# ETHICS: GAME SHOW POTPOURRI
# ROUND IV

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DISCUSSION OVERVIEW

Note: Paper print-outs of the PowerPoint slides will be available for pick-up at the conclusion of this session and will also be available at the following link: http://vae.fd.org/content/training.

Jeopardy Categories

RPC Definitions
Send Lawyers, Guns & Money
RPC Rules
Common Client Comments
Potpourri

I. Undisclosed Recording

A. RPC 4.2 (Communication with Persons Represented by Counsel)
B. RPC 4.4 (Respect for Rights of Third Persons)
C. LEO 1802 (2010) (Lawful Undisclosed Recording)

II. File Retention

A. RPC 1.6 (Confidentiality of Information)
B. RPC 1.15 (Safekeeping Property)
C. RPC 1.16 (Termination of Representation)
D. LEO 1305 (1989) (Disposition of Clients' Closed Files)

III. Candor Toward the Tribunal, Confidentiality, and Meritorious Claims

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B. RPC 1.4 (Communication)
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E. RPC 3.1 (Meritorious Claims and Contentions)
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G. RPC 8.4 (Misconduct)
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IV. Confidentiality and Candor

A. RPC 1.6 (Confidentiality of Information)
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V. Disclosure and Fairness

A. RPC 3.4 (Fairness to Opposing Party and Counsel)
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VI. Judicial Criticism

A. RPC 3.5 (Impartiality & Decorum of the Tribunal)
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C. *In Re. Brown*, No. CL09-5166 (Cir. Ct. Norf. 2009)

# The Monster Called File Retention

by Wendy F. Inge

The question of how long a lawyer has to retain client files of closed cases is one I am still regularly asked by lawyers and their staff. The storage of files, whether physical or electronic, over a long period can be burdensome and expensive. The need for storage and record management is familiar to most attorneys. However, because indexing and otherwise accounting for and storing closed files is an additional business expense, many lawyers would like to destroy closed files as soon as possible. How long must a lawyer retain the files of former clients?

**Ethical Requirements**

The only express requirement regarding file retention in the Virginia ethics rules applies to trust account records. Rule 1.15(e) requires that all records required to be maintained under that rule should be retained for five years after the end of the fiduciary relationship. For all other files, the ethics rules do not direct an exact time period; however, Rule 1.16 does establish a general duty not to prejudice a client upon termination of the relationship. Thus, an attorney should not destroy a former client's file so quickly that the client's interests are prejudiced. Virginia LEO 1305 states "a lawyer does not have a general duty to preserve indefinitely all closed or retired files." However, "the lawyer should use care not to destroy or discard materials or information that the lawyer knows or should know may still be necessary or useful in the client's matter for which the applicable statutory limitations period has not expired or which may not be readily available to the client through another source." LEO 1305 also provides detailed suggestions for the destruction of client files such as never destroying any client property or original legal documents, preserving confidentiality when the file is destroyed, continuing to comply with Rule 1.15(e) and creating an index of destroyed files.

**Malpractice Considerations**

The exact retention period for any file should be determined based on the area of law and nature of the particular matter. Also the statute of limitations for a malpractice claim and its accrual should be considered. In Virginia the legal malpractice statute is typically either five years for a written contract (engagement letter) or three years for an oral contract, and the accrual is typically from the date of the breach of the contract or at the latest when the representation is over. Based on these parameters, as a general rule of thumb malpractice carriers will encourage a lawyer to consider a ten-year retention period after closing the file. This can be shifted up or down depending upon the area of practice. For example, criminal matters and other litigation may appropriately have a shorter storage life of seven years after all appeals have expired. On the other hand, real estate matters and wills and trusts should often be kept twenty years or beyond because these files may contain useful information long after the file is closed. Clients may return long after the work is done and request copies or information from the file. Also, in these two areas of practice an error or mistake may not surface until long after the representation is over, and it is always better to have the file than not. Domestic matters fit well into the ten-year range unless there are outstanding issues such as pension and retirement provisions that will not come to fruition for many years.

Because there can be exceptions, the lawyer should thoroughly review each file before destroying it. Some situations require additional years in retention times. For example, you should not destroy a file in any of the following situations:

- Cases for which the malpractice statute of limitation has not yet run (and don't forget about the doctrine of continuous representation);
- Cases involving a minor client who still is a minor when the recommended file retention period ends;
- Estate plans for clients who still are alive;
- Agreements to be executed or fully paid off after the retention period expires;
- Files establishing a tax basis;
- Adoption files;
- Support or custody files with continuing support obligations;
- Cases with renewable judgments;
- Corporate books and records;
- Files of clients convicted of a capital crime; and
- Files of certain "problem clients."

**File Retention Considerations**

Your firm should create a file retention policy specific to your areas of practice. It should take into account your ethical obligations as set in Rules 1.15(e) and 1.16(d) and (e) and LEO 1305, and the malpractice statute of limitations. Notice of the firm's retention policy should be communicated to the client in the engagement letter and in the closing letter at the end of the representation. At the end of the representation, when the file is being closed the lawyer who handled the matter should review it to determine what the retention period is based on the firm's policy and whether any exceptions apply that would lengthen the period. The file can then go to staff for further handling; this would include things like indexing it as a closed

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file, making sure all of the file is present (including printing any e-mails or other electronic documents that need to be added to the paper file), making sure all original documents were returned to the client, and creating a copy of any documents the firm may want to add to its forms library for future drafting use. The file should be stored in a safe (try to prevent water and moisture damage) and secure area that protects confidentiality. Based on the closed file index, when the destruction date arrives the file should be destroyed in a fashion that is consistent with protecting confidentiality. And the closed file index should reflect the date and manner of destruction.

Regarding electronic file storage the same rules for closing the file set out above apply, and firms should continue to have a file retention policy for electronic files. While accessing and storage may be easier and more affordable with electronic storage options, uncontrolled volume increases the costs of storage, and as the technology changes the ability to view older records beyond a reasonable period of time can become burdensome. Also, when using electronic storage methods for closed files, make sure all parts of the electronic file, including e-mail and anything that is on paper and needs to be scanned in are added to the electronic file at closing. Electronic storage media should be maintained under conditions that seek to prevent unintentional damage and confidentiality should continue to be protected.

Truth be told, the advice shared here is nothing more than a little common sense. The real problem is that it is too easy to overlook these issues in a desire to get to the next active matter. Once matters close, files can quickly move to the out-of-sight, out-of-mind category and the few final administrative/storage steps move into that “we’ll get to it when we can” to-do list which too often never gets properly addressed. A little effort up front truly can prevent a major headache down the road.

## Considerations for deciding whether to keep or discard a client file

1. Unless the client consents, a lawyer should not destroy or discard original items belonging to the client. Such items include those furnished to the lawyer by or in behalf of the client, the return of which could reasonably be expected by the client, and original documents (especially when not filed or recorded in the public records).

2. A lawyer should use care not to destroy or discard information that the lawyer knows or should know may still be necessary or useful in the assertion or defense of the client’s position in a matter for which the applicable statutory limitations period has not expired.

3. A lawyer should use care not to destroy or discard information that the client may need, has not previously been given to the client, and is not otherwise readily available to the client, and which the client may reasonably except will be preserved by the lawyer.

4. In determining the length of time for retention of disposition of a file, a lawyer should exercise discretion. The nature and contents of some files may indicate a need for longer retention than do the nature and contents of other files, based upon their obvious relevance and materiality to matters that can be expected to arise.

