South Carolina Bar
Continuing Legal Education Division

2024 SC BAR CONVENTION

Young Lawyers Division

"In the Age of New Media, How Do We Maintain Ethical Standards"

Friday, January 19

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Ethical Considerations for Lawyers with New Media

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LAWYERS WHO ENGAGE IN THE PUBLIC CONVERSATION
--What is Permitted and What is Improper?

South Carolina Bar Convention
January 2024

I. OVERVIEW OF APPLICABLE RULES OF PROFESSIONAL CONDUCT (RPC)

A. Coverage of RPC 3.6 and 3.8

RPC 3.6 applies only if

- the lawyer "is participating or has participated in the investigation or litigation of a matter" **or is associated in a firm or government agency** with such a lawyer
- the statement is "an extrajudicial statement"
- the lawyer **knows or reasonably should know** that the statement
  - **will be** disseminated by means of public communication
  - and **will** have a **substantial likelihood** of **materially prejudicing** an adjudicative proceeding in the matter

(1) An **exception** to RPC 3.6 allows 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**
- provided that the statement is **limited to such information as is necessary to mitigate** the recent adverse publicity

(2) RPC 3.8(f) applies to

- Extrajudicial statements by **prosecutors**
- that have a **substantial likelihood of heightening public condemnation** of the accused.

(3) RPC 3.8(f) also requires that a **prosecutor**

- exercise **reasonable care to prevent** investigators, law enforcement personnel, employees or **other persons assisting or associated** with the prosecutor in a **criminal** case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or 3.8.

(4) An **exception** to RPC 3.8 allows statements

- that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose

B. Specific Subjects Listed in Rule 3.6 as Permissible

RPC 3.6(b) provides a safe harbor for a number of specific types of statements including

- information contained in a **public record**

C. Specific Subjects Listed in the Comments to Rule 3.6 as More Likely Than Not to be Impermissible

Comment [5] to RPC 3.6 provides examples of statements that are "more likely than not to have a material prejudicial effect on a proceeding" including statements related to

- the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness
- the identity of a witness
- the expected testimony of a party or witness
- in a criminal case, the existence or contents of any confession or a statement that a person refused or failed to make a statement
- the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test
- the identity or nature of physical evidence expected to be presented
- any opinion as to the guilt or innocence of a defendant or suspect in a criminal case
- 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

D. RPC 8.4

RPC 8.4 (e) prohibits any lawyer from engaging in conduct that is prejudicial to the administration of justice.

E. RPC 8.2

RPC 8.2(a) prohibits any lawyer from making a statement known to be false (or with reckless disregard of the statement's truth or falsity) regarding a judge's qualifications or integrity.

II. EXAMPLES OF OUT-OF-COURT COMMENTARY

Extrajudicial statements about a court matter are not always improper. Statements may be justified to inform the public of certain permitted information about a matter, to correct misinformation, or to explain a legal process that may not otherwise be easily understood by non-lawyers. A number of reasons, however, may cause a lawyer to exceed the bounds of proper communication. Access to social media increases the opportunity for a lawyer to make statements impulsively on a medium that will widely disseminate the lawyer's statements. The risk of impropriety is especially high when statements, whether impulsive or calculated, are motivated by factors such as anger, frustration, misguided zealousness, or ego. Impropriety may also be the result of simple carelessness.

Uncontrolled anger can be a powerful and very harmful motivator as shown in decisions such as the following:

***In re McCool*, 172 So.3d 1058 (La. 2015) (lawyer disbarred)**

> The lawyer created an on-line petition for the public to urge two judges to consider evidence of sexual abuse, that the lawyer claimed was being ignored in a child custody case. The lawyer also urged people to call the judges and ask "why they won't follow the law and protect these children."

***Florida Bar v. Krapacs,* 2020 WL 3869584 (Fla. July 8, 2020) (lawyer disbarred)**

> Lawyer commented about other lawyers on Facebook calling one "a moron and a sexist and a bully" and calling the other "a door lawyer. Which is basically a lawyer who takes anything that walks in the door."

The following hypotheticals are intended to illustrate the boundaries of acceptable and unacceptable statements in other, more typical, situations.

A. ***"This is all about politics."***

Defense lawyer comments on motive of prosecutors

Hypothetical:

Over the past year, an elected prosecutor has been outspoken about an alleged connection between sports gambling and criminal activity and has publicly pledged to "act aggressively to shut down this illegal revenue stream for criminal enterprises."

Recently, after a multi-count indictment alleged that the defendant had engaged in illegal gambling activities related to sports betting, the lawyer for the defendant posted a statement on social media and made similar statements to the media at a press conference contending that the indictment "is just another example of prosecutors attempting to enforce their political agenda at the expense of innocent citizens, while the dangerous criminals roam the streets untouched. This is not an indictment; it is nothing but an attempt at intimidation."

Issues:

(1) To what extent may defense counsel publicly question the performance of the prosecutor?

***Dippolito v. State*, 225 So. 3d 233 (Fla. App. 2017):**

During a criminal trial, defense counsel held regular press conferences that the trial court found included false statements about the integrity of the court, comments on the tactics and motivations of law enforcement, and allegations regarding the political motivations of prosecutors. The trial court noted that while the defendant was expressing her concerns about press coverage of the trial and its impact on jury selection, her defense counsel "was commenting about the case on a [T]witter account." The trial court had found the defense counsel's extrajudicial statements "whether intended or not, are likely to bias potential jurors by repeated exposure to matters which are completely collateral to this case. The numerous press conferences…suggested that this case is a referendum on the police." The trial court then made clear its reasoning:

In most cases, commentary on collateral matters, or on the case itself, would not pose an imminent threat to a fair trial. However, as already discussed, the level of media coverage of this case has been, and continues to be, extraordinary. Every statement made by anyone connected with this case is being reported and re-reported. Speculation runs rampant on irrelevant issues in this case such as when did the Defendant have a child while on house arrest. In a case that has already been tried twice in this county, and in a case exposed to such pervasive media coverage, the impact on potential jurors of

continued extrajudicial statements by the attorneys in this case poses a real and imminent threat to the orderly administration of justice and to a fair trial.

