LEGAL ETHICS OPINION 1802 ADVISING CLIENTS ON THE USE OF LAWFUL UNDISCLOSED RECORDING .

A. Introduction

In this opinion, the Committee will address whether it is ethical for a lawyer to advise a client to engage in the undisclosed recording of the communications or actions of another. To address this question, the Committee will review its prior opinions on these issues.

This opinion focuses on the ethical implications of a lawyer advising clients regarding the use of undisclosed recording. Towards that end, the Committee finds it necessary to discuss the legality of undisclosed recording, because many states' ethics rules or opinions hinge on whether such recording is legal.[1] Fundamentally, a lawyer cannot advise a client to engage in conduct that is illegal or fraudulent. Rule 1.2(c). Federal law and more than two-thirds of the states permit "one party consent recording." This means that undisclosed recording is legal if one of the parties to a communication—the recorder—is aware of and consents to the recording. Virginia Code Section 19.2-62(B)(2) states that "[i]t shall not be a criminal offense under this chapter for a person to intercept a wire, electronic or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception." Under the remaining states' laws, undisclosed recording is illegal unless all parties to the communication consent to the recordation.[2] Finally, subject to some very stringent exceptions, federal and state law makes it a felony to record communications in which no party has consented. In addition, federal and state law makes it a crime to *use* any communication that has been unlawfully intercepted.

B. Relevant Standards and Rules

The Rules of Professional Conduct adopted by the states, including Virginia and the ABA Model Rules of Professional Conduct, do not specifically address undisclosed recording. However, undisclosed recording does implicate a number of other general ethics rules.[3] First and foremost, Virginia Rule 8.4(c) states that it is "professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law." Prior to the adoption of Virginia Rule 8.4, DR 1-102(A)(4) of the former Virginia Code of Professional Responsibility had a nearly identical prohibition. In 2006, the Virginia State Bar petitioned the Supreme Court of Virginia to adopt comments to Rule 8.4 specifically addressing undisclosed recording.[4] However, the Bar's petition was rejected by a divided Court without comment. Consequently, lawyers must turn to

---

[1] *See, e.,g*. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-422 (2001)(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 if the act of secretly recording is not illegal in the jurisdiction). *See also* n.7, *infra*.

[2] Cal Penal Code § 692; *Kimmel v. Goland*, 793 P.2d 524 (Cal. 1990) (Court adopted a *per se* ban on lawyer participation and tape-recording calls without everyone's consent.); Connecticut General Statutes Section 52-570d (makes it illegal and civilly actionable for any person to secretly record an oral private telephone communication by means of an instrument, device or equipment, except under certain delineated circumstances.) *See also* Conn. Bar Ass'n.Eth. Op. 98-9; Florida Security of Communications Act, § 934.06, Fla. Statutes Annotated; Md. Code § 10-402 (requires consent of all parties); Mass. Wiretap Statute requires all parties to consent to record. M.G.L.A., ch. 272, §99; *see also Commonwealth v. Hanedania*, 51 Mass. Ct. App. 64, 742 N.E.2d 1113 (2001).

[3] Some states may have explicit language addressing secret recording in commentary to their rules of conduct.

[4] At the recommendation of this Committee the Virginia State Bar petitioned the Court to add comments to Rule 8.4 that would have permitted undisclosed recording if the recording: a) is lawful, b) is consented to by one of the parties to the transaction, c) is in furtherance of an investigation on behalf of a client, d) is not effectuated by means of any misrepresentations, and e) the means by which the communication or event was recorded and the use of the recording do not violate the legal rights of another.

this Committee's prior opinions rather than the Rules for specific guidance on the use of undisclosed recording.

