

You have advised the Committee that Plaintiff initiated suit on behalf of herself and her infant child for injuries arising out of an automobile accident. The suit was filed against Defendant A, the driver of the vehicle which struck the vehicle occupied by Plaintiff and her child, and Defendant B, the employer corporation of Defendant A and the owner of the vehicle operated by Defendant A. The suit alleged that Defendant A was intoxicated and liable for his negligent operation of the vehicle and that Defendant B is also liable for Defendant A's negligence under the doctrine of respondeat superior, and charges B with negligent entrustment of the vehicle when B knew or should have known that A would operate the vehicle while intoxicated.

During the course of discovery, Plaintiff stated Witness will offer testimony to corroborate the allegation that Defendant A was intoxicated as Witness was a waitress at the bar where Defendant A was drinking just prior to the time the accident occurred. Prior to the trial, Witness contacted Defendant A and stated that she was recently visited by Plaintiff and that Plaintiff made overtures to Witness which could be interpreted as an attempt to bribe Witness into testifying favorably for Plaintiff at trial. As a result, Defense Counsel learned of this and issued a subpoena for Witness to appear for a deposition. In an interview with Defense Counsel prior to taking the deposition, Witness revealed the same information plus the fact that Plaintiff affirmatively stated she was trying to bribe Witness and that Plaintiff had requested that none of this be mentioned to her attorney. Several days later, Witness appeared for a deposition and reaffirmed bribery allegations made by Plaintiff under oath.

Thereafter, Defense Counsel and Plaintiff's Counsel appeared before the court and Defense Counsel advised the court of the recent discovery against Plaintiff's alleged attempted criminal activity. Defense Counsel also expressed to the court his concern as to whether he may be under any ethical duty to reveal this information to the appropriate Commonwealth's attorney.

You have asked the Committee to consider the propriety of whether Defense Counsel has an ethical obligation to inform the Commonwealth's attorney of the possible criminal activity of Plaintiff, opposing party in a personal injury matter, based on information gained in an interview and during a deposition of a witness. If Defense Counsel has an obligation to inform the appropriate authorities, would it be improper for Defense Counsel to continue the representation of Defendants in the personal injury matter. If not, he asks if he may offer the information gained as evidence for impeachment purposes or any other purpose for which the Court would deem admissible.

The appropriate and controlling Disciplinary Rules relative to your inquiry are DR:7-102(A)(3) and DR:7-102(B)(1). Disciplinary Rule 7-102(A)(3) provides that during the

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course of the representation of a client, a lawyer shall not conceal or knowingly fail to disclose that which he is required by law to reveal; DR:7-102(B)(1) provides that a lawyer who receives information clearly establishing that a person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

The Committee opines that if Defense Counsel is able to ascertain either by deposition or a responsive pleading that Plaintiff had in fact presented a bribe to Witness, then Defense Counsel may have a legal obligation to report the alleged bribery to the appropriate authorities which may include the office of the Commonwealth's attorney. The Committee directs your attention to LE Op. 1222 in which the Committee opined that pursuant to Virginia Code § 18.2-461, the compounding or concealing of offenses is a crime if the agreement to conceal the offense is granted in exchange for pecuniary benefit or reward or an engagement therefore. The determination of whether an attorney has a legal duty to reveal to law enforcement authorities or the appropriate prosecutor information concerning a non-client's intention to commit a crime is beyond the purview of the Committee. The Committee is unaware of any Disciplinary Rules which address an attorney's ethical duty to reveal information concerning the possible criminal activities of a person, other than his client, to the Commonwealth's attorney, unless, of course, the activities are substantially related to a criminal matter before the court. (See DR:7-102(A) and (B))

The Committee, therefore, is of the view that, under the facts as you have presented them in the inquiry, Defense Counsel fulfilled his ethical duty by advising the tribunal of the potential fraud in light of Plaintiff's earlier statement in her deposition that Witness would be able to corroborate her allegations that Defendant A was intoxicated at the time of the collision. Witness' testimony in contravention to Plaintiff's earlier statement must be revealed to the court since the matter of Defendant A's intoxication is the central issue of Plaintiff's cause of action. (See DR:7-102(A)(3) and, in particular, DR:7-102(B))

In addition, you are concerned that if Plaintiff's actions are revealed to the Commonwealth's attorney, Defense Counsel may be in violation of DR:7-104(A) if he remains in the civil action. This Committee has consistently opined that a violation of DR:7-104(A) would occur only if Defense Counsel presented, participated in presenting, or threatened to present to Plaintiff's Counsel the criminal charges against Plaintiff solely for the purpose of obtaining an advantage in a civil matter. (See also LE Op. 782 and LE Op. 1063)

If an attorney had an ethical duty to reveal the criminal activities of non-clients that are related to the subject of a representation, the Committee opines that it would not be improper for that attorney to continue the client's representation in a civil matter. Even if the attorney anticipates being called as a witness in the collateral criminal matter filed against a non-client, the attorney may continue the representation of his client in the civil matter. The Committee cautions that an attorney must be mindful of his duty to guard the confidences and secrets of his client, unless he is required by law or court order to reveal information which could be construed to be a confidence or secret. (See DR:4-101(A), (B) and (C))

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Finally, the question you raise as to the use of the information for impeachment or other purposes presents a legal or evidentiary issue, the determination of which is beyond the purview of the Committee.

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