225 So. 3d at 238. The court issued a limited gag order.

Defendant then filed a motion to require that police remove videos about the case that were already on the department's YouTube page. Although no new videos had been posted after the court's order, defendant argued that "allowing the videos to remain online despite the gag order would constitute 'viewpoint discrimination.'" The trial court declined to do so, clarifying that its "order did not require 'anyone to go back and remove anything from the public domain, nor could I.'"

The court of appeals affirmed the propriety of the gag order imposed, citing RPC 3.6.

***In re Hurley*, 257 A.3d 1012 (Del. 2021):**

In a criminal rape proceeding, there were six cases against the defendant, each to be tried separately. Defense counsel made two statements after the first case that the court found to be in violation of a gag order that prohibited any statements not allowed by Rule 3.6. One statement was that the lawyer was "horrified" by comments made in court during the sentencing hearing by a prosecutor that defense counsel characterized as implicitly blaming the parents of the defendant for their son's conduct. At sentencing, the prosecutor had pointed in court to statements by the defendant and his parents that the prosecutor had characterized as showing lack of remorse. The defense counsel afterwards told media that "There's no excuse for that. Why would you do that to a parent?"

The court found that the lawyer's comment "would materially prejudice upcoming proceedings 'by creating the impression … that the state prosecutor was off the rails … and doing something horrific.'" The lawyer argued simultaneously that he had the right to respond to the prosecutor's implications and that his statements would not materially influence any later juries. The court found those positions inherently inconsistent. "It is difficult to understand how Hurley [the lawyer] could have simultaneously thought his comments would be helpful and that his comments would not influence potential jurors."

(2) Is any part of the defense lawyer's comment substantially likely to cause material prejudice in the prosecution?

***State v. Island*, 894 N.W.2d 804 (Neb. 2017):**

Lawyer represented the mother of a child who had been murdered. The mother's boyfriend was charged and later convicted of intentional child abuse resulting in death. The mother was initially charged as an accessory after the fact, but the charge was dismissed, due to the expiration of the statute of limitations. The mother refused to

testify at the boyfriend's trial despite a grant of immunity and was held in custody for contempt throughout the trial.

During the trial, the mother's lawyer issued a press release stating that the mother wanted to cooperate with the prosecution but "the only testimony they want to believe is their version of the truth. The Prosecution's version of the truth, while inconsistent with the actual events, forces [respondent's client] to either lie or face perjury charges." A grievance was filed against the lawyer who issued the press release and a referee found that the allegation questioning the prosecutor's integrity constituted an aggravating circumstance even though the lawyer later denied that had been his intent. The lawyer was publicly reprimanded.

(3) Do the prosecutor's prior comments play any role in evaluating the propriety of the defense lawyer's posting?

Rule 3.6: Allows response

- To the extent **required**
- to protect a client from the **substantial undue prejudicial effect**
- of **recent** publicity

B. ***"Let's talk about what's really going on here."***

Statements about the motives of another party or counsel in civil litigation

Hypothetical:

A pending lawsuit has been brought against a municipality and others by a civil rights group on behalf of individuals living on the street, claiming that the defendants have sought to "criminalize poverty" by disproportionately arresting people living on the streets. When asked by a news reporter about the plaintiff's claims, a lawyer for one of the defendants referred to the undocumented immigration status of many of those on the streets. He also characterized the population as one that suffers disproportionately from untreated mental illness. "These are people who are breaking the law and many are a serious threat to public safety. Plaintiffs' counsel, I am sure, see their clients in a sympathetic light, but they also have a political agenda of delegitimizing law enforcement by portraying the police as racist. The truth is that, if our police are not allowed to enforce the law, these people will overtake and destroy the livability of our downtown neighborhoods"

***Doe No. 1 v. Kingfisher Indep. School District No. 7*, 2023 WL 3444698 (W.D. Okla. May 11, 2023):**

In a civil lawsuit, the court declined to impose a gag order against counsel for the plaintiff but did express concern that the plaintiff's lawyer's comments on Twitter regarding the character of the defendant "push the limits of public commentary allowable under Rule 3.6." The specific nature of the comment regarding character is not included in the Court's Order. The court seemed unconcerned about other comments made by plaintiff's counsel regarding the defendant's rejection of a settlement offer because that fact already was publicly known.

***United States v. Chen*, 2021 WL 2813613 (D. Mass. 2021):**

Federal prosecutors charged an MIT professor with felony failure "to fully disclose to the government the full extent of his relationship with China" in connection with his use of federal research funding. Prosecutors held a press conference and released a statement to the press regarding the charges. In response to a question at the press conference the U.S. Attorney said that "the allegations of the complaint imply that this was not just about greed, but about loyalty to China." The defense characterized the statement as a comment upon the defendant's loyalty to the United States. The prosecution characterized it as a comment on motive only and not a comment on the defendant's character.

In the absence of any allegation of espionage, the court found that statement without clarification to be inappropriate, but not in violation of the local court rule equivalent of Rule 3.6. The court gave weight to the fact that the statement was not part of prepared remarks but was in response to a reporter's question and that it did not give rise to further questions, "suggesting that the pejorative inference…did not appear to resonate." The reference to loyalty "was not well advised but it was a short and relatively tame answer to a reporter's question and on balance did not unfairly call into question the defendant's character or reputation." Other statements made by the prosecutor were held to be appropriate references to allegations contained in the public indictment.

In a press release, the Government printed a portion of an e-mail sent by the defendant to himself. The defense complained that the e-mail had been edited to omit exculpatory context. The court did not totally reject the view that the Government may have been using the excerpt for some advantage, but it found no violation because the e-mail was included in the publicly filed complaint. "Perhaps the government sought to wring more value out of the email than it should have, but there is no basis to find that the press release interfered with the defendant's right to a fair trial."

