WHAT SORTS OF EXTRAJUDICIAL SPEECH SHOULD THE RULES OF PROFESSIONAL CONDUCT BE CONSIDERED TO PROHIBIT?

By Kip Purcell

If the life of the law has been experience, experienced lawyers have often been the life of the party in the media's coverage of American courts. As their clients' designated champions, and as the high priests of a profession that the public frequently finds fascinating, lawyers are an irresistible source for journalists seeking insight into the intricacies of civil and criminal justice. Some attorneys, of course, want nothing to do with the limelight; but many others regard media relations as an inescapable facet of full-service lawyering. To what extent do the rules of professional conduct permit lawyers to cooperate with the media, or even court media attention, concerning a pending case?

Lawyers understand that their speech can never be completely free. Scattered throughout the rules of professional conduct are references to communications in which lawyers cannot engage under any circumstances, whether within or without the courtroom, via the media or otherwise. Thus, for example, the rules categorically condemn disclosures of "information relating to the representation of a client" that are neither authorized by nor for the benefit of the client,[1] "knowingly … false statement[s] of material fact or law,"[2] "false or misleading communication[s] about the lawyer or the lawyer's services,"[3] false statements (made knowingly or with malice) "concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer,"[4] and communications that "state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law."[5] But aside from forbidding lawyers to spill client confidences, to lie, to indulge in deceptive self-promotion, to defame judicial officers, and to brag about their ability to game the system,[6] what limits do the rules place on a lawyer's out-of-court speech about an ongoing case?

The relevant Model Rule is 3.6, entitled "Trial Publicity." Its central commandment is contained in paragraph (a):

> 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.

Lawyers who long for clear boundaries – who would be perfectly happy, for example, with an inventory of the seven words that a lawyer can never say on television – are likely to be disappointed by this formulation. Far from supplying bright-line proscriptions, the rule requires a lawyer to become an oddsmaker: she must calculate whether her words "will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." It is a speech-chilling task, but one that the Supreme Court has found to be entirely constitutional.[7] At least 45 states, and about half of the nation's federal judicial districts, require lawyers to edit

themselves in accordance with this standard.[8] And prosecutors must be even more circumspect. Because they have professional obligations not only to represent their government clients zealously, but also to see that justice is done – and because the government regulates them not only as citizens, but also as employees – prosecutors are enjoined to "refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused," "except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and serve a legitimate law enforcement purpose."[9]

To be sure, Rule 3.6 incorporates a number of safe harbors for extrajudicial speech, and it provides loquacious lawyers with substantial comfort in other respects as well. First, by addressing itself to "lawyer[s] who [are] participating or ha[ve] participated in the investigation or litigation of a matter,"[10] the rule enables pundits and other legal commentators to ply their trade without fear of professional reproach, provided that they remain uninvolved with the "matter" in question. (But no such immunity is available to the participating lawyers' partners and associates, to all of whom the expressive disability imposed by paragraph (a) is imputed.)[11] Second, paragraph (b) of the rule sets forth a laundry list of topics that a litigator may tackle extrajudicially "[n]otwithstanding paragraph (a)" – in other words, even if the lawyer "knows or reasonably should know" that their public dissemination "will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." Among these free shots are "information contained in a public record,"[12] "a request for assistance in obtaining evidence and information necessary thereto,"[13] and "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."[14] Finally, and also "[n]otwithstanding paragraph (a)," the rule creates a qualified privilege of proportional response to recent extrajudicial chatter that the lawyer reasonably believes would otherwise cause "substantial undue prejudice[e]" to the client, as long as lawyer and client themselves did not initiate the publicity.[15]

Outside these refuges, however, a lawyer contemplating the possibility of expressing herself extrajudicially is thrown back upon the question whether her speech "will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."[16] How should she go about answering it?

