
**E-86-7 Duties of public prosecutors with
knowledge of witnesses helpful to
defendants**

Facts

A public prosecutor is prosecuting a defendant for a crime. During the course of the prosecution, the prosecutor becomes aware of a witness who may be helpful to the defendant. The witness contacts the prosecutor and asks if he or she should talk to the defendant's lawyer or investigator.

Question 1

Does the public prosecutor have an ethical duty to encourage the witness to talk to the defendant's lawyer or investigator?

Opinion

It is unprofessional conduct for a prosecutor to discourage or obstruct communication between prospective witnesses and defense counsel or to advise any person to decline to give any information to the defense. *State v. Simmons*, 57 Wis. 2d 285, 292-93, 203 N.W.2d 887 (1973). See Wisconsin Supreme Court Rule (hereinafter SCR) 20.37(2); SCR 20.43; and *Disciplinary Proceedings Against Zapf*, 126 Wis. 2d 123 (1985).

This ethical duty derives from a prosecutor's constitutional duty to provide exculpatory information to the defense. See, e.g., *Brady v. Maryland*, 373 U.S. 83 (1963).

The committee concludes that although the prosecutor has no ethical duty to actively encourage a witness to talk with the defense, the prosecutor has a duty under SCR 20.37(2) to timely disclose to the defense the existence and whereabouts of the potential witness so that the defendant has the opportunity to contact him or her. All lawyers, including prosecutors, are prohibited from advising or causing persons to be unavailable as witnesses. SCR 20.43(2). These ethical duties are necessarily subject to section 971.23, Wis. Stats., and the constitutional duty of disclosure upon which the Committee is not able to comment. See *State*

v. Calhoun, 67 Wis. 2d 204, 226 N.W.2d 504 (1975) (there is no requirement to provide exculpatory evidence which is not within the exclusive possession of the state and does not surprise or prejudice the defendant).

Facts

A public prosecutor is ordered by the court to disclose the name of a witness to the defense, who was involved in the same matter as the defense counsel's client. The witness presently is being prosecuted by the public prosecutor (or has recently been convicted). The defense attorney has informed the court that he or she has heard that the witness is afraid to testify for fear of reprisal by the state.

Question 2

May the public prosecutor ethically write a letter to the witness and advise that he or she does not have to talk to the defense?

Opinion

See opinion to Question 1. In addition, the following rule, upon which the committee expresses no opinion, should be considered: When communicating with a potential witness, a prosecutor must inform the witness that there is no legal obligation to grant an interview but that it is in the interest of justice to cooperate and that the lawyer may have a duty to interview all potential witnesses. *See, e.g.*, Federal Rule of Criminal Procedure 16.

Facts

A legal partnership exists. Partner A agrees to represent a criminal defendant and does considerable work for the client. Partner B is then appointed city attorney for City C. Before the appointment, the police in City C had contacted a police informant, who lives in City C to be an informant in the case that Partner A is working on. As the investigation wears on, Partner A's client is charged with a crime. City C has had no involvement with the case other than the recruitment of the informant and the initial investigation but is not involved in the prosecution. At this point, a considerable amount of work has been done by

Partner A for his or her client so that it would make it very difficult for another lawyer to take over the representation.

Question 3

Does a conflict of interest exist that would require the withdrawal of Partner A from the representation of the criminal defendant?

Opinion

No, provided that the city attorney is not involved in the prosecution of A's client, no City C police officers are involved as witnesses and provided the city attorney has no access to the file or communication with the prosecutor regarding the case. *See* Formal Opinion E-76-12, 57 Wis. Bar Bull. 58 (June 1984) and Formal Opinion E-81-3, 57 Wis. Bar Bull. 71 (June 1984).