***Watness v. City of Seattle*, 457 P.3d 1177 (Wash. App. 2020):**

Lawyer bringing a civil action on behalf of a victim of a police shooting filed a motion asking the court to refer one of the defendant police officers to the prosecutor for perjury

charges. She then notified local media of the motion even before it was served on the defendants. She subsequently retweeted tweets from a local news station about the filing of the motion. She added "one year ago Charleena Lyles was shot to death in her own home by the police. Today we honor her memory and children by relentlessly fighting to uncover the truth of what happened."

The defense filed a response to strike the motion as one that was "not well grounded in fact or exiting law and lacks good faith arguments." They characterized her motion as an effort to harass the defendants and "materially prejudice this proceeding by publicly attacking the character and credibility of a party."

The defense motion was granted with Rule 11 monetary sanctions imposed. Plaintiffs appealed. In upholding the award of sanctions, the appellate court agreed with the trial court finding that the counsel's retweeting of news reports accompanied by her own statements constituted a violation of Rule 3.6 (at least for purposes of imposing a Rule 11 sanction). She could not rely on the public record exception because the motion referenced a deposition that was covered by a protective order and thus not yet publicly available. The court noted that "statements about the character, credibility, or reputation of a party in reference to a civil matter triable by a jury are more likely than not to have a prejudicial effect."

The court then found it to be important that the motion had been delivered to the media even before it was served and that the defendants had been "unable to prepare a response, let alone have an opportunity to respond before the media began posting about it. Accordingly [plaintiff's counsel] reasonably should have known that her conduct would have a substantial likelihood of materially prejudicing the proceedings."

C. ***"My client is the real victim here."***

Defense lawyer in civil litigation defends client's conduct

Hypothetical:

Jones is accused of fraud in connection with the use of funds raised on a Go Fund Me site after a recent house fire that left Jones' child badly injured. Plaintiff's counsel posted a pdf of the civil Complaint on social media and the law firm's website, accompanied only by the statement that "We have filed the following Complaint in state court on behalf of the plaintiffs named in the Complaint." Prior to filing any response to the Complaint, the defense lawyer representing Jones responded with the following social media posting:

> A group of plaintiffs have raised unsubstantiated and defamatory claims against our client, Jones. As a result, a family already struggling to deal with a recent tragedy and the severe injuries of their child must now defend their reputation in court. There is no evidence of wrongdoing by Jones, and we will show that every dollar contributed to the Joneses has

> either been spent for proper purposes or set aside for future legitimate expenses. Jones has an unblemished reputation for integrity and is a faithful, church-going person. The family is grateful for the help they have received and is humbled by the generosity shown to them by strangers.

Issues:

(1) Is Plaintiff's posting appropriate? Does it justify defendant's posting as a reply?

***Heckard v. Murray*, 428 P.3d 141 (Wash. App.2018):**

Plaintiff's lawyer in a civil action against a public official was held to have filed documents in court records in order to make them available to the media and to generate publicity. The documents in question included correspondence from plaintiff's counsel to defense counsel and notices of depositions that set out likely topics to be addressed at the depositions. The trial court imposed a Rule 11 sanction of a $5,000 fine, which plaintiff's counsel paid and then appealed. The appeal argued in part that Plaintiff's counsel had not violated RPC 3.6, and thus a Rule 11 sanction was inappropriate. The Court of Appeals found that the sanctions were not dependent upon a violation of Rule 3.6 and did not decide whether 3.6 had been violated. The court upheld the sanctions and, while not directly addressing whether Rule 3.6 had been violated, made clear that

> filing documents with the court for the purpose of generating publicity is an improper purpose. The court file is not a bulletin board for attorneys to post information for the press….Attorneys may communicate with the press through a number of avenues. But the court file does not exist for the purpose of facilitating this communication.

(2) Are any parts of defendant's posting substantially likely to cause material prejudice?

(3) Would it matter if the defendant had already filed an answer denying all claims?

> See *Calhoun v. Invention Submission Corp.,* 2020 WL 620174 (W.D. Pa. February 20, 2020) *infra* at page 16 of this outline *(*allowing extrajudicial statements that were not materially different from the content of a party's pleading and adding that the statements did not have to be verbatim from the pleading).

D. ***"Who are you going to believe -- my client or a liar?"***

Defense lawyer in criminal matter questions credibility of prosecution witness

Hypothetical:

Defendant is being prosecuted for an alleged assault at a local bar. It is a high-profile case, given the defendant's status as a star college athlete. Several friends of the defendant have posted statements on social media alleging that the defendant was first shoved by the alleged victim and was defending himself against further attacks. Defense counsel has liked the friends' posts and has reposted several.

Defense counsel's office obtained records showing that the alleged victim had previously been arrested for assault and filing a false police report. The lawyer leaked, or directed someone in the office to leak, the records anonymously to the host of a weekly local sports podcast, which had been discussing the charges against the client. The podcast reported the information shortly afterwards without any attribution to a source of the records they had obtained.

Recently, the alleged victim posted on social media that "There is only one truth about what happened -- and the truth is that I was enjoying a beer at the bar wearing a shirt from another school when the defendant, without any justification other than apparently my connection to a rival school, pushed me down and kicked me." In response the defense lawyer reposted the victim's statement and then added: "And this from someone who has been twice arrested for assault and once for filing a false police report. Who would you believe?"

