

LEO #1614 ATTORNEY AS WITNESS; DEFENSE ATTORNEY AS WITNESS IN
COROLLARY PERJURY CHARGE AGAINST COMMONWEALTH'S WITNESS;
THREATENING CRIMINAL PROSECUTION TO GAIN ADVANTAGE IN
CRIMINAL CASE

You have presented a hypothetical situation in which an attorney represents three defendants charged with distribution of cocaine: two adults who were directly indicted and the third a juvenile who was charged on a petition in the Juvenile Court.

You indicate that the key witness in all three cases is a convicted felon who had been working undercover making "buys" for the Sheriff's Department as the result of a plea agreement made in another county.

The trial of the juvenile was heard in judge's chambers. The key witness was in the witness chair, testifying and showing a videotape of the drug transaction. You advise that the tape clearly showed the face of the juvenile defendant. The attorney asked the witness whether there had been someone else in the vehicle with him at the time the tape was made, and he answered "Yes". The attorney then asked who it was. Before an answer could be given to the question, a discussion ensued about whether the other person, who turned out to be the girlfriend of the key witness, could and should be brought to court to testify.

It was generally agreed that she should be brought to court, and the discussion turned to a date for a continuance. A date was set, following which the judge turned to the key witness, who was still in the witness chair, and asked whether the girlfriend could be brought to court that day. The key witness said, "She's not in the area today," or words to that effect.

You further indicate that, after the key witness and the attorney leave the courtroom, the attorney sees the girlfriend in the parking lot of the courthouse. The attorney demands that a deputy arrest the key witness for perjury; however, the deputy tells the attorney that she can swear out a warrant. The attorney comes back into the courtroom and demands that the Commonwealth's Attorney prosecute the key witness for perjury. The Commonwealth's Attorney tells the attorney that she will deal with the situation. The attorney then goes to the investigator who supervised the drug operation and says that she (the attorney) will not swear out a warrant for perjury if the investigator will persuade the Commonwealth's Attorney to nolle prosequi the charges against her client. The investigator tells the attorney that she must talk to the Commonwealth's Attorney.

Further, you indicate that the Commonwealth's Attorney researches the perjury statute, opines that the statement was not material and, therefore, that it does not constitute perjury. She writes a letter, stating that opinion, to the attorney. Before the letter reaches the attorney, however, the attorney has brought perjury charges. The Commonwealth's Attorney then informally asks another Commonwealth's Attorney to prosecute the matter, and he agrees to do so. The attorney sees the second Commonwealth's Attorney at a function and learns that he does not believe that the statement constitutes perjury.

When the key witness is arraigned for perjury, the attorney demands

that a third prosecutor be found. The court contacts a third Commonwealth's Attorney, who does prosecute.

Although she believes there is no duty to do so, the original Commonwealth's Attorney requests continuances in the cases in the Circuit Court involving the key witness, hoping for a quick resolution to the perjury matter. After two continuances of the preliminary hearing in the perjury case, the Commonwealth's Attorney notifies affected attorney that she plans to go forward with the cases, but expects to ask on direct about the facts leading to the perjury charges.

The attorney then requests further continuances of her two Circuit Court cases so that the perjury matter can be resolved. The Commonwealth's Attorney objects and argues her reasons for wanting to go forward, relating what happened in the juvenile court and the fact that the attorney brought the perjury charges, but leaving out the attorney's visit to the investigator. The court denies the motion for continuances and says that the attorney ought to consider whether it is appropriate for her to represent the two clients under the circumstances. The judge suggests that the attorney has acquired an interest in the outcome of the perjury trial. An hour later, the attorney comes before the court and says that she has decided to withdraw from representation of her clients.

Finally, you indicate that the attorney does not withdraw from representation of the juvenile client; the key witness has his preliminary hearing, and the court does not certify the perjury charge, finding that the key witness did not lie.

You have asked the committee to opine under the facts of the inquiry, (1) whether an attorney goes beyond the bounds of the law in representing her client when she brings charges which raise doubts about the credibility of a prosecution witness and then attempts to exploit the doubts she has created; and (2) whether it is unethical to threaten criminal prosecution to gain an advantage in a criminal case.

The appropriate and controlling Disciplinary Rules related to your inquiry are DR 7-102(A)(1) which states that a lawyer shall not file a suit, initiate criminal charges, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another; DR 7-104 which states a lawyer shall not present, participate in presenting, or threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter; DRs 7-105(C)(1) and 7-105(C)(4) which provide, respectively, that in appearing in his professional capacity before a tribunal, a lawyer shall not state or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence and shall not assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein.

The facts presented illustrate the tension between the duty of

zealous advocacy of a client's interest and the duty to wage advocacy within the bounds of law and the Disciplinary Rules. Striking a balance is, EC 7-6 observes, a "perplexing question."

The lawyer, in the facts presented, used a threat of a criminal warrant as a bargaining chip with the investigator. The attorney did not go forward on the claimed perjury until after the investigator declined to intervene with the Commonwealth's Attorney for a nolle prosequi of charges against the client. That timing of events colors whether the lawyer had a good faith belief that perjury had been committed. The appearance is that the lawyer's interest was tactical rather than redressing a wrong affecting the judicial process. Yet tactics, within the bounds of law and the Disciplinary Rules, are an integral part of zealous advocacy.

The subjective intent of the lawyer cannot be discerned. In the facts presented, the Committee is of the opinion that whether the lawyer exceeded the bounds of law or violated the Disciplinary Rules in her actions is conjectural and is not established with a sufficient degree of certainty.

Finally, the committee opines that the plain language of DR 7-104 states that a lawyer shall not threaten criminal prosecution solely to gain an advantage in a civil matter. Additional guidance may be found in EC 7-18, which interprets the use of the criminal process to gain an advantage in the civil process as a subversion of the criminal process and an action which tends to diminish public confidence in the legal system. Thus, the committee opines that it is not per se unethical for an attorney to threaten criminal prosecution to gain an advantage in a criminal case, subject, however, to the constraints of DR 7-102(A)(1), DR 7-105(C)(1) and (C)(4).

[DRs 7-102(A)(1), 7-104, 7-105(C)(1) and (4); ECs 7-6, 7-18]

Committee Opinion
February 7, 1995