Committee Opinion
April 13, 2000

LEGAL ETHICS OPINION 1738 — ATTORNEY PARTICIPATION IN ELECTRONIC RECORDING WITHOUT CONSENT OF PARTY BEING RECORDED.

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 an attorney to participate in, or to advise another person to participate in, a communication with a third party which is electronically 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 an attorney, or an agent under the attorney's direction, acting in an investigative or fact-finding capacity, may ethically tape record the conversation of a third party, without the latter's knowledge.

The applicable Rules of Professional Conduct are:

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;

(b) commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer;

(c) engage in professional conduct involving dishonesty, fraud, deceit or misrepresentation;

RULE 5.3 Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person’s conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

> (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
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> (2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows or should have known of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

In its earliest opinion on the subject the committee addressed the issue of whether it is ethical for a Virginia attorney to tape record a telephone conversation with opposing counsel in pending litigation, concerning the subject matter of the litigation, without informing the opposing counsel that the conversation is being recorded. LE Op. 1217 (1989). The committee concluded that even though such a 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.

One year later, the committee was presented with a situation in which an attorney was representing the wife in a divorce case. *Prior to engaging the attorney,* the wife had tape-recorded her husband's conversations on a telephone in the marital home. The tape recordings revealed the husband's intimate relationship with another woman. The attorney instructed the wife to immediately cease any further recording. While the committee did not decide whether the wife's conduct was unlawful (as this presented a legal question beyond its purview), and the issue of the attorney's involvement in the tape recording was not before the committee,[1] the committee opined in LE Op. 1324 (1990):

> . . . even if non-consensual tape recording of telephone conversations is not prohibited by Virginia or federal law, a lawyer's engaging in such conduct, or assisting a client in such conduct, would be improper and violative of DR:1-102(A)(4) which prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation which reflects adversely on a lawyer's fitness to practice law. In holding that a lawyer's advising a client to non-consensually tape record telephone conversations was proscribed by DR:1-102(A)(4), the Supreme Court of Virginia recently found that "conduct may be unethical, measured by the minimum requirements of the Code of Professional Responsibility, even if it is not unlawful. . . . The surreptitious recordation of conversations authorized by Mr. Gunter . . .was an 'underhand practice' designed to 'ensnare' an opponent." *Gunter v. Virginia State Bar*, 238 Va. 617 (1989). (See also ABA Formal Opinion No. 337 (1974)).

In a later opinion, the committee concluded that even if non-consensual tape recordings are not illegal, a lawyer may not participate in such activity nor advise a client to do so. LE Op. 1448 (1992). In LE Op. 1448, an attorney represented a client who was the victim of child abuse at the hands of her father. Suffering from severe emotional distress as an adult, she consulted an attorney about a civil action against the father. The father and client were still seeing each other, and, on occasion, the father freely admitted his sexual abuse of the client. The question was whether the attorney could ethically advise the

client to secretly tape record her conversations with the father in order to capture the father's testimony and corroborate her statement that the abuse had occurred. The committee opined that to have the client initiate a meeting with the father, under false pretenses, and secretly tape record their conversation, would be deceptive conduct. Thus, the attorney could not advise the client to do that which the attorney could not do directly. DRs 1-102(A)(2), 1-102(A)(4).

Finally, the committee applied the holding of LE Op. 1324 and LE Op. 1448 to prohibit an attorney acting only as an officer or agent of a corporation from tape recording a conversation between the attorney and a former employee of corporation with the employee's knowledge or consent. LE Op. 1635 (1995).

