

# The Legal Ethics of Secret Client Recordings

JOHN BLISS\*

## ABSTRACT

*Is it professional misconduct for a lawyer to record lawyer-client conversations without providing notice? When this question hit the national headlines with the summer 2018 release of Michael Cohen’s recordings of Donald Trump, an unresolved area of legal ethics doctrine was brought to public attention. The ABA’s current position is that the Standing Committee is “divided” and unable to offer a disciplinary standard on secret client recordings. This ambivalence is reflected in the lack of consensus across U.S. jurisdictions. Amid recent transformative developments in recording technology, and heated public debate about the risks and benefits of secret recording, the bar can no longer afford to avoid this issue.*

*In the prevailing doctrinal framework, secret client recordings are prohibited when they constitute deceit in violation of the widely adopted Model Rule 8.4(c). As recording technology has grown more pervasive, the bar has increasingly concluded that secret recording is no longer deceitful—under the assumption that people no longer feel that they were deceived when they learn that they were recorded without notice. Yet, even if the deceit rationale for prohibiting secret recording is in decline, this Article argues that secret recording of clients deserves a separate analysis drawing on client-specific professional duties that weigh heavily against the practice. The Article concludes by assessing the exceptional circumstances where such recordings might be justified by exigent public-interest purposes. This analysis revisits and sheds new light on the fundamental tension between lawyers’ duties to clients and the public.*

## TABLE OF CONTENTS

INTRODUCTION .....	57
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\* Visiting Assistant Professor, University of Denver Sturm College of Law. Invaluable research assistance was provided by Diane Burkhardt and Joseph Chase. Earlier drafts were improved thanks to the comments and revisions suggested by Rebecca Aviel, Scott Cummings, Stephen Galoob, Kevin Lynch, Milan Markovic, Steve Pepper, Govind Persad, Deborah Rhode, Eli Wald, and David Wilkins. Further gratitude is owed to workshop participants at the 2019 AALS New Voices in Professional Responsibility workshop, a Harvard Law School Center on the Legal Profession colloquium, a Denver Law Work-in-Progress colloquium, and the Legal Ethics Schmooze at UC Irvine. I am also thankful for comments from Rachel Arnow-Richman, Natalie Brocklebank, John Campbell, Miriam Cherry, and over 100 responses from lawyers and law faculty in the Lawyers for Good Government Facebook group. © 2020, John Bliss.

I.	DECEIT: THE CURRENT FRAMEWORK FOR ANALYZING SECRET RECORDING BY LAWYERS . . . . .	63
A.	ALL-PARTY CONSENT JURISDICTIONS . . . . .	63
B.	THE ABA PROHIBITION ERA: FROM WATERGATE TO THE NEW MILLENNIUM . . . . .	64
C.	CURRENT STANDARDS: DIVERGENT ANSWERS TO THE DECEIT QUESTION . . . . .	65
D.	DIFFICULTY IN APPLYING THE DECEIT ANALYSIS . . . . .	68
E.	OPINIONS ON SECRET CLIENT RECORDINGS . . . . .	69
II.	THREE CATEGORIES OF SECRET CLIENT RECORDINGS . . . . .	72
A.	SECRETLY RECORDING THE CLIENT IN ORDER TO ADVANCE THE CLIENT'S INTERESTS . . . . .	73
1.	HOW A SECRET CLIENT RECORDING COULD ENHANCE THE REPRESENTATION . . . . .	73
2.	PER SE HARMS AND WRONGS . . . . .	77
3.	THE DUTY TO COMMUNICATE WITH CLIENTS (MODEL RULE 1.4) . . . . .	80
4.	THE DUTY TO SHARE CONTROL WITH CLIENTS (MODEL RULE 1.2) . . . . .	81
5.	THEORIES OF CONTROL IN THE LAWYER-CLIENT RELATIONSHIP	84
B.	SECRETLY RECORDING THE CLIENT IN ORDER TO ADVANCE THE LAWYER'S INTERESTS . . . . .	84
1.	CONFIDENTIALITY LIMITS . . . . .	86
2.	WITHDRAWAL LIMITS . . . . .	87
3.	LOYALTY AND PERSONAL CONFLICTS OF INTEREST . . . . .	88
C.	SECRETLY RECORDING THE CLIENT IN ORDER TO ADVANCE THE PUBLIC'S INTERESTS . . . . .	90
1.	CONFIDENTIALITY LIMITS . . . . .	93
2.	CIRCUMSTANCES WHERE HARM PREVENTION COULD POSSIBLY JUSTIFY SECRET CLIENT RECORDINGS . . . . .	95
a.	Serious Bodily Harm . . . . .	95
b.	Crime . . . . .	95
c.	Complying with Law or Court Order . . . . .	97

2020]	THE LEGAL ETHICS OF SECRET CLIENT RECORDINGS	57
	d. Perjury . . . . .	98
	e. The Generally Accepted Societal Good . . . . .	99
	3. ASSESSING THE HARM-PREVENTION EXCEPTIONS . . . . .	100
III.	POLICY PRESCRIPTIONS . . . . .	103
IV.	CONSIDERATIONS FOR THE FUTURE . . . . .	105
	CONCLUSION. . . . .	106

## INTRODUCTION

On August 9, 1974, President Richard Nixon turned to the crowd and cameras amassed on the South Lawn and enthusiastically raised both arms with his trademark dual “V” hand gestures, which generally signaled “victory” but in this moment represented a decidedly non-victorious farewell to the nation. He boarded the presidential helicopter, which then ascended and disappeared into the hazy summer air beyond the Washington Monument. Nixon’s resignation was not only an embarrassment for American political leadership, but also a major setback for the public image of the American legal profession.<sup>1</sup> Many of the perpetrators of the scandal, Nixon included, were lawyers. Indeed, Watergate has been widely cited as a motivating force in the subsequent overhaul of the American legal ethics regime, culminating in the introduction of the original *Model Rules of Professional Conduct* in 1983.<sup>2</sup> One legal ethics reform measure came the very day after Nixon’s infamous departure. On August 10, 1974, the ABA issued Formal Opinion 337, forbidding lawyers from making secret tape recordings, with narrow exceptions for law enforcement.<sup>3</sup> This opinion responded to the prominent role of secret recordings in Watergate, from the botched wiretapping caper that started the scandal to the “smoking gun tape” that ultimately brought down the president.<sup>4</sup>

In 2018, the issue of secret recording by lawyers returned to national headlines in a startlingly familiar context—an investigation with potential criminal implications for the President of the United States and his lawyers and other associates.<sup>5</sup>

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1. Jerold S. Auerbach, *The Legal Profession After Watergate*, 22 WAYNE L. REV. 1287 (1976).

2. Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 L. & SOC. INQUIRY 677, 688 (1989).

3. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 337 (1974) [hereinafter 1974 ABA Opinion].

4. FRED EMERY, WATERGATE (1995).

5. The 2018 circumstances recall not only Watergate, but also the secret recordings that spurred forward the investigation that led to President Clinton’s impeachment. See RICHARD POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON (2009) (discussing Gennifer Flowers’s secret recordings of President Clinton and Linda Tripp’s secret recordings of Monica Lewinsky, both on her own initiative and wearing an FBI wire).

Attorney Michael Cohen's secret recordings of conversations with his client, then-presidential-nominee Donald Trump, were not only disclosed as evidence in criminal proceedings, but were also offered to the media and broadcast publicly.<sup>6</sup> Upon (apparently) first learning of these tapes, President Trump tweeted that it was "inconceivable that a lawyer would tape a client—totally unheard of & perhaps illegal."<sup>7</sup> When the tapes were released three days later, Trump added, "What kind of a lawyer would tape a client? So sad!"<sup>8</sup> While making such recordings is not "illegal" under the one-party consent rule in the state of New York (where the recordings were reportedly made),<sup>9</sup> the question of whether Cohen had violated standards of professional conduct sparked considerable debate in legal<sup>10</sup> and general<sup>11</sup> news media.

The most recent ABA guidance on secret recording by lawyers was a 2001 reversal of the prohibitive 1974 rule.<sup>12</sup> The 2001 opinion concluded that "the mere act of secretly but lawfully recording a conversation inherently is not deceitful"

6. Matt Apuzzo, Maggie Haberman & Michael S. Schmidt, *Michael Cohen Secretly Taped Trump Discussing Payment to Playboy Model*, N.Y. TIMES (July 20, 2018), <https://www.nytimes.com/2018/07/20/us/politics/michael-cohen-trump-tape.html> [<https://perma.cc/UZB5-NS3K>].

7. Donald Trump (@realDonaldTrump), TWITTER (July 21, 2018, 8:10 AM), <https://twitter.com/realdonaldtrump/status/1020642287725043712?lang=en> [<https://perma.cc/GT97-CG3D>].

8. Donald Trump (@realDonaldTrump), TWITTER (July 25, 2018, 8:34 AM), <https://twitter.com/realdonaldtrump/status/1022097879253635072> [<https://perma.cc/DJ5B-M9FG>] ("Is this a first, never heard of it before . . . I hear there are other clients and many reporters that are taped - can this be so? Too bad!").

9. One-party consent laws are discussed *infra* Part I.B.

10. Bernie Berk, *Was Michael Cohen's Secret Taping of his Then-Client Donald Trump Improper?*, THE FACULTY LOUNGE (July 26, 2018), <https://www.thefacultylounge.org/2018/07/was-michael-cohens-secret-taping-of-his-then-client-donald-trump-improper.html> [<https://perma.cc/R6ZR-CDLV>] (concluding that Cohen's recordings were likely improper on the basis of multiple professional duties); Carry Covert, *Can You Record a Client or Fellow Counsel without Consent*, BUFFALO L.J. (Nov. 2018), <https://www.bizjournals.com/buffalo/news/2018/11/21/can-you-record-a-client-or-fellow-counsel-without.html> [<https://perma.cc/Q7LY-DPFX>]; David L. Hudson Jr., *Is Recording Others Legal, and Is It Ethical?*, ABA J. (Jan. 2019), [http://www.abajournal.com/magazine/article/is\\_recording\\_others\\_legal\\_and\\_is\\_it\\_ethical](http://www.abajournal.com/magazine/article/is_recording_others_legal_and_is_it_ethical) [<https://perma.cc/4EJX-SRAB>]; Andrew Strickler, *Cohen Tapes Show Broken Attorney-Client Relationship*, LAW360 (July 23, 2018), <https://www.law360.com/articles/1066168/cohen-tapes-show-broken-attorney-client-relationship> [<https://perma.cc/GV46-A9RQ>] (stressing that there is no "black and white" rule, but that lawyers who secretly record clients disrupt trust in the lawyer-client relationship).

11. Deanna Paul, *Michael Cohen Secretly Recorded Donald Trump. Does that Make Him a Bad Lawyer?*, WASH. POST (July 26, 2018), <https://www.washingtonpost.com/news/the-fix/wp/2018/07/25/michael-cohen-secretly-recorded-trump-does-that-make-him-a-bad-lawyer/> [<https://perma.cc/YR2J-ZGDH>] (suggesting that it would be unlikely Cohen would be disbarred for secretly recording the client); Danny Cevallos, *If Trump Lawyer Cohen Recorded Conversations, Is that Ok?*, NBC NEWS (Apr. 16, 2018), <https://www.nbcnews.com/politics/donald-trump/if-trump-lawyer-cohen-recorded-conversations-ok-n866236> [<https://perma.cc/FS3Q-8K8S>]; Greg Price, *Michael Cohen Recorded Donald Trump for "Insurance" Should President Turn on Him, Legal Expert Says*, NEWSWEEK (July 20, 2018), <https://www.newsweek.com/michael-cohen-insurance-trump-president-1035505> [<https://perma.cc/VY6T-8M3L>]; Robert Charles, *Most Americans Agree with Trump, not Cohen—Taping Clients 'Smacks of Trickery'*, FOX NEWS (July 31, 2018), <https://www.foxnews.com/opinion/most-americans-agree-with-trump-not-cohen-taping-clients-smacks-of-trickery> [<https://perma.cc/K8UP-PYH8>] (suggesting that most Americans would be outraged to find that their lawyer had secretly recorded their lawyer-client conversation, as this would be the "antithesis of the revered attorney-client relationship").

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

and therefore is not per se unethical.<sup>13</sup> This opinion claimed a sea change in public expectations about whether one's conversations are recorded, such that the twenty-first century person who is recorded without being notified does not feel deceived. Yet, on the more specific question taken up in this Article, lawyers secretly recording *clients*, the ABA committee in 2001 was "divided" and unable to establish a disciplinary standard.<sup>14</sup> This ambivalence from the ABA is reflected in the inconsistent regulatory approaches to secret client recordings across American jurisdictions.<sup>15</sup>

The ABA's emphasis on the question of deceit is mirrored in the disciplinary rules, opinions, commentaries, and case law on secret recording by lawyers.<sup>16</sup> Under this framework, such recordings are prohibited when they amount to "dishonesty, fraud, deceit or misrepresentation" in violation of the widely adopted Model Rule 8.4(c).<sup>17</sup> This framework has failed to produce a consistent standard.<sup>18</sup> The ABA's opposite conclusions in 1974 and 2001 appear to have influenced state and local ethics committees in both directions.<sup>19</sup> As summarized in

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13. *Id.*

14. *Id.* (noting that while it is inadvisable to record clients without notice, the committee is divided on whether to recommend a disciplinary standard).

15. See *infra* Part I.E.

16. See 1974 ABA Opinion, *supra* note 3 (citing MODEL CODE OF PROF'L RESPONSIBILITY Canon DR 1-102(A)(4) (1980) (the predecessor to Model Rule 8.4(c)); Carol M. Bast, *Surreptitious Recording by Attorneys: Is It Ethical?*, 39 ST. MARY'S L.J. 661 (2007); Ellen A. Mercer, *Undisclosed Recording of Conversations by Private Attorneys*, 42 S.C. L. REV. 995 (1990); Doug Jones, *Our Dirty Little Secret Recording: A History and Critique of Ethical Rules Regarding Lawyers Secretly Recording Conversations*, 12 JONES L. REV. 1, 2 (2007) (calling for a prohibition against secret recording with limited exceptions); Allison A. Vana, *Attorney Private Eyes: Ethical Implications of a Private Attorney's Decision to Surreptitiously Record Conversations*, U. ILL. L. REV. 1605 (2003) (recommending a strict prohibition against secret recording except "under the guidance of law enforcement personnel in an ongoing criminal investigation").

17. MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2018) [hereinafter MODEL RULES].

18. The lack of consensus on whether secret recordings constitute deceit raises an important terminological point for the analysis in this Article. Existing opinions often refer to recordings made without notice using the adjectives "surreptitious," "covert," and "clandestine." See *infra* Part I.C. These adjectives beg the deceit question. Surreptitious, per the Oxford English Dictionary, implies that something is "obtained by . . . suppression of the truth, or fraudulent misrepresentation." 17 OXFORD ENGLISH DICTIONARY 305 (John Simpson & Edmund Weiner eds., Clarendon Press 2d ed. 1989) [hereinafter OED]. Yet, the question of whether secret recording is fraudulent is highly contested. Covert, in its OED definition, appears apt, referring to something "which serves for concealment, protection, or shelter." 3 OED at 1077. But covert generally connotes adversarial and even militaristic relationships. Yet, as discussed in this Article, some secret recordings by lawyers are supportive of the client's interests. "Clandestine" refers to something "secret, private, concealed" but the OED clarifies that this is "usually in a bad sense, implying craft or deception; underhanded, surreptitious." 3 OED at 268. "Undisclosed" has more neutral connotations, but I choose not to use this term in order to avoid confusion between the question of making the recording without notice and the question of disclosing the recording after it is made (under disclosure exceptions to the duty of confidentiality). Thus, this Article consistently uses the term "secret," which, per the OED, refers to keeping something "from knowledge or observation; hidden, concealed." 14 OED at 836. It should further be noted that throughout this Article, the "secret" recordings I reference are recordings made with one-party consent (namely the consent of the lawyer). This term does not denote recordings made without the consent of any participants in a conversation, which is legally prohibited by statute in 49 states and under federal law. See the discussion *infra* Part I.A.

19. See *infra* Part I.

Part I, ethics opinions in some jurisdictions broadly allow secret recording, some allow it under certain narrow circumstances, and many have avoided taking a formal position, leaving lawyers without normative or disciplinary standards.<sup>20</sup> Most ethics opinions on secret recording by lawyers have not distinguished between recording clients and non-clients.<sup>21</sup> Those that have spoken on the specific question of secretly recording *clients* have taken divergent positions and have generally offered only a few words of client-specific analysis.<sup>22</sup>

Perhaps the bar has neglected this issue because of an assumption that lawyers do not record their conversations. The era of smartphones and other new and emerging recording technologies should put this assumption in question. With three-fourths of U.S. adults now using smartphones, “spy craft is no longer exclusively left to the professionals.”<sup>23</sup> Lawyers now carry the capacity to conveniently record in-person and phone conversations.<sup>24</sup> In contrast, in the first ABA ethics opinion on secretly recording client phone calls in 1967, the lawyer assembled “an audio-type of recording device wherein the lawyer amplifies the client’s voice in his own office and then has a recording device which records the amplified voice.”<sup>25</sup>

Recent transformative developments in recording technology have fostered unprecedented public attention to the risks and benefits of secret recording. Secret recording has been a continuing theme in the Trump White House.<sup>26</sup> Politicians and other public figures and organizations have faced increasing scandals relating

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20. See *infra* Part I.C.

21. See *infra* Part I.

22. See *infra* Part I.E.

23. Cynthia A. Brown & Carol M. Bast, *Professional Responsibility: Making Smart Ethical Decisions While Making the Most of Smart Technology*, 48 CREIGHTON L. REV. 737 (2014); *Mobile Fact Sheet*, PEW RESEARCH CENTER (June 12, 2019), <http://www.pewinternet.org/fact-sheet/mobile/> [https://perma.cc/6UEJ-GLZZ] (suggesting that 77% of U.S. adults owned smartphones in 2018).

24. See Fact Sheet, *supra* note 23.

25. ABA Comm. on Prof’l Ethics, Informal Op. 1008 (1967).

26. Secret recordings have been made or reportedly contemplated several times in the first two years of the Trump White House, in addition to the Access Hollywood Tape during the campaign and Trump’s reported practice of secretly recording conversations in Trump Tower before his presidency. See Adam Goldman & Michael S. Schmidt, *Rod Rosenstein Suggested Secretly Recording Trump and Discussed 25th Amendment*, N.Y. TIMES (Sept. 21, 2018), <https://www.nytimes.com/2018/09/21/us/politics/rod-rosenstein-wear-wire-25th-amendment.html> [https://perma.cc/SB39-VTWU] (Trump’s deputy attorney general Rod Rosenstein reportedly commented that he considered secretly recording the president); Maggie Haberman, *Omarosa Manigault Newman Taped Her Firing by John Kelly*, N.Y. TIMES (Aug. 12, 2018), <https://www.nytimes.com/2018/08/12/us/politics/omarosa-trump-tape.html> [https://perma.cc/7KW8-4XSU] (Trump’s Director of Communications for the Office of Public Liaison, Omarosa Manigault Newman, secretly recorded and publicly released the tape of her firing in a conversation with the White House Chief of Staff); Donald Trump (@realDonaldTrump), TWITTER (May 12, 2017, 8:26 AM), <https://twitter.com/realdonaldtrump/status/863007411132649473?lang=en> [https://perma.cc/97G8-YBVY] (“James Comey better hope that there are no ‘tapes’ of our conversations before he starts leaking to the press!”); Donald Trump (@realDonaldTrump), TWITTER (June 22, 2017, 9:55 AM), <https://twitter.com/realdonaldtrump/status/877932956458795008?lang=en> [https://perma.cc/RNA8-MYFX] (“[W]hether there are ‘tapes’ or recordings of my conversations with James Comey, but I did not make, and do not have, any such recordings.”).

to leaked recordings.<sup>27</sup> Claimants in employment discrimination, harassment, and whistleblower cases now routinely record without notice.<sup>28</sup> Audio and video recordings of and by police (e.g., bodycams and dashcams) have transformed and galvanized public debate.<sup>29</sup> Private citizens have used secret recording to document domestic violence, elder abuse, misconduct by teachers, and other harms.<sup>30</sup> While these examples tend to advance the public's interest in transparency and justice, ubiquitous recording technology also raises serious privacy concerns. These include voyeuristic and other nonconsensual recordings,<sup>31</sup> the abuse and overuse of surveillance technology,<sup>32</sup> and the audio and video storage associated with the Internet of Things, wearable technology, and other devices that routinely record as part of their operation.<sup>33</sup>

This Article provides a comprehensive overview of how the bar has approached the legal ethics of secret recording by lawyers. While there is no consensus view, the growing omnipresence of recording technology has led regulators to increasingly conclude that secret recording is no longer deceitful—under the assumption that people are no longer particularly surprised, and no longer feel that they were deceived, when they learn that they were recorded without notice or consent.<sup>34</sup> Even if the deceit rationale for prohibiting secret recording is in decline, this Article argues that secret audio recording of *clients* deserves a separate analysis drawing on client-specific professional duties that weigh heavily against the practice.<sup>35</sup> I divide this analysis into three categories of secret client

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27. Examples of political scandals resulting from secret recording abound in the U.S. and abroad on a regular basis. In 2018, Casey Cagle, a Georgia gubernatorial candidate, faced three rounds of leaked secret recordings from conversations with a fellow candidate. Richard Fausset, *Georgia Governor Candidate Caught Saying He's in Race to Be the 'Craziest'*, N.Y. TIMES (July 15, 2018), <https://www.nytimes.com/2018/07/15/us/georgia-governor-cagle-kemp.html> [<https://perma.cc/ZYE2-XRV5>]. Conservative political activist James O'Keefe has made a career of using dubious and sometimes illegal means to record conversations revealing alleged misconduct of representatives of ACORN, NPR, and other actors and organizations perceived to have liberal political agendas. See Tim Alberta, *James O'Keefe Can't Get No Respect*, POLITICO MAGAZINE (May/June 2018), <https://www.politico.com/magazine/story/2018/05/04/james-okeefe-undercover-sting-profile-feature-2018-218015> [<https://perma.cc/S7ZE-VXVN>].