Legal ethics authorities have identified two principal ways in which extrajudicial communications might "materially prejudice an adjudicative proceeding." First, a lawyer's statements to the press might "influenc[e] or intimidat[e] a prospective witness."[17] It is easy enough to envision how a mob lawyer, for example, might run afoul of the rule by publicly proclaiming his intention to ferret out the identities of the informants against his client and hold them accountable for their malicious lies.[18] Suppose, however, that in the course of decrying the weakness of the government's case against her client, a lawyer disparages the government's star witness and vows to destroy his credibility on cross-examination. Would this statement be substantially likely to accomplish any material incremental intimidation beyond the terrors that the courtroom itself holds? Analogously, when an athlete grabs the microphone to talk trash before the game, does he gain any additional psychological edge over his adversary, or does he merely heighten public anticipation of the main event? No rule of professional conduct can or should prohibit attorneys from encouraging the audience to tune in to the trial itself.

The more commonly articulated concern about permitting lawyers to discuss their ongoing cases with the media is that they will unfairly influence the decisionmakers outside the carefully controlled confines of the courtroom. Again, however, except in extreme cases, no one should lightly assume that the decisionmakers are the contemporary lawyer's intended audience. In a society as complex as ours, lawyers speak through the media to their clients' customers, creditors, shareholders, regulators, present and prospective employers and business partners, and potential litigation adversaries, among others – all of them clamoring for progress reports in real time. Gone are the days, if they ever existed, when a lawyer's only job was to win the case. The court of public opinion demands at least a portion of the lawyer's attention.

In what circumstances, then, should a lawyer nevertheless anticipate that his public statements outside the courtroom "will have a substantial likelihood of materially prejudicing an adjudicative proceeding" by swaying the decisionmakers? ABA commentary on Rule 3.6 identifies "certain subjects that are more likely than not to have a material prejudicial effect," including (among others) "the character, credibility, reputation or criminal record of a party," "the performance or results of any examination or test," "any opinion as to the guilt or innocence of a defendant," and, in general, "[prejudicial] information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial."[19] But the context of any such extrajudicial statement is surely critical to its propriety. When the press asks defense counsel for comment on the recent indictment of his client, no one expects him to say, "I guess we'll just have to wait for the verdict, won't we?" In some settings, a lawyer's self-restraint may do his client a grave disservice without contributing anything to the fairness of trial.

Consider four situations. In the first, the case will be tried to the bench. Day in and day out, we trust judges to compartmentalize – to consider whether evidence is admissible, to rule that it is not, and to remain impartial regardless. In bench trials, we routinely expose them to evidence that a jury would never be allowed to hear, and we still expect them to decide the whole case fairly at the end of the day.[20] Then why should we worry that their judgment will be hijacked by something that a lawyer says to a journalist? While recognizing that the prospect of prejudice is remote when a judge serves as the adjudicator, the ABA insists that Rule 3.6 "still place[s] limitations on prejudicial comments in these cases."[21] But the circumstances in which the rule might come into play are difficult to imagine.[22]

Next, consider a case that has just begun, and in which the parties have demanded a jury. What should the lawyers "reasonably know" about the "likelihood of material[] prejudic[e] [to] an adjudicative proceeding" if they talk to the press at that juncture? They know, first of all, that adjudication itself is substantially unlikely: plea bargains are probable in prosecutions for all but the most heinous crimes, and civil lawsuits are overwhelmingly resolved by settlement.[23] They know that newspaper readership is declining, and that a substantial majority of households have more than 500 cable and satellite channels among which to surf.[24] They know that even with respect to legal affairs that manage to penetrate the public consciousness, memories are notoriously short.[25] They know that in the unlikely event that their case captures and holds the public's attention, they themselves wield little power to pollute the jury pool; as Hazard and Hodes put it, "[i]n a sea of pretrial publicity, the droplets of information contributed by the lawyers are in fact very unlikely to materially prejudice a trial."[26] And they know, as an empirical matter, that adverse publicity almost never affects the fairness – or even the cost or

convenience – of an adjudicative proceeding.[27] Voir dire almost always suffices to filter out its injurious effects. Granted, the Supreme Court has declared that voir dire itself "entail[s] serious costs to the system"[28] – but if so, they appear to be the costs of doing judicial business in an information age. With or without lawyer speech, the system would still need to incur them.

