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DO BAR ASSOCIATION ETHICS COMMITTEES SERVE THE PUBLIC OR THE PROFESSION?: AN ARGUMENT FOR PROCESS CHANGE

Hon. David G. Trager*

I. INTRODUCTION

Thank you Dean Twerski for your most gracious introduction, and Professor Simon and Professor Freedman for asking me to participate in this gathering of distinguished scholars for Hofstra University School of Law's 2005 Legal Ethics Conference: Lawyers Ethics in an Adversary System. I hope that my comments contribute in some small way to this fascinating discussion of the problems of ethics in an adversarial system.

As I explained to Dean Twerski when he extended his invitation, this is not my area of expertise. So I thought long and hard about what I might say that would be of interest to the audience, as well as whether I might have something worth contributing.

As I thought about this talk, I reflected on my experiences serving on the state bar ethics committee some twenty-five years ago. That experience left me with some significant doubts about how ethics rules and opinions are developed in our system. I think those criticisms have been borne out in my observations, as well as some personal experiences, since then. In particular, there are two issues I have previously spoken or written about—the prohibition against bugging.1

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1 Trager: Do Bar Association Ethics Committees Serve the Public or the Profession? Published by Scholarly Commons at Hofstra Law, 2006

* United States District Judge for the Eastern District of New York. I wish to thank my future law clerk, Mark Ladov, for his assistance in editing this lecture for publication. My discussion of unilateral taping is an updated version of a talk and paper I delivered in 1986, which was prepared with the assistance of my then-research assistant, Brian S. Sokoloff.

and the "no contact" rule—where I found not only the relevant substantive ethics law troubling, but even more I found the process by which the ethics rules and opinions were developed disturbing. As a result, I have developed some views about reforms which I will espouse here, and which I have no doubt will strike some of you as controversial to say the least.

I will touch on some of my substantive concerns with these issues. But more importantly, I want to draw attention to the evolution of those substantive rules. The substantive rules were, and to some extent still are, plagued by inconsistencies and conflicts. Some might say that such problems are inevitable. But I think that the legal profession as a whole has an obligation to create both rules and a process by which ethics rules and opinions are developed that ensure clear and consistent rulings with a justifiable basis in policy. Otherwise, we are left with vague and inconsistent ethics opinions from overlapping bar associations, which leave lawyers at risk of professional discipline. Furthermore, we are left with situations which allow alleged rule violations by one attorney to be used for tactical purposes by opposing counsel. This reflects badly on the profession as a whole because ethics rules appear only to serve the interests of the profession, and not the public. Perhaps most importantly, vague ethics rules or inconsistencies in ethics opinions can adversely affect the ability of lawyers to represent their clients effectively.

Vagueness in the law, as we know, is a form of prior restraint. By keeping the line between legal and illegal conduct vague, we deter people in general and certainly professionals from testing or approaching that line. There may be areas of law where some ambiguity is acceptable. For example, our laws define mail fraud in extremely broad language. And that may be appropriate, since a goal of our legal system should be to discourage people from morally objectionable conduct, and there is a public benefit if people stay away from the indefinite line. In

2. As discussed in detail below in Part III of this essay, the "no contact" rule of DR 7-104(A)(1) states that:
   During the course of the representation of a client, a lawyer shall not...[c]ommunicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so.
   NY CODE OF PROF'L RESPONSIBILITY DR 7-104(A)(1).

3. Compare N.Y. CODE OF PROF'L RESPONSIBILITY DR 7-101 (requiring an attorney to represent a client zealously), with id. at DR 7-104(A)(1).

4. See, e.g., United States v. Rybicki, 354 F.3d 124, 126, 142-43 (2d Cir. 2003) (en banc) (quoting United States v. Rybicki, 287 F.3d 257, 264 (2d Cir. 2003) (quotations omitted) (concluding that the reach of 18 U.S.C. § 1346, defining "scheme or artifice to defraud," is not
contrast, we do not countenance legal vagueness in a First Amendment context, because one of the primary goals of our free speech jurisprudence is to limit prior restraints to further the communication of ideas. I believe that ethics rules should fall firmly into the latter camp. Because ethics rules are a restraint on how lawyers may advocate for their clients, clear and predictable rules are necessary so that lawyers can pursue the most vigorous advocacy available.

In this talk, I will endeavor to give a legal and ethical overview of the subject of surreptitious recording by lawyers or their clients, and briefly the “no-contact” rule of DR 7-104(A)(1). I will then present what I am sure are my somewhat controversial views about the development of these particular ethical rules. But, as I have said, I am not only interested in these particular subjects. I hope these examples will illuminate the broader issue of how ethical rules and authorities are interpreted by bar association committees. Unfortunately, in my view, in too many instances the interpretation is guided by professional interests and not the public interest.

II. CAN (SHOULD) LAWYERS BUG?6

Just the phrase—surreptitious recording—is one which is enough to raise the hackles of many lawyers. Having participated in discussions on the issue in other contexts, I have learned that the topic is an emotional one, not easily given to reasoned discourse. Personally, I find the terms “surreptitious recording” or “secret taping” objectionable as more a conclusory emotional statement than a fair statement of the issue. A more balanced phrase in my view would be “unilateral recording,” although I am willing to accept the term “surreptitious,” as it is commonly used.

A. The Legal Basis for Unilateral Recording

It would be best to start with a discussion of the legality of surreptitious recording and then proceed to an historical survey of the issue from the ethics perspective. As Professor Simon has pointed out,

5. See, e.g., NAACP v. Button, 371 U.S. 415, 432-33 (1963) (“[S]tandards of permissible statutory vagueness are strict in the area of free expression . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.”).

6. This section is an updated version of a talk delivered at the Association of the Bar of the City of New York on April 9, 1986.
the history of the issue is "long and twisted." The place to begin is Title III of the Omnibus Crime Control and Safe Streets Act of 1968, which regulates the interception of oral and wire communications. The controversy which attended its congressional enactment is a reflection of the polarization to which this issue seems naturally to lend itself.

When Title III was enacted there were several conflicting views on the form any legislation regulating electronic surveillance should take: at one extreme were those who believed that a total ban on electronic surveillance was necessary for the protection of individual privacy; and at the other extreme were advocates of strong law enforcement who hesitated to limit the use of a technique claimed by many to be a vital tool in fighting crime, particularly organized crime.

The statute represents a compromise between these opposing views. It permits the court to authorize, via warrant, electronic surveillance by law enforcement officers in the investigation of certain crimes under procedures designed to protect individual privacy. On the other hand, it completely bans the use of wiretapping surveillance by private individuals unless—and this is the critical exception—one party to the conversation consents.

Specifically, 18 U.S.C. § 2511(2)(c) permits interception by "a person acting under color of law," provided that either "such person is a party to the communication or one of the parties . . . has given prior consent." This exception is most frequently used by prosecutors or other governmental investigators who secure the cooperation of an informant who consents to recording a hopefully incriminating conversation with another suspect. Further, 18 U.S.C. § 2511(2)(d) permits interception of a conversation by "a person not acting under color of law," that is to say, a non-law enforcement person, provided "one of the parties to the communication has given prior consent" and that the interception is not made "for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State."

11. Id. § 2155(2).
12. Id. § 2511(2)(c).
13. Id. § 2511(2)(d). This law also originally barred any interception made under this exception "for the purpose of committing any other injurious act." That language was deleted from...
Title III, however, was not a Congressional attempt to occupy the entire field of electronic surveillance law. Under 18 U.S.C. § 2516(2), the "[s]tates were authorized to enact similar legislation, which could be more restrictive but not more permissive than Title III."¹⁴ State laws are by no means uniform. According to a 2002 survey, thirty-eight states and the District of Columbia adhere to the federal policy of allowing recording so long as one party consents; eleven states require the consent of all parties to a conversation,¹⁵ and one state (Vermont) has not adopted legislation on the matter.¹⁶

Article 250 of New York’s Penal Law—Offenses Against the Right to Privacy—sets forth the New York law on eavesdropping. It provides that: "[a] person is guilty of eavesdropping [a class E felony] when he unlawfully engages in wiretapping, mechanical overhearing of a conversation, or intercepting or accessing of an electronic communication."¹⁷ For purposes of the section:

"Wiretapping" means the intentional overhearing or recording of a telephonic or telegraphic communication by a person other than a sender or receiver thereof, without the consent of either the sender or receiver, by means of any instrument, device or equipment . . . . "Mechanical overhearing of a conversation" means the intentional overhearing or recording of a conversation or discussion, without the consent of at least one party thereto, by a person not present theret, by means of any instrument, device or equipment.¹⁸

Thus, under New York law, it is not a criminal violation for a private person—which would include an attorney—to record his

¹⁸ U.S.C. § 2511(2)(d) by the Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, § 101(b)(2), 100 Stat. 1850 (1986). For interpretations of the one-party exceptions, see, for example, By-Prod Corp. v. Armen-Berry Co., 668 F.2d 956, 959 (7th Cir. 1982) ("[A] desire to make an accurate record of a conversation to which [one is] a party is a lawful purpose under the statute even if [one wants] to use the recording in evidence."); Meredith v. Gavin, 446 F.2d 794, 798 (8th Cir. 1971) ("[A] party to a conversation may . . . protect himself and his credibility by recording the entire conversation, unless his purpose is evil—that is, to commit or attempt a criminal or tortious act or injure the unsuspecting participant in some vague but illegitimate fashion.").