28. See John Burchill, *Tale of the Tape: Policing Surreptitious Recordings in the Workplace*, 40 MAN. L.J. 247 (2017).

29. See Alexandra Mateescu, Alex Rosenblat & Danah Boyd, *Dreams of Accountability, Guaranteed Surveillance: The Promises and Costs of Body-Worn Cameras*, 14.1 SURVEILLANCE & SOC'Y 122 (2016).

30. See Malcolm John Fisk, *Surveillance Technologies in Care Homes: Seven Principles for Their Use*, 19.2 WORKING WITH OLDER PEOPLE 51 (2015).

31. See Lance E. Rothenberg, *Re-Thinking Privacy: Peeping Toms, Video Voyeurs, and the Failure of Criminal Law to Recognize A Reasonable Expectation of Privacy in the Public Space*, 49 AM. U. L. REV. 1127, 1132 (2000) (suggesting that surveillance laws are ill-equipped to protect against voyeuristic crimes).

32. See GARY T. MARX, *WINDOWS INTO THE SOUL: SURVEILLANCE AND SOCIETY IN AN AGE OF HIGH TECHNOLOGY* (2016).

33. *Id.*

34. 2001 ABA Opinion, *supra* note 12, at 4.

35. This Article focuses on audio recordings, including the audio component of video recordings. When courts, scholars, and ethics opinions that have dealt with lawyers' secret recordings have on rare occasion mentioned video, they have focused exclusively on the audio from these recordings, not the images. See, e.g., Bast, *supra* note 16, at 688. Secret video recordings are subject to different, and in some respects more permissive, legal standards than audio recordings. See Jesse Harlan Alderman, *Police Privacy in the iPhone Era: The Need*

recordings, which I label “client-interest,” “lawyer-interest,” and “public-interest.”

In the client-interest category, the recording is made in order to advance the *client’s interests* as a means of diligent legal representation. I argue that this category should be analyzed primarily under the rules governing control (Model Rule 1.2) and communication (Model Rule 1.4). Irrespective of whether these recordings amount to deceit, they violate the lawyer’s duties under the *Model Rules* to consult, reasonably inform, and foster participation of clients. Given the potential client harms associated with such recordings, it would assume remarkable trust in lawyers to conclude that clients impliedly authorize (per Model Rule 1.2) unconsented recordings of lawyer-client conversations.

In the lawyer-interest category, the recording is made in order to advance the *lawyer’s own interests*. This category may arise when the lawyer believes that the client is likely to later mischaracterize lawyer-client conversations. Although the lawyer has a legitimate interest in self-defense, I argue that these recordings violate duties of loyalty, conflicts, and withdrawal. Furthermore, I argue that a rule permitting lawyers to make self-protective recordings could encourage a widespread practice of secretly recording clients. Instead of making such recordings, a lawyer can rely on other tools of self-protective documentation, such as written memos or consented recordings, which are less violative of client expectations.

In the public-interest category, the lawyer secretly records the client in order to advance the *public’s interests* by investigating and seeking to prevent the client’s harmful conduct. Like the lawyer-interest category, the analysis here focuses on loyalty, conflicts, and withdrawal. I argue for a prohibition against public-interest recordings subject to a possible narrow exception. Such recordings may be justified in rare circumstances when the lawyer is not required to withdraw or to maintain confidences, when the recording is necessary to prevent the harm, and when the harm to be prevented is reasonably certain and exceptionally severe.<sup>36</sup>

The Article is structured around three central contributions. First (in Part I), I summarize existing rules and ethics opinions on secret recording by lawyers across U.S. jurisdictions. Second (also in Part I), I establish that the deceit approach has failed to resolve the legal ethics of secret client recordings. Third (in Part II), I present a doctrinal alternative to the deceit approach rooted in client-specific duties. I conclude (in Part III) by recommending a prohibition against secret client recordings subject to a narrow exception in the public interest. Finally (in Part IV), I raise considerations for the future.

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for *Safeguards in State Wiretapping Statutes to Preserve the Civilian’s Right to Record Public Police Activity*, 9 FIRST AMEND. L. REV. 487, 489–511 (2011). As the technology to create secret video recordings becomes more pervasive, video recordings may increasingly deserve separate attention in the law governing lawyers.

36. As discussed *infra* Part II.C, opinions in several jurisdictions permit investigatory secret client recordings in enumerated circumstances. The New York City Bar provides a synthesis of these circumstances under a “societal good” test. N.Y.C. Bar Ass’n, Formal Op. 2003-02 (2003) [hereinafter 2003 NYC Opinion].



## I. DECEIT: THE CURRENT FRAMEWORK FOR ANALYZING SECRET RECORDING BY LAWYERS

This Part examines the prevailing deceit approach for analyzing secret recording by lawyers. Through a comprehensive review of published legal ethics opinions, I establish that the deceit approach has failed to produce a consensus view on whether lawyers are permitted to engage in secret recording. Although my focus in this Article is on recording *clients*, the existing perspectives from ethics opinions, case law, and scholarly commentary have generally not distinguished between recording clients and non-clients (e.g., witnesses, opposing counsel, and judges). Therefore, this Part, by way of reviewing the current landscape, includes standards that apply to lawyers secretly recording anyone (in Sections A through D) in addition to client-specific standards (in Section E).

### A. ALL-PARTY CONSENT JURISDICTIONS

In nine states, secret recording by anyone (lawyers included) is legally prohibited by “all-party” consent requirements under state wiretapping and eavesdropping laws.<sup>37</sup> Legal ethics opinions have consistently held that lawyers are forbidden from secretly recording when the recording violates such laws.<sup>38</sup> Exceptions in all-party consent statutes often include law enforcement, communication service providers, emergency services, and court orders.<sup>39</sup>

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37. See CAL. PEN. CODE §§ 630-632.7 (West 2018); FLA. STAT. ANN. § 934.03 (West 2018); 720 ILL. COMP. STAT. ANN. § 5/14-2 (West 2018); MD. CODE ANN., CTS. & JUD. PROC. § 10-402 (West 2018); MASS. GEN. LAWS ANN. ch. 272, § 99 (West 2018); MONT. CODE ANN. § 45-8-213 (West 2017); N.H. REV. STAT. ANN. § 570-A:2 (West 2018); 18 PA. STAT. AND CONS. STAT. ANN. § 5703 (West 2018); WASH. REV. CODE ANN. § 9.73.030 (West 2018). The all-party consent law in Illinois, 720 ILL. COMP. STAT. ANN. § 5/14-2, was amended in 2014 to permit one-party consent for recording of conversations in public places and private electronic communications. Nevertheless, the most recent Illinois ethics opinion on secret recording interprets the state law as providing an all-party consent standard. See Ill. State Bar Ass’n Comm. on Prof’l Conduct, Op. 18-01 (2018). The opinion determines that secret recording is prohibited on the grounds of the 8.4(b) violation regarding certain criminal conduct by lawyers, although the opinion notes that secret recording also likely violates the deceit rule. See *id.* In addition to these nine all-party states, Oregon has an all-party standard for in-person conversation, but not for phone calls. See OR. REV. STAT. ANN. § 165.540 (West 2018). Nevada takes the opposite stance, requiring all-party consent for phone calls but not for in-person conversations. See NEV. REV. STAT. ANN. §§ 200.620, 200.650 (West 2017). Michigan’s eavesdropping law appears to present an all-party standard but has been interpreted by the Michigan Court of Appeals as effectively a one-party consent rule. See *Sullivan v. Gray*, 324 N.W.2d 58 (Mich. Ct. App. 1982). Delaware has conflicting legal standards, but the more recent wiretapping law does not require all-party consent. See DEL. CODE ANN. tit. 11, § 2402 (West 2018). In these four states (Oregon, Nevada, Michigan, and Delaware), the issue of whether lawyers may secretly record is not entirely resolved as a question of criminal law. Federal law requires only one party to a conversation to consent to the recording. See 18 U.S.C. § 2511(2)(d) (2018).

38. These opinions cite to the Model Rule 8.4(b) prohibition on criminal conduct that “reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.” MODEL RULES R. 8.4(b).

39. Lawyers could fall under these exceptions in theory, yet no ethics opinions in the all-party consent states have contemplated whether lawyers acting in these capacities are permitted to engage in secret recording. See, e.g., FLA. STAT. ANN. §§ 934.03(2)(a)(1), 934.03(2)(j) (communication service provider exception and exceptions for persons “acting under the color of law”) (West 2015); N.H. REV. STAT. ANN. § 570-A:2(II)(h) (2017) (emergency services exception); DEL. CODE ANN. tit. 11, § 2402(c)(2) (West 2014) (court-ordered investigation exception).

## B. THE ABA PROHIBITION ERA: FROM WATERGATE TO THE NEW MILLENNIUM

Secret recording by lawyers poses a question for standards of professional conduct in the forty-one states and Washington, D.C. that legally permit people to record conversations without the consent of all parties. The most common approach in legal ethics opinions, case law, and commentaries is to assess whether such recordings are inherently deceitful. This approach has a long history, going back to a 1936 ABA opinion about a prosecutor recording a conversation between the defense attorney and the defendant.<sup>40</sup> The opinion held that it would be “professionally improper” for the lawyer to use the recording as evidence because making the recording violated the lawyer’s duty of candor under the *Canons of Professional Ethics*.<sup>41</sup> While the candor standard of the early *Canons* was broader than the modern deceit standard, both refer to the lawyer’s honesty and forthrightness.<sup>42</sup> Thus, the early emphasis on candor reflects a nascent version of what would later prevail as the deceit approach to secret recording.

The candor analysis was applied again three decades later in a 1967 ABA opinion, which was the first to address a lawyer secretly recording a *client*.<sup>43</sup> The lawyer in question recorded a phone call in which his client admitted that he owed unpaid legal fees to the lawyer.<sup>44</sup> The opinion concluded that the recording was professionally improper on the ground that lawyers’ duties of candor and fairness are owed not only to the court and other lawyers, but also to clients.<sup>45</sup>

On August 10, 1974—the day after President Nixon’s resignation—the ABA issued a formal opinion recommending a blanket prohibition against recording “any conversation whether by tapes or other electronic device, without the consent or prior knowledge of all parties to the conversation.”<sup>46</sup> This recommendation was based on an analysis of the deceit standard under the *Model Code* (which uses substantially the same language as the current Model Rule 8.4(c) deceit standard).<sup>47</sup> The prohibition was explicitly extended to recordings of clients.<sup>48</sup> The opinion carved out only a narrow possible exception, where it “might

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40. ABA Comm. on Prof’l Ethics & Grievances, Formal Op. 150 (1936).

41. *Id.* (citing CANONS OF PROF’L ETHICS Canon 15, 22 (1908)) (stating that attorneys must be zealous but not unscrupulous and outlining the lawyer’s standard of candor and fairness).

42. *Id.*

43. ABA Comm. on Prof’l Ethics & Grievances, Informal Op. 1008 (1967).

44. *Id.*

45. *Id.* (citing previous opinions that applied the Canon 22 duty of candor to clients, the opinion concluded that “there is an obligation on the lawyer to be candid and fair with his client when he is making a verbatim record of the conversation, and not to make such recording without such disclosure”).

46. 1974 ABA Opinion, *supra* note 3.

47. MODEL CODE OF PROF’L RESPONSIBILITY DR 1-102(A)(4) (AM. BAR ASS’N 1908) [hereinafter MODEL CODE] (prohibiting “conduct involving dishonesty, fraud, deceit, or misrepresentation.”).

48. 1974 ABA Opinion, *supra* note 3 (“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.”).

breach no ethical standard” for lawyers in law enforcement to use secret recording within “strictly statutory limitations” under judicial supervision.<sup>49</sup>

Between the 1974 ABA opinion and the turn of the millennium, sixteen states (as reflected in ethics opinions and case law) adopted the ABA’s general prohibition on secret recording.<sup>50</sup> Half of these states broadened the exceptions to this prohibition, incorporating, for example, criminal defense lawyers recording witnesses and any lawyer recording threats.<sup>51</sup> Another nine states rejected the 1974 ABA standard by adopting a contextual case-by-case approach.<sup>52</sup>

### C. CURRENT STANDARDS: DIVERGENT ANSWERS TO THE DECEIT QUESTION

In a 2001 formal opinion, the ABA reversed course, determining that the practice of recording conversations had become widespread and that the people of the new millennium assume that they are frequently recorded without notification, such that “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>53</sup> The opinion also noted that secret recording is legal in most jurisdictions,<sup>54</sup> and that the *Model Rules* no longer carry the “appearance of impropriety” standard but only deal with conduct that is actually improper.<sup>55</sup> On these grounds, the opinion concluded that secret recording is no longer per se unethical unless the lawyer is otherwise engaged in deceit, for example by “falsely represent[ing] that a conversation is not being recorded.”<sup>56</sup>

Table 1 summarizes the current disciplinary standards on secret recording by lawyers in all fifty states and Washington, D.C.<sup>57</sup> The positions discussed here deal with secret recording of both clients and non-clients. The state opinions are split on the issue: secret recording is considered per se unethical in sixteen states<sup>58</sup>

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49. *Id.*

50. Mercer, *supra* note 16, at 999.

51. *Id.* at 1009.

52. *Id.* at 1012.

53. See 2001 ABA Opinion, *supra* note 12, at 4.

54. *Id.* at 3–4.

55. The “appearance of impropriety” language was removed from the ABA framework with the introduction of the *Model Rules* in 1983. Some states, however, retain an appearance of impropriety standard. See Edward C. Brewer, III, *Some Thoughts on the Process of Making Ethics Rules, Including How to Make the “Appearance of Impropriety” Disappear*, 39 IDAHO L. REV. 321, 322 (2003).

56. 2001 ABA Opinion, *supra* note 12.

57. Opinions from local city and county bar associations are discussed in this Article, but not included in these tallies.

58. See State Bar of Ariz. Comm. on Prof’l Responsibility, Op. 00-04 (2000); Colo. Bar Ass’n Ethics Comm., Op. 112 (2003); Ind. State Bar Ass’n Legal Ethics Comm., Op. 1 (2000); Iowa Sup. Ct. Bd. of Prof’l Ethics & Conduct, Op. 83-16 (1982); Kan. Bar Ass’n Ethics Advisory Comm., Op. 96-9 (1997); Ky. Bar Ass’n,

**TABLE 1**  
**GENERAL POSITION ON LAWYERS ENGAGING IN SECRET RECORDING: 50 STATES**  
**AND WASHINGTON, D.C.**

Position on Secret Recording	Number of States
Forbidden by all-party consent law	9
Generally forbidden because inherently unethical	7
Generally permitted because not inherently unethical	21 (and Washington, D.C.)
No stated opinion	13

and not per se unethical in twenty-one states and Washington, D.C.<sup>59</sup> The remaining thirteen states have no stated position.<sup>60</sup>

Most of the ethics opinions on secret recording cite deceit as the primary framework for analysis. This is true in all seven state opinions that deem secret recording inherently unethical.<sup>61</sup> It is also true in sixteen of the twenty-one states where secret recording has been deemed permissible (not unethical per se) on the ground that it is not deceitful (see [Table 2](#) below).<sup>62</sup> Another four of the twenty-

Op. KBA E-279 (1984); S.C. Bar Ethics Advisory Comm., Op. 08-13 (2008).

59. See *In re PRB*, 989 A.2d 523, 528 (Vt. 2009); Ala. State Bar Disciplinary Comm'n, Op. 1983-183 (1984); Alaska Bar Ass'n Ethics Comm., Op. 2003-1 (2003); D.C. Bar, Op. 323 (2004); D.C. Bar, Op. 229 (1992); Idaho State Bar Comm. on Ethics & Prof'l Responsibility, Op. 130 (1989) [hereinafter Idaho Op. 130]; Me. Bd. of Overseers Prof'l Ethics Comm., Op. 168 (1999) [hereinafter Me. Op. 168]; State Bar of Mich., Op. RI-309 (1998) [hereinafter Mich. Op. RI-309]; Minn. Law. Prof'l Responsibility Bd., Op. 18 (2002); Miss. Bar Op. 203 (2013) [hereinafter Miss. Op. No. 203]; Mo. Sup. Ct. Advisory Comm., Op. 123 (2006) [hereinafter Mo. Op. 123]; Neb. Ethics Advisory Op. for Lawyers, Op. 06-07 (2006) [hereinafter Neb. Op. 06-07]; N.M. Ethics Advisory Comm., Op. 2005-03 (2005) [N.M. Op. 2005-03]; N.Y. State Bar Ass'n Comm'n on Prof'l Ethics, Op. 515 (1979); N.C. State Bar, Op. 192 (1995); N.C. State Bar, Op. 171 (1994); Ohio Bd. of Comm'rs on Grievances & Discipline, Op. 2012-1 (2012) [hereinafter Ohio Op. 2012-1]; Okla. Bar Ass'n Ethics Counsel, Op. 307 (1994); Or. State Bar Bd. of Governors, Op. 2005-156 (2005) (revised 2015) [hereinafter Or. Op. 2005-16]; TENN. RULES OF PROF'L CONDUCT R. 4.4 cmt. 1, 8.4(c) cmt. 6 (2017); Sup. Ct. of Tex. Prof'l Ethics Comm, Op. 575 (2006) [hereinafter Tex. Op. 575]; Utah State Bar Ethics Advisory, Op. 02-05 (2002) [hereinafter Utah Op. 02-05]; Va. State Bar Ass'n Legal Ethics Comm., Op. 1738 (2000) [hereinafter Va. Op. 1738]; Wis. State Bar Prof'l Ethics Comm., Op. E-94-5 (1994) [hereinafter Wis. Op. E-94-5].

60. The states with no announced position on secret recording are: Arkansas, Connecticut, Delaware, Georgia, Hawaii, Louisiana, Nevada, New Jersey, North Dakota, Rhode Island, South Dakota, West Virginia, and Wyoming. South Dakota is included here, although an Eighth Circuit case regarding secret recordings made by a South Dakota lawyer appears to follow the ABA 2001 standard. See *Midwest Motor Sports v. Arctic Cat Sales, Inc.*, 347 F.3d 693, 698-99 (8th Cir. 2003).

61. See opinions cited *supra* note 59. The deceit rules that are referenced include MODEL RULE 8.4(c), MODEL CODE DR 1-102(A)(4), and the candor standard under Canon 22. See MODEL CODE DR 102(A)(4), Canon 22. For five out of these seven states, the most recent opinion was issued before the ABA 2001 opinion. Only two states (Colorado and South Carolina) have issued opinions since 2001 that explicitly reject the new ABA standard.

62. See case, opinions, and comments cited *supra* note 59; *In re PRB*, 989 A.2d at 528; Ala. Op. 1983-183;

**TABLE 2**  
**DECEIT ANALYSIS IN OPINIONS HOLDING THAT SECRETLY RECORDING IS NOT PER SE UNETHICAL**

Deceit Analysis	Number of States
Not unethical because not inherently deceitful	16/21 (and Washington, DC)
Not unethical unless lawyer otherwise engages in deceit	14/21 (and Washington, DC)
Case-by-case, context-of-the-circumstances analysis of whether secret recording is deceitful	8/21 (and Washington, DC)

one states where secretly recording is deemed permissible also cite deceit, but not as the basis for determining that secret recording is inherently unethical.<sup>63</sup>

Most of the state opinions (fourteen of twenty-one and Washington, D.C.) that generally permit secret recording clarify that such recordings are prohibited when the lawyer misrepresents the fact that the conversation is being recorded.<sup>64</sup> This can include circumstances where the lawyer affirmatively lies to an interlocutor or, under the Missouri standard, simply implies that the conversation is not being recorded.<sup>65</sup>

A substantial minority of the states holding that secret recording is not per se unethical (eight of twenty-one and Washington, D.C.) use a case-by-case

Alaska Op. 2003-1; D.C. Op. 323; D.C. Op. 229; Me. Op. 168; Mich. Op. RI-309; Minn. Op. 18; Miss. Op. 203; Mo. Op. 123; Neb. Op. 06-07; Ohio Op. 2012-1; Okla. Op. 307; Or. Op. 2005-156; TENN. RULES OF PROF'L CONDUCT R. 4.4 cmt. 1, 8.4(c) cmt. 6; Tex. Op. 575; Utah Op. 02-05; Wis. Op. E-94-5.

