SURREPTITIOUS RECORDING BY ATTORNEYS: ETHICAL ISSUES AND POSSIBLE REMEDIES

Brian K. Dempster*

* J.D. Candidate Class of 2020, Seton Hall University School of Law. A special thanks to those involved in research, writing, and editing of this comment, especially Dean Brian Sheppard, Senior Comments Editor Emily Sklar, and Comments Editor Andrew Cameron.

Attorney ethics are complicated in the sense that there are a multitude of sources that propound information regarding attorney ethics and a general lack of uniformity amongst them. Lawyers are guided primarily by three sources: the American Bar Association Model Rules of Professional Conduct (hereinafter "Model Rules"), the laws of the state in which the lawyer practices, and the individual attorney's "moral compass."[1]

Attorney compliance with the ethical boundaries proscribed by the American Bar Association (hereinafter "ABA") is largely self-imposed, while the courts retain the ultimate enforcement authority.[2] *The ABA Model Rules are only a loose framework; they are not an exhaustive code featuring the answer to every possible ethical dilemma an attorney might face.*[3] *As a result, attorneys must go beyond the Rules to answer difficult, "grey area" questions in which the ABA Model Rules are silent*.[4]

I. INTRODUCTION

The legal ethics question this comment seeks to shed light upon concerns the topic of surreptitious recordings, specifically the ethics invoked where an attorney surreptitiously records their client. This comment will discuss and analyze whether it is ethical for an attorney to surreptitiously record their clients, and if it is, under what circumstances.

This comment is divided into multiple sections. Section II provides relevant background information on the topic. Section III of this comment analyzes the two ABA Model Rules that are most pertinent to the issue: Rule 1.6 concerning the Duty of Confidentiality and Rule 8.4 concerning Attorney Misconduct. Section IV of this comment provides a historical guide on how the ABA has approached surreptitious recordings and their current opinion on the topic. Section V highlights how different jurisdictions approach the issue. Section VI provides analysis of Sections III-V and the ethical issue of surreptitious recording. Finally, Section VII proposes possible solutions to the issue of surreptitious recording.

More specifically, this comment focuses on the ethical issues surrounding single-party consent jurisdictions. In such jurisdictions, only one party to a conversation needs to consent to a recording for said

---

1 MODEL RULES OF PROF'L CONDUCT Scope (AM. BAR ASS'N 2018).

2 MODEL RULES OF PROF'L CONDUCT Preamble (AM. BAR ASS'N 2018).

3 *Id.*

4 AMERICAN BAR ASSOCIATION, GOVERNMENT & PUBLIC SECTOR LAWYERS: ETHICS: PUBLIC LAWYERS AND ETHICAL DILEMMAS, https://www.americanbar.org/groups/government_public/resources/ethics/ (last visited Sept. 28, 2019).

recording to be legal.[5] In a single-party jurisdiction, an attorney taping the conversation could provide his or her "consent" to such taping thus making the recording legal. Alternatively, if an attorney were to record a client surreptitiously in a two-party consent jurisdiction they are necessarily breaking the law, thereby violating Model Rule 8.4(b), which states that it is attorney misconduct to willfully break the law.[6] Therefore, this comment focuses on recording in a single-party consent jurisdiction, where the ethics of surreptitious recording are murkier and unclear. This comment argues that surreptitious recording of clients is extremely problematic, mostly unethical, and should only be done in rare, specific circumstances after the attorney has weighed the potential consequences to all involved parties.

II. BACKGROUND

The recent controversy involving President Donald J. Trump and his former personal attorney, Michael Cohen, prompted this comment. Cohen worked for the Trump Organization (hereinafter "Organization") beginning in 2007, quickly earning a reputation as a fixer and assuming different roles in the Organization.[7] Cohen was instrumental in guiding then candidate Trump through the primaries and general election during the 2016 presidential campaign.[8] Prior to the general election, Cohen's guidance led to the campaign distributing payments to women who alleged they had extramarital affairs with Trump.[9] These payments were made to keep the women from further discussing their allegations with the press.[10] Despite Cohen's efforts, news of these payments eventually leaked.[11] As media stories of the payments developed, many sources speculated that Trump

[5] MATTHIESEN, WICKERT & LEHRER, S.C., *Laws on Recording Conversations in all 50 States*, https://www.mwl-law.com/wp-content/uploads/2018/02/RECORDING-CONVERSATIONS-CHART.pdf (last visited November 20, 2019).

[6] MODEL RULES OF PROF'L CONDUCT r. 8.4(b) (AM. BAR ASS'N 2018).

[7] William K. Rashbaum, Danny Hakim, Brian M. Rosenthal, Emily Flitter & Jesse Drucker, *How Michael Cohen, Trump's Fixer, Built a Shadowy Business Empire,* THE NEW YORK TIMES (May 5, 2018), https://www.nytimes.com/2018/05/05/business/michael-cohen-lawyer-trump.html.

[8] *Id.*

[9] Rebecca Ballhaus & Joe Palazzolo, *Trump Denies Knowledge of $130,000 Payment to Stormy Daniels,* WALL STREET JOURNAL (April 5, 2018), https://www.wsj.com/articles/trump-denies-knowledge-of-130-000-payment-to-former-porn-star-1522963827.

[10] *See Id.* Although Trump originally claimed that he had no personal involvement in payments to Stormy Daniels, he later acknowledged that he had indeed given a retainer to Cohen to offset his personal costs.

[11] Michael Rothfeld & Joe Palazzolo, *Trump Lawyer Arranged $130,000 Payment for Adult-Film Star's Silence,* WALL STREET JOURNAL (Jan. 12, 2018), https://www.wsj.com/articles/trump-lawyer-arranged-130-000-payment-for-adult-film-stars-silence-1515787678.

was directly involved in making the payments; however, no concrete evidence surfaced to confirm their suspicions.[12] Trump adamantly maintained he had no connection to the payments and denied any direct involvement in them.[13]

In early April 2018, Cohen's office and home were raided by the Federal Bureau of Investigation ("FBI") in furtherance of the United States Department of Justice's investigation into potential Russian interference and collusion in the 2016 Presidential Election.[14] The FBI seized numerous records and documents, including those relating to a payment made to former adult film actress Stephanie Clifford, professionally known as Stormy Daniels.[15] Some of the records seized in the raids suggested that Trump and Cohen attempted to purchase former Playboy Playmate Karen McDougal's publishing rights from American Media Incorporated.[16]

Of particular importance to this discussion is the medium the evidence seized by the FBI was in.[17] Rather than traditional written records such as personal notes or memos, the FBI found secret recordings Cohen took of conversations with his client, Donald Trump.[18] After the existence of these recordings became public knowledge, Cohen acknowledged that he habitually taped his clients rather than taking traditional handwritten notes.[19] Trump was unaware that his attorney had recorded their discussions about the payments and was understandably not happy when this information came to light.[20]

---

[12] *See* Rebecca Ballhaus & Joe Palazzolo, *Trump Denies Knowledge of $130,000 Payment to Stormy Daniels,* WALL STREET JOURNAL (April 5, 2018), https://www.wsj.com/articles/trump-denies-knowledge-of-130-000-payment-to-former-porn-star-1522963827.

[13] *Id.*

[14] Erica Orden, Rebecca Ballhaus & Michael Rothfeld, *Agents Raid Office of Trump Lawyer Michael Cohen in Connection with Stormy Daniels Payments,* WALL STREET JOURNAL (April 9, 2018), https://www.wsj.com/articles/fbi-raids-trump-lawyers-office-1523306297.

