

**OPINION NO. 18**Secret Recordings of Conversations

Adopted: September 20, 1996.

Repealed: April 18, 2002.

**Comment**

*At its April 18, 2002 meeting the Lawyers Professional Responsibility Board repealed Opinion No. 18 which made it unethical for lawyers to secretly record conversations with others. The repeal of Opinion No. 18 followed the lead of the American Bar Association in changing its longstanding position condemning the surreptitious, but legal, recording of conversations by lawyers. In June 2001, the ABA issued Formal Ethics Opinion 01-422, which withdrew its previous opinion (Formal Opinion 337) that had been in effect since 1974 prohibiting secret recording.*

*Minnesota Lawyers Board Opinions for the most part constitute interpretations or clarifications of the Minnesota Rules of Professional Conduct. Opinion No. 18 was premised upon the belief that secret recording of conversations by lawyers was inherently deceitful, and therefore unethical except in the limited circumstances enumerated in the Opinion. The Comment to Opinion No. 18 relied principally upon the ABA opinion from 1977 for the proposition that secret recording was inherently deceitful and therefore violated the ethical standards.*

*The Minnesota Rules of Professional Conduct generally prohibit lawyers from engaging in conduct that involves deceit. See Rule 8.4(c). A number of states, like Minnesota, have since 1974, issued ethics opinions concluding that secret recording was deceitful and therefore unethical. However, given the ABA's recent change of heart, and its rationale, the Minnesota Lawyers Board was doubtful about whether secret recording by itself continued to fall clearly within the deceit proscription of Rule 8.4(c). It was this doubt that led the Board to withdraw or repeal Opinion No. 18.*

*In repealing the Opinion, the Board and its Opinion Committee echoed the concerns expressed by the ABA. Lawyers should be aware that secret recording is illegal in some states and therefore prohibited by Rule 4.4. Moreover, lawyers who falsely deny recording conversations will be subject to discipline under Rules 4.1 and 8.4(c). And finally, although it may not be unethical to record client conversations, except in very limited circumstances (e.g., client is making criminal threats to the lawyer) it is certainly inadvisable to do so without disclosure.*