***In re Morrissey*, 168 F.3d 134 (4th Cir. 1999):**

Morrissey represented a political figure charged with federal drug crimes in a case that involved drugs and sex and attracted considerable public attention. The case originally went before a state grand jury but was then moved to federal jurisdiction because of concerns about political cronyism. Morrissey located a state grand jury witness and videotaped the witness recanting much of his grand jury testimony. He then held a press conference at which he showed the video of the witness recanting. He argued that there was no violation because the testimony dealt only with the state proceeding that had been dismissed. His investigator said he did it to induce other witnesses to come forward but the court characterized the effect as being to "rattle" other witnesses. Rejecting First Amendment arguments, the court found that the press conference had "publicly called into question the credibility of a key witness in the federal case, that would "likely influence the outcome of the trial." The lawyer also was found to have violated the rule by making additional statement to the media that "cast doubt on the strength of the government's case." In doing so he had relied on his expertise as a former prosecutor.

***In re Hurley*, 257 A.3d 1012 (Del. 2021):**

In a criminal rape proceeding, there were six cases against the defendant, each to be tried separately. Defense counsel made two statements after the first case that the court found to be in violation of a gag order that prohibited any statements not allowed by Rule 3.6. The first comment was discussed earlier regarding a prosecutor's character.

Separately, after the client's second conviction of unlawful sexual contact, the defense lawyer, when asked about the verdict, told media that "There was a reasonable basis for it [the conviction], even though she put herself there."

The Court found that the victim-blaming "comment would materially prejudice upcoming proceedings by undermining the credibility of the complaining witnesses" and by "painting a better picture" of the defendant in public opinion.

E. ***"The defendant is a threat to the community."***

A lawyer in civil litigation comments on the opposing party's alleged conduct

Hypothetical:

Plaintiff has alleged that a local doctor prescribed a series of medications and treatments that the doctor knew were of no benefit to the plaintiff, that the prescribed medications had side effects that were not disclosed to the plaintiff, and that as a result of the doctor's wrongful actions, the patient did not seek timely advice from other doctors, to the detriment of the plaintiff's health. The doctor has denied any wrongdoing.

The case has attracted significant public attention because the doctor is well-known locally. Plaintiff's counsel has spoken with the media about the case and has repeated many of the factual allegations set out in the Complaint. In addition, the plaintiff's counsel has described the defendant as a "threat to the community." The plaintiff's counsel added, "Given what defendant did in this case, I have no doubt that the defendant has mistreated other patients, perhaps many other innocent patients, who may not yet be aware that they too were harmed by this so-called physician. If others begin to ask questions about treatments they received, we may well discover that what we have here is a serial snake oil salesman masquerading as a doctor.

***In re Kline*, 311 P.3d 321 (Kan. 2013):**

The former Kansas Attorney General had broadly interpreted statutory reporting requirements for abuse in an apparent effort to chill the availability of abortions in the state. A civil action had been filed seeking to enjoin enforcement of the statute in the

manner he had deemed proper, and a long investigations of abortion clinics and their records followed.

One criminal investigation involved a doctor who became the subject of national discussion. No criminal charges had yet been filed. Four days before an election in which he was defeated in his bid for re-election, the attorney general appeared on a national cable network. The lead topic was the doctor being investigated by the State of Kansas, whose practice was described by the host as an "abortion mill" and "barbaric." The host introduced the attorney general as working to "rectify" the situation. The attorney general then discussed the need for mandatory reporting because of child rape. In response to a question, he also said that the doctor earlier discussed had performed late term abortions based on mental health rather than physical health issues. He concluded by discussing a case in which a man had been convicted of raping a minor and then taking her to receive an abortion.

The initial disciplinary panel found that this interview "had a substantial likelihood of heightening public condemnation of" the doctor and served no legitimate law enforcement purpose. At the time, however, the Kansas equivalent of Rule 3.8 did not prohibit prosecutorial statements that heightened public condemnation of an accused.

The court then considered whether a Rule 3.6 violation had occurred but found an insufficient record to make that determination. To decide the Rule 3.6 issue, the court indicated that it would need a record that showed whether there was a material likelihood of prejudice; whether he should have known of the impact of his statements; whether his comments should be considered in isolation or in the context of the entire show segment; whether the host's comments can be attributed to the lawyer; and whether the lawyer was only explaining the nature of a claim against the doctor or referring only to public record. The court declined to rule on these questions without more record.

***In re Disciplinary Proceedings Against Sommers*, 851 N.W. 458 (Wis. 2014):**

The lawyer, who later became a candidate for election to the state Supreme Court, represented a person being prosecuted for negligent operation of a motor vehicle. At the end of the matter, both he and the prosecutor faced disciplinary charges for their conduct in the case. While the disciplinary case against the prosecutor was still pending, the defense lawyer wrote a letter to the Court advising the court of his candidacy and alleging prosecutorial misconduct by the prosecutor in multiple cases.

In addition to the *ex parte* concerns that the letter to the court created, the lawyer also published the letter on his campaign website, raising a Rule 3.6 issue. He then issued a press release decrying court corruption, raising a third potential disciplinary charge of statements intended to undermine the judiciary. On the Rule 3.6 issue, the court found that the posting of the letter to the website was an out of court statement that had a substantial likelihood of prejudicing the on-going disciplinary proceedings against the prosecutor. The content of the letter "far exceeded the scope of the official court record" in the matter. The lawyer was publicly reprimanded.

F. ***"I know I am just a law student, but I am very impressed by my insights."***

A law clerk in the prosecutor's office comments on a case being tried.

Hypothetical:

Defendant has been charged with multiple counts of robbery and defense counsel has filed a series of motions seeking to recuse the judge, to quash the indictment, to prevent the introduction of certain evidence, and to delay the trial. Separately, defendant has demanded a jury trial. A law student working in the prosecutor's office, but not on this matter, posted on social media that "I know that defendants have the right to make motions like these, but am I the only one who thinks they make a defendant look guilty? He has shown no remorse for what happened. Maybe it's time for a little of that instead. I can't understand why he would want a jury trial. Jurors are not going to like such a cold and calculating person."

The student law clerk also told a friend over lunch that the person committing the robberies had badly beaten several elderly victims. The law clerk described the photos of their injuries. Several days later, without the law clerk's knowledge, the friend posted on social media that she was following the case and that "apparently this is much worse than just a robbery or two. I am told that some elderly victims were mauled and that the photos of their injuries are sickening."

