ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I am deeply disturbed by the events that transpired at a recent on-site visit to inspect the opposing party's books and records in compliance with a discovery order. Due to the defendants' repeated failure to comply with several discovery orders and deadlines and the parties' contentious and acrimonious relationship, I got a court order directing that the defendants produce certain documents by a specified date. The court also granted us permission to have an on-site visit and inspection of the defendants' books and records.

On the agreed-upon site-visit date, I met the defendants' counsel at the defendants' offices and was accompanied by an accountant that the plaintiff hired to assist with the litigation. Despite the fact that the defendants had several weeks to prepare the documents requested by the plaintiff for the on-site inspection, after we were placed in a conference room, we were given only two Bankers Boxes® of documents, with limited information. Although I made repeated requests for additional information, the defendants failed to produce numerous categories of documents that the court ordered them to produce. The defendants' counsel stated that they would produce these materials at a later date since they did not have them available.

That wasn't the end of the story. While we were in the conference room, I saw that there were several boxes of documents in the hallway outside the conference room. I knew right away that the boxes contained categories of documents responsive to the plaintiff's requests, which the court had ordered the defendants to produce. This was obvious from the labels that were clearly visible and in plain sight on the sides of the boxes.

I asked the defendants' counsel about the boxes in the hallway but was told that I could not see them because he did not currently have access to those materials. Since I had reason to believe that the boxes contained responsive materials and felt that I was being stonewalled, I used my smartphone camera to take pictures of the boxes from the conference room so that I would be able to present the issue to the court if necessary.

Although the defendants' counsel was nowhere in sight when I took the pictures, within two minutes he came storming into the conference room and asked whether I had taken any pictures. It was only then that I discovered that we had been under surveillance in the conference room during the entire document production. When I saw the webcam in the conference room, I confronted opposing counsel, asking whether he and his clients had been watching and listening to my communications with the plaintiff's accountant. The defendants' counsel did not deny that he and his clients had been watching and listening to our communications. Instead, he smirked and replied that my communications with the plaintiff's accountant had no expectation of confidentiality or privilege. He refused to allow me to take a picture of the webcam. Based on these circumstances, I can only assume that both opposing counsel and his clients had been secretly monitoring my private and privileged communications and work product with the plaintiff's retained expert.

I am deeply troubled by what happened and by opposing counsel's behavior, which strikes me as outrageous. Are we now at a point in the practice of law when opposing counsel can secretly videotape a document production and eavesdrop on my conversations during my inspection of the documents? What about telephone conversations? If counsel secretly put me under surveillance while I was in the conference room, it is possible that he may have also recorded our telephone conversations. I am writing to the Forum because, quite frankly, I am unfamiliar with the rules. What should I do?

Sincerely,
Ben Camed

Dear Ben Camed:

Your letter raises several important issues about what we hope is not becoming a common practice. It seems as if everyone has an iPhone, or another kind of smartphone, with the ability to surreptitiously record conversations and events at will with only the tap of a screen or the click of a button. The fact that technology may present an irresistible temptation to certain members of our profession makes your question particularly timely.

As an initial matter, what occurred may be a great example of an outrageous discovery abuse that would allow you to pursue a whole host of remedies before the court that ordered the document production. However, that is a subject for another time, and perhaps another space. Our focus here is through the lens of the ethical and professional questions that arise from the secret attorney recording that you described and its implications to the legal profession.

The Attorney Professionalism Committee invites our readers to send in comments or alternate views to the responses printed below, as well as additional hypothetical fact patterns or scenarios to be considered for future columns. **Send your comments or questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by e-mail to journal@nysba.org.**

This column is made possible through the efforts of the NYSBA's Committee on Attorney Professionalism. Fact patterns, names, characters and locations presented in this column are fictitious, and any resemblance to actual events or to actual persons, living or dead, is entirely coincidental. These columns are intended to stimulate thought and discussion on the subject of attorney professionalism. The views expressed are those of the authors, and not those of the Attorney Professionalism Committee or the NYSBA. They are not official opinions on ethical or professional matters, nor should they be cited as such.