5. The lawyer should use reasonable means to notify the client of his or her intention to destroy a file and give the client a reasonable time to respond. If the lawyer is unable to locate the former client the lawyer may destroy items whose retention is not required by law and is not reasonably necessary to the client’s future legal representation.

6. A lawyer should take special care to preserve, for five years after the end of the representation, accurate and complete records of the lawyer’s receipt and disbursement of trust funds.(Rule 1.15)

7. In disposing of a file, a lawyer should protect the confidentiality of the contents.

8. A lawyer should not destroy or dispose of a file without screening it in order to determine that consideration has been given to the matters discussed above.

9. A lawyer should preserve for an extended period an index or identification of the files that the lawyer has destroyed or disposed of.

*See Virginia LEO 1305 and ABA Informal Opinion 1384.*

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LEGAL ETHICS OPINION 542 CONFIDENTIALITY – REVEALING A CONTEMPLATED CRIME.

Client was charged with a first offense of driving under the influence as initially represented to the attorney. However, attorney subsequently determined that his client had been driving a brother's car and had been charged in the brother's name based upon the registration of the car. Client later admitted this to the attorney, stated that he would admit same in court, and asked the attorney to notify the court. Attorney was subsequently asked to postpone the notification to the court. The driving record of the client revealed an extensive list of convictions including a suspension and a second instance of driving under the influence.

Under the requirements of DR:4-101(D), an attorney is required to reveal the intention of his client to commit a crime; first, however, the attorney may try to dissuade his client from the criminal act and encourage the client to notify the court of the error in charges. If the client cannot be dissuaded and the crime involves perjury, the attorney must reveal the error to the court and withdraw from further representation.

If the client commits perjury despite assurances to his lawyer that he would not, the attorney has the duty to disclose the commission of the crime to the court.

The attorney has no obligation to reveal his client's driving record to the court or to the commonwealth's attorney, nor does he have an obligation to reveal his client's perjury to the commonwealth's attorney. [DR:4-101(D), DR:7-101(A)(3), LE Op. 341]

Committee Opinion
March 1, 1984

LEGAL ETHICS OPINION 1305 CONFIDENTIALITY – FILES/PROPERTY OF A CLIENT: DISPOSITION OF CLIENTS' CLOSED FILES.

You have advised that you have slightly over 700 closed files in storage, a majority of which concern cases where you were the court-appointed defense counsel in criminal matters which took place between April 1, 1981 and May 15, 1989. You indicate your concern with costs of rental of storage space and of sending notices or complete files to former clients.

You have asked that the Committee consider first the length of time that clients' records need to be retained by an attorney who is no longer engaged in the private practice of law, and second, the propriety of disposal of files by shredding, incineration, or landfill burial.

The appropriate and controlling disciplinary rules relative to your inquiry are DR 2-108(D) which enumerates actions which must be taken upon the termination of a lawyer's representation of a client and DR 4-101(B) which mandates that a lawyer shall not knowingly reveal a confidence or secret of his client. Under the former, the lawyer must take reasonable steps for the continued protection of a client's interests, including, among other tasks, delivering all papers and property to which the client is entitled. The lawyer is permitted to retain papers relating to the client to the extent permitted by applicable law. With regard to the lawyer's trust account information, DR 9-103(A) instructs that such records (including reconciliations and supporting records) be preserved for at least five years following completion of the fiduciary obligation and accounting period. Further guidance as to a lawyer's responsibilities is available through EC 4-6 which instructs that a lawyer must continue to preserve a client's confidences and secrets even after the termination of his employment and also should provide, for example, for the personal papers of the client to be returned to him.

The Committee has previously opined that the mere passage of time does not affect the ongoing requirement of an attorney to preserve the confidentiality of his client. (See Legal Ethics Opinion No. 812) Furthermore, the Committee has also opined that it is not proper, post-death, for an attorney's files to be turned over to an institution since the wishes of the client are still a dominant consideration. (See Legal Ethics Opinion 928) Finally, it has been the view of the Committee that the attorney's responsibility to preserve such confidentiality survives the death of the client. (See Legal Ethics Opinion 1207)

In addressing the issue you have raised, the Committee assumes that no questions have been raised with respect to a lawyer's retaining lien which has arisen as a result of unpaid legal fees or with respect to ownership of the contents of the files you describe. Such questions, if applicable, would raise legal matters beyond the purview of this Committee.

It is the opinion of the Committee that a lawyer does not have a general duty to preserve indefinitely all closed or retired files. Since neither the Code of Professional Responsibility nor any specific Virginia Statute apparently sets forth specific rules addressing the retention of such files by private practitioners, the Committee, in applying DR 2-108(D) and DR 4-101, as described above, suggests the following guidelines as indicated in ABA Informal Opinion No. 1384. (See also Maine Ethics Opinion 74 (10/1/86), Nebraska Ethics Opinion No. 88-3 (undated), New Mexico Ethics Opinion No. 1988-1 (undated), and New York City Bar Association Ethics Opinion No. 1986-4 (4/30/86)).

Although not required, the Committee suggests the following procedures as cautionary guidelines. Since they are merely cautionary, failure to follow these procedures would not result in any ethical impropriety. The lawyer should screen all closed files in order to ascertain whether they contain original documents or other property of the client, in which case the client

should be notified of the existence of those materials and given the opportunity to claim them. Having culled those materials from the closed files, the lawyer should use care not to destroy or discard materials or information that the lawyer knows or should know may still be necessary or useful in the client's matter for which the applicable statutory limitations period has not expired or which may not be readily available to the client through another source. Similarly, the lawyer should be cognizant of the need to preserve materials which relate to the nature and value of his legal services in the event of any action taken by the client against the lawyer. Having screened the files for the removal of any materials as indicated, the lawyer may at the appropriate time dispose of the remaining files in such a manner as to best protect the confidentiality of the contents.

In determining the appropriate length of time for retention or disposition of the remaining materials in a given file, a lawyer should exercise discretion based upon the nature and contents of the file. As instructed in DR 9-103(A), however, all trust account and fiduciary records should be maintained for a period of five years following completion of the fiduciary obligation and accounting period. Finally, the Committee is of the opinion that the lawyer should preserve for an extended period of time an index of all files which have been destroyed.

Committee Opinion
November 21, 1989

LEGAL ETHICS OPINION 1802 ADVISING CLIENTS ON THE USE OF LAWFUL UNDISCLOSED RECORDING .

A. Introduction

In this opinion, the Committee will address whether it is ethical for a lawyer to advise a client to engage in the undisclosed recording of the communications or actions of another. To address this question, the Committee will review its prior opinions on these issues.

This opinion focuses on the ethical implications of a lawyer advising clients regarding the use of undisclosed recording. Towards that end, the Committee finds it necessary to discuss the legality of undisclosed recording, because many states' ethics rules or opinions hinge on whether such recording is legal.[1] Fundamentally, a lawyer cannot advise a client to engage in conduct that is illegal or fraudulent. Rule 1.2(c). Federal law and more than two-thirds of the states permit "one party consent recording." This means that undisclosed recording is legal if one of the parties to a communication—the recorder—is aware of and consents to the recording. Virginia Code Section 19.2-62(B)(2) states that "[i]t shall not be a criminal offense under this chapter for a person to intercept a wire, electronic or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception." Under the remaining states' laws, undisclosed recording is illegal unless all parties to the communication consent to the recordation.[2] Finally, subject to some very stringent exceptions, federal and state law makes it a felony to record communications in which no party has consented. In addition, federal and state law makes it a crime to *use* any communication that has been unlawfully intercepted.