G. ***"This is not my favorite judge, if you get my drift, and, as for the jury, have you noticed…"***

Lawyer comments on judge and jurors in a matter not involving the lawyer

Hypotheticals:

A multi-week civil jury trial between heirs to a large family fortune has captured the attention of the public. The case has provided the public with headline-grabbing insights into the celebrity lifestyles of very wealthy, self-centered, and rather spoiled family members. But, at its core, it is a case that involves complex financial dealings and quite sophisticated business matters. Lawyer has previously represented high-profile clients in sophisticated business litigation but has no connection to this case. After being consulted repeatedly by the media for comments as an independent observer of the case prior to trial, Lawyer decided to start a regular podcast discussing the case as it progressed.

(a) Prior to the start of the trial, one episode of the podcast focused on the background of the judge. Lawyer informed listeners that the judge had been on the bench for 12 years. Lawyer reminded listeners that the judge is legislatively elected and noted that, at the judge's last re-election, the judge faced strong criticism from two former parties who had appeared before the judge and claimed

to have been victims of judicial bias. The judge had nevertheless been found qualified and re-elected. Lawyer noted also that one of the counsel in this case is a legislator. Lawyer added, however, that legislators regularly appear before the judges they elect. "If you think it's a rotten system, you are probably right, but it's what we have."

(b) In a podcast episode after the first week of trial, Lawyer expressed a concern that "the judge needs to take control of the courtroom before this becomes a celebrity reality show." Lawyer also questioned a ruling by the judge that allowed a line of examination that Lawyer characterized as "wholly inappropriate to this case." Finally, Lawyer expressed concern that several questions asked by the judge "suggest this judge may not have the business sophistication needed to understand the issues in this case. It's going to be a complex case and the judge already seems to be struggling to understand what is being presented to the court."

(c) Most recently, Lawyer included several comments about jurors in the podcast, noting that "two jurors look like they are asleep most of the time and two others look totally baffled by the testimony. Perhaps worst of all is the juror in the second row who keeps making eye contact and smiling at someone, apparently one of the plaintiffs."

***Akron Bar Assn. v. Shenise*, 34 N.E.3d 910 (Ohio 2015):**

A show-cause notice was issued for lawyer's client to appear and explain why he should not be held in contempt in a civil case. When the client failed to appear, a bench warrant issued, and client was taken briefly into custody after a traffic stop some time later. The lawyer and client spoke to a newspaper reporter, and the lawyer made statements that the client had not been told of the judge's order and that no one had notified the client or counsel of the arrest warrants. A disciplinary board found that the statements were degrading to the judge and were disrespectful to the court. They did not allege a violation of Rule 3.6. The Ohio Supreme Court found no likelihood that the statements would obstruct or prejudice justice and that they were "little more than a statement that he did not receive notice of a hearing." Thus, there was no violation for the statements made to the press. (Other misconduct, however, resulted in discipline.)

***In the Matter of Westfall*, 808 S.W.2d 829 (Mo. 1991):**

After a defendant was acquitted of the most serious charges, the prosecutor, Westfall, filed new charges that were held to constitute double jeopardy. On the day of the appellate court ruling that the new charges could not be prosecuted, Westfall told a television news outlet that

> For reasons that I find somewhat illogical, and I think even a little bit less than honest, Judge Karohl [the author of the appellate decision] has said today that we cannot pursue [charges of] armed criminal action. He has really distorted the statute and I think convoluted logic to arrive at a decision that he personally

> likes….And that, to me, really means that he made up his mind before he wrote the decision, and just reached the conclusion that he wanted to reach.

Westfall was accused of violating RPCs 8.2 and 8.4 and disbarment was recommended. The Missouri court agreed that the statements violated the rules but imposed a public reprimand.

In re *Green*, 11 P.3d 1078 (Colo. 2000):

In communications with the trial judge during a matter involving a fee dispute, one of the lawyers accused the judge of racism and of bigotry. The lawyer stated that the judge was not free of "all taint of bias and impartiality." In considering whether the statements violated RPC 8.4, the court applied First Amendment defamation analysis to consider whether the statements were protected speech. Finding that the lawyer's statements were expressions of opinion based on known facts and not false statements of fact, the Court concluded that the lawyer was not subject to discipline. Because the statements were not made in a context likely to be communicated in the media, there was no RPC 3.6 issue.

***In the Matter of Marshall*, 528 P.3d 653 (N.M. 2023):**

A lawyer for parties appearing before a judge included statements in a motion and brief attacking the judge's candor and integrity. The judge had approved a settlement over the objection of the lawyer's clients. The statements were made on appeal and included a statement that "the public might reasonably wonder whether the judge fixed this case for his former client." The Court of Appeals denied the motion to disqualify the trial judge and referred the allegation to disciplinary authorities. Finding that no basis existed in fact or law to support the allegations, the disciplinary board recommended discipline. The court addressed what constitutes reckless disregard of truth or falsity in this context. The court rejected an actual malice standard, as used by the Colorado court in *Green,* applying instead an objective knowledge standard.

> [W]e conclude that the public's interest is best served by *ensuring* that an attorney has an objectively reasonable basis for challenging the integrity or qualifications of a judicial officer…. Such a requirement does not deprive attorneys of their free-speech rights in pending cases; it simply means that attorneys must not make accusations against judicial officers in the absence of adequate factual grounding.

528 P.3d at 663-64.

H. ***"You may have a claim too. Call now to find out."***

Lawyer creates website with information on a type of matter or class of cases

Hypothetical:

Law firm becomes aware of a business practice by a company called Retirement Security Advisors ("RSA"), targeting older persons who are seeking both high returns and stable investments of their retirement funds. The Law Firm believes that RSA's activities are fraudulent. RSA has made millions of dollars from its activities, and there potentially are many victims of the allegedly illegal activity. After being retained by several clients to pursue legal action against RSA, the Law Firm seeks to locate witnesses with additional information or engage additional clients with potential related claims. It does so by creating a website with the URL of RSAfraudvictims.com. At this point, no litigation has yet been filed, but litigation against RSA is contemplated.

