

VIRGINIA LEGAL ETHICS OPINION 1741

**PROSECUTORS: RULE 3.8(c): ADVISING
WITNESSES; INVESTIGATIVE TACTICS**

You have presented a hypothetical situation wherein you advise that during the course of criminal prosecution, defense counsel will sometimes hire a private investigator or will have access to court-appointed investigators. A few of these investigators resort to tactics that you perceive to be less than honest in attempting to obtain statements from the Commonwealth's witnesses. Examples you provide include defense investigators displaying a badge to imply they are police officers, or stating they were sent by the judge or are working with the prosecution. When working on a case where such an investigator is involved, the prosecutor would like to inform prosecution witnesses of the tactics that may be employed by these investigators. The prosecutor has also considered sending a letter to all witnesses explaining that it is the witnesses' decision whether or not they want to speak with defense investigators. The prosecutor also proposes including in that letter language warning about certain tactics that may be used by the investigators and possibly naming the investigators.

Under the facts you have presented, you have asked the committee to opine as to the propriety of the prosecutor advising prosecution witnesses as described above, and whether this would be in compliance with Rule 3.8(c).

Rule 3.8(c) of the Rules of Professional Conduct states:

Rule 3.8 Additional Responsibilities Of A Prosecutor

A lawyer engaged in a prosecutorial function shall:

- (c) not instruct or encourage a person to withhold information from the defense after a party has been charged with an offense

In the facts you present, the committee believes that it would not be improper to inform Commonwealth's witnesses that they may be contacted by private investigators working for the defense, and identify them by name if known to the prosecutor. Also, the committee believes that it is not improper for a prosecutor to inform his or her witnesses that they have the right to speak or not speak with an investigator working for the defense. Beyond that, however, the committee believes that Rule 3.8 (c) prohibits the prosecutor from making any remarks, including the references to the questionable tactics employed by some investigators, that would explicitly or implicitly instruct or encourage a witness to withhold information from the defense.

Committee Opinion
April 13, 2000