

Committee Opinion.  
April 19, 1989

LEGAL ETHICS OPINION 1217

COMMUNICATIONS-MISCONDUCT-  
REPRESENTING CLIENT WITHIN THE  
BOUNDS OF THE LAW: NON-  
CONSENSUAL TAPE RECORDING OF  
TELEPHONE CONVERSATION WITH  
OPPOSING COUNSEL.

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).)

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**Legal Ethics Committee Notes.** – Editor's Note: See also L E Op. No. 1738 stating 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.

**Editor's Note.** – Portions of this opinion are overruled by L E Op. No. 1324. L E Op. No. 1324, dated February 27, 1990, provides that to the extent that the opinion overrules L E Op. No. 1217, that opinion is so overruled.