International Association of Defense Counsel

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DON'T BELIEVE EVERYTHING YOU READ ON THE INTERNET: The Role of the Court in Regulating Extrajudicial Statements Which May Influence Ongoing Litigation

This month, Quentin F. Urquhart, Jr. and Kelly G. Juneau highlight the case of Edward Carrington vs. Duke University and discuss to what the extent the court can and should regulate extrajudicial speech which may have a prejudicial effect on pending litigation.

BY QUENTIN F. URQUHART, JR., AND KELLY G. JUNEAU

"Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper." *Bridges v. California*, 314 U.S. 252, 271 (1941). The Supreme Court made this observation over sixty years ago and today, in the age of the internet and 24 hour cable news networks, never has this sentiment been more fitting. To protect against legal battles being fought in the court of public opinion, Model Rule 3.6 of the ABA Model Code of Professional Responsibility prohibits a lawyer who is participating in litigation from making "extrajudicial statement[s] 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." *ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY RULE* 3.6 (2004).

This rule, more particularly the North Carolina incarnation of it, has been brought to the forefront in a case currently pending in the United States District Court for the Middle District of North Carolina, entitled *Edward Carrington, et al. vs. Duke University, et al.*, Case No. 1:08-cv-119. This case arises out of the 2006 rape allegations against members of the Duke University lacrosse team, allegations which were later recanted. Plaintiffs have engaged in a media campaign which, at the direction of the Plaintiffs' media advisor, has included holding a press conference, issuing press releases, and maintaining a controversial website about the litigation, www.dukelawsuit.com, which proclaims itself to be "the official source of information about th[e] lawsuit." The Duke University defendants filed a motion requesting that the Court enter an order declaring that these "attorney-initiated and

attorney-sanctioned statements" violate North Carolina's Rule of Professional Conduct 3.6.

On April 15, 2008, the Honorable James A. Beaty, Jr. denied Duke University's motion for sanctions against Plaintiffs for alleged violations of the North Carolina Rules of Professional Conduct 3.6. Judge Beaty went on to state that:

> [A]ll attorneys in this case are cautioned against making or authorizing any statement that will have a substantial likelihood of materially prejudicing any of the proceedings going forward regardless of what publicity may have occurred in the past. In addition, to the extent Plaintiffs' counsel maintains their website about this case, either directly or through an agent, Plaintiffs' counsel is cautioned that they are responsible for the content of that website and for ensuring that any material contained in, quoted to or linked to on their website complies with the obligation of Professional Rules of Conduct 3.6 Of course, as presented under present circumstances, nothing that this Court rules on as part of this announcement affects or limits any third party, including any member of the media or other persons acting independently of the attorneys in this case. As this case proceeds, the Court will consider whether any specific protective orders may be necessary to ensure the integrity of the proceedings is maintained and that a fair jury pool is not materially prejudiced.
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> *Carrington vs. Duke University*, No. 1:08-cv-119 (M.D.N.C. April 15, 2008) (order denying motion for sanctions for violation of Rule 3.6).

Carrington vs. Duke University brings up an interesting question of law – to what extent can the court regulate extrajudicial speech which may influence ongoing litigation and when does such judicial regulation run afoul of the First Amendment? This article focuses primarily on the regulation of extrajudicial speech of lawyers participating in pending litigation – something the courts will not undertake to do lightly. Given lawyers' special access to information and the threat such statements pose to the fairness of the judicial proceedings, however, courts are willing to regulate such speech under the right circumstances.

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As the comments to Model Rule 3.6 note, "[i]t 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 involves some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved." *ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY RULE* 3.6, cmt. 1 (2004).

While it is true that a lawyer's extrajudicial statements may enlighten public debate, these statements also heighten the risk of turning litigation into a media circus, tainting the jury pool, and eroding the integrity of the court in the eyes of the public. *Constand v. Cosby*, 229 F.R.D. 472, 475 (E.D. Pa. 2005). But despite these risks, "[t]here may be circumstances where conscientious lawyers must act to defend against adverse publicity where their clients have been tried and convicted by the media long before trial, or where the opposing litigants – government or private – have blanketed the community with damaging publicity." *Id*. at 476.

In an effort to strike that delicate balance, Model Rule 3.6 prohibits lawyers from making extrajudicial statements which will have a "substantial likelihood of materially prejudicing" a pending matter. In the *Gentile v. State Bar of Nevada*, the United States Supreme Court held that the "substantial likelihood" test constitutes a constitutionally permissible balance between the First Amendment rights of lawyers and the State's interest in fair trails. *Gentile*, 501 U.S. 1030, 1075-1076 (1991). The test is "designed to protect the integrity and fairness of a State's judicial system, and it imposes only narrow and necessary limitations on lawyers' speech." *Id*. Further, the Court noted that the test is aimed at "two principal evils: (1) comments that are likely to influence the actual outcome of the

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trial, and (2) comments that are likely to prejudice the jury venire, even if an untainted panel can ultimately be found." *Id.* at 1075.

