Protecting Client Confidences in an Environment of Ubiquitous Media:
Rule 3.6 of the ABA Model Rules of Professional Conduct

by
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Abstract: In 1887 Alabama became the first state bar in the country to adopt an official code of legal ethics that, among other concerns, attempted to regulate a lawyer's relationship with the media. While the essence of that original rule—recognizing the need to curtail dissemination of certain information about a party prior to trial in order to preserve the right to a fair trial—has not changed, the notion of who or what comprises the "media" has. The media of 1887, or indeed the media of 1987, do not define the media landscape of 2015. This paper provides some insight for the practitioner on two levels: first, a dive into defining the myriad contributors to and sources for what we know as the media today; and second, an examination of how courts and bar associations are responding to the ethical implications of the lawyer's relationship with this dynamic media environment.

I. Introduction

Most lawyers understand the ethical issues presented when a journalist calls asking for information about a pending lawsuit or investigation: do not say anything that could materially prejudice the matter. More often than not, law firm and corporate counsel policies dictate a terse "no comment" as the appropriate response and nothing more. But when is "no comment" not enough? Should "no comment" continue to be your response when your client becomes the target of a social media campaign replete with inaccurate information? At what point must the lawyer respond in rebuttal fashion with the intent of mitigating the adverse and prejudicial effects of the publicity? And who are the bloggers, citizen journalists, and networked individuals who function outside traditional media outlets?

Twitter launched in 2006, YouTube in 2005, Facebook in 2004, Myspace in 2003, and LinkedIn in 2002. Blogging (originating from the word "weblog") rose in popularity in the late 1990's as newly created web publishing tools meant that bloggers no longer needed to know HTML language to post content on the web. The ubiquity of electronic social media ("ESM") is unparalleled. As of January 2015, there were 1.4 billion Facebook users globally, and 157 million in the US and Canada. While initially behind the curve in acceptance and use, lawyers have rushed in over the last four or five years, and national, state and local bar associations—and the occasional court—have noticed. Altogether, these online forums have proved to be both a rich and risky resource for the connected lawyer.

The ABA's 2014 Legal Technology Survey Report[1] provides useful insight. Scattered among the results are statistics that reveal the legal industry's increasing use of ESM. The Survey incorporated responses from 850 lawyers nationwide, ranging from sole practitioners to mega-firms. One of the surveyed topics was the use of social media, and here the data show that 23.9% of law firms have legal blogs (a slight drop from 26.9% in 2013), with larger firms more likely to maintain blogs (62% of firms with more than 500 lawyers) than small firms. However you look at it, knowing that nearly a quarter of all law firms are active bloggers is notable. Looking at LinkedIn and Facebook, the Survey reported law firm use of these

[1] http://www.americanbar.org/publications/techreport/2014.html visited February 14, 2015.

ESM at 56% and 34%, respectively. Also worth noting is that 26% of individual lawyers stated that they used Facebook for professional purposes. Gone are the days when the sole product of a law firm's marketing reach was the printed and snail-mailed newsletter.

While 81% of lawyers say that they use social media, they add the caveat that their use is "not necessarily" for professional use. One wonders whether the following lawyers were intending their social media postings to be for professional or personal use:

- In May 2010, the Illinois Supreme Court suspended the license of an Illinois assistant public defender, who had been charged with revealing client identities and confidences in her blog, disparaging judges, and failing to advise the court of her client's false statements.

- In July 2012, a former assistant Commonwealth of Virginia attorney was charged with one count of posting a written threat to kill or do bodily injury to his former employer on Facebook.

- In July 2012, an assistant district attorney in Brooklyn was embarrassed when inappropriate and offensive pictures of himself—taken and posted while in college six years prior—surfaced online in the New York Post.

- In February 2013, Indiana Attorney General Jeffrey Cox engaged in a controversial Twitter conversation with a *Mother Jones* journalist who had been reporting on Wisconsin demonstrators protesting the actions of certain elected officials, and Wisconsin's use of riot police to contain the demonstrators. Cox had tweeted that the police should "use live ammunition" to disperse the demonstrators and called them "thugs." Cox later apologized, but was fired by the Indiana Attorney General's Office.