[15] *Id.*

[16] Rebecca Ballhaus, Michael Rothfeld & Joe Palazzolo, *Michael Cohen Taped Conversation with Trump about Buying Rights to Playmate's Story,* WALL STREET JOURNAL (July 20, 2018), https://www.wsj.com/articles/michael-cohen-taped-conversation-with-trump-about-buying-rights-to-playmates-story-1532112954 (American Media Inc. owned the rights to Karen McDougal's story claiming that she had an extramarital affair with Trump. Candidate Trump and Michael Cohen were discussing how to purchase the rights.).

[17] *Id.*

[18] *Id.*

[19] Deanna Paul, *Michael Cohen Secretly Tape-Recorded Trump. Does that make him a Bad Lawyer?* WASHINGTON POST (July 26, 2018), https://www.washingtonpost.com/news/the-fix/wp/2018/07/25/michael-cohen-secretly-recorded-trump-does-that-make-him-a-bad-lawyer/?utm_term=.c6a27d93cf1a.

[20] Donald J. Trump (@realDonaldTrump), TWITTER (July 25, 2018, 5:34 AM),

The Trump-Cohen attorney-client relationship and its eventual breakdown is a useful example that provides real world context to the issues discussed in this comment. The Trump-Cohen fallout illustrates potential consequences of surreptitiously recording clients. The decision to use this example is not, and should not be understood as, supporting or criticizing the Presidency. Rather, it is an opportunity to use a high-profile example to further an ethics discussion.

III. AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT IN THE CONTEXT OF SURREPTITIOUS RECORDINGS

The American Bar Association Model Rules of Professional Conduct are the current ethics rules which guide attorneys in the ethical practice of law.[21] The Model Rules provide a framework that nearly every legal jurisdiction in the country has adopted; however, each state maintains the ability to adopt or modify the Model Rules before enacting them within their borders.[22] The framework lays out the ethical obligations that all attorneys owe to their clients, adversaries, and third parties.[23] Although the Model Rules do not discuss surreptitious recording, they do speak of the Duty of Confidentiality and of Attorney Misconduct.[24] This section provides an overview of these topics and explains their relevance to the issue of surreptitious recording.

https://twitter.com/realdonaldtrump/status/1022097879253635072?lang=en. ("What kind of lawyer would tape a client? So sad! Is this a first, never heard of it before? Why was the tape so abruptly terminated (cut) while I was presumably saying positive things? I hear there are other clients and many reporters that are taped – can this be so? Too bad!"); *see also* Donald J. Trump (@realDonaldTrump), TWITTER (July 21, 2018, 5:10 AM), https://twitter.com/realdonaldtrump/status/1020642287725043712?lang=en.
("Inconceivable that the government would break into a lawyer's office (early in the morning) – almost unheard of. Even more inconceivable that a lawyer would tape a client – totally unheard of & perhaps illegal. The good news is that your favorite President did nothing wrong.").

[21] GEOFFREY C. HAZARD, JR., W. WILLIAM HODES & PETER R. JARVIS, LAW OF LAWYERING §1.03 SOURCES OF LAW CONSTITUTING THE LAW OF LAWYERING (4th ed., 2019-1 Supp. 2014).

[22] LAWYERS MANUAL ON PROFESSIONAL CONDUCT: PRACTICE GUIDES, MISCONDUCT AND DISCIPLINE, DISHONESTY, FRAUD, DECEIT. (North Dakota, Oregon, and Virginia have added to the definition of Rule 8.4(c) to prevent fraud if that conduct reflects adversely on the lawyer's fitness as a lawyer).

[23] HAZARD, *supra* note 21, at §2.01 THE CLIENT-LAWYER RELATIONSHIP: PART I OF THE MODEL RULES OF PROFESSIONAL CONDUCT.

[24] *See* MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 2018).

A. American Bar Association Model Rule of Professional Conduct 8.4

ABA Model Rule 8.4 is an all-encompassing rule that requires attorneys to obey all of the Model Rules.[25] If an attorney violates any of the Model Rules, they inherently also violate Rule 8.4.[26] Although Rule 8.4 is extremely comprehensive and has many subsections addressing a long list of scenarios, for the purposes of this comment it is only necessary to focus on Rule 8.4(a), Rule 8.4(b) and Rule 8.4(c).[27] Model Rule 8.4 is relevant to this discussion because some jurisdictions have determined that surreptitious recording is inherently deceitful, while other jurisdictions have not.[28] This will be addressed in more detail in Section V.

Rule 8.4(a) states that a lawyer shall not "violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another."[29] Rule 8.4(b) states that a lawyer shall not engage in illegal conduct that adversely reflects "on the lawyer's honesty, trustworthiness, or fitness as a lawyer."[30] Rule 8.4(c) states that an attorney shall not "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."[31] This Model Rule not only applies to the attorney's professional practice, but also applies to their actions outside the practice of law.[32] This highlights the fact that attorneys must be cognizant of ethical conduct both within and outside of their practice, as they are held to a higher standard of conduct in society than an ordinary citizen.[33] Following this logic, in a single-party consent jurisdiction an ordinary citizen could secretly tape conversations without serious consequences, while attorneys may be subject to punishment for similar actions.

---

[25] HAZARD, *supra* note 21, at §69.02 OVERVIEW.

[26] HAZARD, *supra* note 21, at §69.03 VIOLATION OF A RULE OF PROFESSIONAL CONDUCT AS MISCONDUCT.

[27] MODEL RULES OF PROF'L CONDUCT r. 8.4 (AM. BAR ASS'N 2018).

[28] *See* discussion *infra* Section V.

[29] MODEL RULES OF PROF'L CONDUCT r. 8.4(a) (AM. BAR ASS'N 2018).

[30] MODEL RULES OF PROF'L CONDUCT r. 8.4(b) (AM. BAR ASS'N 2018).

[31] MODEL RULES OF PROF'L CONDUCT r. 8.4(c) (AM. BAR ASS'N 2018).

[32] *See* Att'y Grievance Comm'n v. Johnson, 976 A.2d 245, 261 (Md. 2009) (stating that Rule 8.4(c) can be violated even if the conduct occurred outside of the practice of law); *see also* In re Pugh, 710 N.W.2d 285 (Minn. 2006) (disciplining lawyer under rule 8.4(c) for embezzling funds from his real estate closing company); *see generally* In re Ellis, 204 P.3d 1161 (Kan. 2009) (disciplining lawyer for stealing food from the office cafeteria and lying about it when asked by superiors).

[33] *See e.g., Johnson*, 976 A.2d at 261.

B. American Bar Association Model Rule of Professional Conduct 1.6

ABA Model Rule 1.6 concerns the confidentiality of information between an attorney and client.[34] An obligation exists for attorneys to preserve client confidences, prevent disclosure of information about a client, and prohibits use such information in the adverse interest of a client.[35] The Rule prevents attorneys from voluntarily discussing or giving information about a client to anyone.[36] Model Rule 1.6(a) concerns a broad category of information "relating to the representation of a client" that is prohibited from disclosure, and therefore, an attorney must not reveal it.[37] Model Rule 1.6(b) contains a list of exceptions, which *permit* a lawyer to disclose information when a lawyer "reasonably believes" that disclosure is necessary.[38]

The duty of confidentiality is the foundation of the attorney-client relationship.[39] The duty enables the attorney to gain the trust of clients and serve them more effectively.[40] It allows the client to fully engage in their representation and enables them to be honest with their attorneys.[41] However, this enhanced attorney-client relationship comes at a cost.[42] Occasionally, an attorney learns information that would be useful or beneficial to a third party; nonetheless, the attorney is not permitted to disclose such information. Clients have legitimate expectations that the information they disclose to their attorney will remain confidential.[43] The confidential relationship between attorney and client enhances client autonomy and gives the client a sense that the legal system is capable of fair play.[44] Indeed Rule 1.6 is extremely relevant to the topic of surreptitious recording of clients because the clients's words, phrases, and tone are recorded verbatim without their knowledge.[45] Furthermore, secret

---

[34] *See* MODEL RULES OF PROF'L CONDUCT r. 1.6 (AM. BAR ASS'N 2018).