Consider a third scenario: a jury is seated, and trial is in progress. Should a lawyer know that if she talks to the press during trial, her words will have "a substantial likelihood of materially prejudicing" the proceeding? At least if the jury is sequestered, she should be able to speak freely. But even if the jury's only protection against outside influences is the judge's admonition not to read the newspapers or watch TV, the lawyer should be able to bank on the jury's compliance. We routinely "adhere to the crucial assumption underlying our constitutional system of trial by jury that jurors carefully follow instructions."[29] Why should we assume otherwise here?

Plainly, the most substantial likelihood of material prejudice surrounds remarks that a lawyer makes on the eve of trial – and before the jurors have been instructed not to listen to them – on subjects that could never come into evidence. In that situation, professional discipline seems justified, not only because the fairness of the proceeding is imperiled, but also because it is hard to avoid the conclusion that an unfair advantage is exactly what the lawyer aims to gain.[30] But the less strongly a lawyer's extrajudicial speech resembles an eleventh-hour end run around the rules of evidence, the more readily we should absolve him of professional misconduct. Even lawyers have First Amendment rights.

---

[1] Model Rules of Prof'l Conduct R. 1.6(a) (2004).
[2] Model Rules of Prof'l Conduct R. 4.1(a) (2004).
[3] Model Rules of Prof'l Conduct R. 7.1 (2004).
[4] Model Rules of Prof'l Conduct R. 8.2(a) (2004).
[5] Model Rules of Prof'l Conduct R. 8.4(e) (2004).
[6] To this list it is tempting to add "engag[ing] in conduct intended to disrupt a tribunal." Model Rules of Prof'l Conduct R. 3.5(d) (2004). But the better view is that Rule 3.5(d) speaks exclusively to courtroom decorum and tells us nothing about the acceptability of extrajudicial speech. "If a lawyer takes action outside a courtroom setting, it is virtually impossible that it could 'disrupt' a tribunal or be intended to do so, and Rule 3.5([d]) should not apply." 2 Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering § 31.6, at 31-8 (3d ed. 2007).
[7] See Gentile v. State Bar, 501 U.S. 1030, 1065-76 (1991) (holding that "the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press," and therefore rejecting contention that nothing short of "clear and present danger" would justify professional discipline).
[8] United States v. Wecht, 484 F.3d 194, 206 nn.11-12 (3d Cir. 2007).
[9] Model Rules of Prof'l Conduct R. 3.8(f) (2004).
[10] Model Rules of Prof'l Conduct R. 3.6(a) (2004).
[11] See Model Rules of Prof'l Conduct R. 3.6(d) (2004).
[12] Model Rules of Prof'l Conduct R. 3.6(b)(2) (2004). The scope of this protection, however, may be subject to some dispute. See, e.g., Attorney Grievance Comm'n v. Gansler, 835 A.2d 548, 567, 569 (Md. 2003) (construing "information contained in a public record" as matter of first impression to include "anything in the public domain, including public court documents, media reports, and comments made by police officers," but warning that it would henceforth refer only to "public government records – the records and papers on file with a government entity to which an ordinary citizen would have lawful access").
[13] Model Rules of Prof'l Conduct R. 3.6(b)(5) (2004). This provision could conceivably encompass paid advertisements soliciting witnesses. Cf., e.g., Rodriguez v. Feinstein, 734 So. 2d 1162, 1164-65 (Fla. Dist. Ct. App. 1999) (per curiam) (invalidating broad gag order in medical malpractice action, notwithstanding plaintiff's counsel's advertising aimed at locating defendant doctor's other patients).

