

## **Ethics Opinion No. 84-3**

### **Advice to Potential Witnesses in a Criminal Case.**

#### **I**

The attention of the Ethics Committee has been drawn to a brochure distributed to witnesses by the criminal division of the State Department of Law. The Committee has been asked to rule on the propriety of the following advice given by the State Prosecutor's Office to its witnesses:

1. "If you [witnesses] are willing to talk to them [defense attorneys], you should insist that someone from the District Attorney's Office be present," and

2. "Don't allow yourself to be pressured into an on the spot interview." The Ethics Committee believes that it is improper for a prosecutor (endnote 1) to instruct a prospective witness that he should insist on the presence of the prosecuting attorney, or to otherwise interfere in any form with the means of the defense interview.

#### **II**

Both statutory law and disciplinary rules (contained below) leave little doubt of Alaska's policy toward the principle of non-interference with defendant's means of witness interview. This implicit policy seems apparent even though no statute or rule expressly prohibits the prosecutorial conduct complained of herein. Criminal Rule 16(b)(1) requires the prosecuting attorney to disclose to the defendant relevant information, including: "[t]he names and addresses of persons known by the government to have knowledge of relevant facts and their written or recorded statements or summaries of statements." It would not conform to the spirit of this section to require prosecutors to disclose "names and addresses" of witnesses, but still allow the district attorney to advise witnesses not to be interviewed unless the prosecution is present. (endnote 2)

Further, Section DR 7-103(B) of Alaska's Code of Professional Responsibility requires the prosecutor to "make timely disclosure" to the defense of any evidence which tends to negate the accused's guilt. DR 7-109 forbids any attorney from suppressing any relevant evidence, or to "advise or cause a person to secrete himself . . . for the purpose of making him unavailable as a witness." A similar policy is expressed in DR 7-102(A)(3). (endnote 3)

The ABA Standards also suggest a parallel policy of cooperation, disclosure and non-interference. It is the responsibility of counsel to conduct discovery so as to achieve "a minimum of imposition on the time and energies" of counsel and potential witnesses. ABA Standard, *Discovery and Procedure*

*Before Trial* (1970) §1.4 (b). The duty to disclose witness names and addresses is indicated in Section 2.1(i). The prosecution "should ensure that a flow of information is maintained." *Id.* S 2.2(c) Neither counsel shall "impede or oppose counsel's investigation of the case." *Id.* §4.1 The ABA Standards more directly state that a prosecutor "should not obstruct communication" between prosecutive witnesses and defense counsel. It is unprofessional conduct to advise any person "to decline to give information to the defense." ABA Standards, *Prosecution and Defense Function* (1970) S 3.1(c). The commentators explain that while counsel may request the chance to be present at opposing counsel interviews, "he may not make his presence a condition of the interview." *Id.* S 3.1, commentary (c).

### III

We do not believe that the prosecutor's conduct here is directly in violation of the above professional rules. (endnote 4) However, implicit in these ethical considerations is a policy against any interference in any form in the means of the defense interview. Witnesses may freely choose not to be interviewed by the defense. *Kines v. Butterworth* 669 F.2d 6, 9 (1st Cir. 1981). This Committee does not believe that witnesses should always be ordered to speak with the defense. The Committee does not believe that it is improper for a prosecutor to advise prospective witnesses of their right to refuse to submit to an interview.

This is not a case wherein the prosecutor has used direct coercion, threats of prosecution or instructed the witness not to cooperate. *Webb v. Texas*, 409 U.S. 95 (6th Cir. 1973). However, at the same time, this prosecutor's statement does *not* suggest the government simply "does not care" one way or the other. *U.S. v. Nardi*, 633 F.2d 972, 977 (1st Cir. 1980).

### IV

It is the belief of this Committee that a prosecutor should not instruct a potential witness that he should "insist" on the prosecutor being present at any defense interview, or further to otherwise interfere in any form with the means of the defense interview. Rather, the prosecutor's advice on the subject of defense interviews should be limited to merely advising a witness that a witness is free to choose, whether or not, he wishes or declines to be interviewed. (endnote 5)

### V

It is not suggested that there is any direct suppression of witness access by the State's brochure. But there is a suppression of the "means by which the defense could obtain evidence." *Gregory v. U.S.*, 369 F.2d 185, 189 (D.C. Cir.

1966). The concern is the potential by the district attorney to interfere with the "right" of a defendant to interview an otherwise willing witness. But the issue need not be the form which the interference takes, but rather whether it is effective. *State v. York*, 632 P.2d 1261, 1264-65 (Or. 1981).

On the text of this brochure, the "means" of defense preparation is affected. Witnesses are property of neither side in a case. Presumably, the prosecutor, in interviewing and giving his witness a copy of the brochure, was not encumbered by the presence of defense counsel. There is no reason why the means available to the defendant should not be equal. Further, State's brochure does not seek to coerce or threaten witnesses, but merely tells them to insist on his presence. The State's choice of the lesser degree of interference, even if in good faith, is still error.

The "decision" regarding whether the interview be private is neither for the prosecutor nor the defense counsel but "rests with the witness." *Mota v. Buchanan*, 547 P.2d 517, 522 (Ariz. 1976). Where the prosecutor has advised or encouraged a witness to decline to be interviewed by defense counsel unless the prosecutor is present, it has been held that such prosecutorial conduct violates both the defendant's due process rights and general standards of professional conduct. See *Gregory v. State*, 369 F.2d 185 (D.C. Cir. 1966); *State v. Williams*, 581 P.2d 1290 (N.M. 1978). It is "imperative that prosecutors and other officials maintain a posture of strict neutrality when advising witnesses of their duties and rights." *U.S. v. Rich*, 580 F.2d 929, 934 (9th Cir. 1978). "Abuses can easily result" when officials seek to provide witnesses with advice. *Id.*

In the instant situation, the Committee is of the view that absent a showing of exceptional circumstances or compelling reasons, the district attorney should not interfere in any form with the means of defense pre-trial preparation and witness interview. (endnote 6) As such, the State should decline to provide witnesses with extended advice, and rather should limit its comments to indicating the freedom of choice to grant or decline an interview.

Adopted by the Alaska Bar Association Ethics Committee on February 16, 1984.

Approved by the Board of Governors on March 9, 1984.

Endnotes:

1. The Committee notes that the comments contained herein with regard to the prosecutor's duty could equally apply to the defense attorney's obligation.

2. Indeed, this Criminal Rule continues to prohibit counsel from advising witnesses to refrain from discussing the case with opposing counsel . . . or "otherwise impede opposing counsel's investigation of the case." Criminal Rule 16 (d) (1).
3. An identical expression of the prosecutor's duty to cooperate with disclosure of evidence is provided in Ethical Consideration 7-13.
4. The Committee does not wish to impugn the reputation of the prosecutor's office for distributing the brochure at issue. Indeed, the advice may have been given in good faith, and includes the statement to witnesses that it is "completely proper" and they are "encouraged" to talk to the defense.
5. The State's brochure tells the witnesses that while they are "not legally obligated" to talk to the defense, it is "completely proper" and that they "are encouraged" to do so. Any advice on the subject should be limited to that language and the other comments deleted. Indeed, a witness could be confused when he is "encouraged" to grant an interview, but also told to "insist" on the State's presence and warned against being "pressured."
6. It is believed in "exceptional circumstances" or for "compelling reasons" that appropriate remedies can be fashioned by counsel and the court.