

In this hypothetical, a Criminal Defense Lawyer represents A who is charged with conspiracy to distribute controlled substances. An unindicted co-conspirator, B, who is unrepresented by counsel, has information and will give a statement that will prove helpful to A's defense, for example, that A's involvement and participation in the conspiracy was nominal. B has other charges against him pending that are unrelated to the conspiracy with which A has been charged. A has told Criminal Defense Lawyer that B has been contacted by law enforcement authorities in regard to the investigation of the charges against A. Criminal Defense Lawyer is concerned that B might change his story to give a less favorable statement about A in order to negotiate a more favorable disposition of the charges against B. To preserve B's statement, Criminal Defense Lawyer wants to record an interview with B after identifying himself before B could consider changing his statement later. At the very least, Criminal Defense Lawyer reasons, he/she will be able to attack B's credibility in the event B testifies against A and B's statement is inconsistent with the statement B gave during the recorded interview.

#### QUESTIONS PRESENTED

You have 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 Criminal Defense Lawyer to participate in, or employ an agent to participate in, a communication with a third party which is being 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, are there circumstances under which Criminal Defense Lawyer, or an agent under his/her direction, acting in an investigative or fact-finding capacity, may ethically tape record the conversation of a third party, without the latter's knowledge?

Also, your question raises a second question. Under the *Virginia Rules of Professional Conduct*, must a Criminal Defense Lawyer participating in, or employing an agent participating in, a communication with a third party which is being recorded with the full knowledge and consent of one party to the conversation, but without the knowledge or consent of the other party, inform that other party of the lawyer's role in the matter under discussion? Stated differently, must Criminal Defense Lawyer or his/her agent inform the third party that he/she is the defendant's lawyer or an agent of the defendant's lawyer?

#### APPLICABLE RULES & OPINIONS

The applicable *Rules of Professional Conduct* are Rule 1.1,<sup>1</sup> requiring a lawyer to render competent representation to a client; Rule 1.3<sup>2</sup>, requiring the lawyer to act with diligence in

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<sup>1</sup> Rule 1.1. Competence. A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

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representing a client; Rule 4.3, dealing with unrepresented persons<sup>3</sup>; and Rule 8.4,<sup>4</sup> prohibiting the lawyer, or the lawyer's agent, from engaging in deceitful conduct that reflects adversely on the lawyer's fitness to practice law. Also pertinent to the Committee's analysis are LEOs 1217, 1738, 1765 and 1802.

## ANALYSIS

You have requested reconsideration of prior LEOs 1217 and 1738. Each of those opinions involved the tape-recording of conversations by lawyers or by non-lawyers at their direction without consent of all parties to the conversations. LEO 1217, the earliest opinion of the Committee on the subject, concluded that even though an undisclosed recording may be permissible under Virginia or federal law, it may nevertheless be improper under DR 1-102(A)(4) if there are additional facts which would make such recording dishonest, fraudulent, deceitful or a misrepresentation. After LEO 1217 was issued, the Virginia Supreme Court decided *Gunter v. Virginia State Bar*, 238 Va. 617 (1989) and during the next 11 years this committee issued opinions generally prohibiting non-consensual recordings as unethical. LEO 1738 considered whether the general prohibition against the non-consensual tape-recording by lawyers should yield to some exceptions including undercover law enforcement investigations, housing discrimination testing and situations in which the recording lawyer was the victim of a crime. The Committee in LEO 1738 reviewed that conduct with regard to former Rule 8.4(c)'s prohibition against "conduct involving dishonesty, fraud, deceit, or misrepresentation" and *Gunter*. Prior legal ethics opinions have cited *Gunter* for the general proposition that "the mere fact that particular conduct is not illegal does not mean that such conduct is ethical," as well as for the more specific proposition that just because a lawyer may legally tape-record a particular conversation does not necessarily mean he/she is permitted to do so under the ethics rules. *See*, LEO 1738. The Committee opined that, in most instances, undisclosed recording is improper conduct under DR 1-102(A)(4). However, the Committee identified three necessary exceptions: lawyers working in law enforcement or in connection with housing discrimination testers and where the lawyer is the victim of either the threat or actual commission of criminal activity. The Committee clarified that this list of exceptions was not necessarily an exhaustive list; the opinion acknowledges that there may be "other factual situations in which the lawful recording of a

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<sup>2</sup> Rule 1.3. Diligence. (a) A lawyer shall act with diligence and promptness in representing a client.

<sup>3</sup> Rule 4.3 Dealing With Unrepresented Persons.

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

(b) A lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interest of the client.

<sup>4</sup> Rule 8.4. Misconduct. It is professional misconduct for a lawyer to: (a) 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; (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law.

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telephone conversation by a lawyer, or his or her agent, might be ethical.” The opinion suggested that the Committee would await a subsequent specific inquiry before addressing any other possible scenarios.

