**Enduring Ethics Opinions**  
Robert J. Stolt, Esq.

Opinion # 168 was issued by the Professional Ethics Commission on March 9, 1999. The question posed then and now is: "Attorney A makes a regular practice of taping all her telephone calls, whether with the client, opposing counsel, another lawyer other than opposing counsel or the court. The attorney does not tell the other person(s) on the phone call that the conversation is being recorded. State and Federal law permit the recording of the phone call as long as Attorney A is a participant. Bar Counsel inquires as to whether the practice is prohibited by the Bar Rules, and further inquires as to whether it matters who the other party is to the conversation.

Opinion

At the time Opinion # 168 was issued, the Maine Bar Rules, Rule 3.2(f) provided the salient focus from which the question could be answered. Rule 3.2(f) directed that "... a lawyer shall not: ... (3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation." So, the question became whether the recording or taping of telephone calls could be characterized as "dishonest, fraudulent, deceitful or involving a misrepresentation."

After an exhaustive review of relevant Bar Opinions of other states and the ABA and available court decisions, in Opinion #168 the Commission concluded that the act of electronically recording a conversation without the knowledge of other participants was not per se prohibited by the text of Rule 3.2(f)(3).

Opinion #168 was a bulls-eye. Other states with similar rules and the ABA with an identical rule, Rule 8.4(c), have each construed the language of their rule to be per se misconduct. (See ABA Opinion #337 (1974)). Many states, including Maine, had included the language in their rules, but Maine looked harder at per se application, perhaps because Maine and federal statutes (15 M.R.S.A. 709 AND 18 U.S.C. 2511), conditionally permit recording.

Effective August 1, 2009, the Maine Supreme Judicial Court adopted the Maine Rules of Professional Conduct designed to coordinate with the ABA Model Rules. The Maine Rules are not identical, but, in fact, in this instance, incorporate verbatim old Bar Rule 3.2(f)(3) as current M. R. Prof. Conduct 8.4(c). That being so, does Opinion #168 still stand?

It does. The ABA withdrew its Opinion 377 in 2011(Ethics Opinion 01-422 (2001)) which "... acknowledged a consensus that surreptitious recording is not 'inherently deceitful.' "ABA/BNA, Lawyers' Manual on Professional Conduct, Misconduct Discipline. 101-407. As Maine did in its Opinion # 168, other states have opined similarly, following the ABA's withdrawal of its Opinion 337(1974) in Opinion 01-422 (2001).

Accordingly, Opinion #168 is alive and well. We now live in a time when surreptitious recording of conversations is widespread and done easily. Lawyers are well served to keep the guiding principles of honor, fair play, candor, and truth as recited in Opinion #168 in mind, such that falling into the violation traps of current Conduct Rule 8.4(c) (formerly 3.2(f)(3)) can be avoided.