

Friday

6th

February, 2004.

Heretofore came the Virginia State Bar, by Jean P. Dahnk, its President, and Thomas A. Edmonds, its Executive Director and Chief Operating Officer, pursuant to the Rules for Integration of the Virginia State Bar, Part Six, Section IV, ¶ 10 (g), and filed a Petition and Notice of Advisory Opinion Review requesting consideration of Legal Ethics Opinion No. 1765.

Whereas it appears to the Court that the Virginia State Bar has complied with the procedural due process and notice requirements of the aforementioned Rule designed to ensure adequate review and protection of the public interest, now, therefore, upon due consideration of all material submitted to the Court, it is ordered that Legal Ethics Opinion No. 1765 be approved as follows, effective immediately:

LEGAL ETHICS OPINION 1765

WHETHER AN ATTORNEY WORKING
FOR A FEDERAL INTELLIGENCE AGENCY CAN
PERFORM UNDERCOVER WORK WITHOUT
VIOLATING RULE 8.4

I am writing in response to your letter dated December 26, 2001, requesting an informal advisory opinion from the Virginia State Bar Standing Committee on Legal Ethics ("committee"). As you may recall, this committee stayed the issuance of an opinion in response to your request as a proposed amendment to the pertinent ethics rule, 8.4(c), was pending before the Supreme Court of Virginia. On March 25, 2003, the Supreme Court of Virginia adopted a revised Rule 8.4. Accordingly, this committee is now providing

you with the response to your request. For clarity, the former Rule 8.4(c) was as follows:

It is professional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

The newly adopted Rule 8.4(c) reads as follows:

It is professional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation *which reflects adversely on the lawyer's fitness to practice law.* (Emphasis added).

You have requested reconsideration of two prior legal ethics opinions 1217 and 1738. Each of those opinions involved the tape-recording of conversations by attorneys, or by those at their direction without consent of all parties to the conversations. In LEO 1738, this committee reviewed the bright line prohibition against the non-consensual tape-recording by attorneys presented in LEO 1217. 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 with regard to *Gunter v. Virginia State Bar*, 238 Va. 617 (1989). 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 an attorney may legally tape-record a particular conversation does not necessarily mean he is permitted to do so under the ethics rules. See, LEO 1738. The committee opined that in most instances the prohibition established

in 1217 should apply; however, the committee identified three necessary exceptions. The first exception is afforded to attorneys working in law enforcement. A second exception was specified for housing discrimination testers. The third exception would be triggered by either the threat or actual commission of criminal activity where the attorney is the victim. The committee makes a final clarifying point in LEO 1738 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 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.

Your request for reconsideration of these prior opinions specifically seeks extension of the 1738 list of exceptions to include the various lawful activities performed by federal attorneys as part of the federal government's intelligence and/or investigative work. The exception created in LEO 1738 for "law enforcement," does not apply to all of these federal intelligence activities as, for example, the CIA is by statute prohibited from engaging in law enforcement. See, 50 U.S.C. §403(d)(3). In contrast, the activities you wish this committee to consider are those involved in authorized intelligence or counterintelligence activities as well as "special activities," also known as "covert actions."

The "law enforcement" exception identified in LEO 1738 was based on several points of analysis. First, the opinion points out that a total ban on non-consensual tape-recording ignores the fact that such recording is a "legitimate and effective investigative practice for law enforcement." Second, the opinion looks at the impact of banning such activity and predicts that such a ban would hinder access to reliable information. Third, the committee opined that the ban in Gunter should be limited to its facts as that case presented especially egregious activity by the attorney involved, with such activity bearing little resemblance to legitimate law enforcement conduct. Fourth, the committee expressed concern that if lawyers were not able to direct non-attorneys to do this sort of activity, then lawyers would be discouraged from supervising investigators and law enforcement officers; the committee did not want to produce a chilling effect on needed supervision. Weighing clarity of an outright prohibition as suggested in LEO 1271 against the benefit of allowing the tape-recording by law enforcement professionals, the committee concluded that non-consensual recording, and other similar undercover techniques, are "methods of gathering information in the course of investigating crimes or testing for discrimination [that] are legal, long-established, and widely used for socially desirable ends."

In applying the analysis found in LEO 1738 to your situation, the committee notes one pertinent legal development since the issuance of that opinion. Specifically, the American Bar Association (ABA) issued Formal Ethics Opinion 01-422, addressing non-consensual tape-recording by attorneys. In that opinion, the ABA reverses its

prior position, taken in Formal Opinion 337, that such recording is unethical. In the new opinion, the ABA concludes that under the ABA Model Rules of Professional Conduct, there is no blanket prohibition against an attorney electronically recording a conversation without the knowledge of the other party or parties to the conversation. LEO 1738 cites the now withdrawn Formal Opinion 337 in finding support for the conclusion in LEO 1738 that the conduct is impermissible outside of certain specific contexts. However, the committee does not see the ABA's reversal as cause to supersede the conclusions drawn in LEO 1738. 1738 cites Gunter as primary authority for the general tape-recording prohibition. The committee notes that while Formal Opinion 337, which is cited within Gunter, has been withdrawn, Gunter remains the current judicial authority regarding this issue in Virginia. Accordingly, with regard to the permissibility of tape-recording, this committee opines that the ABA's reversal on the question does not undermine the basis for the committee's conclusion in LEO 1738. With regard to other conduct at issue (such as alias identities), the committee notes that Formal Ethics Opinion 01-422 delineates that it is addressing exclusively the issue of tape-recording, and "leave[s] for another day the separate question of when investigative practices involving misrepresentations of identity and purpose nonetheless may be ethical." Therefore, this committee will look primarily to the Virginia Rules for Professional Conduct and prior opinions of this committee rather than the position of the ABA in resolving your question.

While the majority of the discussion in LEO 1738 does focus on non-consensual tape-recording, the opinion also applies the same analysis to other investigative techniques that may involve deceit or misrepresentation, such as the undercover identities used by housing discrimination testers. Thus, in resolving your question regarding intelligence and other related activities, the committee believes that its analysis in that opinion is easily extended to the sort of activities outlined in your request. The lawful methods used by intelligence professionals serve a similarly "important and judicially-sanctioned social policy" as that served when those methods are used by law enforcement professionals. The committee sees no reason to distinguish, for purposes of permissibility of investigative techniques under the Rules of Professional Conduct, between the activities of these two groups of government attorneys. As suggested by the closing language of LEO 1738, the committee contemplated there may be additional appropriate exceptions to the strict interpretation of former 8.4(c); the committee agrees with the requester that intelligence and covert activities of attorneys working for the federal government are an appropriate exception under the new language of Rule 8.4(c), with its additional language limiting prohibition only to such conduct that "reflects adversely on the lawyer's fitness to practice law." Accordingly, the committee opines that when an attorney employed by the federal government uses lawful methods, such as the use of "alias identities" and non-consensual tape-recording, as part of his intelligence or covert activities, those methods cannot be seen as reflecting adversely on his fitness to

practice law; therefore, such conduct will not violate the prohibition in Rule 8.4(c).

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

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

A Copy,

Teste:

Clerk