

DELAWARE STATE BAR ASSOCIATION
COMMITTEE OF PROFESSIONAL ETHICS

OPINION 1980-1

We have been asked to provide an opinion on Professional Ethics for a member of the Delaware Bar on a question concerning his public appearance on a local television news program to discuss the recent Delaware Supreme Court decision upholding the doctrine of interspousal immunity.

The lawyer who has requested this opinion represents the plaintiff in a personal injury action. The defendant moved for summary judgment alleging the action was barred by the doctrine of interspousal tort immunity. The Superior Court granted defendant's motion for summary judgment. The plaintiff appealed and, after oral argument before a three justice panel, the panel issued a unanimous opinion which affirmed the judgment of the Superior Court. After the panel opinion, the plaintiff moved for a rehearing before the Court en banc. On December 26, 1979 the Delaware Supreme Court en banc in a per curiam decision affirmed the judgment of the Superior Court. Plaintiff has not moved for reargument, and indeed, the time for reargument has elapsed. However, the question of whether the interspousal tort immunity doctrine violated plaintiff's due process or equal protection rights under the 14 Amendment of the United States Constitution was briefed and argued in

the Delaware Supreme Court. Presently counsel for plaintiff is considering filing an appeal to the Supreme Court of the United States, and has not ruled out this possibility of further appeal.

The lawyer has been advised by his client, the plaintiff, that she has no opposition to his participation in the proposed interview. The lawyer has not been provided with a list of proposed questions, but understands that the interview will seek his view upon the merits of the doctrine of interspousal tort immunity.

The lawyer has requested advice as to whether he may take part in the interview, and, if he may, what ethical limitations there are upon what he might say.

OPINION

It would not be unethical for the lawyer to take part in the interview. However, because the civil action is still in litigation, he should refrain from any remarks proscribed by DR 7-107(G). Further, it would be unethical for the lawyer to make any self-laudatory remarks or make any statements critical of the Court or its decision.

DISCUSSION

The controlling authority for this inquiry is found in Cannon 7 of the Delaware Lawyers Code of Professional Responsibility and the underlying ethical considerations and disciplinary rules of this Cannon. With respect to public

communications generally, DR 2-101 prohibiting a lawyer from public communications containing self-laudatory statements and Canon 1 requiring the lawyer to assist in maintaining the integrity and confidence of the legal profession, are applicable.

There is no ethical prohibition against lawyers appearing and being identified as such on public information television programs provided that such programs and the attorneys' comments during the program conform to the proper standards enunciated in the Code of Professional Responsibility. See, ABA Formal Opinion, 298 (April, 1961); ABA Informal Decision 1366; ABA Informal Decision, C-230(G) (July, 1961) (dealing with the appearance of a lawyer on "Meet the Press" when the lawyer was identified as such.). It is frequently held, however, that there should be no further identification of the attorney beyond his name and profession; mention of the firm's name or address is not permitted. See, Opinion, District of Columbia Bar, Opinion No. 2; Los Angeles County Bar Association Informal Opinion 1970-8. Compare, ABA Formal Opinion 298, supra. Of course, it is settled that the public television appearance must not be a vehicle for improper self-laudation calculated to attract lay clients. Delaware Lawyers Professional Responsibility, DR 2-101(A) (hereinafter cited as "DR - "). See generally, Wise, Legal Ethics at 29-31 (2d ed., 1966) and 1979 Supplement at 156-161.

Of additional concern in your inquiry is the specific ethical restrictions upon extrajudicial statements by lawyers

associated with a civil action during the time such proceeding is pending. DR 7-107(G) provides as follows:

"(G) A lawyer or law firm associated with a civil action shall not during its investigation or litigation make or participate in making an extrajudicial statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication and that relates to:

(1) Evidence regarding the occurrence or transaction involved.

(2) The character, credibility, or criminal record of a party, witness or prospective witness.

(3) The performance or results of any examinations or tests or the refusal or failure of a party to submit to such.

(4) His opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule.

(5) Any other matter reasonably likely to interfere with a fair trial of the action."

(Emphasis supplied).

A threshold inquiry in the present case is whether litigation of a civil action is still pending. On the one hand the ability to seek further review at the state level is at an end and, although further review by the United States Supreme Court may be sought, none has been. However, the opportunity to make a timely petition for review by the United States Supreme Court has not passed, and the lawyer is actively considering the pursuit of such further review. Thus, an appellate tribunal may again consider the merits of plaintiff's legal claim. Furthermore, there

remains the possibility that if such review is sought and accepted, the decision of the highest Court in this State could be reversed and the case remanded for trial on the merits. Given the procedural posture of this case, it is the opinion of the Committee that litigation of a civil action is pending within the meaning of DR 7-107(G).

This conclusion is buttressed by the fact that the policy served by DR 7-107 is to proscribe conduct which is calculated or likely to interfere with a fair and impartial disposition of the matter. This proscription applies not only to cases pending trial but also to cases pending on appeal. See, Los Angeles County Bar Association Opinion 343 (January, 1973); 11 Res Gestae 29 (July-August 1967) (Indiana Bar Association Opinion 9-1964). Thus, the policy supporting DR 7-107 remains applicable so long as there remains the potential for further appellate review or a trial on the merits. See, Delaware Lawyers Code for Professional Responsibility, EC 7-33 (" . . . The release by a lawyer of out-of-court statements regarding an anticipated or pending trial may improperly affect the impartiality of the tribunal . . . ").

Having decided that DR 7-107(G) is applicable does not, of course, prohibit the lawyer from making any extrajudicial statements concerning pending litigation. The specific language of DR 7-107(G) permits ". . . quotation from or reference to public records" Clearly the opinion of the Delaware Supreme Court and the prior opinions and decisions which it affirmed are matters of public record. There would appear to

be no prohibition against explaining the reasons for the disposition and technical legal points so that the public may understand their significance. See, Bar-Bench-Press Declaration of Delaware, Article I, paragraph 5 and Article IV, paragraph 3. Indeed, it would be proper in this case to note the criticisms of the interspousal tort immunity doctrine commented upon by the Delaware Supreme Court in its opinion and the fact that the Supreme Court "commend[ed] to the General Assembly the problem of reviewing the rights of a spouse in the position of this plaintiff in this day and age." Alfree v. Alfree, Del.Supr., No. 35, 1979. In this respect we make a distinction between criticisms which may be directed to the interspousal tort immunity doctrine and its underlying policies, and criticism of the Court's decision. While under our constitutional system of government courts are not immune to criticism, Konigsberg v. State Bar of California, 353 U.S. 252, 269 (1957) a lawyer should maintain a respectful attitude toward the courts to preserve and maintain the supreme importance of the court. See, DR 1-102(A)(4); EC 8-6; Former ABA Cannon 1.

We believe the proceeding authorities accurately interpret the principles of Cannon's 1, 2 and 7 of the Delaware Lawyers Code of Professional Responsibility. In conclusion, ethical considerations do not prohibit your appearance on a television program such as you have described; however, your comments concerning your association with the pending civil litigation in question should conform to the limitations imposed by DR 7-107(G).

Dated: January 23, 1980