Many of the states originally issued ethics opinions stating that undisclosed recording was either generally improper or *per se* unethical, subject to some limited exceptions. Not all states subscribed to this view and more recently a number of states have reversed or significantly revised their opinions to allow undisclosed recording.<sup>5</sup>

This change in how the organized bar regards undisclosed recording, coupled with this committee’s view that some of its prior opinions overextended the application of the *Gunter* decision, influenced the Committee’s view of undisclosed recording in LEO 1802. The issue presented in LEO 1802 was whether a lawyer may ethically advise or suggest to a client that lawful, but undisclosed recording be used by the client to gather information relevant to a legal matter. In LEO 1802 the Committee concluded that, in determining when to use undisclosed recording, a lawyer must balance his/her obligations to fairness to third parties with a lawyer’s duty to pursue diligently the legal objectives of his/her client, pursuant to Rule 1.3. Comment [1]<sup>6</sup> to Rule 1.3 directs a lawyer 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

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<sup>5</sup> In Arizona Bar Opinion 00-04 (2000) a lawyer 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 lawyer concludes that such taping is not prohibited by federal or state law. In the Hawaii Superior Court, Formal Op. 30 (Modification 1995), it is not *per se* unethical for lawyer to engage in undisclosed recording; whether such conduct is deceitful must be determined on a case-by-case basis. In Michigan Bar Association Opinion 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. In *Attorney M. v. Mississippi Bar*, 621 So.2d 220 (Miss. 1992), the lawyer’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. The Missouri Bar Association Ethics Opinion 123 (3/8/06), allows the lawyer/participant to tape record telephone communication if it is not prohibited by law. In New York City Bar Association Ethics Opinion 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. In the Oregon State Bar Opinion 1999-56 (1999), if the substantive law does not prohibit recording a lawyer may do it unless his/her conduct would otherwise cause the other person to believe they are not being recorded. The Tennessee Supreme Court amended the commentary to Rules 4.4 and 8.4 of the Tennessee Rules of Professional Conduct in 2003 to make clear that the secret recording of conversations was not unethical *per se*. In Utah State Bar Ethics Opinion 96-04, recording conversations to which a lawyer 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.

<sup>6</sup> Rule 1.3, Comment [1]: A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued. *See* Rule 1.2. A lawyer’s work load should be controlled so that each matter can be handled adequately.

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legal judgment to pursue his/her role as advocate within the ethical bounds established throughout the *Rules of Professional Conduct*. *Gunter, supra*, and LEOs 1738 and 1765 did not present situations in which the Supreme Court of Virginia or the Committee were asked to balance a lawyer's duty to advise a client competently and diligently regarding lawful means by which to conduct an investigation against the Virginia State Bar's and the Court's disapproval of undisclosed recording.

In LEO 1802, a client wishing to bring a civil suit for past sexual abuse with little corroborating evidence and a client seeking evidence of a hostile work environment because a co-worker repeatedly makes sexually offensive remarks in the workplace, sought advice from the lawyer on how to address the client's legal problem. The undisclosed recording the lawyer proposed 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 violated the legal rights of the person whose statements are to be recorded. Further, as the Committee noted in LEO 1802, 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 undisclosed recording considered in LEO 1802 and the circumstances you present stand in stark contrast to the illegal wiretapping case presented in *Gunter*. Both present situations requiring the lawyer to weigh the competing ethical obligations of a lawyer's duties to third parties against those owed to the client.

In LEO 1765, the Committee extended LEO 1738's list of exceptions to include lawful use of non-consensual recording performed by federal lawyers as part of the federal government's intelligence work. As suggested by the closing language of LEO 1738, the Committee contemplated that there may be additional circumstances in which a lawyer may use or direct others to use undisclosed, but lawful recording without violating 8.4(c); the Committee agrees with the requester that a Criminal Defense Lawyer's use of lawful undisclosed tape-recording under the circumstances described in the request is not deceptive conduct under Rule 8.4(c) that "reflects adversely on the lawyer's fitness to practice law."

As to the second question, Rule 4.3(a) states that when a lawyer is dealing on behalf of a client with a person not represented by counsel, such as the potential witness in the hypothetical above, not only shall a lawyer not state or imply that the lawyer is disinterested, but when a lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

In interpreting Rule 4.3(a) in this hypothetical, the Committee opines that with undisclosed tape-recording there is a higher risk of the unrepresented party misunderstanding the lawyer or the lawyer's agent's role, which correspondingly places a higher burden on the lawyer or the lawyer's agent to ensure that the unrepresented person does not misunderstand the lawyer or the agent's role. The Committee finds it persuasive that in some jurisdictions, when a lawyer contacts an unrepresented party on behalf of a client, the lawyer must identify him/herself and his/her representational role. *See Louisiana State Bar Ass'n v. Harrington*, 585 So.2d 514, 517 (La. 1990) (lawyer's failure to identify himself as a lawyer or carefully explain role in matter violated Rule 4.3

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of the Rules of Professional Conduct of the Louisiana State Bar Association); *In re Air Crash Disaster Near Roselawn, Indiana on October 31, 1994*, 909 F.Supp. 1116, 1123 (N.D. Ill. 1995) (questionnaire sent to Defendant's employees that did not disclose on its face the fact that it was prepared on behalf of plaintiffs' attorney and implied that it was of a neutral and unbiased character violated Rule 4.3 of Rules of Professional Conduct for the Northern District of Illinois).<sup>7</sup>

Accordingly, the Committee opines that when a Criminal Defense Lawyer or an agent acting under their supervision uses lawful methods, such as undisclosed tape-recording, as part of his/her interviewing witnesses or preparing his/her case, those methods cannot be seen as reflecting adversely on his/her fitness to practice law; therefore, such conduct will not violate the prohibition in Rule 8.4(c).

The Committee further opines that when a Criminal Defense Lawyer or an agent acting under his/her supervision uses lawful methods, such as undisclosed tape-recording, as part of his/her interviewing witnesses or preparing his/her case, the lawyer or his/her agent must assure that the unrepresented third party is aware of the lawyer or agent's role.

To the extent that anything in this opinion is in contradiction to the language in LEO 1217 or LEO 1438, that opinion is overruled.

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

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<sup>7</sup> The rules in these two cases were modeled after Rule 4.3 of the *Model Rules of Professional Conduct*, which provides that: "In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding."