

You have advised that attorney B is retained by defendant, H, who has been charged with a drug offense. H agreed to assist police in drug investigations in exchange for favorable consideration on his charge; hence, H arranged for S to sell drugs to an undercover police officer. On one such occasion, H was present when S made such a sale. As a result, S is charged with three drug offenses and the public defender is appointed to represent him. Subsequent to being charged with the three drug offenses, S and a private defense attorney, D, go to H's home whereupon D introduces himself to H and states that he is a personal friend of S who wants to ask him some questions concerning the charges made against S.

You have also indicated that in the course of the conversation between D and H, D stated that he knew H was represented by B and that B was a costly attorney. You further allege that D spoke of B as having charged a drug defendant client \$15,000 for representation on a criminal charge for which the client still went to the penitentiary. However, attorney B claims that this is a total fabrication. Defense attorney D has now replaced the public defender who withdrew as S's attorney.

You wish to know whether it was proper for attorney D to have communicated with defendant H and not to have disclosed to defendant H that he was in fact S's attorney.

The appropriate and controlling rules relative to your inquiry are DR:7- 103(A) and DR:7-103(B), the former of which provides that, during the course of representing a client, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so. The latter provision requires that, in dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested and, furthermore, the lawyer shall make reasonable efforts to correct any misunderstanding that the person has with regard to the lawyer's role in the matter.

The Committee is of the opinion that although the prohibition indicated in DR:7-103(A)(1) refers to a "party," that term is intended to refer broadly to any "person" represented by a lawyer in a matter, i.e., a "third party" and not solely the named parties to a civil action or charged with a criminal offense. The Committee adopts the view of the U.S. District Court for the Eastern District of New York, which indicated that a person who retained counsel to protect him before he was charged but when he was a target of a grand jury investigation was, within the definition of the Model Code's corollary to Virginia's DR:7-103(A)(1), a "represented party." The Court further indicated that "[a]ny more exclusive definition of a party as a person or entity by or against whom a proceeding has been commenced is not serviceable for purposes of construing the ethical rule." *U.S. v. Jamil*, 546 F.Supp. 646, 653 (E.D.N.Y. 1982), rev'd on other grounds, 707 F.2d 638 (2d Cir. 1983). Furthermore, the Court indicated that the Model Code's corollary to Virginia's E.C. 7-15 "itself eschews the formalistic distinction in favor of an admonition to the attorney not to 'communicate on the subject matter of the representation of his client with a person he knows to be represented in the matter'." *Id.* (emphasis in original)

Thus, although in the facts you have presented S and H are not parties in the same proceeding, the Committee is of the view that attorney D's communication with H, a party he knew to be represented by counsel, is improper unless D had prior consent from H's attorney, or unless such communication was authorized by law. (See LE Op. 1158) The Committee directs your attention to LE Op. 533, which states that it is ethically permissible for an attorney to communicate directly with former employees of an adversary party in litigation; however, if the attorney knows that any of these witnesses is represented by counsel, the requirements of DR: 7-103(A) would prohibit direct communication.

In addition, the Committee is of the opinion that attorney D's having represented himself to H as merely a personal friend of defendant S may have been violative of DR:7-103(B) when considered in conjunction with his failure to secure consent of H's attorney. Although a personal friend would not necessarily have been disinterested, the Committee opines that that level of interest would not likely have risen to the level of an attorney zealously representing his client. The Committee has previously opined that it is permissible for an attorney to communicate with an adverse witness on the subject of the litigation as long as the attorney first discloses his adversarial role in the litigation. (See LE Op. 530 and LE Op. 905)

Finally, under the facts of the inquiry, the Committee opines that if it was attorney D's intention not to reveal his true identity and professional relationship with S in order to circumvent that which is prohibited, namely improper communication with one of adverse interest, such conduct may be construed by a finder of fact as dishonest, fraudulent, or as a misrepresentation which reflects adversely on the attorney's fitness to practice law and violative of the Code of Professional Responsibility. (See DR:1-102(A)(8) and DR:1-102(A)(4))

Committee Opinion
October 19, 1989