The question presented is whether a lawyer may advise a client to engage in undisclosed recording without violating Rule 8.4(c)'s prohibition of deceitful conduct. Ethics rules that address a lawyer's duties to clients, third parties, opposing counsel, or the court may also apply to the situation. For example, Rule 4.4 covers respect for the rights of third parties—it prohibits any means of obtaining evidence that violate a third party's legal rights or have no substantial purpose other than to embarrass, delay, or burden a third person. Because one-party consent recording is not illegal in most states, as long as the undisclosed recording has a reasonable purpose and does not violate the rights of the subject of the recording, it will not violate Rule 4.4. While undisclosed recording may not by itself violate Rule 4.4, it may be coupled with other conduct that may be illegal or unethical. For example, it would be unethical for a lawyer in a civil matter to advise a client to use lawful undisclosed recording to communicate with a person the lawyer knows is represented by counsel. Rule 4.2. Similarly, it would be unethical for a lawyer in private practice to advise a client to employ lawful undisclosed recording under pretextual circumstances, i.e., using conduct involving fraud, dishonesty, deceit, or misrepresentation. Rule 8.4(c).[5] Also relevant to the analysis is Rule 8.4(a) because a lawyer cannot violate or attempt to violate the Rules of Professional Conduct by directing a third party, such as the client or an investigator, to engage in conduct prohibited by the Rules. Further, if the undisclosed recording is illegal, Rule 8.4(b) makes it professional misconduct for a lawyer to commit a crime or a deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer.[6] Finally, Rule 1.2(c) forbids a lawyer from counseling or assisting the client in conduct that is illegal or fraudulent.

C. Prior Legal Ethics Opinions

Many of the states originally issued ethics opinions that adopted the position that undisclosed recording was either generally improper although subject to some limited exceptions or *per se* unethical.[7] Not all states subscribed to this view and, more recently, a number of states have

---

[5] *See, e.g. Nissan Motor Co., Ltd. v. Nissan Computer Corp.*, 180 F.Supp.2d 1089 (C.D. Cal. Jan. 14, 2002) (recordation of conversations between counsel in normal course of civil litigation, without consent, is violation of California penal law and is inherently unethical.)

[6] However, lawyers conducting governmental law enforcement investigations may ethically use undisclosed recording in communicating with persons represented by counsel in non-custodial, pre-indictment settings and may use artiface or pretext through the use of "testors" in housing discrimination enforcement investigations to communicate with the targets of the investigation who may be recorded. *See* Va. Legal Ethics Op. 1738, *infra*.

[7] AK Eth. Op. 91 4, 1991 WL 786535 (June 5, 1991) (No lawyers should record any conversation whether by tape or other electronic device, without the consent or prior knowledge of all parties to the conversation.); SC Adv. Op. 91-14 (July 1991)(An attorney may not advise a client to tape record the client's conversations with his spouse); Minnesota Ethics Op. 18 (1996)(It is professional misconduct for a lawyer, in connection with the lawyer's professional activities, to record any conversation without the knowledge of all parties to the conversation, subject to some exceptions); New York City Bar Ass'n Eth. Op. 1995-10(A lawyer may not tape record a telephone or in-person conversation with an adversary attorney without informing the adversary that the conversation is being taped); Supreme Court of Ohio Board of Commissioners on Grievances and Discipline, Opinion Number 97-3 (June 13, 1997)(An attorney in the course of legal representation should not make surreptitious recordings of his or her conversations with clients, witnesses, opposing parties, opposing counsel, or others without their notification or consent); Supreme Court of Texas Professional Ethics Committee Opinion Number 514 (1996)(attorneys may not electronically record a conversation with another party without first informing that party that the conversation is being recorded); *People v. Wallin*, 621 P.2d 330 (Colo. 1981) (attorney's secret recording of telephone conversation of a witness held unethical); *In re Anonymous Member of the South Carolina Bar*, 304 S.C. 342, 404 S.E.2d 513 (1991)(absolute prohibition: an attorney may not record without consent regardless of the purpose or intent); Indiana State Bar Ass'n Op. 1(2000)(undisclosed recording unethical); Iowa State Bar Op. 83-16 (1983)(undisclosed recording unethical); *Comm. on Prof. Ethics & Conduct of Iowa State Bar Ass'n v. Mollman*, 488 N.W.2d 168 (Iowa 1992) (attorney's use of tape recorder to record conversations with former clients as part of attorney's cooperation with law enforcement investigation held improper); Idaho Bar Ass'n Formal Op. 130 (1989)(prohibits surreptitious tape recording as a violation of Rule 8.4 (d)).

reversed or significantly revised their opinions to allow undisclosed recording.[8] Significantly, this Committee's very first ethics opinion on the subject did *not* impose a *per se* or general ban on undisclosed recording, but instead took the view that undisclosed recording only violates ethical rules when it occurs in conjunction with other unethical conduct.

