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Committee on Professional Ethics

NYSBA

Opinion 620 - 3/21/91 (4-91)

Topic: Trial publicity; press release by district attorney; reference to physical evidence seized at time of arrest.

Digest: District attorney ordinarily may issue press release describing physical evidence seized at time of arrest, but may not state whether such evidence will be presented at trial.

Code: DR 7-107, 7-107(A), 7-107(B)(1), (3), (5), 7-107(C), 7-107(C)(7)(c).

QUESTION

May a district attorney issue a press release describing how the prosecution intends to use certain physical evidence seized at the time of arrest?

OPINION

Under the Code, as recently amended, there is a difference between issuing a press release that merely reports the physical evidence seized and a statement that includes the prosecution's intended use of that evidence at the trial. Since September 1, 1990, the effective date of amended DR 7-107, the latter statement is presumptively deemed improper.

Although the amended Code attempts to satisfy long-standing First Amendment concerns about *per se* prohibitions on various categories of expression, *see, e.g., Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975)("serious and imminent threat of interference with the fair administration of justice" required to support professional discipline), *cert. denied*, 427 U.S. 912 (1976); *Markfield v. Association of the Bar of the City of New York*, 49 A.D.2d 516 (1st Dep't), appeal dismissed, 37 N.Y.2d 794 (1975)("clear and present danger" required), the Code continues to express and differentiate certain basic norms of conduct in relation to trial publicity. These norms divide into safe harbors and areas of significant risk: Those kinds of statements that presumptively do not "have a substantial likelihood of materially prejudicing an adjudicative proceeding"; and those that "ordinarily" are "likely to prejudice materially an adjudicative proceeding." *Compare* DR 7-107(A) and (C) *with* DR 7-107(B); *cf., e.g.*, ABA Fair Trial Free Press Standards, § 8-1.1(a) (1978); *In re Hinds*, 90 N.J.

604, 449 A.2d 483 (1982); *Hirschkop v. Virginia State Bar*, 421 F. Supp. 1137 (E.D.Va. 1976), aff'd sub nom., *Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979).

Statements that refer to "the identity or nature of physical evidence expected to be presented" are "ordinarily" deemed "likely to prejudice materially an adjudicative proceeding." DR 7-107(B)(3). This provision is similar in its concerns to DR 7-107(B)(1), which more broadly condemns statements regarding "the expected testimony of a party or witness." In both instances, consistent with the amended Code's design to avoid absolute prohibitions in this area, the proscription depends upon the existence of such circumstances as would lead the lawyer reasonably to conclude that the statements "have a substantial likelihood of materially prejudicing an adjudicative proceeding." DR 7-107(A).

Statements that merely describe the physical evidence seized at time of arrest are not deemed as potentially prejudicial, however, as those that discuss the intended use of that evidence. The reason for this distinction lies in the logical distance or proximity of the two statements to what will happen at the trial, as well as the legal conclusion implicit in the latter statement. A balance is struck between the public's right to know and the needs of the judicial system in a way that common experience teaches will normally assure a fair trial.

Thus, DR 7-107(C)(7)(c) appears to protect statements that simply report "[t]he fact, time and place of arrest, resistance, pursuit, use of weapons, and a description of physical evidence seized." These are facts that the public reasonably ought to know; and, it is the kind of information which, if presented "without elaboration," will not normally prejudice the trial in a material way.

Nevertheless, the safe harbor suggested by DR 7-107(C)(7)(c) is not absolute. DR 7-107(C) contains an introductory proviso that relates back to the basic standard of DR 7-107(A). The lawyer must not make the statement if, under the particular circumstances of the case, the lawyer "knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding." *See, e.g.*, DR 7-107(B)(5).

Issuing a press release that describes how the prosecution intends to use the physical evidence seized is clearly outside the safe harbor recognized by DR 7-107(C) and within the area of material risk described by DR 7-107(B)(3). *See also* DR 7-107(B)(5). In our view, such a release would ordinarily be proscribed as a statement referring to "the identity or nature of physical evidence expected to be presented."

CONCLUSION

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