Ethical Rules for Litigating in the Court of Public Opinion

By Michael Downey – July 18, 2012

Lawyers are sometimes tempted to seek an advantage in a lawsuit by cultivating or influencing media attention to support their case. In other instances, lawyers may believe existing media attention is unjustly casting a negative light on the lawyers' clients, deserving a public response. Such situations reflect lawyers' admirable desires to advocate zealously for clients and to protect their clients' reputations as well as their legal interests.

The U.S. Constitution protects both the right of lawyers to speak in defense of their clients and the right of the public to learn about litigated matters. Yet, such protections and rights have limits. For lawyers, their rules of professional conduct provide four major limits. This article discusses these four limits: (1) the limit that American Bar Association Model Rule 3.6 imposes on extrajudicial statements during civil and criminal investigations and litigation; (2) additional limits that Model Rule 3.8(f) imposes on prosecutors regarding extrajudicial comments; (3) restrictions that Model Rule 8.2 places on criticisms of the judges; and (4) the prohibitions that Model Rule 8.4 contains against misrepresentations and conduct prejudicial to the administration of justice. In addition, this article addresses the rather unusual application of Federal Rule of Civil Procedure 11 to punish a lawyer for his use of the media in *Whitehead v. Food Max of Mississippi, Inc.*, 332 F.3d 796 (5th Cir. 2003) (en banc).

Model Rule 3.6 and Extrajudicial Statements about Pending Matters
"Substantial Likelihood of Materially Prejudicing a Proceeding"

Model Rule 3.6(a) states the fundamental principle that determines when public statements regarding pending matters are permitted and prohibited:

> 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.

This standard also likely governs dissemination of court pleadings, transcripts, and the like to the media without further comment. *See* Pa. Informal Op. 96-45 (June 21, 1996).

Model Rule 3.6(a) "sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding." Model Rules of Prof'l Conduct R. 3.6 cmt. [3]. In doing so, Model Rule 3.6 attempts to strike a balance between "protecting the right to a fair trial and safeguarding the right of free expression." Model Rules of Prof'l Conduct R. 3.6 cmt. [1].

When determining whether a particular statement is substantially likely to have a materially prejudicing effect on a proceeding, the comment to Model Rule 3.6 and other law indicates that at least five factors should be considered. The first factor is the subject matter of the statement, a topic discussed at length below.

The second factor relates to the nature of the proceedings involved. According to paragraph [6] of the comment, criminal jury trials are the "most sensitive to extrajudicial speech. Civil trials may be less

sensitive. Non-jury hearings and arbitration proceedings may be even less affected."

The third factor relates to whether the information disclosed is likely to be admissible or inadmissible at trial. Pennsylvania Informal Opinion 96-45 advises that if a lawyer concludes

> the information is likely to be inadmissible, then under Rule 3.6 [the lawyer] may not release this information to the media. However, if [the lawyer] reasonably feel[s] that this information is not likely to be inadmissible, [the lawyer] must then determine whether it can be disclosed without creating a substantial risk of prejudicing an impartial trial. If [the lawyer] reasonably conclude[s] that releasing this information will not create a substantial risk of prejudicing an impartial trial [the lawyer] then may release this information to the media.

See also Bush v. Commonwealth, 839 S.W.2d 550, 554 (Ky. 1992) (declaring, while considering the effects of a prosecutor's dissemination of information to a newspaper, "[a]mong other things, these rules prohibit dissemination of information that would be inadmissible evidence at trial").

Fourth, the timing of the disclosure relative to the anticipated start of jury selection or other sensitive proceedings should be considered. *Gentile v. State Bar of Nevada*, 501 U.S. 1031, 1079 (1991). Information disclosed at the start of a case, long before a jury will be empaneled, will be less likely to result in discipline than the public release of significant information on the eve of or during trial.

The fifth factor reflects whether the information disclosed was previously disclosed to the public. Disclosing new and shocking information makes discipline more likely.

Ultimately, these five factors, plus any other relevant facts, must be considered to determine whether an extrajudicial statement will result in either of two evils: (1) a likely influence on the "actual outcome of the trial" or (2) a likely prejudice to the jury venire "even if an untainted panel can ultimately be found." *Id.* at 1076. If there is a substantial likelihood an extrajudicial statement will result in either of these evils, Model Rule 3.6(a) generally bars such communications. If the evils are not likely to result, however, the communication generally should not violate Model Rule 3.6(a). As discussed in *In re Brizzi*, 962 N.E.2d 1240, 1244 (Ind. 2012), courts typically look at the likelihood of prejudice. Proof of actual prejudice is not required.

