

Committee Opinion  
May 8, 1990

LEGAL ETHICS OPINION 1336

ADVERTISING AND SOLICITATION –  
EXTRA JUDICIAL STATEMENTS:  
PUBLICATION OF ARTICLE IN  
PROFESSIONAL JOURNAL  
REGARDING BOTH COUNSEL AND  
CIVIL MATTERS PENDING APPEAL  
AND ANOTHER CIVIL MATTER  
PENDING TRIAL.

You have advised that you represented the defendant in a matter which resulted in a highly publicized criminal case and subsequent civil cases. In each case, you indicate that expert testimony on accident reconstruction was the primary evidence set forth, first by the prosecution and then by the civil plaintiff. The criminal case and the first of two civil cases are now on appeal. The second civil case is pending in the circuit court. You indicate that you have prepared an article for publication in the journal of a lawyers' association stating your opinion on the use of accident reconstruction testimony generally and as it was used specifically in the fact situation involving your client. You have also indicated that everything in the article has already been stated in the record and in briefs in the two completed cases.

You have asked that the Committee consider the propriety of the publication of such an article.

The appropriate and controlling disciplinary rules applicable to the facts you have presented are DR:4-101(C)(1) which holds that a lawyer may reveal confidences or secrets with the consent of the client (after a full disclosure to the client); DR:5-101(A) which requires a client's informed consent when a lawyer's professional judgment on behalf of his client may be affected by his own financial, business, property, or personal interests; and DR:7-106(A) which states that

A lawyer participating in or associated with the investigation or the prosecution or the defense of a criminal matter that may be tried by a jury shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication that he knows, or should know, constitutes a clear and present danger of interfering with the fairness of the trial by a jury. (emphasis added)

Further guidance is available through Ethical Consideration 7-30 [ EC:7-30] which states, in pertinent part, that "news or comments [which tend to influence judge or jury] may prevent prospective jurors from being impartial at the outset of the trial and may also interfere with the obligation of jurors to base their verdict solely upon the evidence admitted in the trial."

For purposes of this opinion, the Committee assumes that the client has consented to the preparation of the article, and that no contract has been executed between the lawyer

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and client assigning any literary rights regarding the matter. Such client consent must be based on a full and adequate disclosure which, the Committee believes, should include information as to the potential for opposing parties to use the article's information to the advantage of the plaintiff in preparing the pending second civil case. Furthermore, the Committee also assumes that the attorney is not receiving remuneration for the preparation of the journal article. The converse of any of those situations could result in ethical improprieties which are not being considered under these assumptions.

With regard to the article's impact on the civil cases, one of which is currently on appeal and the other of which is currently pending in circuit court, the Committee is of the opinion that the plain language of the rule, in conjunction with the holding in *Hirschkop v. Snead*, 594 F.2d 356, 373 (4th Cir. 1979) upon which this version of DR:7-106 is founded, limits any restraint to extrajudicial comments related to criminal actions.

Thus, the Committee is of the opinion that there is no ethical impropriety in publishing a law journal article dealing with both civil cases, provided that the information contained in such publication is not false, fraudulent, misleading or deceptive, and that it will not prejudice the client. As noted above, however, any potential use of the information by opposing parties may prove adverse to the client. (See DR:2-101(A) and DR:7-101(A)(3). See also LE Op. 443; Los Angeles County Bar Association Opinion 451 (undated))

With regard to the article's impact on the currently pending appeal of the criminal case, the Committee is of the opinion that the author/lawyer must consider the potential for a remand of the matter for a new jury trial. The committee is cognizant of the minimal likelihood of dissemination of your proposed article to potential jurors since you have advised that it will be published in a professional journal. The Committee is of the opinion that, under the "reasonable person" standard articulated in DR:7-106, it is unlikely that the publication of such an article would constitute the requisite "clear and present danger of interfering with the fairness of the trial by a jury" even if a new jury trial were ordered.

It is therefore the opinion of the Committee that, assuming the client's fully informed consent and further assuming that the article contains nothing which may be considered to be false, fraudulent, misleading or deceptive, the preparation and publication of an article in a legal professionals' journal would not be improper, notwithstanding the possibility of a remand for a new jury trial.

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