63. Idaho Op. 130, *supra* note 59, at 1 n.1 (concluding that secret recording may be deceitful under 8.4(c), but that an 8.4(d) analysis of secret recording as prejudicial to the administration of justice is dispositive of the issue); N.M. Op. 2005-03, *supra* note 59 (holding that it is deceitful for lawyers to *omit* the fact that they are recording, but offering a case-by-case "fact-specific" analysis of this standard which suggests that secret recording is not inherently deceitful); Va. Op. 1738, *supra* note 59 (holding that secret recording is generally deceitful, but offering broad exceptions suggesting that secretly recording is not always or inherently deceitful); *see also* N.Y. State Bar Ass'n Comm'n on Prof'l Ethics, Op. 328 (1974) (holding that secret recording is unethical because it is deceitful). The New York opinion has not been updated at the state level since 1974, before the introduction of the state Rules of Professional Conduct. The more recent positions taken in New York County and New York City characterize secret recording as deceitful but include broad exceptions that suggest that such recordings are not always or inherently deceitful. N.Y. Cnty. Lawyer's Ass'n, Op. No. 696 (1993); 2003 NYC Opinion, *supra* note 36.

64. Under these opinions, to falsely lead an interlocutor to believe that a conversation is not being recorded violates the honesty requirements under Model Rules 4.1 and 8.4(c). MODEL RULES R. 4.1, 8.4(c).

65. *See, e.g.*, Mo. Op. 123, *supra* note 59 (holding that a lawyer cannot secretly record after "stat[ing] or imply[ing] that the conversation is not being recorded"); N.M. Op. 2005-03, *supra* note 59 (concluding that the lawyer's omission of a recording can constitute deceit); Lisa Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659 (1990) (arguing that omission and commission are morally identical means of deception).

contextual analysis to determine whether the recording is deceitful.<sup>66</sup> This approach is often traced to a 1981 Mississippi case, which held that secret recording is not deceitful when “the information requested was of such a nature as reasonably to import to the person called [on the telephone] the probability, if not certainty, that it would be taken down in some manner for future use.”<sup>67</sup> This approach is sometimes described as a “totality of the circumstances” test,<sup>68</sup> applying a “situation specific” or “fact specific” analysis.<sup>69</sup>

Deceit is similarly emphasized in the brief discussion of secret recording in the *Annotated Model Rules* and the *Restatement (Third) of the Law Governing Lawyers*.<sup>70</sup> The two federal court decisions that have weighed in on secret recording by lawyers have also cited deceit.<sup>71</sup>

#### D. DIFFICULTY IN APPLYING THE DECEIT ANALYSIS

While the deceit question has prevailed as the dominant mode of analysis, it has not led to consensus about whether lawyers are permitted to make secret recordings of their conversations. One challenge is that deceit is difficult to define without context.<sup>72</sup> A New Mexico opinion offers several factors to assess whether a secret recording is deceitful,<sup>73</sup> but concedes that this multi-factorial approach leads to an ambiguous standard such that “members of the bar are advised that there are no clear guidelines and that the prudent attorney avoids surreptitious recording.”<sup>74</sup> The insertion of a comment to the Tennessee 8.4(c) deceit rule noting that secret recording by lawyers is not inherently deceitful was reported to have

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66. See opinions cited *supra* note 59.

67. *Netterville v. Miss. State Bar*, 397 So. 2d 878, 883 (Miss. 1981).

68. See Ohio Op. 2012-1, *supra* note 59.

69. See, e.g., Wis. Op. E-94-5, *supra* note 59 (concluding that no “blanket interpretation” can be offered regarding lawyers’ secret recordings; instead a “highly fact intensive” analysis is appropriate, relying on four factors: the prior relationship of the parties, statements made during the conversation, whether threatening or harassing prior calls have been made, and the intended purpose of the recording).

70. See R. 8.4 annot. to para. (c) at 589 (6th ed. 2007); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 71 cmt. c, 106 cmt. b (2000).

71. See *Midwest Motor Sports v. Arctic Cat Sales, Inc.*, 347 F.3d 693, 698–99 (8th Cir. 2003) (concluding that even under the more permissive ABA 2001 standard the recording in question would be considered deceitful); *Nissan Motor Co. v. Nissan Comput. Corp.*, 180 F. Supp. 2d 1089, 1097 (C.D. Cal. 2002) (noting that secretly recording another lawyer is not only a violation of the California Penal Code but is also “inherently unethical”).

72. N.Y.C. Bar Ass’n, Formal Op. 1980-95 (1981) (“[C]onduct that is considered unfair or even deceitful in one context may not be so considered in another.”).

73. N.M. Ethics Advisory Comm., Formal Ethics Advisory Op. 1996-2 (1996) (proposing that the deceit analysis consider several factors, including: “Will the act of recording likely lead to a controversy which could make the lawyer a witness...? Did the lawyer make any false statement to get the witness to talk? Did the lawyer fail to disclose something obvious, fail to make clear the lawyer’s role or position in the litigation? Is the witness represented by counsel, or likely to be represented by counsel, in connection with the litigation? Did the lawyer do or say anything which might mislead the witness? Did the lawyer’s actions trick or coerce the witness in any way?”).

74. *Id.*

“generated more conversation among Tennessee lawyers than all of the other new Rules combined.”<sup>75</sup>

Furthermore, opinions that prohibit secret recording as inherently unethical while providing an extensive list of exceptions to this prohibition appear self-contradictory. For example, an Ohio opinion lifted a secret recording ban on the ground that the ban’s numerous exceptions introduced excessive “variables,” such that the previous opinion “[did] not provide appropriate guidance for Ohio lawyers.”<sup>76</sup> Uneasiness about creating an effective deceit standard may help to explain why thirteen states have issued no stated ethics opinion on secret recording.<sup>77</sup>

Ambivalence in the application of the deceit analysis is further evident in the nine state ethics opinions (in addition to the ABA 2001 opinion) that permit secret recording but make a special point to advise against the practice as “unprofessional,” not “advisable,” or not the “better practice” of a “prudent lawyer.”<sup>78</sup> For example, a Maine opinion applies the deceit analysis with remarkably candid reservations, concluding that “however much we would like to do so, we cannot find that electronically recording a conversation without the knowledge of the other participant(s) is per se prohibited by the text of the rule.”<sup>79</sup>

In spite of these challenges in applying the deceit standard, deceit may nevertheless be a fruitful doctrinal framework for analyzing secret recording by lawyers. The debate about whether secret recording is deceitful may eventually converge around a consensus view, one way or the other, as recording technologies and related social norms undergo continuing transformations (see the discussion *infra* Part IV) and as we gather empirical information about how people perceive secret recording. My aim here is not to dispute the validity of the deceit analysis but rather to provide an alternative approach that handles the client-specific question without entering the doctrinal thicket around deceit.

#### E. OPINIONS ON SECRET CLIENT RECORDINGS

The committee that authored the ABA 2001 opinion was “divided” about whether secretly recording clients constitutes professional misconduct.<sup>80</sup> Thus, the current ABA position is that such recordings are permissible, although the committee was unanimous in the admonition that the practice is “almost always” inadvisable.<sup>81</sup> As summarized in [Table 3](#), state ethics opinions are similarly

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75. Carl A. Pierce & Lucian T. Pera, *Your Ethics Roadmap*, 38 TENN. B.J. 14, 32–33 (2002).

76. See Ohio Op. 2012-1, *supra* note 59, at 5–6 (adopting a case-by-case, “totality of the circumstances” standard).

77. See states listed *supra* note 60.

78. See 2001 ABA Opinion, *supra* note 12; see also opinions cited *supra* note 59: Alaska Op. 2003-1; Me. Op. 168; Miss. Op. 203; N.C. Op. RPC 171; Neb. Op. 06-07; N.M. Op. 2005-03; Wis. Op. E-94-5; see also N.Y. Cnty. Lawyer’s Ass’n, Op. No. 696 (1993); 2003 NYC Opinion, *supra* note 36.

79. Me. Op. 168, *supra* note 59.

80. 2001 ABA Opinion, *supra* note 12, at 6.

81. *Id.*

**TABLE 3**  
**POSITIONS ON SECRET CLIENT RECORDINGS IN THE 50 STATES**

Position on secret client recordings	Number of States	States
Permitted explicitly	8	Alabama, Alaska, Idaho, Ohio, Maine, Minnesota, Mississippi, Texas
<i>Perhaps</i> permitted implicitly—clients are not distinguished from non-clients in an opinion that generally permits secret recording	10	Michigan, New Mexico, New York, North Carolina, Oklahoma, Oregon, Tennessee, Utah, Vermont, Virginia (and Washington, D.C.)
Forbidden explicitly—in an ethics opinion which otherwise permits secret recording of non-clients	2	Missouri, Wisconsin
Forbidden implicitly—clients are not distinguished from non-clients in an opinion that generally forbids secret recording	7	Arizona, Colorado, Indiana, Iowa, Kansas, Kentucky, South Carolina
Forbidden implicitly—under all-party consent laws	9	California, Florida, Illinois, Maryland, Massachusetts, Montana, New Hampshire, Pennsylvania, Washington
No position—lacking any opinion that explicitly or implicitly states a position on secretly recording clients	14	Arkansas, Connecticut, Delaware, Georgia, Hawaii, Louisiana, Nebraska, Nevada, New Jersey, North Dakota, Rhode Island, South Dakota, West Virginia, Wyoming

divided.<sup>82</sup> In eighteen states, secret client recordings appear to be generally forbidden.<sup>83</sup> In another eighteen states (and Washington, D.C.), opinions suggest

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82. The distinction between opinions that permit and forbid secret client recordings is somewhat blurred when we consider exceptions and specific enumerated circumstances where different opinions permit such recordings. These enumerated circumstances will be examined in detail in Part II.C.

83. This includes the nine all-party consent states cited *supra* note 37, the seven states where secretly recording is generally forbidden under ethics opinions cited *supra* 59, and the two state ethics opinions that offer



that secretly recording clients is permitted.<sup>84</sup> This includes eight states where such recordings are explicitly permitted and ten states (and Washington, D.C.) where secret recording by lawyers is permitted in general and, because no separate disciplinary standard for clients has been offered, it can be implied that secret recording of clients is not necessarily prohibited.<sup>85</sup> The remaining fourteen states offer no opinion either explicitly or implicitly stating a position on secret recording of clients.<sup>86</sup>

Because most ethics opinions on secret recording do not distinguish between recording clients and non-clients, the prevailing deceit framework in these opinions appears to also serve as the prevailing framework for analyzing secret recording of *clients*. Opinions in just two states, Wisconsin and Missouri, join the ABA 2001 opinion in providing a separate client-specific analysis referencing duties owed distinctly to clients (communication, loyalty, and fiduciary role).<sup>87</sup>

The remainder of this Article argues that the disciplinary analysis of secret client recordings should move away from 8.4(c) deceit and instead focus on client-specific duties that arguably resolve the question without entering the morass of the bar's ambivalence about the deceit approach. Yet, it is worth noting that a deceit standard specific to the recording of clients could be a viable doctrinal framework and may tend to support the limitations on secret client recordings advocated in this Article. Deceiving clients has been a longstanding concern among commentators of the legal profession, particularly with respect to misrepresentations about billing, mistakes, and the lawyer's expertise.<sup>88</sup> Clients are

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a permissive standard for secret recording in general but prohibit secret recording of clients cited *supra* note 61.

84. See *infra* Table 3.

85. Eight states explicitly permit secret recording of clients: Alabama, Alaska, Idaho, Ohio, Maine, Minnesota, Mississippi, and Texas. See opinions cited *supra* note 59. Ten states and the District of Columbia have issued opinions that generally permit secret recording and make no distinction between recording clients and non-clients: Michigan, New Mexico, New York, North Carolina, Oklahoma, Oregon, Tennessee, Utah, Vermont, Virginia, and Washington, DC. See opinions cited *supra* note 59. While I have characterized these ten permissive state opinions that do not distinguish between clients and non-clients as implicitly permitting secret *client* recordings, these states could instead be characterized as lacking any position on recording clients. Under this view, the bar would appear to have a clear preference for forbidding secret client recordings (18 states prohibiting and 8 states permitting), although the majority (24 states) would have no stated position on recording of clients. Thus, in either interpretation of these ten states, the legal ethics of secret client recordings across U.S. jurisdictions appears deeply unresolved.

86. In addition to the thirteen states that have no opinion on lawyers engaging in secret recording, this category includes Nebraska, whose ethics opinion on secret recording specifically notes that it applies only to non-clients. See Neb. Op. 06-07, *supra* note 59.

87. See Mo. Op. 123, *supra* note 59 ("Giving [notice of recording] is necessary under the attorney's duty to communicate with the client and is consistent with the attorney's duty of loyalty to the client."); Wis. Op. E-94-5, *supra* note 59 ("Different standards apply when the other party involved is a client. The fiduciary duties owed by a lawyer to a client and the duty of communication under SCR 20:1.4 dictate that statements made by clients over the telephone not be recorded without advising the client and receiving consent to the recording after consultation.").

88. Lawyers' clients are vulnerable to deceit because lawyer-client conversations are generally off the record and receive "less scrutiny than when a lawyer appears before a tribunal or meets with another lawyer."

encouraged to trust lawyers with their vital interests and confidential information. In contrast to other parties (particularly adverse witnesses), who may carry heightened expectations that a lawyer could secretly record a conversation, a client may expect that the lawyer, as loyal fiduciary and agent of the client, would not make such recordings without notice and consent. To the extent that clients carry such expectations, the violation of those expectations may be more likely to constitute deceit.

## II. THREE CATEGORIES OF SECRET CLIENT RECORDINGS

Recording of clients deserves a separate legal ethics analysis in recognition that a “fundamental distinction is involved between clients, to whom lawyers owe many duties, and non-clients to whom lawyers owe few duties.”<sup>89</sup> Yet, existing ethics opinions largely fail to provide a standard specific to the recording of clients. Moreover, these opinions fail to differentiate among the different circumstances that motivate and potentially could justify secret client recordings.<sup>90</sup> My analysis divides these circumstances into three categories:

- **Client-interest recordings.** Where the lawyer secretly records the client in order to advance *the client's interests*.
- **Lawyer-interest recordings.** Where the lawyer secretly records the client in order to advance *the lawyer's interests*.
- **Public-interest recordings.** Where the lawyer secretly records the client in order to advance *the public's interests* by seeking to prevent the client's planned harmful conduct.<sup>91</sup>

These categories are not necessarily mutually exclusive. A secret client recording could serve multiple purposes. Furthermore, the intent of the lawyer may be difficult to determine (although the use of the recording is often instructive) and

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Lerman, *supra* note 65, at 664. Furthermore, clients' “relative ignorance creates opportunities for undetected deception.” *Id.* Deceiving the client can be used for the client's benefit, such as white lies that prevent the client from interrupting the lawyer's work or strategic lies that, for example, lead a client to provide more emotional testimony due to the surprising nature of questions that the lawyer asks the client in a deposition or in front of a tribunal. *Id.* at 684, 737.

89. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 71, at 125 (2000); *see also* 2001 ABA Opinion, *supra* note 12 (with respect to secret recording of clients, the ABA 2001 opinion acknowledges that “ethical considerations arise that are not present with respect to non-clients”); Bast, *supra* note 16 (suggesting that recording clients “seem[s] contrary to the purposes of the ethics rules” and “if advisable” the rules could prohibit secret recordings of clients).

90. While the Wisconsin and Missouri opinions are the first to recommend client-specific disciplinary standards based on communication and loyalty duties, both opinions conduct their client-specific analysis in only two sentences. *See* Mo. Op. 123, *supra* note 59; Wis. Op. E-94-5, *supra* note 59.

91. In addition to these three categories, we might recognize a scenario where the lawyer intends to make a consented recording but forgets to notify the client of the recording device. I do not offer an extensive analysis for such inadvertently secret recordings. These recordings could raise some of the benefits and burdens of secret recording under all three categories discussed in this Article.

thus may be interpreted as spanning multiple categories.<sup>92</sup> The purposes of a recording could even change over time. For example, a recording could initially be made to benefit the client but later find use in defending the lawyer in a malpractice claim. This Article is concerned with the legal ethics of making the recording in the first place. Yet, it is important to note that this analysis implicates the intended and unintended uses that the recording may later serve.

#### A. SECRETLY RECORDING THE CLIENT IN ORDER TO ADVANCE THE CLIENT'S INTERESTS

This Section examines recordings made in order to advance the client's interests as a matter of diligent representation. The Section begins with a discussion of how lawyers may or may not find value in client-interest recordings. I then review per se harms and wrongs attaching to these recordings. I conclude, under an analysis of the duties of communication and shared control, that client-interest recordings should be prohibited.

##### 1. HOW A SECRET CLIENT RECORDING COULD ENHANCE THE REPRESENTATION

A lawyer who secretly records a client could conceivably enhance the representation by creating documentation of client statements that are (1) recorded in reliable verbatim format and (2) particularly candid (owing to the secretive nature of the recording).

The first of these two points—that recording is a verbatim, or near verbatim, format—can provide substantial value to the client. For example, recordings can assist the lawyer in avoiding errors relating to memory failure, including loss and distortion of testimony.<sup>93</sup> Recording may be particularly helpful to lawyers who are disabled, including lawyers who have dyslexia or other conditions that inhibit recall, lawyers who are physically unable to take written notes, and lawyers who are visually impaired and rely on audio technologies. Recordings can also help ameliorate the client's memory troubles, inconsistent statements, or issues relating to client illness.<sup>94</sup> Recordings may find further value in memorializing

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92. As will be evident from my use of the Michael Cohen example below, Cohen has explained his recordings of Trump by reference to all three categories.

93. In a client representation context, enhanced memory capacities can promote not only the lawyer's competence (Model Rule 1.0), but also professional diligence (Model Rule 1.3), particularly when a lawyer has an overwhelming caseload and may rely on recordings of previous client meetings in order to refresh the lawyer's memory. See Utah State Bar Ethics Advisory Comm., Op. 96-04 (1996) ("An attorney's ability to recall information from conversations is important to his competence in undertaking an action."). Where such recordings are advantageous to the client, cost-effective, and permitted by the rules, the lawyer may even feel compelled to record under the duty of zealous advocacy. See MODEL RULES pmb. & R. 1.3.

94. Recording can be used to document client recollections when they are fresh, as well as provide a means to effectively revisit those fresh recollections upon rehearsing for testimony, which could be years after the recollections were recorded. A recording can further provide the lawyer a means to review and resolve the client's inconsistent statements. See Okla. Op. 307. Lawyers with gravely ill clients may use recording to document client statements before the client perishes. Similarly, when executing a will, a recording can provide documentation of client competence and lack of duress.

lawyer-client meetings that contain particularly complex content,<sup>95</sup> meetings occurring in law student clinics,<sup>96</sup> and meetings involving organizational clients.<sup>97</sup>

As has been extensively discussed in the qualitative social scientific literature, running a recording device enables the researcher (or lawyer, by analogy) to pay close attention to an interlocutor, maintaining eye contact, and observing and taking notes on contextual information in a conversation.<sup>98</sup> This ability to “be present” with the client, rather than preoccupied with notetaking, may be particularly helpful in building rapport with and providing emotional support to traumatized clients. Furthermore, the lawyer, like the researcher, can transcribe the full text of a recorded meeting and later review and analyze the transcript for the speaker’s wording, tone, hesitations, and other details that may not have been immediately apparent.<sup>99</sup> New and emerging recording and transcription technology enhances these benefits.<sup>100</sup>

In the examples cited so far, many lawyers may prefer to seek consent from a client before recording. Yet, it is conceivable that the value of these recordings could be enhanced by making the recording *secretly*, particularly when the lawyer believes that clients would be less candid if they were aware that the recording device was running.<sup>101</sup> Social scientific researchers have documented reactivity effects of tape recording research interviews that can inhibit respondents’ willingness to share sensitive information.<sup>102</sup> It is a deeply-rooted norm in the legal profession that the lawyer can provide the best client service only when the client is entirely forthcoming with the lawyer.<sup>103</sup> The comments to the Model

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95. Recordings may assist with language translation and documentation of detailed, technical matters, where precise notetaking may require multiple listens.

96. Some law school clinics record client interviews as opportunities to supervise and provide feedback on student practice.