Moreover, there exist a number of subjects on which a lawyer in a civil case can comment without violating the rule. Model Rule 3.6 lists, non-exhaustively, several such "safe harbor" topics including: (1) the claim, offense, or defense involved and, except when prohibited by law, the identity of the persons involved; (2) information contained in the 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; and (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 the public interest. *ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY RULE* 3.6(b) (2004).

In addition to these enumerated exceptions, Model Rule 3.6(c) provides that "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." *Id.* at RULE 3.6(c). Any such statements made pursuant to Paragraph (c) must be limited to "such information as is necessary to mitigate the recent adverse publicity." *Id.*

The ABA comments also make it clear that certain types of proceedings are more sensitive to the effects of prejudicial extrajudicial speech – criminal jury trials are the most sensitive, civil trials are less sensitive,[1] and non-jury trials and hearings and arbitration proceedings are the least affected. *ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY RULE* 3.6, cmt. 6 (2004). Moreover, certain subjects are more likely to materially prejudice the litigation, such as statements relating to "the character, credibility, or reputation" of a party or any "information that a 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." *Id.* at cmt. 5.

The timing of the extrajudicial speech may also play a role in whether it is deemed to create a substantial likelihood of materially prejudicing the litigation. As Justice Kennedy

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[1] In *Hirschkop v. Snead*, 594 F.2d 356, 373 (4th Cir. 1979), the Fourth Circuit Court of Appeals noted that given the protracted nature of civil litigation, "it is not unlikely that the rule could prohibit comment over a period of several years from the time investigation begins until the appellate proceedings are completed. Thus, the Court struck down Virginia's rule regulating extrajudicial statements in civil cases as unconstitutionally broad, stating that the "dearth of evidence that lawyers' comments taint civil trials and the court's ability to protect confidential information establish that the rule's restrictions on freedom of speech are not essential to fair trials." *Id. Hirschkop* dealt with DR 7-107, the ABA precursor to Model Rule 3.6, which many courts struck down as overbroad or vague. Model Rule 3.6 was drafted to cure these constitutional deficiencies.

wrote in *Gentile*, although a "statement which reaches the attention of the venire on the eve of *voir dire* might require a continuance or cause difficulties in securing an impartial jury…exposure to the same statement six months prior to trial would not result in prejudice, content fading from memory long before the trial date. Gentile, 1044. [2] The size of the jury pool can also be a factor.[3] Gentile, 1044.

It is constitutionally permissible for courts to place limits on the extrajudicial statements of lawyers, though it is rare that Model Rule 3.6 is successfully invoked in civil litigation. Given the First Amendment implications, courts are reticent to limit such statements. In order to do so, "the Court must be convinced, not merely suspect, that there is a substantial likelihood that extrajudicial statements, in light of the circumstances of the case, will materially prejudice the pending litigation." *Constand v. Cosby,* 229 F.R.D. 472, 475 (E.D. Pa. 2005).

Existing rules provide little guidance for the regulation of extrajudicial speech of parties and third parties to the litigation, however. While it is true that a lawyer cannot make prejudicial extrajudicial statements through a third person, including his client, Model Rule 3.6 does not apply directly to non-lawyers. Further, courts are loath to limit speech by parties and third parties to the litigation. "Limiting parties and witnesses from making extrajudicial statements during a pending civil proceeding raises constitutional questions where similar limitations upon lawyers do not." *Constand v. Cosby*, 229 F.R.D. 472, 475 (E.D. Pa. 2005).

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Thus, we are left with a number of unanswered questions, such as: (1) Are there any limits on the ability of a litigant, either directly or though a media consultant, maintain a website to publish information about the case, post pleadings, make commentary, or even

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[2] This statement is contained in Part II of Justice Kennedy's opinion, which is not the opinion of the Court. The opinion of the Court with respect to Parts I and II of the *Gentile* decision was delivered by Chief Judge Rehnquist. Justice Kennedy delivered the opinion of the Court with respect to Parts III and VI. As such, Part II of Justice Kennedy's opinion is merely dicta.

[3] *Id.*

make public documents or statements that may ultimately be subject to exclusion under the rules of evidence? (2) Can a lawyer hire a media consultant to maintain a website about the litigation if the lawyer does not exercise direct control over the content? (3) Can the court order that a website be taken down if it is shown that the content of the website is directly controlled by counsel? (4) As advocates, should we be advising our clients to launch websites, counter websites, or other media campaigns so that they may fully benefit from all tactical advantages available?

The internet provides an easy and inexpensive platform to widely disseminate prejudicial information and courts will increasingly be faced with issues such as those presented in *Carrington v. Duke University*. As with extrajudicial statements made by lawyers, when extrajudicial statements made by parties and third parties to the litigation pose a substantial threat to the fairness of the judicial proceedings, courts should undertake to regulate such speech, within the bounds of the constitution. Under the current rules, it is unclear whether the courts are able to do so.

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