¹⁴. CLIFFORD S. FISHMAN, WIRETAPPING AND EAVESDROPPING § 5 (1978) (footnote omitted).

¹⁵. Florida and New Hampshire generally require the consent of all parties, but only require the consent of one party if a law enforcement officer is one of the parties. Charles H. Kennedy & Peter P. Swire, State Wiretaps and Electronic Surveillance After September 11, 54 HASTINGS L.J. 971 app. A, at 1014, 1065 (2003).

¹⁶. Id. at 987-1069 (surveying the laws of all fifty states and the District of Columbia as of June 2002). The authors emphasize that state surveillance laws have been in flux since the September 11 attacks. Id. at app. B, 1163-81.

¹⁷. N.Y. Penal Law § 250.05 (McKinney 2005).

¹⁸. N.Y. Penal Law § 250.00(1)-(2) (McKinney 2005) (emphasis added).
conversations, telephonic or otherwise, with another person without the knowledge, let alone the consent, of that person. Similarly, a client may record his conversations with another solely on the basis of the client’s consent.

B. The Ethical Debate over Unilateral Recording

With this legal background, I turn to a discussion of the ethics of a lawyer recording his conversations with another person, be it another lawyer or a non-lawyer, or recommending that course of action to a client.

My first point is that, with this legal regime, there was no reason for ethics committees to get into this issue at all. Policies set by Congress and the various state legislatures should have ended the discussion. But they did not. Instead, bar associations have gone back and forth on the question for years. Today, lawyers in New York face separate and sometimes contradictory opinions from bar associations at the county, city, state and national levels. The result is a lack of clarity and guidance, and the dangers posed by such vagueness and inconsistencies that I mentioned earlier.

My second point is that ethics decisions against unilateral taping reflect the distaste of the professional bar to this breach of professional courtesy and etiquette—but they rarely offer a coherent argument grounded either in law or the ethics of professional responsibility.

Secret taping is a divisive issue because it raises questions about personal morality, conscience, the role of the profession, judgments about the ethics of the bar generally and an overall view of the duties a lawyer owes to his profession, his client and the public. Unfortunately, I believe those who argue for prohibitions against unilateral taping fail to respect the diversity of points of view on these questions. In addition, these prohibitions fail to respect the diversity of our profession. Ethics rules, particularly when they govern advocacy and the gathering of evidence, need to take account of the divergent needs of criminal and civil lawyers, large firms as well as solo practitioners.19 Ethics rules should also try to treat all clients equally, and while respecting differences, certainly not presume that different rules should apply to

19. To quote from the Preliminary Statement to the Code of Professional Responsibility, “the Disciplinary Rules should be uniformly applied to all lawyers, regardless of the nature of their professional activities.” See SIMON, supra note 7, at 6.
clients whose interests are deemed to coincide with the "societal good."  

1. Early Opposition to Unilateral Recording

Bar discussion of the topic is not new. It has been underway for decades. Until recent years, a strong, and perhaps overwhelming, majority position deemed the practice unethical. It was viewed as "inconsistent with the honor and dignity of the profession." However, a growing chorus of critics has called for a change. In the past few years, a once air-tight prohibition has lost its grip. The American Bar Association has repudiated the traditional view, although the Association of the Bar of the City of New York, while accepting the need for change, has done so with some distaste.

Opposition to the practice of unilateral recording is based not only on the enumerated tenets of codes of professional responsibility, but also on basic theories of human personality. A panel of the Association of the Bar of the City of New York has eloquently stated:

Central to the values involved is the claim, or right, of privacy. This claim to a private personality lies at the core of our Western concept of the essential dignity and worth of the individual. Privacy is not solitude. It is more than the desire of the individual to be let alone. It includes what each of us needs to share and communicate as well as what we wish to conceal.

The essence of privacy, therefore, is the freedom of the individual to pick and choose for himself the time when, the circumstances under which, and the extent to which, his attitudes, beliefs and behavior are to be shared with, or withheld from others.

Surreptitious surveillance and concealed recording are a direct affront to this fundamental human claim.

Justice William O. Douglas once stated: "Electronic surveillance is the greatest leveler of human privacy ever known." In a dissent from a

20. See, e.g., Ass'n of the Bar of the City of NY Comm. on Prof'l Ethics, Formal Op. ("NYC Formal Op.") 2003-02 (2003) (concluding that undisclosed taping should only be permissible when it "advances a generally accepted societal good"). The problems with this opinion are discussed in more detail below. See infra notes 57-67 and accompanying text.


holding dealing with consensual recording and the Fourth Amendment, he adopted the view articulated by a former Attorney General:

"Few conversations would be what they are if the speakers thought others were listening. Silly, secret, thoughtless and thoughtful statements would all be affected. The sheer numbers in our lives, the anonymity of urban living and the inability to influence things that are important are depersonalizing and dehumanizing factors of modern life. To penetrate the last refuge of the individual, the precious little privacy that remains, the basis of individual dignity, can have meaning to the quality of our lives that we cannot foresee. In terms of present values, that meaning cannot be good."24

This Orwellian fear has been aggravated by the rapid advance of modern technology, which miniaturizes the size and reduces the cost of surveillance hardware.25 Similar fears are no doubt present in bar association and court opinions, but almost always sub silentio so that a candid discussion of the issue was rare and the policy dispute rarely acknowledged. Properly, however, the issue has turned more narrowly on the construction given to provisions of the Model Code of Professional Responsibility and its predecessor, the Canons of Professional Ethics.

Prior to the adoption of the Code on January 1, 1970, the Canons controlled. Of paramount importance in the pre-Code era was Canon 22, which stated: "The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness."26

One interesting New York case interpreting Canon 22, albeit not involving a consensual recording, but nevertheless reflecting an

24. Id. at 763 (quoting R. CLARK, CRIME IN AMERICA 287 (1970)).
25. Justice Douglas also quoted the following from Senator Edward Long, who investigated the practice of bugging:

There is today [forty years ago] a transmitter the size of an aspirin tablet which can help transmit conversations in your room to a listening post up to 10 miles away . . . .

A leading electronics expert told my Subcommittee last year that wiretapping and bugging in industrial espionage triples every year. He said that new bugging devices are so small and cleverly concealed that it takes search equipment costing over one hundred thousand dollars and an expert with 10 years of field experience to discover them.

Id. at 764 n.5 (quoting Senator Edward Long, Address at the Annual Meeting of the Indiana Civil Liberties Union (Apr. 1, 1967), in Senator Edward Long Speaks on the Right to Privacy, Comment, 19 ADMIN. L. REV. 442, 444 (1967)).

26. CANONS OF PROF'L ETHICS Canon 22 (1908).
emotional hostility to surreptitious recording, is In re Wittner.27 There, an attorney suggested and approved the installation of a dictograph microphone in a hotel room occupied by opposing counsel and his wife in order to permit the attorney’s secretary to transcribe both the conversations of the couple and that of opposing counsel and his client.28 Today, the attorney’s conduct would constitute a crime—not so in 1942. The First Department held that counsel’s conduct was “highly unethical and reprehensible,” warranting a two year suspension from practice.29 The dissent believed that this punishment was too lenient, and called for disbarment.30 Impliedly relying on Canon 22, the dissent stated: “Professional men are presumed to be men of honor . . . [m]embers of the legal profession have had sufficient training to realize that ethical practices must be followed in their dealings with each other and with their fellow men.”31

This proposition, without any reference to the non-consensual nature of the recording, was echoed repeatedly in the bar association ethics opinions which followed.32 I note also that the opinion had not a word about whether the lawyer’s clients’ interests were served by the lawyer’s conduct.