97. With organizational clients, a recording can help the lawyer provide a transparent institutional record of meetings with officers, employees, and other representatives of the organization. This documentation can help hold representatives accountable to the entity client.

98. See Lynne M. MacLean et al., *Improving Accuracy of Transcripts in Qualitative Research*, 14.1 QUALITATIVE HEALTH RES. 113 (2004).

99. Brown & Bast, *supra* note 23, at 762 (noting that recording “captures the inflection and tone of the speaker and allows the listener to truly stand in the shoes of the conversation’s audience”); NATASHA MACK ET AL., *QUALITATIVE RESEARCH METHODS: A DATA COLLECTOR’S FIELD GUIDE* (2005).

100. Christian Bokhove & Christopher Downey, *Automated Generation of ‘Good Enough’ Transcripts as a First Step to Transcription of Audio-recorded Data*, 11.2 METHODOLOGICAL INNOVATIONS 1 (2018) (discussing applications of emerging automatic transcription technology for qualitative research purposes).

101. Bast, *supra* note 16 (suggesting that clients may choose their words more carefully when they know they are being recorded); Idaho State Bar Comm. on Ethics & Prof’l Responsibility, Formal Op. 130 (1989) [hereinafter Idaho Op. 130] (“People are more cautious, and therefore less candid in their discussions, when they know, or believe their conversations are being recorded.”).

102. Rue Bucher et al., *Tape Recorded Interviews in Social Research*, 21.3 AM. SOC. REV. 359 (1956); Sandy Q. Qu & John Dumay, *The Qualitative Research Interview*, 8.3 QUALITATIVE RES. ACCT. & MGMT. 238 (2011).

103. Eli Wald, *Taking Attorney-Client Communications (and Therefore Clients) Seriously*, 42 UNIV. S.F. L. REV. 747, 757–58 (2008).

Rule 1.6 confidentiality standard express this norm by encouraging the client to “communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.”<sup>104</sup>

In spite of the availability of recording technology and the potential benefits of client-interest recordings, lawyers may generally be disinclined to record their own clients without notice or consent. A recording creates documentation of statements that, if disclosed to adverse parties, could constitute material for impeachment and other liability for the client. If the client later testifies, earlier recorded statements could be used to highlight inconsistencies (where the recordings are not privileged or otherwise protected from disclosure). Criminal defense lawyers, for example, go to great lengths to suppress and avoid creating client statements, often on the grounds of Fourth Amendment violations, *Miranda* warnings, and right-to-counsel issues.<sup>105</sup> Furthermore, when a client discovers that a lawyer has made a recording, the client may feel betrayed, which can severely damage the lawyer-client relationship and lead to adverse online and word-of-mouth reviews of the lawyer.

These risks associated with secret client recordings could be reduced if the lawyer quickly informs the client of the existence of the recording after it is made. The lawyer could then consult with the client about whether to destroy the recording or keep it for future representation-enhancing purposes. Yet, this approach is still likely rare and unappealing to many lawyers. While the lawyer may seek to explain to the client that the recording can benefit the representation by creating a candid and verbatim record, the lawyer may fear that the client’s discovery of the secret recording would vitiate the trust that is essential to an effective lawyer-client relationship.

Imagine, for example, an asylum seeker whose experiences of torture are at the heart of their claim for immigration relief. Such a client may find that the traumatic nature of certain memories makes it difficult to keep the details of their story straight. A lawyer for the asylee, anticipating that the asylum officer will closely scrutinize the veracity of the asylee’s factual claims, may find value in creating a candid and verbatim recording of a lawyer-client meeting in which the asylee discusses certain traumatic details. Such a recording could then serve as the basis for rehearsing near scripted statements that the client would later repeat in the asylum interview. The lawyer may feel that although making such a recording in a secretive manner risks diminishing the asylee’s trust in the lawyer, it is advantageous to obtain the recording secretly in order to avoid inhibiting the client’s sharing of key facts. Although the lawyer has other means of notetaking at

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104. MODEL RULES R. 1.6 cmt. 2 (suggesting that open communication from the client to the lawyer is a precondition for the lawyer to “represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct”).

105. While prosecutors do not have a traditional client, they are also perhaps incentivized to avoid creating recorded statements due to the constitutionally mandated duty to disclose inconsistent and exculpatory evidence. *See Giglio v. United States*, 405 U.S. 150, 154 (1972); *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

their disposal, they may find that such a recording is a particularly helpful aid for the client's rehearsal.

Another helpful illustration of client-interest recordings (and indeed all three categories) can be found with Michael Cohen's recordings of Donald Trump. Cohen explained in his congressional testimony that the recordings served as a means of effective representation, noting that he sometimes would "use the recordings for contemporaneous notetaking instead of writing it down. I find it easier."<sup>106</sup> When asked whether he recorded other clients, Cohen replied, "I have recordings of people, yes."<sup>107</sup> And when asked whether he notified these people that they were being recorded, Cohen replied, "In New York State you don't have to do that."<sup>108</sup>

One could imagine that in addition to notetaking convenience, Cohen (or a hypothetical version of Cohen) might secretly record a client like Trump in order to improve the factual consistency of the client's statements. Cohen faced a client who accumulates a great deal of potential legal liability through inconsistent and dishonest statements.<sup>109</sup> A lawyer in these circumstances may seek to keep the client's stories straight by recalling the exact wording of earlier statements of material legal significance.

It is even conceivable that Cohen, who, according to his own account, once had such "blind loyalty" for Trump that he would "take a bullet" for him,<sup>110</sup> may have made these secret client recordings in order to shield his client from exposure to criminal liability. Perhaps Cohen even intended to take liability bullets himself. In a publicly released excerpt of Cohen's recordings, he responded to Trump's apparent suggestion to pay hush money in cash by saying: "No, no, no, no, no. I got it."<sup>111</sup> Cohen's "I got it" may have signaled an intention to assume

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106. *Hearing with Michael Cohen, Former Attorney to President Donald Trump, Before the H. Comm. On Oversight & Reform*, 116th Cong. 129 (2019) (statement of Michael Cohen) [hereinafter Cohen Testimony].

107. *Id.*

108. *Id.* Here, Cohen appears to be referencing the one-party consent law in New York, not the legal ethics standards, which most likely do not support his routine use of secret recording. *See* 2003 NYC Opinion, *supra* note 36; N.Y. State Bar Ass'n Comm'n on Prof'l Ethics, Op. 515 (1979). When Representative Ralph Norman asked Cohen whether the recordings of Trump violated "lawyer-client privilege" and the duties of an "honest lawyer" (Norman likely meant to refer to the ethical duty of confidentiality not attorney-client privilege, which only prevents disclosure of lawyer-client communications as evidence), Cohen evaded the ethics question saying that he "never thought that . . . that recording even existed. I had forgotten." Cohen Testimony, *supra* note 106, at 129. Norman then followed up by asking Cohen, "If the shoe were reversed, would you like your trusted lawyer recording you?" *Id.* Cohen replied, "I would probably not. No." *Id.* Here, Cohen appears to acknowledge that recording for notetaking purposes is not necessarily, on balance, a great benefit to the client.

109. *See, e.g., In 928 Days, President Trump Has Made 12,019 False or Misleading Claims*, WASH. POST (Aug. 5, 2019) <https://www.washingtonpost.com/graphics/politics/trump-claims-database/> [<https://perma.cc/XL44-WQYP>].

110. Emily Jane Fox, *Michael Cohen Would Take A Bullet for Donald Trump*, VANITY FAIR (Sept. 6, 2017), <https://www.vanityfair.com/news/2017/09/michael-cohen-interview-donald-trump> [<https://perma.cc/QTG8-R9AM>].

111. Aaron Blake, *The Trump-Michael Cohen Tape Transcript, Annotated*, WASH. POST (July 24, 2018), <https://www.washingtonpost.com/news/the-fix/wp/2018/07/24/the-trump-michael-cohen-tape-transcript-annotated/> [<https://perma.cc/33DU-BDNL>].

risk himself, keeping Trump clean of criminal liability. After all, at the time of this writing, Cohen is facing a federal prison sentence.<sup>112</sup> Trump is not.<sup>113</sup>

## 2. PER SE HARMS AND WRONGS

Before proceeding to the analysis of the client-interest category under the *Rules of Professional Conduct*, an important underlying question deserves attention. The existing ethics opinions have failed to address whether secret client recordings are per se harmful to the client even in the absence of disclosure to third parties. When a lawyer denies a client the opportunity to decide whether to be recorded, this denial itself may constitute a substantial violation of the client's dignity and autonomy.<sup>114</sup> In other words, the harm of secret client recording may occur at the moment the recording is made, not later when it is disclosed.<sup>115</sup> Furthermore, from a deontological perspective, the recording may constitute a *wrong* even if the client never discovers that they were recorded (even if there is no harm).<sup>116</sup>

Dignity concerns have been salient in the current groundswell of public and scholarly debate about privacy protection in the digital era. This includes the EU's General Data Protection Regulation, which explicitly aims to "safeguard the data subject's human dignity, legitimate interests, and fundamental rights."<sup>117</sup> This understanding that privacy involves dignity and fundamental rights is highly

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112. Matt Zapotosky & Devlin Barrett, *Michael Cohen sentenced to three years in prison for crimes committed while working for Trump*, WASH. POST (Dec. 12, 2018), [https://www.washingtonpost.com/world/national-security/michael-cohen-scheduled-to-be-sentenced-for-crimes-committed-while-working-for-trump/2018/12/11/57226ff2-fcbf-11e8-83c0-b06139e540e5\\_story.html](https://www.washingtonpost.com/world/national-security/michael-cohen-scheduled-to-be-sentenced-for-crimes-committed-while-working-for-trump/2018/12/11/57226ff2-fcbf-11e8-83c0-b06139e540e5_story.html) [<https://perma.cc/C8FS-VJHH>].

113. Of course, these may not have been the motivations of the real non-hypothetical Michael Cohen. Cohen later abandoned and claimed to regret his loyalty to Trump. Cohen Testimony, *supra* note 106, at 10. In both his sentencing hearing and his congressional testimony, Cohen explicitly inculpated Trump in criminal conduct, including accusations that Trump directed the actions that led to some of Cohen's felony convictions. *Id.* at 13; Transcript of Sentencing at 26–27, *United States v. Cohen*, 18 CR 850 (S.D.N.Y. 2018). But at the time the recordings were made, Cohen perceived himself to be, in the words of his congressional testimony, a "loyal soldier" under the "intoxication of Trump power." Cohen Testimony, *supra* note 106, at 15, 168. Thus, it is possible that Cohen's recordings were initially intended to benefit his client. In this interpretation of Cohen, he illustrates client-interest recordings (to advance the client's interests), although his extreme self-sacrificing allegiance to his client is an outlier in the profession and provides no evidence that client-interest recordings are particularly common.

114. If secret recordings by lawyers are deemed deceitful, as many jurisdictions maintain, this deceit may suggest further disrespect for client dignity. See Lerman, *supra* note 65, at 683 (deceit, for lawyers, can be a "way of asserting superiority in the relationship with the client . . . . By deceiving a client, a lawyer can dehumanize him or her, treating the client as an annoyance").

115. It is likely that a separate harm may occur at the moment of disclosure, which can be assessed under the duty of confidentiality.

116. See Stephen R. Galoob & Ethan J. Leib, *Fiduciary Loyalty, Inside and Out*, 92 S. CAL. L. REV. 69, 103 (2019).

117. Regulation 2016/679, On the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95.46/EC, art. 88, 2016 O.J. (L 119) (General Data Protection Regulation).

relevant to unconsented voice recording.<sup>118</sup> The per se harms of being recorded derive not only from the information being conveyed but also from the autonomy and dignity interests associated with the affective, sui generis nature of a person's voice, which is intimately tied to one's personality and identity.<sup>119</sup>

Furthermore, as Professor David Sklansky argues, privacy violations can raise dignity concerns not only for "data subjects," who lose their "private enclave" or "refuge," but can be even worse for privacy violators who are "train[ed] . . . in habits of dehumanization and depersonalization."<sup>120</sup> These concerns have particular force when placed within the context of special relationships such as the fiduciary-principal relationship between lawyers and clients, where a break in trust can be particularly harmful and wrongful, and where lawyers may be structurally incentivized to dominate and dehumanize clients.<sup>121</sup>

Even under a more narrowly consequentialist view of harm, the creation of the recording can be deemed per se harmful simply by the fact that making the recording increases the expected severity of the potential harm of disclosure. Such disclosure could occur by the lawyer's own decision, a court order, or inadvertent means. While written forms of notetaking do not necessarily provide any greater or lesser probability of disclosure than recording, recording distinguishes itself in terms of the severity of expected harm. Written notes that document lawyer-client conversations, even if taken in near-verbatim format using simultaneous transcription software or highly skilled short-hand, are likely to cause less harm than audio recordings with respect to creating damaging evidence, adverse public response, and loss of trust in one's lawyer.

Regarding evidentiary risks, secret client recordings might not generally raise substantially more risk of creating admissible evidence than a lawyer's written notes on the same conversation.<sup>122</sup> Yet, if the recording is admissible, it may have

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118. We do not have empirical information about how clients feel about lawyers secretly recording them, but Pew data suggests that 88% of U.S. adults feel that it is important to not have "someone watch or listen to them without their permission." This number may be even higher if we add recording to the watching and listening. See Mary Madden & Lee Rainie, *Americans' Attitudes About Privacy, Security and Surveillance*, PEW RESEARCH CTR (May 20, 2015), <http://www.pewinternet.org/2015/05/20/americans-attitudes-about-privacy-security-and-surveillance/> [<https://perma.cc/52NN-T9X8>] (This number combines the 67% of participants who felt that it was important and the 20% who responded that it was somewhat important).

119. An analogous point can be made for recorded images of a person. One's physical appearance raises fundamental identity and personality interests. See discussion *infra* Part IV.

120. David Alan Sklansky, *Too Much Information: How Not to Think about Privacy and the Fourth Amendment*, 102 CALIF. L. REV. 1069, 1107, 1111 (2014).

121. See Lerman, *supra* note 65, at 683; David B. Wilkins, *Team of Rivals? Toward a New Model of the Corporate Attorney-Client Relationship*, 78 FORDHAM L. REV. 2067, 2069 (2019).

122. The admissibility of both (1) a lawyer's recordings of lawyer-client conversations and (2) a lawyer's written notes about those same conversations face a number of hurdles in common, including attorney-client privilege and (if applicable) standards for *inter alia* admissions, statements against interest, recollections recorded, and business records (as an exception to hearsay). Some of these standards may, in some circumstances, distinguish written notes from recording. The work-product doctrine has generally been applied to lawyers' notes (subject to waivers and exceptions) but not to recordings. Furthermore, recordings may have greater indicia of reliability, which can support a finding of admissibility. At the same time, the written notes may be more



greater probative value than written notes, and could therefore expose the client to greater criminal liability. The distinct impact of recording (relative to written notes) largely owes to the “self-authenticating” nature of recordings, which makes the recorded material difficult to dispute as inaccurate or incomplete.<sup>123</sup>

When recordings are disclosed to the public, clients may be subject to greater embarrassment and public backlash than might result from disclosure of written records, both because of the credibility of the recording and the affective impact of hearing someone’s voice.<sup>124</sup> Furthermore, such recordings may be more likely to go viral when broadcast via the internet, reaching a wider audience compared to a story based on written documentation. For clients who are secretly recorded by their lawyers, a publicly disclosed audio recording can either mobilize public support or, depending on how the recording is perceived, risk turning a client’s family, friends and community against them. These social costs to the client are exacerbated by the secretive nature of the recording, which, as the 2001 ABA opinion noted, “captures the client’s exact words, no matter how ill-considered, slanderous or profane.”<sup>125</sup>

Furthermore, if a client discovers that a secret recording was made, the client may lose trust in the lawyer. More generally, if clients know that lawyers are permitted to make secret recordings, clients may place less trust in their lawyers, thereby diminishing the quality of legal representation. Just as surveillance can have chilling effects on relationships and public discourse, secret recording by lawyers may have profound chilling effects on client candor in lawyer-client meetings.

Having argued that recordings in the client-interest category are likely uncommon in practice and raise potential harms and benefits to clients, the rest of this Section considers the legal ethics of client-interest recordings. The existing state

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likely to qualify as business records in establishing an exception to hearsay. Whether recordings or written notes are more likely to be admissible may require a fact-specific analysis. *See, e.g.,* *Costa v. AFGO Mech. Serv., Inc.*, 237 F.R.D. 21, 26 (E.D.N.Y. 2006) (secret recordings should be treated no differently than other documents for discovery purposes). It is worth noting that, while these obstacles to admissibility may exclude many lawyers’ notes and recordings relating to the client, they do not exclude all of these materials. As discussed *infra* part II.C, lawyers’ recordings of lawyer-client conversations have been admitted as evidence in prosecutions of lawyers’ clients. Convictions based on this evidence have been upheld on appeals. *See* *Wm. T. Thompson Co. v. Gen. Nutrition Corp.*, 593 F. Supp. 1443, 1454 (C.D. Cal. 1984).

123. Justin Marceau & Alan K. Chen, *Free Speech and Democracy in the Video Age*, 116 COLUM. L. REV. 991, 1010 (2016) (noting that video recordings have a capacity to shape public debate that exceeds words alone, as video provides an “instant-replay review for real-world events”).

124. For example, when the public heard Donald Trump’s boastful tone in the Access Hollywood Tape, where Trump claimed to have committed acts of sexual assault, many listeners may have reacted differently than they did to printed stories about Trump’s history of sexual misconduct. Similarly, when the public heard Eric Garner’s repeating “I can’t breathe” while subjected to a lethal police chokehold, his voice became a social-movement rallying cry. *‘We Can’t Breathe’: Eric Garner’s Last Words Become Protesters’ Rallying Cry*, THE GUARDIAN (Dec. 4, 2014), <https://www.theguardian.com/us-news/2014/dec/04/we-cant-breathe-eric-garner-protesters-chant-last-words> [https://perma.cc/82HV-57WF].

125. 2001 ABA Opinion, *supra* note 12 (noting that a secret recording of a client can cause greater embarrassment than written notes).

ethics opinions have little to offer regarding this category.<sup>126</sup> I argue below that such recordings violate the spirit and letter of the communication duty and the duty of shared control.

### 3. THE DUTY TO COMMUNICATE WITH CLIENTS (MODEL RULE 1.4)

The *Model Rules* communications standard (Rule 1.4) in some respects appears to demand open communication with clients. Lawyers are required to “reasonably consult” with the client about the means of representation (1.4(a)(2)), to keep the client “reasonably informed about the status of the matter” (1.4(a)(3)), and more generally to provide “reasonable communication” (cmt. 1) that enables the client “effectively to participate in” (cmt. 1), “participate intelligently in” (cmt. 5), and “make informed decisions regarding” (1.4(b)) the representation.<sup>127</sup> Thus, lawyers must explain matters to the extent that would fulfill “reasonable client expectations for information consistent with the duty to act in the client’s best interests, and the client’s overall requirements as to the character of representation.”<sup>128</sup>

The client is likely to feel that knowing that one is being recorded is something “reasonably necessary” to the client’s ability “to make informed decisions

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126. See Sup. Ct. of Tex. Prof'l Ethics Comm., Op. 575 (2006) (permitting lawyers to record clients without notice when the recording is “made to further a legitimate purpose of the lawyer or the client.”). The examples offered of a legitimate purpose include aiding memory and creating an accurate record. *Id.* These examples on their own make a weak case for *secretly* recording clients, as maintaining an accurate record does not require the client to be unaware of the recording. Some standards are remarkably permissive of secret client recordings without considering potential benefits and risks to clients (and thus may apply to client-interest recordings). For example, an Idaho opinion that forbids secret recording in general carves out an unqualified exception for secret *client* recordings on the ground that such recordings would be covered by the lawyer’s duty of confidentiality. See Idaho Op. 130, *supra* note 101 (“As to clients, all conversations between an attorney and the client are confidential, which every client has a right to expect and require. Therefore, the recordation of such a conversation should not impede the candid discussions between the client and the attorney.”); see also Kan. Bar Ass’n, Op. 96-9 (1996) (permitting secret recording to record a memo). Other opinions where secret recording of clients is generally permitted are summarized *supra* Table 3.