The website states that if someone has done business with RSA, they may have been the victim of fraud and encourages them to contact the Law Firm to find out if they might have a legal claim against RSA. The website describes RSA's advertising claims promising investment security and high rates of return. The website then says that there is no evidence that RSA is able to fulfill its claims. The website adds, "Don't be taken in by RSA. If you have invested through RSA, your vital retirement funds may be at risk. Protect your financial future by contacting us now, so that we can help you find out whether you have been the victim of their misleading promises. If you have been financially injured, we also can handle your claim against RSA."

Calhoun v. Invention Submission Corp., **2020 WL 620174 (W.D. Pa. February 20, 2020):**

Plaintiff represented parties in a civil lawsuit against various defendants related to a business known as InventHelp that marketed itself as helping inventors. Plaintiffs claimed it was instead a "deceptive and fraudulent invention promotion scam." Plaintiffs' counsel maintained a website seeking clients and information related to its claims. Defendants characterized the website as hyperbolic and prejudicial in its content. Statements on the website included the following:

• "InventHelp has neither the desire nor infrastructure to actually help inventors."

• "These are lies—there are no such 'specials' ..."

• "These are all shams. After getting what it wants InventHelp disappears without a trace."

• "Universal Payment Corporation is neither independent nor legitimate—it is an integral part of InventHelp's scheme to defraud consumers ..."

Defendants also objected to a media interview in which the plaintiffs' lawyer characterized the defendants' business model as "fraud, pure and simple from start to finish. False promises, false companies, false licensing agreements. Everything about it is fraudulent."

In addressing the website, the court found that the statements were not materially different from the content of plaintiffs' pleading and that they did not have to be verbatim from the pleading. Nor did the court find that the media interview created a substantial risk of material prejudice.

***Waldron v. Belk, Inc.*, 2008 WL 11349833 (D.S.C. 2008) (unreported):**

A civil case in which the plaintiff's lawyers ran newspaper advertisements seeking witnesses to an accident. The ads showed a picture of the mother on injured child and said "Escalator Accident at Belk's" and "Please help!" The ad described the time and nature of the accident and requested that any witnesses contact the law firm. The court declined to issue an injunction finding that the ads did not create a likelihood of prejudice.

III. OTHER CONSIDERATIONS

A. Does Passage of Time Diminish Risk of Prejudice?

***Guerrini v. Statewide Grievance Comm.*, 2001 WL 417337 (Conn. Super. Ct. Apr. 3, 2001):**

In evaluating whether a Rule 3.6 violation had occurred, the court noted the passage of time between a comment to the media and the eventual trial, indicating in dicta that "the statewide grievance committee may have difficulty finding that the plaintiff's statement to the press made several years prior to trial would have a substantial likelihood of materially prejudicing an adjudicative proceeding."

***In re Brizzi*, 962 N.E.2d 1240 (Ind. 2012)**:

After two defendants were charged with the murder of a family of seven, the prosecutor issued a press release which included the following statement: "According to the probable cause affidavit, Desmond Turner and James Stewart thought there was a large amount of money and drugs at 560 North Hamilton Street. They weren't going to let anyone or anything get in the way of what they believed to be an easy score. There was no money in that house. There were no drugs. Seven bodies were carried out, including those of three children. I would not trade all the money and drugs in the world for the life of one person, let alone seven. Turner deserves the ultimate penalty for this crime." With regard to having made a quick decision to seek the death penalty, the prosecutor said that

"The evidence is overwhelming. There are several aggravators present, any one of which would merit the death penalty. To do otherwise would be a travesty."

In resolving a disciplinary complaint against the prosecutor after the trial, a hearing officer had concluded that Rule 3.6 had not been violated. The conclusion that no violation had been proven was based in part upon the passage of three years between the press release and the conclusion that there was "not clear and convincing [evidence] to prove a substantial likelihood of heightening public condemnation of Turner and Stewart or of materially prejudicing an adjudicative proceeding in the matter." The hearing officer had considered also that there had been no actual harm, because the court had been able "to select unbiased jurors in Turner's three jury trials for battery or in Stewart's jury trial for murder" and "Turner ultimately waived his right to a trial by jury in his murder case in exchange for dismissal of the death penalty charge."

On appeal the court considered "the extent to which [the] statements [in the press release], if improper, were substantially likely to cause prejudice to the criminal defendants and/or to an adjudicative proceeding." It accepted the hearing officer's findings that "pre-trial publicity did not actually place Stewart or Turner in grave peril and it did not actually affect the trial court's ability to select unbiased jurors." But the court disagreed as to whether there had been shown to be "a substantial likelihood [of the statements] heightening public condemnation of Turner and Stewart or of materially prejudicing an adjudicative proceeding."

> "In concluding that Respondent had committed no misconduct, the hearing officer considered highly relevant his finding that the Commission made no showing that any of the criminal defendants suffered actual prejudice from the statements at issue. The rules at issue, however, do not require a finding that an otherwise improper statement cause actual prejudice to a criminal defendant or to an adjudicative proceeding…. Even if the passage of time, preventative measures by the trial court, and other factors prevent actual prejudice from occurring in a particular case, it does not necessarily mean that a prosecutor's statements did not meet the "substantial likelihood" standard when made. In considering the propriety of a prosecutor's extra-judicial statement, the court determines the likelihood that a particular statement will cause prejudice at the time made, not whether, in hindsight, it actually worked to the detriment of a defendant.
>
> "[W]e note that the press release did not include the required explanation that a charge is merely an accusation and that the defendant is presumed innocent until proven guilty, and much of the undisputed statements Respondent made in the press release are also of the type rebuttably presumed to have a substantial likelihood of materially prejudicing an adjudicative proceeding. We find nothing in the record to rebut this presumption in this case."

B. How Broad is the Public Records Safe Harbor Provided by Rule 3.6?

In re Brizzi, 962 N.E.2d 1240 (Ind. 2012):

A prosecutor participated in a press conference announcing the filing of a murder charge against Mendenhall in connection with the alleged killing of a missing person, whose body has never been found. Mendenhall had pending murder charges in other states, and he had been previously convicted of murder in Tennessee. The prosecutor allegedly made the following statements to the media, although there was dispute as to whether all of the alleged statements were actually made:

- DNA testing of blood taken from [the alleged victim's] parents matched blood inside the cab of Mendenhall's truck.
- "When the officer opened up the cab of the truck, you can imagine his surprise, because the cab of the truck was literally awash with blood." [The alleged victim's] blood "soaked" the seats of Mendenhall's truck.
- Enough blood matching the DNA of [the alleged victim's] parents was found inside the cab of Mendenhall's truck to determine that she could not possibly be alive.
- The "DNA analysis of [the blood] shows that it's not just the blood of one victim, but the blood of several victims."
- The victims were shot after their heads were wrapped in plastic wrap and duct tape.
- A .22 caliber handgun used by Mendenhall in the killings was found in his truck.
- Mendenhall had admitted to the police when arrested that [the alleged victim] had been shot in the back of the head at the Indianapolis truck stop, then left inside a vehicle parked at a nearby restaurant, but that he denied being the murderer.
- Respondent was confident that he had enough evidence to convict Mendenhall.
- Respondent was "working with the other jurisdictions to see the quickest way and the best way to punish [Mendenhall] with the ultimate punishment—a capital sentence."

The hearing officer concluded that the prosecutor had not violated the rules with respect to some of the alleged statements. Included among the stated bases for his conclusion was a finding that "The statements concerning DNA analysis, plastic wrap, a .22 caliber handgun, and the large amount of blood discovered were previously documented in the

media and/or the probable cause affidavit. 'Thus, these statements were based on publicly available information and are protected by the safe harbor provision in Rule 3.6(b).'"

Professional Conduct Rule 3.6(b)(2) provides that "Notwithstanding paragraph (a), a lawyer may state.... information contained in a public record."

> According to the hearing officer, "Media reports from other states about the Mendenhall case were accessible on the Internet. [The prosecutor] searched the Internet for news stories about Mendenhall because [the prosecutor] himself had little information about the multi-state investigation into the suspected slayings."

Also, "Mendenhall's alleged use of a .22 caliber handgun in his murders was publicly documented and available as early as … six months prior to [the prosecutor's] press conference. The probable cause affidavit filed in the [Indiana] case discusses Mendenhall's suspected killings in other jurisdictions, and states that 'the evidence found in his truck including a .22 caliber weapon, all point to Mendenhall as the killer.'…The Probable Cause Affidavit ... discusses the .22 caliber gun, the DNA testing and the law enforcement officials' discovery of such a large amount of blood that they were able to determine that Ms. Purpura was no longer alive."

> The hearing officer had concluded that "these statements were based on publicly available information and protected by the safe harbor provision in Rule 3.6(b)." ***However, citing an earlier Maryland case defining a public record for this purpose, the court adopted, instead, a construction that includes within the safe harbor "only public government records, i.e., the records and papers on file with a government entity to which an ordinary citizen would have lawful access, … with the proviso that 'on file' does not mandate such formalities as file stamping or entry on a case docket." The court expressly rejected a "more expansive concept of a public record …[that would include] the unfiltered and untested contents of all publicly accessible media."***
>
> "A probable cause affidavit falls under the … definition of 'public record' so long as it is on file with a government entity to which an ordinary citizen has lawful access….However, … to receive the protection of the public record safe harbor, a lawyer may not provide information beyond quotations from or references to the contents of the public record…. Moreover, we hold that a prosecutor must make clear that what is being disclosed is, in fact, the contents of the probable cause affidavit or other identified public document so the statements cannot be misunderstood to be the prosecutor's own opinion about the evidence or the suspect's guilt."

C. Judicial Friends on Social Media

Not per se evidence of bias

***Law Offices of Herssein and Herssein, P.A., v. United Services Automobile Assoc.*, Slip Op. (Florida, Nov. 15, 2018)**

"[T]he mere existence of a Facebook "friendship" between a judge and an attorney appearing before the judge, without more, does not reasonably convey to others the impression of an inherently close or intimate relationship. No reasonably prudent person would fear that she could not receive a fair and impartial trial based solely on the fact that a judge and an attorney appearing before the judge are Facebook "friends" with a relationship of an indeterminate nature."

But be careful…

In re P*aternity of B.J.M.*, 925 N.W.2d 580 (Wisc. App. 2019)

A Family Court judge accepted a Facebook friend request from one of the parties after final argument but before entering a written order. Before the order was issued, the party "liked" eighteen of the judge's Facebook posts and commented on two of his posts. None was directly related to the pending litigation. The judge did not "like" or comment on any of the party's posts, nor did he reply to any of her comments on his posts. However, the judge's disqualification was ordered.

D. Social Media Posts Unrelated to Legal Practice

***In re Traywick*, 860 S.E.2d 358 (S.C. 2021)**

The Court considered a lawyer's social media communications that contained racially offensive terms for African-Americans and offensive comments about women. The former were posted concurrently with the death of George Floyd and were particularly inflammatory in that context. The court imposed discipline for social media comments made outside of a legal representation, distinguishing other types of expressive comments from these comments, which the court characterized as "incendiary" and "tending to incite".

> We are particularly concerned with the statement regarding Mr. Floyd. We find this statement was intended to incite intensified racial conflict not only in Respondent's Facebook community, but also in the broader community of Charleston and beyond. We hold this statement in particular tended to bring the legal profession into disrepute, violated the letter and spirit of the Lawyer's Oath.

