

## I. ETHICS OPINIONS

**Iowa Supreme Court Board of Prof. Ethics and Conduct  
Formal Opinion 83-16; December 15, 1982  
[Reaffirmed in Formal Opinion 95-09 (September 28, 1995)]**

- Secret recording of conversations
- Adopted Formal Opinion 337 of the ABA
- “With certain exceptions spelled out in this opinion, no lawyer should record any conversation whether by tapes or other electronic device, without the consent or prior knowledge of all parties to the conversation.”
- Based on DR 1-102(A)(4), now IRPC 32:8:4 (lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation)
- Exception: Provides that there may be extraordinary circumstances in which the US Attorney or the principal prosecuting attorney of state or local government or law enforcement attorneys or officers acting under the direction of the AG or such principal prosecuting attorneys might ethically make and use secret recordings if acting within strict statutory limitations conforming to constitutional requirements
- Case-by-case basis for determination; lawful recording ≠ ethical conduct

**ABA Formal Opinion  
01-422; June 24, 2001**

- Rejects “broad proscription” in ABA Formal Opinion 337
- “We conclude that the mere act of secretly but lawfully recording a conversation inherently is not deceitful, and leave for another day the separate question of when investigative practice involving misrepresentations of identity and purpose nonetheless may be ethical.”
- Committee does not address exceptions re: investigations of criminal activity, discriminatory practices, or trademark infringement
- Conclusion:
  1. Where nonconsensual recording is legal, mere recording of conversation does not constitute a violation of the Model Rules;
  2. Where nonconsensual recording is illegal, lawyer may violate rule 8.4 (Misconduct) and may also violate rule 4.4 (Respect for Rights of Third Persons) if purpose is to obtain evidence;
  3. Lawyer who records conversation w/o consent may not represent that conversation is not being recorded; and
  4. Inadvisable to record conversation w/client concerning subject matter of representation (committee split on matter)
- Basis for opinion:
  1. Questionable whether anyone today reasonably relies on expectation of privacy in conversations absent a special relationship—majority of states allow one-party consent;

2. There are circumstances under which disclosure of recording may defeat legitimate and necessary activities—exceptions recognized in many jurisdictions;

3. Inconsistent with MRPC—proscription against avoidance of appearance of impropriety removed and the rights of third persons is now recognized

*Note:* Iowa has not responded to ABA change in position

### **San Diego County Bar Legal Ethics Committee**

**Op. 2011-2; May 4, 2011**

- “Friending” a party for purpose of discovering facts
- Concluded that it constitutes improper ex parte contact if with represented party and is deceitful conduct if contactor does not disclose the purpose of the contact to the person “friended”
- Attorney offends ex parte contact rule because she is required to “friend” (contact) the party in order to access restricted information; if information is not restricted, no issue as attorney may view the information without contacting the party
- Attorney’s conduct is deceitful regardless of the representation status of the party
- CA has not adopted model rules

### **The Philadelphia Bar Association Professional Guidance Committee**

**Op. 2009-02; March 2009**

- Attorney has third person “friend” an unrepresented non-party witness
- Third person would state only truthful information—name, etc.—but would not disclose purpose of contact
- Concluded that it constitutes violation of rule requiring truthfulness in statements to others and is deceitful conduct if contactor does not disclose the purpose of the contact to the witness
- Attorney’s conduct is deceitful regardless of whether the witness allows “virtually all would-be ‘friends’ onto her FaceBook...page...” as “excusing the deceit on that basis would be improper.”
- No “covert operations” exception in rules

## **II. STATE and FEDERAL CASES**

### ***People v. Pautler, 35 P.3d 571 (Colo. 2001)***

- DA Pautler is called to crime scene. Suspect earlier murdered three people and is holding three others hostage. Suspect dictates details of crime spree and instructs hostages to provide pager number to police. Suspect confesses to murders, indicates that he is armed, threatens others but indicates that he wants to end the situation peacefully. Sheriff attempts to negotiate but suspect indicates a desire to speak with his attorney. DA attempts to call attorney but number is disconnected. Suspect requests public defender. DA Pautler poses as public defender and suspect surrenders. DA Pautler does not inform suspect or public defender of his actions and suspect continues to believe that he spoke with public defender. When suspect discovers the deception, he refuses all representation and ultimately pleads guilty and is sentenced to death.
- The court found no exception in RPC to prohibition against deception and found that DA Pautler violated RPC 8.4 (misconduct) and RPC 4.3 (re: disclosure of atty's representation of client).
- DA Pautler received a 3-month suspension which was stayed during 12-month probationary period.

### ***Comm. On Prof'l Ethics & Conduct of the Iowa State Bar Ass'n v. Mollman, 488 N.W.2d 168 (Iowa 1992)***

- FBI investigation into drug use by professionals in Cedar Rapids. Attorney Mollman is offered immunity in exchange for agreement to wear a concealed microphone to record his conversation with Johnson, a friend and former client, per trap set by FBI. Johnson is convicted of conspiracy to distribute and files complaint against Atty Mollman.
- Mollman's license is suspended w/no reinstatement for 30 days for violation of [current] IRPC 32:8:4 (misconduct). The Court found no merit in Mollman's argument that the prosecutorial exception applied because he was working with the feds finding that the exception cannot apply to a private citizen or a private attorney. The Court further recognized that Opinion 83-16 was too broad in that it applied to "any" recording regardless of intent to deceive and disavowed the blanket application of it. Court found no attorney-client relationship.
- "Fundamental honesty is the base line and mandatory requirement to serve in the legal profession." *Comm. on Prof. Ethics & Conduct v. Wenger*, 469 N.W.2d 678, 679 (Iowa 1991).

### ***Office of Lawyer Regulation v. Hurley, Supreme Court of Wisconsin (February 11, 2009)***

- Attorney Hurley represents a defendant charged with sex assault and possession of child pornography. In his preparation of defense, Hurley causes the 15-year-old victim to provide his laptop to Hurley under the belief that he is participating in a research study which requires he turn over his laptop in order to receive a new laptop. Hurley analyzes the computer and finds evidence exonerating his client.
- Complaint filed alleging Hurley made false statements to a third person in course of representation [IRPC 32:4:1] and engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation [IRPC 32:8:4].
- The OLR dismissed the complaint finding no distinction between prosecutors and all other attorneys as to the use of undercover activities/sting operations. The OLR further cited a widespread belief amongst the Bar that conduct was acceptable. Affirmed referee's conclusion that Hurley faced conflicting obligations as to zealous representation, effective assistance of counsel and ethics rules; reasonable to side with Sixth Amendment.

