NEW YORK STATE BAR ASSOCIATION
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Committee on Professional Ethics

NYSBA

Opinion #483 - 5/10/78 (133-77) Topic: Defamation; suit against opposing counsel.

Digest: Lawyer may sue opposing counsel for defamation while continuing representation in lawsuit during which alleged defamation occurred only under limited circumstances.

Code: Canon 9;
EC 7-37, 9-2;
DR 2-109(A)(2), 2-110(A)(1), 2-110(C)(5), 7-102(A)(2).

QUESTION

May a lawyer sue opposing counsel for defamation while continuing representation in a pending lawsuit during which the alleged defamation occurred?

OPINION

The law has long disfavored actions for libel and slander based on defamatory statements made by opposing counsel or witnesses during the course of a judicial proceeding. See, e.g., Martirano v. Frost, 25 N.Y. 2d 505 (1969); Wiener v. Weintraub, 22 N.Y. 2d 330 (1968); Andrew v. Gardiner, 224 N.Y. 440 (1918); Bein v. Lewis, 47 App. Div. 2d 538 (2nd Dept. 1975); Seltzer v. Fields, 20 App. Div. 2d 60 (1st Dept. 1964), aff'd 14 N.Y. 2d 624 (1964); Restatement, Torts, §588 (1938); cf., Annotation, 36 A.L.R. 3d 1328 (1971). Since this Committee does not pass on questions of law, we express no opinion as to the scope of the privilege applicable to such defamatory statements. We believe, however, that the policies disfavoring such actions have ethical implications which make it especially inappropriate for a lawyer to bring such an action against an opposing lawyer while continuing as counsel in the litigation in which the alleged defamation was committed. See, N.Y. State 456 (1977).

By reason of the privilege applicable to defamatory statements made in the course of judicial proceedings, there would be relatively few defamation suits which could properly be maintained under the standards of DR 7-102(A)(2) and DR 2-109(A)(2). These two provisions make it improper to advance claims on behalf of a client or to accept employment for that purpose, where the lawyer knows or it is obvious that the claim is "unwarranted under existing law," unless "it can be supported by good faith argument for an extension, modification or reversal of existing law." The same principle is equally applicable to suits brought by the lawyer on his own behalf.

OVER---

The institution of such a suit is more than likely to lead to increased ill-feeling and unseemly wrangling between opposing counsel in the still pending litigation to the potential detriment of both the client and the judicial process. See, EC 7-37. Under such circumstances, the client's knowledge, consent or approval would be totally irrelevant to a resolution of the ethical problem. There would also be an obvious temptation to utilize the defamation suit in the hope of gaining some improper collateral advantage in the original action.

These considerations call for an application of the basic standard of Canon 9 admonishing a lawyer "to avoid even the appearance of professional impropriety," and of EC 9-2 that "[w]hen explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal profession."

Thus, a lawyer should be extremely reluctant to bring a defamation suit against opposing counsel while continuing representation in pending litigation during which the alleged defamation was committed. In the rare instances where such an action may be ethically justified under the standards of DR 7-102 (A)(2) and DR 2-109(A)(2), the lawyer should not bring the action until the pending litigation is terminated or the statute of limitations is about to run, except where the lawyer, with the consent of the client and the court, withdraws as counsel in the original action. See, DR 2-110(A)(1) and (C)(5).

For the reasons stated, and subject to the qualifications hereinabove set forth, the question posed is answered in the affirmative.