127. MODEL RULES R. 1.4.

128. MODEL RULES R. 1.4 cmt. 5. Although the rhetoric of the communication duty appears to offer a robust duty of transparency with clients, client complaints about the quality and quantity of communication by the lawyer are widespread and underenforced. See J. Nick Badgerow, *The Lawyer’s Ethical, Professional and Proper Duty to Communicate with Clients*, 7 KAN. J.L. & PUB. POL’Y 105, 105 (1998); Annotation, *Failure to Communicate with Client as Basis for Disciplinary Action Against Attorney*, 80 A.L.R.3d 1240 § 2[a] (AM. LAW INST. 1977) (the disciplinary penalty for violating the communication duty is generally analyzed by courts under a “totality of the circumstances” test, considering the “moral fitness of the attorney, the ordeal of enduring a lengthy disciplinary proceeding, the harm suffered by others as the result of the misconduct, the need to protect the public, and other variables”). Furthermore, legal scholars have lamented that the communication standards in the Model Rules fail to encourage the realization of the ideal of the “informed client-principal.” Wald, *supra* note 103, at 769. At the heart of these concerns is what Professor Eli Wald has characterized as the ABA’s “one-way communications regime,” wherein clients are encouraged to openly share information with lawyers, while lawyers are only encouraged to share very limited information with clients. *Id.* at 748, 769. This communication asymmetry is reflected in the asymmetry of the confidentiality standard (under Model Rule 1.6), which insists that clients divulge information to the lawyer, but puts no demand on lawyers to offer clients a Miranda-like warning about the exceptions to confidentiality protections. See Wald, *supra* note 103, at 748, 769.

regarding the representation” (1.4(b)).<sup>129</sup> Furthermore, client-interest recordings, by definition, constitute a means of enhancing the representation. The lawyer is required under Rule 1.4(a)(2) to reasonably consult with the client about the means of representation.<sup>130</sup> This consultation standard sits at the intersection of communication and control doctrines. Applying this standard requires a close look at the duty of shared control under Model Rule 1.2.

#### 4. THE DUTY TO SHARE CONTROL WITH CLIENTS (MODEL RULE 1.2)

Under the *Model Rules* framework, decision-making authority between lawyer and client is divided between the means of representation (where the lawyer shall “consult with the client”) and the ends of representation (where the lawyer shall “abide by a client’s decisions”).<sup>131</sup> This creates “presumptive spheres of authority,” where the client controls the ends of representation and the lawyer controls the means subject to a consultation duty.<sup>132</sup> My discussion here largely focuses on how client-interest recordings function as a means of representation, but it is possible that these recordings could, at least in retrospect, also influence the ends of representation. For example, even if the recording advances the client’s cause, the client may feel in retrospect that it would have been better to not pursue the claim at all rather than to face the risks of being recorded without notice.<sup>133</sup> If the clients’ ends would be altered, the decision is allocated to the client under Model Rule 1.2. In order to make this decision, the client would clearly need to be consulted before the recording is created.

If client-interest recordings are viewed as merely a means of representation, without influencing the objectives, such recordings nevertheless run afoul of the duty to share control with clients. Model Rule 1.2 requires the lawyer to consult with the client regarding the means of representation except when the lawyer takes an action “impliedly authorized to carry out the representation.”<sup>134</sup> This framework gives the lawyer power to act on the client’s behalf without

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129. MODEL RULES R. 1.4.

130. MODEL RULES R. 1.4. (“A lawyer shall . . . reasonably consult with the client about the means by which the client’s objectives are to be accomplished”).

131. MODEL RULES R. 1.2(a).

132. Judith L. Maute, *Allocation of Decisionmaking Authority Under the Model Rules of Professional Conduct*, 17 U.C. DAVIS L. REV. 1049 (1984).

133. This claim that the ends of representation could be influenced by secret client recordings is supported by the general criticism of the means-ends dichotomy as vague and false. Meeting with a lawyer tends to shape the client’s goals by informing the client about what objectives are possible, likely, and appropriate. *See id.* at 1067 (arguing that the means-ends dichotomy implies that clients come to lawyers with fixed ends, but, in practice, client objectives are complex and involve a “unique balance of personal values subject to constant modification”); Marcy Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C. L. REV. 315, 330 (1987) (suggesting that the means of representation are not a simple matter of applying legal expertise, but rather involve “questions of values and unquantifiable risk”); Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41 (1979).

134. MODEL RULES R. 1.2(a).

consultation in a manner deemed necessary and professional.<sup>135</sup> A lawyer who secretly records a client in support of the client's interests could argue that the client impliedly authorizes the recording just as the client impliedly authorizes other actions the lawyer takes in the course of diligent representation. However, as I summarize below, the plain language, legislative history, and prevailing interpretations of Model Rule 1.2 point persuasively to the conclusion that secretly recording clients is not impliedly authorized.

Drawing on the plain language of the implied authorization standard, we must consider the plain meaning of the word "imply," which (per the OED) is "to involve the truth or existence of (something not expressly asserted or maintained)."<sup>136</sup> Thus, a lawyer is authorized to act where the client's true but not explicitly stated opinion is that such a recording would be authorized.<sup>137</sup>

The ABA 2001 opinion on secret recording by lawyers does not directly address the implied authorization standard, but it comes close when it offers an exception to the admonition against secretly recording clients when "the lawyer has no reason to believe the client might object."<sup>138</sup> There may be reasons that clients would generally object to being secretly recorded. The control standard is framed in Model Rule 1.2 as a matter of controlling *decisions*. The *decision to be secretly recorded*—and here we must suspend judgment on the paradoxical nature of this timeline regarding a decision that can only be considered in retrospect—is potentially an important decision that a client would weigh carefully. The decision to be secretly recorded is different from the decision to be non-secretly recorded. Secret recording involves documenting statements that the recorded person did not expect to have memorialized and transformed into potential future sources of embarrassment or evidence. As the 2003 NYC opinion on secret recording explained: "[I]ndividuals tend to choose their words with greater care and precision when a verbatim record is being made and some individuals may not wish to speak at all under such circumstances. Undisclosed taping deprives an individual of the ability to make those choices."<sup>139</sup>

Considering the potential harms attaching to secret client recordings, to assume that a client impliedly authorizes the lawyer to record the client without notice is to assume remarkable trust in the lawyer. The client may have well founded

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135. Maute, *supra* note 132, at 1079–80, 1090 (noting that lawyers' authority to make impliedly authorized decisions is justified by systemic benefits including efficiency in resolving disputes, promoting candor to the tribunal, and preventing meritless claims).

136. 7 OED at 725.

137. It is important to note here a timeline paradox that complicates the analysis of how clients may feel about being secretly recorded. The client can only ever authorize (or otherwise issue an opinion on) being secretly recorded as a hypothetical or in retrospect. If the lawyer asks the client for permission to record, the recording is of course no longer secret. Furthermore, the client's retrospective view cannot provide a perfect understanding of how the client would have weighed the risks and benefits of being secretly recorded before the recording was made.

138. 2001 ABA Opinion, *supra* note 12, at 7.

139. 2003 NYC Opinion, *supra* note 36.

reasons to be skeptical of the lawyer's good intentions in making such recordings. Thus, even when the recording is intended to benefit the client, the client may nevertheless hold reasonable suspicion about possible harms resulting from the lawyer's recording.<sup>140</sup>

The legislative history of the *Model Rules* suggests that the "impliedly authorized" clause should be narrowly construed.<sup>141</sup> The introduction of this clause was not intended to provide lawyers a substantially expanded scope of implied authorization but rather to close a linguistic loophole that could permit an interpretation of the consultation rule (under Model Rules 1.2 and 1.4) that would appear to require lawyers to consult with clients about every action taken in the course of representation.<sup>142</sup>

Further persuasive authority on the consultation duty can be found in the *Restatement (Third) of the Law Governing Lawyers*. In particular, the *Restatement* includes a test for determining when the lawyer must consult with the client by considering "reasonableness under all the circumstances."<sup>143</sup> This reasonableness test considers the client's sophistication, the "interest" or "importance" that the client attaches to the matter, and the time and money that the consultation would require.<sup>144</sup> Each of these factors weighs heavily against recording without consultation. When a client is asked for consent to be recorded, there is generally little reason to doubt the client's "sophistication" or "the ability of the

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140. The secretive nature of such recordings gives the lawyer the "unfair advantage of being able to use the verbatim record if it helps [their] cause and to keep it concealed if it does not." *Id.* A Nebraska opinion contemplates misuse of such recordings by a lawyer with respect to "preserving only portions of the conversation to distort its content, using a recording to embarrass the other party to the conversation or a third party, or improper disclosure of a client confidence contained in a recording." Neb. Ethics Advisory Op. for Lawyers, Op. 06-07 (2006).

141. This clause was added in 2002 to both the allocation of authority rule (Model Rule 1.2) and the confidentiality rule (Model Rule 1.6). MODEL RULES R. 1.2, 1.6.

142. AM. BAR ASS'N, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROF'L CONDUCT 1982-2013 (2013) ("The Commission believes that the current paragraph (a) is flawed because the reference to the lawyer's duty to consult about means can be read to imply that the lawyer always must consult in order to acquire authority to act for the client." The Commission further noted that implied authority is to be "determined by reference to the law of agency."). The lawyer's role as an agent comes with a robust duty to communicate with the client-principal, as evident in The Law of Agency Restatement (Third): "an agent has a duty to use reasonable effort to provide the principal with facts . . . [when] the agent knows or has reason to know that the principal *would wish to have* the facts or the facts are *material* to the agent's duties to the principal" (emphasis added). RESTATEMENT (THIRD) OF AGENCY § 8.11 (AM. LAW. INST. 2006). Given the potential harms to clients resulting from being secretly recorded, many clients may well "wish to have" and consider "material" information about when the client is being recorded by the lawyer.

143. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 21 (2000). The Restatement does not use the term "impliedly authorized," nor does it reference Model Rule 1.2(a), but it does state that in the "absence of an agreement or instruction" from the client, and where a decision is not categorically reserved for the client, a lawyer has authority over means that "are reasonably calculated to advance a client's objectives as defined by the client." *Id.* This language would appear to suggest that lawyers may secretly record lawyer-client conversations unless otherwise explicitly instructed by the client; however, the Restatement includes a reasonableness test for consultation. *Id.*

144. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 20 (2000).

client to shape the decision.”<sup>145</sup> This consultation could become somewhat complex if it includes extensive details about the implications of recording for confidentiality exceptions, attorney-client privilege, work product doctrine, and rules of evidence. But these factors could be simplified and presented in straightforward lay terms comprehensible to most clients. This brief consultation would not generally be costly in time or money. Given the risks involved in having one’s candid remarks secretly recorded, most clients have at least an interest in, and likely attach importance to, knowing whether they are being recorded.

## 5. THEORIES OF CONTROL IN THE LAWYER-CLIENT RELATIONSHIP

In this Section, I have argued that the communication and control standards under the *Model Rules* provide no substantial support for permitting client-interest recordings. This conclusion is supported by prevailing theories of control in the lawyer-client relationship. To record the client without notice, raising manifold risks for the client, while claiming to support the client’s interests, is remarkably paternalistic. Paternalism was traditionally the dominant view of the lawyer role, but has fallen out of favor, particularly since the client-centered turn in legal professionalism discourse as reflected in the introduction of the *Model Rules* in 1983.<sup>146</sup> The bar has increasingly adopted a “joint venture” model, where clients define goals, the lawyer implements client goals, and each “consults with the other.”<sup>147</sup> By suggesting shared control over means and ends achieved through open communication between lawyer and client, the joint venture model provides no substantial support for recording clients without notice or consent.

### B. SECRETLY RECORDING THE CLIENT IN ORDER TO ADVANCE THE LAWYER’S INTERESTS

This Section considers lawyer-interest recordings. I begin by reviewing the controversially broad invitation in the *Model Rules* for lawyers to defend themselves. I then discuss circumstances where the lawyer’s interest in self-defense is limited by an obligation to withdraw. I conclude by evaluating the most difficult

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145. *Id.*

146. Spiegel, *supra* note 133 (noting that the paternalist view is traditionally justified by the lawyer’s superior knowledge about the law and legal strategy, which can produce better and more efficient results for the client. Furthermore, paternalism is said to serve the lawyer’s interests in autonomy, craft, reputation, and adhering to professional responsibility standards); Strauss, *supra* note 133 (noting that strong paternalism, where the lawyer overrides client decisions, is generally disfavored by commentators on the legal profession); Maute, *supra* note 132 (noting that clients are particularly vulnerable to paternalistic lawyers because clients are often unaware that they possess a right to control aspects of the representation).

147. Lawyers and clients in this view engage in a “joint undertaking” (in the words of the original 1983 publication of the *Model Rules*) that is highly interdependent. Decision-making authority is not vested in either the lawyer or the client, but rather is a continued negotiation. In the original 1983 publication of Model Rule 1.2, the comment noted that “in many cases the client-lawyer relationship partakes of a joint undertaking where both lawyer and client have authority and responsibility in the objectives and means of representation.” See Maute, *supra* note 132, at 1057 (The *Model Rules* “do not vest primary decisionmaking authority in either participant”).

(and I argue insurmountable) hurdle for lawyer-interest recordings: the duty of loyalty.<sup>148</sup> While a lawyer has a legitimate interest in self-defense, and recording may be a valuable tool in gathering self-protective evidence, I conclude that such recordings should be universally prohibited on the grounds of disloyalty and related public policy considerations.

As a preliminary matter, it is helpful to first contemplate when lawyer-interest recordings are likely to occur. Consider, for example, a securities lawyer who makes unknowingly fraudulent representations to the SEC on behalf of a client. Such a lawyer may face criminal liability if these misleading representations involve “substantial assistance” or implicate the lawyer as a “primary violator” under the controlling legal standards.<sup>149</sup> Being aware of these risks, an innocent lawyer (a lawyer who suspects but does not know that a statement to be made on behalf of a corporate client will involve criminal fraudulence) may seek to document lawyer-client conversations which could later protect the lawyer from liability.<sup>150</sup>

Other examples may arise where the lawyer fears a malpractice claim or fee dispute, in which the client is likely to mischaracterize lawyer-client conversations.<sup>151</sup> Some, but certainly not all, criminal defense lawyers view ineffective assistance of counsel claims and *Padilla* inquiries as professional risks, and may consider documenting lawyer-client conversations in anticipation of such claims.<sup>152</sup> Self-protective recordings may be particularly helpful for lawyers with clients who are dishonest and manipulative, who regularly ignore lawyers’ advice, who have reputations for bringing unmerited malpractice suits, who have a tendency to misremember prior conversations with a lawyer, or who are willfully unrealistic about the achievable goals of the representation.

Secret client recordings may find particular utility in the lawyer-interest category. The lawyer may be the only person positioned to gather self-protective documentation regarding lawyer-client conversations. Furthermore, an audio recording may provide far more probative value than a lawyer’s written notes regarding disputed accounts of what was said by the lawyer or the client.

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148. The communication and control analysis presented earlier for client-interest recordings is perhaps applicable here in the lawyer-interest category as well. Lawyer-interest recordings are likely not impliedly authorized by the client as a means of representation. Yet, the lawyer who seeks to justify such recordings may argue that the recordings were never meant as a means of representation, but rather only as a means of the lawyer’s self-protection. Thus, the communication and control analysis is a circuitous and uncertain route to analyzing lawyer-interest recordings. These recordings are more obviously a violation of the duties of loyalty and avoiding conflicts of interest.

149. Marianne C. Adams, *Breaking Past the Parallax: Finding the True Place of Lawyers in Securities Fraud*, 37 *FORDHAM URB. L.J.* 953, 966 (2010).

150. If the lawyer knowingly assists the client in criminal conduct, the lawyer is required to withdraw from representation. *See infra* Part II.C.

151. Fee collection was the motivation for the lawyer cited in the 1967 ABA opinion who recorded phone calls with his client. *See Informal Op.* 1008, *supra* note 25.

152. *See* Gabriel J. Chin, *What Are Defense Lawyers For? Links between Collateral Consequences and the Criminal Process*, 45 *TEX. TECH L. REV.* 151, 151 (2012).

Many lawyers would refuse or withdraw from representation of such risky clients. Yet, a lawyer might not be able to afford turning the client down. A lawyer may also quite nobly continue the representation in order to fulfill the professional duty to represent unpopular clients and avoid passing a risky client on to the next unsuspecting lawyer.<sup>153</sup> A lawyer who provides this service on behalf of the profession should be allowed reasonable means of self-protection—although I will argue that these means should not include secret client recordings.

Lawyer-interest recordings can be further illustrated with a perhaps slightly fictionalized version of Michael Cohen recording Donald Trump. In this version, Cohen believes that his client poses a threat of implicating him in felonious conduct and that his client has a propensity for dishonesty, disloyalty, and even retribution against past associates.<sup>154</sup> Trump, in this account, is a paradigmatic risky client.<sup>155</sup> Secret recording by Cohen here could be a means to continue the representation, and continue counseling his client to comply with the law, while providing himself with potentially exonerating evidence of lawyer-client conversations. The recording serves as insurance for Cohen.<sup>156</sup> In light of Cohen's felony convictions,<sup>157</sup> this scenario appears to attribute too much innocence (and too much desire to promote compliance with law) to the real non-hypothetical Cohen. Yet, in a hypothetical variant on Cohen, we can imagine a lawyer who seeks to document efforts to counsel the risky client to comply with law, and to document that the client went against the lawyer's advice when engaging in criminal conduct.<sup>158</sup>

#### 1. CONFIDENTIALITY LIMITS

If the recording cannot be disclosed under the lawyer's duty of confidentiality, the recording serves little purpose as self-defense and should be prohibited. Thus,

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153. See MODEL RULES R. 6.2 cmt. 1.

154. See *Testimony of Michael D. Cohen, Hearing Before the H. Comm. on Oversight and Reform*, 116th Cong. 2, 8 (2019). In his congressional testimony, Cohen referred to Trump as a "cheat" and "con man" who is "fundamentally disloyal." *Id.*

155. As described in the Mueller Report, Trump's lawyers and other associates have felt a consistent need to maintain a written record (and some audio recordings) in order to "protect themselves from the president." See Peter Baker & Annie Karni, *To Defend Against a Mercurial Boss, Trump Aides Wield the Pen as Shield*, N.Y. TIMES (Apr. 21, 2019), <https://www.nytimes.com/2019/04/21/us/politics/trump-mueller-note-taking.html> [<https://perma.cc/79AK-TXZ4>].

156. See BOB WOODWARD, *FEAR: TRUMP IN THE WHITE HOUSE* (2018) (reporting that Trump often has not followed advice from his lawyers).

157. See Benjamin Weiser & William K. Rashbaum, *Michael Cohen Sentenced to 3 Years After Implicating Trump in Hush-Money Scandal*, N.Y. TIMES (Dec. 12, 2018), <https://www.nytimes.com/2018/12/12/nyregion/michael-cohen-sentence-trump.html> [<https://perma.cc/E87Y-4LPL>].

158. In his congressional testimony, Cohen briefly raised what appears to be another self-protective interpretation of his Trump recordings that could fall under the lawyer-interest category. He seemed to suggest that the recordings were a means to ensure that he would receive payment from Trump, explaining, "I had a reason for [making the recordings]. . . . Because I knew he wasn't going to pay that money." Cohen Testimony, *supra* note 106, at 129.



the confidentiality rule limits the permissibility of secret recording in the lawyer-interest category. This limitation may at first appear substantial in light of the narrow scope of exceptions to confidentiality (particularly under the *Model Rules*).<sup>159</sup> Yet, the one exception to confidentiality that has been characterized as particularly broad, and indeed frequently criticized for giving lawyers too much discretion, has been Model Rule 1.6(b)(5), which authorizes lawyers to disclose confidential information in order to support the lawyer's own claims in a matter involving the client.<sup>160</sup> Rule 1.6(b)(5) thus permits lawyers to disclose confidences in many of the circumstances where lawyers may consider making lawyer-interest recordings. Due to this exception, the confidentiality rule does not, in itself, dramatically narrow the field of potential circumstances where lawyer-interest recordings could be permitted.

## 2. WITHDRAWAL LIMITS

The withdrawal rule sets more substantial limits on lawyer-interest recordings.<sup>161</sup> Lawyers who *know* that a representation will implicate them in assisting the client's criminal conduct are required to withdraw from representation.<sup>162</sup> When lawyers are required to withdraw, it is hard to imagine that they have any ground for remaining in the lawyer-client relationship in order to gather secret recordings of the client. There is no such stated exception in the withdrawal rule. The lawyer is simply required to withdraw.<sup>163</sup>

The withdrawal rule takes a different approach to a lawyer who does not *know* that the client is engaging in criminal conduct but only *reasonably believes* that the client is using the lawyer's services for criminal purposes. Here the lawyer is permitted, but not required, to withdraw.<sup>164</sup> Similarly, if the lawyer becomes aware of the client's criminal, fraudulent, or lawful but "repugnant" conduct that is not assisted by the lawyer's services, the lawyer is permitted to withdraw on

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159. In spite of scholarly critiques and proposed rule amendments seeking to broaden the circumstances where lawyers can break client confidences, critics describe a remarkably strong "confidentiality fetish" in the *Model Rule* framework. See William H. Simon, *The Confidentiality Fetish*, THE ATLANTIC (Dec. 2004), <https://www.theatlantic.com/magazine/archive/2004/12/the-confidentiality-fetish/303601/> [<https://perma.cc/9V5M-2G7N>].