***Prof. Resp. Bd. Docket No. 2007-046 and No. 2007-047, 989 A.2d 523 (Vt. 2009)***

- Attys represent client in criminal matter and are contacted by a witness that claims to have exculpatory evidence. Defense attorneys arrange a call and when asked directly by the potential witness if they are recording the phone call, one says they are not and one attempts to distract the caller so as to avoid the question.
- The court determined that the private admonition issued to both attorneys was appropriate based on its finding of a violation of rule [IRPC 32:4.1] prohibiting false statements to third person, but no violation of rule [IRPC 32:8:4] prohibiting dishonesty, fraud, deceit or misrepresentation.
- The Court determined that [IRPC 32:8:4(c)] should not be read so broadly as to make any dishonesty actionable—should only prohibit that conduct which reflects adversely on the profession and that any other interpretation makes [IRPC 32:4.1] superfluous. The Court noted that the attorneys had conflicting duties but made “reasonable” choice and that it's not the judiciary's role to establish exceptions to either rule.

***Conduct of Gatti, 8 P.3d 966 (Or. 2000)***

- Atty Gatti intentionally misrepresented his identity to employees of a medical records review company and made false statements to those employees regarding his identity for the purpose of gathering information regarding what he believed to be fraudulent activities by the review company. With the information he gathered, Gatti filed an action against the review company. The company filed a complaint.

- Gatti contended in his defense that his representations that he was a “doctor” were true and that the Bar, in response to his earlier complaint re: government attorneys using the same tactics, led him to believe that attorneys could ethically use deception in investigations.
- The court publicly reprimanded Gatti. The court concluded that Gatti engaged in conduct involving dishonesty, fraud, deceit or misrepresentation and knowingly made false statements of fact but admitted his conduct and was candid.
- The court found that the misconduct rule applies to *all* attorneys—no exception for gov’t or private attys. In “defense” of the Bar’s response to Gatti, the court noted that the response in no way implied that private attorneys could misrepresent their identity or purpose. The court addressed possible changes to the rules and OR Bar thereafter adopted model rules which include the “covert activity” exception as well as language requiring the misconduct “reflect[] adversely on lawyer’s fitness to practice law.”

***U.S. v. Hammad, 858 F.2d 834 (2<sup>nd</sup> Cir. 1988)***

- Informant approached target with sham grand jury subpoena in an effort to elicit incriminating statements.
- The court suppressed the evidence finding that under these circumstances the informant became the alter ego of the prosecutor and once the AUSA became aware the target was represented, he engaged in prohibited communications with a represented party.
- May be allowed in pre-indictment, non-custodial situation, absent the type of misconduct that occurred in this case—purpose was to obtain incriminating statements
- Further concluded that suppression was an appropriate remedy—in district court’s discretion—for ethics violation.

***U.S. v. Tweel, 550 F.2d 297 (5<sup>th</sup> Cir. 1977)***

- IRS agent made statements to target implying that investigation (audit) was civil in nature.
- “From the facts we find that the agent’s failure to apprise the [defendant] of the obvious criminal nature of this investigation was a sneaky deliberate deception by the agent under the above standard [no duty to warn of possible criminal charges, but may not misrepresent] and a flagrant disregard for [defendant’s] rights. The silent misrepresentation was both intentionally misleading and material.”
- Evidence suppressed as obtained in violation of Fourth Amendment rights—unreasonable search.

### **III. SCENARIOS**

#### **Scenario #1: With “friends” like these...**

Question: May an attorney—directly or through an agent—contact an unrepresented person through a social networking website and request permission to access his or her web page for the purpose of obtaining information for use in an investigation or litigation?

Scene: Attorney Kelly Lane and investigator John Jake are meeting regarding a licensure case against a licensed massage therapist named Jeff Reed. Reed is charged with having relationships with a number of young male patients under his care. Harris Bueller is believed to be a victim and is believed to be aware of a number of other victims. Bueller maintains that he never had any interactions with Reed outside of appointments and that he has no additional information. Bueller also says that another of the alleged victims, Cameron Frye, told him that he made up the entire story.

PR Rules possibly implicated:

Rule 32:8.4(c) Misconduct

Rule 32:4.1 Truthfulness in Statements to Others

Rule 32:4.2 Communications with Represented Parties

Rule 32:4.3 Dealing with Unrepresented Persons

Rule 32:4.4 Respect for Rights of Third Persons

Rule 32:5.1 Responsibilities of Supervisory Attorneys

Rule 32:5.3 Responsibilities Regarding Nonlawyer Assistants

Other possible issues:

Informal or formal discovery options

Zealous advocacy

Government attorneys—higher duty?

**Scenario #2: Can you hear me now?**

Q: Is an attorney required to disclose to a third party that the attorney is recording the conversation?

Scenes A and B: Two attorneys speak by telephone with an unrepresented potential witness who has information that may be relevant to a criminal trial that is currently underway.

Scene C: An attorney speaks by telephone with a potential witness and her attorney regarding information the potential witness has that may be relevant to a criminal trial currently underway.

PR Rules possibly implicated:

Rule 32:8.4(c) Misconduct

Rule 32:4.1 Truthfulness in Statements to Others

Rule 32:4.3 Dealing with Unrepresented Persons

Rule 32:4.4 Respect for Rights of Third Persons

Rule 32:5.1 Responsibilities of Supervisory Attorneys

Rule 32:5.3 Responsibilities Regarding Nonlawyer Assistants

Other possible issues:

Zealous advocacy

See: *PRB Docket No. 2007-046 and 2007-047*, 989 A.2d 523 (Vt. 2009)

**Scenario #3: Too Good to be True...**

Q: May an attorney use deception for the purpose of gathering evidence?

Scene: Attorney Clever and Investigator Right are in meeting room discussing strategy for getting evidence of consumer fraud that Investigator Right is sure can be found on a Fraudster Joe's computer.

