

You have presented a hypothetical situation in which Attorney A represents a defendant in general district court on two felony warrants and on two capiases for failure to appear (FTA) on those warrants. The Commonwealth obtains direct indictments for these same two FTAs but does not request the general district court to nol pros the two capiases or otherwise inform the general district court of the direct indictments.

You indicate that the defendant is arrested, and the circuit court appoints Attorney B to represent the defendant on the felony FTAs. Hearings are scheduled for October 27 in the general district court on the two felony warrants and two capiases.

Attorney B informs Attorney A of the felony FTAs in circuit court, and Attorney A agrees to help B by pursuing a motion in general district court to "dispose of" the capiases prior to the October 24 trial date in circuit court. You further indicate that Attorney A presents this motion on October 18, and neither A nor the Attorney for the Commonwealth informs the court that felony charges are pending in circuit court for the same FTAs. The general district court declines to rule on A's motion to dispose but continues it to October 27, the time that had earlier been set for the capiases as well as for the felony warrants. A informs B that A was unable to dispose of the capiases prior to the defendant's circuit court trial, and B suggests that A file a motion in general district court to reduce the defendant's bond. A files such a motion to be heard on October 24, 9: 00 a.m., with the agreement that B will argue the motion in A's stead, since A plans to be out of town on that date.

The general district court declines to rule on the bond reduction motion on October 24, explaining to B that the court had earlier been informed that the prosecutor could not be in general district court that morning because of commitments in circuit court. You advise that B then makes an oral motion to dispose of the capiases, just as A's earlier written motion had sought to do. B does not advise the court of the coexisting felony charges in circuit court and instead informs the court that the defendant wished to plead guilty to the capiases and represents that the general district court could appropriately deal with the capiases without a prosecutor present, inasmuch as they deal only with matters "between defendant and the Court," or words to that effect.

The general district court, notwithstanding its earlier decision to defer until October 27 any ruling on the capiases, convicts the defendant on both and imposes sentence. Later that day in circuit court, B obtains dismissal of the two felony FTA warrants on double jeopardy grounds, based upon the convictions on the capiases in general district court, but does not apprise the circuit court that B had stood in to represent the defendant in general district court earlier that day.

You have asked the committee to opine under the facts of the inquiry, (1) whether B and A are required to reveal to the general district court the fact that the failures to appear charged in the capiases are also the subject of felony charges in the circuit court; and (2) whether B and A's failure to reveal the above information is a failure to be "aboveboard" with the district court, as that term is used in EC:7-33.

The appropriate and controlling Disciplinary Rules related to your inquiry are DR:7-102(A)(5) and DR:7-102(A)(7), which prohibit, respectively, a lawyer from knowingly making a false statement of law or fact, or from counseling or assisting his client in conduct that the lawyer knows to be illegal or fraudulent. Further guidance can be found in EC:7-33, which provides, in pertinent part, that a lawyer should be respectful, courteous, and aboveboard in his relations with a judge before whom he appears.

The committee has earlier opined that it is improper for an attorney, either by omission or commission, to permit the court to be misinformed as to his client's true identity. See LE Op. 350, LE Op. 1331.

The committee is of the opinion that it is not per se improper for B and A to fail to reveal to the general district court that the failures to appear charged in the capiases were also the subject of felony charges in the circuit court. The committee opines that there is no obligation on the part of a defense attorney to inform a court of a mistake by the Commonwealth that would benefit the defense attorney's client; however, if questioned directly, the defense attorney may not make an affirmative representation which is untrue. See LE Op. 1331 and LE Op. 1400. You indicate that B stated to the general district court judge that the capiases dealt only with matters "between defendant and the Court". The Committee is of the opinion that, if there was an agreement between B and A to make such a statement, both would have violated DR:7-102(A)(5) which prohibits an attorney from knowingly making a false statement of law or fact. The Committee is of the further opinion that the actions of B and A may also have been violative of DR:7-102(A)(7) since they may have counseled or assisted their client, the defendant, in conduct that they know to be fraudulent.

In addition, the committee is of the view that the conduct of B and A falls short of the aspirational exhortations contained in EC:7-33, in that they failed to be aboveboard with the judges in both general district court and circuit court.

Committee Opinion
February 17, 1995