[35] HAZARD, *supra* note 21, at §10.02 OVERVIEW.

[36] HAZARD, *supra* note 21, at §10.02 OVERVIEW.

[37] MODEL RULES OF PROF'L CONDUCT r. 1.6(a) (2018).

[38] MODEL RULES OF PROF'L CONDUCT r. 1.6(b) (2018); Prudential Ins. Co. of America v. Massaro, 47 F. App'x 618, 619 (3d Cir. 2002) (*citing* Haines v. Liggett Group, Inc., 975 F.2d 81, 90 (3d Cir.1992) (stating that the crime-fraud exception to both the duty of confidentiality and the attorney-client privilege allows an attorney to disclose confidential information in certain circumstances)).

[39] HAZARD, *supra* note 21, at §10.02 OVERVIEW.

[40] HAZARD, *supra* note 21, at §10.02 OVERVIEW.

[41] HAZARD, *supra* note 21, at §10.02 OVERVIEW.

[42] RESTATEMENT (THIRD) THE LAW GOVERNING LAWYERS § 60 cmt. b (AM. LAW INST. 2000)

[43] *Id.*

[44] Albert Alschuler, *The Preservation of a Client's Confidences*: *One Value Among Many or a Categorical Imperative?*, 52 U. COLO. L. REV. 349, 352 (1981).

[45] *See* discussion *infra* Section IV. B.

recording has the ability to destroy the trust and confidence a client has in their attorney, and has the potential to harm the attorney-client relationship. Section IV will explore these issues in greater detail.

IV. THE AMERICAN BAR ASSOCIATION'S STANCE ON SURREPTITIOUS RECORDING

The American Bar Association is one of the preeminent authorities in the field of legal ethics.[46] The ABA Center for Professional Responsibility houses numerous committees that provide leadership in developing and interpreting scholarly sources in the field of legal ethics.[47] The ABA Standing Committee on Ethics and Professional Responsibility (hereinafter "Committee") exists to answer important ethical questions and help interpret state-adopted Rules of Professional Conduct.[48] The Committee provides this guidance through of written opinions.[49] The Committee promulgates two types of opinions: Formal Opinions and Informal Opinions.[50] Formal Opinions address matters that are of interest to both the general public and the bar.[51] Informal Opinions address specific inquiries and a particular set of facts.[52] However, like the Model Rules themselves, these opinions are advisory, and thus not binding.[53] Nonetheless, ABA ethics opinions are cited frequently by courts as they assist with interpretation of the Model Rules.[54] The ABA has issued a handful of

[46] GEORGETOWN LAW LIBRARY, LEGAL ETHICS RESEARCH GUIDE, https://guides.ll.georgetown.edu/legal_ethics (last visited Nov. 20, 2019).

[47] AMERICAN BAR ASSOCIATION, CENTER FOR PROFESSIONAL RESPONSIBILITY, https://www.americanbar.org/groups/professional_responsibility/resources/ (last visited Nov. 20, 2019) (The Center for Professional Responsibility engages in fields such as professional regulation, professionalism, and client protection).

[48] AMERICAN BAR ASSOCIATION, STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY, https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/ (last visited Nov. 20, 2019). Note that the committee currently known as the Committee on Ethics and Professional Responsibility was formerly known as the Committee on Professional Ethics from 1958 through 1971, the committees are for all intents and purposes functional equivalents and for the purposes of this comment will be collectively referred to as one and the same, hereinafter "Committee".

[49] GEORGETOWN LAW LIBRARY, LEGAL ETHICS RESEARCH GUIDE, https://guides.ll.georgetown.edu/legal_ethics (last visited Nov. 20, 2019).

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] AMERICAN BAR ASSOCIATION, STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY, https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/ (last visited Nov. 20, 2019).

opinions discussing attorneys and their surreptitious recordings of clients, adversaries, and third parties.[55] This section will outline their holdings and show how the ABA's stance has evolved over time.

A. ABA Informal Opinion 1008

In 1967, the Committee issued ABA Informal Opinion 1008, titled "Lawyer Tape Recording Telephone Conversation of Client Without Client's Knowledge."[56] In addressing the question presented, the Committee divided the problem into two separate issues: (1) is it permissible for an attorney to tape a conversation with a client, when the client is unaware that the conversation is being recorded?; and (2) does the disclosure of the recording's substance conform with the ethical rules?[57]

In addressing the first issue, the Committee noted that a particular jurisdiction may have a statute prohibiting the taping of a conversation without the consent of all parties.[58] The opinion then referenced Formal Opinion 7 and Informal Opinion 262.[59] These ethics opinions suggest that attorneys must be candid with their clients, and therefore recording a telephone conversation without the client's knowledge could potentially violate this requirement.

Informal Opinion 1008 extended this principle to the surreptitious recordings of clients.[60] The Committee concluded that an attorney who wishes to record a conversation with a client must first alert the client that they intend to record the conversation.[61] It stated that if the attorney did not obtain the client's consent, the attorney could not ethically record the conversation.[62] Such a recording would be a violation of the obligation of candor and fairness.[63]

In addressing the second issue of disclosure, the Committee stated that an attorney must not disclose the substance of the recording as it would invoke the attorney-client privilege and the fact that an attorney has an obligation to maintain their client's confidences.[64] In sum, the Committee recognized that an attorney must not secretly record a conversation with a client, that the attorney must alert the client if they plan to record the

55 *See* discussion *infra* Section IV. A, B, C.
56 ABA Comm. on Prof'l Ethics, Informal Op. 1008 (1967).
57 *Id.*
58 *Id.*
59 *Id.*
60 *Id.*
61 *Id.*
62 ABA Comm. on Prof'l Ethics, Informal Op. 1008 (1967).
63 *Id.*
64 *Id.*

conversation, and that the attorney must not disclose any substance of said recording, as the attorney has a duty to protect the client's confidences.

B. ABA Formal Opinion 337

In 1974, the ABA Committee on Ethics and Professional Responsibility issued Formal Opinion 337, which reiterated the conclusion previously reached by the Committee in Informal Opinion 1008.[65] The ABA wrote Formal Opinion 337 to address the technological advancements in recording devices and their use by individuals in the legal profession.[66] The Opinion addressed whether it was ethical for an attorney to secretly record three different groups of people: (1) clients, (2) other attorneys and adversaries, and (3) third parties.[67] Affirming Informal Opinion 1008, the Committee advised that it is unethical for an attorney to surreptitiously record their own clients or adversaries.[68] The Committee emphasized that an attorney who wished to ethically record a conversation must alert all parties to the conversation.[69]

The Committee had difficulty, however, in answering whether recording third parties is permissible.[70] After contemplating the question, the Committee determined that except in exceptional circumstances, it is both impermissible and unethical for an attorney to secretly record a third party without their knowledge.[71]

The Committee acknowledged that third party recording would disrupt public confidence in the legal profession and emphasized the need for the public to trust attorneys.[72] It also stated that secret tapings would violate Canon 9 of the Code of Professional Responsibility, which expressed the idea that attorneys must avoid professional impropriety.[73]

---

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

66 *Id.*

67 ABA Comm. on Prof'l Ethics, Informal Op. 1008 (1967).

68 *Id.*

69 *Id.*

70 *Id.*

71 ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 337 (1974) (explaining that the Committee made an exception that permits a prosecutor or an Attorney General to surreptitiously record a client if the recording adheres strictly to the Constitutional requirements. However, the Committee also made clear that even though a recording may theoretically be legal, it does not per se make the recording ethical. The Committee allowed leeway for unethical behavior from governmental attorneys in specific circumstances. The Committee declined to outline specific instances in which this behavior would be permissible.).