It is useful to begin with a brief review of federal and state law on wiretapping. Federal law permits a non-law enforcement individual to record telephone calls and other electronic communications as long as one party to the conversation or communication has consented. *See* 18 U.S.C. § 2511(2)(d) (2008). States are allowed by 18 U.S.C. § 2516(2) to enact their own legislation on wiretapping. The result, as one might expect, has been that the laws on this issue vary widely from state to state. In some states, so-called "two-party consent" laws have been adopted, meaning that *every* party to a phone call or conversation must consent in order for the recording to be lawful. These laws have been enacted in California, Florida, Illinois, Maryland, Massachusetts, Montana, Nevada, New Hampshire, Pennsylvania, and Washington. *See* Robert Pelton, *Ethics and the Law: Professionalism*, Voice for the Defense Online, October 2, 2011, http://www.voiceforthedefenseonline.com/story/ethics-and-law-professionalism-robert-pelton.

The majority of states, however, have adopted "one-party" consent laws, meaning that only one party to the conversation needs to consent to the recording for it to be legal. *See id*. New York is a one-party consent state. Therefore, in New York it is not a crime to record or eavesdrop on an in-person meeting or telephone conversation if one party to the conversation consents; that one party can, in fact, be the individual recording the conversation. N.Y. Penal Law §§ 250.00, 250.05.

With the federal and state laws in mind, the next question is: even if the recording is legal, is it ethical for an attorney to engage in such conduct? Not surprisingly, there also is a wide range of differing opinions on this topic across the United States. Twelve states and the District of Columbia hold that secret attorney recording is not unethical. The 12 states include Alabama, Alaska, Kansas, Maine, Minnesota, Mississippi, Missouri, North Carolina, Oklahoma, Tennessee, Texas, and Utah, as well as the District of Columbia. *See* Carol M. Bast, *Surreptitious Recording by Attorneys: Is It Ethical?*, 39 St. Mary's L.J. 661, 684–85. Nine states hold that secret attorney recording is unethical, except in certain situations. The nine states are Arizona, Colorado, Idaho, Indiana, Iowa, Kentucky, New York, South Carolina, and Virginia. *Id*. at p. 688. Five states hold that secret attorney recording should be evaluated on a case-by-case basis. These states are Hawaii, Michigan, New Mexico, Ohio, and Wisconsin. *Id*. at p. 694. And 13 states have not yet reached a consensus on this issue. The remaining states are Arkansas, Delaware, Georgia, Louisiana, Nebraska, Nevada, New Jersey, North Dakota, Rhode Island, South Dakota, Vermont, West Virginia, and Wyoming. *Id*. at pp. 683, 695. New York is one of the nine states that hold that secret attorney recordings are generally unethical, but under certain circumstances recordings may be permissible. *Id*. at p. 688.

Various New York bar associations and ethics committees have examined the topic and provided guidance. In 1979, the New York State Bar Association Committee on Professional Ethics issued a formal opinion on this subject stating that "lawyers engaged in a criminal matter, representing the prosecution or a defendant, may ethically record a conversation with the consent of one party except where the purpose is to commit a criminal, tortious or injurious act." N.Y. State Bar Ass'n Comm. on Prof'l Ethics Op. 515 (1979). In addition, the 1979 opinion stated that a lawyer may counsel a client about the legality of the client secretly recording a conversation with a third party. *Id*.

In 1993, the New York County Lawyers' Association (NYCLA) also issued an opinion on the subject. The NYCLA reasoned that while "[p]erhaps, in the past, secret recordings were considered malevolent because extraordinary steps and elaborate devices were required to accomplish such recordings [because] [t]oday, recording a telephone conversation may be accomplished by the touch of a button [therefore . . .] we do not believe that such an act, in and of itself, is unethical." N.Y. County Lawyers' Ass'n Ethics Op. 696 (1993). However, the NYCLA's opinion also advised attorneys to avoid using the recording in a "misleading way," or lying about the existence of the recording at all, and stated that in these circumstances, the attorney's behavior would be considered to be "ethically improper." *Id*.

In 2004, the Association of the Bar of the City of New York issued an opinion stating that while a secret recording is improper as a routine practice, there are circumstances where undisclosed tapings should be permitted. *See* Ass'n of the Bar of the City of N.Y. Formal Ethics Op. 2003-2 (2004). For example, where the recording "advances a generally accepted societal good" it may be proper. *Id*. However, it would be unethical for an attorney to surreptitiously record a conversation for the sole purpose of having an accurate record of the conversation. *Id*.

The Association ultimately counseled attorneys against making such recordings absent unusual circumstances, stating: "We further believe that attorneys should be extremely reluctant to engage in undisclosed taping and that, in assessing the need for it, attorneys should carefully consider whether their conduct, if it became known, would be considered by the general public to be fair and honorable." *Id*.