Model Rule 3.6(a) Reaches Only Limited Categories

Model Rule 3.6(a) does not encompass all communications by a lawyer. Model Rule 3.6 is limited to "extrajudicial statements" and thus does not apply to statements made in court or other legal proceeding.

Model Rule 3.6 also regulates only communications the lawyer "knows or should know will be disseminated by means of a public communication." Thus, if the lawyer did not realize a reporter or means of public dissemination was present and reasonably expected that the communication would not be publicly disseminated, the lawyer may avoid discipline for an otherwise prejudicial communication.

Further, Model Rule 3.6(a) focuses only on a lawyer's extrajudicial communications about and during the pendency of an adjudicative proceeding. The rule generally does not limit post-proceeding communications. *In re Sommers*, 811 N.W.2d 387 (Wis. 2012) ("Attorney Sommers has every right to publicly criticize the district attorney's office. However, engaging in pretrial publicity consisting of speculation, unproven allegations, and release of inadmissible evidence in a manner likely to prejudice the integrity of the judicial process may violate [Wisconsin's version of Rule 3.6]."); *see also* Ill. State Bar Ass'n Op. 93-19 (May 1994). And Model Rule 3.6 does not restrict a client's conduct, as long as the client is not serving merely as a conduit for the lawyer's communications. *See* 1998 N.C. Ethics Op. 4 (Apr. 17, 1998); Pa. Informal Op. No. 94-27.

Model Rule 3.6 Does Not Restrict All Lawyers

Under Model Rule 3.6(d), the prohibition contained in Model Rule 3.6(a) applies only to lawyers who participate in the investigation or litigation and lawyers who are "associated in a firm or government agency" with lawyers who are participating or have participated in the investigation or litigation of the matter.

Thus, the rule does not prevent lawyers whose firms are not involved in a matter from speaking publicly on the matter. A lawyer retained by a news station to discuss a matter, but not otherwise involved in the matter, could therefore make statements likely to prejudice the outcome of the matter without violating the current version of Model Rule 3.6. However, as discussed later, such statements may violate Model Rule 8.4 or similar provisions.

Moreover, some jurisdictions continue to employ older versions of Model Rule 3.6 that do not limit the reach of the prohibition against extrajudicial statements to those lawyers whose firms or agencies are participating in the investigation or litigation. The earlier version states only that "[a] lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding."

Types of Communications Presumed to Be Unduly Prejudicial
Comment paragraph [5] to Model Rule 3.6 warns that certain types of extrajudicial statements are "more likely than not to have a prejudicial effect on a proceeding." Specifically targeted are statements regarding the following:

> (1) the character, credibility, reputation, or criminal record of a party, suspect in a criminal investigation, or witness, or the identity of a witness, or the expected testimony of a party or witness;
>
> (2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;
>
> (3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;
>
> (4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;
>
> (5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or
>
> (6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

This list of presumably impermissible subjects has likely been placed in the comment to Model Rule 3.6, not the rule itself, because in *Gentile v. State Bar of Nevada* several Supreme Court justices were critical of a list of presumptively impermissible topics and ambiguities that arose when that list was examined together with the rest of Model Rule 3.6. *Gentile*, 501 U.S. at 1079 (Rehnquist, C.J., dissenting). Despite such criticism, some states retain the list of presumptively impermissible communications in their rule even after other recent amendments (for example, Rule of Professional Conduct 3.6 for Alabama, Mississippi, and West Virginia), and a handful of other states have not yet updated their rule to reflect the criticism in *Gentile* or the resulting changes to Model Rule 3.6.

Several topics presumed prejudicial to proceedings relate specifically to criminal proceedings. This reflects the comment's recognition that certain types of proceedings, notably civil matters triable to a jury, criminal matters, and matters that could result in incarceration, are particularly likely to be prejudiced by extrajudicial statements. *See* Model Rules of Prof'l Conduct R. 3.6 cmt. [6]. These concerns further explain the additional limits on extrajudicial comments (discussed below) that Model Rule 3.8(f) imposes on prosecutors.