72 *Id.*

73 *Id.*; MODEL CODE OF PROF'L RESPONSIBILITY EC 9-6 (AM. BAR ASS'N 1980).

Lastly, the Committee advised that an attorney who secretly tapes another individual would be in violation of Disciplinary Rule 1-102(A)(4) of the Code of Professional Responsibility.[74] Disciplinary Rule 1-102(A)(4) states, "A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."[75]

The ethical rules in combination with the public perception of attorneys prompted the Committee to ultimately advise against all secret tape recordings.[76] Thus a broad and sweeping per se rule that disapproved of all secret tapings, irrespective of identity of those involved in the conversation was promulgated by the Committee.[77]

C. The ABA's Current Stance: Formal Opinion 01-422

Formal Opinion 337 stood untouched for nearly 30 years until 2001, when the Committee revisited the topic.[78] Formal Opinion 01-422 marked a dramatic change in course from the previously longstanding precedent set by Formal Opinion 337.[79]

The Committee shifted its longstanding stance and advised that surreptitious recording is not deceitful.[80] In Formal Opinion 01-422, the Committee asserted that the act of surreptitiously recording a conversation without consent of the other parties does not violate the Model Rules, unless the recording occurs in a jurisdiction that forbids such recording by law.[81] To commit an ethics violation in a single-party consent jurisdiction, the act of recording needs to occur in conjunction with other independently unethical behavior.[82] Although the Committee did not affirmatively advocate for attorneys to adopt the practice of surreptitious recording, it also did not explicitly claim that to do so would be unethical, as the Committee previously had in Formal Opinion 337.[83]

---

[74] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 337 (1974); MODEL CODE OF PROF'L RESPONSIBILITY DR 1-102(A)(4) (AM. BAR ASS'N 1980).

[75] MODEL CODE OF PROF'L RESPONSIBILITY DR 1-102(A)(4) (AM. BAR ASS'N 1980). This is the predecessor to the current Rule of Professional Conduct Rule 8.4(c), which states that "a lawyer shall not [. . . e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

[76] ABA Comm. on Prof'l Ethics, Informal Op. 1008 (1967).

[77] *Id.*

[78] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 01-422 (2001).

[79] *Id*.

[80] *Id.*

[81] *Id*.

[82] *Id*.

[83] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 01-422 (2001); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 337 (1974).

The Committee provided numerous reasons for the adoption of this new standard. It noted that in 1983 the ABA adopted the new Model Rules of Professional Conduct and updated their ethics rules.[84] Some states and bar associations claimed that Formal Opinion 337 did not align with the Model Rules of Professional Conduct and therefore, Opinion 337 was outdated and inapplicable to the modern practice of law.[85] The ABA acknowledged that their opinions are merely advisory, rendering the opinions non-binding on any state or jurisdiction.[86] As a result, a lack of consistency emerged among states. Some states, such as Mississippi, adopted the standard, while other states such as Colorado, did not.[87] Other states, including Oklahoma, Utah, and Maine complained about Opinion 337 and advocated that the ABA reevaluate their stance on surreptitious recordings.[88]

To add further confusion, there were intra-state bar association disagreements on the ethics of surreptitious recording.[89] For example, the New York County Bar Association advised that lawyers could record a conversation where the other party or parties did not consent.[90] Conversely, the New York City Bar Association opined that lawyers should not record other parties without their consent; however, it did suggest a potential exception for attorneys conducting criminal investigations.[91] Interestingly, neither of these bar association opinions matched the New York State Bar Association's stance, which condemned all recordings unless all parties to the conversation are aware that their conversation is being recorded.[92]

The states that heavily criticized Opinion 337 believed that the per se rule forbidding secret recordings was too restrictive and demanded that they be granted some discretion to draft and comply with the ethics opinion to the extent it may be appropriate in their local practice.[93] In response to these issues, the ABA created a framework that each state can apply to

---

84 ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-422 (2001); *see generally,* MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 2018).

85 *Id. See* discussion *infra* Section IV. C.

86 *Id.* (Explaining that some states simply chose not to follow Opinion 337 and ignored the ABA's advice).

87 *Id.*

88 *Id.* (Explaining that the states found the per se rule of Formal Opinion 337 to be too stringent and said that only a surreptitious recording in combination with other deceptive behavior is unethical.).

89 *Id.*

90 ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 01-422 (2001).

91 *Id.*

92 *Id.*

93 *Id.*

determine whether surreptitious recordings by attorneys are ethically permissible.[94]

The first step in the framework is to ask whether the state or jurisdiction has a law that forbids single-party consent recording.[95] If a state is an all-party consent state and an attorney records without permission, the attorney in question likely violates Rules 8.4(b) and (c).[96] If the state is a single-party consent state, the attorney must then use their *best judgment* when recording their clients.[97] The Committee advised that secret recording should only occur where the attorney conducting such recording *knows* that the client would accept and allow the recording to occur.[98] In deciding, the Committee did not actively support surreptitious recordings; rather, it noted that it would prefer attorneys to be upfront and honest with their clients, and advise them that they are recording a conversation.[99]

V. INCONSISTENT INTERPRETATION OF THE ABA MODEL RULES

Nearly every state in the United States has adopted the American Bar Association's Model Rules of Professional Conduct.[100] The Model Rules provide that "failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process."[101] Section 19 of the Scope of the Model Rules states that a disciplinary body will analyze the lawyer's conduct based on the facts and circumstances that existed at the time of the conduct at issue.[102] This section lastly states that the possibility and the severity of such discipline will be determined by the following: the willfulness of the attorney's conduct, the seriousness of the breach, and the outside influences and extenuating factors involved in the

94 *Id.*

95 *Id.*

96 MODEL RULES OF PROF'L CONDUCT r. 8.4(b)-(c) (AM. BAR ASS'N 2018); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 01-422 (2001).

97 ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 01-422 (2001).

98 *Id.*

99 *Id*.

100 American Bar Association, *Alphabetical List of Jurisdictions Adopting Model Rules*, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules/ (last visited November 16, 2019); The State Bar of California, *Rules of Professional Conduct*, https://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Rules/Rules-of-Professional-Conduct (last visited November 16, 2019) (According to the ABA, California has not adopted the Model Rules. However, California recently adopted new Rules of Professional Conduct on November 1, 2018 that align the State with the ABA rules.).