LE Op. 1324, LE Op. 1448, and LE Op. 1635 relied on the Supreme Court of Virginia's decision in *Gunter v. Virginia State Bar*, 238 Va. 617, 385 S.E.2d 597 (1989). Attorney Eugene Gunter represented a husband having marital difficulties with his wife, whom he suspected, was having an affair. Gunter employed an investigator to seek evidence of the wife's infidelity, but no evidence was found. Gunter directed the investigator to install a recording device on the phone of the marital home, which was activated whenever the receiver was picked up and recorded all of the conversations. The investigator reviewed the tape recordings and reported the substance of them to Gunter, including communications the wife had with attorneys and legal advice concerning divorcing her husband. After the device was removed, the wife discovered that it had been in place and that her husband and Gunter were culpable. She reported this to the state police and Gunter was indicted for conspiracy to violate the wiretap (intercept) statutes (Va. Code §§ 19.2-62, *et seq*.). Gunter was tried by jury and acquitted. Thereafter, the Virginia State Bar prosecuted Gunter for misconduct arguing that his conduct was a crime or deliberately wrongful act reflecting adversely on his fitness to practice law. DR:1-102(A)(3). Alternatively, the bar argued that regardless of whether Gunter's conduct was unlawful, it was unethical under DR:1-102(A)(4) as conduct involving fraud, dishonesty, deceit or misrepresentation reflecting adversely on Gunter's fitness to practice law. Gunter's appeal was based on the premise that his conduct was found not to have violated the Wiretap Act. Because his conduct was found not illegal, Gunter argued that his conduct could not be judged as unethical. The Court disagreed, holding that "the recordation, by a lawyer or by his authorization, of conversations between third persons, *to which he is not a party*, without the consent or prior knowledge of each party to the conversation, is 'conduct involving dishonesty, fraud, [or] deceit' under DR:1-102(A)(4)." 238 Va. at 622 (emphasis added).

Gunter v. Virginia State Bar did not address whether it is unethical for an attorney to tape record a telephone conversation *in which the attorney is a participant*, if the other party to that conversation is unaware that it is being recorded. In its appellee brief, the Virginia State Bar cited American Bar Association Formal Opinion 337 (1974), advising that it is unethical for an attorney to record a conversation without the knowledge and consent of all the parties, subject only to a limited exception for law enforcement officials. The Court expressly declined to decide that issue:

> The ABA Opinion, as well as the cited decisions of other courts, however, embrace the recordation by a lawyer of conversations to which he is a party, a circumstance not present in the case before us. *We are not called upon to decide whether that conduct violates DR:1-102(A)(4), and we expressly refrain from deciding that question as well. Id*. (emphasis added).

In addressing the questions presented, the committee assumes that the recording of a conversation with the consent of one party to the conversation is not illegal under Virginia or federal law.[2] The recording of a conversation in violation of any law would constitute a violation of Rule 8.4. In addition, the committee is mindful of the Court's admonition in *Gunter* that the mere fact that particular conduct is not illegal does not mean that such conduct is ethical. Lawyers are governed by the ethical standards in the Rules of Professional Conduct, which require lawyers to do more than comply with civil or criminal laws. However, the committee is concerned that its prior opinions have expanded the holding in *Gunter* and created a categorical ban, without qualification or exception, of any tape recording by an attorney or under the supervision of an attorney. Of all the state bar opinions issued on this subject, Virginia appears to be the only state that does not recognize any exception to the prohibition.

An unqualified prohibition ignores some important and compelling circumstances where tape recording of conversations is a legitimate and effective investigative practice for law enforcement authorities. Such law enforcement officials include attorneys or agents working under their direction or supervision. Indeed, the authority cited by the Virginia State Bar in *Gunter*, ABA Formal Opinion 337, at least recognized a limited "law enforcement exception" to its prohibition of attorneys secretly tape recording conversations:

> There may be extraordinary circumstances in which the Attorney General of the United States or the principal prosecuting attorney of a state or local government or law enforcement attorneys might ethically make and use secret recordings if acting within strict statutory limitations conforming to constitutional requirements.

As stated above, the ethics opinions issued by this committee to date do not recognize *any* circumstances that would allow an attorney to secretly tape record his or her conversations with another or direct another to do so. The committee concludes that its prior opinions sweep too broadly and therefore they are overruled to the extent they are inconsistent with this opinion.