The advent of the Model Code of Professional Responsibility in 1970, with its attendant Disciplinary Rules (“DRs”) and Ethical Considerations (“ECs”) required that the issue—surreptitious recording—had to be decided anew. In 1974, both the ABA and the New York State Bar Association once again issued formal opinions

28. Id. at 774.
29. Id. at 775.
30. See id. at 780 (Martin, J., dissenting).
31. Id.
32. See NYC Bar Op. 683 (1945) (finding it unethical for an attorney to advise, or participate in, concealed recording of an opposing party); NYC Formal Op. 813 (1956) (finding it unethical for an attorney to advise, or participate in, the concealed recording of conversations with an opposing party’s attorney); NYC Formal Op. 832 (1957) (advising that an attorney should not urge his client to record another person); ABA Comm. on Ethics and Prof’l Responsibility, Informal Op. (“ABA Informal Op.”) C-480 (1961) (finding it unethical for an attorney to record proceedings in magistrate’s court without prior consent of the court and opposing counsel); ABA Informal Op. 1008 (1967) (finding it unethical for an attorney to record a telephone conversation with client without client’s knowledge); ABA Informal Op. 1009 (1967) (advising that lawyers should not record telephone conversation with another lawyer without prior consent); see also NYC Bar Ass’n Interim Report, supra note 22, at 654 (“[An attorney should refuse] to engage, or aid his client, in monitoring the conversation of another person without the freely given consent of that person.”). For a discussion of the opinions of ethics committees of other states, see generally Abraham Abramovsky, Surreptitious Recording of Witnesses in Criminal Cases: A Quest for Truth or a Violation of Law and Ethics?, 57 TUL. L. REV. 1, 18-25 (1982); N.Y.S. Bar Op. 328 (1974).
denouncing the practice of one-party consent recording. The New York State Bar Association Opinion (No. 328) relied chiefly on two disciplinary rules and one ethical consideration of the Code: DR 1-102(A)(4) (prohibiting “dishonesty, fraud, deceit or misrepresentation”); DR 7-102(A)(8) (prohibiting “illegal conduct or conduct contrary to a Disciplinary Rule”); and EC 9-6 under Canon 9 of the new Code (stating that a lawyer should uphold the integrity and honor of the profession and avoid even the appearance of professional impropriety).  

The New York State Bar Association opinion stated that these provisions militated against sanctioning the practice. Further, it concluded (and this was the real, although in my view unprincipled, basis of the opinion):

There is a general aversion to the secret electronic recordation of private conversations. Unrecorded private conversation encourages uninhibited and easy flow of expression and facilitates the exchange of ideas even though in unguarded and imprecise language which might not have been employed if the speaker had had knowledge that a literal transcript was being made. Elemental fairness ordinarily dictates that all participants be aware of the ground rules governing a conversation. They may then conduct themselves accordingly.

The ABA’s initial opinion, issued shortly thereafter, amassed the same authority from the Code, and reached the same result. This conclusion was, on the whole, followed throughout the nation—until its recent (albeit incomplete) repudiation.

As I shall try to indicate shortly, these opinions reflected noble sentiments in search of a rationale. The bases on which the opinions rested did not support their conclusion. But before I begin my critique, it should immediately be indicated that the eventual demise of these opinions was forecast in the opinions themselves. The rule against unilateral recording could only survive by accepting certain exceptions—and over time these exceptions gradually devoured the rule.  

34. Id.
35. Id.
37. As I will argue in my conclusion, a rulemaking process that encompassed the profession as a whole might have recognized this problem earlier, and created an ethics rule that the profession could actually follow, rather than a vague and moralistic pronouncement that was rendered meaningless by all of its caveats. See infra Part IV.
If the opinions were taken to their logical conclusion, they would, for example, bar prosecutors from conducting undercover investigations of drug dealers selling drugs, or Congressmen soliciting bribes. It is obvious that the proscription against recording could not be so airtight. Unilateral recording is recognized as being essential to combat crime, and accordingly both the New York State and the ABA Opinions contained “outs” to their apparently absolute prohibitions. Indeed, both opinions in the NY/ABA duet drove a fairly wide wedge into the general rule, with an acknowledgment of broad exceptions, particularly in the case of prosecuting attorneys.  

It has been said that this “prosecutor’s exception” is premised simply on the idea that “in certain investigations surreptitious recording is essential to combat crime.” In addition to being acknowledged by the bar associations, this “prosecutor’s exception” for secret recording was bolstered by the federal courts. The D.C. Circuit, for example, rejected the argument that the U.S. Attorney breached his ethical responsibility by secretly recording conversations between a cooperating witness and another suspect. The court ruled that “the public interest does not—as opposed to the different interests involved in civil matters—permit advantage to be legally and ethically taken of a wrongdoer’s misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.” The same result was reached in New York.  

In a Ninth Circuit case, in a prosecution involving fraudulent government contracts, the defendant, who was secretly recorded by a government informant, claimed that he was denied his Sixth Amendment right to counsel because the U.S. Attorney’s secret recordings of him were made while the U.S. Attorney was aware that he was represented by counsel. In reasoning that gave added vitality to the “prosecutor’s exception” of the ethics opinions, the court stated:

[T]he right to counsel sought by [the defendant] would severely cripple the use of undercover methods to investigate crimes. Those engaged in

38. See ABA Formal Op. 337 (1974); N.Y.S. Bar Op. 328. There is a similar, interesting history with the “no-contact” rule in the Second Circuit in the Hammad case, which attempted to restrict prosecutors’ contact with represented witnesses, and its ultimate demise. United States v. Hammad, 858 F.2d 834 (2d Cir. 1988); see infra text accompanying notes 94-96.
41. Id.
ongoing criminal activity would be encouraged to obtain "house counsel," who would have to be informed prior to government use of informants in the presence of clients . . . 44

Through these exceptions, prosecutors were armed with both legal power and moral authority when they sought to record potential defendants surreptitiously. Such conduct was sanctioned as necessary in the national "war on crime."

What occurred next was that the exception gave an unfair advantage to prosecutors. While the prosecutor could use this weapon to deal a knock-out blow, the defendant was not permitted to do so and seemingly forced to "fight" with one hand tied behind his back. This sort of equal protection argument is not one I find very persuasive. More convincing to me are the due process concerns of assuring a correct result with the concomitant right to effective assistance of counsel. The inability of a defense lawyer to record a witness's statement might well adversely affect the defendant's ability to make an effective defense.

One commentator catalogued four situations in which the defendant and his attorney were hampered:

1. The Misunderstanding Witness
Prior to trial, when interviewed by defense counsel, the witness absolutely absolves the defendant by stating that another individual known to him has committed the offense. At trial, testifying for the prosecution, the witness implicates the defendant. When questioned about his pre-trial statements, the witness admits to having had a conversation with counsel but claims that he misunderstood counsel's questions. The introduction of the taped conversation into evidence permits the jury to determine whether the witness was confused at the time of the interview, or whether he simply changed sides at trial.

2. Statements Made Out of Context
The facts are unchanged, except that the witness testifies that while he understood the questions in the pre-trial interview, the statements alluded to by counsel on cross-examination are out of context. The admission of the taped conversation into evidence would dispel this contention. Unless the prosecution challenges the integrity of the tape, the witness' testimony may be discredited in whole or in part by the jury.

3. The Denying Witness
In this version, the witness not only testifies adversely to the interests

44. Id. at 1338.
of the defendant, but on cross-examination, when asked about absolving statements he made prior to trial, steadfastly denies that he has ever spoken to counsel. The taped conversation's introduction would severely discredit the witness.

4. The Allegedly Bribed Witness
In this scenario, the turncoat witness admits making certain favorable statements, but alleges that he was bribed by defense counsel. This is the most damaging scenario, since the witness not only implicates the defendant but impugns the integrity of defense counsel before the jury. The introduction of the entire taped conversation could assist counsel in impeaching the witness. The length of the conversation and the nature and wording of the statements could convince the jury that the statements made at the lawyer's office were spontaneous, voluntary, and true.45

In all these cases, it was argued, introduction of the recordings made by defense counsel would serve the same purpose as those of the prosecution—namely, that of enhancing the search for truth.

Thus, only five years after issuing their first opinions about surreptitious recording under the Code of Professional Responsibility, both the New York State and New York City Bar Associations responded. In N.Y.S. Op. 515 (1979), the Professional Ethics Committee was asked: "May a lawyer, in response to a client's request for advice, counsel a client concerning the recording of a conversation between the client and a third person to whom no notice is given?"46 The committee answered the question in the affirmative, stating that N.Y.S. Op. 515 "clarifies #328." Interestingly, the opinion explicitly stated: "[L]awyers engaged in a criminal matter, representing the prosecution or a defendant, may ethically record a conversation with the consent of one party...." As to the precise question asked, the opinion is strangely ambiguous, although the discussion made it quite clear that, consistent with the "Digest" of the opinion, a lawyer "in private practice may, under certain circumstances, counsel client concerning conversations to be recorded without notice or consent."47 Note that the digest did not limit itself to criminal matters.

A year later, the Association of the Bar of the City of New York's Professional Ethics Committee was asked directly whether a defense lawyer may make secret recordings of a witness. In N.Y.C. Bar Op. 80-

45. Abramovsky, supra note 32, at 4-5.
47. Id. (emphasis added).
95, the committee held that such practice was ethical. This opinion claimed that the State Bar opinion of a year earlier seemed to hedge on whether an attorney could be directly involved in the recording, rather than merely advising the client on its permissibility. In contrast to N.Y.S. Op. 515, this opinion met the issue frontally.