[14] Model Rules of Prof'l Conduct R. 3.6(b)(6) (2004).
[15] Model Rules of Prof'l Conduct R. 3.6(c) (2004).
[16] Model Rules of Prof'l Conduct R. 3.6(a) (2004).
[17] Restatement (Third) of the Law Governing Lawyers § 109(1) (2000).
[18] Cf. United States v. Megale, 235 F.R.D. 151 (D. Conn. 2006) (suggesting that criminal defense attorney had violated Rule 3.6 by supplying cooperating witness's surname to the press after an open hearing in which he had gratuitously disclosed witness's first name and nickname).
[19] Model Rules of Prof'l Conduct R. 3.6 cmt. 5 (2004).
[20] See, e.g., Fed. R. Evid. 103(c), 104(a), 403.
[21] Model Rules of Prof'l Conduct R. 3.6 cmt. 6 (2004).
[22] In Mississippi Bar v. Lumumba, 912 So. 2d 871 (Miss. 2005), the court held that a lawyer who had told a newspaper reporter that a judge "had the judicial temperament of a barbarian" – at a time when the judge had the lawyer's posttrial motions under advisement – had not only impugned "the qualifications or integrity of a judge" in contravention of Rule 8.2(a), but had also violated Rule 8.4(d) by engaging in "conduct that is prejudicial to the administration of justice." 912 So. 2d at 875, 881-86. Prejudice to "the administration of justice" is a concept far more expansive, and more subjective, than prejudice to a particular "adjudicative proceeding" under Rule 3.6; it has the capacity to cover any conduct that a disciplinary board finds distasteful.
[23] See, e.g., Patricia Lee Refo, The Vanishing Trial, Litig., Winter 2004, at 2, 2 (noting that the number of federal criminal trials declined from 1962 to 2002 even though criminal filings doubled, and that only 1.8% of federal civil cases were disposed of by trial in 2002).
[24] See George F. Will, Fraudulent "Fairness", Newsweek, May 7, 2007, at 72; see also, e.g., Carter v. Chicago Police Officers, No. 95 C 3402, 1996 WL 446756, at *1-2 (N.D. Ill. Aug. 1, 1996) (observing that Sunday Chicago Tribune, with circulation of more than 1,000,000, had reported plaintiff's counsel's revelation of defendants' $350,000 settlement offer two days before jury selection, but "[p]erhaps because we live in a busy world with limited reading opportunity, only one of the over forty prospective jurors used in this case ever acknowledged reading the … article").
[25] See, e.g., Guerrini v. Statewide Grievance Comm., No. CV-000503192, 2001 WL 417337 (Conn. Super. Ct. Apr. 3, 2001) (finding no basis for disciplinary committee's conclusion that in civil case in which plaintiff alleged finger injury from falling headboard during sex with girlfriend, defense counsel's statement to the press several years before trial – to the effect that plaintiff must have engaged in "some serious acrobatics" – had created substantial likelihood of material prejudice).
[26] 2 Geoffrey C. Hazard, Jr. & W. William Hodes, supra note 6, at 32-9. But see Gentile v. State Bar, 501 U.S. at 1074 ("Because lawyers have special access to information through discovery and client communications, their extrajudicial statements pose a threat to the fairness of a pending proceeding since lawyers' statements are likely to be received as especially authoritative.").
[27] Readers with a few hours to kill may wish to try this experiment: search Westlaw for all cases within the past year containing the phrase "pretrial [or pre-trial] publicity"; examine the first 100 of these cases dealing with the merits of a claim that such publicity necessitates or necessitated a change of venue, a continuance, more extensive voir dire, a gag order, a retrial, or some other protective measure; and see how often the claim is sustained. When the undersigned counsel conducted such a search on May 26, 2007, he found one case granting a motion for change of venue (but not because of anything a lawyer said), one case empaneling an anonymous jury (but mostly because of the defendant's alleged dangerousness), and 98 cases rejecting the claim, in several of which cases the publicity included lawyers' extrajudicial speech.
[28] Gentile v. State Bar, 501 U.S. at 1075.
[29] Francis v. Franklin, 471 U.S. 307, 324 n.9 (1985).
[30] Cf., e.g., Maldonado v. Ford Motor Co., 719 N.W.2d 809, 821-22 (Mich. 2006) (holding that plaintiff's counsel in sexual harassment case had violated Rule 3.6 shortly before trial by publicizing defendant supervisor's expunged conviction for indecent exposure – which the court had previously ruled inadmissible – and by proclaiming that local judges were biased in favor of Ford Motor Company).