101 MODEL RULES OF PROF'L CONDUCT Scope (AM. BAR ASS'N 2018).

102 *Id.*

ethical violation.[103] This section also highlights the fact that although the ABA provides a general statement on how the Model Rules should be applied, not all jurisdictions apply them uniformly. Instead, the Model Rules are applied and interpreted at the state's discretion; therefore, the disciplinary outcomes are wildly different. For example, Cohen's surreptitious recording of his client could be ethical according to some jurisdictions, while other jurisdictions would reprimand and sanction him for such actions.[104]

A. Subjective Context Jurisdiction: Mississippi

Concerning surreptitious recordings, Mississippi can be considered a "subjective" jurisdiction because the State does not have a per se rule prohibiting attorneys from secretly recording their clients.[105] Rather, the Supreme Court of Mississippi tends to determine ethical violations on this topic on a case-by-case basis.[106] This individualized approach can be described as one of pragmatism and flexibility, utilizing the "context-of-the-circumstances" to resolve the matter before the court.[107]

In *Attorney M v. Mississippi Bar*, the Supreme Court of Mississippi found that a plaintiff's lawyer who surreptitiously recorded telephone conversations with a potential defendant did not commit an ethical violation.[108] The issue arose during a medical malpractice case in which Attorney M represented the plaintiff.[109] During discovery, plaintiff's attorney telephoned "Dr. C" on two occasions, tape recording both of the phone calls without Dr. C's knowledge or permission.[110] Testimony revealed that Dr. C assumed that his conversations were recorded, but his suspicions were not confirmed until Attorney M sent Dr. C a letter in the mail informing the doctor of the recorded telephone conversations.[111]

The Mississippi State Bar filed a complaint against Attorney M after his actions became public, alleging that his conduct violated the Mississippi Rules of Professional Conduct.[112] The Complaint Tribunal found that

103 *Id.*

104 *Contra* discussion *infra* Section V. A and Section V. B.

105 Allison A. Vana, *Note: Attorney Private Eyes: Ethical Implications of a Private Attorney's Decision to Surreptitiously Record Conversations,* 2003 U. ILL. L. REV. 1605, 1632 (2003).

106 *Id.*

107 *Id.* at 1631.

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

109 *Id.* at 221.

110 *Id.* at 222.

111 *Id.*

112 *Id.*

Attorney M violated Rule 8.4(c) and Rule 8.4(d) of the Model Rules; Attorney M subsequently appealed the decision to the Supreme Court of Mississippi.[113]

The court began their analysis by observing that the Complaint Tribunal followed the framework outlined in ABA Formal Opinion 337, which forbade any secret recording by attorneys.[114] The court disagreed with the Complaint Tribunal's heavy reliance on Opinion 337, because the State of Mississippi had never formally adopted the opinion and instead preferred to adjudicate matters on an individual basis.[115] The court favored the holding in *Netterville v. Mississippi State Bar* over the Committee's stance in Opinion 337.[116]

The court preferred the reasoning in *Netterville* because the case produced a more applicable and flexible rule that applies to all attorneys, instead of carving out exceptions as Opinion 337 had.[117] The court found no basis to apply a standard that treated prosecuting attorneys and private attorneys differently.[118] It noted that there are times that a recording could be used for improper and unethical purposes, like "blackmail or to gain an unfair advantage."[119] However, the court found no improper motive and, therefore, Attorney M had not violated Rule 8.4 because his conduct was not dishonest, fraudulent, deceptive, or misrepresentative in nature.[120]

Although the above examples appear as though Mississippi is lenient in disciplinary actions concerning surreptitious recordings, they have punished other attorneys for such conduct. In *Wilbourn v. Wilbourn*, for example, the Mississippi Court of Appeals affirmed the Chancery Court's decision to remove a trustee as a result of the trustee's repeated surreptitious recording of a co-trustee.[121] The controversy arose after the passing of Richard Wilbourn II, who left his considerable interest in Citizens National Bank Corporation Holding Company to his wife, Deanna Wilbourn, and their son, Richard Wilbourn III.[122] The holding company

---

113 *Id.*

114 *Attorney M,* 621 So.2d at 222–23.

115 *Id.* at 223.

116 *Attorney M,* 621 So.2d at 223*; see also* Netterville v. Mississippi State Bar, 397 So.2d 878 (1981) (stating 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).

117 *Attorney M,* 621 So.2d at 223. *See* discussion *supra* note 71. The court recognized that Opinion 337 only carved out exceptions for certain government employed attorneys.

118 *Id.* at 223.

119 *Id.* at 224 (stating that mere taping is not the issue, rather the determining factor is how the attorney actually uses the tapes).

120 *Id.* at 224.

121 Wilbourn v. Wilbourn, 106 So.3d 360, 372 (Miss. Ct. App. 2012).

122 *Id.* at 363-64.

shares were held in trust by Deanna and Richard III, with the main purpose to ensure Deanna an annual income for the remainder of her life.[123] In addition to being co-trustees, Deanna and Richard III also had an attorney-client relationship.[124] Richard III was a partner of a law firm that represented Deanna for numerous years; he had advised her on buying real estate in Florida, created a life insurance trust for her, and advised her on a potential lawsuit regarding Hurricane Katrina damage.[125]

Richard III secretly tape-recorded discussions with Deanna.[126] The court took this fact seriously, as Richard III was not only a co-trustee, but was also Deanna's attorney.[127] The court noted that in Mississippi, the main factors to determine whether a surreptitious recording is unethical are the reason and manner in which the attorney uses the recordings.[128] The court of appeals agreed with the chancery judge, who determined that Richard III intended to use the secret recordings in an attempt to have his client declared incompetent and removed as a trustee.[129] The court of appeals affirmed the removal of Richard III as co-trustee.[130] It reasoned that an attorney who uses a secret recording to gain an unfair advantage over his or her client has committed an unethical, and possibly illegal, act.[131] Although Richard III was not sanctioned by the Mississippi State Bar for surreptitiously recording his client, his removal as a trustee was directly correlated to the findings that his behavior was unethical.[132]

As shown, Mississippi does not have a hard and fast rule regarding surreptitious recording. Instead, their courts determine the specific facts of the issue at hand, the circumstances under which the recording was made, the intent of the attorney, and the purpose of which the tapes would be used. Only after weighing these factors does a Mississippi court determine if a secret recording is unethical. However, as will be discussed below, not every state is as liberal as Mississippi.

123 *Id.* at 364-65.
124 *Id.* at 375.
125 *Id.* at 366.
126 *Id.* at 366.
127 *Wilbourn*, 106 So.3d at 375.
128 *Id.* at 371.
129 *Id.* at 371-72.
130 *Id.* at 372.
131 *Id.* at 371.
132 *Id.* at 372.

B. Objective Standard Jurisdictions

1. South Carolina

Objective jurisdictions can be characterized as jurisdictions that do not permit private attorneys to surreptitiously record their clients under any circumstance. In these jurisdictions, attorneys who surreptitiously record their clients are typically sanctioned for unethical behavior. The circumstances and facts surrounding the recording are not taken into consideration by the courts.

Although South Carolina does not have a per se rule prohibiting surreptitious recordings, their approach to the issue is far more rigid than Mississippi's. The Supreme Court of South Carolina has consistently determined that surreptitious recording is unethical; however, it does permit attorneys involved with a law enforcement agency to ethically surreptitiously record.

In *In re Anonymous Member of South Carolina Bar*, the attorney in question represented a client involved in a motor vehicle accident.[133] The attorney subsequently called the other driver involved in the collision, without disclosing that he was an attorney for his client or advising the driver that he was recording their conversation.[134] The attorney attempted to use the recording during the deposition of the driver, and opposing counsel objected on the propriety of the recording.[135] The Court held that any time an attorney records a conversation with an adversary or potential adversary without the consent of all parties to record, the attorney violates Disciplinary Rule 1-102(A)(4), which provides that a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."[136]

In the years since *In re Anonymous Member of South Carolina Bar*, the Supreme Court of South Carolina created limited exceptions allowing attorneys to record conversations.[137] In *In re Attorney General's Petition*, the court carved out an exception to the rigid standard the state typically

---

133 In re Anonymous Member of S.C. Bar, 322 S.E.2d 667, 668 (S.C. 1984).

134 *Id.*

135 *Id.*

136 *Id.* at 669. (Adopting ABA Formal Opinion 337, which stated that surreptitiously recording clients is considered attorney misconduct. Note that DR 1-102(A)(4) was the predecessor to ABA Model Rule 8.4(c). The court clarified its position in Matter of S.C. Bar, 404 S.E.2d 513 (S.C. 1991), holding that an attorney cannot record a conversation without the consent of all parties, regardless of the purpose for which the recording is made, the intent of parties to the conversation, whether any confidential information is discussed, or whether any party would gain an advantage.).

