology without thinking of the consequences"); *see also supra* note 531.

533. In Virginia Legal Ethics Opinion 1738, the state's ethics committee stated that it was "mindful" of the language in *Gunter* noting that just because conduct is not illegal does not mean that it is ethical. *See* Va. Legal Ethics Op. 1738 (2000). The ethics committee was concerned, however, about a "categorical ban" on covert taping. It provided that nonconsensual lawful recording for a "criminal investigation or a housing discrimination investigation" would not violate Rule 8.4. *See id.* In addition, covert taping "in other factual situations" might be ethically permissible, but would be addressed when specific cases arose. *See id.* This Note *does* recommend a narrow exception for secret recordings made under the guidance of law enforcement during an ongoing criminal investigation. *See supra* notes 513–15 and accompanying text. With that exception in mind—and even considering the aforementioned provisions of Ethics Opinion 1738—the standard of conduct imposed by ethics codes upon attorneys nevertheless provides a strong rationale for a general prohibition of covert taping.

534. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-422 (2001) (citing these factors as criticisms of Opinion 337).

535. *See* Schwartz, *supra* note 114, at 32 (arguing that while New York penal law allows taping in certain situations, "conduct can be deceitful even if it also is not illegal . . . the absence of criminal sanctions hardly settles the ethical questions raised by covert recordings") (citing a footnote in Opinion 337) (additional citations omitted). Schwartz argues that "the element of secrecy makes covert

tence of rules of professional conduct suggests a heightened standard for attorneys to follow in pursuit of their profession, beyond that imposed upon private investigators or law enforcement, for example. Given the nature of the job, this is the correct result. A lawyer is not a police officer. Techniques essential to law enforcement should not become part of an attorney's preparation or presentation of a case. "'Fundamental honesty is the base line and mandatory requirement to serve in the legal profession.'"[536] With this argument in mind, the position that nonconsensual recording *is* inherently deceitful seems strong.

Formal Opinion 01-422 also notes that under certain circumstances "requiring disclosure of the recording of a conversation may defeat a legitimate and even necessary activity."[537] Thus, "even those authorities that have agreed with the basic proposition of Opinion 337 have tended to recognize numerous exceptions."[538] Rather than "a general prohibition with certain exceptions . . . a prohibition of the conduct only where it is accompanied by other circumstances that make it unethical" is suggested in Opinion 01-422.[539]

States that have generally followed Formal Opinion 337 have indeed created limited exceptions to its sweeping pronouncement. South Carolina's delineation of situations in which surreptitious recording would not rise to the level of an ethical violation is exemplary.[540] A general prohibition with clearly delineated exceptions, however, arguably has more of a deterrent effect than a prohibition that applies only when a lawyer's conduct is "accompanied by other circumstances that make it unethical."[541] The latter approach sounds similar to the "context-of-the-circumstances" test adopted by Mississippi.[542] In that state, secret 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."[543] The potential difficulty with this approach is the hindsight analysis that it may invite. An attorney can develop a multitude of reasons after the fact for why her conduct was not

recordings inherently deceptive." *Id.* at 33. Even if the laws in the jurisdiction allow recording without consent of all parties to the conversation, "lawyers should resist any temptation to make secret recordings because such conduct, even if not deceitful per se . . . can only undermine . . . public confidence in the integrity of the profession." *Id.*; *see also* Anderson v. Hale, 202 F.R.D. 548, 557 (N.D. Ill. 2001) (noting that "the legal profession's repeated announcement of this higher ethical standard creates different expectations of fairness and honesty than the public expects from others"); *supra* note 114 (discussing arguments by commentators on the impact of secret recording on the integrity of the profession).

536. Comm. on Prof'l Ethics & Conduct of Iowa State Bar Ass'n v. Mollman, 488 N.W.2d 168, 171 (Iowa 1992) (quoting Comm. on Prof'l Ethics & Conduct v. Wenger, 469 N.W.2d 678 (Iowa 1991)).

537. Formal Op. 01-422.

538. *Id.*

539. *Id.*

540. *See In re* Attorney General's Petition, 417 S.E.2d 526, 526–27 (S.C. 1992).

541. Formal Op. 01-422.

542. *See supra* notes 288, 302–12 and accompanying text.

