

You advise that an attorney has been retained by a wife in a domestic relations matter. The wife has indicated to the attorney that previously she has secretly taped her husband's telephone conversations on a telephone in their marital home. The taping was done through a device having been placed on the telephone and the wires were not disturbed. The wife further informed the attorney that the taped conversations allegedly reveal the husband's intimate involvement with another woman and other marital indiscretions. The attorney instructed the wife to immediately cease any such taping.

You have inquired as to the propriety of the attorney's use of the tapes, in light of a recent Supreme Court of Virginia decision which found it improper for an attorney to instruct his client to tape record telephone conversations in his home. In addition, you have indicated your concern over the attorney's becoming an accessory to any crime which may have been committed by the wife.

Whether or not non-consensual tape recording of telephone conversations is legal in Virginia is, of course, a question of law and, as such, is beyond the purview of the Committee. If such recordings are prohibited by law, then, by definition, a lawyer's participation in such an activity would be improper and violative of both DR:1-102(A)(3) which proscribes a lawyer's commission of a crime or other deliberately wrongful act that reflects adversely on the lawyer's fitness to practice law and DR:7-102(A)(8) which prohibits a lawyer from knowingly engaging in (other) illegal conduct or conduct contrary to a Disciplinary Rule.

The Committee is of the opinion that, in the facts you have presented, since the client had already taped the telephone conversations at the time she presented herself to the attorney, it is incumbent upon the attorney to preserve that information as a confidence or secret of the client, as required under DR:4-101. The Committee has previously opined that it would be improper for a lawyer to reveal any knowledge he gained from his client during the course of his representation regarding a crime which the client had already committed. (See LE Op. 1087) Additionally, the Committee has earlier opined that a "continuing wrong" does not fall into the category of a prospective crime, thereby decreeing the disclosure of the continuing wrong to be improper and violative of DR:4-101(A) and (B). (See LE Op. 929)

In addition, the Committee believes that even if non-consensual tape recording of telephone conversations is not prohibited by Virginia or federal law, a lawyer's engaging in such conduct, or assisting a client in such conduct, would be improper and violative of DR:1-102(A)(4) which prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation which reflects adversely on a lawyer's fitness to practice law. In holding that a lawyer's advising a client to non-consensually tape record telephone conversations was proscribed by DR:1-102(A)(4), the Supreme Court of Virginia recently found that "conduct may be unethical, measured by the minimum requirements of the Code of Professional Responsibility, even if it is not unlawful The surreptitious recordation of conversations authorized by Mr. Gunter . . . was an 'underhand practice' designed to 'ensnare' an opponent." *Gunter v. Virginia State Bar*, 238 Va. 617 (1989). (See also ABA Formal Opinion No. 337 (1974))

Notwithstanding the Committee's opinion as to the propriety of a lawyer participating in non-consensual tape recording of telephone conversations, the Committee believes that the facts you have presented may be distinguishable from the circumstances addressed in *Gunter* and ABA Formal Opinion No. 337. Earlier this Committee has opined that where an attorney's client had improperly removed medical records from a treating physician's office and presented those records to the attorney, the attorney was required to advise the client of his duty to return the file to the physician. However, the Committee was further of the view that it would not be improper for the attorney to continue to represent the client and to use the documents presented, acquisition of which may or may not have been authorized by the physician, providing the attorney was not a conspirator or an accessory to the illegal or improper obtaining of the evidence. The Committee further declined between the medical records in the client's possession and the "fruits of a crime" as defined in *In re Ryder*, 381 F.2d 713 (4th Cir. 1967). (See LE Op. 1141 and LE Op. 278)

Thus, the Committee is of an opinion that the facts you have presented are appropriately addressed in those earlier opinions. Therefore, the Committee is of the view that it would not be improper for the attorney to continue to represent the wife who had earlier taped the telephone conversations and to use the tape recordings, which acquisition may or may not have been legal, providing that the attorney was not a conspirator or an accessory to the obtaining of the tapes. Furthermore, by having advised the client of the need to immediately cease the tape recording, it is the Committee's opinion that the attorney appears to have fulfilled his duty with regard to any future illegal or improper activity of the client.

Finally, however, the Committee cautions that the attorney's review and use of the tapes may result in the unwitting invasion of privileged communication between the husband and his attorney, should the tapes coincidentally contain recordings of such attorney/client telephone conversations.

To the extent that this opinion overrules LE Op. 1217, that opinion is so overruled.

Committee Opinion
February 27, 1990

Legal Ethics Committee Notes. – Editor's Note: In LEO 1738, the committee indicated that lawyers or their agents may secretly tape record telephone conversations in which they participate, but only in situations involving criminal or housing discrimination investigations or if the lawyers are protecting themselves from possible criminal action.