

**STATE BAR OF NEVADA
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY**

**Formal Opinion No. 23
October 25, 1995**

QUESTION - May a criminal defense attorney urge a domestic battery victim to avoid service of a subpoena, to refrain from testifying against his client, or to not cooperate with the prosecuting attorney?

ANSWER - A defense attorney who discourages a domestic battery victim from testifying, urges the victim not to cooperate with the prosecuting attorney, or attempts to influence the testimony of the victim, is in violation of Supreme Court Rules 173 and 203 and his or her actions may rise to the level of a criminal offense. Further, if the criminal defense attorney gives legal advice or counsel to the domestic battery victim/prosecution witness, the defense attorney's action would be a conflict of interest under Supreme Court Rule 157.

AUTHORITIES RELIED ON

Nevada Supreme Court Rule 173; ARA Model Rule 3.4; Nevada Supreme Court Rule 203(d); ARA Model Rule 8.4(d); Nevada Supreme Court Rule 203; ABA Model Rule 8.4; North Carolina State Bar v. Graves, 274 S.,E.2d 396 (N.C. App. 1981); People v. Kenelly 648 P.2d 1065 (Col. 1982); Nev. Rev. Stat. §§ 199.305, 193.330; Nevada Supreme Court Rule 157; ABA Model Rule 1.7; and People v. Stewart, 511 N.Y. S2d 715 (1987).

INTRODUCTION

There have been increasing incidences of victims of domestic violence alleging that the defense attorney, either directly or through his or her client, has discouraged the victim from cooperating with the prosecuting attorney. Such incidences have included requesting that the victim avoid service of the subpoena, requesting that the victim not appear in court, and attempting to influence the testimony of the victim. Such activities are potentially obstructive to the criminal justice process and may rise to the level of a criminal offense. Further, if the criminal defense attorney provides legal counsel or advice to the victim/prosecution witness, a conflict of interest exists.

This opinion specifically addresses only domestic battery situations. Members of the bar should recognize that this opinion is applicable to all cases whether criminal or civil. This Committee sees not ethical distinctions between a defense attorney's obligation in a domestic battery case or any other criminal or civil matter where similar issues arise.

DISCUSSION

I. Conduct That is Prejudicial To The Administrative of Justice.

Supreme Court Rule 173 provides in relevant part:

A lawyer shall not:

1. Unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having any potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act; . . .

6. Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(a) the person is a relative or an employee or other agent of the client; and

(b) the lawyer reasonably believes that the person's interest will not be adversely affected by refraining from giving such information.

SCR 173. Nevada's Supreme Court Rule 173 is identical to ABA Model Rule 3.4. The purpose of the rule is to ensure fair competition in the adversary system by prohibiting destruction or concealment of evidence, abusive tactics in the discovery process, and the improper influence of witnesses.

Further, Nevada Supreme Court Rule 203 states in relevant part:
It is professional misconduct for a lawyer to:

.....

(d) engage in conduct that is prejudicial to the administration or justice.

SCR 203. Nevada's Supreme Court Rule 203 is identical to ABA Model Rule 8.4. This rule overlaps with other provisions of the rules of professional conduct that prohibit an attorney from dishonesty or misrepresentation, and the board language of the rules allows its application in a wide variety of situations.

Both SCR 173 and 203 would be violated if a defense attorney attempted to discourage or influence the testimony of a domestic battery victim in a criminal proceeding.

In *People v. Kenelly*, 648 P.2d 1065 (Colo. 1982) the Supreme Court of Colorado, sitting En Banc, addressed a situation where an attorney aided and abetted parties in reaching an agreement whereby the attorney's client received a favorable monetary settlement in a related civil action, in exchange for the client making himself unavailable for the service of a subpoena or testimony at the related criminal trial of the defendant. The attorney had indicated that if his client were to receive \$5,000, his client might find himself with the means "to end up in Switzerland or Jamaica, some place like that". *Id.* at 1066. The Grievance Committee of Colorado specifically found that the attorney "knew from the beginning of the settlement negotiations that the primary consideration for the payment" was that the attorney's client "would make himself unavailable for the service of a subpoena or testimony at the criminal trial". *Id.* at 1066. The Grievance Committee concluded that the attorney's conduct was "prejudicial to the administration of justice and reflects his unfitness to practice law and was therefore in violation of DR1-102 (a) (5) and (6)." *Id.* at 399.

In affirming the Grievance Committee's recommendation that discipline be instituted against the attorney, the Colorado Supreme Court stated:

If the legal system in this country is to survive, courts of law must have the testimony of necessary witnesses. An attorney, who is sworn to uphold the law and to aid in the administration of justice, has a high duty as an officer of the court to never participate in any scheme to obstruct the administration of justice or the judicial process.

Id. at 1066.

Likewise, in *North Carolina State Bar v. Graves*, 274 S.E.2d 396 (1901), the Court of Appeals of North Carolina addressed a situation where a defense attorney representing a client charged with driving under the influence of alcohol attempted to influence a witness to not testify in the criminal case. The Court determined that "[c]onduct by an attorney in influencing a potential witness not to testify by which relevant and material evidence is knowingly concealed at trial has been considered unethical". Further, the defense attorney's conduct could "frustrate any prosecution of the case, as relevant evidence as to the identity of the driver would be hidden from view." *Id.* at 399.

1DR 1-102(A) (5) is identical to SCR 203(d) and was the predecessor to ABA 8.4 (d).

