

Committee Opinion
June 14, 1994

LEGAL ETHICS OPINION 1594

EXTRAJUDICIAL STATEMENTS:
COMMONWEALTH'S ATTORNEY
MAKING PUBLIC STATEMENTS
REGARDING SUBJECT OF AN
INVESTIGATION.

You have presented a hypothetical situation in which a Commonwealth's Attorney made statements to a newspaper reporter which were reported as quotes in a written article. The substance of the statements concerned the Commonwealth's Attorney referring an investigation to a special prosecutor because the subject of the investigation was an opponent of the Commonwealth's Attorney in the upcoming election for that office. At the time the Commonwealth's Attorney made these statements, no charges had been lodged against the subject of the investigation. Finally, you indicate that no charges were ever lodged against the subject of the investigation.

You have asked the committee to opine whether, under the facts of the inquiry, the Commonwealth's Attorney has violated DR:7-106(A), in that there were no charges pending at the time the Commonwealth's Attorney made the statements, and, in fact, no charges were ever pressed.

The committee finds that 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 also directs your attention to EC:8-8 which states in pertinent part that "[a] lawyer who is a public officer ... should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties".

The committee has earlier opined that the determination of whether specific extrajudicial statements, such as those you have 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 a finder of fact ultimately 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). See LE Op. 1542. The committee believes that the fact that the matter was not ultimately tried by a jury is not dispositive.

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Legal Ethics Committee Notes. – The new standard under Rule 3.6(a) replaces the “clear and present danger” standard of former DM 7-106 with the “substantial likelihood” test.