While we continue to fully endorse the general proposition that lawyers ought not to participate in making secret recordings, we believe that the ethical rule as applied in the criminal area must take into account society's judgment, reflected in legislation, that secret recordings are a desirable tool in detecting and proving crime. We believe that a necessary corollary, compelled by fairness and our legal tradition which guarantees the fullest protections to a criminal accused, allows similar investigative tools to be available to lawyers who have undertaken the defense of a person being investigated for, or charged with, a crime.

Although this "leveled the playing field" in the criminal law area, it said nothing about attorneys handling civil cases. Under this authority, secret recording by civil attorneys was still unethical, although a careful reading of N.Y.S. Op. 515 appeared to permit attorneys to counsel a client to do the recording in civil matters:

N.Y. State 328 did not specifically address the situation where a client in a civil matter requests counsel's advice concerning the propriety of the client (not counsel) recording a conversation without the other party's consent. DR 7-101(A) mandates that counsel should not fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules, subject to certain exceptions.

There do not appear to be Constitutional prohibitions against monitoring conversations where one party consents. Apart from the FCC policy requiring use of an automatic tone warning device in interstate and international calls, which has been adopted by most states, neither Congress nor the New York legislature has acted to prohibit party monitoring.

In N.Y. State 455 (1976) we said: "where the lawyer does no more than advise his client concerning the legal character and consequences

49. Id.
of the act, there can be no professional impropriety. That is his proper function and fully comports with the requirements of Canon 7.\textsuperscript{50}

Whether or not my reading of N.Y.S. Op. 515 was a fair one—and I believe it was—the time soon came for the other shoe to drop. As we will see, the criminal/civil distinction did not prove viable.

These opinions illustrate the haphazard nature of the development of this issue. First, bar associations set forth a general prohibition against secret taping. Then, after protests from prosecutors, they realized that an exception was necessary for law enforcement. Next came the arguments—and a further exception—for criminal defense lawyers. For a brief time, the bar associations tried to maintain a distinction between criminal cases that implicated the "public interest," where taping might be permissible, and civil cases that only concerned private interests, where taping should be discouraged. But, predictably, the next outcry came from the civil bar. The result has been the steady erosion of the general prohibition against secret unilateral taping.

This erosion should have been completely predictable. And the confusion that has resulted from ever-shifting rules might have been avoided altogether, as I shall argue shortly, if the attorneys who needed to rely on the practice of secret taping had a voice in the ethics rulemaking and interpretation process.

2. Recent Bar Association Opinions on the Ethics of Unilateral Recording

Recent ethics opinions have moved steadily toward the abandonment of the rule against secret taping entirely, but not without some reluctance from certain quarters.

In 1993, the N.Y. County Lawyers Association broke with the ABA and the City and State Bar Associations, and issued an opinion concluding that there should not be a rule against secret taping in any context. The County Lawyers opinion concluded that secret taping does not violate any ethical rules provided it is lawful in the locality in which it is undertaken and no affirmative misrepresentations are made as to whether the conversation in question is being recorded.\textsuperscript{51}

In 2001, the ABA Standing Committee on Ethics and Professional Responsibility reversed course and withdrew its earlier prohibition of secret taping. The 2001 opinion concluded that:

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\(50\) N.Y.S. Bar Op. 515 (citations omitted).

\(51\) N.Y. County Lawyers Ass’n Op. ("N.Y. County Op.") 696 (1993); see also Simon, supra note 7, at 1245.
A lawyer who electronically records a conversation without the knowledge of the other party or parties to the conversation does not necessarily violate the Model Rules. Formal Opinion 337 (1974) accordingly is withdrawn. A lawyer may not, however, record conversations in violation of the law in a jurisdiction that forbids such conduct without the consent of all parties, nor falsely represent that a conversation is not being recorded. The Committee is divided as to whether a lawyer may record a client-lawyer conversation without the knowledge of the client, but agrees that it is inadvisable to do so.52

The ABA acknowledged that its earlier prohibition had not been universally accepted, pointing to the fact that the vast majority of states in 2001 had laws permitting recordings with only the consent of one party to a conversation. With that in mind, the ABA recognized that people should not have an expectation of absolute privacy in their conversations. Most importantly, the ABA acknowledged that its secret taping rule had been rendered meaningless by its exceptions. The existing prohibition had already been carved away for a variety of situations where such a blanket rule was inappropriate, such as the documentation of criminal utterances, threats, obscene telephone calls and the like, and for testers in investigations for housing discrimination and trademark infringement.53

The New York City Bar Association has accepted this trend, but only reluctantly. The City Bar issued a 2003 ruling which called the ABA decision an “overcorrection,” and persisted in maintaining that “undisclosed taping smacks of trickery and is improper as a routine practice.”54 The City Bar found itself “unpersuaded that there has been any material change in societal attitudes or practices with respect to undisclosed taping since the 1970s.”55

The City Bar opinion also granted no deference to legislative judgments on the subject. The Bar concluded: “While it is certainly true that many states currently permit the recording of conversations without the consent of all parties and that courts routinely accept evidence acquired by such techniques, the same could have been said at the time the ABA issued its 1974 Opinion.”56 This assertion seems disingenuous. When I first lectured on this topic in 1986, nineteen states permitted

53. Id.
55. Id.
56. Id.
tape-recording with the consent of only one party to a conversation.\textsuperscript{57} Today, thirty-eight states and the District of Columbia permit the practice.\textsuperscript{58} Given the debate over the practice that has accompanied these laws, it seems to me that this is compelling, if not conclusive, evidence of a legislative trend.

The City Bar opinion argues that secret taping should not become a "routine practice."\textsuperscript{59} I would agree with the observer who described this City Bar opinion as "clinging to what some might consider an antiquated attitude."\textsuperscript{60} Unfortunately, the City Bar's solution is a wholly unsatisfying mixture of hedged bets and subjective reasoning. The opinion settles on a completely subjective standard: undisclosed taping should be permissible when it advances "a generally accepted societal good."\textsuperscript{61} The City Bar acknowledged that "it would be difficult, if not impossible, to anticipate and catalog all such circumstances, and that a lawyer should not be subject to professional discipline if he or she has a reasonable basis for believing such circumstances exist."\textsuperscript{62}

This opinion exemplifies the frustratingly subjective nature of this rule. It would be one thing if a lawyer could go to an authoritative body to obtain a ruling on the issue. After all, who is to decide how to define "a generally accepted societal good," or even when a legal representative has a "reasonable basis" for believing that her client's interests align with the societal good? Furthermore, why should that question even matter? Should a lawyer have to decide whether her client's case serves "a generally accepted societal good" before she sets a course of advocacy? How can lawyers avoid the difficulties that will result from such a vague rule when they give their clients advice, or advocate and collect evidence on a client's behalf?\textsuperscript{63}

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57. See Abramovsky, supra note 32, at 10.
58. See supra text accompanying notes 15-16.
59. NYC Formal Op. 2003-02. Arguably, if people believed that taping were routine then it would be less unethical under the City Bar's definitions. Routine taping would be less likely to trick people, who would be on notice that they always have a responsibility to watch their words. Routine taping would also encourage people who did not want to be taped to make sure to ask whether they are being recorded, since there seems to be a clear consensus (at least in the civil context) that it would be unethical to record a conversation after affirmatively asserting that it is not being taped.
63. I am inclined to agree with Steven Wechsler's entreaty to the State Bar to clear up this mess:

The New York State Bar Association has not yet returned to this issue; when and if it does, rather than embrace an impossible to define "societal good" rationale, the Bar Association would do well to take one side of the debate or the other: either allow secret
The ABA recognized the danger of vagueness and inconsistency when it reversed its earlier ruling against secret taping:

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

Unfortunately, the City Bar Association’s opinion expressed a willingness to countenance that same vagueness. Dismissing the ABA’s concerns, the City Bar defended the principle that secret taping is only appropriate when it “can be said to further a generally accepted societal good.” That is:

While that principle carries with it, as many ethical rules do, some risk of uncertainty in its application, attorneys can easily minimize that risk by confining the practice of undisclosed taping to circumstances in which the societal justification is compelling.

Legal ambiguity may be appropriate to deter socially unacceptable behavior. However, vagueness cannot be countenanced in an ethics ruling where the result is to limit an attorney’s capacity to advocate vigorously for his client, as required by the rules of professional responsibility.

C. Personal Reflections on Unilateral Taping in the Civil Context

I am pleased that, in the past two decades, the supposedly absolute prohibition against surreptitious recording has given way. This change reflects the recognition of the right of the defendant to have a fair trial with all relevant evidence before the jury. In sum, society decided there were more important concerns than the inhibition that recording might have on human discourse—although, based on personal experience in

\[\text{tape recording by attorneys, as the ABA has decided to do, or stand absolutely firm on a ban.}\]

Wechsler, supra note 60, at 1334.