The activity in the present domestic violence cases involves a similar type of conduct as that of the attorneys in *People v. Kenelly* and *North Carolina State Bar v. Graves*. If defense attorneys are discouraging victims of domestic violence from testifying at the pending trial, including encouraging the avoidance of the service of subpoena, the defense attorney is "engaged in conduct that is prejudicial to the administration of justice" in violation of SCR 203. Furthermore, the defense attorney's conduct could

be deemed to [u]nlawfully obstruct another party's access to evidence" in violation of SCR 173. Finally, under SCR 173 an attorney shall not "request a person other than a client to refrain from voluntarily giving relevant information". SCR 173.

The defense attorney's conduct could even rise to the level of a criminal offense under NRS 199.305 which states in part:

1. Every person who, by intimidating or threatening another person, prevents or dissuades a victim of a crime, a person acting on his behalf or a witness from:
 - b) Commencing a criminal prosecution or a proceeding for the revocation of a parole or probation, or seeking or assisting in such a prosecution or proceeding; or
 - (c) Causing the arrest of a person in connection with a crime, or delays such a victim, agent or witness in his effort to carry out any of those actions shall be punished by imprisonment in the state prison for not less than 1 year nor more than 6 years, and may be further punished by a fine of not more than \$10,000.

NRS 199.305 (emphasis added). Further, an "attempt" to commit such an act could be punishable under NRS 193.330. A defense attorney's action of "intimidating or threatening another person" which "prevents or dissuades a victim of a crime" from "assisting in the prosecution or proceeding" could rise to the level of a criminal offense under the above referenced statute. NRS 199.305. If a defense attorney were to be convicted under NRS 199.305, it would clearly be a violation of Supreme Court Rule 203 which provides in relevant part:

It is professional misconduct for a lawyer to:

2. Commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

SCR 203(2). ARA Model Rule 8.4. This general prohibition to dishonesty and misrepresentation overlaps with other provisions of the Rules of Professional Conduct.

II. Conflicts of Interest.

Representation of a criminal defendant while providing advice or counsel to the victim/prosecution witness could create a conflict of interest in violation of Supreme Court Rule 157. Specifically, the restraints placed on the defense attorney's advocacy and independent judgment while advising the victim/prosecution witness, in light of that attorney's duty to the defendant, clearly creates divided loyalties.² Such a conflict could interfere with the defense attorney's professional judgment. A defense attorney's representation must be "untrammelled and unimpaired," his loyalty undivided. See *Glasser v. United States*, 315 U.S. 60, 70, 62 S.Ct. 457, 86 L.Ed. 680 (1941).

Loyalty to a client prohibits undertaking representation adverse to a client without first obtaining that client's consent. In certain circumstances, an impermissible conflict of interest may exist which entirely prohibits representation. This general proposition is codified in Supreme Court Rule 157 which provides:

1. A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
 - (a) the lawyer reasonably believes that representation will not adversely affect the relationship with the other client; and
 - (b) each client consents, preferably in writing after consultation.
2. A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interest, unless:
 - (a) the lawyer reasonably believes that representation will not be adversely affected; and
 - (b) the client consents, preferably in writing after consultation.

When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

SCR 157. Rule 157(1) governs representation of opposing parties in litigation, while subsection (2) addresses the simultaneous representation of co-parties or one party and a potentially damaging witness. Nevada's Supreme Court Rule 157 is nearly identical to ABA Model Rule 1.7, with the exception being that Rule 157 suggests that the client's consent be in writing.

In *People vs. Stewart*, 511 N.Y.S.2d 715 (N.Y. 1987), the New York Appellate Court considered whether a conflict of interest existed in ruling on whether the criminal defendant had been provided effective assistance of counsel. The defendant's attorney not only represented the defendant, but also represented the defendant's father, who was the chief prosecution witness. The Court stated:

Here, the attorney's representation of both the chief prosecution witness and the defendant presented an actual conflict of interest from which prejudice must be presumed. (citations omitted)

Id. at 717. In ruling that an actual conflict of interested existed, the Court focused on the defense attorney's cross-examination and impeachment of the prosecution witness, who was also the defense attorney's client. The Court reasoned:

The nature and character of counsel's cross-examination of the father is also significant to our determination. An attorney's decision whether and how best to impeach the credibility of a witness to whom he . . . owe[s] a duty of loyalty necessarily place[s] [the attorney] in a very awkward position, where prejudice to [defendant] need ot be precisely delineated but must be presumed.

Id. at 717. The Court ruled that "because of the conflict of interest, defendant was deprived of the effective assistance of counsel". *Id.* at 717. The conviction was reversed and a new trial was ordered.

CONCLUSION

Discouraging a domestic battery victim from testifying the court, or urging the victim to be uncooperative with the prosecuting attorney, is clearly a violation of Supreme Court Rules 173 and 203. Further, the defense attorney should not take any action, either personally or through his or her agent or client, to discourage the witness or victim from testifying, or seek to influence the content of such testimony. Finally, if the defense attorney's conduct is "intimidating or threatening" and prevents an adverse witness or victim from testifying the defense attorney may be subject to criminal charges under NRS 199.305. The defense attorney should avoid providing any legal advice or counsel to the victim/prosecution witness, as such action would violate conflict of interest Rule 157. In this way the individual litigants, as well as the integrity of the legal system, will be protected.

This Opinion is issued by the Standing Committee of Ethics and Professional Responsibility of the State Bar of Nevada pursuant to SCR 225. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, its Board of Governors, any person or tribunal charged with regulatory responsibilities, or any member of the State Bar.

2The Committee recognizes a defense attorney may interview witnesses, including the victims of domestic battery, the defense attorney must be sensitive to the difference between interviewing and counseling witnesses.