The practical impact on law enforcement of an absolute prohibition of attorney-supervised tape recordings cannot be overlooked. If such recordings are deemed prohibited, law enforcement counsel could not advise or instruct a crime victim or a "contact person" in an extortion or kidnaping case to wear a wire or record a telephone conversation with the suspect. Under our prior opinions, the lawful investigative technique employed in *Cogdill*, supra, would be deemed unethical if an attorney had advised the victim to wear a recording device and place such a device on her home phone. Without such recordings, the evidence may well have been the victim's word

against the attorney's, making the case difficult, if not impossible, to prove beyond a reasonable doubt. Similarly, law enforcement counsel and federal agents (many of *whom* hold law licenses) are at risk of professional discipline if they participate in undercover operations in which contacts with suspected criminals are recorded. To prohibit this practice would impede law enforcement's capability to monitor the conduct of cooperating individuals and protect them from harm in the event their identity was discovered. Surveillance and recordings assist the police in conducting safe undercover operations and guidance by attorneys ensures that these activities are done in accordance with the law. Electronic and oral communications are *often* intercepted and recorded to establish the alleged wrongdoer's intent and mental state, which may be essential elements the government must prove at trial. Finally, since the prior opinions recognize no "authorized by law" exception, a literal reading of those opinions would prohibit a prosecutor from reviewing or approving wiretap applications or *supervising* those wiretaps as required under state or federal law.

LE Op. 1635 goes even further to opine that it is unethical for an attorney to surreptitiously tape record a telephone conversation with an unrepresented party, even when the attorney is acting in a non-professional capacity outside of the attorney-client relationship. In a situation where an attorney finds herself a victim of obscene, threatening or harassing phone calls to her home, prior opinions would seem to hold that it is unethical for the attorney to put a recording device on her own phone in order to identify or prosecute the caller. *See, e.g.*, Minn. Law. Prof. Resp. Bd. Eth. Op. 18 (1996) (a lawyer who is the subject of a criminal threat should not be subject to discipline for secretly recording the threat).

All of these scenarios demonstrate the need for limited exceptions and are far different from the facts in *Gunter*. While *Gunter* was cited as authority for the opinions holding that one-party consent tape recordings by an attorney are unethical, the committee believes that the holding in *Gunter* should be limited to the facts in that case. At issue in *Gunter* was the attorney's manner and purpose of the surreptitious, non-consensual recording of his adversary's conversations with others. The recordings made under the attorney's direction were made of third parties and without the consent of any parties to the conversation. The committee is informed that this is a classic type of interception that is illegal under federal and state law.[3] Moreover, the attorney continued to intercept the conversations of his client's wife after hearing her conversations with attorneys from whom she was seeking legal advice concerning desertion, support, child custody and property division, in contemplation of seeking a divorce from the attorney's client. Finally, the attorney used the information gleaned from the non-consensual interception to advise his client to take proactive steps in order to frustrate the wife's actions, based on the advice given her by attorneys with whom she had consulted. As stated above, the Court specifically refrained from deciding whether conversations between an attorney and another person may be tape-recorded without that person's consent. The committee does not construe the holding in *Gunter* as applicable to attorneys engaged in law enforcement, or agents under their control, who tape record conversations of suspects and witnesses, where such activity comply with federal and state law, and where other ethical rules, i.e., contacts with represented parties, have not been breached.