These are just a few examples. Suffice it to say that the major source of temptation—and danger—for attorneys is their use of ESM to express themselves in ways that can prejudice what should be a balanced and impartial system of justice. At odds with the necessary constraints established by our ethical rules are two critical components of every lawyer's practice: protecting, upholding, and exercising the freedom of speech with its constitutional guarantee and zealously representing our clients. Among the more traditional focuses on Rule 3.6—for example in the Supreme Court case of *Gentile v. State Bar of Nevada* discussed below—has been the constitutional tension between the lawyer's extrajudicial statement as a form of political speech protected by the First Amendment and the prejudicial nature of the statement itself. These cases involved the lawyers, their clients, and the media, typically print, radio and television. The lawyers made extrajudicial statements that were examined for their prejudicial effect, the media were third parties who disseminated the lawyers' statements, and every now and then one or more parties sought to enforce a gag order to keep the dissemination under control.

The focus in the last five years or so has shifted. As lawyers have used ESM, whether through intent or ignorance, to make public statements about their clients, the focus is less on gagging traditional media and more on gagging the lawyer. Courts have realized that a gag order may not be necessary when Rule 3.6 can accomplish the same thing.

II. Rule 3.6: The Duty of Protecting Client Confidences with regard to the Media

Rule 3.6(a) of the ABA Model Rules of Professional Conduct states: "***A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.***"

At first blush, this statement seems rather basic and straightforward. Similar to a lawyer's duty to maintain a client's confidences, Rule 3.6 requires lawyers to be circumspect about their public communication when participating in the investigation or litigation of a matter. The rub these days is the expansive nature of "public communication." Not only does this Rule embrace the traditional forms of public communication such as network and cable television, broadcast radio, and print media, but also the Rule includes the increasing and non-traditional forms of ESM, such as Facebook, Twitter, LinkedIn, YouTube, and blogs. As these forms of ESM continue to expand, capturing every bit of public communication from the material to the insignificant, it is ESM that poses the greatest ethical risk to lawyers.

Perhaps some of the challenge for lawyers is their unfamiliarity with the technology. While one cannot be expected to have a mastery of all things technological, it is imperative for lawyers to recognize their "techie" deficits and request either help or training. Under Rule 1.1, "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." The recommendation of help or training arising from Comment 8 to Rule 1.1, which states in part that "[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology . . .. " Bar opinions will chastise lawyers for claiming that they were unaware of a party's social media account, or that they didn't realize "deactivating" a Facebook account was not the same as deleting that account. Ignorance is not bliss—it is a violation of Rule 1.1 duty of competency, and downright dangerous when it comes to ESM.

While paragraph (a) of Rule 3.6 warns against making extrajudicial statements, paragraph (b) of the Rule lays out what a lawyer *may* state, and these are commonly referred to as the safe harbor provisions:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
(2) information contained in a public record;
(3) that an investigation of a matter is in progress;
(4) the scheduling or result of any step in litigation;
(5) a request for assistance in obtaining evidence and information necessary thereto;
(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
(7) in a criminal case, in addition to subparagraphs (1) through (6):
    (i) the identity, residence, occupation and family status of the accused;
    (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
    (iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

Most experienced litigators are comfortable with these safe harbor provisions, knowing with a fair amount of confidence what they can and cannot say in any given case. But change the circumstances a bit and add one or more of the following scenarios, and it becomes more challenging:

- Your client whether by name, deed, or association comes to you as a social media target. Critical and misleading information is picked up and magnified on Twitter. Previously private photos appear on Instagram. YouTube parodies are created.
- The legal position you are taking is adverse or antithetical to one or more hacktivist groups leading to massive distributed denial of service attacks upon your law firm's servers, paralyzing not just your effectiveness but that of your colleagues.
- Opposing parties in your matter openly take positions that are false or misleading, but sensationally appealing to a frenzied public.

In these situations, paragraph (c) of Rule 3.6 allows the lawyer to respond in a measured and careful manner:

> Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

There is an interesting balance that is conspicuous in its absence from the application of the gag order. Where the gag order becomes an absolute prior restraint with the exception of what a judge might allow in the way of extrajudicial statements under the order, paragraph (c) launches the lawyer out on her own to choose the statement, the media and the moment. Some successfully navigate this path, others are not so successful.

A recent and high profile example of using ESM for rebuttal purposes was in the Trayvon Martin murder trial. In an effort to counter the relentless criticism, George Zimmerman's defense team launched a website and established Facebook and Twitter accounts, claiming that they had to dispute misinformation and discourage speculation.[2] The website also sought donations for Zimmerman's legal defense fund.