137 *See* discussion *infra* Section V. B. 1.

imposes.[138] There, the court held that it was permissible and therefore ethical for an attorney to surreptitiously record a conversation, as long as the attorney received clearance from a law enforcement agency conducting a criminal investigation.[139] However, the court noted that if an attorney was accused of an unethical recording, the burden of proof is on the attorney to show that the act of recording was ethical.[140]

The Supreme Court of South Carolina recently bolstered this standard in *In re Nolan*.[141] This case involved an out-of-state attorney who was unfamiliar with South Carolina's surreptitious recording case law.[142] The attorney hired private investigators and directed them to go to the defendant's company to secretly record various employees in an attempt to capture the employees making statements regarding products produced by the company.[143] The court determined that this was an unethical recording which violated Rule 8.4(d) of the Model Rules, because the conduct involved dishonesty, fraud, deceit, or misrepresentation.[144] Furthermore, the Court also held that the attorney violated Rule 5.3(c) of the Model Rules because the attorney directed his investigators to act unethically.[145]

In general, South Carolina has an easy to follow rule regarding surreptitious recording; unless an attorney has permission from a law enforcement agency to record or has the permission of all parties to the conversation, the attorney may not ethically record the conversation, regardless of the purpose of the recording itself. This is in contrast to the rule in Mississippi which generally allows surreptitious recordings, as long as the recording is not used in an unethical manner. However, the standard in South Carolina is easier to apply in practice since the framework is more structured.

2. Colorado

Colorado generally adopts the language and assertions the Committee set forth in Formal Opinion 337.[146] In *People v. Smith*, the court determined that a lawyer's secret taping of a telephone conversation with a

138 In re Att'y Gen.'s Petition, 417 S.E.2d 526 (S.C. 1992).
139 *Id.* at 527.
140 *Id.* at 527.
141 In re Nolan, 796 S.E.2d 841, 842 (S.C. 2017).
142 *Id.*
143 *Id.*
144 *Id.*
145 *Id. See also* MODEL RULES OF PROF'L CONDUCT r. 5.3(c) (AM. BAR ASS'N 2018).
146 Vana, *supra* note 105, at 1618–19 (showing Opinion 337 set forth the idea that it was impermissible for an attorney to surreptitiously record their client, their adversary, or a third party).

former client was inherently unethical.[147] Smith had a cocaine addiction and socialized with other cocaine users.[148] Some of Smith's acquaintances were arrested and charged with intent to sell cocaine.[149] Smith agreed to represent these individuals and throughout the representation, he engaged in conversations with them over the telephone.[150] Smith was then contacted by the District Attorney's office, informing him that they knew of his addiction and believed that he was also involved in the sale of cocaine.[151] After he was contacted by the District Attorney's office, Smith withdrew his representation of his clients and cooperated in the District Attorney's investigation.[152] The investigation required Smith to contact his former clients multiple times via telephone and record their conversations.[153] The Colorado Supreme Court stated that even though Smith was acting at the District Attorney's request, his conduct still violated Disciplinary Rule 102(A)(4), which prohibited conduct involving "dishonesty, fraud, deceit, or misrepresentation."[154]

The court held that "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."[155] The court focused on the repercussions and effects of lawyers taping former clients.[156] Thus, a private attorney may not tape others as it is inherently deceitful to do so and it would disrupt the "foundation of trust and confidentiality that is essential to the attorney-client relationship in the context of civil as well as criminal proceedings."[157] Colorado has a theme of honesty, transparency, and openness in their evaluation of attorney-client relationships; secret recordings are actions that are opposite of this theme and thus are considered dishonest, fraudulent, and deceitful and are therefore subject to sanctions.[158]

Seemingly there are three different types of jurisdictions in the topic of secret recordings. There are jurisdictions like Mississippi that do not have a per se rule against recordings, instead measuring each case by the unique circumstances present and by determining the purpose of the

147 People v. Smith, 778 P.2d 685, 686-87 (Colo. 1989).
148 *Id.* at 685.
149 *Id.* at 685-86.
150 *Id.* at 686.
151 *Id.*
152 *Id.*
153 *Smith*, 778 P.2d at 686.
154 *Id.* at 687.
155 *Id.* (citing People v. Selby, 606 P.2d 45, 47 (Colo. 1979).
156 *Smith*, 778 P.2d at 687.
157 *Id.*
158 Vana, *supra* note 105, at 1622–23.

recording. Next, there are jurisdictions such as South Carolina that follow the Committee's guidance set forth in Opinion 337 and only carve out exceptions for attorneys secretly recording at the request of a law enforcement agency. Lastly, there are jurisdictions like Colorado that have no tolerance for surreptitious recording unless that attorney is a government attorney. The difference between a state like South Carolina and Colorado is that the South Carolina rulings allow a private attorney to act on behalf of a law enforcement agency, while in Colorado the attorney must be employed by the agency, otherwise it is an ethics violation subject to sanction.

VI. ANALYSIS

Surreptitious recording of adversaries and third parties is certainly questionable behavior. It is evident and undeniable that it is extremely problematic for an attorney to surreptitiously record clients. Attorneys and clients exchange confidential communication, which is defined as "information exchanged between two people who (1) have a relationship in which private communications are protected by law and (2) intend that the information be kept in confidence."[159] The reasoning of the ethics opinions cited above rely heavily on the duty of confidentiality and the potential for misconduct. This analysis focuses on these two factors to reveal how surreptitious recording has the potential to cause a multitude of problems.

The duty of confidentiality is one of the most important aspects of the attorney-client relationship. The duty of confidentiality protects a client from an attorney's voluntary disclosure of information gathered through the representation of the client.[160] This principle cultivates trust between the attorney and the client; the client knows that they can talk openly and honestly with his or her counsel and have confidence that the information will remain out of the public view.[161] The duty is important, as it allows clients to fully inform their attorneys, which promotes rigorous and effective representation.[162]

The duty of confidentiality is oftentimes confused with the attorney-client privilege since they operate in a similar fashion.[163] Attorney-client privilege is invoked when an attorney is faced with a court order

---

[159] *Confidential Communication*. NOLO'S PLAIN ENGLISH LAW DICTIONARY (1st ed. 2009).

[160] ROGER CRAMTON, *The Lawyer as Whistleblower: Confidentiality and Government Lawyer*, 5 GEO. J. LEGAL ETHICS 291, 302 (1991).

[161] HAZARD, *supra* note 21, at §10.02 OVERVIEW.

[162] EDWARD W. CLEARY, ET AL., MCCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE 175 (2nd ed. 1972).

[163] *See* FED. R. EVID. 502.

demanding information communicated between the attorney and their client.[164] The duty of confidentiality is even more protective of the client, as it forbids an attorney from revealing any information "relating to the representation" of a client.[165] The duty of confidentiality is stronger and more protective than the attorney-client privilege as the attorney client privilege only protects against compelled disclosure, while the duty of confidentiality protects against any disclosure relating to the client's representation.[166] Indeed, both of these principles are extremely similar in nature and are concerned with the improper disclosure of information that a client relays to their attorney.