PR Rules possibly implicated:

Rule 32:8.4(c) Misconduct

Rule 32:4.1 Truthfulness in Statements to Others

Rule 32:4:3 Dealing with Unrepresented Persons

Rule 32:4.4 Respect for Rights of Third Persons

Rule 32:5.1 Responsibilities of Supervisory Attorneys

Rule 32:5:3 Responsibilities Regarding Nonlawyer Assistants

Other possible issues:

Informal or formal discovery options

Obstruction of justice

Officer of the court (bad faith or harassment)

Zealous advocacy

See: *Office of Lawyer Regulation v. Hurley*, No. 2007AP478-D, February 11, 2009

**Scenario #4: Poker face...**

Question: May an attorney use deception for the purpose of attempting to ensure that a witness she has cause to believe may lie testifies truthfully?

Scene: Attorney Dogood is deposing Kyle Cartman in the presence of Cartman's attorney, Attorney Badoo. Attorney Dogood believes that Cartman is lying and is going to lie in the deposition. Attorney Dogood devises a scheme she believes will encourage him to tell the truth.

PR Rules possibly implicated:

Rule 32:8.4(c) Misconduct

Rule 32:4.1 Truthfulness in Statements to Others

Rule 32:4.4 Respect for Rights of Third Persons

Rule 32:5.1 Responsibilities of Supervisory Attorneys

Other possible issues:

Informal or formal discovery options

Obstruction of justice

Officer of the court (bad faith or harassment)

Zealous advocacy

See: *Cincinnati Bar Assoc. v. Statzer*, 800 N.E.2d 1117 (Ohio 2003)

**Scenario #5: Well then who is THAT?!?!**

Question: May an attorney mislead other attorneys and the court in the spirit of zealous representation of the client?

Scene: Defense attorney Ian Trouble has had it with the “system.” He believes that outside of maybe the one or two big cases they have, officers have little recollection of those they arrest and are therefore unlikely to be able to identify the defendant come time for trial. Attorney Trouble decides to test his theory in the criminal trial against his client, Ina Cent.

PR Rules possibly implicated:

Rule 32:8.4(c) Misconduct

Rule 32:8.4 Conduct Prejudicial to the Administration of Justice

Rule 32:3.3 Candor Toward the Tribunal [see comment 7]

Rule 32:3.4(b) Fairness to Opposing Party and Counsel

Rule 32:4.1 Truthfulness in Statements to Others

Rule 32:3.5 Impartiality and Decorum of the Tribunal

Rule 32:5.1 Responsibilities of Supervisory Attorneys

Other possible issues:

Contemptuous conduct

Obstruction of justice

Officer of the court (court’s responsibility to know who the defendant is so as to ensure due process)

Zealous advocacy (protecting client from tainted in-court identification)

Ex parte communication—rule 32:3.5 (disclosure of strategy to judge, but consider motion in limine)

Offering false evidence (candor toward tribunal)

See: *People v. Simac*, 641 N.E.2d 416 (Ill. 1994)

**CHAPTER 32**  
**IOWA RULES OF PROFESSIONAL CONDUCT**

***PREAMBLE AND SCOPE***

Rule 32:1.0           TERMINOLOGY

***CLIENT-LAWYER RELATIONSHIP***

Rule 32:1.1           COMPETENCE  
Rule 32:1.2           SCOPE OF REPRESENTATION AND ALLOCATION OF  
                          AUTHORITY BETWEEN CLIENT AND LAWYER  
Rule 32:1.3           DILIGENCE  
Rule 32:1.4           COMMUNICATION  
Rule 32:1.5           FEES  
Rule 32:1.6           CONFIDENTIALITY OF INFORMATION  
Rule 32:1.7           CONFLICT OF INTEREST: CURRENT CLIENTS  
Rule 32:1.8           CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC  
                          RULES  
Rule 32:1.9           DUTIES TO FORMER CLIENTS  
Rule 32:1.10          IMPUTATION OF CONFLICTS OF INTEREST: GENERAL  
                          RULE  
Rule 32:1.11          SPECIAL CONFLICTS OF INTEREST FOR FORMER AND  
                          CURRENT GOVERNMENT OFFICERS AND EMPLOYEES  
Rule 32:1.12          FORMER JUDGE, ARBITRATOR, MEDIATOR, OR OTHER  
                          THIRD-PARTY NEUTRAL  
Rule 32:1.13          ORGANIZATION AS CLIENT  
Rule 32:1.14          CLIENT WITH DIMINISHED CAPACITY  
Rule 32:1.15          SAFEKEEPING PROPERTY  
Rule 32:1.16          DECLINING OR TERMINATING REPRESENTATION  
Rule 32:1.17          SALE OF LAW PRACTICE  
Rule 32:1.18          DUTIES TO PROSPECTIVE CLIENT

***COUNSELOR***

Rule 32:2.1           ADVISOR  
Rule 32:2.2           (RESERVED)  
Rule 32:2.3           EVALUATION FOR USE BY THIRD PERSONS  
Rule 32:2.4           LAWYER SERVING AS THIRD-PARTY NEUTRAL

***ADVOCATE***

Rule 32:3.1           MERITORIOUS CLAIMS AND CONTENTIONS  
Rule 32:3.2           EXPEDITING LITIGATION  
Rule 32:3.3           CANDOR TOWARD THE TRIBUNAL

Rule 32:3.4	FAIRNESS TO OPPOSING PARTY AND COUNSEL
Rule 32:3.5	IMPARTIALITY AND DECORUM OF THE TRIBUNAL
Rule 32:3.6	TRIAL PUBLICITY
Rule 32:3.7	LAWYER AS WITNESS
Rule 32:3.8	SPECIAL RESPONSIBILITIES OF A PROSECUTOR
Rule 32:3.9	ADVOCATE IN NONADJUDICATIVE PROCEEDINGS

***TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS***

Rule 32:4.1	TRUTHFULNESS IN STATEMENTS TO OTHERS
Rule 32:4.2	COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL
Rule 32:4.3	DEALING WITH UNREPRESENTED PERSON
Rule 32:4.4	RESPECT FOR RIGHTS OF THIRD PERSONS

***LAW FIRMS AND ASSOCIATIONS***

Rule 32:5.1	RESPONSIBILITIES OF PARTNERS, MANAGERS, AND SUPERVISORY LAWYERS
Rule 32:5.2	RESPONSIBILITIES OF A SUBORDINATE LAWYER
Rule 32:5.3	RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS
Rule 32:5.4	PROFESSIONAL INDEPENDENCE OF A LAWYER
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***PUBLIC SERVICE***

Rule 32:6.1	VOLUNTARY PRO BONO PUBLICO SERVICE
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***MAINTAINING THE INTEGRITY OF THE PROFESSION***

- Rule 32:8.1 BAR ADMISSION AND DISCIPLINARY MATTERS
- Rule 32:8.2 JUDICIAL AND LEGAL OFFICIALS
- Rule 32:8.3 REPORTING PROFESSIONAL MISCONDUCT
- Rule 32:8.4 MISCONDUCT
- Rule 32:8.5 DISCIPLINARY AUTHORITY; CHOICE OF LAW

## **CHAPTER 32**

### **IOWA RULES OF PROFESSIONAL CONDUCT**

#### ***PREAMBLE AND SCOPE***

#### **PREAMBLE:**

#### **A LAWYER'S RESPONSIBILITIES**

[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.