Statements Presumed Not Likely to Create Material Prejudice
While the comment sets forth a list of topics presumed to create prejudice, Model Rule 3.6(b) itself provides a "safe harbor" of statements that a lawyer can publish with considerably less concern about whether a pending adjudication may be substantially prejudiced. According to Model Rule 3.6(b), and the majority of comparable state rules, there are seven categories of information that presumably may be disclosed publicly:

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.

This list is not intended to be an exhaustive list of topics on which extrajudicial statements are permitted. Rather, Model Rule 3.6(b) is intended only to provide lawyers with a list of categories they can discuss publicly with little fear of violating the rules of professional conduct. *See* Model Rules of Prof'l Conduct R. 3.6 cmt. [4]. For an interesting case discussing application of the safe harbor where a lawyer effectively paraphrases statements in the public record, see *PCG Trading, LLC v. Seyfarth Shaw, LLP*, 460 Mass. 265, 951 N.E.2d 315 (Mass. 2011).

Yet, some jurisdictions emphasize that the safe-harbor list does not offer absolute safety. Connecticut Informal Opinion 99-3 warns, "The language [of the safe-harbor provisions] should be used as a guidepost to aid a lawyer in evaluating areas that are most and/or least likely to violate the Rule." Consistent with this recognition that even the topics listed in Model Rule 3.6(b) are not automatically safe, some jurisdictions have moved the safe-harbor list to the comment or omitted the list of safe-harbor topics altogether. *See, e.g.*, Conn. Rules of Prof'l Conduct R. 3.6 (safe harbor in the comment); D.C. Rules of Prof'l Conduct R. 3.6 (omitting the safe harbor language altogether).

The topics listed in Model Rule 3.6(b) may also not be safe when some other provision of law prohibits disclosure of the information. Comment paragraph [2] to Model Rule 3.6 specifically cautions that certain types of proceedings, such as those involving juveniles, may have additional limitations against extrajudicial statements. Further, Comment paragraph [2] reminds the reader that Model Rule 3.4 requires a lawyer to comply with virtually all orders, including any confidentiality, gag, or similar order that a court might enter. Other obligations, notably a lawyer's duty of confidentiality, may likewise prevent disclosure even of statements fully within safe-harbor topics and not prejudicial to a proceeding. *See, e.g.*, *Sealed Party v. Sealed Party*, Case No. Civ.A. H-04-2229, 2006 WL 1207732 (S.D. Tex. May 4, 2006) (finding breach of fiduciary duty for publication of the terms of a confidential settlement, but determining plaintiff had failed to prove damages).

Finally, despite the general acceptance of these safe-harbor provisions, some jurisdictions nevertheless advise lawyers not to be overly aggressive in seeking media coverage for pending litigation. Addressing a lawyer's contemplated issuance of an unsolicited press release about malpractice litigation and a sanctions motion against another law firm, Pennsylvania Informal Opinion No. 99-135 states:

> The Inquirer was cautioned that, although there is no absolute prohibition against an attorney issuing a press release, as a general rule there is seldom, if ever, a need to issue press releases in a pending matter. Certainly, under the facts provided in this inquiry, it would be inappropriate for the Inquirer to spontaneously issue a press release describing the events that have transpired in the malpractice action, the content of the pending Motion for Sanctions, as well as revealing information contained from the public record, in the absence of some inquiry from the news media where the law suit is not generally the subject of public notoriety. It is clear that the public dissemination of such a news release would have a substantial likelihood of materially prejudicing the pending proceeding and would serve no purpose in that proceeding.

While this may be wise counsel, it appears somewhat contrary to the recognition of lawyers' First Amendment rights in *Gentile v. State Bar of Nevada*.

Right of Reply

In addition to specifying certain topics as "safe" topics, Model Rule 3.6 attempts in subpart (c) to provide greater freedom for a lawyer whose client is attacked in the press by specifying a right to reply. Under Model Rule 3.6(c), 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." This right of reply, however, is limited only to "such information as is necessary to mitigate the recent adverse publicity." *See also* Model Rules of Prof'l Conduct R. 3.6 cmt. [7].

Additional Limits Model Rule 3.8(f) Imposes

As noted above, the Model Rules note criminal proceedings may be particularly vulnerable to prejudice from extrajudicial statements. Reflecting that much of this concern arises from possible statements by prosecutors, Model Rule 3.8(f) imposes two additional limits on prosecutors. First, prosecutors should "refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused" unless such statements are "necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose." In dictain *Hollywood v. Superior Court*, 43 Cal. 4th 721, 732, 182 P.3d 590, 598 (Cal. 2008), the California Supreme Court warned that an attorney "may not make extrajudicial statements he or she 'reasonably should know . . . will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.'"

