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GUIDELINES FOR OPPOSING COUNSEL CONTACTING WITNESSES

Adopted March 17, 1984.

Syllabus

It is unethical conduct for an attorney or his representative to advise or to imply to a potential witness that he should not submit to a pre-trial interview by opposing counsel or his agent.

In any communication to potential witnesses concerning their duties and privileges, both prosecutors and defense counsel are required routinely to advise that: (1) It is proper and may be the duty of both parties to attempt to interview all persons who may be witnesses and that it is in the interest of justice that such persons, subject to their voluntary and informed consent, be available for pre-trial interviews, and (2) There is no obligation for the witness to submit to a pre-trial interview by the prosecution or defense and the decision to submit to such an interview belongs to the witness.

Facts

This opinion is designed to establish ethical guidelines for both prosecutors and defense counsel whose potential witnesses are contacted by the opposing counsel for purposes of a pre-trial interview. Occasionally, lawyers in criminal cases have advised or implied to such witnesses that they may refuse to grant opposing counsel's request and have thus limited access to the witness by opposing counsel.

Discussion

Rule 16 of the Colorado Rules of Criminal Procedure has adopted the ABA *Standards for Criminal Justice* relating to discovery prior to criminal trial. The Rule and the ABA Standards are aimed at discouraging legal games of "blindman's bluff" in criminal trials. Both the ABA *Standards Relating to the Prosecution Function* and the ABA *Standards Relating to the Defense Function* make clear the impropriety of advising witnesses to refuse to consider submitting to a pre-trial interview by opposing counsel or a member of his staff. This is made clear in the commentary to Standard 3-3.1(C) of the ABA *Standards Relating to the Prosecution Function*:

Prospective witnesses are not partisans. They should be regarded as impartial and as relating the facts as they see them. Because witnesses do not "belong" to either party, it is improper for a prosecutor, defense counsel or anyone acting for either to suggest to a witness that the witness not submit to an interview by opposing counsel. It is not only proper but it may be the duty of the prosecutor and defense counsel to interview any person who may be called as a witness in the case (except that the prosecutor is not entitled to interview a defendant represented by counsel). In the event a witness asks the prosecutor or defense counsel, or a member of their staffs, whether it is proper to submit to an interview by opposing counsel or whether it is obligatory, the witness should be informed that, although there is no legal obligation to submit to an interview, it is proper and may be the duty of both counsel to interview all persons who may be witnesses and that it is in the interest of justice that the witness be available for interview by counsel.

See also, *People v. Antunes*, 680 P.2d 1321 (Colo. App. 1984).

Conclusion

Since free access to potential witnesses is integral to the administration of justice, attorneys are bound to refrain from interfering with efforts of opposing counsel to conduct pre-trial interviews. It is deemed unethical conduct for an attorney or his representative to advise or to imply to a potential witness that he should not submit to a pre-trial interview by opposing counsel or his representative.