Special Counsel Investigations and Legal Ethics: The Role of Secret Taping

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I. INTRODUCTION

In July 2016, Michael Cohen, then presidential candidate Donald Trump’s lawyer, secretly recorded Trump discussing how they would use the publisher for the National Enquirer to purchase former Playboy model Karen McDougal’s story about an alleged affair with Trump in order to stop it from becoming public before the 2016
presidential election.\(^1\) The *National Enquirer*’s publisher purchased McDougal’s story in August 2016.\(^2\) In a similar move to quash another alleged affair from going public in October 2016, Cohen set up a corporation to purchase adult film star Stormy Daniels’s story of her affair with Trump.\(^3\) Trump was elected President in November 2016.\(^4\) Cohen’s secret recording contradicted Trump’s claims that he knew nothing about payments to McDougal, and it raises issues concerning the lengths to which Trump has gone to keep his private life a secret.\(^5\)

The taped conversation between Cohen and Trump later became public when Cohen’s lawyer released a copy of the tape in July 2018,\(^6\) which was after the Federal Bureau of Investigation (FBI) raided and seized audio tapes from Cohen’s office, home, and hotel room.\(^7\) It was also reported that Cohen was cooperating with Special Counsel Robert Mueller’s investigation into Russia’s interference in the 2016 presidential election and possible coordination between the Russian government and individuals associated with Trump’s presidential campaign.\(^8\) Reacting to the release of the tape, Trump tweeted: “Even more inconceivable that a lawyer


\(^2\) Matthews, supra note 1.

\(^3\) Id.

\(^4\) Matt Flegenheimer & Michael Barbaro, *Donald Trump Is Elected President in Stun

\(^5\) Matt Apuzzo et al., *Michael Cohen Secretly Taped Trump Discussing Payment to

\(^6\) Cuomo et al., supra note 1.


would tape a client—totally unheard of & perhaps illegal.” Trump also tweeted: “What kind of a lawyer would tape a client? So sad! Is this a first, never heard of it before? . . . I hear there are other clients and many reporters that are taped—can this be so? Too bad!”

Contrary to Trump’s Twitter rant, this incident is not the first time a lawyer has secretly taped a conversation with a client or others. Secret taping, though, raises a number of questions, including the following: Is secret taping legal? Is secret taping by a lawyer ethical? Lastly, if legal and ethical, what are the pros and cons of a lawyer secretly taping conversations? This essay sets out to answer those questions—but first, a little more about secret taping, secret tapes involving Presidents under Special Counsel investigations, and Trump’s experiences with secret taping.

II. SECRET TAPING AND PRESIDENTS

A. Secret Tapes Involving Prior Presidents and Special Counsel Investigations

One person secretly taping a conversation with another is nothing new, and even secret tapings involving Presidents and Special Counsel investigations have happened previously. Indeed, evidence that Special Counsels obtained through secret tapes was partially responsible for one former U.S. President to resign and another to be impeached. The following sections of this essay examine the roles those secret tapes played.

1. Richard Nixon

President Richard Nixon, who was also a lawyer, reportedly taped his conversations with everyone in the Oval Office. In June 1972, police arrested five burglars who broke into and attempted to bug the Democratic National Committee headquarters in the Watergate complex in Washington, D.C., prior to the 1972 presidential election. In the months after the break-in, the Washington Post

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10. Cuomo et al., supra note 1.
reported links between Nixon’s re-election campaign and the burglars, including a $25,000 re-election campaign check deposited into the bank account of one of the Watergate burglars.\textsuperscript{13} Nixon was re-elected, even as connections between the White House and the break-in emerged.\textsuperscript{14} In May 1973, Attorney General Elliot Richardson appointed Archibald Cox as special prosecutor to lead an independent investigation into the break-in and Nixon’s re-election campaign.\textsuperscript{15} When Nixon’s former aides testified to a grand jury about the break-in, they told the grand jury that Nixon had taped discussions about efforts to cover up the connection between the re-election campaign and break-in.\textsuperscript{16} Cox tried to subpoena the “smoking gun” tapes in which Nixon admitted his role in the cover-up, and Nixon directed Cox to be fired.\textsuperscript{17} The United States Supreme Court forced Nixon to release the tapes,\textsuperscript{18} and the tapes provided evidence of Nixon’s involvement in the Watergate crimes and cover-up.\textsuperscript{19} Nixon resigned under the threat of impeachment with the tapes as key evidence in August 1974.\textsuperscript{20}