160. MODEL RULES R. 1.6(b)(5) (covering three scenarios: where the lawyer and client are in a "controversy," where the lawyer acts in self-defense against a "criminal charge or civil claim against the lawyer based upon conduct in which the client was involved," and where the lawyer responds to allegations "in any proceeding concerning the lawyer's representation of the client"); MODEL RULES R. 1.6 cmt. 11 (noting that a lawyer may break confidences in an action to collect fees from a client by proving services rendered). While this fee-collecting exception has been the target of vociferous scholarly criticism, it is explained in this Model Rule 1.6 comment as a matter of principle: that a client should not be permitted to abuse legal process by exploiting the fiduciary commitments (including confidentiality duties) of the lawyer.

161. MODEL RULES R. 1.16.

162. See MODEL RULES R. 1.16 (emphasis added). The lawyer is further prohibited from engaging in criminal conduct under Rules 1.2(d) and 8.4(b). See MODEL RULES R. 1.2(d) and 8.4(b).

163. MODEL RULES R. 1.16.

164. See MODEL RULES R. 1.16 cmt. 11.

the ground that a “lawyer is not required to be associated with such conduct even if the lawyer does not further it.”<sup>165</sup>

In these areas of permissive withdrawal, Rule 1.16 does not in itself prohibit the lawyer from secretly recording the client. By not requiring withdrawal, the rule may even encourage lawyers to continue representing clients who engage in dishonest and ongoing criminal conduct, so that the lawyer can counsel the client to be truthful and comply with law. To withdraw merely passes the problematic client on to the next lawyer. Thus, although the mandatory withdrawal rule limits lawyer-interest recordings, the permissive withdrawal rule (which applies where the lawyer has reasonable suspicion that the client is engaging in ongoing criminal conduct) does not limit lawyer-interest recordings.

### 3. LOYALTY AND PERSONAL CONFLICTS OF INTEREST

The confidentiality and withdrawal rules set some outer limits to the permissibility of secret recording in the lawyer-interest category. When the lawyer satisfies an exception to these duties, and is thus permitted to *disclose* confidential information and to continue the representation, the lawyer is not necessarily granted permission to take another (large) step and *secretly record* a lawyer-client conversation. Yet, the ABA 2001 opinion seems to take this step quite comfortably. The ABA 2001 opinion notes that even members of the committee who would forbid secret client recordings recognize an exception where “confidential information [is] necessary to establish a defense by the lawyer to charges based upon conduct in which the client is involved.”<sup>166</sup> Assessing whether secret client recordings can be justified by the lawyer’s self-defense requires weighing the value of the lawyer’s own personal interests against the client’s interest in not being recorded. The 2001 opinion avoids this question by concluding that the lawyer may secretly record a client when the client has “forfeited the right of loyalty or confidentiality.”<sup>167</sup> The opinion does not, however, analyze when exactly loyalty is forfeited and what it can possibly mean to represent a client when the lawyer no longer owes the client a duty of loyalty.<sup>168</sup>

Thus, loyalty requires analysis. Loyalty to clients is fundamental to the lawyer-client relationship and to the legitimacy of a system of legal representation. The *Model Rules* do not offer a disciplinary standard for the broad concept of client loyalty, but rather more narrowly address loyalty primarily as a matter of avoiding

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165. MODEL RULES R. 1.16 cmt. 7.

166. 2001 ABA Opinion, *supra* note 12. None of the existing state ethics opinions on secret recording reach the question of lawyers recording in self-defense. *See id.* *But see* NYC 2003 Opinion, *supra* note 36 (permitting lawyers to make secret recordings of “individuals who have made threats against the attorney”). The opinion does not specify whether these threats include client-related disputes under the 1.6(b)(5) exception to confidentiality.

167. *See* 2001 ABA Opinion, *supra* note 12.

168. *See id.*

conflicts of interest.<sup>169</sup> The lawyer who records to advance the lawyer's own interests runs afoul of the Model Rule 1.7 conflicts standard by acting on behalf of other "responsibilities or interests" that are directly adverse to a client's interests or otherwise risk materially limiting the lawyer's diligent representation of the client.<sup>170</sup> These other "responsibilities or interests" under Model Rule 1.7 can include the lawyer's "own interests."<sup>171</sup>

A lawyer could provide diligent representation in the matter for which the lawyer was hired, while also, on the side, secretly documenting client statements. The *appearance* of impropriety is no longer included as a standard in the *Model Rules* framework.<sup>172</sup> Yet, the concurrent conflicts rule (Rule 1.7) does not require a showing that the lawyer *actually* pulled punches in representing a client, but only that there was a "significant risk" of materially limited representation.<sup>173</sup> When the lawyer secretly records in contemplation of an adverse lawyer-client relationship, it is difficult for the lawyer to argue that there is not a significant risk of material limitation.

Lawyer-interest recordings may find some justification in spite of the inherent loyalty violation. As noted in the comments to Model Rule 1.6, lawyers should not be burdened by the fiduciary nature of the lawyer-client relationship such that they are prevented from gathering exonerating evidence in response to claims relating to client representation.<sup>174</sup> Secret recordings, because of their probative value, may be particularly effective in defending the lawyer against clients who seek to dishonestly misrepresent lawyer-client conversations.

Yet, permitting lawyers to record in self-defense could encourage a widespread practice of disloyal legal representation that tends to undermine public trust in the

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169. See Wald, *supra* note 103, at 920 (noting that loyalty is relevant to communications, competence, diligence, and confidentiality rules, and contrasting the narrow view of loyalty in the Model Rules with the more expansive definition of loyalty in the case law as "entire devotion" and "warm zeal"). Relatedly, comment 2 to the confidentiality rule describes trust as the "hallmark of the client-lawyer relationship." See MODEL RULES R. 1.6 cmt. 2. The conflict-of-interest rules are explicitly rooted in the duty of loyalty, in addition to confidentiality. See MODEL RULES R. 1.7 (noting in comment 1 that loyalty is one of the "essential elements in the lawyer's relationship to a client" and in comment 6 that "loyalty to a current client prohibits undertaking representation directly adverse to that client").

170. See Mercer, *supra* note 16, at 1009 ("When a private attorney participates in the investigation of his client by secretly recording conversations with his client, ethical considerations regarding conflicts of interest develop . . .").

171. MODEL RULES R. 1.7 cmt. 10 (explaining that a personal conflict occurs where the lawyer's "own interests" have an "adverse effect on representation of a client" and that personal conflicts of interest result from both financial and non-financial professional interests that materially limit the representation); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 125 cmt. c (2000) (noting that a personal conflict can arise even from altruistic, charitable conduct, or from religious or political beliefs); see, e.g., ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 94-384 (1994) (noting that a personal conflict can arise "by the lawyer's own interest in avoiding discipline," particularly when the lawyer faces a disciplinary complaint from opposing counsel).

172. See Brewer, *supra* note 55, at 322.

173. MODEL RULES R. 1.7(a)(2) cmt. 8.

174. MODEL RULES R. 1.6 cmt. 11.

profession. Furthermore, if a lawyer reasonably suspects that a client will make false accusations against the lawyer, the lawyer can withdraw (if not otherwise prohibited from withdrawing) or use less secretive, harmful, and domineering means of documenting the representation. The lawyer's written notes, statements to third parties, and actions undertaken in the course of representation can serve self-defense purposes. Lawyers who suspect that their clients may put them at risk can write self-protective memos to be sent to or even signed by the client summarizing the advice offered by the lawyer (to comply with law) and the possible repercussions of going against that advice.<sup>175</sup>

### C. SECRETLY RECORDING THE CLIENT IN ORDER TO ADVANCE THE PUBLIC'S INTERESTS

The public-interest category covers circumstances where the lawyer secretly records the client in order to advance the public's interests, generally by seeking to prevent the client's potential harmful conduct. This category is the most commonly seen in the case law on secret client recordings.<sup>176</sup> Such recordings may find support in gatekeeping and lawyer-statesman theories of the lawyer role, which stress the lawyer's duties to the public that are distinct from the client's interests.<sup>177</sup> These public obligations are reflected in the tripartite duties laid out in the opening line to the *Model Rules* Preamble, wherein the lawyer is characterized as a "representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."<sup>178</sup>

Yet, the first of these three duties, service to the client, is generally considered the lawyer's *raison d'être* and should not be easily dismissed.<sup>179</sup> Under the prevailing agency and joint venture theories of the lawyer-client relationship, the

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175. Short of a signed memo, a lawyer can email a client asking to confirm the lawyer's understandings of a meeting's content. Additionally, lawyers can write memos to their own files as self-protective documentation. Such written notes are not particularly disloyal, because clients generally expect lawyers to take notes memorializing the content of lawyer-client meetings. For further transparency, lawyers' notes to the file can be shared with the client. Furthermore, as discussed in the earlier analysis of the client-interest category, the expected harms associated with secret client recordings generally exceed the expected harms associated with a lawyer's written notes. *See supra* Part II.A.2.

176. The fact that the public-interest category is the most commonly seen in the case law does not necessarily mean that it is the most common category in practice. The criminal activity of lawyers and clients found in many examples of public-interest recordings may make such cases inherently more likely to appear in disciplinary and criminal case law. Other examples of secret client recording may be less likely to leave a paper trail.

177. *See, e.g.*, ANTHONY KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1995); Fred Zacharias, *Lawyers as Gatekeepers*, 41 *SAN DIEGO L. REV.* 1387, 1389-90 (2004) (emphasizing lawyers' roles in curbing client misconduct for the sake of the public interest).

178. *MODEL RULES* pmbl.

179. Unless one subscribes to the purest theory of cause lawyering, prioritizing cause to the exclusion of client, or unless we seek to "deprofessionalize" legal practice, eschewing all professional role differentiation, the lawyer's public duties cannot entirely displace the lawyer's essential duty of loyalty to the client. *See* Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 *HUMAN RIGHTS* 1, 5 (1975) (noting that "the role of the professional (like that of the parent) is to prefer in a variety of ways the interests of the client or patient over those of individuals generally.").

lawyer exists to serve and collaborate with the client.<sup>180</sup> Even in the most paternalistic view, which acknowledges divergence between how the lawyer and client seek to pursue the representation, the lawyer is assumed to be acting in the client's best interests. In other words, as I will argue below, for the lawyer to become an undercover agent who spies against the client is a clear violation of client loyalty.<sup>181</sup>

The majority of documented cases of secret investigatory recordings of clients have arisen when a lawyer acts at the direction of law enforcement pursuant to a cooperation agreement or plea negotiation.<sup>182</sup> When the lawyer secretly records the client in order to mitigate the lawyer's own punishment, the conflict of interest and the associated loyalty violation is unmistakable. The lawyer's investigatory efforts are "directly at odds" with the interests of the client, such that it is "difficult, if not impossible, for an attorney to adequately and vigorously represent a client about whom [the lawyer] is providing incriminating information."<sup>183</sup> In some cases, judges and prosecutors have prevented lawyers from acting as informants against a client in recognition of this conflict.<sup>184</sup> In other cases, lawyers who have worn a wire during client meetings in cooperation with law enforcement have later faced professional discipline.<sup>185</sup>

The case law contains few examples of what has been termed "noble ratting," where a lawyer who is not facing criminal charges investigates the client either at the direction of law enforcement or on the lawyer's own initiative.<sup>186</sup> An example of a noble public-interest recording can be found in a 1996 case from the Western District of New York (hereinafter "*Sabri*").<sup>187</sup> A client, frustrated with delays in an immigration proceeding, described to his lawyer a "focused plan" to kill 50 to 100 people at an immigration hearing.<sup>188</sup> The attorney informed law enforcement authorities of the client's threat. The FBI then asked the attorney to wear a wire in

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180. See *supra* Part II.A.

181. The analysis of communication and control duties in the client-interest category has limited application here in the public-interest category. A lawyer seeking to make such investigatory recordings may persuasively argue that the recordings do not constitute a means of representation. Rather than communication and control, my analysis of public-interest recordings focuses on the inherent loyalty violation and conflict of interest.

182. See Aviva Abramovsky, *Traitors in Our Midst: Attorneys Who Inform on Their Clients*, 2 U. PA. J. CONST. L. 676, 677 (1999) (citing several such cases, and suggesting that at least several dozen more likely exist).

183. *Id.* at 701.

184. *Id.* at 683–84 (discussing *United States v. Voigt*, 89 F.3d 1050 (3d Cir. 1996), where a lawyer who intended to serve as a government informant against a client was forbidden (by an Assistant U.S. Attorney) from proceeding due to the lawyer's potential conflict of interest).

185. See *Comm. on Prof'l Ethics & Conduct of the Iowa State Bar Ass'n v. Mollman*, 488 N.W.2d 168, 173 (Iowa 1992); *People v. Smith*, 778 P.2d 685, 685–87 (Colo. 1989). Courts have applied the crime-fraud exception to permit the use of evidence that attorneys gather against their clients, leaving prosecutors to believe that they have a "green light to recruit attorneys to inform on their clients, even regarding matters on which the attorney is currently representing the client." Abramovsky, *supra* note 182, at 695.

186. Abramovsky, *supra* note 182, at 686.

187. *United States of America v. Zafar Sabri*, 973 F. Supp. 134 (W.D.N.Y. 1996).

188. *Id.* at 137–38.

conversations with the client while continuing to represent the client in the immigration matter. The attorney succeeded in recording further threats by the client. When the client was later convicted of two counts of threatening to kill a United States Judge or federal law enforcement officer, one of those counts was dismissed on appeal on the ground that the client had been prejudiced by “manipulation of the attorney-client relationship.”<sup>189</sup>

As the *Sabri* court noted, even when lawyers create investigatory recordings of clients without seeking to mitigate the lawyer’s own liability, such recordings interrupt fundamental duties to the client.<sup>190</sup> By secretly recording the client, the lawyer has shown a willingness to place the interests of third parties ahead of the client’s interests. Rule 1.7 prohibits unconsented conflicts that significantly risk materially interfering with “the lawyer’s independent professional judgment in considering alternatives or foreclosing courses of action that reasonably should be pursued on behalf of the client.”<sup>191</sup> It is possible that the lawyer who investigates the client’s harmful conduct continues effective (not materially limited) representation of the client regarding the matters for which the lawyer has been hired. To continue with an example like the *Sabri* case, an attorney might provide excellent immigration representation while also investigating the client’s threats to attack the courthouse. Although this non-conflicted representation is possible, it is difficult to argue that there is not a “significant risk” (under the Model Rule 1.7 standard) of materially limited representation when the lawyer investigates the client.

The Michael Cohen example is illustrative here as well. If we ascribe to Cohen a motivation to record lawyer-client conversations in order to protect the public from his client’s potentially dangerous misconduct, Cohen would exemplify a public-interest recording made on the lawyer’s own initiative. This rendering of Cohen’s motivations at the time of the recordings is likely fictional, although Cohen does claim that his disclosure of recordings after the fact serve to protect the public.<sup>192</sup> In his congressional testimony, Cohen proclaimed that he would no longer be “concealing Mr. Trump’s illicit acts.”<sup>193</sup> Instead, Cohen accused Trump of fraud, conspiracy, and directing a “cover-up” of criminal activity.<sup>194</sup>

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189. *Id.* at 148 (The court concluded that when the lawyer was cooperating with law enforcement the lawyer “became the ‘alter ego,’ or an agent of the government” and therefore failed to zealously represent the client. *Id.* at 139, 148. Conviction on the other count was upheld because it was based on testimony from the lawyer regarding conversations before the lawyer began cooperating with law enforcement. *Id.* at 147. Those conversations were subject to a crime-fraud exception to attorney-client privilege. *Id.* at 139–41.

190. *Id.* at 148.

191. MODEL RULES R. 1.7 cmt. 8.

192. See Erin Schaff, *Full Transcript: Michael Cohen’s Opening Statement to Congress*, N.Y. TIMES (Feb. 27, 2019), <https://www.nytimes.com/2019/02/27/us/politics/cohen-documents-testimony.html> [https://perma.cc/8G4P-6VTN].

193. *Id.*

194. *Id.*

The primary question addressed in this Section is whether lawyers should be permitted to make secret investigatory recordings of clients in spite of the inherent conflict of interest and violation of client loyalty. This question requires revisiting the deeply rooted tension between lawyers' duties to clients and the public. Both of the state ethics opinions (Wisconsin and Missouri) that cite the duty of client loyalty strictly forbid secret recording of clients.<sup>195</sup> And, although the ABA 2001 opinion only *admonishes* against secret client recordings, it nevertheless acknowledges the steep costs of breaking loyalty, noting that lawyers should "almost always" be advised against making such recordings.<sup>196</sup>

The permissibility of public-interest recordings is limited by the same mandatory withdrawal requirements discussed in the above analysis of the lawyer-interest category—this applies when the lawyer knowingly assists the client's criminal conduct. The confidentiality limits on public-interest recordings require more nuanced discussion, covered below in Section 1. Section 2 then reviews different circumstances that have been contemplated in existing ethics opinions where a lawyer might seek to make investigatory secret client recordings. Finally, Section 3 examines the narrow circumstances when such recordings might be justified.

#### 1. CONFIDENTIALITY LIMITS

The duty of loyalty to clients is not unlimited. In particular, the *Model Rules* contemplate exceptional circumstances where lawyers are permitted to break confidentiality.<sup>197</sup> Where lawyers are permitted to disclose confidential information, and thus to set aside loyalty, the question explored here is whether lawyers are permitted to take the further step of actively investigating the client's harmful conduct using secret recording. This Section works within the current disciplinary regime with respect to confidentiality, just as previous sections of this paper have worked within the rules relating to communication, control, and conflicts, to consider whether secret client recordings are consistent with the letter and spirit of the current law governing lawyers. Here, I argue that the confidentiality rules provide limits on when lawyers could be permitted to make public-interest recordings. If the lawyer is not permitted to disclose such a recording, the recording cannot serve its harm-prevention purposes.<sup>198</sup>

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195. Mo. Sup. Ct. Adv. Comm., Op. 123 (2006); State Bar of Wis., Formal Op. E-94-5 (1998).

196. ABA 2001 Opinion, *supra* note 12, at 6.

197. MODEL RULES R. 1.6.

198. Attorney-client privilege interacts with confidentiality in this analysis. Where the recording satisfies the requirements for a confidentiality exception but does not meet privilege exceptions, harm-prevention purposes can still potentially be served, although prosecutorial purposes are diminished. Some state ethics rules offer confidentiality exceptions to permit (or even require) the lawyer to disclose client information to prevent any form of crime. In contrast, the exceptions in the *Model Rules* relating to client criminal conduct only cover serious financial crime (using the lawyer's services) and information to prevent reasonably certain death or substantial bodily harm. Whether such information can serve evidentiary purposes depends on a privilege analysis, requiring that a nexus be established between the lawyer's advice and client crime, fraud, or post-commission

State legal ethics opinions have permitted secret investigatory recordings in several contexts where, if the recording involves information relating to representation of a client, lawyers might be unable to disclose their investigatory findings due to confidentiality restrictions.<sup>199</sup> Many circumstances where secret investigatory recording by lawyers has been permitted under state ethics opinions and case law do not apply to recording of clients.<sup>200</sup>

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cover up. *See* EDNA SELAN EPSTEIN, *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE* 689 (2007) (A nexus must be “established between the seeking of the legal advice and the illegitimate purpose.”). Some courts have applied a broader exception to the privilege for “malignant” purposes and other public-policy concerns, under the notion that the lawyer owes a “general duty of public service.” *See* W. Bradley Wendel, *Government Lawyers in the Trump Administration*, 69 *HASTINGS L.J.* 275, 319 (2017) (while courts have suggested that a “general duty of public service” can be relevant to an attorney-client privilege analysis, confidentiality standards have decidedly rejected the notion of a public-interest exception). If the recording qualifies for an exception to confidentiality but does not meet the conditions of a crime-fraud exception to attorney-client privilege and therefore cannot be disclosed as evidence (unless the client waives privilege), the recording may still serve important non-evidentiary purposes. Such a recording could potentially be disclosed to credibly warn authorities or potential victims of the client’s threatened harmful conduct. Thus, my analysis primarily focuses on limits on confidentiality, not privilege. As I will conclude at the end of this Section, harm prevention is the only viable justification for secret client recordings.

199. Secret recording by lawyers has been permitted to investigate non-criminal, non-fraudulent civil offenses including copyright infringement, unlawful sales practices, and racial discrimination in housing and employment. *See* Douglas R. Richmond, *Deceptive Lawyering*, 74 *U. CIN. L. REV.* 577, 583 (2005) (citing lawyer-investigators who represented themselves as interior designers shopping for furniture in order to investigate trademark infringement; and citing a lawyer who investigated sales practices allegedly violating a consent decree); Va. State Bar Ass’n, *Legal Ethics Op.* 1738 (2000) (noting that the committee does not prohibit lawyers from using deceit in investigations of housing discrimination). When the recorded information relates to the representation of a client (including where the client is recorded), the recording would be protected by the lawyer’s duty of confidentiality. The *Model Rules* (and most state rules) offer no exception for disclosing information relating to the client’s non-criminal, non-fraudulent civil offenses and other misconduct.

