



Committee on Professional Ethics

Opinion #439 - 7/23/76 (49-76) Topic: Advertising; Lawyer-inspired newspaper report concerning case in which he represents a party.

Digest: A lawyer may assist in the publication of a news story if intended for benefit of his client. Advertisements and news stories in interest of client permissible in certain circumstances.

Code: DR 2-101, 2-104(A)(5), 7-107(G).

QUESTION

Is it proper for a lawyer to advise members of the press about the institution of a lawsuit following the service and filing of a summons and complaint if he refers solely to the contents of the filed papers?

OPINION

It is not improper for a lawyer to assist in the publication of a news story containing his name and his identification as a lawyer if the information is a normal incident to the matter reported. N.Y. State 119 (1969); N.Y. State 67 (1968). He may not, however, utilize such publicity as an indirect method of self-laudation and advertising his stature and availability in a manner calculated to secure professional employment. See N.Y. State 298 (1973); ABA Inf. 479 (1961); ABA Inf. 854 (1965). As stated in Matter of Connelly, 18 A.D. 2d 466, 479, 240 N.Y.S. 2d 126, 139 (1st Dept. 1963):

"Where, as here, there has been a deliberate encouraging or fostering by attorneys of self-interest publicity to be afforded by a news medium or magazine article, and the personal and laudatory aspects of the article have a tendency to promote their private interests, there is unquestionably a violation of the canon. These actions tending prominently to publicize the names of these attorneys and their special qualifications, constitute indirect advertising. They 'offend the traditions and lower the tone of our profession and are reprehensible' (see Canon 27), and require disciplinary action."

Motivation is difficult to establish and the line of demarcation is thin between a bona fide contribution to a news item of public interest and participation in publicity with the ulterior purpose of benefiting the lawyer. See N.Y. State 221 (1971). Since even the appearance of professional impropriety should be avoided (Canon 9), a lawyer should refrain from inspiring a newspaper story highlighting his involvement in the matter reported. N.Y. State 324 (1974) and opinions cited therein.

DR 2-101 and former Canon 27 do not appear to deal explicitly with

the question herein considered, but they are "instinct with an obligation" on the part of a lawyer not to use the news media for selfish gain.

There are of course cases where publicity is in the interest of a client, for example, in order to elicit relevant evidentiary information or the names of witnesses to an event, and in such cases circumstances may justify a lawyer's publishing an advertisement for such purposes. Drinker, Legal Ethics 152 (1953). However, in order to avoid suspicion of solicitation, the lawyer would be well advised to omit his name and address from the advertisement and simply refer replies to a post office box number or to a telephone number.

There are also situations, as in a class action, where it may be to the interest of a client, both financially and in the conduct of litigation, to obtain the cooperation of persons similarly situated. It would not be improper, in order to further the interests of his client in such a situation, for a lawyer to endeavor to obtain the cooperation of others. N.Y. City 717 (1948); N.Y. City 343 (1935). This Committee, although approving N.Y. City 717 (1948), qualified it in N.Y. State 124 (1970) by stating that "the solicitation should ordinarily be handled by the client and not by the attorney", citing N.Y. City 586 (1941); N.Y. City 321 (1934); N.Y. County 278 (1930); Drinker, Legal Ethics 251 (1953).

Cf. DR 2-104(A)(5) which provides:

"If success in asserting rights or defenses of his client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but shall not seek, employment from those contacted for the purpose of obtaining their joinder."

Unless justified by special circumstances, as above indicated, a lawyer should not instigate a news story concerning a matter handled by him. The determination of the propriety of his participation or consent in connection with the publication of such story will depend upon his apparent motivation, the facts of each case, and the nature or tenor of the article. See N.Y. State 124 (1970).

See also DR 7-107(G) for additional limitations on extrajudicial statements by lawyers which involve dissemination by means of public communication.