2. \textit{Bill Clinton}

In 1997, Linda Tripp began to secretly record her phone conversations with Monica Lewinsky, a White House intern who had an affair with President Bill Clinton.\textsuperscript{21} In 1998, Tripp gave the tapes to Independent Counsel Kenneth Starr, who was investigating

\begin{itemize}
\item \textsuperscript{13} \textit{Id.}
\item \textsuperscript{14} Watergate Scandal, HIST. (Oct. 29, 2009), https://www.history.com/topics/1970s/watergate.
\item \textsuperscript{15} Bush, \textit{supra} note 12. "Special counsel" is the term in current law to refer to an individuals previously known as a "special prosecutor" or “independent counsel” under previous legislation. CYNTHIA BROWN \& JARED P. COLE, CONG. RESEARCH SERV., R44857, SPECIAL COUNSEL’S, INDEPENDENT COUNSEL’S, AND SPECIAL PROSECUTORS: LEGAL AUTHORITY AND LIMITATIONS ON INDEPENDENT EXECUTIVE INVESTIGATIONS 1 (2018).
\item \textsuperscript{16} Watergate Scandal, \textit{supra} note 14.
\item \textsuperscript{17} Marjorie Cohn, \textit{The Politics of the Clinton Impeachment and the Death of the Independent Counsel Statute: Toward Depoliticization}, 102 W. VA. L. REV. 59, 61 (1999).
\item \textsuperscript{18} United States v. Nixon, 418 U.S. 683, 702 (1974) ("We also conclude that the Special Prosecutor has made a sufficient showing to justify a subpoena for production [of the tapes] before trial.").
\item \textsuperscript{19} Watergate Scandal, \textit{supra} note 14.
\item \textsuperscript{20} \textit{Id.}
\item \textsuperscript{21} Emily Stanitz et al., \textit{The President Has a Girlfriend': Linda Tripp's Betrayal of Monica Lewinsky and the Taped Phone Calls}, ABC NEWS (Jan. 9, 2019, 4:14 PM), https://abcnnews.go.com/US/president-girlfriend-linda-tripps-betrayal-monica-lewinsky-taped/story?id=58865969.
\end{itemize}
Clinton’s involvement in the Whitewater real estate venture in Arkansas.\textsuperscript{22} Starr called Clinton to testify to the grand jury, and Clinton denied his relationship with Lewinsky.\textsuperscript{23} Then, after learning about the tapes that conflicted with his grand jury testimony, Clinton admitted to the affair.\textsuperscript{24} The tapes gave Starr the evidence he needed and prompted the cooperation of Lewinsky,\textsuperscript{25} which Starr believed necessary to prove that Clinton committed perjury by lying under oath to the grand jury.\textsuperscript{26} The House of Representatives impeached Clinton in December 1998, and the Senate acquitted him in February 1999.\textsuperscript{27}

As the Nixon and Tripp tapes demonstrate, the secret recordings in the hands of Special Counsel proved to be evidence powerful enough to bring down one President and impeach another. What role, if any, Cohen’s secret tapes will play in Special Counsel Mueller’s investigation into Russian interference in the 2016 presidential election is not clear.\textsuperscript{28} Secret recordings in addition to Cohen’s have been a prominent feature of Trump’s candidacy, presidency, and history, however.

B. President Trump and Secret Taping

Cohen’s tape in which Trump discussed hush money for McDougal is not the only tape; it is just one of more than 100 audiotapes that Cohen made and the FBI seized.\textsuperscript{29} According to reports in the press, Cohen made some of the secret recordings with an iPhone, and some additional secret tapes could relate to Trump.\textsuperscript{30}

Cohen is not the only one who has taped Trump. Most famously, there was the Access Hollywood tape made while Trump believed the microphone should have been turned off.\textsuperscript{31} In this videotape,