200. This includes where lawyers are expressly permitted to engage in secret recording in their private lives outside of legal practice. *See* Co. Bar Ass’n Ethics Comm., *Ethics Op.* 112 (2003) (“in matters unrelated to a lawyer’s representation of a client or the practice of law, but instead related exclusively to the lawyer’s private life”); S.C. Bar Ethics Advisory Comm. *Ethics Advisory Op.* 08-13 (2008) (“[T]he Committee advises that surreptitious recording by a lawyer is ethically permissible only when . . . the lawyer is not acting as a lawyer, as a public official, or in any other position of trust.”). It also includes where lawyers are permitted to make secret recordings of witnesses and other third parties. *See, e.g.,* Tenn. Bd. of Prof’l Responsibility, *Formal Ethics Op.* 86-F-14(a) (1986) (holding that “there is no ethical impropriety in secretly recording potentially adverse witnesses in criminal cases for the purpose of providing a means of impeachment in a criminal trial”); Sup. Ct. of Tex. Prof’l Ethics Comm., *Op.* 575 (2006) (legitimate reasons to make secret recordings include “to gather information from potential witnesses”); *RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS* (2000) (suggesting that secret recording of witnesses does not necessarily break confidentiality); and where lawyers are permitted to direct others (including their clients) to engage in secret recording. *See* Va. State Bar Ass’n *Legal Ethics Op.*, 1738 (2000) (finding that lawyers are permitted to “advise another person to participate in [a conversation] which is electronically recorded with the full knowledge and consent of one party to the conversation, but without the knowledge or consent of the other party”); State Bar of Az. Comm. of Prof’l Responsibility, *Op.* 00-04 (2000) (lawyers are permitted to advise the client about the client’s right to make secret recordings). *But see* Colo. Bar Ass’n *Ethics Comm.*, *Op.* 112 (2003) (lawyers are not permitted to direct the client to make secret recordings, but may use a recording made by the client if the client makes the recording independently). Many ethics opinions permit lawyers to record in their capacities as police and prosecutors, where secret recording is a common investigatory tool. Acting in these capacities, such lawyers generally do not represent clients and thus are irrelevant to the issue of secret *client* recordings. Finally, several opinions include an analysis of the Model Rule 4.4 prohibition against embarrassing or burdening third persons, which exclusively applies to non-clients.



## 2. CIRCUMSTANCES WHERE HARM PREVENTION COULD POSSIBLY JUSTIFY SECRET CLIENT RECORDINGS

In this Section, I review circumstances where public-interest recordings have been contemplated under existing ethics opinions. Because the permissibility of these recordings is limited by the scope of confidentiality restrictions, this Section is organized around exceptions to confidentiality in the *Model Rules* and in the rules adopted by bar associations. This includes exceptions relating to serious bodily harm, crime, complying with law, and perjury. Of course, a lawyer who meets the conditions for an exception to confidentiality does not necessarily have permission to take the further step of secretly recording the client. For each confidentiality exception, I note how existing ethics opinions have addressed (or failed to address, in most cases) secret client recordings.

### a. Serious Bodily Harm

Beginning at the top of the list of *Model Rule* exceptions to confidentiality, lawyers are permitted (but not required) under Rule 1.6(b)(1) to break confidences in order to “prevent reasonably certain death or substantial bodily harm.”<sup>201</sup> All states permit disclosure of client confidences to avoid death and serious injury.<sup>202</sup> Twelve states make such disclosures mandatory.<sup>203</sup>

The ABA 2001 opinion concluded that lawyers “might” be permitted to make secret client recordings in order to document threats of death or substantial bodily harm.<sup>204</sup> Only one state ethics opinion specifically allows secret client recordings in these circumstances.<sup>205</sup> This lack of attention to 1.6(b)(1) in the opinions on secret recording is perhaps surprising given the severity of the harms involved.

### b. Crime

Many states (16 out of 50 states and the District of Columbia) have adopted a confidentiality exception that includes non-violent crimes.<sup>206</sup> The *Model Rules* limit this exception to substantial financial crime and fraud using the lawyer’s services.<sup>207</sup> Some jurisdictions construe the criminal exception much more

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201. MODEL RULES R. 1.6(b)(1).

202. JOHN S. DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY, STANDARDS, AND STATUTES (2018).

203. *Id.*

204. *See* 2001 ABA Opinion, *supra* note 12, at 6 (“[e]xceptional 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.”).

205. Ohio Bd. of Comm’rs on Grievances & Discipline, Op. 2012-1 (2012) (“While there may occasionally be extraordinary occasions in which a surreptitious recording of a client conversation would be justified, such as when a lawyer believes a client plans to commit a crime resulting in death or substantial bodily harm, a lawyer generally should not record client conversations without the client’s consent.”).

206. ABA CPR Policy Implementation Comm., *Surv. of State Variations of the ABA Model Rules of Prof’l Conduct R. 1.6* (Sept. 30, 2019).

207. MODEL RULES R. 1.6(b)(6)(2), (3).

broadly. Under the Florida rules, for example, the lawyer is *required* to “reveal confidential information to the extent the lawyer reasonably believes necessary to prevent a client from committing a crime.”<sup>208</sup> The type of crime is not specified in the Florida standard.<sup>209</sup>

Ethics opinions on secret recording frequently cite crime prevention. The NYC 2003 opinion claims that it is an “easy” answer to conclude that secret recording (of both clients and non-clients) is permitted for the “investigation of ongoing criminal conduct or other significant misconduct.”<sup>210</sup> For efforts to prevent some crimes, secret recording can provide vital evidentiary value. Several opinions recommend permitting lawyers to record utterances that are themselves a crime, such as bribes, threats, obscene calls, attempts at extortion, and false accusations against the lawyer by clients and others.<sup>211</sup>

Preventing large-scale fraud can combine both of the key factors that jurisdictions have cited when permitting lawyers to make investigatory secret recordings—fraud may cause extensive harm and may require documenting statements in order to investigate the offense. Where the lawyer’s services are used in commission of the fraud, Model Rules 1.6(b)(2) and (3) permit lawyers to disclose client confidences in order to prevent or mitigate the effects of misconduct that causes “substantial injury to the financial interests or property of another.”<sup>212</sup> This exception is relatively new, adopted in 2003 following Enron, WorldCom, and other corporate scandals.<sup>213</sup> No state opinions have specifically included fraud as a circumstance where lawyers are permitted to make secret client recordings.<sup>214</sup>

As noted earlier, lawyers who investigate their clients’ criminal conduct often do so as informants pursuant to a cooperation or plea arrangement with law enforcement.<sup>215</sup> Traditionally, private lawyers were rarely permitted to engage in various forms of covert investigatory practices.<sup>216</sup> This standard appears to be relaxing, and lawyers “ratting” on clients has been a common occurrence since

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208. FLORIDA RULES OF PROF’L CONDUCT R. 4-1.6(b)(1) (2019).

209. *Id.*

210. NYC 2004 Opinion, *supra* note 36, at 2.

211. *See, e.g.*, Tenn. Bd. of Prof’l Responsibility, Formal Op. 86-F-14(a) (1986) (permitting lawyers to record “an utterance which is itself a felonious crime”); *see also* S.C. Bar Ethics Advisory Comm., Advisory Op. 08-13 (2008) (permitting a lawyer to make secret recordings of anonymous threats, “anonymous information received over the telephone,” and “attempts to bribe the recording attorney”); Va. State Bar Ass’n, Legal Ethics Op. 1814 (2011) (concluding that it is not improper to make secret recordings of conversations involving threatened or actual criminal activity “where the lawyer is the victim of either the threat or actual commission of criminal activity”); Sup. Ct. of Tex. Prof’l Ethics Comm., Op. 575 (2006) (permitting secret recording when used to “protect the lawyer from false accusations”).

212. MODEL RULES R. 1.6(b)(2), (3).

213. *See* Robert W. Gordon, *A New Role for Lawyers: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185, 1205 (2003).

214. *Supra* Part I.

215. Abramovsky, *supra* note 182, at 676–702.

216. *See generally* Bruce Green, *Deceitful Silence*, 33 LITIG. 24 (2006) (arguing that it is professional misconduct for a lawyer to cooperate with authorities against the lawyer’s own client).

the 1980s.<sup>217</sup> The profession has generally viewed lawyers investigating clients as a betrayal of the fiduciary role.<sup>218</sup> Courts have referred to the practice of turning criminal defense attorneys against their clients as “sleazy,” “reprehensible,” and “shocking.”<sup>219</sup> Nevertheless, most courts have upheld convictions that rely on evidence obtained covertly by a criminal defense lawyer against his or her client.<sup>220</sup>

One state ethics opinion has explicitly permitted lawyers to make secret client recordings while acting as informants in cooperation with law enforcement.<sup>221</sup> Courts that addressed this issue have suspended the attorney’s license.<sup>222</sup> For example, a Colorado lawyer who was himself facing drug possession charges cooperated with authorities by secretly recording a conversation in which he purchased cocaine from his past client.<sup>223</sup> The Colorado Bureau of Investigation had assured the lawyer that the recording would not lead to professional discipline.<sup>224</sup> The sting was successful and the lawyer’s past client was charged for selling cocaine.<sup>225</sup> The Colorado Supreme Court handed down a two-year suspension of the attorney’s license on the ground that he was merely seeking to improve his own circumstances at the expense of his past client.<sup>226</sup>

### c. Complying with Law or Court Order

Our final stop on the list of 1.6(b) confidentiality exceptions is the disclosure of client information in order to “comply with other law or a court order.”<sup>227</sup> This exception is most often applied when a tribunal compels a lawyer to reveal otherwise confidential information or when lawyers are subject to mandatory

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217. Abramovsky, *supra* note 182, at 676–702.

218. *Id.* at 707.

219. *Id.* at 677.

220. *Id.* at 681 (noting that few criminal indictments have been dismissed due to the use of secret recording by a criminal defense attorney against a client). In one case, a criminal defense attorney informed on a client in cooperation with law enforcement over a period of several years when the lawyer was continuing to represent the client. *United States v. Marshank*, 777 F. Supp. 1507, 1511 (N.D. Cal. 1991). An indictment based on evidence secured by the lawyer-informant was dismissed on the grounds of ineffective assistance of counsel. *Id.*

221. S.C. Bar Ethics Advisory Comm., Ethics Advisory Op. 08-13 (2008) (permitting secret recording by private lawyers who “cooperat[e] with law enforcement in a legitimate criminal investigation”).

222. *See* *People v. Smith*, 778 P.2d 685, 685–87 (Colo. 1989); *Comm. on Prof’l Ethics & Conduct of the Iowa State Bar Ass’n v. Mollman*, 488 N.W.2d 168, 173 (Iowa 1992).

223. *See Smith*, 778 P.2d at 685.

224. *Id.* at 686.

225. *Id.*

226. *Smith*, 778 P.2d at 688; *see also Mollman*, 488 N.W.2d at 169–70, 173 (like *Smith*, *Mollman* was an attorney who secretly recorded his client as part of a drug sting. The court issued *Mollman* a thirty-day suspension on the grounds of “dishonesty, deceit and misrepresentation.” The court concluded that lawyers may be permitted to make secret recordings as “law enforcement attorneys or officers,” but not as private citizens acting as government agents as *Mollman* described himself.).

227. MODEL RULES R. 1.6(b)(6). The remaining two 1.6(b) exceptions are unlikely to relate to lawyers recording clients: to secure advice about complying with the *Model Rules* (MODEL RULES R. 1.6(b)(4)) and to detect and resolve conflicts of interest (MODEL RULES R. 1.6(b)(7)). MODEL RULES R. 1.6(b).

disclosure laws, dealing with, for example, client child abuse and financial and tax information.<sup>228</sup> Rule 1.6(b)(6) reflects the legal profession's "boundary claim" that lawyers are obligated to zealously pursue client ends within the bounds of the law.<sup>229</sup> The boundary claim has been applied ambivalently and with a remarkably large caveat where lawyers assert exemptions from mandatory reporting laws on the basis of their confidentiality duty to clients.<sup>230</sup>

When lawyers have reason to believe that secret recording can help document child abuse or other harms covered by mandatory reporting laws, the severity of the harm to be prevented may weigh in favor of permitting a lawyer to investigate the client. Yet, no existing ethics opinions on secret recording have offered a 1.6(b)(6) analysis.

#### d. Perjury

Under the *Model Rules*, a lawyer is obligated to disclose client perjury to a tribunal when the lawyer has already attempted to remonstrate with the client and when the lawyer is forbidden from refusing to offer the evidence (such as the testimony of a criminal defendant who wishes to testify) or to withdraw from representation.<sup>231</sup> This obligation does not imply that the lawyer must proactively seek to investigate and document perjury through secret recording. Indeed, such a practice may give the appearance of the lawyer setting a "perjury trap."<sup>232</sup> Since Rule 3.3 only covers false statements and evidence that the lawyer "knowingly" facilitates,<sup>233</sup> lawyers are perhaps incentivized to avoid investigating and gaining actual knowledge of client perjury.

A lawyer who seeks to prevent or expose client perjury could record a conversation in which the client states an intent to give false testimony. Few opinions have considered whether lawyers should be permitted to record for these purposes,<sup>234</sup> although the committee who authored the NYC 2003 opinion included perjury by witnesses within the questions that are "easy to answer" in favor of granting an exception.<sup>235</sup> Like the felonious utterances discussed earlier, secret recording may be particularly beneficial when investigating perjury because what is said is essential to the offense. The Supreme Court in *Nix v. Whiteside* instructively points to the limits of client loyalty with respect to false testimony,

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228. Wendel, *supra* note 198, at 321.

229. See Rebecca Aviel, *The Boundary Claim's Caveat: Lawyers and Confidentiality Exceptionalism*, 86 TUL. L. REV. 1055, 1059 (2011).

230. *Id.* (noting that Rule 1.6(b)(6) is a permissive standard, leaving lawyers leeway to abstain from reporting requirements without facing professional discipline).

231. MODEL RULES R. 3.3 cmt. 10.

232. Billy Joe McLain, *Debunking the Perjury-Trap Myth*, 88 TEX. L. REV. 883, 883 (2010).

233. MODEL RULES R. 3.3.

234. See State Bar of Ariz. Comm. on Prof'l Responsibility, Op. 95-03 (1995) (permitting lawyers to create secret client recordings in order to prevent perjury).

235. NYC 2003 Opinion, *supra* note 36, at 5. The NYC opinion did not comment on *client* perjury.

suggesting that the client has no right “to have a lawyer who will cooperate with planned perjury.”<sup>236</sup>

e. The Generally Accepted Societal Good

The NYC 2003 opinion proposes a “societal good” test as a synthesis of many of the above circumstances where lawyers are permitted to engage in secret recording.<sup>237</sup> The opinion concludes that secret recording by lawyers is generally prohibited (on the basis of deceit), but embraces a broad exception to this prohibition.<sup>238</sup> The opinion notes that it would be “difficult, if not impossible, to anticipate and catalog” all of the recommended exceptional circumstances.<sup>239</sup> Instead, the opinion interprets the growing number of exceptions recognized in ethics opinions as “a cautious case-by-case evolution toward the general principle that if undisclosed taping is done under circumstances that can be said to further a *generally accepted societal good*, it will not be regarded as unethical (emphasis added).”<sup>240</sup>

“Societal good” may seem a broad and unwieldy standard. The NYC 2003 opinion concedes that this exception may face “some risk of uncertainty in its application,” but notes that “attorneys can easily minimize that risk by confining the practice of undisclosed taping to circumstances in which the societal justification is compelling.”<sup>241</sup> These circumstances would only rarely apply.<sup>242</sup> Thus, the opinion prohibits secret recording as a “routine practice.”<sup>243</sup>

Although secret recording of *clients* is permitted under the NYC 2003 opinion, where the recording satisfies the “societal good” test, the opinion emphasizes that occasions when the lawyer may secretly record a client are “few and far between.”<sup>244</sup> The societal good analysis provides no guidance to distinguish what

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236. 475 U.S. 157, 173 (1986).

237. See generally NYC 2003 Opinion, *supra* note 36.

238. *Id.* (explicitly rejecting the 2001 ABA Opinion’s conclusion that secret recording is no longer deceitful because “[u]ndisclosed taping smacks of trickery no less today than it did twenty years ago”).

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.* (“[T]he prudent attorney will, absent extraordinary circumstances, refrain from engaging in the undisclosed taping of such witnesses.”).

243. *Id.* (concluding that secret recording as a routine practice would bring more potential “societal harm” than “societal good.” The opinion offers little guidance as to what might constitute a “compelling” societal justification, but suggests that lawyers should be “extremely reluctant to engage in undisclosed taping,” and, in determining whether a recording serves the societal good, should be held to an objective standard of reasonableness. This objective standard considers not only the reasonable lawyer’s perspective (whether a lawyer “has a reasonable basis for believing” the recording serves the societal good) but also whether the recording “if it became known, would be considered *by the general public* to be fair and honorable” (emphasis added). Courts and disciplinary authorities are to be held to this objective standard, even when the arbiter does not “share an attorney’s assessment of the need for undisclosed taping in a particular set of circumstances.” The court must only consider whether “the attorney had a reasonable basis for believing that the surrounding circumstances warranted undisclosed taping”).

244. *Id.*

is reasonable in recording clients from what is reasonable in recording non-clients.

The societal good test has not been adopted in any other opinions in the fourteen years since it was introduced.<sup>245</sup> A Nebraska opinion explicitly rejected the NYC 2003 approach, explaining that the “subjective analysis after-the-fact is so uncertain as to render this position unworkable.”<sup>246</sup> Other opinions cite “compelling societal interests” and “socially desirable ends” to support permitting secret recordings in specific circumstances, while also raising the possibility that further circumstances that have not been enumerated may be permissible.<sup>247</sup> These standards, however, do not constitute a broad public-interest test for secret recording as found in the NYC 2003 opinion.<sup>248</sup>

### 3. ASSESSING THE HARM-PREVENTION EXCEPTIONS

Having reviewed the circumstances where lawyers may seek to make public-interest recordings and where the harm-prevention purposes of such recordings would not be undermined by a restriction on confidentiality or a mandatory duty to withdraw from representation, this Section assesses public and professional interests for and against permitting public-interest recordings.

The public may desire for lawyers to engage in secret client recording when such recordings can prevent serious harms, particularly bodily injuries, large-scale fraud, domestic violence, and mandatory reporting around child abuse. Deputizing lawyers to intervene in these circumstances could help to counteract the image of lawyers as mere hired guns for client objectives with little regard for the public good.<sup>249</sup> By demonstrating that lawyers are willing to go against their clients, such investigatory recordings may even enhance public trust in the profession. The bar has moved away from a hired-gun image of the profession in

245. *Supra* Part I.

246. Neb. Ethics Comm. Advisory Op. for Lawyers 06-07 (2006); *see also* Vana, *supra* note 16, at 1611 (“adoption of a flexible, case-by-case analysis may invite endless argument and hindsight speculation as to why an attorney’s conduct was justified under the circumstances.”).

247. State Bar of Ariz. Comm. on Prof’l Responsibility, Op. 95-03 (1995) (in an opinion that prohibits secret recording by lawyers, noting that “compelling societal interests” underlying criminal and constitutional law may “give rise to considerations that supersede the principles addressed in this opinion”); Va. Bar Ass’n, Legal Ethics Op. 1738 (2000) (noting that secret recording should be permitted for law enforcement and investigations of housing discrimination because “[t]hese methods of gathering information in the course of investigating crimes or testing for discrimination are legal, long-established and widely used for socially desirable ends.” The opinion implies that the committee is “open to other possible circumstances” where “information would not be available by other means and without which an important and judicially-sanctioned social policy would be frustrated”).

248. States that offer a case-by-case, context-of-the-circumstances analysis primarily focus on determining whether the lawyer was deceitful, not whether the recording served the societal good. *See* states listed, *supra* note 78. The Texas opinion that permits secret recording of clients to “further a legitimate purpose of the lawyer or the client” could be interpreted as including a public-interest analysis, although the opinion does not explicitly define a “legitimate purpose” as a broad societal good. *See* Tex. Prof’l Ethics Comm., Op. 575 (2006).

249. *See* Eli Wald & Russell G. Pearce, *Being Good Lawyers: A Relational Approach to Law Practice*, 29 GEO. J. LEGAL ETHICS 601, 604 (2016).

some modest respects. Lawyers were criticized in the Enron scandal for complicity,<sup>250</sup> and in the subprime mortgage crisis of 2007 to 2009 for failing to play vital roles as “outsiders” who can counteract the “complacency” of corporate clients.<sup>251</sup> With the introduction of a fraud exception to confidentiality under the *Model Rules* in 2003, corporate lawyers have been invited to prioritize their roles as gatekeepers.<sup>252</sup> If the gatekeeping function is to be taken seriously, perhaps lawyers are more generally justified in investigating client misconduct that threatens severe harm.<sup>253</sup>

The public perception of the value of such recordings should be understood against the backdrop of the ongoing revolution in recording technology. The value of secret recording was nowhere more obvious than in Watergate, where the course of national politics was altered by a smoking-gun tape.<sup>254</sup> But the ubiquity of today’s recording technology has created an unprecedented public appetite for recordings that expose harmful conduct. Recordings by private individuals can be a means of “decentraliz[ing] political power” by enabling people to “participate in democracy and inform public discourse.”<sup>255</sup> The public may feel that investigating misconduct by violent and corporate criminals, police, politicians, employers, teachers, and others can be justified even if the lawyer violates client loyalty or an all-party consent law.