543. Attorney M. v. Miss. Bar, 621 So. 2d 220, 223 (Miss. 1992) (quoting Netterville v. Miss. State Bar, 397 So. 2d 878, 883 (Miss. 1981)).

dishonest under the circumstances, possibly relying on the benefits of the evidence obtained for her client's case. On the other hand, clearly delineated exceptions to a clear rule against secret recording would require the attorney to fall within one of the limited sets of circumstances justifying her behavior. States could still promote policies requiring honesty and candor from attorneys,[544] while recognizing situations in which secret recording is justified. With the integrity of the profession in mind, a general prohibition of covert taping arguably serves as the best deterrent against truly unnecessary conduct.

Finally, Formal Opinion 01-422 notes that the Model Rules lack the proscription found in the Model Code stating that attorneys "'should avoid even the appearance of impropriety.'"[545] Also, Model Rule 4.4 addresses "'Respect for Rights of Third Persons'" and prohibits "'means that have no substantial purpose other than to embarrass, delay or burden a third person,' and 'methods of obtaining evidence that violate the legal rights of such a person.'"[546] The Model Code, under which Opinion 337 was decided, lacked such a counterpart.[547] With these differences in mind, the ABA Committee concluded "that to forbid obtaining of evidence by nonconsensual recordings that are lawful and consequently do not violate the legal rights of the person whose words are unknowingly recorded, would be unfaithful to the Model Rules as adopted."[548]

A plaintiff in a 1994 secret recording case before a New Jersey district court made an analogous argument, which the court rejected.[549] The plaintiff in *Ward v. Maritz, Inc.* had argued that the court should discount Opinion 337 and cases decided under it because New Jersey had adopted the Model Rules rather than the Model Code.[550] The court noted that Model Rule 8.4(c), like DR 1-102(A)(4), proscribes "'conduct involving dishonesty, fraud, deceit or misrepresentation.'"[551] Thus "the message is the same."[552] The ABA Ethics Committee in Formal Opinion 01-422 did note that Model Rule 8.4(c) preserved the proscription found in DR 1-

544. *See, e.g.*, People v. Smith, 778 P.2d 685, 687 (Colo. 1989) (stating that nonconsensual recording "involves elements of deception and trickery which do not comport with the high standards of *candor and fairness* to which all attorneys are bound") (citations omitted) (emphasis added).

545. *See* Formal Op. 01-422.

More than a decade before the issuance of Formal Opinion 01-422, at least one commentator noted that the version of the Model Rules adopted in most states may no longer support a prohibition against secret recording when otherwise lawful in the relevant jurisdiction. *See* Adams, *supra* note 61, at 179. Adams noted that the Model Rules eliminated "the 'appearance of impropriety' standard in former Canon 9." *Id*. Adams noted, however, that "there is considerable uncertainty" regarding the implications of secret recording given precedent admonishing such conduct and because the Model Rules do not explicitly address the issue. *Id*. at 180. Adams argued that public knowledge that attorneys covertly record conversations with witnesses could "tarnish the profession's image." *Id*.

546. Formal Op. 01-422 (quoting MODEL RULES OF PROF'L CONDUCT R. 4.4 (2001)).

547. *Id.*

548. *Id.*

549. *See* Ward v. Maritz, Inc., 156 F.R.D. 592, 597 (D.N.J. 1994).

550. *Id.*

551. *Id.*

552. *Id.*

102(A)(4), yet still determined that the conclusion of Opinion 337 was inconsistent with the Model Rules.[553] But, as *Ward* may suggest, whether the message *should* change, given the proscription contained in Rule 4.4 and the removal of language requiring lawyers to "avoid even the appearance of impropriety," is debatable.[554]

