

You have presented a hypothetical situation in which Attorney represented A, a divorced mother of a child whose custody and support was contested by B, the child's father. After substantial litigation, A regained custody of her daughter. You indicate that, ancillary to the custody case, Attorney represented A regarding child support.

You advise that, in the Juvenile and Domestic Relations District Court (J& DR), B testified that he had quit his job to restart his insurance business. The court transcript documents this testimony. You further advise that, on appeal in circuit court, B testified that he had not quit his job but that he was wrongfully fired and he produced a Virginia Employment Commission document to prove this statement. B then acknowledged that he had told the lower court a different story and said that he had been embarrassed that he had been fired. This is also documented by a court transcript. You state that because A believed B to be lying in many other areas (without proof to do anything about it), she was anxious to have this matter settled in court.

Further, you indicate that, at the end of the trial in which B said that he had testified falsely in the lower court, the circuit court judge directed Attorney to report B's possible perjury to the J& DR district court judge. The J& DR district court judge, through his staff, directed Attorney to speak with the Commonwealth's Attorney as to the necessary steps to pursue the perjury. You advise that Attorney spoke with an Assistant Commonwealth's Attorney and later spoke with the Commonwealth's Attorney, who advised Attorney to start a perjury action through the magistrate's office, the entire process for which took several months.

You indicate that, subsequently, B was arrested for perjury and Attorney testified against B at the preliminary hearing in general district court. Because the Assistant Commonwealth's Attorney did not have the complete transcript, a partial transcript was ruled inadmissible, and the case was dismissed. You advise that Attorney continued to pursue the collection of support from B and also spoke with the Commonwealth's Attorney who decided to directly indict B on perjury. Attorney then testified before the grand jury.

You indicate that Attorney then received a letter from B's present attorney which stated that B's present attorney was "uncomfortable with the situation" since Attorney had personally sworn out a perjury warrant against B, concerning testimony two years earlier, after believing that B had violated the terms of a Court order as to support. The letter from B's present attorney recited Attorney's testimony in the General District Court preliminary hearing and her personal contact with the Commonwealth's Attorney. Finally, the letter alleges that the perjury case and the domestic case were "so closely interwoven, especially with [Attorney] as a [prosecuting] witness against B in the criminal matter and at the same time representing A against B in the support matter". Based upon those conclusions, B's attorney urged Attorney to consider withdrawing from representation of A in the domestic case.

You have asked the committee to opine whether, under the facts of the inquiry, Attorney may continue to represent her client in the support matter against the client's ex-husband while also serving as a witness against the ex-husband on a perjury charge. You also ask whether there is the "appearance of impropriety".

The appropriate and controlling Disciplinary Rules related to your inquiry are DR:5-102, which concerns possible withdrawal as counsel when the lawyer becomes a witness, and DR:7-104(A), which involves threatening criminal prosecution to gain an advantage in a civil matter.

The committee is of the opinion that it would not be improper for Attorney to continue Legal representation of her client while also testifying for the prosecution against the client's ex-husband on a perjury charge. The committee is of the opinion that Attorney's role as a complaining witness in the perjury matter is not tantamount to testifying in her client's case.

The committee cautions, however, that the Attorney must be vigilant in observing the requirement of DR:7-104, which prohibits an attorney from presenting or participating in the presentation of criminal charges solely to gain an advantage in a civil matter. Furthermore, the committee similarly cautions that, in testifying on behalf of the Commonwealth, the lawyer should continue to preserve the client's confidences and secrets as required by DR:4-101.

Finally, the committee notes that the "appearance of impropriety" language of Canon 9 relates only to the limited contexts of judges, former government attorneys, and a lawyer's exertion of improper influence upon a tribunal, legislative body, or public official.

Committee Opinion
July 21, 1994