

LEGAL ETHICS OPINION 1448

MISCONDUCT - REPRESENTING A
CLIENT WITHIN THE BOUNDS OF THE
LAW: ADVISING CLIENT/POTENTIAL
CIVIL PLAINTIFF TO RECORD ORAL
CONVERSATION WITH
UNREPRESENTED POTENTIAL CIVIL
DEFENDANT.

An attorney represents A, who allegedly was sexually abused by father, B, for an extended period during her childhood. B's sexual abuse of A, if proven, would constitute a criminal felony act. A repressed the memories of the abuse and did not recall the extent and nature of the abuse until she received therapy as an adult. As a result of the abuse, A suffers from several significant psychiatric disorders and has required extensive therapy, including several periods of hospitalization.

Attorney represents A as to a potential civil suit against B for damages related to his alleged sexual abuse of A. There is little corroborating evidence and Attorney has suggested that A arrange a meeting with B, who is not currently represented by counsel, and surreptitiously record their conversation, since B has continued to have contact with A, and in some conversations, has freely admitted his sexual abuse of A.

The Committee was asked to opine whether, under the facts of the inquiry, it would be violative of the Code of Professional Responsibility for an attorney to advise a client to record a conversation between the client and another party, without the consent or prior knowledge of that party, for the purpose of obtaining an admission of the party's sexual abuse of the client, when the party is not represented by counsel.

Whether or not the surreptitious recordation of conversations by a lawyer, or by his authorization, to which the lawyer's client is a party, is legal in Virginia is a question of law and, as such, is beyond the purview of the Committee. The Committee has previously opined, however, that even if non-consensual tape recordings are not prohibited by Virginia or federal law, a lawyer's engaging in such conduct, or assisting a client in such conduct may be improper since a lawyer is prohibited from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation which reflects adversely on the lawyer's fitness to practice law. 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.

The Committee also opined 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. [DR:1-102(A)(2) and (4), DR:7-102(A)(8), DR:7-103(B); LE Op. 233, LE Op. 848, LE Op. 1170, LE Op. 1217, LE Op. 1324; Gunter v. Virginia State Bar, 238 Va. 617 (1989).]

Committee Opinion
January 6, 1992

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 must consult with the client under that Rule.

In LEO 1738, the committee recognized narrow exceptions to this prohibition in the case of criminal investigations and housing discrimination “tests.” In addition, 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 must consult with the client under that Rule.