

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-161
Issued: January 1977

This opinion was decided under the Code of Professional Responsibility, which was in effect from 1971 to 1990. Lawyers should consult the current version of the Rules of Professional Conduct and Comments, SCR 3.130 (available at <http://www.kybar.org>), especially Rules 7.01-7.50 and the Attorneys' Advertising Commission Regulations, before relying on this opinion.

Question: When a lawyer first begins practice, may he, his partner, or his employer suggest publication of a brief news story concerning the event to a local newspaper, and furnish the newspaper a brief biography and photograph of the lawyer for use in preparing the story?

Answer: Qualified Yes.

References: DR 2-101; ABA Formal Opinion 42 (1931), 43 (1931), 62 (1932), 184 (1938); ABA Informal Opinion 392 (1961), 479 (1961), 546 (1961), 548 (1962), 552 (1962), 562 (1962), 854 (1965), 1052 (1968)

OPINION

Our opinion of the propriety of the two news stories about newly-admitted lawyers has been requested. In each case the story appeared in a newspaper published in the lawyer's home community. Each story is accompanied by a small photograph of the lawyer's face.

One story occupies 2.75 column inches in a nine column format. It states the lawyer's name and home address; high school and date of graduation; college, undergraduate major and minor, undergraduate degree, and date it was conferred; law school, law degree, and recent conferral; recent admission to practice; and employment as a lawyer in a public position in which he is not permitted private practice.

The other story occupies 1.35 column inches in a six column format. It states the lawyer's name and home address; college, undergraduate major, receipt of an undergraduate degree, and date of conferral; law school and recent receipt of a law degree; employment by a law firm identified by name; and the fact that his father (whose full name is given) is a partner in the firm.

We have assumed (1) that neither story was published in more than one day's issue of the newspaper and (2) that neither newspaper received anything of value for publishing the story. If assumption (1) does not hold, our opinion might be different. If assumption (2) does not hold, our opinion would obviously be different.

We have also assumed that in each case the lawyer or someone in his new firm or office suggested publication of the story to the newspaper and furnished the photograph and information published. If this assumption does not hold, however, our opinion would follow *a fortiori*.

Regardless of its contents, publication of a news story about a lawyer cannot be improper on his part unless he has cooperated in some way in its preparation or publication. (Mere acquiescence in publication could constitute such cooperation.) In this opinion, when we say that a particular publication is proper or improper, we mean that the lawyer's cooperation in its preparation or publication is proper or improper.

We can find no published opinion of the Kentucky Bar Association, and no post-Code ABA opinion, dealing with the question presented. Before promulgation of the Code of Professional Responsibility, similar questions were presented to the ABA Standing Committee on Ethics on several occasions.

There has never been a rule that a lawyer must refuse all cooperation in preparation and publication of any and every news story about himself. ABA Informal Opinions 546 (1961), 548 (1962), 5S2 (1962), and 854 (1965) all state that such cooperation is proper in certain circumstances.

Publication was improper where it was the equivalent of commercial advertising, ABA Formal Opinion 43 (1931) (the lawyer paid the newspaper the "cost of publication"), or where publication was repeated on several days, ABA Formal Opinion 62 (1932).

In general, however, propriety had to be determined with reference to the lawyer's motive. Motive can of course be inferred from the nature of the statements about the lawyer. Laudation of the lawyer was condemned, ABA Formal Opinion 62 (1932) ("leading trial lawyer"), 184 (1938), ABA Informal Opinion 552 (1962) (firm's fitness to handle and effectiveness in handling, various kinds of matters). A purpose to "extol" the lawyer was condemned, ABA Informal Opinion 479 (1961), 546 (1961), 548 (1962), 1052 (1968).

Motive can also be inferred from the subject matter of the news story. If the news value of the story was at least partially independent of the lawyer's participation in the event reported, publication might be proper, ABA Informal Opinion 546 (1961) (publication of the name of a lawyer for a party in a story concerning pending litigation), ABA Informal Opinion 552 (1962) (publication of biographical information concerning a lawyer on his election as president of a chamber of commerce). If there was no such independently newsworthy event, publication was improper, ABA Formal Opinion 42 (1931) (posing for pictures depicting steps in a divorce case), ABA Informal Opinion 392 (1961) (question-and-answer interview on a general legal topic), 562 (1962) (relocation of a lawyer's office).

Of particular interest, however, are the cases in which propriety was made to depend on whether the lawyer or the newspaper initiated publication of the story. In every case in which the ABA Committee focused on this question and it appeared that publication was initiated by the lawyer, the Committee decided that publication was improper, ABA Informal Opinion 419 (1961),

562 (1962), 854 (1965). In ABA Informal Opinion 854 (1965), the Committee stated that this test was the “first consideration.”

DR 2-101 was drafted against this background. DR 2-101(B) states that “[a] lawyer shall not publicize himself, his partner, or associate as a lawyer through advertisement or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf DR 2-101(C) states that “[a] lawyer shall not compensate or give anything of value to representatives of the press □ in anticipation of or in return for professional publicity in a news item.”

The news stories presented for our review are clearly not advertisements or commercial publicity. We have taken this case out of DR 2-101(C) by hypothesis. Our only concern is with DR 2-101(A).

DR 2-101(A) states that “[a] lawyer shall not prepare, cause to be prepared, use, or participate in the use of, any form of public communication that contains professionally self-laudatory statements calculated to attract lay clients.

The stories presented to us are about nothing but the respective lawyers and in both cases, by hypothesis, the lawyer initiated publication of the story. These considerations may have some bearing on whether a story is or is not calculated to attract lay clients, but we believe it clear that DR 2-101(A) has abandoned these considerations as decisive tests in themselves.

Neither of these stories contains any laudatory statement. In the case of the lawyer who has been employed in a public position in which he will not be permitted private practice, the story is certainly not “calculated to attract lay clients.” In the other case, the lawyer has called public attention to himself as a lawyer, an act which is “calculated to attract lay clients.” But he has not done so by self-laudatory statements and that is the conduct on which application of DR 2-101(A) is predicated. Neither publication is improper.

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). The Rule provides that formal opinions are advisory only.