\begin{itemize}
\item \textsuperscript{22} Id.
\item \textsuperscript{23} Id.
\item \textsuperscript{24} Id.
\item \textsuperscript{25} Id.
\item \textsuperscript{26} Brooks Jackson, Clinton’s Three Lies, According to Starr, CNN (Sept. 21, 1998), http://www.cnn.com/ALLPOLITICS/stories/1998/09/21/lie.jackson/. Clinton’s lawyers argued that Clinton did not commit perjury because he gave literally true answers even if they were misleading. Id. Clinton was never criminally prosecuted. Tara Law, Bill Clinton Was Impeached 20 Years Ago. Here’s How the Process Actually Works, TIME (Dec. 18, 2018), http://time.com/5477435/impeachment-clinton/.
\item \textsuperscript{27} Cohn, supra note 17, at 72-73.
\item \textsuperscript{29} Rucker et al., supra note 7.
\item \textsuperscript{30} Id.
\item \textsuperscript{31} Lisa de Moraes, Donald Trump Blames NBCU Microphone for His Lewd ‘Access Hollywood’ Boost in New Interview, DEADLINE HOLLYWOOD (Oct. 27, 2016, 11:13 AM), https://
Trump bragged about kissing women and grabbing their genitals, stating, “when you’re a star, they [women] let you do it. You can do anything.” Then, there are the tapes that Omarosa Manigault Newman made while serving as an assistant to Trump as Director of Communications for the White House office of Public Liaison. When asked why she made secret recordings, Manigault Newman replied that without the tapes “no one in America would believe me.”

It seems that Trump has long assumed others are taping him, and he may have secretly taped others as well. In 2015, he told a radio host, “I assume when I pick up my telephone, people are listening to my conversations anyway, if you want to know the truth.” “It’s pretty sad commentary, but I err on the side of security.”

In 2000, long before he was in politics, Trump admitted he had taped a reporter for Fortune who was questioning Trump’s stated net worth, and Trump threatened to sue the publication for stating that Trump’s net worth was less than Trump claimed. Trump later denied that he had taped the phone call.

In addition to these instances of secret taping, including those that have occurred in Special Counsel investigations, lawyers engaged in law enforcement activities often direct or are involved in secret taping, including securing wiretaps from undercover law enforcement agents or cooperating witnesses wearing hidden microphones or recording devices. But what about lawyers not engaged...
in law enforcement activities? The next two parts of this essay analyze the law on secret taping and, if legal, under what circumstances it may be ethical for a lawyer to secretly tape conversations.

III. THE LAW ON SECRET TAPING

Federal law and the law in more than two-thirds of states permit the taping of conversations as long as one party to the conversation consents. These jurisdictions are known as “one-party consent” jurisdictions. Therefore, both non-lawyers and lawyers in most states may secretly record a conversation with anyone, even when one or more persons being recorded are unaware of the taping. Conversely, it is illegal for someone to arrange to record conversations when the lawyer is not a party to the conversation and the lawyer does not have the consent of at least one of the parties to the conversation. The statutes regulating secret recording are usually referred to as anti-wiretap or eavesdropping laws.

Other jurisdictions require everyone—all parties—to consent to being recorded, and Pennsylvania is among these jurisdictions. Another such jurisdiction is Maryland, where Linda Tripp secretly

40. Federal law generally proscribes the interception of wire, electronic, and oral communications, but permits the recording of a phone call or conversation provided one is a party to the conversation. 18 U.S.C. § 2511(2)(d) (2018). The federal law states:

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


42. See, e.g., Celia Guzaldo Gamrath, A Lawyer’s Guide to Eavesdropping in Illinois, 87 ILL. B. J. 362 (1999) (discussing the history of eavesdropping and anti-wiretapping laws in Illinois). Electronic eavesdropping refers to overhearing, recording, or transmitting any part of a private communication without the consent of at least one party to the communication. MATTHIESEN, WICKERT & LEHRER S.C., supra note 40, at 2. Wiretapping is using “covert means to intercept, monitor, and record telephone conversations of individuals.” Id.

43. MATTHIESEN, WICKERT & LEHRER, S.C., supra note 40, at 2.


45. The Maryland law prohibits “willfully” intercepting, recording, and disclosing wire, oral, or electronic communications, but also provides:

   It is lawful under this subtitle for a person to intercept a wire, oral, or electronic communication where the person is a party to the communication and where all of the parties to the communication have given prior consent to the interception
recorded conversations with Monica Lewinsky.\textsuperscript{46} After her secret taping became public, police sought charges against Tripp for a conversation she taped in Maryland after she was warned that secret taping was illegal and before she received a federal grant of immunity from the special prosecutor.\textsuperscript{47} Prior to Tripp’s taping, a Maryland court of special appeals held that the person doing the taping must know that it is illegal,\textsuperscript{48} which made the date of this one phone call so important. The Maryland prosecutor later dropped the charges when the judge presiding over the case ruled that Lewinsky’s testimony against Tripp would not be admissible because it was tainted by the Special Counsel’s investigation, which the judge ruled had influenced Lewinsky’s recollection of when the conversation took place.\textsuperscript{49}

When a taped conversation is illegal, federal law prohibits the admission of such evidence. Illegally intercepted oral or wire conversation may not be admitted into evidence “before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof.”\textsuperscript{50} In addition to this federal law, some states also exclude evidence obtained in violation of statutes regulating recording conversations.\textsuperscript{51}


\textsuperscript{47} Id.

