

OPINION No. 451

PUBLICATION OF LEGAL ARTICLE BY LAWYER RELATED TO A CLIENT'S CASE -- An attorney may publish an article in a law journal that is related to the subject matter of a client's case which does not prejudice the client.

AUTHORITIES CITED:

Formal Opinion No. 343

American Bar Association Informal Opinion No. 1090

California Rules of Professional Conduct 4-101, 5-101, 5-102, 7-108(b)

Morrison-Knudsen Co. v. CHG International, Inc., 811 F.2d 1209 (9th Cir. 1987)

North Mississippi Savings & Loan Association v. Hudspeth, 756 F.2d 1096 (5th Cir. 1985), cert. denied, 474 U.S. 1054 (1986)

A law journal has asked the Committee its opinion on the propriety of the publication of an article by an attorney ("A") on an issue pending before the United States Supreme Court in the following circumstances.

A represents a client ("C") with a claim against a failed savings and loan association, for which the Federal Savings and Loan Insurance Corporation ("FSLIC") has been appointed as conservator. After A obtained a writ of attachment for C in

Superior Court, C's case was dismissed by the California Court of Appeal, based on a legislative interpretation by the Fifth Circuit in North Mississippi Savings & Loan Association v. Hudspeth, 756 F.2d 1096 (5th Cir. 1985), cert. denied, 474 U.S. 1054 (1986) ("Hudspeth"), where the Fifth Circuit court ruled that 12 U.S.C. § 1729(d) gave the FSLIC the exclusive power to adjudicate claims against associations in receivership, and that 12 U.S.C. § 1464(d)(6)(C) prohibited courts from restraining the powers of the FSLIC as receiver in adjudicating such claims.

Thereafter, the Ninth Circuit rejected Hudspeth in Morrison-Knudsen Co. v. CHG International, Inc., 811 F.2d 1209 (9th Cir. 1987), and interpreted the same statutes to require the FSLIC to litigate claims through the judicial system. The United States Supreme Court has granted review in the Morrison-Knudsen case to resolve this dispute. If the Supreme Court upholds Morrison-Knudsen and rejects Hudspeth, A will have an opportunity to refile C's claim in an appropriate court.

A has submitted an article to the journal concerning the pending Supreme Court case involving the FSLIC's adjudicative powers, in which he argues that the best solution is a legislative compromise between the Hudspeth and Morrison-Knudsen approaches. The article discloses A's litigation on C's behalf in a footnote.

The ethical concern arises from the fact that the article advocates a position in a pending appeal that will

affect the rights of A's client, and that the article may possibly affect the outcome of the pending appeal.

The article does not take a position adverse to C. In consequence, A does not fall within the scope of rules 4-101, 5-101, and 5-102 of the California Rules of Professional Conduct, which prohibit an attorney from holding or representing conflicting interests.

Lawyers have a right to publish articles that may be of interest to the general public. The decision on whether to publish such an article is an editorial decision of the publisher, that is not constrained by the rules governing attorney conduct. The ethics problem, if any, is A's, and not the law journal's.

However, as an editorial policy, the law journal wants to know whether the publication of the article by A is a violation of A's ethical obligations. If so, in the exercise of its editorial discretion the journal may decide not to publish the article.

The Committee sees no impropriety in the publication of the article by A. The American Bar Association has stated that there is no ethical or other valid reason why an attorney may not write articles on legal subjects for magazines and newspapers. APA Informal Opinion No. 1090. The Committee does not consider publication of the article to be an improper attempt to influence the United States Supreme Court in a case that may affect the rights of A's client, C.

As an editorial decision, the law journal may want to disclose A's interest in related litigation on C's behalf. However, no ethics rule requires such disclosure.

In Opinion No. 343 a lawyer sought to publish a law review article dealing with an issue involved in a case on appeal in which he was counsel of record. The Committee expressed the opinion that such an article is permissible, and need not contain a disclosure of the attorney's involvement in the litigation.

Judges are accustomed to seeing and hearing materials on issues that may be pending before them. They are also accustomed to seeing articles on issues pending before them by writers who may have clients with interests in the outcome. Judges are not expected to isolate themselves from the rough and tumble of real life. They are expected to decide cases on the evidence that is properly before them. However, they are expected to use whatever resources may be available to define the applicable law. Judges are assumed to have the ability to disregard information (if appropriate) from interested persons on what the law should be, particularly where such interest is disclosed.

This opinion is advisory only. The Committee acts only upon specific questions submitted ex parte, and its opinions are based only upon such facts as are set forth in the questions submitted.