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Standing Committee on Professional Ethics

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INFORMAL OPINION 15-05

CRIMINAL AND CIVIL CASE UNDER RULE 3.4(7)

You are an attorney who represents a victim who sustained injuries as a result of the negligence of a drunk driver. The driver was later arrested and charged with DUI in connection with the accident. You are pursuing a personal injury claim on behalf of your client, and have also appeared for your client in the related criminal case.

In furtherance of your client's civil case and for insurance purposes, you would like to request the driver to sign a true statement admitting responsibility for causing the accident so that your client can be compensated for his/her injuries. You have advised us that because your client did not sustain "serious physical injuries," the defendant appears eligible to participate in Alcohol Education Program[1] under CGS §54-56g.

On these facts, you ask whether Rules 3.4(7) or 8.4 of the Rules of Professional Conduct prohibit you from requesting that the defendant furnish a true statement attesting to the facts establishing his/her civil liability, in exchange for which your client would agree not to object to defendant's AEP application.

Rule 3.4(7) provides that a lawyer shall not:

> Present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

The Rule is not applicable to the situation you describe for multiple reasons. First, you are not proposing to either "[p]resent, participate in presenting, or threat[ing] to present criminal charges." As you describe it, a prosecutor has already charged the defendant for DUI and our

[1] The Alcohol Education Program (or AEP) is a pre-trial diversionary program whereby a defendant charged with a violation of CGS §14-227a may avoid a trial and guilty finding. We understand that the program is only for applicants with no prior alcohol related motor vehicle convictions and who have not used the AEP in the previous ten year period.

understanding is that your participation in that proceeding – an action that your client neither initiated, nor threatened to initiate – is as an advocate for the victim. Second, even assuming *arguendo* that the written admission you seek from the defendant is motivated primarily to further your client's financial interests in the related civil proceeding, there would be no violation of Rule 3.4(7) if your client has other legitimate reasons for asserting that the defendant's eligibility for the AEP program be conditioned on his/her acceptance of responsibility for the accident. That taking this position provides a corollary benefit to the civil case is not tantamount to initiating or prosecuting a criminal action "solely" for the purpose of advancing the civil case. *See Somers v. Statewide Grievance Committee*, 245 Conn. 277, 292 (1998) ("Rule 3.4(7) does not prohibit an attorney from simultaneously pursuing a criminal complaint and a civil action against the same party unless the attorney's ***sole reason*** for filing the criminal complaint is to seek an advantage in the civil action"); Informal Opinion 98-19 (same).

Finally, we do not view the conduct described as a violation of Rule 8.4. Rule 8.4(2) provides that it is professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects. Rule 8.4(4), in turn, prohibits lawyer from "engag[ing] in conduct that is prejudicial to the administration of justice." Where, as here, your client is entitled to have his/her interests as a victim represented in the DUI proceeding, the DUI action relates directly to your representation of the client in a related civil claim, and the defendant's failure to accept responsibility for the accident presumably would constitute a good faith basis[2] for your client to object to defendant's participation in the AEP program, there is no violation of Rules 8.4 (2) or (4). In this respect, we agree with the American Bar Association's analysis of a similar question under Rule 8.4 in Formal Opinion 92-363. ("It is the opinion of the Committee that a threat to bring criminal charges for the purpose of advancing a civil claim" would not violate Model Rules 8.4 unless "the criminal wrongdoing were unrelated to the client's civil claim, [] the lawyer did not believe both the civil claim and the potential criminal charges to be well-founded, or [] the threat constituted an attempt to exert or suggest improper influence over the criminal process.")

THE COMMITTEE ON PROFESSIONAL ETHICS

BY _____
Marcy Tench Stovall, Chair

[2] For purposes of this analysis we assume there is a good faith basis for your client to either object or take no position with respect to defendant's request to participate in the AEP program, and that Rule 3.1 is therefore not implicated. *See* Rule 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification").