

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND

IN THE MATTER OF
SUPREME COURT RULES, PART 6, § II,
RULE 8.4, VIRGINIA RULES OF PROFESSIONAL CONDUCT

PETITION

TO THE HONORABLE CHIEF JUSTICE AND THE JUSTICES OF THE SUPREME COURT
OF VIRGINIA:

NOW COMES the Virginia State Bar, by its President and Executive Director, pursuant to Part 6, §IV, ¶10(g) of the Rules of this Court, and herewith requests review and approval of amendments to Virginia Supreme Court Rules, Part 6, § II, Rule 8.4, which were approved unanimously by the Council of the Virginia State Bar on October 27, 2006 (Record, Pages 4-6).

The Virginia State Bar's Standing Committee on Legal Ethics ("Committee") proposed amendments to Rule 8.4 of the Virginia Rules of Professional Conduct, in the form of new Comments 6 through 9 (Record, Pages 1-3). These proposed comments provide guidance to lawyers regarding when a lawyer, or an agent under the lawyer's direction or control, may ethically engage in lawful, undisclosed or non-consensual recording of communications in which the lawyer or agent is a participant.¹ Under these proposed comments, the undisclosed recording of a communication or event by a lawyer or an agent under the lawyer's supervision is permitted

¹ The recording of a conversation to which one participating party consents is not illegal. See *Cogdill v. Commonwealth*, 219 Va. 272, 278 (1978).

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.

These comments represent a significant departure from the *per se* prohibition adopted by the Committee in prior legal ethics opinions, wherein the Committee concluded that a lawyer who engages in the undisclosed recording of his or her conversation with another violates the ethical prohibition against deceitful conduct under former DR 1-102 (A)(4) of the Code of Professional Responsibility and current Rule 8.4 (c) of the Rules of Professional Conduct.² The Committee took the position (although often in dicta) that undisclosed tape recording was inherently deceitful conduct in violation of Rule 8.4 (c) and therefore generally prohibited, except in narrowly defined circumstances. *See, e.g.*, Virginia Legal Ethics Ops. 1738 and 1765 (recognizing exceptions to the ban on undisclosed tape recording for law enforcement undercover activity, discrimination testing and intelligence operations).³ After careful deliberation, the Committee has cautiously retreated from the view that a lawyer's use of undisclosed recording is *per se* "deceitful" conduct. Indeed, as reflected in Virginia Legal Ethics Opinions 1738 and 1765⁴, the Committee was compelled to acknowledge that there are circumstances under which a

² Former DR 1-102 (A)(4) of the Code of Professional Responsibility stated: "[a] lawyer shall not. . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation which reflects adversely on a lawyer's fitness to practice law." Effective January 1, 2000, the Supreme Court of Virginia adopted the Virginia Rules of Professional Conduct ("RPC"). RPC 8.4 (c) states: "[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation which reflects adversely on a lawyer's fitness to practice law."

³ *See generally*, Virginia State Bar Standing Comm. Legal Ethics, Legal Ethics Ops. 848, 1217, 1324, 1448, 1635, 1738, and 1765.

⁴ Virginia Legal Ethics Opinion 1765 was approved by the Supreme Court of Virginia and therefore is not merely advisory but rather has the force of a decision by the Court. Va. S. Ct. R., pt. 6, § IV, ¶ 10 (g)(iv).

lawyer or an agent under the supervision or direction of the lawyer may secretly record communications in which he or she is a participant and that such conduct does not violate Rule 8.4's prohibition against deceitful conduct reflecting adversely on the lawyer's fitness to practice law.

The Committee recommended the proposed Comments 6 through 9 to Rule 8.4 at its meeting on September 7, 2006 (Record, Pages 1-3). The Virginia State Bar issued a press release dated July 25, 2006 pursuant to Pt. 6, §IV, ¶10(c)(iii) of the Rules of this Court (Record, Pages 8-9). Pursuant to Pt. 6, §IV, ¶10(d)(i), the Virginia State Bar issued a second press release dated August 28, 2006 (Record, Pages 10-11). The proposed amendments were also published in the *Virginia Lawyer Register*, Vol. 55 No. 2 at page 63 in the August/September 2006 issue (Record, Pages 12-13). Comments were timely filed by the Attorney General of Virginia (Record, Pages 17-18). Two additional comments were received from members of the bar, Peter L. Sissman and John Sharer. (Record, Pages 19-22).

