

# ADVISORY ETHICS OPINION 91-04

## **SYNOPSIS:**

- (A) An attorney may represent private parties in separate proceedings even though each party may be called as a witness in the other's case, where there is no reasonable likelihood of conflict between the two parties and where each consents to the dual representation after full disclosure of relevant facts.
- (B) An attorney may report to police authorities information regarding the commission of a crime against his client even though the likely perpetrator of the crime is a complaining witness against the client in a civil proceeding.
- (C) An attorney may meet with an interview a person he knows to be an adverse witness where he reasonably believes the person is not represented by an attorney and he properly identifies himself and his purpose prior to conducting the interview.

## **FACT PATTERN A & OPINION:**

The requesting attorney is involved in representing a client in a civil proceeding. He is concerned that certain of his actions may violate the Code of Professional Responsibility. While some of the actions about which the attorney inquires have already taken place, it appears that similar actions will likely take place in the future and it is as to that future course of conduct that this Opinion applies. The attorney represented a noncustodial parent in a divorce, and, at the same time, represented a client in a separate civil proceeding. The second client testified for the parent client in the divorce. The parent client may be a witness in the civil proceeding. There is no apparent conflict between the information possessed by the noncustodial parent and the lawyer's second client. The subject matter of the representation of each is entirely different.

Under these circumstances, there do not appear to be differing interests which would likely result in a conflict of interest. Dual representation is permissible under DR 5-105 (C) if each of the clients consents to the representation after full disclosure of relevant facts and if it is obvious that the attorney can adequately represent the interest of each client.<sup>1</sup>

## **FACT PATTERN B & OPINION:**

During the course of representing his client, the requesting attorney was provided information by his client suggesting that a key complaining witness against the client had engaged in criminal activity, including a burglary of the client's office and residence. The attorney prepared a narrative outline of the information provided to him by his client and provided it to the local police department for further investigation.

This conduct does not violate DR 7-105 pertaining to threatening criminal prosecution. That section states that "a lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter." Under the facts presented, the attorney has presented evidence of criminal misconduct for the proper purpose of having it investigated and protecting his client. There is no violation of the code under these facts.

## **FACT PATTERN C & OPINION:**

In the course of representing his client, an attorney learned that a key witness against his client had a history of mental health problems and had been hospitalized on and off at the state hospital. The witness apparently had first hand information regarding several events directly relevant to a complaint brought against the attorney's client in a civil proceeding. The attorney went to see the witness at the state hospital but, after speaking with her treating physician and a Legal Aid lawyer who represented hospital patients, was told that the witness' condition did not permit her to speak with the attorney at that time. The witness was later released from the state hospital and the witness' mother told the attorney that the witness had been released "unconditionally." The mother also told the attorney that the witness was not then represented by an attorney. The attorney then interviewed the witness and obtained a statement from her. It appears from the facts that in connection with the interview, the attorney identified himself as the client's attorney and stated the purpose of his visit. We assume these facts for purposes of our opinion.

On these facts, the attorney has violated no provision of the Code of Professional Responsibility by interviewing the witness. The attorney may conduct further interviews of the witness should the occasion arise under similar circumstances. The

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<sup>1</sup> See Committee Opinions 88-2 and 88-7.

attorney's conduct does not violate DR 7-104 pertaining to communicating with one of adverse interests. That provision bars communication with a person an attorney knows to be represented with regard to the subject matter of the communication without the prior consent of the attorney or unless otherwise authorized by law. Here the attorney had reason to believe that the witness was not and is not represented by an attorney; thus, there is no bar to the attorney's conducting an inter- view with the witness.