\textsuperscript{48} Hawes v. Carberry, 653 A.2d 479, 484 (Md. Ct. Spec. App. 1995). In 2001, the highest state court in Maryland, the Maryland Court of Appeals, issued a decision overruling \textit{Hawes}, and held that it was not necessary to prove that a person knew that it was illegal to intercept or record a communication without the consent of all parties to the communication. Deibler v. State, 776 A.2d 657, 665 (Md. 2001).


\textsuperscript{50} 18 U.S.C. § 2515 (2018). In its entirety, the federal statute provides:

\begin{quote}
Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.
\end{quote}

\textit{Id.}

\textsuperscript{51} For example, a Florida statute follows the federal approach in excluding evidence obtained in violation of the law, and it states:

\begin{quote}
Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any
\end{quote}
It is legal in most states, therefore, for a lawyer to secretly record a conversation with a potential witness or client. When a conversation is lawfully recorded, the lawyer may use the recording to impeach a witness with a prior inconsistent statement,\(^5\) or have the recording admitted into evidence if there is an applicable hearsay exception.\(^5\) If the recording is of a client, as the following section on the ethics of secret taping by lawyers explains, there are circumstances in which a lawyer may use the recording to establish a claim or defense, or to respond to allegations, in a matter involving the client or arising from conduct in which the client was involved.\(^5\)

**IV. THE ETHICS OF SECRET TAPING BY LAWYERS**

Ethics codes, such as the American Bar Association (ABA) Model Rules of Professional Conduct,\(^5\) do not specifically address secret taping by lawyers. The secret recording of conversations potentially implicates some general ethics rules, however.

Model Rule 8.4 states: “It is professional misconduct for a lawyer to . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”\(^5\) The older ABA Model Code of Professional Responsibility, which the Model Rules replaced, had a virtually identical prohibition in DR 1-102.\(^5\) If secret taping by a lawyer is inherently deceitful or dishonest, then such conduct would violate Model Rule 8.4(c).

The Model Code also contained a broad provision, Canon 9, that a lawyer “should avoid even the appearance of professional impropriety.”\(^5\) An Ethical Consideration to Canon 9 advised, among

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\(^2\) Duquesne Law Review

\(^5\) See infra note 107 and accompanying text.

\(^5\) See infra note 137 and accompanying text.

\(^5\) FLA. STAT. § 934.06 (2018).

\(^5\) See infra notes 94-95 and accompanying text.

\(^5\) MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 2018) [hereinafter MODEL RULES].

\(^5\) Id. at r. 8.4.

\(^5\) DR 1-102, which defined professional misconduct, stated in pertinent part: “(A) A lawyer shall not . . . (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.” MODEL CODE OF PROF'L RESPONSIBILITY DR 1-102(A)(4) (AM. BAR ASS'N 1980).

other things, that “a lawyer should guard against otherwise proper conduct that has a tendency to diminish public confidence in the legal system or in the legal profession.”  

Ethics authorities have taken various and sometime evolving positions on the ethics of secret taping. An early ABA ethics opinion, based on provisions in the Model Code, held that the secret taping of conversations by a lawyer was inherently deceitful and therefore prohibited, but, nearly three decades later, another ABA ethics opinion, based on the Model Rules, determined that was not always the case. State ethics authorities that have addressed secret taping are divided on whether it is a violation of the ethics rules, and some too have changed their position over time.

A. ABA’s Early Position on Secret Taping

In 1974, the ABA Standing Committee on Ethics and Professional Responsibility issued an advisory ethics opinion addressing secret recordings. The Committee acknowledged that it was not a federal crime to make secret recordings when one is a party to the conversation, but the Standing Committee nonetheless determined DR 1-102’s prohibition against conduct involving “dishonesty, fraud, deceit, or misrepresentation” “clearly encompasses the making of recordings without the consent of all parties,” and Canon 9’s prescription that a lawyer “[s]hould [a]void [e]ven the [a]ppearance of [p]rofessional [i]propriety” would not condone secret taping. The Committee identified a possible exception to this prohibition by finding that under “extraordinary circumstances” a prosecutor “might ethically make and use secret recordings if acting within strict statutory limitations conforming to constitutional requirements.”