64. ABA Formal Op. 01-422 (2001).
66. Id.
67. See N.Y. CODE OF PROF’L RESPONSIBILITY DR 7-101 (requiring an attorney to represent a client zealously).
the civil context of board meetings or judges' conferences, knowledge that a conversation is being taped often seems, after a relatively short passage of time, to have little effect on the discourse.

The initial retreat from the absolute prohibition against secret recording came about when a little dose of reality, brought to bear by the more humble representatives of the bar engaged in prosecutorial and criminal defense work, said that the rule was unfair and unjust. More recently, representatives of the civil bar have affected the same change—although the transformation of the rule in the civil context remains incomplete. But the use of secret recordings may be just as necessary to effective representation in the civil case as in a criminal case, and what may be at stake in a civil litigation may far exceed in personal or social importance anything but the most serious of crimes.

For such reasons, I, myself, on at least three occasions during the period of hostility to unilateral bugging, not only recommended but urged clients to surreptitiously record conversations which they would be having with third persons.

In one of these instances, I was consulted by a person who claimed to have been a victim of a fraudulent scheme to strip him of his assets by an attorney who had previously represented him in a criminal proceeding. He was now in the position of having a criminal record. His claims against the attorney would not likely have gotten very far if he had simply sued the attorney. The critical conversations were ones as to which there were no witnesses other than possibly the client's wife. Also, the story that the client told hardly painted the client in the best light.

Even though I could not be sure, for a number of reasons, I believed that the client was telling the truth. Thus, I was faced with a client, a convicted criminal who was about to lose all his remaining assets which he needed to support his family while he would be in jail, and who had no proof of his claim, other than his own word. His only hope was to obtain incontrovertible evidence of the fraud. Also, I, too, wanted to be sure that, before any law suit was brought, there was a basis to the claim in order not to defame unfairly the attorney who was fairly prominent.

Let me simply say that the conversation which the client subsequently recorded—while not a smoking gun—was sufficient that when a subsequent civil law suit was brought, the suit was settled upon the service of the complaint on terms favorable to the client. The lawyer-defendant was never directly informed that his former client had bugged their conversation, but from the precise factual nature of the complaint, I am sure he must have suspected it.
In a second case, where I recommended that a client bug his conversation, the results were not so dramatic. The recording did serve, however, to protect the client from a possible attempted extortion.

To give another example, I was once consulted by a lawyer who represented a defendant who was being sued for allegedly underpaying on his liability insurance by claiming residence outside of New York City. The client owned three or four cars that were used by himself, his wife and his two children. The claim, covering a few years, was not large, say $25,000. The client told the lawyer that when the client went to the agent for the insurance company, he candidly told the agent that his principal residence was in the City but that he owned a vacation home near the agent’s office. He had told the agent he spent most weekends and summer vacations at the vacation residence—all of which was true. The agent had told the client that it was perfectly all right to register the cars at the vacation home so long as there was bona fide use of the vacation home by the insured. Indeed, the client told the lawyer that if he called the insurance agent himself that very day he would be advised similarly. Now, how should the lawyer effectively represent this client?

The lawyer thought he should seek to confirm the client’s statement, which is exactly what he did. Because he recorded the conversation, the lawyer could prove that his client’s account was entirely accurate. But now, having disclosed the existence of the tape to plaintiff’s counsel, he was facing claims by the attorney that this conduct was unethical. The plaintiff’s attorney threatened to file ethics charges against him with the disciplinary committee—unless, of course, his client settled on terms favorable to the insurance company. These spurious allegations of misconduct are just one example of how our ethics enforcement process has been abused by lawyers seeking tactical advantages.

But did this lawyer have any more “ethical” alternatives than unilateral recording? He presumably could hire a private investigator to go out and interview the insurance agent. He could hope the agent had not heard of the lawsuit and that he would not speak with the investigator. Then the investigator could ask the agent whether in fact he had had such a conversation. Perhaps this tactic would be helpful to the client’s defense. I do not think anyone would question the ethics of proceeding in this fashion, but likewise most of us would not think it likely to be very effective.

Suppose, however, he has the investigator go down and pose as someone seeking insurance and give the agent the exact facts of the
client's case. (By the way, is there any "dishonesty, fraud, deceit or misrepresentation" here, as barred by DR 1-102(A)(4), assuming the lawyer knows—as he must—what the investigator is doing?) In any event, sure enough, the agent says the same thing to the investigator that he said to the client a few years before. Indeed, the investigator speaks to three or four agents of the insurance company and they all say the same thing. Now, I assume that if the case goes to trial and the lawyers call the investigator as a witness, without complaint, the investigator could testify as to these conversations. Of course, at this point it would be a one-on-one witness case if the insurance agent denies having the conversation. I suppose if the lawyer wanted to protect his client, he could hire four investigators, each of whom would have gone to the same four agents, and hopefully corroborate each other. Now, even if this approach works, what is the bill for this effective representation—$20,000, $25,000? All this for a $25,000 claim? I just do not think that this is at all realistic.

If, as in my hypothetical case, the agents will make the same statements over the telephone or in person, and the lawyer or his associate can surreptitiously record the conversation, I do not see why a client should be denied this probative and valuable evidence at a reasonable cost, just so that a lawyer's fastidiousness against such conduct is not offended. 68

These investigations are similar to the need for testers in an anti-discrimination case. Indeed, a promising step for this issue was taken in 2003 in an anti-discrimination case in Brooklyn, where a state supreme court justice cited the ABA's opinion in support of using unilateral taping. In *Mena v. Key Food Stores Co-operative, Inc.* 69 supermarket workers alleged racial bias in the workplace. When one of the plaintiffs asked her attorney how to record the obscenities and racial slurs that were commonplace at her job, he advised her on how to create a secret recording. 70 The resulting tape caught a voice alleged to be a Key Food supervisor asking whether a job applicant was a "'f*** g

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68. I would add that my rationale for bugging a potential witness, including someone who may eventually be a party to the litigation, seems to me generally not to provide the same justification for lawyers bugging each other. Normally, lawyers' informal statements to each other do not constitute any form of admissible evidence and, in the case of settlement negotiations, are clearly inadmissible. See, e.g., FED. R. EVID. 408. Nevertheless, even here I can see a situation where a lawyer says one thing to his opponent and then proceeds in court to assert the truth of the complete factual opposite. This might, on occasion, justify a subsequent surreptitious recording of one's opponent.


70. *Id.* at 247.
n * * * * * r"" along with other shocking and offensive comments.\footnote{71} At trial, the defendants moved to suppress the tapes as a violation of the Disciplinary Rules’ prohibition of “fraudulent or dishonest conduct.”\footnote{72} The court responded clearly: “Contemporary ethical opinions hold that a lawyer may secretly record telephone conversations with third parties without violating ethical strictures so long as the law of the jurisdiction permits such conduct.”\footnote{73}

This trial court opinion was the first published opinion to reinforce the ABA’s rule permitting secret taping.\footnote{74} The \textit{Mena} case illustrates how taping can be beneficial, and even necessary, in a civil case. The decision could be read narrowly, since the lawyer here only advised his clients that their secret taping would be legal; the lawyer did not initiate the recording or do the taping on his own. But I hope that the \textit{Mena} opinion is read more broadly than that, and that it moves us toward a clear rule that secret taping, when legal and done for a purpose other than mere harassment, is clearly ethical behavior.

What then do these examples illustrate? They illustrate first that the distinction between the justification for surreptitious recording in civil, as distinguished from criminal, cases is purely arbitrary. Extortion, fraud, discrimination—all have both civil and criminal dimensions, and the stakes may be just as high in the civil case and the incentive for perjury just as great as it is in a criminal case. And here, I must add, I am not talking just about perjury on the part of party-witnesses. Here, I must regretfully admit that my position is based in part on my view that perjury is widespread in civil cases and this is often tolerated by the bar.

The picture of the bar as a noble profession, always acting in a manner consistent with the highest ethical standards, may have been true of the English barristers of old—although if one watches that wonderful show, \textit{Rumpole of the Bailey}, one would not draw the inference that the picture in England is much different from what it is here\footnote{75}—but it is certainly not true of the bar in America. Even if I would concede that most lawyers would not be parties to subornation of perjury, the fact

\footnote{71}{Id.}
\footnote{72}{Id.}
\footnote{73}{Id. at 248-49 (citing ABA Formal Op. 422; N.Y. County Op. 696).}
\footnote{74}{Steve Seidenberg, \textit{Lawyers May Instruct on Secret Taping}, NAT'L L.J., Apr. 28, 2003, at A9.}
\footnote{75}{I have been told that even in England, the bar has grown to such a size that the moral constraints which previously operated, when all the barristers knew each other personally, no longer exist.}
remains that we have more than a million lawyers in this country. Even if it is only a small minority, say one out of every 200 lawyers or 5000 (although the number is surely higher) who engage in such conduct, the problem is serious. Yet, no one would contend that the problem is being dealt with either by the criminal justice system, or the self-policing mechanisms of the profession. An ethical system that must, therefore, rely on the personal integrity of a competitive profession, made up of more than a million people, to ensure that truth and standards of proper conduct prevail, is not a viable one.

