You have inquired 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.

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 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 Disciplinary Rule while representing a client.

The Committee is of the opinion, however, that even if non-consensual tape recording of telephone conversations is permissible under Virginia or federal law, 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. (See also ABA Formal Op. 337 (1974).)