A year later, the Committee reconsidered and affirmed its position that secret taping was unethical, with a limited exception for prosecutors, and added that a lawyer in private practice could not ethically direct an investigator to tape-record a conversation without the knowledge of the other party. Under the Model Rules,

59. Id. at EC 9-2.
60. See infra Section IV.A.
61. See infra Section IV.C.
62. See infra Sections IV.B., D.
64. Id.
65. Id.
66. ABA Comm’n on Ethics & Prof’l Responsibility, Informal Op. 1320 (1975). The Committee noted that this opinion was limited to lawyers in private practice. Id.
Model Rule 5.3 makes it clear that the lawyer is ethically responsible for the conduct of nonlawyer assistants, and Model Rule 8.4 states that it is professional misconduct to violate the Rules of Professional Conduct "through the acts of another."  

B. State Ethics Authorities’ Early Positions on Secret Taping  

In the years after the ABA issued these two ethics opinions, the opinions influenced ethics authorities in a number of jurisdictions to adopt the ABA’s position. But, some jurisdictions expanded the list of exceptions, and still other jurisdictions concluded that, when done legally, a lawyer is ethically permitted to secretly record conversations.  

The rationale that most states used, in following the ABA’s approach, centered on some version of the proscription against the appearance of impropriety. In 1978, for example, the Texas Committee on Professional Ethics issued an opinion stating that “attorneys are held to a higher standard” than simply what the law permits, and “secret recording of conversations offends the sense of honor and fair play of most people.”  

From 1978 through 1995, ethics authorities in Alabama, Alaska, Colorado, Hawaii, Iowa, Missouri, and Virginia issued similar advisory ethics opinions. Ethics authorities in several other jurisdictions adopted the basic ABA approach to secret recording, but expanded the list of exceptions. A 2012 Congressional Research Service report to Congress identified ethics opinions from these jurisdictions—including Arizona, Idaho, Kansas, Kentucky, Minnesota, Ohio, South Carolina, and Tennessee—containing one or more of the following exceptions: 

permitting recording by law enforcement personnel generally not just when judicially supervised; or recording by criminal
defense counsel; or recording statements that themselves constitute crimes such as bribery offers or threats; or recording confidential conversations with clients; or recordings made solely for the purpose of creating a memorandum for the files; or recording by a government attorney in connection with a civil matter; or recording under other extraordinary circumstances.\textsuperscript{73}

The Report found that in still other jurisdictions—including the District of Columbia, Mississippi, New Mexico, North Carolina, Oklahoma, Oregon, Utah, and Wisconsin—ethics authorities rejected the ABA approach and held that whether secret recording violated any ethical rules had to be decided on a case-by-case basis.\textsuperscript{74}

Given the wide-ranging approaches that different jurisdictions took to the issue of secret recording, it is not surprising that the ABA revisited the issue in 2001.\textsuperscript{75} The next two sections to this part of the essay analyze the ABA’s current approach to secret taping and how state ethics authorities have responded.

C. ABA’s Current Position on Secret Taping

The ABA Standing Committee on Ethics and Professional Responsibility reexamined its position on secret taping and withdrew Opinion 337 in 2001.\textsuperscript{76} The Committee announced the ABA’s current position in ABA Formal Opinion 01-422 that “[a] lawyer who electronically records a conversation without the knowledge of the other party or parties to the conversation does not necessarily violate the Model Rules,” provided the lawyer is not violating the law in making the secret recording.\textsuperscript{77}

In reaching this new position on the ethics of secret recording, the Committee observed that its earlier opinion relied on the principle that a lawyer “should avoid even the appearance of impropriety,” which does not appear in the Model Rules.\textsuperscript{78} The Committee then identified two instances in which secret recording could violate an ethics rule.

First, if a lawyer secretly records a conversation in a state that requires the consent of all parties, or secretly records a conversation without being a party to the conversation, the Committee found

\begin{itemize}
  \item \textsuperscript{73} Id. at 2; see also id. at nn.5-11 (citing to the ethics opinions).
  \item \textsuperscript{74} Id.; see also id. at n.12 (citing to the ethics opinions).
  \item \textsuperscript{75} ABA Comm’n on Ethics & Prof’l Responsibility, Formal Op. 01-422 (2001).
  \item \textsuperscript{76} Id.
  \item \textsuperscript{77} Id.
  \item \textsuperscript{78} Id.
\end{itemize}
that such a lawyer "likely has violated Model Rule 8.4(b) or 8.4(c) or both."\textsuperscript{79} The Committee reached this conclusion because it is professional misconduct under Model Rule 8.4(b) to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects,"\textsuperscript{80} and misconduct under Model Rule 8.4(c) to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."\textsuperscript{81} The Committee also reasoned that an illegal secret recording would also violate Model Rule 4.4, which prohibits using "methods of obtaining evidence that violate the legal rights of [a third] person."\textsuperscript{82}