[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

[3] In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these rules apply directly to lawyers who are or have served as third-party neutrals. *See, e.g.*, rules 32:1.12 and 32:2.4. In addition, there are rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. *See* rule 32:8.4.

[4] In all professional functions a lawyer should be competent, prompt, and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Iowa Rules of Professional Conduct or other law.

[5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

[6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice, and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law, and work

to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

[7] Many of a lawyer's professional responsibilities are prescribed in the Iowa Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession, and to exemplify the legal profession's ideals of public service.

[8] A lawyer's responsibilities as a representative of clients, an officer of the legal system, and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

[9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system, and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Iowa Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous, and civil attitude toward all persons involved in the legal system.

[10] The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

[11] To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal

profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

[12] The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to ensure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Iowa Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

[13] Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Iowa Rules of Professional Conduct, when properly applied, serve to define that relationship.

### SCOPE

[14] The Iowa Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other rules define the nature of relationships between the lawyer and others. The rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the comments use the term "should." Comments do not add obligations to the rules but provide guidance for practicing in compliance with the rules.

[15] The rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers, and substantive and procedural law in general. The comments are sometimes used to alert lawyers to their responsibilities under such other law.

[16] Compliance with the rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion, and finally, when necessary, upon enforcement through disciplinary proceedings. The rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The rules simply provide a framework for the ethical practice of law.

[17] Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach

only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under rule 32:1.6, that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. *See* rule 32:1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

[18] Under various legal provisions, including constitutional, statutory, and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These rules do not abrogate any such authority.

[19] Failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. The rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors, and whether there have been previous violations.

[20] Violation of a rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule. Nevertheless, since the rules do establish standards of conduct by lawyers, a lawyer's violation of a rule may be evidence of breach of the applicable standard of conduct.

[21] The comment accompanying each rule explains and illustrates the meaning and purpose of the rule. The Preamble and this note on Scope provide general orientation.

The comments are intended as guides to interpretation, but the text of each rule is authoritative.

### **Rule 32:3.3: CANDOR TOWARD THE TRIBUNAL**

**(a) A lawyer shall not knowingly:**

**(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;**

**(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or**

**(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.**

**(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.**

**(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by rule 32:1.6.**

**(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.**

#### **Comment**

[1] This rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See rule 32:1.0(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must

not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

### *Representations by a Lawyer*

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. *Compare* rule 32:3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in rule 32:1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with rule 32:1.2(d), see the comment to that rule. See also the comment to rule 32:8.4(b).

### *Legal Argument*

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

### *Offering Evidence*

[5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an attorney to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding.

### *Duration of Obligation*

[13] A proceeding has concluded within the meaning of this rule when it is beyond the power of a tribunal to correct, modify, reverse, or vacate a final judgment, or to grant a new trial.

### *Ex Parte Proceedings*

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

#### *Withdrawal*

[15] Normally, a lawyer's compliance with the duty of candor imposed by this rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by rule 32:1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see rule 32:1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this rule or as otherwise permitted by rule 32:1.6.

[Court Order April 20, 2005, effective July 1, 2005]

### **Rule 32:3.4: FAIRNESS TO OPPOSING PARTY AND COUNSEL**

#### **A lawyer shall not:**

**(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;**

**(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;**

**(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;**

**(d) in pretrial procedure, make a frivolous discovery request or fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party;**

**(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused; or**

**(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:**

**(1) the person is a relative or an employee or other agent of a client; and**

**(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.**

#### **Comment**

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed, or destroyed. The law may make it an offense to destroy material for the purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. The law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, the law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

[3] With regard to paragraph (b), it is not improper to pay a witness's expenses, including loss of time in attending or testifying, or to compensate an expert witness on terms permitted by law. It is improper to pay an occurrence witness any fee other than as authorized by law for testifying and it is improper to pay an expert witness a contingent fee.

[4] Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. *See also* rule 32:4.2.

[Court Order April 20, 2005, effective July 1, 2005]

### **Rule 32:3.5: IMPARTIALITY AND DECORUM OF THE TRIBUNAL**

#### **A lawyer shall not:**

**(a) seek to influence a judge, juror, prospective juror, or other official by means prohibited by law;**

**(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;**

**(c) communicate with a juror or prospective juror after discharge of the jury if:**

**(1) the communication is prohibited by law or court order;**

**(2) the juror has made known to the lawyer a desire not to communicate; or**

**(3) the communication involves misrepresentation, coercion, duress, or harassment; or**

**(d) engage in conduct intended to disrupt a tribunal.**

## **Comment**

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the Iowa Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

[2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters, or jurors, unless authorized to do so by law or court order.

[3] A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. The lawyer may do so unless the communication is prohibited by law or a court order but must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.

[4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

[5] The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition. See rule 32:1.0(m).

[Court Order April 20, 2005, effective July 1, 2005]

## **Rule 32:4.1: TRUTHFULNESS IN STATEMENTS TO OTHERS**

**In the course of representing a client, a lawyer shall not knowingly:**

**(a) make a false statement of material fact or law to a third person; or**

**(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by rule 32:1.6.**

## **Comment**

### *Misrepresentation*

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see rule 32:8.4.

### *Statements of Fact*

[2] This rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

### *Crime or Fraud by Client*

[3] Under rule 32:1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in rule 32:1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation, or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by rule 32:1.6. [Court Order April 20, 2005, effective July 1, 2005]

## **Rule 32:4.2: COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL**

(a) In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

(b) An otherwise unrepresented person to whom limited representation is being provided or has been provided in accordance with rule 32:1.2(c) is considered to be unrepresented for purposes of this rule unless the opposing lawyer knows of, or has been provided with, a written notice of appearance under which, or a written notice of time period during which, the opposing lawyer is to communicate with the limited-representation lawyer as to the subject matter within the limited scope of representation.