Second, Model Rule 3.8(f) requires a prosecutor to "exercise reasonable care" in preventing investigators and other law enforcement personnel or similar agents from making statements not permitted under Model Rule 3.6 or 3.8. Paragraph [5] of the comment to Model Rule 3.8 makes clear that this requirement is not intended to negate the safe-harbor provision in Model Rule 3.6(b) or the right of reply in Model Rule 3.6(c) discussed above.

Model Rule 8.2 Limits Criticism of Judges

While Model Rule 3.6 provides the primary framework for regulating extrajudicial public statements by

lawyers, Model Rule 8.2 provides specific restrictions on criticisms that may be voiced about judges as well as judicial candidates. Model Rule 8.2(a) states:

> A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

This rule applies to public comments made through the media (*e.g.*, *Kentucky Bar Ass'n v. Prewitt*, 4 S.W.3d 142, 143 (Ky. 1999) (press release to newspapers)), as well as more private communications (*e.g.*, *Attorney Grievance Comm'n of Md. v. Hermina*, 842 A.2d 762 (Md. Ct. App. 2004) (private letter to opposing counsel). Further, unlike Model Rule 3.6, Model Rule 8.2 likely limits criticisms that may be made by lawyer-commentators, for Model Rule 8.2 has been found to govern even comments a lawyer has made when acting as a "private citizen" instead of as a lawyer. *See Notopoulos v. Statewide Grievance Comm'n*, 857 A.2d 424, 432 (Conn. App. Ct. 2004).

Model Rule 8.2 is generally interpreted in a manner that is consistent with the prohibition against making false statements contained in Model Rule 8.4(c). But Rule 8.2 broadens potential disciplinary liability to statements made with "reckless disregard" for the truth or falsity of the statement when the statement concerns the "qualifications or integrity" of a judge.

Jurisdictions vary regarding whether Rule 8.2 should be evaluated on a subjective or an objective basis. For example, the Colorado Supreme Court has required a subjective test and a showing of malice. *In re Green*, 11 P.3d 1078 (Colo. 2000). But the Minnesota Supreme Court has used an objective test that evaluates what a reasonable lawyer would have known under the circumstances. *In re Nathan*, 671 N.W.2d 578, 585 (Minn. 2003).

Model Rule 8.2 does not restrict two types of statements. First, Model Rule 8.2 does not limit true statements a lawyer may make. To benefit from this exemption, however, a lawyer ordinarily must bear the burden of proving the factual basis for his or her statements criticizing a judge's qualifications or integrity. *Notopoulos*, 857 A.2d at 430. *But see Standing Comm. on Discipline v. Yagman*, 55 F.3d 1430, 1441 (9th Cir. 1995) (requiring the disciplinary authority seeking to impose sanctions to demonstrate the statements were false). Second, Rule 8.2 does not limit statements of opinion. This exception, however, is normally narrowly construed. *See In re Green*, 11 P.3d 1078.

Further, Model Rule 8.2 is not intended to limit statements that provide social benefit, notably honest and candid assessments of judges or judicial candidates. *See* Model Rules of Prof'l Conduct R. 8.2 cmt. [1]. Therefore, lawyers can provide their opinion about judges for voter surveys and the like with little concern that such answers might result in disciplinary sanctions.

Model Rule 8.2 therefore has some unique limitations, but those limitations are quite different from the limitations imposed by Rule 3.6. For example, under Model Rule 8.2, a lawyer may be disciplined for false criticisms of a judge made privately or after a proceeding, but such comments would not violate Model Rule 3.6. Likewise, a lawyer may face discipline under Model Rule 3.6 for true statements that prejudice a proceeding, although making such statements would likely not violate Model Rule 8.2.

What Model Rule 8.4 Restricts

In addition to the specific requirements established in Model Rules 3.6 and 8.2, Model Rule 8.4—sometimes referred to as the "catchall provision"—has been used to discipline lawyers for public statements concerning judges and proceedings. Two subsections of Model Rule 8.4 are normally used as the basis for such discipline.

First, Model Rule 8.4(c) makes it improper for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Model Rule 8.4(c) generally has a broad application, and it has been used to punish lawyers who attempt to not only use but also mislead the press.

