

LEGAL ETHIC OPINION 1795

IS IT ETHICAL FOR A CRIMINAL DEFENSE
ATTORNEY TO DISCOURAGE A WITNESS
FROM SPEAKING WITH THE
COMMONWEALTH'S ATTORNEY?

I am writing in response to your request for an informal advisory opinion from the Virginia State Bar Standing Committee on Legal Ethics ("Committee").

You have presented a hypothetical situation involving a lawyer's representation of a criminal defendant. The defense attorney represented a client charged with felony unauthorized use of a vehicle. The defendant's mother reported the incident as victim of the crime. On the day of trial, the Commonwealth Attorney attempted to interview her in the hall of the courthouse, within earshot of the defense attorney. The defense attorney joined them and asked the victim/mother, in a terse fashion, if the defense attorney could speak with her. The defense attorney then told the mother that she did not have to speak to the Commonwealth Attorney.

The Commonwealth Attorney learned from this interview that the mother, while the primary driver of the vehicle, was not the owner. The titleholder of the vehicle was the defendant's father. The victim/father came to the courthouse to discuss the matter with the Commonwealth Attorney prior to the trial. The Commonwealth Attorney observed the defense attorney speaking with the two victims/parents. The defense attorney then announced that he planned to go to trial. The Commonwealth Attorney realized that while the mother was waiting in the courtroom, the victim/father was not. The mother told the Commonwealth Attorney that the father was in the hallway. This turned out not to be the case. The defense attorney admitted that he had instructed the father that he could leave as he was not under subpoena. The defense attorney had also told the father that as he was a necessary witness to prove ownership of the vehicle, if he left the courthouse, the Commonwealth would lose the case. The defense attorney later explained he had checked the court's file for the subpoena as the father had told him he did not know why he had to be there.

Under the facts you have presented, you have asked the Committee to opine as to whether it was a violation of the Rules of Professional Conduct when:

- 1) The defense lawyer asked the victim/mother if he could speak with her before she spoke with the Commonwealth Attorney;
- 2) The defense lawyer told the victim/mother that she did not have to speak with the Commonwealth Attorney;
- 3) The defense lawyer told the victim/father that he had checked the court's file and that as there was no subpoena, the father was free to leave; and
- 4) The defense lawyer told the victim/parents that if the father left the courthouse, the Commonwealth attorney would lose the case due to the absence of the father's necessary testimony.

These comments by the defense attorney should be analyzed in light of two provisions of the Rules of Professional Conduct. Rule 3.4(h) greatly restricts when an attorney may request that someone decline to provide relevant information to another party. Rule 4.3(b) restricts an attorney's communications with an unrepresented person, such as a witness. Those provisions state as follows:

RULE 3.4 Fairness To Opposing Party And Counsel

A lawyer shall not:

- (h) Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
 - (1) the information is relevant in a pending civil matter;
 - (2) the person in a civil matter is a relative or a current or former employee or other agent of a client; and
 - (3) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

RULE 4.3 Dealing With Unrepresented Persons

- (b) A lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interest of the client.

Rule 3.4(h) prohibits requesting a person other than a client to withhold information from another party, outside a narrow exception. The Committee notes that the exception only applies to *civil* proceedings and is, therefore, inapplicable in the present scenario. Thus, the communications between this defense attorney and the victim/parents must be reviewed in light of this particular prohibition.

Previous opinions of this Committee on this topic addressed other related provisions less on point than Rule 3.4(h); paragraph (h) was not in effect until January 1, 2000, subsequent to the issuance of those opinions. *See*, LEOs 1426, 1678, 1736. In considering the permissibility of an attorney requesting or encouraging a witness from providing information to the opposing side, Rule 3.4(h) is now the proper authority. The Committee therefore does not base its conclusions regarding this issue on its prior opinions issued before the adoption of Rule 3.4(h). Outside the parameter of the above-mentioned exception, Rule 3.4(h) presents a straightforward directive:

A lawyer shall not...request a person other than a client to refrain from voluntarily giving relevant information to another party.

In the present scenario, the attorney's first comment to the victim/mother was to speak to him before speaking to the Commonwealth Attorney. That statement alone merely requested

preferential treatment; it did not request that she not speak to the Commonwealth Attorney *at all*. Thus, that statement did not constitute an impermissible request under this rule.

The attorney's next statement was to inform the mother that she did not have to speak to the Commonwealth Attorney. That statement may involve the giving of advice, but it does not include a clear request that the mother withhold the information from the Commonwealth Attorney. While it is a possible motivation for that attorney's comments, his actual statement is not in the nature of a request. Therefore, this statement did not constitute an impermissible request under this rule.

The attorney subsequently told the father that as he had not been subpoenaed, he need not appear in court. This statement similarly does not on its face constitute a request to refrain from testifying. Thus, it did not constitute an impermissible request under Rule 3.4(h).