The law has long recognized that law enforcement may employ tape recording in undercover operations. *See Lopez v. United States*, 373 U.S. 427 (1963). In addition, the courts have recognized that deception in the search for truth is justified in some circumstances in both the law enforcement and private realms. *Sorrells v. United States*, 287 U.S. 435, 441 (1932) (artifice and stratagem are "frequently essential to the enforcement of the law" in order to "reveal criminal design; to expose illicit traffic, the prohibited publication, the fraudulent use of the mails, the illegal conspiracy, or other offenses, and thus to disclose the would-be violators to the law"); *Hampton v. United States*, 425 U.S. 484, 495 n.7 (1976) (Powell, J., concurring) (stating that contraband offenses "are so difficult to detect in the absence of undercover Government involvement"); *United States v. Russell*, 411 U.S. 423, 432 (1973) (asserting that infiltration of drug rings, the only practicable means of detecting unlawful conduct, is a recognized and permissible means of investigation); *Hamilton v. Miller*, 477 F.2d 908, 909 n.1 (10th Cir. 1973) ("it would be difficult indeed to prove discrimination in housing without [the tester's] means of gathering evidence"). Prior opinions of this committee disregard these decisions, and, when read literally, prohibit any sort of undercover activity or misleading behavior if conducted, directed or supervised by a member of the bar.

The courts have also approved one party consent tape recording in certain civil investigations. In housing discrimination cases, testers have long been approved by the courts as a valid means to enforce the Fair Housing Act of 1968, which creates an enforceable right to truthful information concerning the availability of housing. 42 U.S.C. §3604 (d); *Havens Realty Co. v. Coleman*, 455 U.S. 363 (1982) (tester given false information concerning availability of housing by realtor suspected of "racial steering" has standing to sue despite lack of actual interest in the subject property). *See also Spann v. Colonial Village, Inc.*, 899 F.2d 24 (D.C. Cir. 1990) (housing organization had standing to sue under Fair Housing Act using evidence gathered by testers); *Richardson v. Howard*, 712 F.2d 319 (7th Cir. 1983) (observing that the evidence obtained by testers is frequently indispensable and that the requirement of deception is a relatively small price to pay to defeat racial discrimination); *Northside Realty Associates v. United States*, 605 F.2d 1348, 1355 (5th Cir. 1979) (holding that testers acted legally and sought only publicly available information and that "the element of deceit has no significant effect"); *Zuch v. Hussey*, 394 F. Supp. 1028 (E. D. Mich. 1975), *aff'd and remanded*, 547 F.2d 1168 (6th Cir. 1977) (evidence gathered by testers may be the only competent evidence available to prove unlawful conduct).

The current prohibition also creates a dilemma for an attorney who relies on investigators in criminal or civil matters. If the lawyer directly supervises police or other non-lawyer investigators who employ tactics that are regarded as unethical, then such behavior is imputed to the lawyer who faces discipline. Rules 5.3(c)(1) and 8.4(a). To avoid these consequences, the lawyer may choose to exercise no control or supervision over the investigator. This can result in police being deprived of critical legal guidance or, in a civil case, an unsupervised investigation in which important matters may have been overlooked that might have been discovered had the investigator been supervised.

The scenarios described in your request for opinion involve far more artifice and stealth than merely using a recording device to capture a conversation. The “testing” scenario typically entails more deception and fabrication than the tester surreptitiously recording conversations (i.e., misrepresentation of identity, qualifications, financial ability, intent or purpose) in order for the investigation to succeed. The same can be said for participants in law enforcement undercover operations. The most obvious example is the police officer misrepresenting himself as a drug dealer. In fact, very few criminal conspiracies could be infiltrated without the use of outright deceit and deception on the part of prosecuting attorneys and the law enforcement officers they supervise. Both realms involve the use of misrepresentation by the investigator and the investigations are likely to be supervised by lawyers. Thus, on their face, setting aside the tape recording issue, these activities involve conduct violative of Rules 4.1(a), 5.3(c) and 8.4(a) and (c). Yet, in the housing discrimination cases, Congress specifically created a cause of action for the tester, knowing full well that testers have no interest in purchasing the subject property and that their purpose is to expose discrimination by falsely posing as a prospective buyer. *Fair Employment Council of Greater Washington v. BMC Marketing Corp.*, 28 F.3d 1268, 1271-72 (D.C. Cir. 1994) (it did not matter whether the testers merely posed as interested renters or purchasers because regardless of their intentions the statute gave them an enforceable right to truthful information about the availability of housing).

