NEW YORK STATE BAR ASSOCIATION

ONE ELK STREET ALBANY, NEW YORK 12207 TEL. (518) 463-3200

Committee on Professional Ethics

Opinion 606 - 1/11/90 (21-89)

Topic: Assistant district attorney; media rights; conflict of interest.

Digest: An assistant district attorney may sell own media rights upon completion of a criminal prosecution in compliance within certain ethical guidelines.

Code: Canon 4;
DR 2-101(A), (B), 4-101(B), 5-101(A), 5-104(B), 7-101, 7-107(E);
EC 2-21, 4-4, 4-6, 5-1, 5-2, 5-4, 7-9, 7-13.

Former Canon 27

QUESTIONS

May an assistant district attorney who prosecuted a highly publicized criminal case sell media rights concerning her role in the case while still employed as an assistant district attorney?

May the assistant district attorney participate in the development of her character in the screenplay or other literary medium?

OPINION

The inquirer, an assistant district attorney, prosecuted a murder case that resulted in a conviction. A national magazine did a review of the murder victim's life and of the trial. The trial transcript itself was the basis for much of the factual information regarding the case. As a result of the publication of the article, there is both television and movie interest in the case. The inquirer has been approached by an agent seeking to purchase limited lifetime

media rights to her life so that the assistant district attorney can be developed as a major character in the story.

Prior to the decision of the United States Supreme Court in *Bates* v. *State Bar*, 433 U.S. 350 (1977) and the consequent amendments to the Code of Professional Responsibility, the proposed conduct would have been deemed improper advertising. Several opinions of this and other bar associations condemned cooperation by lawyers with the media as indirect — and improper — advertising. *See, e.g.*, ABA 298 (1961) (lawyers may not appear on commercial programs as actors or performers where they are "identified as lawyers either generally or individually"); ABA Inf. 1067 (1968) (an attorney writing newspaper articles concerning legislation cautioned by the Committee not to extol himself as a lawyer); ABA Inf. 79 (unpublished), ABA Opinions on Professional Ethics 1967, p. 118 ("law firm may not acquiesce in the publication by a magazine of a laudatory history of the firm"). These opinions were premised upon the view that every direct and indirect form of advertising by lawyers was unethical. Indeed, Former Canon 27 provided (in part):

> Indirect advertisements for professional employment such as furnishing or inspiring newspaper comments, or procuring his photograph to be published in connection with causes in which the lawyer has been or is engaged or concerning the manner of their conduct, the magnitude of the interest involved, the importance of the lawyer's position and all other like self-laudation, offend the traditions and lower the tone of our profession and are reprehensible.

In light of *Bates* and its progeny, however, many of the ethical strictures against advertising by lawyers have been removed. Former pronouncements that self-laudatory conduct offends the traditions of the profession and is reprehensible are no longer viable.

Nothing in the Code of Professional Responsibility as currently in effect would prohibit an assistant district attorney from selling her media rights upon completion of a criminal prosecution.[1]

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1 We are not addressing here the issue of the defendant's property rights or the propriety of defense counsel entering into an arrangement with the defendant giving the lawyer an interest in literary or media rights with respect to the defendant's life story. That issue has been addressed in a number of cases. See, e.g., *Ray v. Rose*, 535 F2d 966 (6th Cir.), cert. denied, 429 U.S. 1026 (1976); *Maxwell v. Superior Court*, 30 Cal.3d 606, 639 P.2d 248, 180 Cal. Rptr. 177 (1982); *People v. Corona*, 80 Cal. App. 3d 684, 145 Cal. Rptr. 894 (1978) *See also* N.Y. City 1988-6 (1988).

Although the American Bar Association's Model Rules of Professional Conduct do not obtain in New York, it is worth noting that they, in fact, sanction such conduct. Model Rule 1.8(d) states:

> Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

This rule prohibits a lawyer from negotiating or entering into a media or literary rights agreement while a matter is still pending. N.Y. City 1988-6 (1988). The prohibition attempts to avoid possible conflicts of interest that arise when the lawyer's economic motivation might prevent her from devoting the requisite undivided loyalty to her client. *See* ABA Model Rules of Professional Conduct, M.R. 1.8(d), Comment (Legal Background). After the conclusion of the representation, however, the potential conflict with which the rule is concerned disappears.

The Model Rules, of course, have not been adopted in this State, so that conduct sanctioned by the Model Rules may nevertheless be improper under the Code of Professional Responsibility. This Committee knows of no reason under the Code, however, why an assistant district attorney may not sell her life rights with respect to the subject matter of a completed representation.[2] We must caution, however, that certain safeguards should be noted and followed by attorneys involved in "newsworthy" cases.

A lawyer must be certain during representation of a client not to be influenced by any personal motives or hopes for future employment. Counsel must avoid even the temptation to take a course of action that might enhance the value of the lawyer's publication or media rights at the risk of impeding the client's cause. *See* DR 5-101(A); DR 7-101. The lawyer must act solely in the interest of the lawyer's client, free of compromising influences. EC 5-1; EC 7-9. A lawyer should not, after accepting employment, "acquir[e] a property right or assum[e] a position that would tend to make his judgment less protective of the interest of his client." EC 5-2. This responsibility devolves at least as heavily upon a public prosecutor as upon other advocates if not more so. As noted in EC 7-13, the prosecutor's special duty "is to seek justice, not merely to convict." *See also* N.Y. State 492 (1980). A lawyer who

2 For purposes of this opinion, we assume there are no laws or internal guidelines in the District Attorney's office that would prohibit the conduct addressed herein.

gains an interest in publication rights relating to the subject matter of employment may be tempted to compromise the interest of the client for the lawyer's own anticipated pecuniary gain. EC 5-4. We concur with the drafters of the Model Rules that these concerns would prohibit a public prosecutor from negotiating or entering into an agreement with third parties for the sale of media rights during the course of an ongoing criminal prosecution. *Accord* N.Y. City 1988-6 (1988) (law firm that continues to represent defendant in connection with a criminal trial may not enter into a contract with a publisher or a movie or television producer until matter has been concluded). *See also* DR 7-107(E) (prior to sentencing, prosecutor shall not make "an extrajudicial statement that a reasonable person would expect to be disseminated by public communication and that is reasonably likely to affect the imposition of sentence"); DR 5-104(B); EC 2-21.

Even with respect to a representation that has been concluded, the lawyer proposing to sell media rights must be certain to continue to protect the confidences and secrets of the client. *See* N.Y. City 1988-6 (1988); N.Y. City 82-34 (1982). DR 4-101(B) prohibits a lawyer from revealing confidences or secrets or using them "for the advantage of himself or of a third person, unless the client consents after full disclosure." This duty of confidentiality exists without regard to whether others share the information or whether it is part of the public record or available from another source. *See* EC 4-4; N.Y. City 82-71 (1982); N.Y. City 82-34 (1982); N.Y. City 79-63 (1980). Furthermore, the duty of confidentiality expressed in Canon 4 survives the termination of the representation. EC 4-6; *see* ABA Inf. 1301 (1975); N.Y. City 1988-6 (1988).

The inquirer has also asked whether she can participate in the development of the assistant district attorney as a major character in the story. Despite the substantial relaxation of the rules against advertising, DR 2-101(A) still precludes a lawyer from participating in the preparation of any public communication containing statements or claims that are false, deceptive or misleading. *See* ABA Inf. 1423 (1978). Subject to that limitation and those contained in DR 2-101(B), we believe that an assistant district attorney may properly participate in the development of the character based on her.

We express no opinion as to whether advertising or publicity that is neither false nor misleading may, even though prohibited by the Code, nevertheless be protected by the Constitution. That is an issue of law that is beyond the jurisdiction of this Committee to resolve and upon which we cannot

opine. *See generally Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988); *In re R.M.J.*, 455 U.S. 191 (1982); *Bates v. State Bar*, 433 U.S. 350 (1977); *In re von Wiegen*; 63 N.Y.2d 163, 470 N.E.2d 838, 481 N.Y.S.2d 40 (1984), *cert. denied*, 472 U.S. 1007 (1985).

CONCLUSION

For the reasons stated, and subject to the foregoing ethical restrictions, the questions posed are answered in the affirmative.