B. Relevant Standards and Rules

The Rules of Professional Conduct adopted by the states, including Virginia and the ABA Model Rules of Professional Conduct, do not specifically address undisclosed recording. However, undisclosed recording does implicate a number of other general ethics rules.[3] First and foremost, Virginia Rule 8.4(c) states that it is "professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law." Prior to the adoption of Virginia Rule 8.4, DR 1-102(A)(4) of the former Virginia Code of Professional Responsibility had a nearly identical prohibition. In 2006, the Virginia State Bar petitioned the Supreme Court of Virginia to adopt comments to Rule 8.4 specifically addressing undisclosed recording.[4] However, the Bar's petition was rejected by a divided Court without comment. Consequently, lawyers must turn to

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[1] *See, e.,g.* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-422 (2001)(A lawyer who electronically records a conversation without the knowledge of the other party or parties to the conversation does not necessarily violate the Model Rules if the act of secretly recording is not illegal in the jurisdiction). *See also* n.7, *infra*.

[2] Cal Penal Code § 692; *Kimmel v. Goland*, 793 P.2d 524 (Cal. 1990) (Court adopted a *per se* ban on lawyer participation and tape-recording calls without everyone's consent.); Connecticut General Statutes Section 52-570d (makes it illegal and civilly actionable for any person to secretly record an oral private telephone communication by means of an instrument, device or equipment, except under certain delineated circumstances.) *See also* Conn. Bar Ass'n.Eth. Op. 98-9; Florida Security of Communications Act, § 934.06, Fla. Statutes Annotated; Md. Code § 10-402 (requires consent of all parties); Mass. Wiretap Statute requires all parties to consent to record. M.G.L.A., ch. 272, §99; *see also Commonwealth v. Hanedania*, 51 Mass. Ct. App. 64, 742 N.E.2d 1113 (2001).

[3] Some states may have explicit language addressing secret recording in commentary to their rules of conduct.

[4] At the recommendation of this Committee the Virginia State Bar petitioned the Court to add comments to Rule 8.4 that would have permitted undisclosed recording if the recording: a) is lawful, b) is consented to by one of the parties to the transaction, c) is in furtherance of an investigation on behalf of a client, d) is not effectuated by means of any misrepresentations, and e) the means by which the communication or event was recorded and the use of the recording do not violate the legal rights of another.

this Committee's prior opinions rather than the Rules for specific guidance on the use of undisclosed recording.

The question presented is whether a lawyer may advise a client to engage in undisclosed recording without violating Rule 8.4(c)'s prohibition of deceitful conduct. Ethics rules that address a lawyer's duties to clients, third parties, opposing counsel, or the court may also apply to the situation. For example, Rule 4.4 covers respect for the rights of third parties—it prohibits any means of obtaining evidence that violate a third party's legal rights or have no substantial purpose other than to embarrass, delay, or burden a third person. Because one-party consent recording is not illegal in most states, as long as the undisclosed recording has a reasonable purpose and does not violate the rights of the subject of the recording, it will not violate Rule 4.4. While undisclosed recording may not by itself violate Rule 4.4, it may be coupled with other conduct that may be illegal or unethical. For example, it would be unethical for a lawyer in a civil matter to advise a client to use lawful undisclosed recording to communicate with a person the lawyer knows is represented by counsel. Rule 4.2. Similarly, it would be unethical for a lawyer in private practice to advise a client to employ lawful undisclosed recording under pretextual circumstances, i.e., using conduct involving fraud, dishonesty, deceit, or misrepresentation. Rule 8.4(c).[5] Also relevant to the analysis is Rule 8.4(a) because a lawyer cannot violate or attempt to violate the Rules of Professional Conduct by directing a third party, such as the client or an investigator, to engage in conduct prohibited by the Rules. Further, if the undisclosed recording is illegal, Rule 8.4(b) makes it professional misconduct for a lawyer to commit a crime or a deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer.[6] Finally, Rule 1.2(c) forbids a lawyer from counseling or assisting the client in conduct that is illegal or fraudulent.

C. Prior Legal Ethics Opinions

Many of the states originally issued ethics opinions that adopted the position that undisclosed recording was either generally improper although subject to some limited exceptions or *per se* unethical.[7] Not all states subscribed to this view and, more recently, a number of states have

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[5] *See, e.g. Nissan Motor Co., Ltd. v. Nissan Computer Corp*., 180 F.Supp.2d 1089 (C.D. Cal. Jan. 14, 2002) (recordation of conversations between counsel in normal course of civil litigation, without consent, is violation of California penal law and is inherently unethical.)

[6] However, lawyers conducting governmental law enforcement investigations may ethically use undisclosed recording in communicating with persons represented by counsel in non-custodial, pre-indictment settings and may use artiface or pretext through the use of "testors" in housing discrimination enforcement investigations to communicate with the targets of the investigation who may be recorded. *See* Va. Legal Ethics Op. 1738, *infra*.

[7] AK Eth. Op. 91 4, 1991 WL 786535 (June 5, 1991) (No lawyers should record any conversation whether by tape or other electronic device, without the consent or prior knowledge of all parties to the conversation.); SC Adv. Op. 91-14 (July 1991)(An attorney may not advise a client to tape record the client's conversations with his spouse); Minnesota Ethics Op. 18 (1996)(It is professional misconduct for a lawyer, in connection with the lawyer's professional activities, to record any conversation without the knowledge of all parties to the conversation, subject to some exceptions); New York City Bar Ass'n Eth. Op. 1995-10(A lawyer may not tape record a telephone or in-person conversation with an adversary attorney without informing the adversary that the conversation is being taped); Supreme Court of Ohio Board of Commissioners on Grievances and Discipline, Opinion Number 97-3 (June 13, 1997)(An attorney in the course of legal representation should not make surreptitious recordings of his or her conversations with clients, witnesses, opposing parties, opposing counsel, or others without their notification or consent); Supreme Court of Texas Professional Ethics Committee Opinion Number 514 (1996)(attorneys may not electronically record a conversation with another party without first informing that party that the conversation is being recorded); *People v. Wallin*, 621 P.2d 330 (Colo. 1981) (attorney's secret recording of telephone conversation of a witness held unethical); *In re Anonymous Member of the South Carolina Bar*, 304 S.C. 342, 404 S.E.2d 513 (1991)(absolute prohibition: an attorney may not record without consent regardless of the purpose or intent); Indiana State Bar Ass'n Op. 1(2000)(undisclosed recording unethical); Iowa State Bar Op. 83-16 (1983)(undisclosed recording unethical); *Comm. on Prof. Ethics & Conduct of Iowa State Bar Ass'n v. Mollman*, 488 N.W.2d 168 (Iowa 1992) (attorney's use of tape recorder to record conversations with former clients as part of attorney's cooperation with law enforcement investigation held improper); Idaho Bar Ass'n Formal Op. 130 (1989)(prohibits surreptitious tape recording as a violation of Rule 8.4 (d)).

reversed or significantly revised their opinions to allow undisclosed recording.[8] Significantly, this Committee's very first ethics opinion on the subject did *not* impose a *per se* or general ban on undisclosed recording, but instead took the view that undisclosed recording only violates ethical rules when it occurs in conjunction with other unethical conduct.