Our research did not uncover many New York court decisions on this issue. The one case we did locate is illustrative of when the exception rather than the general rule on secret recordings applies. In *Mena v. Key Food Stores Co-op., Inc.*, 195 Misc. 2d 402, 403 (Sup. Ct., Kings Co. 2003), the plaintiffs, who were employees of defendant Key Food, brought suit against their employer, alleging that obscenities and racial slurs were being directed at women and African Americans in the workplace. A Key Food employee consulted with counsel, who advised her about the legality of secretly recording her employer, and subsequently, a secret recording did take place. Although the defendant

employer tried to suppress the contents of the taped telephone conversations between the employer and third parties, and tried to disqualify the employee's counsel because of his involvement in the recording, the court ultimately found that the attorney's conduct was reasonable and appropriate given the circumstances surrounding the recording. The Supreme Court reasoned that the recording was justified because

> [t]he interests a[t] stake here transcend the immediate concerns of the parties and attorneys involved . . . The public at large has an interest in insuring that all of its members are treated with that modicum of respect and dignity that is the entitlement of every employee regardless of race, creed or national origin. Weighed against this ethical imperative, the attorney's conduct . . . should not be subject to condemnation . . .

Id. at 407. Notably, privileged and/or confidential communications and information did not appear to be at stake in that case as seems to be the case here.

Other authorities, including the American Bar Association (ABA), have also weighed in on this topic. Interestingly, as technology has advanced and changed over time, so has the ABA's position on attorney recording. For instance, in 1974, in ABA Formal Opinion 337, the ABA held that an attorney should not record a conversation without full consent from all parties, the exception being that government and law enforcement attorneys could record a conversation without such consent. *See* Bast, *supra*, p. 665.

However, 27 years later, in June 2001, the ABA changed course with the adoption of Formal Opinion 01-422, which permits an attorney to secretly record conversations with non-clients in one-party consent states like New York. *See* ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 01-422 (2001). According to the ABA, "[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." *Id.*

ABA Opinion 01-422 is not without limitations, however. For example, an attorney should not surreptitiously record a conversation in a two-party consent state, where the consent of all the parties is necessary in order for the recording to be lawful. The Opinion also cautions that an attorney shall not falsely deny that a recording is taking place or has taken place. According to the ABA, "[t]o do so would likely violate Model Rule 4.1, which prohibits a lawyer from making a false statement of material fact to a third person." *Id*.

This very issue of lying about making a recording was addressed by the Mississippi Supreme Court in *The Mississippi Bar v. Attorney ST*, 621 So. 2d 229 (Miss. 1993). The Mississippi Supreme Court determined that even if the attorney did not violate any ethical rules by surreptitiously taping two telephone conversations, one with an acting city judge and one with the city police chief, it was a violation of the Mississippi Rules of Professional Conduct for the attorney to lie and deny that the recordings ever took place. The court explained:

> We find . . . that Attorney ST stepped over the line in violation of the Mississippi Rules of Professional Conduct when he blatantly denied, when asked, that he was taping the conversations. Rule 4.1 comment expressly states that "[a] lawyer is required to be truthful when dealing with others on a client's behalf." An attorney is not a private detective or a secret agent; he is not acting as an undercover police officer; rather, he is first and foremost an attorney, and his truthfulness must be above reproach. When asked point-blank whether he is mechanically reproducing a conversation, his answer must be truthful. To respond otherwise vitiates all rules of professional conduct.

Id. at 233.

Another court to examine the issue of covert recordings by an attorney is the U.S. District Court of the Northern District of Illinois in *Anderson v. Hale*, 202 F.R.D. 548 (N.D. Ill. 2001). In *Anderson*, the court found that an attorney's surreptitious tape recording of telephone conversations with plaintiff's witnesses in a civil case violated the state's local rule. The court explained that "[a]t a minimum, fairness and honesty require attorneys to disclose material facts to witnesses at the commencement of a conversation [. . . and] [w]hether a conversation is being recorded is a material fact . . ." The court further reasoned that because the attorney's conduct was inherently deceitful and involved trickery, it would injure the public's confidence in the legal profession and the legal system as a whole. *Id*. at 556. We note, however, that Illinois, unlike New York, is a two-party consent state.