On public policy grounds, the scales may intuitively seem to tilt toward permitting the lawyer to record the client in order to prevent serious harms.<sup>256</sup> Yet, a rule that permits lawyers to use the promise of confidentiality and loyalty to lure clients into making self-incriminating statements on tape could tend to undermine trust in lawyers.<sup>257</sup> Such recordings constitute a clear betrayal of the client.<sup>258</sup> A

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250. See Gordon, *supra* note 213, at 1199–200 (arguing that lawyers are complicit when they willfully ignore corporate misconduct).

251. Steven Schwarcz, *The Role of Lawyers in the Global Financial Crisis*, 24 AUSTL. J. CORP. L. 1, 5 (2010).

252. See Gordon, *supra* note 213, at 1190.

253. Zacharias, *supra* note 177, at 1393–95.

254. See EMERY, *supra* note 4.

255. Marceau & Chen, *supra* note 123, at 992, 1000.

256. Fred C. Zacharias, *The Lawyer as Conscientious Objector*, 54 RUTGERS L. REV. 191, 195 (2001) (“Few observers would condemn a lawyer for violating the rules to save a life”).

257. *Id.* (“There is no need to add to the challenges of our criminal justice system, or to increase the public’s distrust, by making it permissible for lawyers to act in concert with the government to investigate their own clients.”); Zacharias, *supra* note 177, at 1404 (suggesting that a hypothetical rule “requiring lawyers to investigate clients and report any suspicious activity to law enforcement authorities” would “undermine the role of lawyers.”).

258. *United States v. Zafar*, 973 F. Supp. 134, 145 (W.D.N.Y. 1996) (concluding that the lawyer was prevented from providing zealous, unprejudiced advocacy because the lawyer went “beyond mere disclosure of the information . . . to use the attorney-client relationship to investigate the client . . . .”); see also Jones, *supra* note 16, at 22 (“The most shocking aspect of [the ABA 2001 opinion] is that it fails to prohibit the secret recording of clients . . . [the] attorney-client relationship must be characterized by the utmost trust and candor.”); Sklansky, *supra* note 120, at 1118 (noting that the use of informants more generally can “invade and corrode friendships, intimate relationships, and communities of trust. Even more so than searches of the home, informants can endanger the very existence of a personal sphere, a zone of retreat.”).

client who perceives a trusting relationship with the lawyer, reinforced by the lawyer's professional duty to maintain confidences, may be willing to admit something to the lawyer, which the client would not admit to law enforcement personnel or an undercover police officer. The more often this trust in lawyers is used against clients, the less likely clients are to trust lawyers in general. When clients do not trust lawyers, they are likely to be less forthcoming, which diminishes the quality of legal representation and, recursively, reduces clients' willingness to share their illegal and harmful conduct with lawyers. As noted in the *Sabri* opinion discussed above, regarding the lawyer whose client threatened an attack on the courthouse, permitting lawyers to make investigatory recordings of their own clients could have "profound implications upon the nature of the attorney-client relationship and the integrity of the judicial process."<sup>259</sup>

The bar's assessment of public-interest recordings should also consider whether a "compelling need exists to obtain evidence otherwise unavailable in an equally reliable form."<sup>260</sup> When what is said is essential to investigating the offense (e.g., when investigating perjury, threats, extortion, etc.), the lawyer may have a stronger case for making such recordings. However, such recordings would not be justified if the lawyer could prevent the harm simply by notifying authorities. For example, the *Sabri* court found disingenuous the government's claim that it was necessary for the lawyer to record the client because, the state argued, "no other means of investigation were available."<sup>261</sup> The court pointed to phone taps and other surveillance techniques that law enforcement could have used.<sup>262</sup>

When a recording is made to assist the prosecution of a lawyer's client, rather than simply to prevent the client's threatened harm, the recording is particularly hard to justify. For a lawyer to turn on a client in order to provide law enforcement and prosecutors with evidentiary materials against the client adds insult to the disloyal legal service. This insult and structural disadvantage is especially abhorrent when a criminal defense attorney cooperates with prosecutors against the attorney's client.

Rather than deputizing lawyers as effectively undercover police against clients, lawyers could inform law enforcement authorities without personally participating in investigations themselves. This point was emphasized by a Mississippi court, which reminded the bar that "an attorney is not a private detective or a secret agent . . . [but rather is] first and foremost an attorney."<sup>263</sup>

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259. United States of America v. Zafar Sabri, 973 F. Supp. 134, 148 (W.D.N.Y. 1996).

260. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 106 cmt. b (2000).

261. *Sabri*, 973 F. Supp. at 148.

262. *Id.*; see also Marceau & Chen, *supra* note 123, at 1007 (noting that some courts permit video recording in criminal investigations when law enforcement officials can demonstrate that "all other 'reasonable' investigatory methods would not suffice in a particular investigation."). A similar standard appears in The Restatement (Third) of the Law Governing Lawyers, which suggests that investigatory recordings by lawyers should be permitted only when "compelling need exists to obtain evidence otherwise unavailable in an equally reliable form." See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 106 cmt. b (2000).

263. Miss. Bar v. Attorney ST, 621 So. 2d 229, 233 (Miss. 1993)



The public may be unconcerned about such systemic consequences, opting for the “nothing to hide” argument (or fallacy, as it is often characterized), assuming that secretly recording clients in enumerated circumstances would injure only those clients who are engaging in serious criminal or otherwise harmful conduct.<sup>264</sup> Clients who have nothing to hide, so the argument goes, would not be harmed by a rule permitting lawyers to investigate clients.

Jurisdictions that permit secret investigatory recording of clients have generally noted that this permission is limited to rare, “extraordinary” circumstances.<sup>265</sup> For example, the ABA 2001 opinion noted that “it is *almost always* advisable” to inform a client when the client is being recorded.<sup>266</sup> My analysis has emphasized how these permissible circumstances are narrowed by duties of confidentiality and mandatory withdrawal. Even within these narrow confines, public-interest recordings constitute conflicts of interest and violate the duty of loyalty. For a secret client recording to be justified in spite of these professional duties would likely require a persuasive case that the recording is reasonably certain to prevent an exceptionally severe harm and that it is necessary for the lawyer to serve as the agent investigating the client rather than other informants or law enforcement personnel.

### III. POLICY PRESCRIPTIONS

This Article has argued that secret client recordings may be justified in extraordinary circumstances where the recording is reasonably certain to prevent an exceptionally severe harm, where prevention of the harm depends on the lawyer’s recording, and where the lawyer is not required to withdraw or to maintain confidences. Given that these circumstances occur rarely and that secret client recordings raise serious risks to clients, lawyers, and the operation of the legal system, any exception to a general ban on secret client recordings should be narrowly constructed. As noted earlier, clients may place less trust in their lawyers if they know that lawyers can transform into undercover agents when they suspect the client of wrongdoing. When lawyers secretly record in order to obtain incriminating statements, clients may justifiably worry that their comments will be taken out of context or that minor inconsistencies may be used against them.

Furthermore, any rule that allows broad grey areas of permissibility may tempt lawyers to expand and abuse interpretations of the rule to include situations where the lawyer is not particularly certain that the client is engaging in harmful conduct or where the degree of the harm is unclear or minimal.<sup>267</sup> The secretive nature of

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264. DANIEL J. SOLOVE, *NOTHING TO HIDE: THE FALSE TRADEOFF BETWEEN PRIVACY AND SECURITY* (2011).

265. See opinions from Alaska, Ohio, Maine, Minnesota, Mississippi, Texas, *supra* note 59. Six of the eight state opinions that permit secret recording of clients include a note that the practice is most often inadvisable.

266. 2001 ABA Opinion, *supra* note 12, at 6 (emphasis added).

267. The 2003 NYC Opinion addresses this concern with an objective standard of reasonableness. 2003 NYC Opinion, *supra* note 36.

these recordings gives the lawyer discretion over whether to disclose to anyone that a recording has been made. This may lead a lawyer (unscrupulously) to make secret client recordings on a routine basis, only disclosing that they had made such recordings when advantageous circumstances arise.

A generally prohibitive rule is further supported by considerations for vulnerable clients. The case law suggests that it is often criminal defense lawyers who use secret recording against their clients.<sup>268</sup> Given that criminal defendants already face the power of the state, against the backdrop of mass incarceration, it is inappropriate to give the state even more power against defendants by enabling lawyers to actively investigate their own clients.

A blanket prohibition on secret client recordings may have some merit in encouraging clients to trust their lawyers. Under such a rule, lawyers who feel compelled to make secret client recordings (e.g., to prevent harm) could conscientiously object to the prohibition,<sup>269</sup> and perhaps even hope to escape punishment under the disciplinary authority's prosecutorial discretion.<sup>270</sup> Yet, such a prophylactic rule risks discouraging lawyers from helping to prevent the most horrifyingly violent offenses and large-scale financial and political crimes. Lawyers who avail themselves of an exception to confidentiality in order to warn law enforcement and potential victims of impending harm may find that their warnings are viewed less credibly unless corroborated by a secret recording. Thus, to help prevent grave harms, I advocate permitting a narrow exception to an otherwise prohibitive rule on secret client recordings.

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268. In addition to recordings made by defense lawyers, criminal defendants have also had meetings with lawyers recorded by police and other authorities. *See, e.g.,* Mary Jenkins, *Alameda County Deputy Secretly Recorded Attorney Conversations with Minors*, CBS SACRAMENTO (Aug. 21, 2018, 11:35 PM), <https://sacramento.cbslocal.com/2018/08/21/alameda-county-deputy-recording-minors> [<https://perma.cc/2F8U-429Z>].

269. Following the civil disobedience model, the attorney who seeks to conscientiously object would break the rule, publicly state the reasons for the violation, and accept the penalty. *See* Leslie Griffin, *The Relevance of Religion to a Lawyer's Work: Legal Ethics*, 66 FORDHAM L. REV. 1253, 1259–60 (1998).

270. *See* Bruce Green, *Lawyer Discipline: Conscientious Noncompliance, Conscious Avoidance, and Prosecutorial Discretion*, 66 FORDHAM L. REV. 1307, 1309 (1998); *see also* GEOFFREY C. HAZARD & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* § 1.6:304 (1993) (suggesting that disciplinary authorities would generally support a lawyer's decision to save a life); *In re PRB*, 989 A.2d 523, 528 (Vt. 2009) (holding that the conduct of a lawyer who had engaged in deceitful secret recording was not sufficiently egregious to lead to a conclusion that the lawyer “lacks the moral character to practice law.”). A lawyer may also consider violating a prohibition against secret client recordings when the lawyer is cooperating with law enforcement in order to reduce the lawyer's own criminal liability. If the lawyer's criminal offenses are the type that reflect “adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects,” MODEL RULES R. 8.4(b), or if the lawyer is in a jurisdiction that has automatic disbarment for felony convictions (as was the case for Michael Cohen, who was disbarred in New York in 2019 as an automatic consequence of his felony convictions), the lawyer may feel that the possibility of facing additional discipline for secretly recording the client is worth the promise of a reduced criminal sentence. Furthermore, if the lawyer is in a jurisdiction where an advisory state ethics opinion recommends a prohibition on secretly recording clients, but (as in most jurisdictions) no case law has established how courts or other disciplinary authorities might actually respond to such recordings, the lawyer may reasonably calculate that it is uncertain whether secretly recording clients will result in discipline.

## IV. CONSIDERATIONS FOR THE FUTURE

Privacy expectations have declined in the Digital Era. This is evident in the increasing public acquiescence to growing surveillance technology, which has “habituated most Americans to radically diminished informational privacy.”<sup>271</sup> Even in circumstances where people claim to be concerned about privacy, research portrays a “privacy paradox,” wherein people tend to disregard privacy in their behavior.<sup>272</sup> Along with this wider trend, expectations that one’s conversations are not recorded have likely decreased amid the expansion of recording technology. While this shift in expectations has led a portion of the bar to conclude that secret recording by lawyers does not generally constitute deceit, this Article has argued that secret recording of *clients* nevertheless violates a lawyer’s duties with respect to communication, control, and loyalty.

The analysis of secret client recordings might look different in a radical future, which is possibly not far away. We have already seen the emergence of “always on” audiovisual recording devices that either record non-stop or record when artificial intelligence determines that something might be worth documenting.<sup>273</sup> These devices can provide wearable “life-logging”<sup>274</sup> that leaves little room to request consent from all parties who might be recorded. Some of these devices are difficult or near impossible for interlocutors to detect. If consumers grow more receptive to this always-on technology, in addition to the expanding use in law enforcement and other contexts, some commentators suggest that in the coming world, privacy will be effectively obsolete.<sup>275</sup>

Furthermore, recording has increasingly entered professional relationships. For example, some doctors are using video and audio recordings with patients, either with high-tech augmented reality for complex procedures or simply to provide audio or video documentation of a patient meeting so that the doctor can more accurately refresh their memory for subsequent appointments.<sup>276</sup> If the use of recording technology continues to expand in professional contexts, perhaps medical patients and legal clients alike, along with most of the public, will grow accustomed to being recorded at all times.

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271. Richard A. Posner, *Privacy, Surveillance, and Law*, 75 U. CHI. L. REV. 245, 249 (2008).

272. Patricia A. Norberg et al., *The Privacy Paradox: Personal Information Disclosure Intentions Versus Behaviors*, 41.1 J. CONSUMER AFFAIRS 100, 106 (2007).

273. See, e.g., Jay Peters, *Google Clips Is Dead*, THE VERGE (Oct. 16, 2019) <https://www.theverge.com/2019/10/16/20917386/google-clips-dead-discontinued-rip-camera-ai> [<https://perma.cc/K3Y5-X6T9>] (describing Google’s Clips device, sold from 2017 to 2019, as one of many such cameras on the consumer market that uses artificial intelligence to “automatically capture short videos of precious moments with your loved ones.”).

274. See, e.g., Katrin Wolf et al., *Lifelogging: You’re Wearing a Camera?* 13 IEEE PERSASIVE COMPUTING 8 (2014).

275. See David Cole, *Is Privacy Obsolete*, THE NATION (Mar. 23, 2015), <https://www.thenation.com/article/privacy-20-surveillance-digital-age/> [<https://perma.cc/J47K-94VD>].

276. See, e.g., Bruno Jacobsen, *How Augmented Reality Can Change Surgical Procedures* (Jan. 14, 2019), <https://www.futuresplatform.com/blog/how-augmented-reality-can-change-surgical-procedures> [<https://perma.cc/552A-WMGG>].

In a professional context, recording in this future world would then come to occupy a similar place to written notes in today's world. This change would be the kind of radical societal transformation that could reverse the legal ethics analysis under communication and control duties. In this possible future, recording would still raise risks for those recorded, but these harms would not be exacerbated by the secretive nature of recording without notice (recording without notice would no longer be possible). Thus, clients would impliedly authorize recordings and assume any associated risks. A lawyer may still be subject to discipline for violating loyalty by investigating the client, but the lawyer's transgression would not owe to the use of a recording device but rather to the disloyal client service (and conflict of interest) inherent in investigating the client.

It is not certain that a future where recording without notice is no longer possible will ever materialize. While some commentators suggest (and even embrace) that we are already entering a post-privacy world due to near ubiquitous recording technology and lack of informational privacy, we are not yet in the world where recording is "always-on."<sup>277</sup> Furthermore, the public remains concerned about privacy violations relating to emerging big data, facial recognition, wearable technology, the Internet of Things, artificial intelligence, and other developments.<sup>278</sup> These new technologies may be keeping pace with privacy expectations—while privacy expectations decline, technology makes perhaps commensurate gains in finding more invasive ways to violate personal privacy. A Pew survey found that roughly half of those questioned believed that by 2020 "the benefits of recording technologies wouldn't be worth the cost paid in the loss of privacy."<sup>279</sup>

## CONCLUSION

The question of whether secret client recordings constitute professional misconduct has not been adequately addressed with the prevailing deceit analysis. This Article has presented a doctrinal alternative. I have argued that client-specific duties of loyalty, communication, and shared control weigh heavily against permitting secret client recordings under the standards of professional conduct. In light of these duties, I recommend a prohibition on such recordings subject to a narrow exception where recordings are justified in the public interest.

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277. See Thomas L. Friedman, *Four Words Going Bye-Bye*, N.Y. TIMES, May 20, 2014 (suggesting that "privacy is over" because it is "how so easy for anyone to record, film, or photograph anyone else anywhere and share it with the world . . . that we are all now on Candid Camera."); Michael Massimi et al., *Understanding Recording Technologies in Everyday Life*, 9.3 IEEE PERSVASIVE COMPUTING 64, 64 (2010) (suggesting that people can quickly adapt, assimilate, and grow resilient to the rise of recording technology); DAVID BRIN, *THE TRANSPARENT SOCIETY: WILL TECHNOLOGY FORCE US TO CHOOSE BETWEEN PRIVACY AND FREEDOM?* (1999) (suggesting that we should embrace the rise of a world without privacy, except for a small sanctuary).

278. See Meg Leta Jones, *Privacy Without Screens & the Internet of Other People's Things*, 51 IDAHO L. REV. 639, 641–42, 645, 650 (2014).

279. Massimi et al., *supra* note 277, at 64.

This public interest exception would be limited to rare circumstances where the recording is reasonably certain to prevent exceptionally severe harm, the evidence needed to prevent the harm could not reasonably be obtained in another manner, and the lawyer is not required to withdraw or maintain confidences.

Prohibiting a lawyer from secretly recording a client may be unpalatable to the public in circumstances where the recording could provide immense value in preventing harm. The public might celebrate a lawyer who abandons loyalty to the client, who, in Cohen's words, is no longer willing to "take a bullet" as a "loyal soldier" for his client, and instead secretly records conversations about the client's threatened harmful conduct and then releases those recordings to investigators and to the media. Although Cohen's own account of these recordings emphasizes client interest (for convenient "contemporaneous notetaking") and lawyer interest (to assure that he received payment from Trump), perhaps a best-case scenario for Cohen's public image would be for him to be viewed under the public interest category as a whistleblower, having made the recordings to reveal some dangerous misconduct by his client. In a survey of lawyers' clients in the 1980s, two thirds of clients expressed that lawyers should disclose information that reveals the President's deceitful and criminal conduct (the president used in the hypothetical was Nixon).<sup>280</sup> Yet, only 3.8 percent of *lawyers* felt that a "good lawyer" would make such a disclosure.<sup>281</sup> The lawyers in that survey may have been reacting to the confidentiality restrictions, still in place in the *Model Rules* today, which subject lawyers to discipline for breaking client confidences even where the lawyer's disclosure is protected by a whistleblowing law.<sup>282</sup>

If lawyers are to serve as gatekeepers, following their own moral compasses and standing independent of the market and politics, I argue that lawyers are justified, on rare occasions, in breaking client loyalty to make secret recordings. This justification is strongest when the lawyer has an opportunity to prevent severe harm, such as physical violence or large-scale fraud. Yet, lawyers can only play a legitimate role as advocates in a representational system if they respect the client's authority either as a collaborative joint venturer or as an "informed client-

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280. Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 403, 411 (1989) (The prompt from the survey read: "President Nixon announces publicly that the Watergate tapes show he knew nothing about any potentially illegal activities. Nixon's lawyer listens to the tapes and urges Nixon to disclose its contents 'in the national interest.' Nixon refuses and tells the press that he will not disclose anything about them because of his 'duty to protect the presidency.'").

281. *Id.*

282. Wendel, *supra* note 198, at 321; Kathryn Marshall, *Advancing the Public Interest: Why the Model Rules Should Be Amended to Facilitate Federal Government Attorney Whistleblowing*, 31 GEO. J. LEGAL ETHICS 747, 749 (2018) (suggesting that the lack of a whistleblowing exception to confidentiality may create missed opportunities for lawyers to make important contributions to the public interest; describing lawyers as the "most significant class of potential whistleblowers in the federal government," because legal training uniquely situates lawyers to "understand when fraud, illegality, or mismanagement is occurring").

principal” in an agency relationship.<sup>283</sup> The paternalistic or disloyal legal representation provided by a lawyer who makes secret client recordings violates fundamental professional duties, endangers clients, and tends to undermine public trust in the legal profession. Weighing these interests against the backdrop of the fundamental tension between lawyers’ duties to clients and the public should be central to the bar’s analysis of the narrow harm-prevention exception I have advocated within an otherwise strictly prohibitive rule on secret client recordings.

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283. Wald, *supra* note 103, at 769.