

We understand from your hypothetical statement that during a Medical Malpractice Review Panel proceeding, defendant's counsel designated certain physicians as experts. None of those designated was a member of Medical Practice Group G.

Subsequently, according to your statement, plaintiff filed a medical malpractice action, and plaintiff's counsel designated Dr. D as his expert witness. Dr. D was a member of Medical Practice Group G. Several weeks after plaintiff's designation of Dr. D, defendant's counsel designated Dr. K as his expert witness. Dr. K was also a member of Medical Practice Group G and was senior to Dr. D. Defendant's counsel had engaged Dr. K as an expert in previous cases and was aware of the association between Dr. K and Dr. D in Medical Practice Group G.

Following Dr. K's designation, Dr. K had conversations with Dr. D in which he explained, according to your statement, that there were disadvantages associated with Dr. D testifying as an expert for plaintiff against another physician in the community, and that it would be inappropriate for Dr. D to testify adverse to him. In response to those conversations, you state that plaintiff's counsel wrote defendant's counsel protesting Dr. K's communications with Dr. D, assumed to have been made to discover Dr. D's testimony, and requesting the communications to be stopped. Dr. D thereafter declined to testify as plaintiff's expert due to the conversations with Dr. K.

You state that defendant's counsel knew about Dr. K's communications with Dr. D following the letter of protest from plaintiff's counsel. There is no affirmative statement, however, that the defendant's counsel caused or consented to K's communications with Dr. D.

On the facts presented, you have asked the committee to opinion whether 1) it was ethically permissible for defendant's counsel to engage an expert witness who was known to be the senior member of the medical practice group in which plaintiff's previously designated expert was also a member, and 2) counsel for defendant had a duty to inform Dr. K that Dr. K was not to solicit or cause Dr. D to withdraw as plaintiff's expert witness.

The appropriate and controlling disciplinary rules relative to your inquiry are DR 1-102(A)(3), which prohibits a lawyer from engaging in a deliberately wrongful act reflecting adversely on the lawyer's fitness to practice law, and DR 7-102(A)(1), which prohibits an attorney, in his representation of a client, from conducting a defense or taking other action on behalf of his client when he knows or it is obvious that such action would serve merely to harass or maliciously injure another.

The committee is unaware of any prior opinions dispositive of or pertinent to your inquiry. There are no prior opinions, for example, addressing the propriety of any attorney, either directly or indirectly through the actions of another, influencing a witness not to testify or participate as an expert for the opposing party. Other jurisdictions have found such conduct to be improper.

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See e.g. North Carolina State Bar v. Graves, 50 N.C. App. 450, 274 S.E.2d 396 (1981) (suspension of lawyer who attempted to influence a potential witness not to testify); Oregon State Bar Op. 1992-132 (lawyer may not attempt to dissuade either an adverse fact witness or an expert witness from testifying).

EC 7-24 provides helpful guidance as follows: "Because it interferes with the proper administration of justice, . . . [A] lawyer should not advise or cause a person to secrete himself or to leave the jurisdiction of a tribunal for the purpose of making him unavailable as a witness therein." The committee sees no distinction in principle between a lawyer advising or causing a witness not to testify on the one hand, and advising or causing a witness to hide or leave the jurisdiction, on the other hand. Whether the lawyer's conduct in either case would constitute a contempt of court under Code of Virginia ' 18.2-456 or an obstruction of justice under Code of Virginia ' 18.2-460, presents a legal issue beyond the committee's purview. Cf. Spoilation: Civil Liability for Destruction of Evidence, 20 U. Rich. L.R. 191 (1985-86).

That is not to say, however, that a lawyer is barred from interviewing witnesses where permissible, subject to the constraints of DR 1-102(A)(4) and DR 7-103(A)(2). Following the interview a witness may decide that he or she no longer wishes to be involved. The fact of the interview, without more, does not constitute impermissibly influencing a witness not to testify.

The committee believes, therefore, that it is not ethically permissible for a lawyer directly to advise the other party's expert witness not to testify, or indirectly through another acting at the lawyer's request to cause the other party's expert witness not to testify. A lawyer may not do indirectly what he is prohibited from doing directly. DR 1-102(A)(2) and EC 7-24.

On the facts presented, the committee does not find that Dr. K's communications with Dr. D were made at the direction or with the consent and prior knowledge of defendant's counsel. Dr. K states that defendant's counsel did not ask him to speak with Dr. D or to have Dr. D withdraw, and that Dr. K himself chose to speak with Dr. D, but did not ask Dr. D to withdraw as plaintiff's expert witness.

In the facts you present, the committee believes that there is no duty on the part of defense counsel to take any measure in response to Dr. K's contact with Dr. D, absent information clearly establishing that Dr. K's tampering with Dr. D is a fraud on the tribunal by a third party which counsel must report to the court under DR 7-102(B)(1). Nassau Co. Bar Assn. Op. 91-12 (a lawyer who suspects that criminal client's father intends to tamper with witness may continue to represent the client but may not assist in the witness tampering plan; if witness tampering affects the plea bargain, this constitutes a fraud on the court perpetrated by someone other than his client which the lawyer is required to reveal to the court).

Moreover, on the facts presented, the committee does not find that defense counsel employed Dr. K as an expert merely to harass or maliciously injure plaintiff by subverting plaintiff's

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employment of Dr. D. If it can be shown that defense counsel did in fact employ Dr. K merely to harass or injure plaintiff by subverting plaintiff's employment of Dr. D, then such conduct would violate DR 7-102(A)(1). The facts presented are that defense counsel had worked on several cases with Dr. K in the past. That pre-existing relationship could have been the impetus for defense counsel's employment of Dr. K irrespective of plaintiff's employment of Dr. D. in the same medical group. Whether two physicians in the same practice group may serve as opposing expert witnesses does not present a legal ethics issue.