In LEO 1217, we addressed the issue of "whether it is ethical for a Virginia attorney to tape record a telephone conversation occurring wholly in Virginia with opposing counsel in a pending civil litigation, concerning the subject matter of the litigation, without notifying opposing counsel their conversation is being recorded." We decided that "a lawyer's engaging in such conduct may be improper and violative of DR:1-102(A)(4) *if there are additional facts which would make such tape recording dishonest, fraudulent, deceitful or misrepresentational [sic]***.**" (emphasis added).

Later that same year, the Supreme Court of Virginia decided *Gunter v. Virginia State Bar*, 238 Va. 617, 385 S.E.2d 597 (1989). In *Gunter*, a husband hired a lawyer in a domestic relations matter in which he suspected the wife of having an affair. After consulting with the client, the lawyer suggested installing a recording device on the parties' marital telephone.[9] The husband authorized an investigator to install a device that was activated each time the telephone receiver was picked up. The lawyer and investigator listened to these recordings, but did not obtain any evidence of the wife's infidelity; however, by listening to the tapes, the lawyer did learn that his client's wife had consulted other lawyers regarding divorce proceedings. She discussed with others the advice she had received. Upon learning through the surreptitious recordings that the wife had possession of some joint tax refund checks, the lawyer advised his client to close a joint

---

[8] Alabama Bar Op. 83-183 (1983); Arizona Bar Op. 00-04 (2000) (An attorney may ethically advise a client that the client may tape record a telephone conversation in which one party to the conversation has not given consent to its recording, if the attorney concludes that such taping is not prohibited by federal or state law.); Hawaii SupCt, Formal Op. 30 (Modification 1995) (not per se unethical for lawyer to engage in undisclosed recording; whether conduct is deceitful must be determined on a case-by-case basis); Mich. Bar Ass'n Op. RI-309 (1998) (Whether a lawyer may ethically record a conversation without the consent or prior knowledge of the parties involved is situation specific, not unethical *per se*, and must be determined on a case by case basis); *Attorney M. v. Mississippi Bar,* 621 So.2d 220 (Miss. 1992)(attorney's surreptitious taping of two telephone conversations with doctor who was a potential codefendant in medical malpractice suit did not violate rule of professional conduct, as conduct did not rise to level of dishonesty, fraud, deceit, or misrepresentation); Missouri Bar Ass'n Ethics Op. 123 (3/8/06)(allowing lawyer/participant to tape record telephone communication if it is not prohibited by law); New York City Bar Ass'n Ethics Op. 2003-02 (Lawyers may not routinely tape-record conversations without disclosing that the conversation is being taped, but they may secretly record a conversation where doing so promotes a generally accepted societal benefit);New York County Lawyers' Ass'n, Op. 696 (1993) (not unethical per se for a lawyer to record his or her conversations without the consent or prior knowledge of the other parties to the conversation); NC Eth. Op. RPC 171 (1994) (not a violation of the Rules of Professional Conduct for a lawyer to tape record a conversation with an opposing lawyer without disclosure to the opposing lawyer.); Okla, Bar Ass'n Ethics Op. 307 (1994) (Lawyers have the same rights as other citizens, and may therefore record conversations to which they are a party); Or. State Bar Op. 1999-56 (1999) (if the substantive law does not prohibit recording a lawyer may do it unless his conduct would otherwise cause the other person to believe they are not being recorded); 86-F-14 (a) and Comment 5 to RPC 8.4 which states. "The lawful secret or surreptitious recording of a conversation or the actions of another for the purpose of obtaining or preserving evidence doe not, by itself, constitute conduct involving deceit or dishonesty." In 2003, the Tennessee Supreme Court amended the commentary to Rules 4.4 and 8.4 of the Tennessee Rules of Professional Conduct so as make clear that the secret recording of conversations was not unethical per se. *See also* State Bar of Texas Legal Ethics Op. 575 (Nov. 2006) (if undisclosed recording is not a crime the Texas RPC do not prohibit a Texas lawyer from making undisclosed recording) *overruling* State Bar of Texas Op. 514 (1996) (an attorney may not record without the other party's consent but may advise client that such recording is not a crime under Texas law as long as one participant to the conversation is the recorder; attorneys held to a higher standard); Utah State Bar Ethics Op. 96-04 (Recording conversations to which an attorney is a party without prior disclosure to the other parties is not unethical when the act, considered within the context of the circumstances, does not involve dishonesty, fraud, deceit or misrepresentation); Wisconsin Bar Op. E-94-5 (the Wisconsin RPCs do not support a blanket rule prohibiting or permitting surreptitious tape recording; determination of whether Rule 8.4 has been violated must be fact-specific on a case-by-case basis; routine recording would almost always violate the rule).

