

LEGAL ETHICS OPINION 1768

PROSECUTOR THREATENING TRIAL BY JURY TO DISSUADE A DEFENDANT FROM APPEALING A CRIMINAL CONVICTION TO THE CIRCUIT COURT

You have presented a hypothetical involving comments made by a prosecutor in open court. The represented defendant just after sentencing had asked the court about his right of appeal. The Commonwealth Attorney then informed the court that if the defendant appeals, he will be tried by a jury and requests that the clerk of court note that on the warrant. In this jurisdiction, it is commonly known that a jury will usually impose a longer sentence than the judge for this offense. The defendant subsequently chose not to exercise his right of appeal.

Under the facts you have presented, you have asked the committee to opine as to whether the prosecutor has violated any provision of the Rules of Professional Conduct by making this statement in the presence of the defendant.

The Rule that specifically addresses conduct of a prosecuting attorney is Rule 3.8. That provision places special restrictions on the activities of a prosecutor; however, none of those apply here. Those provisions deal with probable cause, unrepresented defendants, communication with witnesses, disclosure of exculpatory evidence, and extrajudicial statements. The statements made by this prosecutor in court regarding a jury trial are not prohibited by any of the provisions in Rule 3.8.

As the specific rule regarding prosecutors does not preclude the statements made in your hypothetical, the permissibility of those statements is governed by the Rules' general provisions regarding restrictions on an attorney's professional communications.

The committee opines that nothing in the provisions of broad application governing attorney communications, nor the specific provisions directed at prosecutors prohibit the remarks of this Commonwealth's Attorney in the presence of this represented defendant.

This opinion is advisory only, based only on the facts you presented and not binding on any court or tribunal.

Committee Opinion
November 26, 2002

LEGAL ETHICS OPINION 1771

DUTY OF ATTORNEY WHEN ASSISTING CLIENT IN THE ISSUANCE OF A FRAUDULENT AND VOLUNTARY CONVEYANCE

You have presented a hypothetical in which a client comes into the lawyer's office seeking legal assistance regarding the client's plan to render herself insolvent by transferring her only asset from sole ownership to ownership with her husband in the form of tenants by the entirety with survivorship. The transfer would not include any consideration. The client clearly expresses to the attorney that the client's purpose in making this conveyance is to place her one asset outside the reach of her creditors and, thereby, rendering herself insolvent. Your hypothetical presumes that the conveyance would be void under the Fraudulent Conveyance Act, Va. Code § 55-80, and voidable under the Voluntary Conveyance Act, Va. Code § 55-81.

The provision in the Rules for Professional Conduct that governs this situation is Rule 1.2 (c) which states:

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

Nothing in your hypothetical suggests that determination of "the validity, scope, meaning, or application of the law" is at issue. Rather, the question posed in your scenario requires making a distinction between counseling or assisting a client in fraudulent conduct and merely discussing the legal consequences of proposed conduct. Comment 6 discusses that determination as follows:

A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

This committee has previously applied this test to a number of situations. In most of those situations, the committee concluded that the question rested on a substantive legal question outside the purview of the committee. For example, in LEO 782, the committee addressed whether it was permissible for an attorney to tell a spouse separated from, and divorcing, her husband to enter the jointly owned home, now occupied solely by the husband, for the purposes of removing items of personal property. The committee concluded that whether such entry was legal was outside the purview of the committee; the committee just noted that if the conduct was illegal, the attorney could not advise the client to do it. *See*, LEO 782. The committee took a similar approach in several subsequent opinions. *See*, LEO 1219 (regarding whether an attorney could arrange for one client to loan a second client money for litigation expenses in light of the statutes addressing champerty and maintenance), LEO 1222 (regarding whether an attorney could assist in a settlement involving secrecy about criminal acts in light of the statutes addressing misprision of a felony), and LEO 1227 (regarding whether an attorney could assist potential parents in certain steps toward a private adoption). In each of these LEOs, the committee declared that a substantive legal question regarding the legality of particular conduct was outside the purview of the committee and concluded only that should the attorney determine the conduct in question to be illegal, he should not counsel his client to take that action.

The committee concludes that the present hypothetical presents a similarly limited issue within the committee's purview. A definitive conclusion as to whether the attorney in this hypothetical can assist this client without violating Rule 1.2(c) would require an analysis of whether a transfer described by Va. Code §§ 55-80 and/or 55-81 constitutes fraud.¹ Interpretation of those statutes is outside the purview of this committee. Accordingly, this committee must limit its conclusion regarding this matter by opining only that if this attorney determines that the proposed transfer constitutes fraud, he cannot recommend that transfer, nor assist his client in that conveyance. Rather, if the

attorney does determine that the proposed transfer constitutes fraud, Rule 1.2(c) would only permit the attorney to explain the legal consequences of the client's proposal, namely, that the transfer would be void with regard to those creditors this client wishes to evade.

This opinion is advisory only, based only on the facts you presented and not binding on any court or tribunal.
Committee Opinion

November 27, 2002

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- 1 The committee notes that the Rules of Professional Conduct use a unique definition of "fraud." "Fraud" is defined in the Rules as "conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information."