III. Summary of Relevant Opinions and Rulings from the Bench and Bar

The Bench

Historically, there have been a number of high-profile cases in which a lawyer has been accused of making extrajudicial statements to the press that the lawyer knew or should have known would have a "substantial likelihood of materially prejudicing" the lawsuit or investigation. One of the most extensive discussions of the structure, features and restraints contained within Rule 3.6 in the context of ESM is from a U. S. district court in Alabama. In the 2012 case of *United States v. McGregor*, 838 F. Supp. 2d

[2] http://gzlegalcase.com/ viewed on February 22, 2015.

1256, 1263 (M.D. Ala. 2012), the Department of Justice alleged that eleven defendants participated in a bribery conspiracy to enact a state senate bill that would have authorized a constitutional referendum on electronic bingo.

Among the defendants were two well-known casino owners and four state senators. One of the DOJ's witnesses, Scott Beason, was a state senator who had worn a wire to record conversations during his meetings with the defendants. Media coverage was extensive: the DOJ held a press conference in Washington, D.C. to announce the indictment, and the defense attorneys for at least three of the defendants would "[o]n a nearly daily basis . . . talk to the press as they left the courthouse.[3]" The media established a live blog and Twitter account dedicated to the trial such that updates were conveyed on a close to real-time basis. In this highly-charged political environment, the court established special precautions to minimize the jurors' exposure to the media.

The first trial concluded with two defendants having pled guilty prior to trial, two defendants found not guilty on all counts and the remaining seven defendants were found guilty on some counts, but on others, the jury was unable to reach a verdict. Consequently, the government sought a retrial.

Six months passed before the retrial, but the media attention did not wane. Before the retrial the government moved for a gag order to prohibit any defense attorney or members of the defense teams from making any extrajudicial comments about the case.[4] The proposed order did not limit what the defendants could say or place any restrictions on media coverage. Indeed, the order proposed to allow the defense team to disseminate information pertaining to scheduling matters, such as what witnesses were testifying and when and other details that otherwise would have been part of the public record.

The issue before the court was whether a gag order was the appropriate restraint when its application was only to the parties' attorneys, not to the media or the parties themselves, and neither the Eleventh Circuit Court of Appeals nor the Supreme Court had addressed this precise question before. Thus, the McGregor court embarked upon its analysis using the two seminal Supreme Court cases on the question of gag orders generally: one in the matter of issuing a gag order against members of the press in *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976) and the other in determining the appropriate standard of punishment for attorney speech in violation of bar disciplinary rules. *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991). After a thoughtful and thorough analysis, the McGregor court declined to grant the government's motion, observing that the gag order (as drafted) "was not the least restrictive alternative and it would not have been fully effective in curbing trial publicity.[5]" The court determined that Alabama's Rule of Professional Conduct 3.6 was a "less restrictive alternative" that would strike an effective balance between "defense counsel's First Amendment rights and the government's interest in a fair trial.[6]"

There exists constitutional tension in applying gag orders in trial environments. In support of its own decision *not* to issue a gag order, the *McGregor* court quoted from a Fifth Circuit Court of Appeals decision that *did* issue a gag order: "Rule 3.6 is particularly instructive because an 'attorney's ethical obligations to refrain from making prejudicial comments about a pending trial will exist whether a gag order is in place or not.[7]'" Of particular interest was the McGregor court's quote from an Eleventh

[3] *United States v. McGregor*, 838 F. Supp. 2d 1256, 1259 (M.D. Ala. 2012)
[4] *Id* at 1260.
[5] *Id* at 1267.
[6] *Id*.
[7] *McGregor*, 838 F. Supp. 2d at 1264, *quoting United States v. Brown*, 218 F.3d 415, 428 (5th Cir. 2000).

Circuit Court of Appeals' case where the court had observed: "'Because of their legal training, attorneys are knowledgeable regarding which extrajudicial communications are likely to be prejudicial.[8]'"

While Alabama's Rule 3.6 is not a verbatim version of ABA Rule 3.6, it does mirror the basic structure of the ABA Rule, stating the general prohibition on extrajudicial remarks, the "safe harbor" section enumerating those statements that attorneys may make, and the authorization provision allowing attorneys to make statements to protect a client from "substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client.[9]" Thus, the McGregor court's analysis is instructive when weighing the reluctance courts have in placing a prior restraint on a lawyer's freedom of speech on the one hand with the existing limitations provided by Rule 3.6 on the public dissemination of extrajudicial communications on the other hand.

The United States Supreme Court's decision in *Gentile v. State Bar of Nevada*, explored a different tension at issue in Rule 3.6 (albeit one not involving ESM). In this 1991 case, Nevada defense attorney Dominick Gentile held a press conference hours after his client was indicted on criminal charges. Gentile read a brief opening statement and responded to questions from the media. On numerous occasions during the press conference, Gentile refused to elaborate when reporters sought further details, stating that his ethical obligations prohibited him from further comments.[10] The trial took place six months later and Gentile's client was acquitted on all charges. The Southern Nevada Disciplinary Board found that Gentile "knew or should have known that there was a substantial likelihood that the statements [he made] would materially prejudice [his client's] trial."[11] The Nevada Supreme Court affirmed and the U.S. Supreme Court reversed, finding the Nevada equivalent of Rule 3.6 void for vagueness.[12]

The Bar

In many instances, national, state and local bar associations have been quick to address the ethical implications posed by a lawyer's use of the many and varied tools offered through technological advances over the past fifteen years or so. Many will recall the consternation over whether use of email or "cordless and cellular phones" (as they were called back then) without special precautions was a violation of our rule to protect client confidences.[13]

The bar opinions selected below are specific to the issue of a lawyer's use of ESM in actual or potential violation of Rule 3.6.

Los Angeles County Bar Association
Professional Responsibility and Ethics Committee Opinion No. 525 December 6, 2012

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[8] *McGregor*, 838 F. Supp. 2d at 1264, *quoted in The News-Journal Corp. v. Foxman, 939 F.2d 1499, 1515 n. 18 (11th Cir 1991).*

[9] This statement is the same in both the Alabama version of this authorization provision and the ABA version. Not part of the ABA Rule, but reflected in the Alabama version of 3.6 is a subsection that describes examples of comments that would result in the "substantial likelihood of materially prejudicing" a criminal trial. *McGregor*, 838 F. Supp. 2d at 1263.

[10] *Gentile*, 501 U.S. 1030, 1050.

[11] *Id.* at 1065-66.

[12] The Nevada Rule at issue was "almost identical" to the version of the ABA Model Rule 3.6 at that time, although the Gentile court pointedly noted that it was NOT addressing the constitutionality of the ABA Rule. *Id.* at 1037.

[13] *See* ABA Formal Opinion No. 99-413, Protecting the Confidentiality of Unencrypted E-Mail: *"A lawyer may transmit information relating to the representation of a client by unencrypted e-mail sent over the Internet without violating the Model Rules of Professional Conduct (1998) because the mode of transmission affords a reasonable expectation of privacy from a technological and legal standpoint. The same privacy accorded U.S. and commercial mail, land-line telephonic transmissions, and facsimiles applies to Internet e-mail. A lawyer should consult with the client and follow her instructions, however, as to the mode of transmitting highly sensitive information relating to the client's representation."*

Ethical Duties of Lawyers In Connection With Adverse Comments Published By a Former Client

This case involved a lawyer who had previously represented an individual in a civil matter. The lawyer and the former client had no existing attorney-client relationship when the former client posted a website message about lawyers and specifically mentioned his/her former attorney, stating that the attorney was incompetent and had over-charged the former client and advised others seeking a lawyer to not contact this attorney.

The question presented was: "In what manner, if any, may Attorney publicly respond to disparaging public comments by Former Client, whether of malpractice or otherwise?" The advisory opinion of the LA County Bar assumed that no confidential information would be disclosed in this attorney's rebuttal to his/her former client, and that there was no litigation or arbitration pending between the parties.

The Professional Responsibility and Ethics Committee concluded in its advisory opinion that the attorney may publicly respond to the former client's comments as long as the rebuttal: (1) "does not disclose confidential information;" (2) does not "injure" the former client in any matter involving the prior representation; and (3) is "proportionate and restrained."

ABA Formal Opinion 466 April 24, 2014[14]
Standing Committee on Ethics and Professional Responsibility
Lawyer Reviewing Jurors' Internet Presence