[9] Both parties were still living in the marital home and the husband was the subscriber to the telephone and the billing account was in his name.

bank account so that the wife could not cash them. The tape recorder was removed out of fear that the wife would discover it. The wife subsequently discovered reports from the lawyer to the client disclosing the fact that her conversations had been recorded. She complained to the state police and the lawyer was indicted for conspiracy to violate the wiretapping statute. Following a jury trial, Mr. Gunter was acquitted, but a district committee brought lawyer disciplinary charges against Mr. Gunter. All of the charges were dismissed by the district committee except one—that Mr. Gunter had engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of DR 1-102(A)(4), which was certified to the Disciplinary Board. Mr. Gunter opted for a trial by a three-judge court which found that he violated the cited rule. Mr. Gunter appealed to the Supreme Court of Virginia.

The Court ruled that the recordation, by a lawyer or by his authorization, of telephone conversations between third persons, to which he is not a party, without the consent or prior knowledge of each party to the conversation, is conduct involving dishonesty, fraud, or deceit under DR 1-102(A)(4). At issue in *Gunter* was the lawyer's manner and purpose of the surreptitious, non-consensual recording of his adversary's conversations with others. The recordings made under the lawyer's direction were made of third parties and without the consent of *any* parties to the conversation. Although the lawyer was acquitted of criminal charges, this is a classic type of interception that is illegal under federal and state law. Mr. Gunter's investigator did not attach a tape recorder to the marital phone, nor did he use the telephone to acquire the conversations. Rather, he used a wiretap and a recorder. Moreover, the lawyer continued to intercept the conversations of his client's wife after hearing her conversations with friends discussing the advice provided by lawyers to her in contemplation of seeking a divorce from the lawyer's client. Finally, the lawyer used the information gleaned from the non-consensual interception to advise his client to take proactive steps in order to frustrate the wife's actions, based on the advice given her by the other lawyers with whom she had consulted. The Virginia Supreme Court held that "[t]he surreptitious recordation of conversations authorized by Mr. Gunter in this case was an 'underhand practice' designed to 'ensnare' an opponent. It was more than a departure from the standards of fairness and candor which characterize the traditions of professionalism." *Gunter v. Virginia State Bar,* 238 Va. at 622.

In *Gunter,* the Virginia State Bar argued that the conduct complained of did indeed violate the wiretapping laws, notwithstanding Mr. Gunter's acquittal of the criminal conspiracy charge, but that even if it was not unlawful, it was unethical, and fell within the prohibition of DR 1-102(A)(4).[10] The bar argued that more is expected of a lawyer than to refrain from criminal conduct. The Court agreed, stating:

> The lowest common denominator, binding lawyers and laymen alike, is the statute and common law. A higher standard is imposed on lawyers by the Code of Professional Responsibility, many parts of which proscribe conduct which would be lawful if done by laymen ….
>
> It follows that conduct may be unethical, measured by the minimum requirements of the Code of Professional Responsibility, even if it is not unlawful. It is therefore immaterial whether the conduct complained of in the present case violates the wiretapping laws, and we expressly refrain from deciding that question. 238 Va. at 621.

