

FORMAL OPINION NO. 92*

The Committee on Professional Ethics has been asked:

Is an attorney constrained by DR 7-107(G) of the Code of Professional Responsibility from permitting his client to make public disclosures prior to the institution of suit?

Though the Code section cited does not specifically state that an attorney should prevent his client from making extrajudicial disclosures, the omission should not be construed as a license for the attorney to permit such conduct. We are of the opinion that the attorney should not condone such disclosures but moreover should exercise his maximum influence to discourage his client from making them. The impartiality that is essential to the judicial process should be protected against extraneous influences. Members of the legal profession certainly have the greatest responsibility of all to insure such impartiality.

Section DR 7-107(J) of the Code makes it incumbent upon the lawyer to use reasonable care in preventing his employees and associates from making extrajudicial statements which he himself cannot ethically make. We do not believe that it unreasonably strains the definition of "associate" to conclude that each, the attorney and his client, is an "associate", one with the other.

The Code of Professional Responsibility as adopted by the American Bar Association and made effective January 1, 1970, consists of three separate but interrelated parts: "Canons", "Ethical Considerations", and "Disciplinary Rules." The Canons state in general terms the standards of professional conduct expected of lawyers; the Ethical Considerations are said to be aspirational in character and represent the objectives towards which every member of the profession should strive; the Disciplinary Rules are mandatory in character and state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Though only the "canons"

and "Disciplinary Rules" were adopted by the Idaho State Bar in 1971 as our Code of Professional Responsibility (which replaces the former applicable "Canons of Legal Ethics"), we think it pertinent and appropriate to refer to certain parts of the "Ethical Considerations" as adopted by the American Bar Association, for interpretive guidance with respect to the above question.

Ethical Consideration 7-33 provides as follows:

"A goal of our legal system is that each party shall have his case, criminal or civil, adjudicated by an impartial tribunal. The attainment of this goal may be defeated by dissemination of news or comments which tend to influence judge or jury. Such news or comments 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. The release by a lawyer of out-of-court statements regarding an anticipated or pending trial may improperly affect the impartiality of the tribunal. For these reasons, standards for permissible and prohibited conduct of a lawyer with respect to trial publicity have been established."

Among other provisions, Ethical Consideration 7-28 provides:

". . . A lawyer should exercise reasonable diligence to see that his client and lay associates conform to these standards."

Canon 20 of the old "Canons of Professional Ethics" provides in part:

"Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration

of justice. Generally, they are to be condemned."

Canon 16 of the old Code also provides:

"A lawyer should use his best efforts to restrain and to prevent his client from doing those things which the lawyer ought not to do, particularly with reference to their conduct towards Courts, judicial officers, jurors, witnesses and suitors. If a client persists in such wrongdoing the lawyer should terminate their relation."

It is obvious that some disclosures could be more offensive than others, but it would always be difficult to determine whether or not an extra-judicial disclosure has, or would have, any influence upon the Court or jury. Therefore, we can only recommend that such disclosures by the client be discouraged by the attorney at every opportunity.

DATED this 28th day of October, 1975.

*This opinion remains valid, although there have been some suggestions that DR 7-107 constitutes an impermissible restraint on the right of expression guaranteed by the First Amendment of the United States Constitution. See, Chicago Council of Lawyers v. Bauer, 552 F.2d 242 (7 Cir., 1975).