Second, while the Committee found secretly recording a conversation does not itself equate to a lawyer falsely stating that the conversation is not being recorded, a lawyer falsely denying that a conversation is being recorded "would likely violate Model Rule 4.1, which prohibits a lawyer from making a false statement of material fact to a third person."\textsuperscript{83} The Committee cited to two disciplinary cases in which the Mississippi Supreme Court drew this distinction—in one case holding that nonconsensual recording of a conversation by a lawyer is usually ethical,\textsuperscript{84} in the other holding that a lawyer who falsely denied to another that he was recording a telephone conversation violated Mississippi Rule 4.1, which tracks the Model Rule.\textsuperscript{85}

Finally, the Committee split on whether secret recording of a confidential conversation with a client would violate any of the Model Rules.\textsuperscript{86} The Committee noted that a recording could capture a client saying something profane or slanderous, and if the recording was inadvertently disclosed or disclosed by operation of law, it could prove damaging or embarrassing to the client.\textsuperscript{87} The disclosure in the secret tape Cohen made where Trump arranged with Cohen to suppress the story of Trump's alleged affair with McDougal before the 2016 election highlights how a client may be embarrassed or damaged by the disclosure of a secret tape.\textsuperscript{88}

While it was divided on the issue of secret taping of a client, the Committee unanimously agreed "that it is almost always advisable

\textsuperscript{79} Id.
\textsuperscript{80} MODEL RULES r. 8.4(b).
\textsuperscript{81} Id. at r. 8.4(c).
\textsuperscript{82} ABA Formal Op. 01-422.
\textsuperscript{83} Id.
\textsuperscript{84} Id. (citing Attorney M. v. Miss. Bar, 621 So. 2d 220, 223-24 (Miss. 1992)).
\textsuperscript{85} Id. (citing Miss. Bar v. Attorney ST, 621 So. 2d 229, 232-33 (Miss. 1993)).
\textsuperscript{86} Id.
\textsuperscript{87} Id.
\textsuperscript{88} See supra notes 1-10 and accompanying text.
for a lawyer to inform a client that a conversation is being or may be recorded, before recording such a conversation.”

The Committee also opined that the trust and confidence of the client would likely be undermined if a client discovered that her lawyer had secretly recorded her, which Trump’s tweets appear to demonstrate.

Counterbalanced against how secret taping of a client could undermine the client’s trust and confidence in her lawyer, the Committee identified two exceptional circumstances where a client may forfeit a lawyer’s loyalty and confidentiality, and which would permit a lawyer to disclose confidential client communications, including recordings secretly taped. Those exceptional circumstances are a client’s “plans or threats by a client to commit a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm,” which is an exception to Model Rule 1.6 on confidentiality. The second exceptional circumstance is when a lawyer may use “confidential information necessary to establish a defense by the lawyer to charges based upon conduct in which the client is involved,” which is another exception to confidentiality in Model Rule 1.6.

D. Current State Ethics Authorities’ Positions on Secret Taping

Ethics authorities in two states, Colorado and South Carolina, have considered the new ABA ethics opinion and rejected the ABA’s current position that secret recording does not necessarily violate an ethics rule, provided that no law is broken. After considering the ABA’s current position, the Colorado Bar Ethics Committee stated: “Because surreptitious recording of conversations or statements by an attorney may involve an element of trickery or deceit,

89. ABA Formal Op. 01-422.
90. Id.
91. See supra notes 9-10 and accompanying text.
92. ABA Formal Op. 01-422.
93. Model Rule 1.6(b)(1) provides: “A lawyer may reveal information relating to the representation of a client to the extent that the lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm.” MODEL RULES r. 1.6(b)(1).
94. ABA Formal Op. 01-422.
95. Model Rule 1.6(b)(5) provides:
A lawyer may reveal information relating to the representation of a client to the extent that the lawyer reasonably believes necessary:... (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client. MODEL RULES r. 1.6(b)(5).
96. DOYLE, supra note 72, at 4 (citing the ethics opinions).
it is generally improper for an attorney to engage in surreptitious recording even if the recording is legal under state law.” 97 The Colorado Committee, however, adopted the ABA’s position in the criminal law setting, stating that “an attorney may surreptitiously record, and may direct a third party to surreptitiously record conversations or statements for the purpose of gathering admissible evidence in a criminal matter.” 98 The South Carolina Bar Ethics Advisory Committee also decided that “[w]hile representing a client, a lawyer may not surreptitiously record any conversation, subject to certain law-enforcement related exemptions.” 99 Noting that the ABA had changed its position, the South Carolina Committee affirmed that it had not changed its position. 100 Several other states—including Arizona, Idaho, Indiana, Iowa, Kansas, and Kentucky—have not revisited the issue, and those states’ opinions that lawyers secretly recording conversations are usually unethical still stand. 101