The *Gunter* decision, and in particular the above oft-quoted passage—described by some as dicta—formed the basis for a series of legal ethics opinions on undisclosed recording that followed. Importantly, the Supreme Court of Virginia made clear that it was not deciding

---

[10] The Virginia State Bar argued "[s]tripped to its essentials, appellant's position is that if it's legal, it's ethical." *Gunter, supra*, 238 Va. at 621.

whether "one-party consent recording" would be unethical. The Court observed that "the recordation by a lawyer of conversations to which he is a party . . . [is] a circumstance not present in the case before us. We are not called upon to decide whether that conduct violates DR:1-102(A)(4), and we expressly refrain from deciding that question as well." 238 Va. at 622. Nevertheless, the quoted language in *Gunter* has been applied by this Committee over the years to prohibit one-party consent recordings as deceitful conduct in violation of DR 1-102(A)(4) and now Rule 8.4(c).

The next year, in LEO 1324 (1990), the Committee had an opportunity to address the use of undisclosed recordings delivered to a lawyer by the wife whom he represented in a domestic relations matter. Prior to engaging the lawyer, the wife explained that she had secretly taped her husband's conversations on the telephone in the marital home revealing her husband's intimate involvement with another woman. The lawyer asked the Committee if it would be ethical to use the recordings. Because the client had already taped the conversations before the professional engagement, the lawyer was not a co-conspirator or accessory to the means by which the tapes were obtained. Therefore, the Committee opined that it would not be improper to use them.[11] Tangentially, the Committee cited to *Gunter*, warning that even if the non-consensual recording was not illegal under federal or state law, a lawyer's engaging in such conduct or assisting a client in such conduct violates DR 1-102(A)(4). Arguably, the Committee's reference to and reliance on *Gunter* was not necessary to decide the narrow question before it; however, the *Gunter* decision was new, the decision had been referenced in the opinion request, and the facts presented in the opinion involved nonconsensual recording in a somewhat similar context. LEO 1324 was the Committee's first post-*Gunter* opportunity to warn the bar and to provide guidance about the ethical implications if the lawyer *had* directed the client to engage in nonconsensual recording. Finally, unlike one-party consent recording, the undisclosed recordings in LEO 1324 were of conversations between the husband and third parties, none of whom had consented to the recording.

Legal ethics opinions that followed did, however, conflate the *Gunter* decision resulting in a blanket ban on lawyers using or even advising their clients to use one-party consent recording; that is, undisclosed recording of conversations in which they are a participant. As noted above, the Supreme Court of Virginia in *Gunter* specifically declined to decide whether it was unethical for a lawyer to engage in the undisclosed recording of a conversation with another in which the lawyer is a participant.

LEO 1448 is an example where the Committee evidently interpreted the decision in *Gunter* as banning undisclosed recording (even where one party to the conversation consented), reaching the conclusion that it would be unethical for a lawyer to advise his client to tape record conversations with her father. The client was allegedly sexually abused by her father when she was a child, and in some conversations the father had freely admitted his sexual abuse of her. The lawyer proposed that the client arrange to meet with her father and record their conversation. The Committee cited *Gunter* and LEO 1324, and opined: "Under the facts presented, the Committee opines that advising one's client to initiate a conversation under possibly false pretenses and to secretly record such conversation is improper, deceptive conduct which may reflect on the lawyer's fitness to practice law." LEO 1448 does not disclose what facts were involved that indicated the client was going to "initiate a conversation under possibly false pretenses[.]" The Committee in LEO 1448 also noted:

---

[11] Whether the tapes could be lawfully used or admitted into evidence are entirely separate issues beyond the purview of this Committee and therefore not addressed in its legal ethics opinions. Nevertheless, this Committee warns that a lawyer must carefully consider applicable criminal and civil law in determining whether to use an intercepted recording.

> …that the attorney may be attempting to do indirectly, through the client, what the attorney could not ethically accomplish directly and personally, i.e. contact the potential defendant directly under the appearance of disinterestedness and surreptitiously record the conversation, thus attempting to circumvent the applicable Disciplinary Rules. [DRs 1-102(A)(2) and (4), 7-102(A)(8), 7-103(B); LEOs Nos. 233, 848, 1170, 1217, 1324; *Gunter v. Virginia State Bar*, 238 Va. 617 (1989)].

