

Committee Opinion
January 31, 1989

LEGAL ETHICS OPINION 1215

CRIMINAL PRACTICE – DISCLOSURE –
ZEALOUS REPRESENTATION:
IMPROPER FOR ATTORNEY TO
REVEAL EXPIRATION OF
PROSECUTION TO THE DETRIMENT
OF CLIENT.

You are concerned with your conflicting ethical duties as an officer of the court to disclose to the court that it has scheduled the trial of a murder case outside of the time limits as set forth in Virginia Code § 19.2-243, and your obligation to zealously represent your client. You allege that disclosure of this information to the court at the present time may eliminate a defense to the criminal action presently pending against your client and therefore work as a detriment to his case.

You advise that on September 6, 1988, Defendant Z, your client, was indicted along with defendants T, X and Y for first-degree murder. These were straight indictments, and at the time the indictment was served on your client on September 7, 1988, he was serving time at a correctional center on an unrelated charge. On October 8, 1988, a joint hearing with counsel for the other defendants was held in which your client's case was set for trial on January 26, 1989.

The next regularly scheduled docket call day for the circuit court was November 1, 1988. You did not appear, but instead sent a letter to the clerk with a request to set four of five cases on any of the available dates noted in your letter to the court. You did not refer to the case of Defendant Z and received no notice that the trial date scheduled for your client's case would be discussed or changed at the docket call date. On November 1, 1988, you were notified that the case of *Commonwealth v. Z* had been continued on motion of the Commonwealth to February 9, 1989, which was one of your available dates.

As you understand the facts, the Commonwealth chose to rearrange the dates of the trial of the defendants for the purpose of accommodating one of the attorneys for one of the other defendants, and for the purpose of arranging the order of trial. At the time the case was set to be heard on January 26, 1989, your client would have been the third defendant tried, but with the extension of time on the motion of the Commonwealth, your client will be the fourth defendant tried. You were not consulted before the request for the continuance, nor have you consented to the continuance of this case. You allege that the time limitation for the prosecution of this felony will expire on February 8, 1989, one day before the case is set for trial pursuant to § 19.2-243 of the Code of Virginia, and assuming that the numbered paragraphs contained in the Code section will not apply in the instant case.

You wish to know whether you are required under the Code of Professional Responsibility to disclose this possible defense to the court on or prior to February 8, 1989, and thereby probably eliminate the defense to the charge against your client; or,

Committee Opinion
January 31, 1989

may you wait until the morning of the trial and file a motion to have the charges dismissed pursuant to Virginia Code § 19.2-243.

The Committee believes DR:7-101(A) is the appropriate and controlling rule relative to your inquiry. The rule provides that an attorney shall not intentionally fail to seek the lawful objectives of his client through reasonably available means permitted by law and the disciplinary rules, except as provided by DR:7-101(B). Subsection (3) of DR:7-101(A) further provides that an attorney shall not intentionally prejudice or damage his client during the course of the professional relationship, except as required under DR:4-101(D) with regard to revealing privileged information. Furthermore, DR:7-102(A)(3) prohibits a lawyer from concealing or knowingly failing to disclose that which he is required by law to reveal.

It is the opinion of the Committee that since you have no legal obligation to reveal the expiration of the limitations period, you may not reveal it to the detriment of your client.

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