The attorney-client privilege is a common law principle that was formalized in *Annesley v. Anglesea* in England in 1743.[167] The court summarized the importance of the privilege saying

> if he [the client] does not fully and candidly disclose everything that is in his mind, which he apprehends may be in the least relative to the affair he consults his attorney upon, it will be impossible for the attorney properly to serve him: therefore, to permit an attorney, whenever he thinks fit, to betray that confidence . . . would be of the most dangerous consequence, not only to the particular client concerned, but to every other man who is or may be a client.[168]

The court had the foresight to realize the importance of honesty and candor between attorney and client. They recognized that an attorney who is ignorant of certain facts will be handicapped and thus will not be able to represent the client to their fullest capabilities. Furthermore, the court noted that by preventing disclosure they not only protect the rights and information of the client, but also the general public, some of whom will be serviced by the attorney in the future.

Indeed, the concerns of *Anglesea* still hold true in modern jurisprudence. In *Upjohn Co. v. United States*, the Court recognized the importance of honest and frank communications between client and counsel.[169] It noted that rigorous representation serves the public good, and that the best way to achieve proper representation is for an attorney to be

---

164 Hunt v. Blackburn, 128 U.S. 464, 470 (1888).

165 HAZARD, *supra* note 21, at §10.02 OVERVIEW; MODEL RULES OF PROF'L CONDUCT r. 1.6 (AM. BAR ASS'N 2018).

166 Bruce M. Landesman, *Confidentiality and the Lawyer-Client Relationship,* THE GOOD LAWYER 191 (David Luban ed., 1983).

167 Annesley v. Anglesea, 17 How. St. Trials. 1139 (1743).

168 *Id.* at 1237.

169 Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

fully informed by their client.[170] The Court quoted the ABA Model Code of Professional Responsibility, Ethical Consideration 4-1 in support of their belief in the attorney-client privilege.

> A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.[171]

Ethical Consideration 4-1 of the ABA Code of Professional Responsibility is the predecessor to Rule 1.6 of the ABA Model Rules of Professional Conduct.[172] Thus, there is support that the duty of confidentiality is firmly planted in the modern jurisprudence of this country. It is not merely a theoretical rule that lawyers should follow, but it is one of the most important building blocks of the attorney-client relationship.

Although the duty of confidentiality is well established, it does not mean that it is not without limits and boundaries.[173] The difficult problem is defining those boundaries; at what point does the duty of confidentiality cease to apply? At what point can an attorney ethically record a client without their consent and knowledge?

A client who discloses information to an attorney has an understanding that the attorney will keep the information confidential; however, there are different types of information that a client may reveal to their attorney, which complicates the question of confidentiality. The first type contains information that is completely outside the scope of confidentiality and thus an attorney may ethically disclose the information to an outside party.[174] Generally, an attorney may disclose information in

---

170 *Id.*; *see also* Trammel v. United States, 445 U.S. 40, 51 (1980) ("The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out."); *see* Fisher v. United States, 425 U.S. 391, 403 (1976) (recognizing the purpose of the privilege to be "to encourage clients to make full disclosure to their attorneys.").

171 *Upjohn Co.*, 449 U.S. at 391 (1981).

172 MODEL CODE OF PROF'L RESPONSIBILITY EC 4-1 (AM. BAR ASS'N 1980).

173 Geoffrey C. Hazard, Jr., *A Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061, 1091 (1978).

174 Landesman, *supra* note 166, at 203.

this category under Rule 1.6(b) of the Model Rules.[175] This category includes information such as the intent to commit a future crime or harm another person.[176] Positive information can be disclosed without an overhanging ethics violation; however, this is not applicable to this comment, since the focus here is negative disclosure: information that can damage a client, cause them to look bad in the public eye, or embarrass them.[177]

The second category of confidential information is information that lies in the grey zone, information an attorney cannot disclose except under unique circumstances.[178] All else being equal, the attorney cannot disclose this type of information because of the duty of confidentiality. However, if the client acts in a particular way such as committing perjury or misrepresenting themselves to the court, their attorney can disclose certain information to correct the record.[179] Attorneys must hold information in this category in confidence unless the client acts in a manner which permits their attorney to disclose it.[180]

The final category of confidential communications is those which cannot be disclosed under any circumstances. The ABA does not specifically list or enumerate these communications. Attorneys must absolutely protect the information in this category and cannot reveal it under any set of circumstances.[181]

Some information is indeed not protected by the duty of confidentiality; an attorney can break the duty to prevent future physical harm or correct an incorrect record in court. However, most information disclosed to an attorney will not fall under such categories; instead, it will fall into the third category, which requires absolute protection and cannot be revealed under any circumstances.[182] It is in this context that surreptitious recording is most problematic, as no circumstances exist to permit an attorney to divulge such information to those outside of the attorney-client relationship. The remainder of the comment will discuss the various issues that an attorney would face if they were to surreptitiously record their client.

---

175 MODEL RULES OF PROF'L CONDUCT r. 1.6(b) (AM. BAR ASS'N 2018).

176 *Id.*; *see also* Haines v. Liggett Group, Inc., 975 F.2d 81, 90 (3d Cir.1992).

177 Landesman, *supra* note 166, at 203.

178 Landesman, *supra* note 166, at 203.

179 Landesman, *supra* note 166, at 203.

180 Landesman, *supra* note 166, at 203.

181 Landesman, *supra* note 166, at 206.

182 Landesman, *supra* note 166, at 206.

A. Timing Issues Associated with Surreptitious Recording

Even if an attorney is ethically permitted to reveal client confidences, how does an attorney know when to tape? Attorneys, like the remainder of the world's population, are not mind readers nor can they predict the future. An attorney will not know when to tape their client unless they have prior knowledge that a client is going to specifically reveal information that is not protected by the duty of confidentiality. It is unrealistic for a client to advise their attorney that they will now start to say something which can be disclosed under Rule 1.6(b). Clients will not announce that they will say something important, implicating, or damning; they will just blurt it out. The attorney will not have an opportunity to start a recording until after the words are spoken. It is highly unlikely that an attorney will be able to specifically record a conversation in which the client says something disclosable without recording unimportant and non-disclosable (category three) information along with it.

The obvious argument against this premise is that an attorney can record all conversations with every client and therefore they will gather the information they seek. An attorney could install recording equipment in their office and ensure that every time a client walks through their door they are recording every single word. However, this is problematic for a few reasons. Although some jurisdictions would determine that this behavior is ethically sound, it is highly suspect.[183] The entire premise of the attorney client relationship is one of openness and candor. A client needs to feel that they can confide in their counsel for the purposes of their representation. If a client were to discover their attorney was secretly recording them, their relationship with their attorney would be irreparably damaged, as would those of the attorney's other clients, both past and future. Instead of speaking their minds and offering any possible information relating to their representation, the client will be inclined to keep their mouth shut and disclose less information than they would otherwise. The relationship will go from open and honest to silenced and adversarial. The client will not wish to say anything that could possibly be used against them and their representation will suffer.

B. Practicality Issues Associated with Surreptitious Recording

Although the Committee did not completely condemn attorneys secretly recording their clients in Formal Opinion 01-422, it is highly doubtful that they wish this behavior to become the norm in the legal industry. It seems that the ABA advocates for any attorney who is

[183] *See* discussion *supra* Section V. B.

recording a conversation to inform those being recorded and gain their consent. It would go against the grain for the ABA to advocate for such deceptive actions. There are both positive and negative consequences of informing the client of the recording. If an attorney does not alert their client of the recording, the client would not act any differently. The client's ignorance would be the benefit of the attorney; the client would conduct themselves in a normal way, they would not suspect anything, and they would interact with their attorney as they would any other meeting. The client would share all pertinent information regarding their representation and would be more inclined to tell the attorney possibly damning or embarrassing information.