In LEO 1635, the Committee again relied on an expansive view of G*unter*, concluding that a corporation's attorney engaged in misconduct by using an undisclosed recording device to tape a conversation with a recently discharged employee, to which the lawyer was a party, citing a violation of DR 1-102(A)(4). No discussion was provided regarding how the fact pattern involved "dishonesty, fraud, deceit, or misrepresentation."

In LEO 1738, the Committee addressed some rather compelling scenarios in which the seemingly unqualified ban on lawyer involvement with one party consent recording was not only impractical, but frustrated important public policy. The Committee concluded that its prior opinions disapproved of a lawyer's use of one party consent recording under *any* circumstances and found it necessary to carve out what has been termed a "law enforcement exception."[12] The requesting party asked the Committee "to reconsider prior opinions and opine as to whether it would be ethical under the Virginia Rules of Professional Conduct for a lawyer to participate in, or to advise another person to participate in, a communication with a third party which is electronically recorded with the full knowledge and consent of one party to the conversation, but *without* the knowledge or consent of the other party. Stated differently, in the context of legitimate government law enforcement investigations, are there circumstances under which a lawyer, or an agent under the lawyer's direction, acting in an investigative or fact-finding capacity, may ethically tape record the conversation of a third party, without the latter's knowledge?"

In LEO 1738, this Committee reviewed its previous opinions and stated that:

> The Committee is concerned that its prior opinions have expanded the holding in *Gunter* and created a categorical ban, without qualification or exception, of any tape recording by an attorney or under the supervision of an attorney. Of all the state bar opinions issued on this subject, Virginia appears to be the only state that does not recognize any exception to the prohibition.

The Committee decided that its previous decisions were too broad in their reach. The opinion continues:

> As stated above, the ethics opinions issued by this Committee to date do not recognize any circumstances that would allow an attorney to secretly tape record his or her conversations with another or direct another to do so. **The Committee concludes that its prior opinions sweep too broadly and therefore they are overruled to the extent they are inconsistent with this opinion.** (emphasis added).

Following a discussion of well-recognized and judicially approved practices in which government lawyers supervised undercover criminal investigations conducted by agents who employed deception and undisclosed recording, the Committee stated in LEO 1738 that "[a]ll of

---

[12] In LEO 1765 the Committee described LEO 1738 as identifying a "law enforcement" exception to non-consensual recording.

these scenarios demonstrate the need for *limited exceptions* and are far different from the facts in *Gunter*." (emphasis added).

The Committee stated in LEO 1738 that there are at least three circumstances where such recording would be ethical: in a criminal investigation, in a housing discrimination investigation, and in situations involving threatened or actual criminal activity in which the recording lawyer was the victim. Moreover, the Committee expressly stated:

> **The Committee recognizes that there may be other factual situations in which the lawful recording of a telephone conversation by a lawyer, or his or her agent, might be ethical.** However, the Committee expressly declines to extend this opinion beyond the facts cited herein and will reserve a decision on any similar conduct until an appropriate inquiry is made. (emphasis added).

In LEO 1765, the requester inquired whether the "various lawful activities performed by federal attorneys as part of the federal government's intelligence and/or intelligence work" would be ethically permissible even though they involved use of methods such as "alias identities" and nonconsensual tape-recording. The Committee, citing LEO 1738 and its analysis, concluded that such lawful intelligence activities were ethically permissible. In reaching this conclusion, the Committee also emphasized the "new language of Rule 8.4(c) [Prof. Conduct Rule 8.4(c)], with its additional language limiting prohibition only to such conduct that 'reflects adversely on the lawyer's fitness to practice law.'" LEO 1765 went on to state that "[t]o the extent that anything in this opinion is in contradiction to the language in LEO 1217, that opinion is overruled." LEO 1765 was approved by the Supreme Court of Virginia (2004).[13]