Despite the fact that these law enforcement and testing practices are longstanding and widespread, there have been no reported judicial decisions or ethics committee opinions addressing the ethical propriety of a lawyer directing such practices. David B. Isbell & Lucantonio N. Salvi, *Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation Under the Model Rules of Professional Conduct*, 8 Geo. L. J. Legal Ethics 791, 794 (1995) (“Isbell”). However, some bar opinions have created some limited exceptions under which an attorney or an agent under his control may tape record their conversations with another without the other person's knowledge. In certain limited circumstances, the interests served by surreptitious recordings outweigh the interests protected by prohibiting such conduct through professional standards. Minn. Law. Prof. Resp. Bd. Eth. Op. 18 (1996) (ethical rules against tape recording do not prohibit a government lawyer charged with criminal or civil law enforcement authority from making or directing others to make a recording of a conversation without the knowledge of all parties to the conversation and do not prohibit a lawyer engaged in the prosecution or defense of a criminal matter from recording a conversation without the knowledge of all parties to the conversation); Ohio Bd. Com. Griev. Disp. Adv. Op. 97-3 (1997) (recognized exceptions to the prohibition on surreptitious recording include prosecuting and law enforcement attorney exception; criminal defense attorney exception; and extraordinary circumstances exception).

In the facts you present, the committee acknowledges that the conduct of undercover investigators and discrimination testers acting under the direction of an attorney involves deception and deceit. The conduct about which you have inquired arises in the context where information would not be available by other means and without which an

important and judicially-sanctioned social policy would be frustrated. These methods of gathering information in the course of investigating crimes or testing for discrimination are legal, long-established and widely used for socially desirable ends.

As a result, the committee is of the opinion that Rule 8.4 does not prohibit a lawyer engaged in a criminal investigation or a housing discrimination investigation from making otherwise lawful misrepresentations necessary to conduct such investigations. The committee is further of the opinion that it is not improper for a lawyer engaged in such an investigation to participate in, or to advise another person to participate in, a communication with a third party which is electronically recorded with the full knowledge and consent of one party to the conversation, but without the knowledge or consent of the other party, as long as the recording is otherwise lawful. Finally, the committee opines that it is not improper for a lawyer to record a conversation involving threatened or actual criminal activity when the lawyer is a victim of such threat.

The committee recognizes that there may be other factual situations in which the lawful recording of a telephone conversation by a lawyer, or his or her agent, might be ethical. However, the committee expressly declines to extend this opinion beyond the facts cited herein and will reserve a decision on any similar conduct until an appropriate inquiry is made.

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[1] The issue in LE Op. 1324 was whether the attorney could use the tapes which the wife had made prior to engaging the attorney, not the propriety of an attorney or agent making a non-consensual recording of a conversation with another.

[2] § 19.2-62(A)(2), Code of Virginia of 1950, as amended; 18 U.S.C. § 2511(2)(c) and (d); *Cogdill v. Commonwealth*, 219 Va. 272, 247 S.E.2d 392 (1978) (tape recording of conversation between woman and attorney who was trying to procure her for prostitution where recording was made by a woman using recording device on her phone did not violate wiretap laws; *Wilks v. Commonwealth*, 217 Va. 885, 234 S.E.2d 250 (1977) (not unlawful for a person to intercept a wire or oral communication if such person is a party to the communication or if one of the parties to the verbal exchange has given prior consent to the interception); *See also* 85-86 Va. AG 132 (1985) (party to a communication who tape records without other party's knowledge falls under exception contained in Va. Code § 19.2-62(B)(2)); 87-88 Va. AG 67 (1988) (neither recording of telephone conversation to which one is a party nor subsequent disclosure of recorded communication violates Va. Code §§ 19.2-62, *et seq*.).

[3] In *Gunter*, the Virginia State Bar took the position that notwithstanding his acquittal, the attorney nevertheless violated the wiretap laws, and thus violated DR:1-102(A)(3) (criminal act). 238 Va. at 621. The Court held, however, that the legality of the attorney's acts was immaterial to its analysis. *Id*.