### **Comment**

[1] This rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those

lawyers with the client-lawyer relationship, and the uncounseled disclosure of information relating to the representation.

[2] This rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[3] The rule applies even though the represented person initiates or consents to the communication.

A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this rule.

[4] This rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this rule through the acts of another. *See* rule 32:8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this rule.

[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[7] In the case of a represented organization, this rule prohibits communications with a constituent of the organization who supervises, directs, or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this rule. *Compare* rule 32:3.4(f). In communicating with a current or former constituent of an

organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. *See* rule 32:4.4.

[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. *See* rule 32:1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to rule 32:4.3. [Court Order April 20, 2005, effective July 1, 2005; March 12, 2007]

### **Rule 32:4.3: DEALING WITH UNREPRESENTED PERSON**

**In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.**

#### **Comment**

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see rule 32:1.13(f).

[2] The rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature, and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

[Court Order April 20, 2005, effective July 1, 2005]

### **Rule 32:4.4: RESPECT FOR RIGHTS OF THIRD PERSONS**

**(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.**

**(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.**

#### **Comment**

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship. For example, present or former organizational employees or agents may have information protected by the attorney-client evidentiary privilege or the work product doctrine of the organization itself. If the person contacted by the lawyer has no authority to waive the privilege, the lawyer may not deliberately seek to obtain the information in this manner.

[2] Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these rules, as is the question of whether the privileged status of a document has been waived. Similarly, this rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this rule, "document" includes e-mail or other electronic modes of transmission subject to being read or put into readable form.

[3] Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. *See* rules 32:1.2 and 32:1.4.

[Court Order April 20, 2005, effective July 1, 2005]

### **Rule 32:5.1: RESPONSIBILITIES OF PARTNERS, MANAGERS, AND SUPERVISORY LAWYERS**

**(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable**

**assurance that all lawyers in the firm conform to the Iowa Rules of Professional Conduct.**

**(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Iowa Rules of Professional Conduct.**

**(c) A lawyer shall be responsible for another lawyer's violation of the Iowa Rules of Professional Conduct if:**

**(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or**

**(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.**

### **Comment**

[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. *See* rule 32:1.0(c). This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.

[2] Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Iowa Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property, and ensure that inexperienced lawyers are properly supervised.

[3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. *See* rule 32:5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members, and the partners may not assume that all lawyers associated with the firm will inevitably conform to the rules.

[4] Paragraph (c) expresses a general principle of personal responsibility for acts of another. *See also* rule 32:8.4(a).

[5] Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory

authority over performance of specific legal work by another lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

[6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification, or knowledge of the violation.

[7] Apart from this rule and rule 32:8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate, or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these rules.

[8] The duties imposed by this rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Iowa Rules of Professional Conduct. *See* rule 32:5.2(a).

[Court Order April 20, 2005, effective July 1, 2005]

## **Rule 32:5.2: RESPONSIBILITIES OF A SUBORDINATE LAWYER**

**(a) A lawyer is bound by the Iowa Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.**

**(b) A subordinate lawyer does not violate the Iowa Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.**

### **Comment**

[1] Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority

ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under rule 32:1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

[Court Order April 20, 2005, effective July 1, 2005]

### **Rule 32:5.3: RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS**

**With respect to a nonlawyer employed or retained by or associated with a lawyer:**

**(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;**

**(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and**

**(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Iowa Rules of Professional Conduct if engaged in by a lawyer if:**

**(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or**

**(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.**

#### **Comment**

[1] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline. [2] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Iowa Rules of Professional Conduct. *See* comment [1] to rule 32:5.1. Paragraph (b) applies to lawyers who have supervisory authority over the work of a nonlawyer. Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Iowa Rules of Professional Conduct if engaged in by a lawyer.

[Court Order April 20, 2005, effective July 1, 2005]

## **Rule 32:8.4: MISCONDUCT**

**It is professional misconduct for a lawyer to:**

- (a) violate or attempt to violate the Iowa Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;**
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;**
- (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;**
- (d) engage in conduct that is prejudicial to the administration of justice;**
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Iowa Rules of Professional Conduct or other law;**
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or**
- (g) engage in sexual harassment or other unlawful discrimination in the practice of law or knowingly permit staff or agents subject to the lawyer's direction and control to do so.**

### **Comment**

[1] Lawyers are subject to discipline when they violate or attempt to violate the Iowa Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Illegal conduct can reflect adversely on fitness to practice law. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] A lawyer who, in the course of representing a client, knowingly manifests, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule. For another reference to discrimination as professional misconduct, see paragraph (g).

[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of rule 32:1.2(d) concerning a good faith challenge to the validity, scope, meaning, or application of the law apply to challenges of legal regulation of the practice of law.

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of a lawyer. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent, and officer, director, or manager of a corporation or other organization.

[6] It is not professional misconduct for a lawyer to advise clients or others about or to supervise or participate in lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights or in lawful intelligence-gathering activity, provided the lawyer's conduct is otherwise in compliance with these rules. "Covert activity" means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. Covert activity may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place, or will take place in the foreseeable future. Likewise, a government lawyer who supervises or participates in a lawful covert operation which involves misrepresentation or deceit for the purpose of gathering relevant information, such as law enforcement investigation of suspected illegal activity or an intelligence-gathering activity, does not, without more, violate this rule.

[Court Order April 20, 2005, effective July 1, 2005]



~~... We conclude that the recording of conversations without the consent of all parties is not acceptable, and leave for another day the question of whether the recording of conversations without the consent of all parties is acceptable.~~

## 2. Reasons for Abandonment of the General Prohibition Stated in Opinion 337

Formal Opinion 337 was decided under the Code of Professional Responsibility, which incorporated the principle that a lawyer "should avoid even the appearance of impropriety."<sup>5</sup> That admonition was omitted as a basis for professional discipline nine years later in the ABA's adoption of the Model Rules of Professional Conduct. Opinion 337 further stated, however, that "conduct which involves dishonesty, fraud, deceit or misrepresentation in the view of the Committee clearly encompasses the making of recordings without the consent of all parties."<sup>6</sup> The Model Code's prohibition against conduct involving deceit or misrepresentation was preserved in Model Rule 8.4(c),<sup>7</sup> and thus we must consider whether that conclusion by the Committee in Opinion 337 is correct under the Model Rules.