An important principle reiterated in LEO 1765 is that conduct that is legal may nevertheless be unethical for a lawyer. LEO 1765 relied on *Gunter v. Virginia State Bar*, 238 Va. 617 (1989), to conclude that a lawyer may properly be prohibited from particular conduct under the Rules of Professional Conduct even where such conduct is legal.[14] The ethical rules for lawyers properly impose responsibilities on the profession beyond doing merely what is legal. While these principles are important, they must also be balanced against the lawyer's ethical obligations to the client. In this opinion, we examine two situations in which we believe that a lawyer may ethically advise or counsel a client to use lawful undisclosed recording to obtain information relevant to the client's legal matter.

D. Advising Clients to Use Lawful Undisclosed Recording

First Example

In the first example, the Committee reexamines the hypothetical presented in LEO 1448. B, a father, sexually abused A, his daughter, for an extended period of time during her childhood. B's sexual abuse of A constituted a felony. As is the case with many victims of sexual abuse, A repressed her memories of this abuse and could not recall its nature or extent until after she received therapy as an adult. As a result of this abuse, A suffers from several substantial psychological disorders and has received extensive therapy including hospitalizations to treat or manage these disorders. A has contacted a lawyer to consider a possible civil claim against B for damages resulting from his abuse of her. There is little corroborating evidence and the claim is

---

[13] Generally, a legal ethics opinion is advisory only and not binding on any court or tribunal. Va. S. Ct. R., Pt.6, §IV, ¶10 (b)(vi). However, if an advisory opinion such as LEO 1765 is reviewed and approved by the Supreme Court of Virginia, it becomes a decision of the Court. *Id*. at ¶ 10 (g)(iv).

[14] This principle from *Gunter* was relied upon in *U.S. v. Smallwood*, 365 F. Supp.2d. 689 (E.D. Va. 2005) with regard to the tape-recording of witnesses.

essentially A's word against B's. A has continued to have contact with B who has freely admitted, in prior conversations with A, his sexual abuse of her. A's lawyer suggests that A arrange a meeting with B and unbeknownst to B, makes an undisclosed recording of their conversation. B is not currently represented by counsel.

In LEO 1448, the Committee concluded that the lawyer's suggestion to A was improper because the lawyer was using the client to do indirectly what the lawyer was prohibited from doing directly, i.e., unethically tape record the conversation with B and improperly communicate with an unrepresented person.[15] Rule 8.4(a) states that "it is professional misconduct for a lawyer to . . . violate or attempt to violate the Rules of Professional conduct, knowingly assist or induce another to do so, or do so through the acts of another."[16]

The Committee opines that the concerns regarding fairness to third parties must not be viewed in isolation, but must be considered along with a lawyer's duty to diligently pursue the legal objectives of his client, pursuant to Rule 1.3. Comment [1] to Rule 1.3 directs an attorney to "act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." It is an essential part of a lawyer's legal judgment to pursue his role as advocate within the ethical bounds established throughout the Rules of Professional Conduct. Rule 1.2 (a) states, *inter alia*, that "a lawyer shall consult with the client as to means by which [the client's objectives] are to be pursued." Rule 1.2(c) states that "a lawyer shall not counsel the client to engage, or assist the client, in conduct that the lawyer knows is criminal or fraudulent . . . ." Moreover, Rule 1.4 (b) states that, "a lawyer shall explain a matter to the extent reasonably necessary for the client to make informed decisions regarding the representation; and Rule 1.4(c) states that "a lawyer shall inform the client of facts pertinent to the matter. . . ." Comment [5] to Rule 1.4 states that, "the client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation *and the means by which they are to be pursued*." (emphasis added).