Most jurisdictions considering the ABA’s position that secret recording is usually ethical agree with the ABA, however. 102 Like ABA Formal Opinion 01-422, the ethics opinions in these jurisdictions find that under some circumstances secret taping may still be unethical, such as when the taping is done in violation of the law or when a lawyer falsely denies the taping. 103

On the issue of secret taping of client communications, jurisdictions are split. For example, ethics authorities in Ohio changed their position, much like the ABA, and found that secret taping that is legal is also usually ethical. 104 The Ohio ethics opinion also agreed with the ABA that it was advisable for a lawyer to inform a client before recording a conversation, and it also extended this admonition to recording prospective clients. 105 In contrast, the Wisconsin State Bar Professional Ethics Committee, which has not considered secret recording since the ABA issued Formal Opinion 01-422, stated, in 1994, that while secret recording of others is not per se unethical, “fiduciary duties owed by a lawyer to a client and the duty of communication under SCR 20:1.4 [the equivalent to Model

98. Id.
100. Id.
101. DOYLE, supra note 72, at 4.
102. Id.
103. Id. at 4-5.
105. Id. at 7.
Rule 1.4] dictate that statements made by clients over the telephone not be recorded without advising the client and receiving consent to the recording after consultation.”

Because secret taping is legal in most jurisdictions as long as the lawyer is a party to the communication, and also ethical, does the potential benefit of secret recording outweigh the risks? The following part of this essay sets out the pros and cons of secret taping.

V. THE PROS AND CONS OF SECRET TAPING

The advantages and disadvantages of legally and ethically allowing lawyers to secretly record conversations may be assessed from several different points of view—the points of view of the justice system, the legal profession, the lawyer who does the recording, and the lawyer’s client.

From a systemic perspective, recording what a potential witness has to say helps to prevent the loss of evidence due to faulty recollection over time. Recording a witness also averts a witness’s conscious or unconscious distortion of testimony by information a witness learns at a later point. If the witness learns that he or she was secretly taped before testifying in a proceeding, the existence of the tape may discourage the witness from giving testimony that is unreliable or perjured. If a witness who was secretly taped testifies inconsistently with the recording, then the lawyer may use the recording to impeach the witness and expose the unreliable or perjured testimony.

From the organized bar’s point of view, secret taping has both positive and negative aspects. If secret taping results in more information to resolve factual issues and increases the reliability of witness testimony, then secret taping fulfills a positive function by improving the justice system. On the other hand, if the public views secret taping by lawyers as deceptive, then secret taping by a lawyer reflects negatively on the profession. Especially when a lawyer secretly tapes the lawyer’s own client, both the client and the public are likely to view the lawyer as disloyal. Certainly, Trump’s tweets indicate that he felt Cohen had acted improperly by taping their

106. Wis. State Bar Prof’l Ethics Comm’n, Formal Op. E-94-5, at 480 (1994). Citing to Wisconsin’s equivalent to Model Rule 8.4 and the Attorney’s Oath, the Wisconsin Ethics Committee also stated that the secret recording of judges and their staff is prohibited by the duty “to maintain the respect due to courts of justice and judicial officers.”  Id.

107. For example, a Federal Rule of Evidence states that a party may use a witness’s prior statement during the examination of the witness. FED. R. EVID. 613. States also permit the impeachment of a witness with a witness’s prior inconsistent statement. See, e.g., PA. R. EVID. 613(a) (“A witness may be examined concerning a prior inconsistent statement made by the witness to impeach the witness’s credibility.”).
conversation. And, one commentator claims that “most Americans will likely side with the [sic] President Trump," that secret taping “smacks of trickery.”

From the attorney’s perspective, there is a benefit in documenting exactly what was said by someone unaware that a conversation was being taped. For example, a defense lawyer talking with a witness could use a secret tape recording to help prove that the lawyer did not intimidate, coerce, or bribe the witness. Just as taping police interrogations protects police from false charges of misconduct, secretly taping witnesses can protect the lawyer from later false misconduct allegations by a witness, opposing party, or, in criminal cases, by the prosecution. Of course, the benefit of documenting exactly what was said by someone could be achieved if the lawyer openly tapes interviews or has a third party present, such as an investigator. The lawyer may believe that openly taping a witness or having a third person present may prompt a witness to be less candid or even refuse to talk to the lawyer, however.

