OPINION 18:

SECRET RECORDINGS OF CONVERSATIONS

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On September 20, 1996, the Lawyers Professional Responsibility Board adopted Opinion 18, *Secret Recordings of Conversations*. The opinion, with the committee comment which is incorporated as part of the opinion, is set out herein.

OPINION NO. 18

Secret Recordings of Conversations

It is professional misconduct for a lawyer, in connection with the lawyer's professional activities, to record any conversation without the knowledge of all parties to the conversation, provided as follows:

1. This opinion does not prohibit a lawyer from recording a threat to engage in criminal conduct;
2. This opinion does not prohibit a lawyer engaged in the prosecution or defense of a criminal matter from recording a conversation without the knowledge of all parties to the conversation;
3. This opinion does not prohibit a government lawyer charged with civil law enforcement authority from making or directing others to make a recording of a conversation without the knowledge of all parties to the conversation;
4. This opinion does not prohibit a lawyer from giving legal advice about the legality of recording a conversation.

It has been the position of the Lawyers Professional Responsibility Board and the Office of Lawyers Professional Responsibility for over a decade that surreptitious recording of conversations by a lawyer constitutes unprofessional conduct. This position is consistent with that announced by the ABA Committee on Ethics and Professional Responsibility in Formal Opinion 337 (August 10, 1974). It is also the position held by the majority of state ethics authorities who have addressed the issue. The ABA and other state ethics authorities recognize that although secret recording is not illegal (provided one of the parties to the conversation consents to the recording), such conduct is inherently deceitful and violates the profession's standards prohibiting conduct involving dishonesty, fraud, deceit or misrepresentation. *See* Rule 8.4 (c), Rules of Professional Conduct, and DR 1-102(A)(4), Code of Professional Responsibility. The committee agrees that in most instances secret recording violates these standards.

The exceptions provided for in this opinion recognize that in certain limited circumstances, the interests served by surreptitious recordings outweigh the interests protected by prohibiting such conduct through professional standards. For example, a lawyer who is the subject of a criminal threat ought not be subject to discipline for secretly recording the threat. The "in connection with the lawyer's professional activities" language is intended to limit application of the opinion to those situations where a lawyer is representing a client or is representing him or herself in a legal matter.

Another exception is secret recording in the criminal prosecution area where such conduct has become a

recognized law enforcement tool provided it is done within constitutional requirements. *See e.g.,* ABA Formal Opinion 337 at page 3. The committee determined, however, that such an exception should also be recognized for lawyers engaged in the defense of a criminal matter. *See also,* Arizona Opinion No. 9092; Tennessee Ethics Opinion 86-F-14 (a) (July 18,1986); and Kentucky Opinion E-279 (Jan. 1984). Creating an exception only for prosecutors could create an imbalance raising potential constitutional problems. *See e.g., Kirk v. State,* 526 So.2d 223, 227 (La. 1988) (court found disparity between permitting prosecutors to secretly record and prohibiting defense lawyers was impermissible denial of equal protection).

The exception provided to government lawyers engaged in civil law enforcement similarly recognizes that to effectively protect the public, surreptitious recording is a necessary law enforcement tool. In certain areas such as consumer fraud, false advertising, deceptive trade practices and charitable solicitation, there may be few, if any, alternatives to surreptitious recording for effective enforcement. The exception also recognizes that during the investigative stage, a government lawyer may not be able to determine with certainty whether the violations are civil, criminal or both.

Finally, because surreptitious recording with the consent of one of the parties is not illegal, the committee determined that a lawyer should not be prohibited from advising a client about the legality or admissibility of such a recording. This exception is not intended, however, to permit nonlawyer employees or agents of the lawyer to record conversations in violation of this opinion. *See* Rule 5.3, Minnesota Rules of Professional Conduct.

RATIONALE

The opinion provides specific notice to lawyers of the longheld enforcement position of the Board and the Office of Lawyers Professional Responsibility that surreptitious recording of conversations by lawyers constitutes unprofessional conduct in violation of Rule 8.4(c), Minnesota Rules of Professional Conduct. With Opinion 18, Minnesota joins the majority of states that have considered the issue, in finding that surreptitious recording by lawyers is unethical.

The impetus for the Board opinion came last year. The Director's Office issued an admonition to an attorney for secretly tape recording several conversations he held with persons (potential parties) about the subject matter of a lawsuit he eventually filed against them. The lawyer appealed the admonition. The panel noted the director's enforcement position was in accord with the position held by the ABA since 1974, and with the majority of jurisdictions. Nonetheless, the panel dismissed the admonition on the following rationale:

1. There was no specific rule or opinion on the issue in Minnesota;
2. There are conflicting ethics opinions in other states on this issue;
3. The panel found no general understanding amongst lawyers that secret recording was unethical.

For these reasons, the panel believed that if there was to be a general prohibition as to secret taping by lawyers in Minnesota, it should be done by an explicit rule or opinion.

The issue was presented to the full board, which concurred that there was a need for specificity. The Board published for comment two draft versions of a proposed board opinion on secret taping in the March 1996 issue of *MSBA in brief*. The Board's opinion committee also specifically invited comment from certain law enforcement, public defense, and trial lawyer organizations. The bar responded with many diverse views and thoughtful comments.

Some comments questioned adopting any opinion that limited an attorney's right to do something otherwise legal. One described the draft opinion as "a death wish for the profession." Others recommended exceptions to the prohibition that would have swallowed, even engulfed, the rule itself. Several comments addressed the concern that prosecutors and criminal defense counsel were being treated disparately, and unfairly to defense counsel, with possible constitutional implications. Other comments noted that threats against lawyers are not uncommon and that lawyers must be able to protect themselves. Finally, comments suggested that tape recording actually furthered the administration of justice, as it preserves the most accurate evidence of what was said.

The Board considered the concerns raised. The notion, that because secretly recording a conversation is legal it is ethical, does not follow. Lawyers, because of their duty to clients and the courts, are commonly constrained from otherwise "legal" actions. Procrastination is not illegal, but accounts for a sizable percentage of all ethics complaints. Further, to the extent that an *attorney's* surreptitious recording amounts to "deceit or collusion," it might not be legal.

Similarly, the speculation raised that in this age of cellular phones and exploding technology, no one should assume that *any* conversations are private must also fail. Surely, for lawyers, technological possibility should not be the defining line for professional ethics. Orwell's *1984* now looms *behind* us, at least chronologically, but is Big Brother really something the legal profession is ready to embrace? The country is a generation past the Watergate scandals, but the black eye the profession received during that time is still discolored. Surely, allowing generalized secret taping by lawyers with no constraints would not elevate, but instead would cause to plummet the still flagging public confidence in the profession. In adopting Opinion 18, the Board determined that any potential evidentiary benefits to particular practitioners from permitting secret recording were simply outweighed by the generalized costs to the reputation of the profession.

Opinion 18 addresses several of the specific concerns raised in the comments by expanding those extraordinary circumstances under which a lawyer may ethically, secretly tape. The circumstances remain narrow and are limited primarily to those situations where protection of the public is paramount, where a client's liberty interests are affected, or where a threat of criminal action is conveyed against an attorney. Opinion 18 also permits a lawyer to advise a client about the legality or admissibility of secretly taping a conversation. It does not, however, permit a lawyer to *advise* or *direct* a client to tape conversations or provide a client with the necessary equipment and technical advice. From an ethical standpoint, there is a critical distinction between presenting an analysis of the legal aspects of client's secret recording and recommending such conduct or the means by which it might be accomplished. *See e.g*. Rule 1.2(d), MRPC, and Comment.