

## ADVISORY ETHICS OPINION 2001-04

### SYNOPSIS:

A prosecutor named as one of over 200 defendants in a frivolous civil lawsuit does not violate Rule 4.5 in continuing to prosecute a criminal action which was instituted against the plaintiff prior to the civil action.

### FACTS:

Prosecutor A has been pursuing a State criminal action against Mr. X. Five months after the arraignment, Mr. X filed a civil case in Federal District Court against Prosecutor A and over 200 other people including the President and First Lady of the United States, members of the Vermont executive, legislative and judicial branches, Vermont's Congressman and Senators, the Vermont Bar Association Board Members, Blue Cross/Blue Shield, several Vermont Clerks of Court, and prosecutors. Prosecutor A was not served with the complaint. The Federal District Court dismissed the civil action as "frivolous," noting: "In [the] complaint, [x] makes a variety of bizarre, fantastical claims, such as that the President and First Lady "established imprisonments for our children . . . , support[ed] SS [sic] Social Child Services operating in a Communistic way and/or worse, [and] legaliz[ed] kidnapping." X has appealed to the Court of Appeals, and Prosecutor A has asked whether Rule 4.5 requires his withdrawal and substitution with another prosecutor.

### ANALYSIS:

Rule 4.5 of the Vermont Rules of Professional Conduct states that "A lawyer shall not be present, participate in presenting, or threaten to present criminal charges in order to obtain an advantage in a civil matter." (emphasis added). The current rule amended the former rule, DR 7-105, to eliminate the term "solely" before "in order to obtain an advantage in a civil action." While this change broadened the rule somewhat, it did not remove the requirement that a lawyer's actions be related to gaining an advantage in a civil matter.

In this case, we do not see any relation between Prosecutor A's carrying out his official duties as a lawyer for the State and the gaining of an advantage in the civil action. The civil action was filed well after the criminal action; it can and has fairly been said to be indecipherable and frivolous. In these circumstances to interpret Rule 4.5 otherwise, would open the sluice gate for every criminal defendant to disqualify the prosecutor by naming him or her in a frivolous civil complaint after criminal charges have been filed. Accordingly, we conclude that Prosecutor A may continue to prosecute the criminal action against X without violating Rule 4.5