In balancing these competing interests, the Committee believes that A's lawyer may advise, suggest or recommend that A lawfully record her conversation with B, without disclosing to B that their conversation is being recorded. Clients consult with lawyers for solutions to legal problems and expect lawyers to suggest the means, within the bounds of the law and the Rules of Professional Conduct, by which to achieve their objectives. A's lawyer is not violating or attempting to violate the Rules of Conduct through the actions of A by advising A that she may record conversations with B. Rather, A's lawyer is advising A of a legal course of conduct, which may or may not be acted upon by the client. In so doing, A's lawyer is discharging her ethical obligation to advise the client of lawful means by which the client's objectives may be achieved. By analogy, the Committee observes that the drafters of the Rules of Conduct concluded that a lawyer should be permitted to advise a client, whom the lawyer is representing on a civil claim, of the right to file criminal or disciplinary charges against their adversary without being deemed to have violated Rule 3.4(i) indirectly through the actions of the client.[17]

To the extent that prior Legal Ethics Opinion 1448 (1992) is inconsistent with this opinion, it is hereby overruled.

---

[15] See, e.g., DR 7-103 now Rule 4.3. This rule does not ban entirely a lawyer's communications with an unrepresented person, but only those communications in which the lawyer acts disinterested or is giving legal advice if that person's interests conflict with the interests of the lawyer's client. It is not clear to the Committee how this rule was violated under the facts presented in LEO 1448.

[16] Rule 8.4 (a) is essentially the same as DR 1-102(A)(1) relied on in LEO 1448. DR 1-102(A)(2) stated that a lawyer shall not "circumvent a Disciplinary Rule through actions of another."

[17] *See* Comment [5], Virginia Rule 3.4(h):
Although a lawyer is prohibited by paragraph (h) from presenting or threatening to present criminal or disciplinary charges solely to obtain an advantage in a civil matter, a lawyer may offer advice about the possibility of criminal prosecution and the client's rights and responsibilities in connection with such prosecution.

Second Example

In the second example, a lawyer conducting an ongoing internal investigation of employee misconduct within a company may consider when and under what circumstances the lawyer may ethically use or direct another to use lawful, undisclosed recording to gather information in the representation of a client. A hypothetical will facilitate the discussion:

> Able is in-house counsel for Company B. At the suggestion of a manager, an employee of Company B goes to Able's office and complains that she is being subjected to a hostile work environment because a co-worker repeatedly makes sexually offensive remarks in the workplace. The coworker has been questioned about this on a number of occasions and denies the other worker's claims. Management asks Able for advice on what to do. Able recommends that the coworker be equipped with an undisclosed device to record the coworker's remarks. Able has researched the applicable law and concluded that the proposed recording does not violate any law.

Has Able violated Rule 8.4(c) directly or indirectly via Rule 8.4(a) by advising Management to have the complaining employee wear a hidden recoding device? Using the analysis applied in the first example, the Committee opines that Able has not violated Rule 8.4(c) directly or indirectly.

As indicated in this opinion, Legal Ethics Opinions 1738 and 1765 provide specific and limited exceptions to the general rule that a lawyer cannot use or direct an agent to use lawful but undisclosed recording in gathering evidence. The hypotheticals in this opinion clearly do not fit within these specific and limited exceptions. However, those opinions acknowledged that there may be other circumstances under which a lawyer may use or advise another to use lawful undisclosed recording.

E. Conclusion

Gunter, supra, and LEOs 1738 and 1765 did not present situations in which the Supreme Court of Virginia or the Committee were required to balance a lawyer's duty to competently and diligently advise a client regarding lawful means by which to conduct an investigation against the Virginia State Bar's and the Court's disapproval of undisclosed recording. In both of the above examples, the Committee faces situations in which the client has asked the lawyer for his or her opinion on how to address the client's legal problem. The proposed undisclosed recording is not only lawful, but could very well be the only means by which the client may obtain relevant information. Nothing that the lawyer has suggested or recommended to the client violates the legal rights of the person whose statements are to be recorded. The Supreme Court of Virginia in the *Gunter* decision did not rule that undisclosed recording with the consent of one of the parties to the conversation was "deceitful" conduct and expressly declined to decide that issue. This Committee believes that the circumstances presented in both examples are easily distinguishable from and stand in stark contrast to the illegal wiretapping case presented in *Gunter*. Both examples are situations that require the lawyer to weigh the competing ethical obligations of a lawyer's duties to third parties against those owed to the client.

This opinion is advisory only, based only on the facts presented and not binding on any court or tribunal.

Committee Opinion
September 29, 2010