For states that have adopted the Model Code, changes in language under the Model Rules may carry little weight. For those that have adopted the Model Rules, a general proscription against secret recording can arguably coexist with the Rules. A state policy dictating that a lawyer is subject to a higher standard than that imposed by rules governing professional responsibility[555] may dispose of the concern that the Rules lack language directing attorneys to "avoid even the appearance of impropriety."[556] By viewing Rule 4.4 as a separate basis for disciplining an attorney, rather than as a proscription inconsistent with the treatment of a secret recording as an ethical violation, additional tension might be circumvented. The language of DR1-102(A)(4) and Rule 8.4(c) remains the same. By focusing on that similarity and the policy reasons that states have promulgated for finding ethical violations, the general proscription of secret recording can stand. In addition, for those jurisdictions relying upon Formal Opinion 337 that also make nonconsensual electronic recording of conversations illegal, then covert recording should still rise to the level of an ethical violation regardless of Opinion 337's withdrawal.[557]

Formal Opinion 01-422 indicates attorney conduct that probably *would* violate the Model Rules. First, an attorney cannot engage in nonconsensual recording where the laws of the jurisdiction prohibit such conduct.[558] Second, the Opinion speculates that an attorney's false statement that he is not recording a conversation would violate the prohibition of false statements of material fact to third persons found in Rule 4.1.[559] The Opinion also distinguishes situations where an attorney

553. *See* Formal Op. 01-422.

554. *See supra* notes 545–52 and accompanying text.

555. *Cf.* Gunter v. Va. State Bar, 385 S.E.2d 597, 600 (Va. 1989) (arguing that the Code of Professional Responsibility imposes a higher standard on lawyers). Even in light of the differences between the Model Code and the Model Rules listed in Opinion 01-422, the fact that there are comprehensive rules governing attorney behavior suggests that a higher standard of professionalism, and the policy concern articulated in *Gunter*, should apply regardless of which Model a state adopts.

556. *See* Formal Op. 01-422; *see also* MODEL CODE OF PROF'L RESPONSIBILITY Canon 9 (1983).

557. *Cf.* Formal Op. 01-422 (suggesting that an attorney might violate Model Rule 8.4 by covertly recording a conversation when nonconsensual taping is prohibited by the jurisdiction's law); *see also Report of the Ethics Committee*, *supra* note 81, at 534 (summarizing Opinion 01-422 and stating that the ABA indicated that nonconsensual recording done "in violation of state law" would constitute an ethical violation); Rachel Thompson, *Recent Ethics Opinions and Cases of Significance*, 26 J. LEGAL PROF. 287, 294 (2002) (discussing Opinion 01-422 and noting that "[t]he Model Rules would probably be violated if an attorney recorded a conversation, while engaged in the practice of law, in violation of a state statute").

558. Formal Op. 01-422.

559. *Id.*

secretly records a conversation with a client.[560] "Lawyers owe to clients, unlike third persons, a duty of loyalty that transcends the lawyer's convenience and interests."[561] With this duty in mind, "it is almost always advisable for a lawyer to inform a client that a conversation is being or may be recorded, before recording such a conversation."[562] Nonconsensual recordings might breach the "relationship of trust and confidence that clients need to have with their lawyers."[563] The opinion concludes by commenting that while a lawyer engaging in nonconsensual recording "may not represent that the conversation is not being recorded,"[564] the Committee was "divided" as to whether secretly recording a conversation with a client would violate the Model Rules.[565] Such action "is, at the least, inadvisable."[566]

Courts addressing the issue under Opinion 337 contemplated these distinctions. Colorado, for example, noted that "trust and confidentiality" form the basis for the attorney-client relationship.[567] Allowing an attorney to secretly record a conversation with a client or former client might weaken this foundation.[568] In *Ward*, part of the district court's rationale for finding the work-product doctrine vitiated was based on the plaintiff's false statement, when asked by the other party to the conversation, that she was not recording.[569]

Beyond blatant denials of secret recordings and a need to protect the trust inherent in the attorney-client relationship, there remains a realm of attorney conduct that just seems wrong in light of the integrity of the profession.[570] Although a lawyer may not owe a special duty to a witness, for example, his covert taping of a conversation with such a person still seems objectionable. Against the need for information to further a client's interest, the policy implications of allowing attorneys to make secret recordings must be weighed. In limited circumstances, such as when an attorney acts under the guidance of law enforcement, covert taping may be justified. Otherwise, the act of secret recording should seem no less deceptive than it did in 1974 when Formal Opinion 337 was adopted. The Model Rules differ from the Model Code, as do the opinions of states regarding whether and when secret recording violates ethical rules. Given the responsibilities inherent in the profession, however, a general proscription against secret recordings would better deter conduct that some courts have found unfair.