The final statement at issue of this attorney was his assessment that the father's testimony was essential to the Commonwealth's case. Again, this statement, while containing advice, did not contain an impermissible request under Rule 3.4 (h). While the Committee can speculate as to the motives of the defense attorney in providing the advice he did to these individuals, the Committee sees no statement in those communications that went as far as an actual request to withhold information from the Commonwealth Attorney or at trial. Accordingly, the Committee opines that none of the defense attorney's statements violated Rule 3.4(h).

Whenever an attorney, on behalf of a client, is communicating with an unrepresented person, he must be mindful of the broad prohibition against providing advice found in Rule 4.3(b). Thus, in prior LEOs 1426 and 1589, this Committee applied Rule 4.3(b)'s predecessor, DR 7-103(A)(2), to prohibit a lawyer from advising a witness that he need not speak with opposing counsel. While not presenting a complete bar, Rule 4.3(b) does restrict communications with an unrepresented person in many instances. Communications with an unrepresented person are prohibited in a particular instance when each of the following characteristics is present:

- 1) The communication must be on behalf of a client;
- 2) The communication must include advice, other than the advice to secure counsel; and
- 3) The interests of the person must be or have a reasonable possibility of being in conflict with the interest of the client.

In applying Rule 4.3's prohibition to the communications in the present hypothetical, each prong must be considered. In each conversation with these victim/parents, the attorney's comments were on behalf of the attorney's client, a first prong of the prohibition.

In applying the second prong of this prohibition, the statements must each be reviewed to determine whether the attorney provided advice. The Committee notes that the rule is not triggered solely by *legal* advice. The attorney first spoke to the victim/mother by requesting that she speak with him prior to speaking with the Commonwealth Attorney. Even if such a request

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was made in a terse fashion, it remains a request, not advice of any sort. Rule 4.3(b) does not prohibit that request. However, the defense attorney did not stop at that point in his communication; rather, he went on to tell the mother that she was not required to speak with the Commonwealth Attorney. The Committee opines that this particular comment meets the second prong; the defense attorney was providing advice to the mother with that statement. The defense attorney then proceeded to inform the victim/father that the attorney had checked the file, there was no subpoena, and thus the father was not required to appear in court. The defense attorney's statement to the father that he was free to leave is a statement of advice and thus meets the second prong. Finally, the defense attorney told both parents that the father's testimony was necessary for the Commonwealth's case so that if he failed to appear, the Commonwealth would lose. Again, the Committee finds advice in that communication as the defense attorney is advising the parents as to the consequences of whether or not the father testified. Three of the four statements of this defense attorney were made on behalf of his client and provided advice.

The third prong of a Rule 4.3(b) violation is that the interests of the unrepresented persons "are or have a reasonable possibility of being in conflict with the interest of the client." Thus, the prohibition is broader than just actual adverse *parties*. Here, all of the defense attorney's statements at issue were made to the victims of the client's crime. Ordinarily, while crime victims are not the clients of the prosecutor, they do nonetheless have interests adverse to those of the defendant. However, in this particular hypothetical the true interest of the two crime victims is less clear cut as they are the parents of the defendant. The mother was the person who originally reported the incident and was the primary user of the vehicle, and the father, as titleholder of the car, may potentially have had civil remedies against the defendant. In communicating with these individuals, this defense attorney was speaking with people whose interests were or possibly could have been in conflict with those of the defendant. The attorney therefore may not without further clarification provide advice to these individuals. However, given the family relationship between the "victims" and the defendant, it would not have been unreasonable for this attorney to ask these parents about their interest in the matter: did they want to pursue criminal charges regarding their vehicle or did they instead want to protect their son from prosecution? If the lawyer had obtained clear indication of the latter from the parents, he would no longer have had to treat them as persons whose interests "are or have a reasonable possibility of being in conflict with the interest of the client," and could have provided them the advice in question. The defense attorney needs to clarify the interests of these unrepresented persons before giving any advice.

The request to speak with the defense attorney before the Commonwealth Attorney was not in violation of Rule 4.3(b) as it did not provide any advice. However, under the limited facts provided, each of the other statements made by this defense attorney to the victim/parents were impermissible under that rule as the statements were made on behalf of a client and included advice to unrepresented people with interests that have a reasonable possibility of being in conflict with those of the client.

The Committee notes that the materials you provided with your request suggested authorities that do not form the foundation of this Committee's conclusions. Specifically, your materials suggest that the conversations between the defense attorney and these victim/parents qualify as an attorney/client relationship and therefore are the source of a conflict of interest for this

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defense attorney. The Committee did not find facts in the hypothetical to support the formation of an attorney/client relationship; accordingly, the Committee did not view these conversations from a conflicts perspective but rather from the perspective of conversations with unrepresented persons.

Your materials also raise the issue of whether these conversations constitute the crime of obstruction of justice under Va. Code §18.2-460 on the part of this attorney. Applying the Virginia Code is outside the purview of this Committee; therefore, this Committee declines to opine on that issue.

In resting its conclusions on application of Rules 3.4 and 4.3, this Committee notes that all such conclusions are limited to this hypothetical with an *individual* client. Were a similar scenario to involve an *entity* client, the analysis would need to extend to include the impact of Rule 1.13, which governs representation of organizations.

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

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