APPENDIX

FULL TEXT OF APPLICABLE RULES AND GUIDANCE

I. South Carolina Rules of Professional Conduct

Rule 3.6: Trial Publicity

(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.

(b) Notwithstanding paragraph (a), a lawyer may state:

(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.

(c) 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.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Comments to Rule 3.6

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.

[3] The Rule 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. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the Rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

[5] There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

> *(a) 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;*
> *(b) 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;*

(c) 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;
(d) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;
(e) 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
(f) 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.

[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

[8] See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

Rule 3.8(f): Special Responsibilities of a Prosecutor

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

Comments to Rule 3.8

[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

II. ABA Criminal Justice Standards for the Defense Function (2017)

Standard 4-1.10 Relationship With Media

(a) For purposes of this Standard, a "public statement" is any extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication or media, including social media. An extrajudicial statement is any oral, written, or visual presentation not made either in a courtroom during the criminal proceedings or in court filings or correspondence with the court or counsel regarding the criminal proceedings.

(b) Defense counsel's public statements about the judiciary, jurors, other lawyers, or the criminal justice system should be respectful even if expressing disagreement.

(c) Defense counsel should not make, cause to be made, or authorize or condone the making of, a public statement that counsel knows or reasonably should know will have a substantial likelihood of materially prejudicing a criminal proceeding. Defense counsel's public statements should otherwise be consistent with the ABA Standards on Fair Trial and Public Discourse.

(d) Defense counsel should not place statements or evidence into the court record to circumvent this Standard.

(e) Defense counsel should exercise reasonable care to prevent investigators, employees, or other persons assisting or associated with the defense from making an extrajudicial statement or providing non-public information that defense counsel would be prohibited from making or providing under this Standard or other applicable rules or law.

(f) Defense counsel may respond to public statements from any source in order to protect a client's legitimate interests, unless there is a substantial likelihood of materially prejudicing a criminal proceeding, in which case defense counsel should approach the prosecutor or the Court for relief. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(g) In making any public statement regarding a representation, defense counsel should comply with ethical rules governing client confidentiality and loyalty, and should not provide confidential information to the media, on or off the record, without authorization from the client.

(h) Defense counsel should not allow the client's representation to be adversely affected by counsel's personal interest in potential media contacts or attention.

(i) A defense attorney uninvolved in a matter who is commenting as a media source may offer generalized media commentary concerning a specific criminal matter that serves to educate the public about the criminal justice system and does not risk prejudicing a specific criminal proceeding. Counsel acting as such a media commentator should make reasonable efforts to be well-informed about the facts of the matter and the governing law. Counsel should not offer commentary regarding the specific merits of an ongoing prosecution or investigation, except in a rare case to address a manifest injustice and counsel is reasonably well-informed about the relevant facts and law.

III. ABA Criminal Justice Standards for the Prosecution Function (2017)

Standard 3-1.10 Relationship with the Media

(a) For purposes of this Standard, a "public statement" is any extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication or media, including social media. An extrajudicial statement is any oral, written, or visual presentation not made either in a courtroom during criminal proceedings or in court filings or correspondence with the court or counsel regarding criminal proceedings.

(b) The prosecutor's public statements about the judiciary, jurors, other lawyers, or the criminal justice system should be respectful even if expressing disagreement.

(c) The prosecutor should not make, cause to be made, or authorize or condone the making of, a public statement that the prosecutor knows or reasonably should know will have a substantial likelihood of materially prejudicing a criminal proceeding or heightening public condemnation of the accused, but the prosecutor may make statements that inform the public of the nature and extent of the prosecutor's or law enforcement actions and serve a legitimate law enforcement purpose. The prosecutor may make a public statement explaining why criminal charges have been declined or dismissed, but must take care not to imply guilt or otherwise prejudice the interests of victims, witnesses or subjects of an investigation. A prosecutor's public statements should otherwise be consistent with the ABA Standards on Fair Trial and Public Discourse.

(d) A prosecutor should not place statements or evidence into the court record to circumvent this Standard.

(e) The prosecutor should exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the prosecutor from making an extrajudicial statement or providing non-public information that the prosecutor would be prohibited from making or providing under this Standard or other applicable rules or law.

(f) The prosecutor may respond to public statements from any source in order to protect the prosecution's legitimate official interests, unless there is a substantial likelihood of materially prejudicing a criminal proceeding, in which case the prosecutor should approach defense counsel or a court for relief. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(g) The prosecutor has duties of confidentiality and loyalty, and should not secretly or anonymously provide non-public information to the media, on or off the record, without appropriate authorization.

(h) The prosecutor should not allow prosecutorial judgment to be influenced by a personal interest in potential media contacts or attention.

(i) A prosecutor uninvolved in a matter who is commenting as a media source may offer generalized commentary concerning a specific criminal matter that serves to educate the public about the criminal justice system and does not risk prejudicing a specific criminal proceeding. A prosecutor acting as such a media commentator should make reasonable efforts to be well-informed about the facts of the matter and the governing law. The prosecutor should not offer commentary regarding the specific merits of an ongoing criminal prosecution or investigation, except in a rare case to address a

manifest injustice and the prosecutor is reasonably well-informed about the relevant facts and law.

(j) During the pendency of a criminal matter, the prosecutor should not re-enact, or assist law enforcement in re-enacting, law enforcement events for the media. Absent a legitimate law enforcement purpose, the prosecutor should not display the accused for the media, nor should the prosecutor invite media presence during investigative actions without careful consideration of the interests of all involved, including suspects, defendants, and the public. However, a prosecutor may reasonably accommodate media requests for access to public information and events.

South Carolina Bar
Continuing Legal Education Division

2024 SC BAR CONVENTION

Young Lawyers Division

Friday, January 19

Panel: Impact of Podcast and True Crime on Trials and Politics

Joseph Bias
Vincent A. Sheheen
Joel B. Lourie

No Materials Available