Reception by state and local bar committees of the principle embraced by Opinion 337 has been mixed.<sup>8</sup> Courts and committees in a number of states have adopted the position of the opinion.<sup>9</sup> The State Bar of Michigan Standing

4. The subject is discussed thoughtfully in David B. Isbell & Lucantonio Salvì, *Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation Under The Model Rules of Professional Conduct*, 8 *Geo. J. Legal Ethics* 791 (Summer 1995). The ethics of supervising investigators who use "pretext" techniques to gather information, often accompanied by secret electronic recording of conversations with their subjects, also is discussed in *Apple Corps, Ltd. v. International Collectors Society*, 15 F.Supp.2d 456, 475-76 (D.N.J. 1998).

5. Prior to Opinion 337, the Committee had interpreted Canon 22 of the ABA Canons of Professional Ethics, which stated that a lawyer's conduct "should be characterized by candor and fairness," to proscribe surreptitious taping of a court proceeding of conversations with clients, and of conversations with other lawyers. See Informal Decision C-480 (Attorney's Use of Recording Device for Court Proceedings) (December 26, 1961), in 1 *INFORMAL ETHICS OPINIONS*, at 81 (ABA 1975); Informal Opinion 1008 (Lawyer Tape Recording Telephone Conversation of Client Without Client's Knowledge) (October 25, 1967), in 2 *INFORMAL ETHICS OPINIONS*, at 180 (ABA 1975); Informal Opinion 1009 (Lawyer Tape Recording Telephone Conversation with Lawyer for Other Party) (October 25, 1967), *id.* at 182.

6. *FORMAL AND INFORMAL ETHICS OPINIONS* (1985), at 96.

7. Model Rule 8.4(c) provides that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

8. Ethics opinions on the subject prior to 1990 are discussed in Mark Koehn, Note, *Attorneys, Participant Monitoring and Ethics: Should Attorneys Be Able to Surreptitiously Record their Conversations?*, 4 *Geo. J. Legal Ethics* 403 (1990).

9. See Matter of Anonymous Member of So. Carolina Bar, 404 S.B.2d 513, 513 (S.C. 1991); *People v. Selby*, 606 P.2d 45, 47 (Colo. 1979); Supreme Court of Texas Professional Ethics Committee Op. 392 (Feb. 1978).

Committee on Professional and Judicial Ethics initially agreed with Opinion 337,<sup>10</sup> but later found that the ethos of nonconsensual recording should be considered on a case-by-case basis.<sup>11</sup> The New York State Bar adopted a *per se* rule condemning nonconsensual recordings,<sup>12</sup> while the New York City Bar recognized exceptions to that position in the case of prosecutors and defense counsel in criminal investigations.<sup>13</sup> The New York County Bar more recently opined that recording of a conversation without the consent of the other party is not, in and of itself, unethical.<sup>14</sup>

In Virginia, a series of opinions condemned nonconsensual recordings by or at the direction of lawyers,<sup>15</sup> but the latest opinion on the subject found such conduct not to be unethical when done for the purpose of a criminal or housing discrimination investigation. The Virginia Standing Committee on Legal Ethics noted there may be other factual situations in which the same result would be reached.<sup>16</sup> Oklahoma, Utah, and Maine have rejected the broad prohibition of Opinion 337, saying that nonconsensual recordings by lawyers are not unethical unless accompanied by other deceptive conduct.<sup>17</sup> The District of Columbia also found a *per se* rule inappropriate,<sup>18</sup> and Kansas has found surreptitious recording by lawyers to be "unprofessional," but not unethical.<sup>19</sup>

Criticism of Opinion 337 has occurred in three areas. First, the belief that non-consensual taping of conversations is inherently deceitful, embraced by this Committee in 1974, is not universally accepted today. The overwhelming majori-

10. State Bar of Michigan Standing Committee on Professional and Judicial Ethics Informal Op. CI-200 (Interpreting the Code of Professional Responsibility).

11. State Bar of Michigan Standing Committee on Professional and Judicial Ethics Op. RI-309 (May 12, 1998).

12. New York State Bar Ass'n Committee on Professional Ethics Op. 328 (1974).

13. The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics Op. 80-95 (1981).

14. New York County Lawyers' Ass'n Committee on Professional Ethics Op. 696 (Secret Recording Of Telephone Conversations) (July 28, 1993).

15. *Gunter v. Virginia State Bar*, 385 S.E. 2d 597, 622 (Va. 1989); Virginia Legal Ethics Op. 1324 (Representing a Client Within the Bounds of the Law: Attorney Obtaining Non-Consensual Tape Recordings From Client) (Feb. 27, 1990); Virginia Legal Ethics Op. 1448 (Advising Client/Potential Civil Plaintiff to Record Oral Conversation With Unrepresented Potential Civil Defendant) (January 6, 1992); Virginia Legal Ethics Op. 1635 (Attorney's Tape Recording Telephone Conversation When Not Acting in Attorney Capacity) (February 7, 1995).

16. Virginia Legal Ethics Opinion 1738 (Attorney Participation In Electronic Recording Without Consent Of Party Being Recorded) (April 13, 2000).

17. Maine Professional Ethics Commission of the Bd. of Overseers of the Bar Op. 168 (March 9, 1999); Utah State Bar Ethics Advisory Op. Committee No. 96-04 (July 3, 1996); Oklahoma Bar Ass'n Op. 307 (March 5, 1994).

