LEGAL ETHICS OPINION 1635

DUTY TO REPORT MISCONDUCT; FRAUD; ATTORNEY'S TAPE RECORDING TELEPHONE CONVERSATION WHEN NOT ACTING IN ATTORNEY CAPACITY; THREATENING DISCIPLINARY ACTION AGAINST OPPOSING ATTORNEY IN CIVIL MATTER.

You have presented a hypothetical situation in which Attorney A represents an individual, Mr. Doe, who was involved in a dispute over the termination of his employment with a corporation. Prior to Attorney A's involvement in the case, Attorney B, the son of the owners of the corporation and an officer of the corporation, telephoned Mr. Doe to inform him of the termination of his employment and the reasons therefore. While Attorney B did not indicate in the telephone conversation that he was acting as attorney for the corporation, Mr. Doe was aware that Attorney B was an attorney. You indicate that, without notifying Mr. Doe and without obtaining his consent, Attorney B tape recorded the telephone conversation. In a subsequent telephone conversation with Attorney A, Attorney B informed Attorney A that he had tape recorded the earlier conversation with Mr. Doe. In response to Mr. Doe's Request for Production of Documents filed in the lawsuit against the corporation for wrongful discharge, the corporation produced the transcript of the taped conversation.

Under the facts you have presented, you have asked the committee to opine as to several issues related to the tape recording of the telephone conversations.

The appropriate and controlling disciplinary rules relative to your inquiry are DR:1-102(A)(4) which prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; DR:1-103(A) which mandates that a lawyer having information indicating that another lawyer has committed misconduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness to practice law in other respects, shall report such information to the appropriate professional authority; and DR:7-104 which prohibits a lawyer from presenting, participating in presenting, or threatening to present criminal or disciplinary charges solely to obtain an advantage in a civil matter.

The committee has previously opined 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 . . . would be improper and violative of DR:1-102(A)(4). LE Op. 1324 citing *Gunter v. Virginia State Bar*, 238 Va. 617 (1989) [“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”.

Therefore, in the facts you present, the committee believes that LE Op. 1324 is dispositive of the question as to whether Attorney B's conduct in engaging in the non-consensual tape recording was improper and violative of DR:1-102(A)(4). Since the disciplinary rule in issue is not specifically applicable to activities undertaken in an attorney-client relationship, the committee is of the opinion that the outcome would not be different if Attorney B were acting only as an officer of the corporation or as agent for the owners of the corporation and not as the corporation's attorney.

As to whether Attorney B's misconduct raises a substantial question as to his honesty, trustworthiness, or fitness to practice law in other respects, thereby imposing a duty on

Attorney A to report the misconduct pursuant to DR:1-103(A), the committee is of the view that Attorney A must make such a determination after appropriate consideration of the facts and analysis of the impact of the misconduct on the delineated areas. Relevant factors to be considered include, but are not limited to: the recency of the conduct, the seriousness of the conduct, the likelihood that the behavior will be repeated, the likelihood that it will affect the attorney's competence, and any mitigating or aggravating circumstances. *See* LE Op. 1308, LE Op. 1522, LE Op. 1528; *In re Himmel*, 125 Ill.2d 531, 533 N.E.2d 790 (1988). The committee is of the opinion that, given that Attorney B knew that Mr. Doe's interests were adverse to those of the corporation, Attorney B's having surreptitiously tape recorded a telephone conversation without Mr. Doe's consent may raise a substantial question as to Attorney B's honesty, trustworthiness, or fitness to practice law in other respects.

Finally, as to any conflict between Attorney A's reporting of Attorney B's misconduct pursuant to DR:1-103(A) and the prohibitions of DR:7-104 against presenting or threatening to present disciplinary charges solely to obtain an advantage in a civil matter, the committee directs your attention to LE Op. 1338 and LE Op. 1545, which the committee believes are applicable to the circumstances you present. In those prior opinions, the committee concluded that, once an attorney concludes that both prongs of DR:1-103(A) have been met, i.e. that misconduct has occurred which raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness to practice law, "the attorney is obligated to report such misconduct without any unnecessary delay". LE Op. 1545. However, the committee reiterates its caution that, in reporting such misconduct, the lawyer must be "vigilant in observing the DR:7-104 prohibition against presenting or threatening to present disciplinary charges *solely* to obtain an advantage in a civil matter". *Id*. [emphasis added]

Committee Opinion
February 7, 1995

Legal Ethics Committee Notes. – If information about the ethics violation is a client confidence, a lawyer may report the other lawyer's misconduct only if the client consents under Rule 1.6(c)(3); the lawyer considering whether to report <u>must</u> consult with the client under that Rule

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.