I am not painting a very nice picture, but I think it is a realistic one. We cannot continue to denigrate accuracy in fact-finding by our ethical rules. If our court system is not to be a charade, it will require lawyers to recommend that their clients record witnesses, and even on occasion that the lawyers do so themselves. Moreover, I would argue that in the three instances where I recommended that lawyers engage in or encourage surreptitious recording, had I not done so, I believe that I would not have acted in a manner consistent with my obligation under DR 7-101 to provide effective representation.

The other aspect of the problem which cannot be ignored is the question of resources. I believe the original, and even the present, rule to be somewhat class-based. Not every case is a major anti-trust case in which the parties can devote hundreds of thousands of dollars to litigate their dispute. There are lots of little cases where clients cannot afford to hire private investigators to do what the lawyers may disdain doing; often in these “small” cases the lawyer must do his own investigatory work and even then it must be a minimal job. Endless depositions and searches for documents are just not feasible. Are these clients with their little cases to be denied justice because of the self-imposed ethical sensitivities of the bar? I am not sure the public can afford an ethical rule against surreptitious recording.

To summarize, the law in this area is fairly clear; at least in New York, surreptitious or unilateral recording is legal. Whether it is ethical

77. Perjury is a notoriously difficult subject to research, but anecdotal evidence suggests that perjury is a common—and rarely punished—occurrence in our courtrooms. See, e.g., Mark Curriden, The Lies Have it, 81 A.B.A. J. May 1995, at 69, 71 (suggesting from interviews with judges, lawyers and academics that “perjury in some form permeates civil and criminal courts,” but that “hardly anyone . . . is getting caught or prosecuted for perjury.”); JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 85 (1949) (“Experienced lawyers say that, in large cities, scarcely a trial occurs, in which some witness does not lie.”).
is, despite many general pronouncements, a proposition that unfortunately remains somewhat open to question. Both prosecutors and criminal defense attorneys have now been given bar association sanction to record surreptitiously or recommend that their clients tape conversations with third persons. Although civil attorneys also have strong authority for this practice, at least some corners of the bar are trying to cling to divisions between "public" and "private" interests in the civil law arena. I suggest that all of these distinctions are not justifiable or sustainable. Inevitably, the same kinds of considerations, which led to the change in view in the criminal area, must lead to expanding the rule to cover completely civil litigation as well.

Unfortunately, this change has been hampered by our system for providing ethics opinions, which often focuses on the beliefs of small and often unrepresentative segments of the bar, instead of the needs of the profession as a whole. I hope that this brief history of secret taping or unilateral recording illustrates that there is a need to rethink our procedures for creating bar association ethics opinions.

III. THE "NO CONTACT" RULE

Next I want to turn to the "no contact" rule, DR 7-104(A)(1), which instructs that:

During the course of the representation of a client, a lawyer shall not . . . communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so. 78

As my earlier discussion illustrated, ethics rules in the area of unilateral recording have been dogged by artificial distinctions and inconsistent interpretations. The same is true for the "no contact" rule. As was the case with unilateral recording, each corner of the bar has tried to use ethics debates to serve its own interests, rather than the public interest as a whole. I hope that a discussion of the "no contact" rule will further convince you of the need for a more open ethics process, one that provides greater predictability and clarity, and which creates rules that serve all attorneys and clients equally.

In 1995, I had the opportunity to examine the "no contact" rule while sitting on a panel of the Second Circuit. In the Simels case, 79 a

78. N.Y. CODE OF PROF'L RESPONSIBILITY DR 7-104(A)(1).

https://scholarlycommons.law.hofstra.edu/hlr/vol34/iss3/16
defense attorney appealed a censure order issued by the Committee on Grievances for the Southern District of New York. I will briefly outline the facts and legal arguments, which can be found in more detail in the published opinion. Then I want to focus on two themes raised by that case, which are common to the rest of my talk today. First: the need for ethics decisions to avoid interfering with an attorney's obligation to provide vigorous advocacy for his client. Second: the need for clearly defined and narrowly interpreted rules, to ensure that attorneys are not unduly deterred by vagueness.

A. Factual Background of the Simels Case

The attorney at the center of the Simels disciplinary controversy represented a client, Brooks Davis, who had been charged in a drug conspiracy. Prior to trial, one of the government witnesses against Davis and his co-defendants was shot and seriously wounded. The police soon picked up Aaron Harper in connection with the shooting. Harper told authorities that one of Davis's co-defendants, Claddis Arrington, had instigated the attempted murder of the witness. Harper was arraigned and appointed counsel. In the meantime, the government requested that Davis and his co-defendants, who had been out on bail, be remanded, because the government now had a confidential informant who was the basis of a new complaint alleging attempted murder, obstruction of justice and witness tampering.

While Harper was at the Manhattan Correctional Center for his arraignment process, he encountered Davis and his co-defendants. Davis informed Harper that his lawyer would be calling to discuss the case. Davis then called his lawyer, Simels, and told him to interview Harper for information that might be relevant to Davis's defense. I remind you that at this point Harper's name had been kept confidential and, therefore, was not on the list of government witnesses for the drug conspiracy trial.

Now we reach the point in this story where Simels conducted the conversation that allegedly breached the Rules of Professional Responsibility:

The next morning, April 12, Simels went to interview Harper, introducing himself as Brooks Davis' attorney. During the interview, Simels learned about the circumstances surrounding Harper's arrest

80. These facts are set forth in detail in Simels, 48 F.3d at 642-44.
81. Id. at 642-43.
82. Id. at 643.
and incarceration and that the court had appointed counsel for him, although Harper was unable to recall the name of the attorney. Harper also stated that he and his family were in the process of retaining private counsel. Simels inquired about the shooting and the government’s interrogation of Harper, and had an affidavit prepared which Harper signed the same day. At no point during this exchange did Simels make any attempt to contact Harper’s attorney. 83

The opinion further explains:

When the affidavit was presented to Judge Griesa during the drug conspiracy trial and the circumstances surrounding its creation were revealed, the District Court declared a mistrial and disqualified Simels from serving as defense counsel because Davis’ co-defendants stated that they would call Simels to testify in order to counter Harper’s testimony. 84

The U.S. Attorney’s Office reported Simels to the Committee on Grievances for the Southern District of New York, which decided that the conduct merited prosecution. The Committee appointed Special Counsel to prosecute the charges and named a three-member panel to hear evidence and report back. The panel investigated a number of charges, but the one that was considered by the Second Circuit (and with which I am concerned today) was the alleged violation of DR 7-104(A)(1), the “no contact” rule. 85

Interestingly, the panel recommended that all charges against Simels be dismissed. 86 The panel concluded that, “DR 7-104 does not bar an attorney from communicating with one scheduled to appear as a witness or with his client’s co-defendant, even though the one to be interviewed is represented by counsel.” 87 The Committee on Grievances, however, accepted the Panel’s Findings of Fact, but reversed the Panel’s Findings of Law. The Committee concluded, first, that Davis and Harper were parties to the same “matter,” namely the pending charges for attempted murder of the government witness for which both men could conceivably be charged. 88 Second, the Committee concluded that, because the affidavit which Simels had procured from Harper could be

83. Id. (footnote omitted).
84. Id. at 643, n.3.
85. Id.
86. Id.
87. Id. at 644 (citing Panel’s Findings of Fact and Conclusions of Law).
88. Id. (citing In re Simels, No. M2-238, 1993 WL 524939 (S.D.N.Y. Dec. 10, 1993)).
used against Harper, “the interests of Harper and Brooks Davis were ‘adverse’ at the time [Simels] took the statement.”\textsuperscript{89}

The threshold question was whether Harper and Davis were both “parties” to the same “matter,” such that Simels should have been prohibited from contacting one man during the course of his advocacy for the other.\textsuperscript{90} Ultimately, our Second Circuit panel concluded that “Harper was a potential witness against Davis in the attempted murder matter and, only nominally, a co-defendant or ‘party.’”\textsuperscript{91} Therefore, Simels should not have been disciplined for contacting this witness without advising Harper’s counsel. As I will discuss in more detail momentarily, any other outcome would have accepted a broad and ambiguous definition of “party” that would “chill all sorts of investigation essential to a defense attorney’s preparation for trial.”\textsuperscript{92}

\textbf{B. Legal Issues in the Simels Case}

A number of issues emerged during the \textit{Simels} case that are germane to my earlier discussion of unilateral taping. First is the question of whether ethics rules should apply to all attorneys equally. I should note that the “no contact” rule, when it was first promulgated, did not apply to criminal proceedings at all. As our panel noted, it was originally created as a rule of professional courtesy. Our panel reasoned:

DR 7-104(A)(1), which has existed since 1908, presumably protects “a defendant from the danger of being tricked into giving his case away by opposing counsel’s artfully crafted questions.” . . . This provision has also been said to further other interests, such as “protecting the client from disclosing privileged information or from being subject to unjust pressures; helping settle disputes by channeling them through dispassionate experts; rescuing lawyers from a painful conflict between their duty to advance their clients’ interests and their duty not to overreach an unprotected opposing party; and providing parties with the rule that most would choose to follow anyway.” . . . It is evident, therefore, that DR 7-104(A)(1), both in origin and in scope, is primarily a rule of professional courtesy. If it were more than that, DR 7-104(A)(1) also would have provided protection for unrepresented

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\textsuperscript{89} \textit{Id.} \\
\textsuperscript{90} \textit{Id.} \\
\textsuperscript{91} \textit{Id. at} 650. \\
\textsuperscript{92} \textit{Id.; see also} Int’l Bus. Machs. Corp. v. Edelstein, 526 F.2d 37, 41 (2d Cir. 1975) (citing Hickman v. Taylor, 329 U.S. 495 (1947)) (“A lawyer talks to a witness to ascertain what, if any, information the witness may have relevant to his theory of the case, and to explore the witness’ knowledge, memory and opinion—frequently in light of information counsel may have developed from other sources. This is part of the attorney’s so-called work product.”). \\
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parties, as does DR 7-104(A)(2), which forbids an attorney from giving legal advice to an unrepresented person whose interests might be adverse to those of the attorney's client.\footnote{Simels, 48 F.3d at 647 (quoting United States v. Jamil, 707 F.2d 638, 646 (2d Cir. 1983); John Leubsdorf, Comment, Communicating with Another Lawyer's Client: The Lawyer's Veto and the Client's Interest, 127 U. PA. L. REV. 683, 686-87 (1979)).}

It was not until the 1980s that the Second Circuit affirmatively stated that the rule applied to criminal cases.\footnote{See United States v. Hammad, 858 F.2d 834, 837-38 (2d Cir. 1988); United States v. Jamil, 707 F.2d at 645.} Initially, the vast majority of cases, outside of the civil context, concerned the rights of criminal defendants to the protections of counsel and the applicability of DR 7-104(A)(1) to federal prosecutors and their agents.\footnote{See generally United States v. De Villio, 983 F.2d 1185 (2d Cir. 1993); United States v. Schwimmer, 882 F.2d 22 (2d Cir. 1989); United States v. Hammad, 858 F.2d at 834; United States v. Pinto, 850 F.2d 927 (2d Cir. 1988); United States v. Foley, 735 F.2d 45 (2d Cir. 1984); United States v. Jamil, 707 F.2d at 638; United States v. Vasquez, 675 F.2d 16 (2d Cir. 1982) (per curiam) (all considering the applicability of DR 7-104(A)(1) to federal prosecutors and their agents in the context of a criminal trial).} Simels raised a novel question about the applicability of the rule to a defense attorney in the context of a disciplinary hearing.

The Simels case illustrated a good rule of thumb: given the opportunity, lawyers will argue that ethics rules should be enforced vigorously against opposing counsel, but leniently against themselves.

For example, the Simels case coincided with the development of new (and now defunct) Department of Justice ("DOJ") rules regulating government contact with represented parties. The DOJ, following the controversial so-called "Thornburgh Memorandum," was arguing that its prosecutors should not be limited by the "no contact" rule, and that all pre-indictment contacts (and even some post-indictment contacts) between federal prosecutors and represented persons should fall within DR 7-104(A)(1)'s "authorized by law" exception.\footnote{Issued in response to the Hammad decision, the so-called "Thornburgh Memorandum" purported to bring most contacts between federal prosecutors and represented persons within DR 7-104(A)(1)'s "authorized by law" exception. See Memorandum from Dick Thornburgh, Attorney General, to All Justice Dept Litigators (June 8, 1989), reprinted in In re Doe, 801 F. Supp. 478, 489-93. While we were hearing the Simels case, the DOJ promulgated final rules on contact with represented parties derived from this memorandum. See Communications with Represented Persons, 59 Fed. Reg. 39,910, 39,930 (Aug. 4, 1994) (codified at 28 C.F.R. pt. 77). Specifically, the regulations authorized government attorneys to communicate or cause another to communicate with a represented person "in the process of conducting an investigation," and authorized certain government-initiated contacts after the commencement of formal adversarial proceedings in connection with the "[i]nvestigation of additional, different or ongoing crimes or civil violations." Id. at 39,930.} Our Second Circuit
panel requested an *amicus* brief from the U.S. Attorney’s office to address the impact of the Committee’s interpretation of DR 7-104 on the then-proposed DOJ regulations. The U.S. Attorney argued that the principles addressed in the DOJ’s proposed regulations were inapposite to the appeal in light of the fact that even “the proposed rule would not permit a prosecutor [to make] the contact at issue here . . . an individual who had already been arrested and presented before a judicial officer on criminal charges.”

I found that argument less than satisfying. The U.S. Attorney seemed to be arguing that because a defendant’s Sixth Amendment right to effective assistance of counsel would have barred the government from contacting Harper, DR 7-104(A)(1) should bar a defense counsel such as Simels’s from engaging in that sort of contact as well. This reasoning also conveniently ignored the possibility that, if the DOJ’s regulations were ultimately held invalid or unenforceable—which turned out to be the case—the Committee’s broad interpretation of the Rule clearly would bar most of the contacts that the “Thornburgh Memorandum” and subsequent DOJ regulations sought to permit. In effect, the government appeared to have no difficulty with a broad interpretation of the Rule so long as it only functioned to limit defense counsel’s activities. Strict enforcement of the “no contact” rule was encouraged, so long as prosecutors were permitted to conduct their own investigations freely in the name of the DOJ’s “obligation . . . to enforce the [federal] law vigorously.”

Meanwhile, Simels’s response to the U.S. Attorney’s brief argued for an expansive reading of the Rule as applied to *prosecutors*, even though he vigorously contested the Committee’s expansive reading of DR 7-104(A)(1) in his case. Simels would have exempted himself from its application on the basis that either the Sixth Amendment’s right to effective assistance of counsel permitted his conduct, or that as defense counsel he could not control the bringing of charges. Accordingly, any broad interpretation of the “no contact” rule should not apply to him.

These regulations were subsequently amended in 1999, by the enactment of 28 U.S.C. § 530B (2000) (known as the “McDade” Amendment for its primary sponsor). Under the 1999 law, which continues to govern today, all government attorneys are subject to the same rules of professional responsibility as any attorney practicing in the same state or federal court. See *id.* and the implementing rules promulgated at 28 C.F.R. § 77.1 (2005). For more on the history of this issue, see SIMON, supra note 7, at 976-77.


However, DR 7-104(A)(1) by its language applies to all counsel. Moreover, the reasons for the rule have little to do with who can invoke the process, whether it be the prosecutor in criminal cases or plaintiff's counsel in civil cases.

In short, prosecutors asked for an expansive reading of the rule as applied to defense attorneys, and vice versa. That is not surprising. Attorneys in an adversarial system can be expected to seek advantages for their side, and to limit the similar advantages for their opponents. Ethics opinions, however, should be above that fray. Ethics committees cannot put the interests of certain corners of the bar over the public interest that should be served by an effective adversarial system as a whole. Moreover, ethics opinions must provide all attorneys clear guidance that does not deter them from providing vigorous and effective advocacy.

Second, Simels confronted the question of whether courts and other bodies should construe ethics rulings broadly or narrowly.\(^{100}\) My opinion should be clear by now. Narrow rulings are necessary to develop a principled and clear body of interpretation that applies to prosecutors and defense counsel, as well as the civil bar, while allowing all lawyers to carry out their respective functions effectively without the threat of disciplinary action. To quote from the published opinion in Simels:

> [T]he vague terms of DR 7-104(A)(1) should be construed narrowly in the interests of providing fair notice to those affected by the Rule and ensuring vigorous advocacy not only by defense counsel, but by prosecutors as well. Accordingly, we believe that the Committee's expansive interpretation of "party" cannot stand. Balancing the purposes served by DR 7-104(A)(1) against the overriding concern of a defendant's Sixth Amendment right to the effective assistance of counsel and a lawyer's ethical duty of zealous advocacy, the Committee's ruling threatens to inhibit defense attorneys' efforts to interview witnesses and develop trial strategies.\(^{101}\)

This commitment to narrow interpretation is particularly important in the ethics context, where so many different courts and bar association bodies provide often contradictory commentary. As we have seen with secret taping, a patchwork of broad and conflicting opinions is difficult to comply with and, therefore, can deter effective advocacy. Whenever the rules seem ambiguous, narrow interpretations create less risk of such deterrence.

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100. *Simels*, 48 F.3d at 649-51.
101. *Id.* at 650.
Furthermore, broad rulings are likely to have significant and even unintended policy implications. Critical policies about law enforcement and the rights of the accused should not be set by ethics committees. As our panel concluded in Simels:

We believe that the Committee's interpretation may well result in broad and unwarranted changes in traditional law enforcement and defense practices and procedures. If such substantial modifications are to be made, they should occur only after careful consideration by the representative branches of the federal government.102

There are, of course, legitimate policy concerns raised when a defense attorney interviews a government witness, especially a secret witness like Harper. Suppose, hypothetically, that Harper wanted to hide his cooperation with the government, for fear of reprisal from Davis or the other defendants. Under those circumstances, Harper might lie to Davis's attorney to hide the fact that he was a government witness. Harper might offer contradictory statements during this interview, and defense counsel could use those statements at trial to impeach Harper's truthful testimony. To take my hypothetical a step further, if Simels suspected that Harper was a government witness, Simels could be viewed as obstructing justice by intentionally seeking contradictory statements during this interview, which he could later use to impeach the witness and protect his client. This would certainly be the case if he knew or had reason to know that the statements he was seeking were untrue. This is a serious issue, and one that needs to be addressed—and perhaps there need to be different rules for prosecutors and defense counsel. But such important policy concerns must be resolved in a candid discussion of the various interests involved.

IV. CONCLUDING THOUGHTS

My concerns about the Simels matter only heightened long-standing concerns over how bar association ethics committees work and how their ethics opinions are issued. Bar association ethics committees, in order to promulgate fair and precise rulings that do not interfere with the needs of advocacy, must hear from all corners of the bar. My experience has been that most bar association ethics committees are heavily weighted with civil practitioners and, furthermore, have far more representation from the defense side in criminal practice. The former, at best, may have little

102. Id. at 644.
knowledge of the concerns and needs of law enforcement, while the latter may take a less than disinterested stance.

The inconsistent and often contradictory approaches taken by overlapping local, state and national bar associations only adds to the problem. Our panel in the Simels case recognized that federal courts could take limited guidance from such opinions, because "requiring a federal court to follow the various and often conflicting state court and bar association interpretations of a disciplinary rule, interpretations that may also contravene important federal policy concerns, threatens to balkanize federal law."\(^\text{103}\) Of course, a federal court has the authority to accept state court and bar association opinions as non-binding guidance. A practicing attorney does not have that luxury. He must try to make sense of this balkanized state of affairs and live in fear that a vague rule or one of two conflicting opinions could be cited to his detriment. Such vagueness and inconsistency cannot stand.

When I participated in that bar association ethics committee twenty-five years ago, I worried that my colleagues, unintentionally for the most part, were too concerned with viewing the rules through the lens of their practice—their interests or the needs of their particular clients. Thus, the ethics committee had earlier set forth its prohibition against secret taping, but insisted that its opinion would not affect law enforcement. That assertion might once have been true, but it failed to reflect the changing nature of law enforcement, where prosecuting attorneys were increasingly in control of investigations into white-collar crimes, organized crime and other major areas. In those situations, barring unilateral recording by lawyers, either directly or through their agents, had a major impact on the capabilities of law enforcement.

Then, of course, the prohibition against secret taping became an issue for defense attorneys, who realized they had an interest in recording witnesses who might change their stories. And ultimately it became a problem for the civil bar as well, which realized that unilateral recording was a necessity for investigations in areas as diverse as housing discrimination and trademark enforcement.

Unfortunately, the ethics committee I sat on failed to reflect this diversity of opinion. Instead, bar committees were overrepresented by major law firms and private practitioners. These firms had insight into the professional ethics of their practice, but less awareness of the needs

\(^{103}\text{Id. at 645 (citing Roger C. Cramton & Lisa K. Udell, State Ethics Rules and Federal Prosecutors: The Controversies Over the Anti-Contact and Subpoena Rules, 53 U. Pitt. L. Rev. 291, 315-16 (1992) (discussing the increasing divergence in states' interpretations of DR 7-104(A)(1) and its threat to federal uniformity).}\)
of the criminal bar, especially on the prosecutorial side. In addition, the large firms had the luxury of significant resources. They could hire investigators to do the research that was necessary when unilateral recording was barred. But, as my earlier stories illustrate, those resources might not be available to a small practitioner, or to a client whose case is not worth the big dollars that a major investigation requires. In those cases, the legitimate and necessary benefits that could be brought by secret recordings were deemed unethical.

As I have tried to show in this history, the secret recording rules were beset by controversy, as a result of the overly narrow focus of bar ethics committees. Unfortunately, the flaws in these rules could only be uncovered through requests for advisory opinions or complaints and disciplinary actions, and not through the give and take of notice and comment that is usually the appropriate way to bring varied constituencies into a rulemaking process.

A similar story is told in the history of the “no contact” rule. In that case, the ethics rule was initially a safeguard for civil practice, as a form of professional courtesy. Then the defense bar, employing the broad language of the rule, began to clamor for its application to prosecutors, as a way of extending protections to clients who were under ongoing investigation. Prosecutors pushed back to prevent the rule from interfering with traditional law enforcement practices. But then defense counsel also found themselves on the defensive, when the rule was used in cases like Simels to prevent defense lawyers from speaking with witnesses who might also be described as potential co-defendants or “adverse parties.” Only when the rule came back to bite the defense bar did they cease to use the “no contact” rule as a tactical device.

These unintended consequences were discerned only through a messy process of disciplinary enforcement, with lawyers’ professional fates on the line, rather than in the safer confines of the rulemaking process. In the meantime, these vague rules may have deterred legitimate practices that were necessary to fulfill the bar’s obligation for vigorous advocacy, and the public’s interest in effective law enforcement.

And now to my controversial views, with which I will close. There is a serious process problem. Why has it taken decades to bring about change in these two rules? Unfortunately, for far too long ethics committees were—and probably still are—not representative of the bar as a whole, either in the nature of the profession or in the class of clients. Therefore, there is very little input from the profession as a whole. The result has been inevitable: ethics opinions that reflected the interests of
the membership of the particular bar association committee interpreting the rule.

I think that the time has come for a serious review of the process by which ethical rules are made and, especially, interpreted. The current system does not work. It results in conflicting decisions that reflect the parochial interests of certain corners of the bar. This might be acceptable, except that these conflicting opinions deter lawyers from effective representation. Lawyers, facing vague and contradictory rulings, know that they may risk sanctions if they engage in advocacy that could be seen, under a broad reading of the rules, as misconduct. This, in turn, puts the interests of the public—which relies on effective advocacy in an adversarial system—at stake. The system makes many lawyers more conservative, without necessarily making them more ethical. In short, these bar association decisions, though well-meaning, are not necessarily representative of the needs of the bar as a whole and, more importantly, often not in the public interest.

Ethics committees are often too concerned with propounding the professional ethics that would adhere in an ideal world. I may wish that we lived in that ideal world, but we do not. Most members of our profession, if pressed on the question, would probably acknowledge that fact. We need ethics rules, and a procedure for crafting those rules, which acknowledge that reality as well.

I would therefore propose two changes, which I think would improve the current state of affairs. The adoption of either would be an improvement. The adoption of both would be even better.

First, I would propose that the state judiciary take responsibility for establishing a single ethics committee with the authority to issue binding, authoritative opinions. Allowing a single body to interpret ethics rules for a state would certainly provide greater consistency and predictability than the current situation, where local, state and national bar associations can all issue contradictory opinions. Furthermore, the state judiciary would be more likely to create rulemaking bodies that are representative of the entire bar (including prosecutors, defense counsel, big firms, small practitioners, public interest lawyers, and the like) to interpret the rules of professional responsibility for the entire profession.

I would not rule out the role of local bar associations in interpreting ethics rules completely. Their contributions could add much to the conversation. But under my proposal, their opinions would not be binding, in the sense that they could not be the basis for any disciplinary action.
Second, whether or not my first recommendation is adopted, I would urge that the process by which binding opinions are issued by bar associations and other ethics committees change to reflect an administrative rulemaking model, with room for public input. A more unified, representative and open process is required. As a first step, I believe that before an opinion with a significant and binding impact on the profession is adopted, it should be published and available for public comment. The publication should be in a forum such as the *New York Law Journal* in order to reach the broadest possible audience. This type of open process might avoid some of the haphazard developments that we have seen in the areas of bugging and "no contact" rules.

I suggest that an ethics rulemaking process that incorporates the bar as a whole would be more likely to reach appropriate and consistent results. If all portions of the bar, and not only those with access to an ethics committee, had the opportunity to comment on an ethics rule before it became enforceable, then many of the problems that I have described might be foreseen in advance. Under such a process, ethics opinions are likely to be narrower than they are today. That would be an appropriate result, one that would balance the need for an ethical profession with the realities of practice on the ground, a commitment to effective client advocacy and the search for truth in an adversarial system.