18. D.C. Bar's Legal Ethics Committee Op. 229 (Surreptitious Tape Recording By Attorney) (June 16, 1992).

19. Kansas Bar Ass'n Ethics Op. 96-9 (Secret Tape Recordings of Other Persons by Attorneys and Clients) (August 11, 1997).

ty of states permit recording by consent of only one party to the conversation.<sup>20</sup> Surreptitious recording of conversations is a widespread practice by law enforcement, private investigators and journalists, and the courts universally accept evidence acquired by such techniques.<sup>21</sup> Devices for the recording of telephone conversations on one's own phone readily are available and widely are used. Thus, even though recording of a conversation without disclosure may to many people "offend a sense of honor and fair play,"<sup>22</sup> it is questionable whether anyone today justifiably relies on an expectation that a conversation is not being recorded by the other party, absent a special relationship with or conduct by that party inducing a belief that the conversation will not be recorded.<sup>23</sup>

Second, there are circumstances in which requiring disclosure of the recording of a conversation may defeat a legitimate and even necessary activity. For that reason, even those authorities that have agreed with the basic proposition of Opinion 337 have tended to recognize numerous exceptions. The State Bar of Arizona, for example, listed four exceptions to the ethical prohibition for such things as documenting criminal utterances (threats, obscene calls, etc.); documenting conversations with potential witnesses to protect against later perjury; documenting conversations for self-protection of the lawyer; and recording when "specifically authorized by statute, court rule or court order."<sup>24</sup> Other ethics committees have excepted recordings by criminal defense lawyers, reasoning that the commonly accepted "law enforcement exception" otherwise would give prosecutors an unfair advantage.<sup>25</sup> Exceptions also have been recognized for "testers" in investigations of housing discrimination and trademark infringement.<sup>26</sup> And the Ohio Supreme Court, although finding nonconsensual recordings by lawyers generally impermissible, has noted an exception for "extraordinary circumstances" as well as for investigations by prosecutors and criminal defense lawyers.<sup>27</sup>

A degree of uncertainty is common in the application of rules of ethics, but an ethical prohibition that is qualified by so many varying exceptions and such frequent disagreement as to the viability of the rule as a basis for professional discipline, is highly troubling. We think the proper approach to the question of legal but nonconsensual recordings by lawyers is not a general prohibition with certain

*Rule of w/ the many exceptions*

20. See *infra* note 30 and accompanying text.

21. E.g., *Richardson v. Howard*, 712 F.2d 319, 321 (7th Cir. 1983); *Miano v. AC & R Advertising Inc.*, 148 F.R.D. 68, 88-89, *aff'd*, 834 F.Supp. 632 (S.D. N.Y. 1993).

22. Maine Op. 168, *supra* note 17.

23. As discussed in Part 5, *infra*, the client-lawyer relationship may create a justifiable expectation that the lawyer will not record a client's conversation without the knowledge of the client.

24. Arizona Op. No. 75-13 (June 11, 1975).

25. See, e.g., Board of Professional Responsibility of the Supreme Court of Tenn. Formal Ethics Op. 86-F-14(a) (July 18, 1986); Kentucky Bar Ass'n Op. E-279 (Jan. 1984).

26. Virginia Legal Ethics Op. 1738, *supra* note 16.

27. Supreme Court of Ohio Board of Commissioners on Grievances and Discipline Op. 97-3 (June 13, 1997).

exceptions, but a prohibition of the conduct only where it is accompanied by other circumstances that make it unethical.

The third major criticism of Opinion 337 has been that whatever its basis under the Canons and the Model Code, it is not consistent with the approach of the Model Rules. The Model Rules do not contain the injunction of the Model Code that lawyers "should avoid even the appearance of impropriety." Furthermore, unlike the Canons or the Code, the Model Rules deal directly with "respect for rights of third persons" in Rule 4.4. That rule proscribes only "means that have no substantial purpose other than to embarrass, delay or burden a third person," and "methods of obtaining evidence that violate the legal rights of such a person."

If a lawyer records a conversation with no substantial purpose other than to embarrass or burden a third person, the lawyer has violated Model Rule 4.4. But there seems no reason to treat recording of conversations any differently in this respect from other methods of gathering evidence.<sup>28</sup> The Committee believes that to forbid obtaining of evidence by nonconsensual recordings that are lawful and consequently do *not* violate the legal rights of the person whose words are unknowingly recorded, would be unfaithful to the Model Rules as adopted.

### 3. Nonconsensual Recording In Violation of State Law

Federal law permits recording of a conversation by consent of one party to the conversation.<sup>29</sup> Some states, however, prohibit recordings without the consent of all parties, usually with an exception for law enforcement activities and occasionally with other exceptions.<sup>30</sup> Violation of such laws is a criminal offense, and may subject the lawyer to civil liability to persons whose conversations have been recorded secretly.<sup>31</sup> A lawyer who records a conversation in the practice of law in violation of such a state statute likely has violated Model Rule 8.4(b) or 8.4(c) or both. Further, because the state statute creates a right not to have one's conversations recorded without consent, nonconsensual recordings of conversations for the purpose of obtaining evidence would violate Model Rule 4.4's proscription

28. Similarly, if a lawyer falsely states that a conversation is not being recorded, the lawyer likely has violated Model Rule 4.1's prohibition against knowingly making false material statements of fact to third persons, but again there seems no reason to treat the subject of nonconsensual recording differently from any other conduct when it is not accompanied by misrepresentations to third persons.

29. 18 U.S.C. § 2511(2)(d).

30. According to a 1998 law review note surveying state statutes, twelve states at that time prohibited recording without consent of both parties to the conversation: California, Connecticut, Delaware, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, New Hampshire, Pennsylvania and Washington. Stacy L. Mills, Note, *He Wouldn't Listen to Me Before, But Now . . . : Interspousal Wiretapping and an Analysis of State Wiretapping Statutes*, 37 BRANDEIS L.J. 415, 429 and nn. 126, 127 (Spring 1998). Oregon law permits recording of telephone conversations, but not in-person conversations, with one party's consent. Or. Rev. Stat. § 165.540 (1999).

31. See *Kimmel v. Goland*, 51 Cal. 3d 202, 212 (Cal. 1990), holding that a lawyer is not immune from tort liability for transcribing conversations recorded by a client in violation of California's two-party consent statute.

against using "methods of obtaining evidence that violate the legal rights of [a third] person."<sup>32</sup>

A lawyer contemplating nonconsensual recording of a conversation should, therefore, take care to ensure that he is informed of the relevant law of the jurisdiction in which the recording occurs.

#### 4. False Denial That a Conversation is Being Recorded

That a lawyer may record a conversation with another person without that person's knowledge and consent does not mean that a lawyer may state falsely that the conversation is not being recorded. To do so would likely violate Model Rule 4.1, which prohibits a lawyer from making a false statement of material fact to a third person. The distinction has been recognized by the Mississippi Supreme Court, which held in *Attorney M. v. Mississippi Bar*<sup>33</sup> that nonconsensual recording of conversations by lawyers generally is not a violation of ethical rules, but then held in *Mississippi Bar v. Attorney ST*<sup>34</sup> that a lawyer who falsely denied to a third person that he was recording their telephone conversation had violated the proscription of Rule 4.1 against false statements of material fact in the course of representing a client.