In summary, in New York an attorney is not permitted to secretly record communications with opposing counsel absent some very unusual circumstances. When evaluating the ethical implications of an attorney recording, it is important to consider the context in which the secret recording was made, as well as the intent and purpose behind the recording. Additionally, practitioners should bear in mind the New York Rules of Professional Conduct (NYRPC), specifically, Rule 8.4(c), which provides that a lawyer or law firm shall not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

Applying these principles to the situation you have described, it certainly seems as though the behavior exhibited by opposing counsel in secretly recording your private, and arguably privileged, communications and work product with the plaintiff's retained expert was made for an improper purpose. Indeed, it seems obvious that opposing counsel knew what he was doing and was trying to obtain an unfair strategic advantage by listening into the confidential conversations between you and the plaintiff's expert. Although some might suggest that you should have checked the room for the surveillance camera and/or

microphone, in our view, you had a reasonable expectation of privacy and should not have been subjected to your adversary's eavesdropping. We are at a loss at how counsel could say with a straight face that you had no expectation of confidentiality during the periods you were alone with plaintiff's expert in the conference room, or how this secret recording of the document inspection "advances a generally accepted societal good," or in any way was an exercise conducted in good faith with the principles of fairness and honesty in mind. Moreover, although your adversary did not deny recording your conversations when you confronted him with the question, it is unclear from the facts whether he has actually acknowledged the recording or will later deny doing so. As discussed *supra*, both bar associations and courts have taken a strong position against lying about the occurrence of an attorney recording.

Either way, we believe that opposing counsel's behavior runs contrary to the standards of fairness and candor, and we echo your sentiment that it is quite outrageous. Indeed, we believe that you would be on solid ground to notify the court and seek, *inter alia*, the disqualification of the defendants' counsel and the preclusion of any recording or transcription of the document inspection, as well as to inform the state bar authorities of your adversary's actions.

That leads us to our last point. Putting aside the legal and ethical ramifications in New York, is this really the direction that we want to be taking the legal profession in – covertly recording or eavesdropping on our adversaries – simply because in the age of smartphones it is just so easy to do so. We think not. George Orwell warned us about Big Brother, but perhaps he should have said something about opposing counsel! We know that the technology exists and facilitates such recordings or eavesdropping, but that does not mean that it should be used. In this world of mass social media and technology, we should take the high road as attorneys and resist the constant temptation to use technology to gain what is, in our opinion, an improper advantage over our adversaries.

Sincerely,
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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

I am an income partner at a 100-lawyer firm. I was made partner just two years ago. Six months after making partner, I became pregnant with my third child. After making it through my first trimester, I started to share the happy news with my colleagues. When I told a senior partner in my group that I was expecting, he remarked, "Wow! Haven't you already done your fair share of overpopulating the earth?" I didn't know how to respond. I felt both defensive and uncomfortable, but I chuckled along anyway, hoping to dissolve the awkwardness. In the months and weeks leading up to my maternity leave, I made sure to communicate effectively both internally at the firm with my colleagues, and externally with my clients, about my anticipated three-month leave and made sure that all my cases would be accounted for and covered during my absence.

Upon returning to work three months later, I was greeted with further offensive comments. On my first day back to work, the managing partner casually strolled into my office asking, "How was your vacation?" I responded that I was not on vacation, but on maternity leave for the birth of my son. The managing partner laughed and stated, "Same difference!" and walked out.

The following week, I attended a meeting with a client at opposing counsel's office on a case that I had been working on before my maternity leave. When I made a suggestion about a possible resolution of the matter that I felt would achieve the client's goals, my adversary's snide response was, "Did it take you nine months to come up with that idea?" I honestly did not know what to say and did my best to ignore the comment.

I have also noticed that the quality and quantity of my work has changed since I've returned from maternity leave. Not only do I have a lower volume of work, but the level of interesting work is also lower. Even though I have returned to the firm full-time, my billable hours have decreased significantly. During my first year as partner, I billed 2,500 hours. During my second year as partner, when I had my son and was on maternity leave for three months, I billed 1,800 hours. This leads me to what happened at my end-of-the-year meeting with the firm's Compensation Committee. During that meeting, one of the partners remarked that my hours were very low for the year. When I responded by reminding the Committee that I had been on maternity leave for three months, another partner said something along the lines of: "Well, if you had spent as much time billing as you did breastfeeding, you would have had more billables this year."

I cannot believe that in this day and age I should be subjected to these types of comments and behavior. I am outraged. Is the conduct described above acceptable professional behavior?

Sincerely,
Pumped Up

MEMBERSHIP TOTALS

New Regular Members	
1/1/15 - 10/14/15	**6,893**
New Law Student Members	
1/1/15 - 10/14/15	**1,580**
Total Regular Members	
as of 10/14/15	**65,061**
Total Law Student Members	
as of 10/14/15	**3,635**
Total Membership as of	
10/14/15	**68,696**