

Facts: Attorneys A and B represent Clients C and D respectively in divorce proceedings. Clients C and D agree that Client C shall remove certain items from the marital domicile to a separate location with the understanding that separate ownership of these items is not claimed, nor is any right to the remaining items. Although the parties agree to separate, no agreement is reached regarding ownership or possession of the jointly owned marital residence. Client C removes the designated items to a separate location. Subsequently, Client C's roommate departs, taking his belongings, and Client C has a need for additional furniture. Client C advises Client D that additional furniture is needed, but receives no answer from either Client D or Attorney B.

Attorney A advises Client C not to enter the marital domicile, but does inform him that it is within Client C's rights to do so. Client C enters the marital domicile while D is absent, removes property and leaves a note. Client C refuses to return the goods and Attorney B advises Client D to secure a warrant against C for grand larceny. No action is taken by Attorney B through civil proceedings but a warrant for grand larceny is issued and served upon C.

Attorney A advises the commonwealth's attorney of the circumstances as set forth above. An indictment is secured from the grand jury. The commonwealth's attorney refuses to meet with Client C and Attorney A to discuss the basis of Client C's claim to the subject property. Since it appears that trial will proceed as scheduled, Client C retains an independent counsel for the criminal trial. On the day prior to trial, the commonwealth's attorney agrees to nolle process the charge if C returns the property. Client C agrees and the charge is nolle processed.

Conclusions: Considering the above-related circumstances, it is the opinion of the committee that it was not unethical for Attorney B to advise Client D to secure a criminal warrant, suggest such a warrant could be obtained or fail to take civil action to remedy any injustice perceived by Client D, since it does not appear that Attorney B acted solely to gain advantage in a civil matter. [DR:7-104]

It was not unethical for Attorney A to advise Client C with regard to entry of the marital domicile unless he knew the counseled conduct to be illegal or fraudulent [DR:7-102(A)(7)] It is beyond the committee's responsibility to opine with regard to the legality of Attorney A's client's right to enter the marital premises.

The commonwealth's attorney's failure to receive information offered by Attorney A and Client C concerning claims of ownership and failure to fully investigate circumstances was unethical only if the commonwealth's attorney had knowledge that the facts did not support probable cause to believe a crime had been committed. The committee does not opine with regard to the commonwealth's attorney's knowledge or judgment.

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Facts: In the second situation, attorneys A and B represent clients C and D respectively in divorce proceedings. Attorney A drafts a proposed agreement and mails it to Attorney B for execution. Attorney B does not respond to Attorney A by phone or letter. The parties separate. Client C continues residence in the marital home and Client D moves to another domicile. Attorney B advises Client D that there is no legal impediment to entry into the marital home to secure certain marital property. After Client D moves out of the marital domicile, Client C has the locks in the home changed. Client D has a key made, enters the marital home and recovers certain property.

Attorney A instructs Client C to obtain a criminal warrant charging Client D with trespassing. The warrant is issued and served. Attorney B advises the commonwealth's attorney that a trespass warrant has been issued against Client D for property jointly owned by Client D. The commonwealth's attorney does not respond to Attorney B's correspondence. A trial on the trespassing charges proceeds and the assistant commonwealth's attorney argues for a conviction of Client D on a trespass charge, but fails to present any authority for such a conviction. Attorney A testifies that he did indeed instruct Client C to swear out a trespass warrant, but states no legal authority for such advice. Client C testifies that there is no agreement providing for exclusive use or possession of the marital residence. Charges against D are dismissed.

Conclusions: In consideration of the above facts, it was not unethical for Attorney A to instruct Client C to obtain a criminal warrant against Client D or to fail to take civil action to remedy any injustice perceived by Client C as long as Attorney A did not act solely with the intent of obtaining an advantage in a civil matter. [DR:7-104] The committee's understanding of the facts does not support a conclusion that Attorney A was acting solely to obtain advantage in a civil matter.

Attorney B did not act unethically by informing Client D that it was within his legal right to enter the marital premises and remove property unless he was assisting his client in conduct he knew to be illegal. [DR:7-102(A)(7)] The commonwealth's attorney acted unethically by continuing and presenting prosecution for an offense against Client D where there was neither probable cause nor law to support a conviction of Client D upon property jointly owned by Client D only if the commonwealth's attorney knew there were insufficient facts to support probable cause to believe that a crime had occurred. [DR:8-102(A)(1)] The committee did not express an opinion as to the commonwealth's attorney's knowledge of the law or judgment. [DR:7-102(A)(7), DR:7-104, DR:8-102(A)(1)]

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