In LEO 1217, we addressed the issue of "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." We decided that "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 [sic]***.**" (emphasis added).

Later that same year, the Supreme Court of Virginia decided *Gunter v. Virginia State Bar*, 238 Va. 617, 385 S.E.2d 597 (1989). In *Gunter*, a husband hired a lawyer in a domestic relations matter in which he suspected the wife of having an affair. After consulting with the client, the lawyer suggested installing a recording device on the parties' marital telephone.[9] The husband authorized an investigator to install a device that was activated each time the telephone receiver was picked up. The lawyer and investigator listened to these recordings, but did not obtain any evidence of the wife's infidelity; however, by listening to the tapes, the lawyer did learn that his client's wife had consulted other lawyers regarding divorce proceedings. She discussed with others the advice she had received. Upon learning through the surreptitious recordings that the wife had possession of some joint tax refund checks, the lawyer advised his client to close a joint

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[8] Alabama Bar Op. 83-183 (1983); Arizona Bar Op. 00-04 (2000) (An attorney 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 attorney concludes that such taping is not prohibited by federal or state law.); Hawaii SupCt, Formal Op. 30 (Modification 1995) (not per se unethical for lawyer to engage in undisclosed recording; whether conduct is deceitful must be determined on a case-by-case basis); Mich. Bar Ass'n Op. 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); *Attorney M. v. Mississippi Bar,* 621 So.2d 220 (Miss. 1992)(attorney'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); Missouri Bar Ass'n Ethics Op. 123 (3/8/06)(allowing lawyer/participant to tape record telephone communication if it is not prohibited by law); New York City Bar Ass'n Ethics Op. 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);New York County Lawyers' Ass'n, Op. 696 (1993) (not unethical per se for a lawyer to record his or her conversations without the consent or prior knowledge of the other parties to the conversation); NC Eth. Op. RPC 171 (1994) (not a violation of the Rules of Professional Conduct for a lawyer to tape record a conversation with an opposing lawyer without disclosure to the opposing lawyer.); Okla, Bar Ass'n Ethics Op. 307 (1994) (Lawyers have the same rights as other citizens, and may therefore record conversations to which they are a party); Or. State Bar Op. 1999-56 (1999) (if the substantive law does not prohibit recording a lawyer may do it unless his conduct would otherwise cause the other person to believe they are not being recorded); 86-F-14 (a) and Comment 5 to RPC 8.4 which states. "The lawful secret or surreptitious recording of a conversation or the actions of another for the purpose of obtaining or preserving evidence doe not, by itself, constitute conduct involving deceit or dishonesty." In 2003, the Tennessee Supreme Court amended the commentary to Rules 4.4 and 8.4 of the Tennessee Rules of Professional Conduct so as make clear that the secret recording of conversations was not unethical per se. *See also* State Bar of Texas Legal Ethics Op. 575 (Nov. 2006) (if undisclosed recording is not a crime the Texas RPC do not prohibit a Texas lawyer from making undisclosed recording) *overruling* State Bar of Texas Op. 514 (1996) (an attorney may not record without the other party's consent but may advise client that such recording is not a crime under Texas law as long as one participant to the conversation is the recorder; attorneys held to a higher standard); Utah State Bar Ethics Op. 96-04 (Recording conversations to which an attorney 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); Wisconsin Bar Op. E-94-5 (the Wisconsin RPCs do not support a blanket rule prohibiting or permitting surreptitious tape recording; determination of whether Rule 8.4 has been violated must be fact-specific on a case-by-case basis; routine recording would almost always violate the rule).

[9] Both parties were still living in the marital home and the husband was the subscriber to the telephone and the billing account was in his name.

bank account so that the wife could not cash them. The tape recorder was removed out of fear that the wife would discover it. The wife subsequently discovered reports from the lawyer to the client disclosing the fact that her conversations had been recorded. She complained to the state police and the lawyer was indicted for conspiracy to violate the wiretapping statute. Following a jury trial, Mr. Gunter was acquitted, but a district committee brought lawyer disciplinary charges against Mr. Gunter. All of the charges were dismissed by the district committee except one—that Mr. Gunter had engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of DR 1-102(A)(4), which was certified to the Disciplinary Board. Mr. Gunter opted for a trial by a three-judge court which found that he violated the cited rule. Mr. Gunter appealed to the Supreme Court of Virginia.

The Court ruled that the recordation, by a lawyer or by his authorization, of telephone 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). At issue in *Gunter* was the lawyer's manner and purpose of the surreptitious, non-consensual recording of his adversary's conversations with others. The recordings made under the lawyer's direction were made of third parties and without the consent of *any* parties to the conversation. Although the lawyer was acquitted of criminal charges, this is a classic type of interception that is illegal under federal and state law. Mr. Gunter's investigator did not attach a tape recorder to the marital phone, nor did he use the telephone to acquire the conversations. Rather, he used a wiretap and a recorder. Moreover, the lawyer continued to intercept the conversations of his client's wife after hearing her conversations with friends discussing the advice provided by lawyers to her in contemplation of seeking a divorce from the lawyer's client. Finally, the lawyer 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 the other lawyers with whom she had consulted. The Virginia Supreme Court held that "[t]he surreptitious recordation of conversations authorized by Mr. Gunter in this case was an 'underhand practice' designed to 'ensnare' an opponent. It was more than a departure from the standards of fairness and candor which characterize the traditions of professionalism." *Gunter v. Virginia State Bar,* 238 Va. at 622.

In *Gunter,* the Virginia State Bar argued that the conduct complained of did indeed violate the wiretapping laws, notwithstanding Mr. Gunter's acquittal of the criminal conspiracy charge, but that even if it was not unlawful, it was unethical, and fell within the prohibition of DR 1-102(A)(4).[10] The bar argued that more is expected of a lawyer than to refrain from criminal conduct. The Court agreed, stating:

> The lowest common denominator, binding lawyers and laymen alike, is the statute and common law. A higher standard is imposed on lawyers by the Code of Professional Responsibility, many parts of which proscribe conduct which would be lawful if done by laymen ….
>
> It follows that conduct may be unethical, measured by the minimum requirements of the Code of Professional Responsibility, even if it is not unlawful. It is therefore immaterial whether the conduct complained of in the present case violates the wiretapping laws, and we expressly refrain from deciding that question. 238 Va. at 621.

The *Gunter* decision, and in particular the above oft-quoted passage—described by some as dicta—formed the basis for a series of legal ethics opinions on undisclosed recording that followed. Importantly, the Supreme Court of Virginia made clear that it was not deciding

[10] The Virginia State Bar argued "[s]tripped to its essentials, appellant's position is that if it's legal, it's ethical." *Gunter, supra*, 238 Va. at 621.

whether "one-party consent recording" would be unethical. The Court observed that "the recordation by a lawyer of conversations to which he is a party . . . [is] 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." 238 Va. at 622. Nevertheless, the quoted language in *Gunter* has been applied by this Committee over the years to prohibit one-party consent recordings as deceitful conduct in violation of DR 1-102(A)(4) and now Rule 8.4(c).

