

You have presented a hypothetical situation in which a defense attorney (A) was retained by a felony criminal defendant (D). D is the stepfather of a juvenile victim and husband of the mother of the victim. After A was retained, and before the preliminary hearing, the Commonwealth's Attorney's Office (CAO) called the mother to make an appointment to talk to the mother and juvenile victim about the case. The mother refused to make an appointment, saying she would have to discuss it with "our attorney in the matter," A, and then she hung up.

The investigating detective then tried to speak with the mother by phone and was unsuccessful, but received a call from A. In the ensuing phone conversation, A told the detective that he (A) was going to make the mother aware that she did not have to talk with the police nor the CAO, that he (A) would try to arrange a meeting with mother, victim, police, and CAO in his (A's) office, and that if he (A) could be assured that the case would be handled in the lower court as a misdemeanor (instead of as a felony in the Circuit Court), it might make it easier for him to get the mother to cooperate.

You have further indicated that the Social Services worker for the juvenile victim received an anonymous phone call that stated that if she wanted to speak with the victim, she would have to go through A. The juvenile victim also told the Social Services worker that A was her attorney.

For purposes of this opinion, the Committee assumes that the attorney is asserting representation of the defendant, the victim and the victim's mother in this case.

You have asked the Committee to opine whether, under the facts of the inquiry, the defense attorney's apparent representation of both the defendant and the victim in a criminal case, and the attorney's apparent attempt to prevent the prosecutor's access to witnesses constitute ethical improprieties.

The appropriate and controlling disciplinary rules related to your inquiry are 5-105(A) and (B), which mandate respectively that a lawyer shall not accept or continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR:5-105(C); DR:7-103(A)(2), which prohibits a lawyer from, during the course of his representation of a client, giving advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client; DR:7-103(B), which 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 should, furthermore, make reasonable efforts to correct any misunderstandings held by the unrepresented person; and DR:7-108(B), which prohibits a lawyer from advising or causing a person to secrete himself for the purpose of making him unavailable as a witness. Further guidance is available through Ethical Consideration 5-15 [EC:5-15] which, in pertinent part, exhorts that a lawyer should never represent in litigation multiple clients with differing interests.

The Committee has earlier opined that it is improper for an attorney to represent both a father seeking custody and the minor child in a criminal defense, the disposition of which may affect the resolution of the custody dispute. (See LE Op. 1304.) The Committee has also opined that it is improper for defense counsel in a medical malpractice insurance case to advise the plaintiff's treating physician, whose interests may be adverse to defense counsel's client, or to indicate to the treating physician that he is obligated to disclose certain information. (See LE Op. 1235; see also LE Op. 1281.)

In the facts you present, the Committee is of the opinion that the multiple representation of the defendant, victim and victim's mother (defendant's wife), as described, is per se improper since, as described in DR:5-105(A) and (B), the attorney's professional judgment on behalf of one client is likely to be adversely affected by his representation of the other client. Despite the fact that the victim is merely a witness in the prosecution of the defendant, and not a party to the action, the Committee believes that the impropriety cannot be cured under DR:5-105(C) since it is not obvious that A can adequately represent the interests of both the stepfather/defendant and the child/victim.

In addition, it appears that A has given advice, other than the advice to secure counsel, to a person who is possibly adverse to his client and who is unrepresented by counsel. The facts indicate that A was going to make the mother aware that she did not have to cooperate with either the police or Commonwealth's attorney in the investigation of the charges against the defendant. The Committee opines that such advice is improper and violative of DR:7-103(A)(2). (See LE Op. 1235, LE Op. 1281.)

Finally, under the facts of the inquiry, the Committee opines that, if it was Attorney A's intention to obstruct the police and Commonwealth's attorney's investigation and preparation of the case by improper representation of, and advice to, the defendant, victim, and victim's mother, such conduct may be construed by a finder of fact as dishonest, fraudulent, deceitful, or as a misrepresentation which reflects adversely on the attorney's fitness to practice law, and therefore violative of DR:1-102(A)(4).

Committee Opinion
September 16, 1992

Legal Ethics Committee Notes. – Rule 1.7(a)(1) follows a subjective “reasonably believes” standard rather than the old Code’s objective “obvious” standard.