

# INFORMAL ADVISORY ETHICS OPINION 86-01

## SYNOPSIS:

A defense attorney's communication to a State's attorney suggesting an arresting officer mistook symptoms of the defendant's medical condition for symptoms of intoxication and requesting dismissal of the case violated no rules of conduct and cannot reasonably be construed to have been intended to "merely harass or maliciously injure another."

## FACTS:

Defense counsel for an elderly client charged with driving while intoxicated ("DWI") wrote a letter to the deputy state's attorney detailing his client's medical history. This medical history suggested that the defendant while sober may appear intoxicated to an unknowing observer. The letter suggested that the defendant's arrest may have resulted from the arresting officer' mistaking the defendant's medical symptoms for intoxication, and requested that the deputy state's attorney dismiss the case.

Prior to arraignment the arresting officer made a telephone call to defense counsel. During the phone call the arresting officer told defense counsel that she had no right to send a letter casting doubt on his professional judgment. The officer accused defense counsel of behaving unprofessionally in writing the letter, and stated that the case would not be dismissed.

At a hearing on the defendant's refusal to submit a blood alcohol testing, a defense counsel cross-examined the arresting officer about this phone call. The deputy state's attorney, by the way of rehabilitation, elicited a statement from the trooper that his phone call legitimately questioned defense counsel's professional behavior.

Advice is sought regarding the ethical propriety of the respective conduct of the defense counsel, the deputy state's attorney and the arresting officer. As the deputy state's attorney has not sought our advice we adhere to our long-standing policy of not offering opinions as to the ethical propriety of the conduct of attorneys not seeking advice from this Committee and express no opinion regarding the deputy state attorney's conduct. In addition, as the conduct of the arresting officer is not within the purview of the Code of Professional Responsibility or of this Committee, we express no opinion thereon.

## ISSUE:

May defense attorney make known to a deputy state's attorney a defendant's medical history so as to suggest that the arrest of the defendant for DWI was an error?

## ANALYSIS:

On the facts presented, the conduct of the defense counsel did not violate ethical limitations.

Defense counsel acted in accordance with her duty to zealously represent the interests of her client within the bounds of the law.<sup>1</sup> While the arresting officer's professional judgment might have been indirectly called into question by defense counsel's letter to the deputy state's attorney, such action did not "serve merely to harass or maliciously injure another," as prohibited by DR1-102.

Under DR7-101(A)(1) an attorney is required "to seek the lawful objectives of his client" as permitted by law. In some circumstances, communication of a possible defense to a prosecuting attorney early on in a proceeding may constitute the best means of meeting this obligation. Absent fraud, deceit, or misrepresentation, such a course of action is both proper and professionally correct.

It should be noted that defense counsel's action also has the potential to aid the deputy state's attorney in conforming his behavior to the requirements of EC 7-13, and EC 7-14, which respectively militate against "unfair" litigation and impose an obligation of prosecutorial restraint in the discretionary exercise of governmental power. Given a convincing showing that a prosecution is without merit the deputy state's attorney might be obligated to dismiss charges.

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<sup>1</sup> EC 7-1.