Committee Opinion
October 20, 1999

LEGAL ETHICS OPINION 1736

ATTORNEY THREATENING NONPARTY OPPOSING WITNESS WITH "APPROPRIATE LEGAL ACTION" FOR WITNESS'S DEFAMATORY STATEMENT ABOUT ATTORNEY'S CLIENT.

You have presented a hypothetical situation in which an attorney is representing Plaintiffs in a discrimination claim. Plaintiffs contend that Defendants are attempting to force them to move from the neighborhood because of their race, and Defendants contend that the problem is Plaintiffs' disruptive behavior. Prior to the lawsuit, a resident of the neighborhood who is a nonparty witness wrote to the homeowner's association complaining of the Plaintiffs' behavior. Plaintiffs' attorney has written the nonparty witness, accusing the witness of making defamatory statements and indicating that if the witness stands by the statements, Plaintiffs' attorney will seek "appropriate legal action." Plaintiffs' attorney has now subpoenaed this witness for depositions and also subpoenaed witness's homeowner's insurance policy "just in case appropriate legal action is necessary."

Under the facts you have presented, you have asked the committee to opine as to whether this conduct by Plaintiffs' attorney is unethical in that it constitutes threatening and harassing a nonparty witness, or an attempt to intimidate the witness not to testify about the Plaintiffs' behavior as reported to the homeowner's association.

The disciplinary rules which appear to apply to your inquiry are DR:7-102(A)(1) and(2) prohibiting the assertion of frivolous claims or asserting positions to harass or maliciously injure another; DR:7-108(B) and EC:7-24 which prohibit a lawyer from causing a witness to secrete himself for the purpose of making himself unavailable as a witness; and DR:1-102(A)(3) which prohibits a lawyer from committing a deliberately wrongful act reflecting adversely on the lawyer's fitness to practice law.

The committee has previously opined that it does not see a distinction between 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. LE Op. 1678 (applying DR:7-108; EC:7-24). In any event, it is improper for a lawyer, directly or indirectly, to persuade an opponent's witness not to testify. *Id. See also 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); *Harlan v. Lewis*, 982 F.2d 1255 (6th Cir. 1983) (defense attorney in medical malpractice case sanctioned for telling non-party physician who had treated plaintiff that he could be sued too, and that without his testimony, the plaintiff's suit would probably not be

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successful); Virginia Rules of Professional Conduct, Rule 3.4(a) (a lawyer shall not obstruct another party's access to evidence) and 3.4(g) (request a person other than a client to refrain from voluntarily giving relevant information).[1] In the facts you present, the committee believes that the answer to your inquiry depends upon the motivation and intent of the lawyer representing Plaintiffs. Such matters involve factual determinations beyond the purview of the committee. In *Attorney M v. Mississippi Bar*, 621 So. 2d 220 (Miss. 1992), the lawyer warned a witness who was a doctor that even though he "didn't do any thing wrong," the lawyer might be "forced" to join the doctor as a co-defendant in a malpractice case if the doctor was not willing to state that the plaintiff left his care in the same condition as when she arrived at the hospital. The court looked to Rule 3.1 noting that whether the lawyer viewed the doctor as blameless was irrelevant as long as the claim was colorable.

In the situation in your request, if the threatened legal action is without legal basis in law or fact, and the threatened suit is made merely to harass and intimidate the witness, or influence the witness not to come forward with truthful and relevant information, then the attorney for Plaintiffs would be in violation of the cited rules and opinions. On the other hand, if the lawyer for Plaintiffs has a well-founded belief that the threatened legal action is warranted based on the contents of the complaint letter sent to the homeowner's association, or that the letter gives rise to a colorable action, then such conduct would not be improper.

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