From the client’s perspective, the client’s lawyer secretly taping others may give the client access to information that the client might not otherwise have, and, as discussed previously, secret recordings may allow a lawyer to impeach false or unreliable testimony against the client. A potential downside of secret taping for the client is that such recordings may be discoverable under rules of civil procedure and may constitute discoverable material under rules of criminal procedure. For example, Federal Rule of Civil Procedure 26 requires the initial disclosure of “all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment.” Thus, if the recording is solely used for impeachment, it would not have to be initially disclosed. It would be subject to later disclosure if a subsequent discovery request asked for recordings of all witness statements, however.

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108. See supra notes 9-10 and accompanying text.
110. Id.
111. For example, a person engaged in unlawful activity would be less likely to speak openly with a lawyer if the person knew the conversation was being taped. See Lefcourt, supra note 39, at 389.
113. The discovery rule provides that, with some limitations, a party “may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense.” Id. at R. 26(b)(1).
of Criminal Procedure 26.2, and similar reciprocal state discovery rules, prior recorded statements by a defense witness must be turned over to the prosecution for use in impeachment.114 If the recording provides a means for impeaching a witness who testifies favorably for the client, then the recording could wind up hurting the client’s position.

But, what about the client’s perspective on being secretly taped by her own lawyer? From the client’s perspective, it is difficult to imagine how a lawyer secretly taping conversations with the client would not undermine trust and confidence in the lawyer, just as the ABA’s current ethics opinion predicts.115

VI. CONCLUSION

In addition to undermining trust and confidence in one’s lawyer, a client discovering that she was secretly taped by her own lawyer would most likely lead to a breakdown in the attorney-client relationship. Whether this is what occurred between Cohen and Trump is unclear, but there are some things we do know that point in that direction.

It is very likely that Cohen was still Trump’s lawyer at the time that the FBI searched Cohen’s office, hotel room, and home on April 9, 2018.116 We know this because Trump stated on April 5, 2018, a few days before the FBI searches, that Cohen was representing Trump.117 On April 16, 2018, the judge presiding over Cohen’s case ruled that Cohen could review the materials the FBI seized, and he could share materials with lawyers representing Trump.118 When Cohen shared the tapes with Trump’s lawyers is unclear, but a member of Trump’s legal team, Rudy Giuliani, stated that Cohen was no longer representing Trump on May 11, 2018.119

114. “After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, must order an attorney for the government or the defendant and the defendant’s attorney to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter of the witness’s testimony.” FED. R. CRIM. P. 26.2(a). A statement included “any recording or any transcription of a recording.” Id. at R. 26.2(f)(2).
119. Samuelsohn, supra note 117.
also stated that Trump’s legal team “never really determined’ a precise day” when Cohen stopped representing Trump.\textsuperscript{120} So, sometime after April 5 and before May 11, Trump terminated his attorney-client relationship with Cohen.

In July 2018, Trump’s lawyers waived any claims of attorney-client privilege on Trump’s behalf in connection with the conversation Cohen secretly recorded concerning the payment to McDougal,\textsuperscript{121} as well as to at least eleven other audio files.\textsuperscript{122} It is unclear from this timeline if Trump terminated Cohen after learning that Cohen had secretly taped him, because we do not know for certain when Trump learned of the secret tapes. What is clear, at least from Trump’s tweets, is that Trump was unhappy and upset with Cohen secretly taping him. It is reasonable to assume that if Cohen was still Trump’s lawyer when Trump learned of the secret tapes, Trump would have fired him because Cohen had secretly taped him.

Whether secret taping will play an even greater role in the Special Counsel Mueller’s investigation is still unknown. Unlike Nixon’s secret tapes, the secret tape of Trump that has been disclosed thus far is “no smoking gun” that would lead Trump to resign. Also, unlike Tripp’s secret tapes of Lewinsky, the secret tapes involving Trump and his associates do not seem to be sufficient to lead to an impeachment. Even if secret tapes do not directly affect the Trump presidency, it is remarkable that secret taping has played such a prominent role in Special Counsel investigations involving three Presidents. If the past is any indication, then secret taping is likely to continue to play a prominent role in Special Counsel investigations.

\textsuperscript{120} Id.