On the flip side, if an attorney were to alert their client that they are recording, the attorney risks not getting their client's complete honesty and candor. The client may leave out specific details that they do not wish to be on a verbatim recording. They might change their story to be more pleasing or embellish on their facts. The discussion will not be frank and honest. If clients knew that there were certain areas that were exempted from the scope of confidentiality, clients would avoid such areas, and would not reveal information concerning those areas.[184] Often, clients intertwine these unprotected areas with relevant information, and also omit relevant information.[185] Restrictions on the duty of confidentiality would make individual clients cautious and would negatively affect their representation.[186]

Although the ABA advised in their latest ethics opinion that secret recording is not in and of itself unethical, this conclusion is suspect.[187] Model Rule 8.4(c) states that a lawyer may not engage in deceitful behavior.[188] The premise that secretly recording a client is not deceitful is questionable. The only way an attorney could record a client without their knowledge is through deception. Although attorneys are not misrepresenting themselves, because they are not making a representation in general, their conduct is sneaky. They have the opportunity to alert the client of the recording, and their choice not to do so could be classified as withholding important information. Although not deceit by definition, it seems that there is a certain amount of avoidance; and through that avoidance there is some misrepresentation and deceit.

---

184 Landesman, *supra* note 166, at 206.

185 Landesman, *supra* note 166, at 206.

186 Landesman, *supra* note 166, at 206.

187 ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 01-422 (2001).

188 MODEL RULES OF PROF'L CONDUCT r. 8.4(c) (AM. BAR ASS'N 2018).

C. Evidentiary Issues Associated with Surreptitious Recording

An attorney has a duty of loyalty to their clients; they have to protect confidential information at all times unless the client gives permission to release the information.[189] This duty extends not only to the spoken words; it also includes all documents memorializing this confidential information.[190] If an attorney were to surreptitiously record clients, they would create a full and complete record of the conversation.[191] The tape would be a verbatim record, complete with the exact tone, emotions, and phrases of the client.

Clients do not necessarily know what information an attorney needs for proper representation.[192] Therefore, when a client is recounting facts or their story to their attorney, the pertinent information will be mixed in with irrelevant information. The topics and subject matter of this irrelevant information may be of an embarrassing nature or information that a client shares in confidence, knowing that their attorney is not permitted to share this information with others.[193] By tape recording a client, an attorney not only gathers the important information necessary for representation, but also collects this irrelevant information and memorializes it. If an attorney is taking the meeting with handwritten notes, it is unlikely that an attorney will even bother writing down this irrelevant information and will only focus on the important facts of the story, simply for brevity's sake. By creating a verbatim record, all of the information is on the tape. If the recording were to get into the wrong hands, not only would the information concerning the representation be in the public eye, but this irrelevant information could also be under public scrutiny. Indeed, the ABA in Opinion 01-422 foreshadowed this problem, as taped evidence could be subjected to misuse and abuse the duty of confidentiality.[194]

As seen in the Trump-Cohen relationship, if their conversation about the payments was made without a tape recording and in short memorialized notes, there would be less hard evidence of the conversation even taking place. Ignoring the obvious illegality of these payments and the use of an attorney's services in furtherance of these payments, the existence of a verbatim record damages the client's reputation and has the potential to create more legal problems in the future. An attorney's purpose is to serve their clients with the strongest representation and skill. By recording a

189 HAZARD, *supra* note 21, at §10.02 OVERVIEW.
190 HAZARD, *supra* note 21, at §10.02 OVERVIEW.
191 ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 01-422 (2001).
192 Landesman, *supra* note 166, at 203.
193 Landesman, *supra* note 166, at 203.
194 ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 01-422 (2001).

client and materializing sensitive information, the attorney ignores and neglects their purpose. They are necessarily harming their client as there is a possibility that this recording is put into the pubic scope for all to see. A traditional handwritten note or unrecorded conversation protects client information as there is less likelihood that the material will be made public and connected specifically to a particular client. This method protects the client's interests better than any recorded conversation ever could.

D. Summary

It is difficult to conclude that surreptitious recording is on its face ethical. Although the ABA permits it in certain circumstances, it seems deceptive and deceitful. In practice, there is no uniform answer to the question, different states view the issue differently; some allow it, while others strictly forbid it with no exceptions. However, in the end, the question truly boils down to individual attorneys and their judgment. The attorney must decide only after considering all the circumstances and possible consequences. They must be cognizant that surreptitiously recording their client could potentially irreparably damage the attorney-client relationship. However, if the attorney determines that the situation requires such surreptitious recording, the attorney must confirm that there is a proper motive for the action and ensure that the client's representation and confidences remain intact. To do otherwise would be to abuse the relationship and jeopardize the client's confidence in their representation.

VII. PROPOSAL

A. Legislative Solution

There are two possible remedies that could solve the ethics issue discussed in this comment. The first solution is quite simple. The ethical issues surrounding single-party consent jurisdictions are numerous as explained above. The most straightforward solution to nullify these ethical issues is to amend the law of recording itself. If state legislatures were to amend their laws to mandate consent of all parties of a conversation, the ethics issues would vanish. As previously explained, Rule 8.4(b) of the Model Rules states that it is professional misconduct to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."[195] Therefore, if surreptitious recording was outlawed by statute, it would necessarily be an ethics violation if an attorney were to record their client without their consent. However, it is unlikely for this to occur as the federal government and 38

[195] MODEL RULES OF PROF'L CONDUCT r. 8.4(b) (AM. BAR ASS'N 2018).

individual states are single-party consent jurisdictions.[196]

B. American Bar Association Solution

The ABA could resolve the issue of surreptitious recording in two ways. The first method is to release a new Formal Opinion on surreptitious recording that provides specified guidance on when and where an attorney could ethically record. If the ABA were to provide clear cut examples it would clarify the issue surrounding the problem.

The second method the ABA could undertake is through Model Rule amendment and annotation. If the ABA were to specifically amend and annotate Rule 8.4(c) to include surreptitious recording as deceptive conduct, the ABA could change the way surreptitious recording is viewed. If surreptitious recording of clients was considered deceptive, to do so would violate the Model Rules and thus attorneys would be vulnerable to sanctions or penalties.

For either of these options to work, state supreme courts would have to adopt the ABA's position. In the first method, the state supreme courts would have to adopt the new Formal Opinion. Since ABA Formal Opinions are not binding on any court, the states would have to voluntarily adopt the new opinion and use the opinion in attorney misconduct hearings.[197] However, it is highly unlikely that all jurisdictions will adopt such an opinion. As explained above, numerous states have different methodologies when analyzing the ethics of surreptitious recordings, and it is unlikely that these jurisdictions will abandon their precedent because the ABA promulgated something new.[198]

The second proposed method runs into a similar problem. Even if the ABA were to promulgate an amendment to Model Rule 8.4(c), the individual states would still have the discretion to adopt the amendment. States do not necessarily need to adopt all of the Rules verbatim and can often modify them to their specific needs and requirements.[199] Thus, even if the ABA were to amend the Rule, a state could strike the modification regarding surreptitious recordings.

Ultimately it seems that any change regarding the act of surreptitious recording must come from the state's willingness to change. Since the ABA does not have any enforcement powers of their own, they are to an extent hindered in their ability to promulgate ethical rules or opinions which may be unpopular amongst a group of states. As such, unless

196 MATTHIESEN, *supra* note 5.
197 *See* discussion *supra* Section IV. C.
198 *See* discussion *supra* Section V.
199 *See supra* note 22.

individual states change their views on the ethics of surreptitious recording or change their substantive laws, it is unlikely that any tangible change will occur.