560. *Id.*
561. *Id.*
562. *Id.*
563. *Id.*
564. *Id.*
565. *Id.*
566. *Id.*
567. *See* People v. Smith, 778 P.2d 685, 687 (Colo. 1989).
568. *See id.*
569. *See* Ward v. Maritz, Inc., 156 F.R.D. 592, 598 (D.N.J. 1994).
570. *See supra* notes 112–14, 528–36 and accompanying text.

Finally, the approach taken by the federal courts may remain the same. In *Ward*, the New Jersey district court distinguished between conduct deemed unethical and that which vitiates the work-product doctrine.[571] While *Parrott* noted that certain "'*unprofessional* conduct may vitiate the work product privilege,'"[572] even those courts unwilling to find an ethical violation stemming from clandestine recording may continue to hold that work-product protection is abrogated by such conduct. The *Ward* court, for example, noted that "regardless of whether the conduct of plaintiff's counsel violated the [Model Rules] . . . the secret tape recording vitiated the work product rule."[573] The court went on to describe the attorney's conduct in encouraging his client to secretly record as "unprofessional."[574] Federal courts might thus find a distinction between conduct deemed unprofessional for work-product purposes and conduct deemed unethical.

In a 2001 opinion issued months before the issuance of Formal Opinion 01-422, an Illinois district court magistrate judge provided a compelling statement of the reasons for prohibiting secret recording.

> People who speak to attorneys in civil cases reasonably expect that they are not being recorded. The legal community fosters and protects this expectation; as it should because of the unique position attorneys hold in society as officers of the court. In this capacity, attorneys, like judges, are 'bound to work for the advancement of justice.' Whether justice is advanced depends on public confidence in the legal system. Public confidence in the legal system . . . depends on public confidence in the legal profession. . . . [T]his is why the legal profession holds itself out to the public as adhering to the highest possible ethical standards.[575]

Adherence to such high ethical standards is best promoted when covert recording by attorneys is deemed unethical. A rule that generally allows, rather than primarily prohibits, such conduct may have the adverse effect of condoning otherwise objectionable behavior. Society has changed since 1974. Technology has facilitated covert recording, perhaps making it more prevalent. The role of attorneys in society and the integrity of the profession, however, have not changed.

571. *See Ward*, 156 F.R.D. at 598 (finding that "regardless" of whether the conduct constituted an ethical violation, the work-product privilege had been abrogated); *see also* Dolatly, *supra* note 104, at 541–42 (noting the *Ward* court's hesitance to declare covert recording unethical while still finding that such conduct may abrogate work-product protection).

572. Parrott v. Wilson, 707 F.2d 1262, 1271 (11th Cir. 1983) (quoting Moody v. IRS, 654 F.2d 795, 799–801 (D.C. Cir. 1981)) (additional citation omitted) (emphasis added).

573. *Ward*, 156 F.R.D. at 598.

574. *Id.*

575. Anderson v. Hale, 202 F.R.D. 548, 556 (N.D. Ill. 2001) (footnote omitted).

V. CONCLUSION

The impact of Formal Opinion 01-422 remains uncertain. Prior to the withdrawal of Opinion 337, many states considered surreptitious recording by an attorney to constitute an ethical violation. Federal courts generally held that such conduct vitiated any work-product protection that may have otherwise arisen in the tapes. For states that have adopted the Model Code, under which Opinion 337 was issued, Formal Opinion 01-422 may be of little consequence. After all, that opinion finds that covert recording "does not necessarily violate the Model Rules."[576] The reasons cited for withdrawing Opinion 337, however, extend beyond wording changes from the Code to the Model Rules. With its conclusion "that the mere act of secretly but lawfully recording a conversation inherently is not deceitful,"[577] Opinion 01-422 may therefore provide added support for the flexible, contextual view, while causing states that have generally followed the broad approach embodied in Opinion 337 to rethink their positions. Notwithstanding the withdrawal of Opinion 337, an approach that prohibits secret recording as an ethical violation, with clearly delineated exceptions, will both deter such conduct and further promote the integrity of the legal profession.

576. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-422 (2001).
577. *Id.*