In response to these comments, the Council of the Virginia State Bar, at its meeting on October 27, 2006, made further modifications to the proposed amendments, including the addition of proposed Comment 10. The modifications approved by Council added additional language indicating that the proposed Comments do not condone or approve a lawyer's routine use of recording devices to record communications with another lawyer without that lawyer's consent. Further, the lawyer should not record communications with a client except under extraordinary circumstances. Finally, proposed Comment 10 adds that a lawyer does not violate Rule 8.4 (c) if he or she, acting purely in a personal capacity, records a conversation with a person without their knowledge or consent.

The proposed amendments to Rule 8.4, as approved by Council on October 27, 2006, are set out here:

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

- (a) * * * *
- (b) * * * *
- (c) **engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law;**
- (d) * * * *
- (e) * * * *

COMMENT

- [1] * * * *
- [2] * * * *
- [3] * * * *
- [4] * * * *
- [5] * * * *

Use of Undisclosed Recording

[6] Generally, a lawyer who makes or causes another to make an undisclosed recording of communications or events violates these Rules if the recording is unlawful, is accomplished by means of fraud or misrepresentation which reflects adversely on the lawyer's fitness to practice law, or is accomplished by means which violate the legal rights of another.

[7] It is not an automatic violation of the Rules for an lawyer to record or cause to be recorded a communication or event without disclosing the fact of recordation to all parties to the communication or event where 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. Such conduct is not unethical per se. For example, a lawyer representing a criminal defendant, or his investigator, may conduct interviews with potential witnesses using an undisclosed recording device, provided that the lawyer or the lawyer's investigator clearly informs the potential witness of the interviewer's identity and the interviewer's connection with the accused, the recording is lawful, the recording is consented to by one of the parties to the interview, and is not effectuated by means of any misrepresentations or violation of legal rights of another. In civil cases, a lawyer or his agents investigating a matter on behalf of a client may interview potential witnesses using an undisclosed recording device with the consent of only one party to the conversation provided the same conditions are met.

[8] Lawyers should be aware that although federal law, and most states' laws, permit recording with the consent of only one party to the conversation, some states prohibit recordings unless consent has been obtained from all parties to the conversation. In addition, a secret recording that is accomplished by means of false statements would generally violate Rule 4.1 prohibiting false statements of material fact to a third person, as well as Rule 8.4 (c).

[9] There may be special circumstances in the civil and criminal setting where even the use of misrepresentations in connection with an undisclosed recording made in the course of an investigation does not reflect adversely on an attorney's fitness to practice law. See, e.g., Virginia Legal Ethics Ops. 1738 and 1765.

[10] The use of undisclosed recording permitted under these comments is limited to the lawful undisclosed recording of events or communications "in furtherance of an investigation of behalf of a client." These comments do not suggest or encourage the routine use of undisclosed recording of communications with other lawyers without their consent. Except where exceptional circumstances exist, lawyers should not, without obtaining consent, record communications with a client, because such conduct is likely to undermine the client's trust and confidence in the attorney/client relationship. A lawyer's lawful recording of an event or communication does not violate the Rules of Professional Conduct if such recording is performed in his or her personal capacity and such recording is unrelated to his or her representation of a client or is not performed in his or her capacity as a lawyer.

CONCLUSION

The Supreme Court is authorized to regulate the practice of law in the Commonwealth of Virginia and to prescribe a code of ethics governing the professional conduct of attorneys. Va.

Code §§ 54.1-3909, 3910.

Pursuant to this statutory authority, the Court has promulgated rules and regulations relating to the organization and government of the Virginia State Bar. Va. S. Ct. R., Pt. 6, §IV. Paragraph 10 of these rules sets forth the process by which legal ethics advisory opinions and rules of professional conduct are promulgated and implemented. The amendments to Rule 8.4 were developed and approved in compliance with all requirements of Paragraph 10.

THEREFORE, the bar requests that the Court approve the proposed Comments 6 through 10 to Rule 8.4 of the Virginia Rules of Professional Conduct.

Respectfully submitted,

VIRGINIA STATE BAR

By: _____

Karen A. Gould, President

By: _____

Thomas A. Edmonds, Executive Director

Dated this _____ day of November, 2006