In *Iowa Supreme Court Board of Professional Ethics & Conduct v. Visser*, 629 N.W.2d 376 (Iowa 2001), a lawyer was admonished for violating Iowa's version of Rule 8.4(c) after writing a letter to a newspaper that overstated a judge's disapproval of an opposing party's claims. The lawyer had written that a judge had "already determined [the opposing party was] unlikely to succeed on the merits of his far-fetched claims," but the judge had made this comment only with regard to one of the party's two lawsuits, and the two lawsuits involved different claims. *Id.* at 383.

Second, Model Rule 8.4(d) states that it is improper for a lawyer to "engage in conduct that is prejudicial to the administration of justice." This provision was recently used to punish a lawyer for conduct that also violated another provision of the rules of professional conduct. In *Mississippi Bar v. Lumumba*, a lawyer told a local newspaper that a judge "had the judicial temperament of a barbarian." 912 So. 2d 871, 875 (Miss. 2005). This comment was made after trial and thus could not serve as a basis for discipline under Model Rule 3.6, but the Mississippi Supreme Court found that the communication constituted conduct unbecoming a member of the bar and prejudicial to the administration of justice, and thus affirmed a sanction imposed under Rule 8.4(d). The court also concluded this criticism violated Rule 8.2. Several justices dissented, however, arguing that the statements to the media were protected by the First Amendment and too remote temporally to prejudice the proceedings.

Model Rule 8.4(d) has also been used to discipline lawyers when their public comments probably would not give rise to discipline under other provisions. For example, in *In re Swarts*, 30 P.3d 1011 (Kan. 2001), the Kansas Supreme Court upheld discipline imposed against a county prosecutor who advised a father to chain his child to a bed and who supported corporal punishment—including providing a paddle at the courthouse—despite a Kansas Department of Social and Rehabilitation Services policy against corporal punishment. *Id.* at 1025. The *Swarts* opinion does not suggest these comments related to a particular proceeding, so the statements probably did not violate Kansas's version of Rule 3.6, and the lawyer was not speaking about a judge, so Rule 8.2 was not implicated. Nevertheless, discipline could be and was imposed under the catchall provision, Rule 8.4.

Limitations under Rule 11

Finally, rules that limit court filings and related conduct may also apply to case-related publicity. A somewhat unusual example of this is the en banc decision that the U.S. Court of Appeals for the Fifth Circuit issued in *Whitehead v. Food Max of Mississippi, Inc.*, 332 F.3d 796 (5th Cir. 2003) (en banc). In *Whitehead*, plaintiffs' counsel obtained a $3.4 million judgment against Kmart related to Kmart's alleged failure to provide adequate supervision of a parking lot from which the plaintiffs were abducted. (One plaintiff was subsequently raped.) With the media in tow and accompanied by federal marshals, plaintiffs' counsel then attempted to execute on the judgment by seizing the money in the Kmart store's cash registers and vault.

After thwarting these efforts, the district court imposed sanctions against plaintiffs' counsel under Federal Rule of Civil Procedure 11. The Fifth Circuit sitting en banc affirmed on the basis that Rule 11 prohibits filing a pleading for "any improper purpose, such as to harass" an opposing party, and the lawyer in *Whitehead* had staged the public execution to "embarrass Kmart and advance his personal position"—two purposes the Fifth Circuit agreed were improper. *Id.* at 808.

Conclusion

Media reports on pending cases have caused problems in litigation since almost the dawn of the Republic. More than 200 years ago, while presiding over the treason trial of former vice president Aaron Burr, Chief Justice John Marshall complained, "[T]he public mind had been so filled with prejudice against [the defendant] that there was some difficulty in finding impartial jurors [because of the] the inflammatory articles which had been published against [him] in the *Alexandria Expositor* and other newspapers." *United States v. Burr*, 25 F. Cas. 49, 49 (C.C.D. Va. 1807) (No. 14692g).

Today, a battery of legal principles and ethical rules seek to circumvent such problems while allowing lawyers to speak and the press to report on noteworthy legal proceedings. I would not be surprised if the Supreme Court revisits the boundaries for permissible communications between lawyers and the press. Until that time, a lawyer seeking to litigate in the court of public opinion should study the rules carefully or disclose promptly and limit statements to matters that are true, already matters of public record, and not related to evidence likely to be deemed inadmissible.

Keywords: litigation, ethics and professionalism, media, Model Rules of Professional Conduct, prejudice, fair trial, extrajudicial, trial publicity

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