This ABA Opinion addresses Model Rule 3.5(b) and lawyer's communication with a juror or prospective juror. While outside the scope of our discussion of Rule 3.6, the Opinion is notable for its position on distinguishing between two types of ESM communication: (1) one in which a network-generated response confirms that a lawyer has visited a juror's social media account and (2) one in which a lawyer directly communicates with a juror. The ABA Opinion cites two ethics opinions from New York, one from the Association of the Bar of the City of New York Committee on Professional Ethics and the second from the New York County Lawyers' Association Committee on Professional Ethics, and pointedly states: "The lawyer is not communicating with the juror; the ESM service is communicating with the juror based on a technical feature of the ESM. This is akin to a neighbor's recognizing a lawyer's car driving down the juror's street and telling the juror that the lawyer had been seen driving down the street.[15]" Notwithstanding the ABA Opinion that the network-generated communication is not a communication from the lawyer to the juror, the ABA Standing Committee on Ethics suggests (with an explicit nod to Rule 1.1, Comment 8 and the importance of a lawyer's being competent and current with technology) that "lawyers be aware of these automatic, subscriber-notification features. . . . While many people simply click their agreement to the terms and conditions for use of an ESM network, a lawyer who uses an ESM network in his practice should review the terms and conditions, including privacy features – which change frequently – prior to using such a network. And, as noted above, jurisdictions differ on issues that arise when a lawyer uses social media in his practice.[16]"

The Committee concluded:

[14] *See* http://www.americanbar.org/groups/professional_responsibility/publications/ethics_opinions.html for access to the ABA's Ethics Opinions.
[15] ABA Formal Opinion 466 at 5.
[16] *Id*. at 5.

"[A] lawyer may passively review a juror's public presence on the Internet, but may not communicate with a juror. Requesting access to a private area on a juror's ESM is communication within this framework.

. . .

The fact that a juror or a potential juror may become aware that the lawyer is reviewing his Internet presence when an ESM network setting notifies the juror of such review does not constitute a communication from the lawyer in violation of Rule 3.5(b).[17]"

Pennsylvania Bar Association
Ethics Opinion 2014-300[18]
Committee on Legal Ethics and Professional Responsibility
Ethical Obligations for Attorneys Using Social Media

This recent Pennsylvania Bar Association Opinion covers a wide swath of the social media pitfalls that can entangle today's practitioner. The opinion explains the basics of social media in nontechnical language, and provides guidance on ten broad topics, concluding that:

- Attorneys may advise clients about the content of their social networking websites, including the removal or addition of information.
- Attorneys may connect with clients and former clients.
- Attorneys may ***not*** contact a represented person through social networking websites.
- Although attorneys may contact an unrepresented person through social networking websites, they may not use a pretextual basis for viewing otherwise private information on social networking websites.
- Attorneys may use information on social networking websites in a dispute.
- Attorneys may accept client reviews but must monitor those reviews for accuracy.
- Attorneys may generally comment or respond to reviews or endorsements, and may solicit such endorsements.
- Attorneys may generally endorse other attorneys on social networking websites.
- Attorneys may review a juror's Internet presence.
- Attorneys may connect with judges on social networking websites provided the purpose is not to influence the judge in carrying out his or her official duties.

As with ABA Opinion 466, the Pennsylvania Bar opinion also points to the attorney's ethical obligation to provide competent representation, noting: "As a general rule, in order to provide competent representation under Rule 1.1, a lawyer should advise clients about the content of their social media accounts, including privacy issues, as well as their clients' obligation to preserve information that may be relevant to their legal disputes.[19]"

Summary

As the bench and bar struggle to navigate the transition from traditional media to ESM in the practice of law, so too do lawyers. Thus, a bit of time spent with Rule 3.6 and its components is informative.

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17 *Id*. at 9.

18 See https://www.pabar.org/public/committees/LEG01/ though it is for PA Bar members only.

19 PA Bar Association Ethics Opinion 2014-300 at 4.

Today's litigator cannot rest on his or her skill-set of ten or even five years ago. The relevant question is: If you are going to use a tool in the practice of law, shouldn't you be sufficiently knowledgeable and competent in its use *not* to place your clients at risk? If, as one public defender did, you post a photo of a client's leopard print underwear with a disparaging caption on Facebook so that it is available for all to view, would you not realize that such a posting would be a "public communication."? When you express your frustrations over a judge's ruling on your public blog, isn't that a "public communication?" Nowadays the standard communication forum consists of far more than a single telephone call, or a press conference, or a throng of reporters with microphones and audio recorders. It is often us: Lawyers using ESM and losing site of our professional boundaries via the quick and easy outlet ESM allows. We have become an extension of the Fifth Estate[20]. With that, we are both the message and the medium.

[20] Going back to the Middle Ages, three broad social orders, or "Estates," were created and referred to in order of their importance: the clergy (the First Estate), the nobility (the Second Estate), and the commoners (the Third Estate). The term "Fourth Estate" came later and includes all those who were outside the recognized hierarchy of the times, now commonly referred to as the independent media. The Fifth Estate—even lower in the social order—is comprised of bloggers, citizen journalists, and any media outlet that operates outside of what we consider to be the mainstream.