#### 5. Undisclosed Recording of Conversations With Clients

When a lawyer contemplates recording a conversation with a client without the client's knowledge, ethical considerations arise that are not present with respect to non-clients.<sup>35</sup> Lawyers owe to clients, unlike third persons, a duty of loyalty that transcends the lawyer's convenience and interests. The duty of loyalty is in part expressed in the Model Rules requiring preservation of confidentiality and communication with a client about the matter involved in the representation. Whether the Model Rules that define and implement these duties permit a lawyer to record a client conversation without the client's knowledge is a question on which the members of this Committee are divided. The Committee is unanimous, however, in concluding that it is almost always advisable for a lawyer to inform a client that a conversation is being or may be recorded, before recording such a conversation.<sup>36</sup>

Clients must assume, absent agreement to the contrary, that a lawyer will memorialize the client's communication in some fashion. But a tape recording that captures the client's exact words, no matter how ill-considered, slanderous or profane, differs from a lawyer's notes or dictated memorandum of the conversa-

32. That conclusion does not, of course, apply to lawyers engaged in law enforcement whose activities are authorized by state or federal law.

33. 621 So. 2d 220, 223-24 (Miss. 1992).

34. 621 So. 2d 229, 232-33 (Miss. 1993).

35. "A fundamental distinction is involved between clients, to whom lawyers owe many duties, and non-clients, to whom lawyers owe few duties." THE RESTATMENT (THIRD) OF THE LAW GOVERNING LAWYERS, ch. 2, topic 1, Introductory Note, at 125 (2000).

36. A lawyer may satisfy the need to inform a client that their conversations are or may be recorded by advising the client, at the outset of the representation or any later time, that the lawyer may follow this practice.

tion. If the recording were to fall into unfriendly hands, whether by inadvertent disclosure or by operation of law,<sup>37</sup> the damage or embarrassment to the client would likely be far greater than if the same thing were to happen to a lawyer's notes or memorandum of a client conversation.

Recordings of conversations may, of course, serve useful functions in the representation of a client. Electronic recording saves the lawyer the trouble of taking notes, and ensures an accurate record of the instructions or information imparted by a client. These beneficial purposes may weigh in favor of recording conversations, but they do not require that the recording be done secretly.

The relationship of trust and confidence that clients need to have with their lawyers, and that is contemplated by the Model Rules, likely would be undermined by a client's discovery that, without his knowledge, confidential communications with his lawyer have been recorded by the lawyer. Thus, whether or not undisclosed recording of a client conversation is unethical, it is inadvisable except in circumstances where the lawyer has no reason to believe the client might object, or where exceptional circumstances exist. Exceptional circumstances might arise if the client, by his own acts, has forfeited the right of loyalty or confidentiality. For example, there is no ethical obligation to keep confidential 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. Nor is there an ethical obligation to keep confidential information necessary to establish a defense by the lawyer to charges based upon conduct in which the client is involved. Those members of the Committee who believe that the Model Rules forbid a lawyer from recording client conversations without the client's knowledge nonetheless would recognize exceptions in circumstances such as these.

#### Conclusion

In summary, our conclusions are as follows:

1. Where nonconsensual recording of conversations is permitted by the law of the jurisdiction where the recording occurs, a lawyer does not violate the Model Rules merely by recording a conversation without the consent of the other parties to the conversation.
2. Where nonconsensual recording of private conversations is prohibited by law in a particular jurisdiction, a lawyer who engages in such conduct in violation of that law may violate Model Rule 8.4, and if the purpose of the recording is to obtain evidence, also may violate Model Rule 4.4.

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37. Though a client-lawyer conversation ordinarily will be privileged, there are numerous ways in which disclosure of the recording might nevertheless later be compelled by law, as in a situation where the client is held to have waived the privilege, or where a court finds the crime-fraud exception is applicable. Further, when a recording is made of an officer of a client corporation, the recording may become the property of an unfriendly successor in the case of a bankruptcy, receivership, or hostile takeover.

3. A lawyer who records a conversation without the consent of a party to that conversation may not represent that the conversation is not being recorded.
4. Although the Committee is divided as to whether the Model Rules forbid a lawyer from recording a conversation with a client concerning the subject matter of the representation without the client's knowledge, such conduct is, at the least, inadvisable.



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**Ethics Opinions**  
Iowa Supreme Court Board of Professional Ethics and Conduct

**Date of Opinion:** 09/28/1995

**Opinion Number:** 95-09

**Title:** Recording Conversations

Opinion: Pursuant to your request of August 18, 1995, the Board has reconsidered Formal Opinion 83-16 (1982), concerning undisclosed tape recording by lawyers.

The Board is of the opinion that Formal Opinion 83-16 is correct and it hereby is reaffirmed.

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*That see ABA 2001 opinion that withdraws 337*

**Ethics Opinions**  
Iowa Supreme Court Board of Professional Ethics and Conduct

Date of Opinion: 12/15/1982

Opinion Number: 83-16

Title: RECORDING CONVERSATIONS NOT PERMITTED WITHOUT CONSENT

Opinion: Lawyers have more and more begun to take advantage of new technologies including tape recording of conversations. The ~~Committee on Professional Ethics & Conduct of The Iowa State Bar Association has adopted Formal Opinion 337 of the American Bar Association Committee on Ethics and Professional Responsibility.~~ For the information of the members of the Bar, that opinion is printed here below:

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

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

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

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

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

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

No prior Formal Opinion has been issued which deals directly with the problem. Informal

Opinions have addressed the issue only in part.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*Possible exceptions*

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

"It shall not be unlawful under this Chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication, or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act...(or) any other injurious act." 18 U.S.C.A section

2511.

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

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

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

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

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

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

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

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

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

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

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

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

A carrier found in violation of the regulations is subject to a fine of \$500 for each day of continued violation, and an attorney who fails to use a "beep tone" device, is subject to the discontinuance of his telephone service for violation of the telephone company's tariff. There is no evidentiary sanction against the introduction at trial of recordings obtained without the use of the "beep tone" device.

*Bantaglia v. U.S.*, 349F.2d 556 (9th Cir. (1965), cert. denied 382 U.S. 955 (1966).

The position of the FCC is also indicated by its issuance of an order forbidding the use by private citizens of radio devices, which must be licensed by the Commission, to overhear or record conversations unless all parties to the conversation have given the consent. 31 F.R. 3396 (1966).

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