The next year, in LEO 1324 (1990), the Committee had an opportunity to address the use of undisclosed recordings delivered to a lawyer by the wife whom he represented in a domestic relations matter. Prior to engaging the lawyer, the wife explained that she had secretly taped her husband's conversations on the telephone in the marital home revealing her husband's intimate involvement with another woman. The lawyer asked the Committee if it would be ethical to use the recordings. Because the client had already taped the conversations before the professional engagement, the lawyer was not a co-conspirator or accessory to the means by which the tapes were obtained. Therefore, the Committee opined that it would not be improper to use them.[11] Tangentially, the Committee cited to *Gunter*, warning that even if the non-consensual recording was not illegal under federal or state law, a lawyer's engaging in such conduct or assisting a client in such conduct violates DR 1-102(A)(4). Arguably, the Committee's reference to and reliance on *Gunter* was not necessary to decide the narrow question before it; however, the *Gunter* decision was new, the decision had been referenced in the opinion request, and the facts presented in the opinion involved nonconsensual recording in a somewhat similar context. LEO 1324 was the Committee's first post-*Gunter* opportunity to warn the bar and to provide guidance about the ethical implications if the lawyer *had* directed the client to engage in nonconsensual recording. Finally, unlike one-party consent recording, the undisclosed recordings in LEO 1324 were of conversations between the husband and third parties, none of whom had consented to the recording.

Legal ethics opinions that followed did, however, conflate the *Gunter* decision resulting in a blanket ban on lawyers using or even advising their clients to use one-party consent recording; that is, undisclosed recording of conversations in which they are a participant. As noted above, the Supreme Court of Virginia in *Gunter* specifically declined to decide whether it was unethical for a lawyer to engage in the undisclosed recording of a conversation with another in which the lawyer is a participant.

LEO 1448 is an example where the Committee evidently interpreted the decision in *Gunter* as banning undisclosed recording (even where one party to the conversation consented), reaching the conclusion that it would be unethical for a lawyer to advise his client to tape record conversations with her father. The client was allegedly sexually abused by her father when she was a child, and in some conversations the father had freely admitted his sexual abuse of her. The lawyer proposed that the client arrange to meet with her father and record their conversation. The Committee cited *Gunter* and LEO 1324, and opined: "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." LEO 1448 does not disclose what facts were involved that indicated the client was going to "initiate a conversation under possibly false pretenses[.]" The Committee in LEO 1448 also noted:

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[11] Whether the tapes could be lawfully used or admitted into evidence are entirely separate issues beyond the purview of this Committee and therefore not addressed in its legal ethics opinions. Nevertheless, this Committee warns that a lawyer must carefully consider applicable criminal and civil law in determining whether to use an intercepted recording.

> …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. [DRs 1-102(A)(2) and (4), 7-102(A)(8), 7-103(B); LEOs Nos. 233, 848, 1170, 1217, 1324; *Gunter v. Virginia State Bar*, 238 Va. 617 (1989)].

In LEO 1635, the Committee again relied on an expansive view of G*unter*, concluding that a corporation's attorney engaged in misconduct by using an undisclosed recording device to tape a conversation with a recently discharged employee, to which the lawyer was a party, citing a violation of DR 1-102(A)(4). No discussion was provided regarding how the fact pattern involved "dishonesty, fraud, deceit, or misrepresentation."

In LEO 1738, the Committee addressed some rather compelling scenarios in which the seemingly unqualified ban on lawyer involvement with one party consent recording was not only impractical, but frustrated important public policy. The Committee concluded that its prior opinions disapproved of a lawyer's use of one party consent recording under *any* circumstances and found it necessary to carve out what has been termed a "law enforcement exception."[12] The requesting party 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 lawyer 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, in the context of legitimate government law enforcement investigations, are there circumstances under which a lawyer, or an agent under the lawyer'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?"

In LEO 1738, this Committee reviewed its previous opinions and stated that:

> 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.

The Committee decided that its previous decisions were too broad in their reach. The opinion continues:

> 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.** (emphasis added).

Following a discussion of well-recognized and judicially approved practices in which government lawyers supervised undercover criminal investigations conducted by agents who employed deception and undisclosed recording, the Committee stated in LEO 1738 that "[a]ll of

[12] In LEO 1765 the Committee described LEO 1738 as identifying a "law enforcement" exception to non-consensual recording.

these scenarios demonstrate the need for *limited exceptions* and are far different from the facts in *Gunter*." (emphasis added).

The Committee stated in LEO 1738 that there are at least three circumstances where such recording would be ethical: in a criminal investigation, in a housing discrimination investigation, and in situations involving threatened or actual criminal activity in which the recording lawyer was the victim. Moreover, the Committee expressly stated:

> **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. (emphasis added).

In LEO 1765, the requester inquired whether the "various lawful activities performed by federal attorneys as part of the federal government's intelligence and/or intelligence work" would be ethically permissible even though they involved use of methods such as "alias identities" and nonconsensual tape-recording. The Committee, citing LEO 1738 and its analysis, concluded that such lawful intelligence activities were ethically permissible. In reaching this conclusion, the Committee also emphasized the "new language of Rule 8.4(c) [Prof. Conduct 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.'" LEO 1765 went on to state that "[t]o the extent that anything in this opinion is in contradiction to the language in LEO 1217, that opinion is overruled." LEO 1765 was approved by the Supreme Court of Virginia (2004).[13]

An important principle reiterated in LEO 1765 is that conduct that is legal may nevertheless be unethical for a lawyer. LEO 1765 relied on *Gunter v. Virginia State Bar*, 238 Va. 617 (1989), to conclude that a lawyer may properly be prohibited from particular conduct under the Rules of Professional Conduct even where such conduct is legal.[14] The ethical rules for lawyers properly impose responsibilities on the profession beyond doing merely what is legal. While these principles are important, they must also be balanced against the lawyer's ethical obligations to the client. In this opinion, we examine two situations in which we believe that a lawyer may ethically advise or counsel a client to use lawful undisclosed recording to obtain information relevant to the client's legal matter.

D. Advising Clients to Use Lawful Undisclosed Recording

First Example

In the first example, the Committee reexamines the hypothetical presented in LEO 1448. B, a father, sexually abused A, his daughter, for an extended period of time during her childhood. B's sexual abuse of A constituted a felony. As is the case with many victims of sexual abuse, A repressed her memories of this abuse and could not recall its nature or extent until after she received therapy as an adult. As a result of this abuse, A suffers from several substantial psychological disorders and has received extensive therapy including hospitalizations to treat or manage these disorders. A has contacted a lawyer to consider a possible civil claim against B for damages resulting from his abuse of her. There is little corroborating evidence and the claim is

[13] Generally, a legal ethics opinion is advisory only and not binding on any court or tribunal. Va. S. Ct. R., Pt.6, §IV, ¶10 (b)(vi). However, if an advisory opinion such as LEO 1765 is reviewed and approved by the Supreme Court of Virginia, it becomes a decision of the Court. *Id.* at ¶ 10 (g)(iv).
[14] This principle from *Gunter* was relied upon in *U.S. v. Smallwood*, 365 F. Supp.2d. 689 (E.D. Va. 2005) with regard to the tape-recording of witnesses.

essentially A's word against B's. A has continued to have contact with B who has freely admitted, in prior conversations with A, his sexual abuse of her. A's lawyer suggests that A arrange a meeting with B and unbeknownst to B, makes an undisclosed recording of their conversation. B is not currently represented by counsel.

