

Committee Opinion
September 2, 1993

LEGAL ETHICS OPINION 1542

EXTRAJUDICIAL PUBLIC
STATEMENTS BY PROSECUTOR.

You have presented a hypothetical situation in which a client has been arrested and charged with the robbery and murder of another.

The prosecutor who will prosecute the case makes the following statements, reported in two newspapers that are widely distributed throughout the jurisdiction. Client has not yet had a preliminary hearing on the robbery and murder charges and has not yet been indicted for any offense.

In newspaper #1, the prosecutor is quoted as saying: "Defendant is the one who is alleged to be the shooter ... The investigation is continuing ... We expect some other arrests in this case. We think others were involved and we're looking for them now ... " The prosecutor said that the men followed the victim from the District of Columbia to a certain neighborhood in the County before killing him and stealing his car. "It appears he was spotted somewhere along the way and was followed right into the cul-de-sac where he was killed," the prosecutor said. The prosecutor also said that he has not yet decided whether the defendant will be tried on capital murder charges, which could carry the death penalty upon conviction. (In a subsequent article in the same newspaper, he stated he would seek the death penalty in this case). The prosecutor called the case "scary". Further, the prosecutor stated: "It is certainly a particularly brutal and heartless kind of killing. I've been doing this kind of stuff for a lot of years and this one is about as heartless and brutal a kind of case as I've seen." "You realize this kind of case can happen to anyone," he added.

In newspaper #2, the prosecutor is quoted as saying: "When the victim got out of the car, he was forced to lie down on the street, where he was shot in the head at close range. It's a terrible, terrible case. He was killed really at random. He didn't know these people. They were just determined to get his particular car."

You indicate that the defendant is being held in the D.C. jail, and the prosecutor has stated that he would seek to extradite the defendant if he does not agree to be transferred to Virginia for trial.

Finally, you advise that, following a preliminary hearing, the prosecutor is quoted in a major newspaper as follows: "I really believe this is the most brutal case I've seen in all the years I've been a prosecutor. That's the reason I'm going to seek a capital murder indictment."

You have asked the committee to opine whether, under the facts of the inquiry, the prosecutor has violated DR:7-106(A), by making extrajudicial statements which constitute a clear and present danger of interfering with the fairness of the trial by a jury.

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As you have indicated, the appropriate and controlling Disciplinary Rule related to your inquiry is 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. See also EC:7-30.

The committee is of the view that, under the hypothetical facts you have presented, the determination of whether the extrajudicial statements cited constitute a clear and present danger of interfering with the fairness of the trial by a Jury raises a legal question requiring a factual determination beyond the purview of this committee. However, the committee cautions that should the appropriate court determine that the extrajudicial statements did constitute such a danger to a fair trial, clearly the statements would also be per se violative of DR:7-106(A).

Legal Ethics Committee Notes. – The “clear and present danger” standard under DR 7-106 is replaced with “substantial likelihood” standard under Rule 3.6(a).