

You have presented a hypothetical situation in which a client was the victim of an alleged aggravated sexual assault by her work supervisor on the work premises. The client filed a civil action pursuant to Va. Code § 65.2-301(B) and subsequently filed a claim with the Virginia Workers' Compensation Commission. You indicate that another law firm represents the employer and its insurance carrier in both the circuit court and before the Commission. You further indicate that the defendants' law firm has indicated that it plans to defend in circuit court by arguing that the matter is compensable by exclusive remedy under the Workers' Compensation Act. The law firm indicates that it will simultaneously argue before the Commission that the matter is not compensable but should be addressed in circuit court.

You have asked the Committee to opine whether, under the facts of the inquiry, the defendants' law firm may present the same factual matter at the same time in two different tribunals arguing diametrically opposed legal conclusions.

The appropriate and controlling Disciplinary Rule related to your inquiry is DR:7-102(A)(2), which states that a lawyer shall not knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.

The Committee is aware that there is a split among other jurisdictions as to the propriety of an attorney arguing opposing sides of the same issue for different parties in different courts, the so-called "issues conflict". See California LE Op. 1989-108, ABA/BNA Law. Man. on Prof. Conduct, 901:1605 [arguing opposing sides of the same issue is proper]; Philadelphia LE Op. 89-27 (3/90), ABA/BNA Law. Man. on Prof. Conduct, 901:7528 [arguing opposing sides of the same issue is proper, but not in appellate court]; New Mexico Legal Ethics Opinion No. 1990-3 (5/23/90), ABA/BNA Law. Man. On Prof. Conduct, 901:6009 [arguing opposing sides of the same issue is improper]. However, at least one jurisdiction has opined that it is not improper for an attorney to take totally different positions, as to an administrative rule, on behalf of the same party provided that the validity of the rule is subject to legitimate dispute. See Michigan Legal Ethics Opinion CI-1194 (4/6/88), ABA/BNA Law. Man. on Prof. Conduct, 901:4762.

The Committee also directs your attention to EC:7-20 which states, in pertinent part, that the adversary system contemplates that each lawyer will present and argue the existing law in the light most favorable to his client. Indeed, the Committee believes that the concept of zealous representation requires the attorney to so argue for his client within the bounds of the law.

Although the Committee is cognizant that there is a credibility problem inherent in an attorney's arguing both sides of the same issue in different forums, it believes, however, that the duty to zealously represent one's client outweighs any credibility problem the attorney may have. Thus, the Committee opines that it is not improper for the attorney to present the same facts at the same time in two different tribunals arguing opposing legal conclusions so long as he does not violate DR:7-102(A)(1). The Committee believes that such contradictory argument is analogous to filing pleadings in the

alternative, wherein the court is given the opportunity to accept one of several theories of recovery.

Committee Opinion
August 24, 1992