In LEO 1448, the Committee concluded that the lawyer's suggestion to A was improper because the lawyer was using the client to do indirectly what the lawyer was prohibited from doing directly, i.e., unethically tape record the conversation with B and improperly communicate with an unrepresented person.[15] Rule 8.4(a) states that "it is professional misconduct for a lawyer to . . . 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."[16]

The Committee opines that the concerns regarding fairness to third parties must not be viewed in isolation, but must be considered along with a lawyer's duty to diligently pursue the legal objectives of his client, pursuant to Rule 1.3. Comment [1] to Rule 1.3 directs an attorney 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 legal judgment to pursue his role as advocate within the ethical bounds established throughout the Rules of Professional Conduct. Rule 1.2 (a) states, *inter alia*, that "a lawyer shall consult with the client as to means by which [the client's objectives] are to be pursued." Rule 1.2(c) states that "a lawyer shall not counsel the client to engage, or assist the client, in conduct that the lawyer knows is criminal or fraudulent . . . ." Moreover, Rule 1.4 (b) states that, "a lawyer shall explain a matter to the extent reasonably necessary for the client to make informed decisions regarding the representation; and Rule 1.4(c) states that "a lawyer shall inform the client of facts pertinent to the matter. . . ." Comment [5] to Rule 1.4 states that, "the client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation *and the means by which they are to be pursued*." (emphasis added).

In balancing these competing interests, the Committee believes that A's lawyer may advise, suggest or recommend that A lawfully record her conversation with B, without disclosing to B that their conversation is being recorded. Clients consult with lawyers for solutions to legal problems and expect lawyers to suggest the means, within the bounds of the law and the Rules of Professional Conduct, by which to achieve their objectives. A's lawyer is not violating or attempting to violate the Rules of Conduct through the actions of A by advising A that she may record conversations with B. Rather, A's lawyer is advising A of a legal course of conduct, which may or may not be acted upon by the client. In so doing, A's lawyer is discharging her ethical obligation to advise the client of lawful means by which the client's objectives may be achieved. By analogy, the Committee observes that the drafters of the Rules of Conduct concluded that a lawyer should be permitted to advise a client, whom the lawyer is representing on a civil claim, of the right to file criminal or disciplinary charges against their adversary without being deemed to have violated Rule 3.4(i) indirectly through the actions of the client.[17]

To the extent that prior Legal Ethics Opinion 1448 (1992) is inconsistent with this opinion, it is hereby overruled.

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[15] See, e.g., DR 7-103 now Rule 4.3. This rule does not ban entirely a lawyer's communications with an unrepresented person, but only those communications in which the lawyer acts disinterested or is giving legal advice if that person's interests conflict with the interests of the lawyer's client. It is not clear to the Committee how this rule was violated under the facts presented in LEO 1448.

[16] Rule 8.4 (a) is essentially the same as DR 1-102(A)(1) relied on in LEO 1448. DR 1-102(A)(2) stated that a lawyer shall not "circumvent a Disciplinary Rule through actions of another."

[17] *See* Comment [5], Virginia Rule 3.4(h):
Although a lawyer is prohibited by paragraph (h) from presenting or threatening to present criminal or disciplinary charges solely to obtain an advantage in a civil matter, a lawyer may offer advice about the possibility of criminal prosecution and the client's rights and responsibilities in connection with such prosecution.

Second Example

In the second example, a lawyer conducting an ongoing internal investigation of employee misconduct within a company may consider when and under what circumstances the lawyer may ethically use or direct another to use lawful, undisclosed recording to gather information in the representation of a client. A hypothetical will facilitate the discussion:

> Able is in-house counsel for Company B. At the suggestion of a manager, an employee of Company B goes to Able's office and complains that she is being subjected to a hostile work environment because a co-worker repeatedly makes sexually offensive remarks in the workplace. The coworker has been questioned about this on a number of occasions and denies the other worker's claims. Management asks Able for advice on what to do. Able recommends that the coworker be equipped with an undisclosed device to record the coworker's remarks. Able has researched the applicable law and concluded that the proposed recording does not violate any law.

Has Able violated Rule 8.4(c) directly or indirectly via Rule 8.4(a) by advising Management to have the complaining employee wear a hidden recoding device? Using the analysis applied in the first example, the Committee opines that Able has not violated Rule 8.4(c) directly or indirectly.

As indicated in this opinion, Legal Ethics Opinions 1738 and 1765 provide specific and limited exceptions to the general rule that a lawyer cannot use or direct an agent to use lawful but undisclosed recording in gathering evidence. The hypotheticals in this opinion clearly do not fit within these specific and limited exceptions. However, those opinions acknowledged that there may be other circumstances under which a lawyer may use or advise another to use lawful undisclosed recording.

E. Conclusion

*Gunter, supra,* and LEOs 1738 and 1765 did not present situations in which the Supreme Court of Virginia or the Committee were required to balance a lawyer's duty to competently and diligently advise a client regarding lawful means by which to conduct an investigation against the Virginia State Bar's and the Court's disapproval of undisclosed recording. In both of the above examples, the Committee faces situations in which the client has asked the lawyer for his or her opinion on how to address the client's legal problem. The proposed undisclosed recording 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 violates the legal rights of the person whose statements are to be recorded. 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 circumstances presented in both examples are easily distinguishable from and stand in stark contrast to the illegal wiretapping case presented in *Gunter*. Both examples are situations that require the lawyer to weigh the competing ethical obligations of a lawyer's duties to third parties against those owed to the client.

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

Committee Opinion
September 29, 2010

LEGAL ETHICS OPINION 1862 ”TIMELY DISCLOSURE” OF EXCULPATORY EVIDENCE AND DUTIES TO DISCLOSE INFORMATION IN PLEA NEGOTIATIONS

In this hypothetical, in a pending criminal prosecution, the prosecutor is aware of exculpatory evidence, in the form of witness statements accusing another individual of the offense with which the defendant is charged. The prosecutor is also aware that the primary inculpatory witness, an eyewitness to the offense, has died and therefore will not be available to testify in future proceedings in the case. There is an upcoming preliminary hearing scheduled in the case, although the prosecutor has offered a plea bargain in which the defendant would plead guilty to a lesser offense and waive the preliminary hearing. The prosecutor has not disclosed either the exculpatory evidence or the death of the primary witness.

QUESTION PRESENTED

1. Is the “timely disclosure” of exculpatory evidence, as required by Rule 3.8(d), broader than the disclosure mandated by *Brady v. Maryland*, 373 U.S. 83 (1963), and other case law interpreting the Due Process clause of the Constitution? If so, what constitutes “timely disclosure” for the purpose of Rule 3.8(d)?

2. During plea negotiations, does a prosecutor have a duty to disclose the death or unavailability of a primary witness for the prosecution?

APPLICABLE RULES AND OPINIONS

The applicable Rules of Professional Conduct are Rule 3.8(d)[1], Rule 3.3(a)(1)[2], Rule 4.1[3], and Rule 8.4(c)[4].

ANALYSIS

Pursuant to *Brady v. Maryland* and subsequent cases, a prosecutor has the *legal* obligation to disclose material exculpatory evidence to a defendant in time for the defendant to make use of it at trial. A number of cases interpreting this legal obligation have noted that the

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[1] Rule 3.8 Additional Responsibilities Of A Prosecutor
A lawyer engaged in a prosecutorial function shall:
***
(d) make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence which the prosecutor knows tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment, except when disclosure is precluded or modified by order of a court;

[2] Rule 3.3 Candor Toward the Tribunal
(a) A lawyer shall not knowingly:
(1) make a false statement of fact or law to a tribunal;

[3] Rule 4.1 Truthfulness In Statements To Others
In the course of representing a client a lawyer shall not knowingly:
(a) make a false statement of fact or law; or
(b) fail to disclose a fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

[4] Rule 8.4 Misconduct
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;

prosecutor's *ethical* duty to disclose exculpatory evidence is broader than the legal duty arising from the Due Process clause, although they have not explored the contours of that ethical duty.[5]

Rule 3.8(d) does not refer to or incorporate, in the language of the Rule or its comments, the *Brady* standard for disclosure. The standard established by the Rule is also significantly different from the *Brady* standard in at least two ways: first, the Rule is not limited to "material" evidence, but rather applies to all evidence which has some exculpatory effect on the defendant's guilt or sentence; second, the Rule only requires disclosure when the prosecutor has actual knowledge of the evidence and its exculpatory nature[6], while *Brady* imputes knowledge of other state actors, such as the police, to the prosecutor. These differences from the *Brady* standard raise the further question of whether Rule 3.8(d) requires earlier disclosure than the *Brady* standard, which requires only that the evidence be disclosed in time for the defendant to make effective use of it. Thus, the prosecutor has complied with the legal disclosure requirement if the evidence is disclosed in the midst of trial so long as the defendant has an opportunity to put on the relevant evidence.[7]

Although the Committee has never definitively addressed the question, it opines today that the duty of timely disclosure of exculpatory evidence requires earlier disclosure than the *Brady* standard, which is necessarily retrospective, requires. This conclusion is largely based on the response to *Read v. Virginia State Bar*, in which the Supreme Court of Virginia reversed the Virginia State Bar Disciplinary Board's order revoking a prosecutor's license, finding that the prosecutor had complied with his legal obligations under *Brady* and therefore had complied with the correlative ethics rule in force at that time. The disciplinary rule in effect at that time was DR 8-102 of the Virginia Code of Professional Responsibility which read, "The prosecutor in a criminal case or a government lawyer shall . . . [d]isclose to a defendant all information required by law."

At the time of the conduct at issue, Beverly Read was a Commonwealth's Attorney. Read was conducting the prosecution of an arson case. During the investigation, the Commonwealth discovered two witnesses, Sils and Dunbar, who both identified the defendant at the scene of the crime. Sils had second thoughts after he identified the defendant in a line-up and later became convinced that the defendant was not the person Sils had observed at the scene of the crime. Sils disclosed to Read that the defendant was definitely not the man observed at the scene of the crime. Read told Sils that he would not be called as a witness and that his presence was no longer necessary. Read concluded his case and rested without disclosing that the two witnesses had changed their statements. When Sils went home and had further discussions with the other witness, Dunbar, both became convinced that the defendant was not the man they saw. They returned to the courthouse during the trial the following day and agreed to testify for the defense. Read then attempted to pass a message to defense counsel that would have disclosed the exculpatory information but defense counsel refused to accept the writing. Unsuccessful in passing this information to defense counsel, Read then read into the record that the two witnesses had recanted and would testify that the defendant was not the man they saw at the scene of the crime. After this exchange, defense counsel moved to dismiss for prosecutorial misconduct.

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[5] *See* Cone v. Bell, 129 S. Ct. 1769, 1783 n. 15 (2009) ("Although the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations."), *citing* Rule 3.8(d); Kyles v. Whitley, 514 U.S. 419, 436 (1995) (noting that *Brady* "requires less of the prosecution than" Rule 3.8(d)).

[6] As Comment [4] to Rule 3.8 explains, "[p]aragraphs (d) and (e) address knowing violations of the respective provisions so as to allow for better understanding and easier enforcement by excluding situations (paragraph (d)), for example, where the lawyer/prosecutor does not know the theory of the defense so as to be able to assess the exculpatory nature of evidence…"

[7] *See e.g., Read v. Virginia State Bar,* 233 Va. 560, 357 S.E.2d 544 (1987).

The motion to dismiss was denied. A complaint against Read was made with the Virginia State Bar and a disciplinary proceeding ensued.

Read's counsel argued that his client had complied with *Brady* because the information was available to use during trial, and therefore had disclosed "all information required by law." In spite of the Board's finding that Read had willfully intended to see the defendant tried without the disclosure that the two witnesses had recanted, the Supreme Court of Virginia agreed that Read had complied with the disciplinary rule, reversed the Disciplinary Board's decision, and entered final judgment that Read had not engaged in any misconduct. Following this decision, the Bar rewrote the relevant rule, replacing the *Brady* standard with the standard now found in Rule 3.8(d), clarifying that the prosecutor's ethical duty under that rule is not coextensive with the prosecutor's legal duty under *Brady.*

In light of the conclusion that Rule 3.8(d) requires earlier disclosure than the *Brady* standard, the Committee next turns to the meaning of "timely disclosure." In general, "timely" is defined as "occurring at a suitable or opportune time" or "coming early or at the right time." Thus, a timely disclosure is one that is made as soon as practicable considering all the facts and circumstances of the case. On the other hand, the duty to make a timely disclosure is violated when a prosecutor intentionally delays making the disclosure without lawful justification or good cause.

The text of the Rule makes clear that a court order is sufficient to delay or excuse disclosure of information that would otherwise have to be turned over to the defendant. Thus, where the disclosure of particular facts at a particular time may jeopardize the investigation or a witness, the prosecutor should immediately seek a protective order or other guidance from the court in order to avoid those potential risks. As specified by the Rule, however, disclosure must be "precluded or modified *by order of a court*" (emphasis added) in order for the prosecutor to be excused from disclosure.

Because this is not a bright-line rule, the Committee cannot give a definitive answer to the question of whether the prosecutor must immediately turn over the exculpatory evidence at issue in the hypothetical; however, the prosecutor may not withhold the evidence merely because his legal obligations pursuant to *Brady* have not yet been triggered.

As to the second question, assuming that the witness's unavailability does not come within the scope of Rule 3.8(d), other rules might obligate the prosecutor to disclose this information during plea negotiations or when the plea bargain is being presented to the court.

Specifically, Rules 3.3, 4.1, and 8.4(c) all forbid making false statements or misrepresentations in various circumstances. Rule 4.1(a) generally prohibits making a false statement of fact or law, and Rule 8.4(c) specifically forbids any misrepresentation that "reflects adversely on the lawyer's fitness to practice law." Both of these provisions would apply to any misrepresentation or false statement made in the course of plea negotiations with the defendant/his lawyer. Rule 3.3(a)(1) specifically forbids any false statement of fact or law to a tribunal, which includes any statements made in the course of presenting a plea agreement to the court for approval and entry of the guilty plea. Accordingly, the prosecutor may not make a false statement about the availability of the witness, regardless of whether the unavailability of the witness is evidence that must be timely disclosed pursuant to Rule 3.8(d), either to the opposing lawyer during negotiations or to the court when the plea is entered.[8]

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

[8] See also Rule 3.8(a), which bars a prosecutor from filing or maintaining a charge that the prosecutor knows is not supported by probable cause.

Committee Opinion
July 23, 2012

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VIRGINIA:

BEFORE THE CIRCUIT COURT OF THE CITY OF NORFOLK

VIRGINIA STATE BAR EX REL
SECOND DISTRICT COMMITTEE

Case No. CL09-5166

v.

