

ADVISORY ETHICS OPINION 94-03

SYNOPSIS:

Absent consent of an unindicted co-conspirator's attorney the attorney for a co-conspirator defendant may not communicate with the unindicted co-conspirator who is represented in connection with an appeal from a conviction growing out of the conspiracy charged by the prosecution.

FACTS:

Four persons were arrested and charged with a criminal conspiracy in Vermont. One of those arrested has been convicted and is currently represented in connection with an appeal pertaining to the sentence that he received. This convicted party has provided information to prosecuting authorities implicating the client of the requesting attorney in the same conspiracy. Client has now been arrested and is being prosecuted. The convicted party is named as an unindicted co-conspirator in client's case. The prosecutor has notified requesting attorney that the convicted party will testify against client at the up coming trial. Requesting attorney would like to interview the convicted party regarding matters that the convicted party may testify to at client's trial without first obtaining the consent of the convicted party's attorney. Is this permissible under the code?

ANALYSIS:

This request raises the question whether DR 7-104 bars an attorney's direct communication with a person who is represented by counsel but who is not a party to the proceedings giving rise to the first attorney's representation.

DR 7-104 states in pertinent part as follows:

DR 7-104 Communicating With One of Adverse Interest

(A) During the course of representing a client a lawyer shall not:

- (1) Communicate or cause another to communicate on the subject of the representation with a party known to be represented by a lawyer in that matter unless the first lawyer has the prior consent of the lawyer representing the other party or is authorized by law to do so (emphasis added).

The narrow issue in this case involves the scope and meaning of the terms "on the subject of the representation", "with a party" and "represented by a lawyer in that matter" as those terms are used in DR 7-104(A)(1). Here, the requesting attorney intends to communicate with the convicted person on the subject of requesting attorney's representation of client; however, narrowly construed, the convicted person is not represented by a lawyer in that matter, that is, the convicted person is not a party in the criminal case pending against the client. Being named an unindicted co-conspirator does not give rise to party status in the criminal prosecution. Nonetheless, the convicted person is represented by counsel in connection with proceedings closely related to the subject of requesting attorney's representation and arising out of the same underlying circumstances and offense conduct. It is the committee's view that the phrase "in that matter" fairly extends to the offense conduct and the circumstances giving rise to the charges and is not limited to the specific case pending before the court. The convicted person is clearly represented by an attorney in regard to the general subject matter of the offense charged against client. Under these circumstances a reasonable interpretation of the rule requires that client's attorney obtain the consent of the convicted person's lawyer before communicating with the convicted person in regard to facts pertaining to the conspiracy alleged by the prosecution.

This interpretation is consistent with the purpose behind the rule of protecting the attorney-client relationship and ensuring that a represented person will have the benefit of counsel's advice when approached for comment regarding the subject matter or facts relevant to the representation. The use of the term "party" in OR 7-104 (A)(1), read in light of the purpose of the rule is reasonably interpreted as extending to any person represented by counsel in matters closely related to the subject matter of the client's representation. This interpretation of the term "party" is consistent with past opinions of this committee.¹

¹ See Synopsis C of Opinion 91-4 where the proscriptions of OR 7-104 were extended to an adverse witness (no violation found because the witness was not represented by an attorney). See also EC 7-18, which makes no reference to "party" status, but extends the rationale for the rule to any person represented by an attorney in connection with the same subject matter.