



Committee on Professional Ethics

Opinion #402 - 7/9/75 (59-75) Topic: Lawyer-employed investigator befriending prosecution witness

Digest: Not improper to employ investigator to befriend key prosecution witness to ascertain truthfulness of testimony

Code: Canons 6, 7
EC 7-19, 26, 28
DR 1-102(A)(4); 7-109(C)

QUESTION

Following the conviction of his client may defense counsel, who has reason to suspect that the key prosecution witness presented perjured testimony, employ a private investigator to befriend the witness to determine whether or not the witness's testimony was truthful?

OPINION

Interviewing a witness for the prosecution prior to trial is not improper, N.Y. State 245 (1972), because it fulfills a lawyer's duty under Canon 6 to represent a client competently. It would also not be improper, in an attempt to bring out the truth in the interests of justice, for the lawyer to interview an adverse witness after trial. Employing a private investigator to interview the witness does, however, present additional questions.

The spirit of EC 7-26, which admonishes a lawyer not to use perjured testimony, also suggests that a lawyer, with some reason for suspecting the use of perjured testimony, has the right to take affirmative action to redress the wrong and seek the truth. When considered with Canon 7, which is summed up in the last sentence of EC 7-19, "The duty of a lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law", defense counsel may use a private investigator in an attempt to determine whether perjury had been committed.

ABA Defense Function Standard 4.2, provides:

"It is unprofessional conduct for a lawyer knowingly to use illegal means to obtain evidence or information or to employ, instruct or encourage others to do so."

The commentary for this section states that, "Lawyers must also forbid the use of oppressive methods of securing information, as by threats or intimidation or invasions of privacy..." This refers to wiretaps and like invasions, and the investigator's activities in befriending the witness would not fall within the scope of the activities proscribed in Section 4.2.

Care must be taken, however, that the lawyer not be a party to conduct involving deceit or misrepresentation in contravention of DR 1-102(A)(4), or that the investigator not offer any improper inducement to persuade the witness to change the testimony previously given. EC 7-28; DR 7-109(C). If inquiry is made by the witness as to whom the investigator represents, he should, of course, disclose the lawyer-principal. See, ABA Inf. 581 (1962).