CURTIS TYRONE BROWN

VSB Docket No. 08-021-072452

**MEMORANDUM ORDER**

This cause came to be heard on November 9, 2009 before a Three-Judge Court duly impaneled pursuant to Section 54.1-3935 of the Code of Virginia, 1950, as amended, consisting of the Honorable William H. Shaw, III, retired Judge of the Ninth Judicial Circuit, the Honorable George F. Tidey, retired Judge of the Fourteenth Judicial Circuit, and the Honorable Lisa B. Kemler, Judge of the Eighteenth Judicial Circuit, Chief Judge presiding. The Virginia State Bar appeared through Assistant Bar Counsel M. Brent Saunders, and the Respondent appeared in person *pro se*.

WHEREUPON, a hearing was conducted upon the Rule to Show Cause issued against Respondent, Curtis Tyrone Brown, which Rule directed him to appear and to show cause why his license to practice law in the Commonwealth of Virginia should not be suspended or revoked, or why he should not otherwise be sanctioned by reason of allegations of ethical misconduct set forth in the Charge of Misconduct issued by a subcommittee of the Second District Committee of the Virginia State Bar.

The Chief Judge of the Three-Judge Court inquired of the members of the Three-Judge Court whether any had any personal or financial interest that would preclude the member from being impartial. After each answered in the negative, the Chief Judge of

the Three-Judge Court provided a preliminary explanation of the proceedings, at the conclusion of which Respondent objected to the stated dispositions available to the Three-Judge Court following the hearing. After hearing argument of counsel, the Three-Judge Court overruled Respondent's objection.

The Virginia State Bar presented its evidence, at the conclusion of which Respondent moved to strike the Virginia State Bar's evidence. After hearing argument of counsel, the Three-Judge Court unanimously overruled Respondent's motion to strike. Respondent was then afforded the opportunity to present evidence, and elected not to present any evidence. The parties then presented arguments as to whether the evidence proved any of the charged violations of the Virginia Rules of Professional Conduct under the clear and convincing standard. Following deliberation, the Three-Judge Court unanimously found by clear and convincing evidence the following facts:

1. At all times relevant hereto, Respondent was an attorney licensed to practice law in the Commonwealth of Virginia.

2. On October 1, 2007, Respondent appeared in the Norfolk Circuit Court before The Honorable Charles D. Griffith, Jr. ("Judge Griffith") in a criminal jury trial scheduled for that day to which Judge Griffith had been assigned and in which Respondent represented the defendant. (*Commonwealth of Virginia v. Lyndon Deneil Porter*, Case No. CR07002110-00-03).

3. Prior to the commencement of the jury trial proceedings, Respondent moved for Judge Griffith to recuse himself as the presiding judge.

4. In furtherance of his efforts to have Judge Griffith recuse himself, Respondent made various statements to Judge Griffith as reflected in the transcript of the hearing conducted on October 1, 2007, including the following:

- "I don't feel that you're appropriate to hear any cases that I might be . . . defending."

- "It makes me feel comfortable for you not to ever hear any jury trial that I got against any of my clients."

- Respondent accused Judge Griffith of harboring animosity toward Respondent and implied that it would cause Judge Griffith to treat the defendant unfairly.

- Respondent suggested that Judge Griffith was biased for the Commonwealth in criminal cases.

5. Respondent's reason for making the recusal motion was that while Judge Griffith was the Commonwealth's Attorney for the City of Norfolk, two of his former assistants, Sherry Capotosto (now an Assistant United States Attorney in Norfolk) and Norman Thomas (now a judge of the Norfolk Circuit Court), had filed complaints against Respondent with the Virginia State Bar in 1999 and 2000, respectively. By the time of the October 1, 2007 hearing: i) Respondent had been sanctioned by the First District Committee of the Virginia State Bar for the conduct underlying the complaint filed by Sherry Capotosto; and ii) a disciplinary subcommittee had certified the complaint filed by Norman Thomas and the Virginia State Bar Disciplinary Board had determined that Respondent had violated multiple provisions of the Virginia Rules of Professional Conduct[1].

6. When Judge Griffith advised Respondent that if he recused himself the case would need to be continued, Respondent accused Judge Griffith of delaying the trial in order to inconvenience Respondent's client.

7. Judge Griffith stated during the October 1, 2007 hearing that he did not have any animosity toward Respondent or believe that there was an actual conflict warranting his recusal, but would nonetheless recuse himself "because [Respondent] makes himself so obnoxious in the courtroom that given his dissatisfaction, I don't see how we could orderly present a case in this courtroom with him here."

8. Judge Griffith's recusal resulted in the trial of the case being continued for several months.

The Three-Judge Court unanimously found that the evidence established violations of the following provisions of the Virginia Rules of Professional Conduct:

**RULE 3.5 Impartiality And Decorum Of The Tribunal**

(f) A lawyer shall not engage in conduct intended to disrupt a tribunal.

**RULE 8.2 Judicial Officials**

A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge or other judicial officer.

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[1] Although in 2005 the Supreme Court of Virginia reversed the determination of the Virginia State Bar Disciplinary Board on procedural grounds, Respondent ultimately stipulated to the facts and rule violations underlying the Norman Thomas complaint.

**THEREAFTER**, the Three-Judge Court received evidence and argument regarding the sanction to be imposed upon Respondent, and then retired to deliberate.

**AFTER DUE CONSIDERATION** of the evidence and the nature of the ethical misconduct committed by Respondent, the Three-Judge Court reached the unanimous decision that Respondent should receive a public reprimand with terms. Therefore, the Three-Judge Court hereby imposes on Respondent, Curtis Tyrone Brown, a **Public Reprimand With Terms**. The terms and conditions with which Respondent must comply are as follows:

Respondent is placed on probation for a period of six (6) months effective January 1, 2010. Respondent will not engage in professional misconduct as defined by the Virginia Rules of Professional Conduct during such probationary period. Any final determination made by a District Subcommittee, District Committee, the Disciplinary Board, a Three-Judge Panel or the Supreme Court of Virginia that Respondent engaged in professional misconduct during this probationary period shall conclusively be deemed to be a violation of this Term. If the terms and conditions are not met, the alternative disposition shall be the suspension of Respondent's license to practice law in the Commonwealth of Virginia for a period of one (1) year.

Pursuant to Part Six, Section IV, Paragraph 13-9 of the Rules of the Supreme Court of Virginia, the Clerk of the Disciplinary System of the Virginia State Bar shall assess costs.

**ORDERED** that four (4) copies of this Order be certified by the Clerk of the Circuit Court of the City of Norfolk and mailed to the Clerk of the Disciplinary System of the Virginia State Bar at 707 East Main Street, Suite 1500, Richmond, Virginia 23219-

2800, for further service upon the Respondent and Bar Counsel consistent with the rules and procedures governing the Virginia State Bar Disciplinary System.

The court reporter who transcribed these proceedings is Ronald Graham and Associates, Inc., 5344 Hickory Ridge, Virginia Beach, Virginia 23455-6680 (757) 490-1100.

ENTERED this 15th day of December, 2009.

The Honorable Lisa B. Kemler
Chief Judge

SEEN:

M. Brent Saunders, Assistant Bar Counsel

COPY TESTE:
GEORGE E. SCHAEFER, CLERK
NORFOLK CIRCUIT COURT
BY
Janice O'Hern, Deputy Clerk
Authorized to sign on behalf
of George E. Schaefer
Date: 12-21-09

SEEN AND ________________________________

________________________________
Curtis Tyrone Brown, Respondent
*Pro se*

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