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FEATURED TOPIC
TRIAL PUBLICITY II

Last month's issue laid out the basis for the limitations on lawyers engaging in trial publicity pursuant to Rule 3.6. This issue continues the discussion. We focus first on the First Amendment issues—in particular, Rule 3.6 as interpreted by *Gentile v. State Bar of California*, 501 U.S. 1030 (1991). Second, we focus on the specific limitations on prosecutorial initiated publicity as set forth in Rule 3.8(f).

Lawyers have First Amendment rights, but those rights may be limited, within reason, in order to protect the integrity of the judicial process. The case that first established the boundaries for these limitations on lawyers' rights as regards trial publicity is *Gentile v. State Bar of Georgia.* Gentile, a lawyer, held a pretrial press conference including a question and answer session about the case going to trial. At the press conference, he stated that his client was a "scapegoat" and the victim of "crooked cops," amongst other things. At the time this occurred, Nevada Bar Rule 177 prohibited a lawyer from making "an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding." The Nevada rule was essentially the same as Model Rule of Professional Responsibility 3.6. Based on the statements he made at the press conference, Gentile was charged with violating Rule 177 and found in violation. He appealed, and his disciplinary case found its way to the United States Supreme Court.

In the majority decision written by Justice Anthony Kennedy, the United States Supreme Court found that Gentile's speech "neither in law nor in fact created any threat of real prejudice to his client's right to a fair trial or to the State's interest in the enforcement of its criminal laws." *Gentile*, 501 U.S. at 1033. At the same time, the Court was unwilling to strike down Model Rule 3.6:

> Model Rule 3.6's requirement of substantial likelihood of material prejudice is not necessarily flawed. Interpreted in a proper and narrow manner, for instance, to prevent an attorney of record from releasing information of grave prejudice on the eve of jury selection, the phrase substantial likelihood of material prejudice might punish only speech that creates a danger of imminent and substantial harm. A rule governing speech, even speech entitled to full constitutional protection, need not use the words "clear and present danger" in order to pass constitutional muster. . . .

The drafters of Model Rule 3.6 apparently thought the substantial likelihood of material prejudice formulation approximated the clear and present danger test. See ABA Annotated Model Rules of Professional Conduct 243 (1984) ("formulation in Model Rule 3.6 incorporates a standard approximating clear and present danger by focusing on the likelihood of injury and its substantiality"; citing Landmark

Communications, supra, at 844; Wood v. Georgia, 370 U.S. 375 (1962); and Bridges v. California, supra, at 273, for guidance in determining whether statement "poses a sufficiently serious and imminent threat to the fair administration of justice"); G. Hazard & W. Hodes, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct 397 (1985) ("To use traditional terminology, the danger of prejudice to a proceeding must be both dear (material) and present (substantially likely)"); In re Hinds, 90 N.J. 604, 622, 449 A.2d 483, 493 (1982) (substantial likelihood of material prejudice standard is a linguistic equivalent of clear and present danger).

The difference between the requirement of serious and imminent threat found in the disciplinary rules of some States and the more common formulation of substantial likelihood of material prejudice could prove mere semantics. Each standard requires an assessment of proximity and degree of harm. Each may be capable of valid application.

In the end, Gentile won his case. The Supreme Court upheld the constitutionality of the "substantial likelihood of material prejudice test," while also holding that Nevada's interpretation of the test was constitutionally flawed. And, thus, we have current KRPC 3.6.

In addition to the requirements of KRPC 3.6, KRPC 3.8(f) sets out special rules for prosecutors:

> …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.

Comment 5 reads:

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).

The fact that we have a special rule for prosecutorial public statements must be understood to underline the importance that prosecutor exercise special care in what they say about pending criminal

proceedings. We live in a world of multiple news outlets, social media, and the phenomenon of news clips going "viral" in an instant. In our highly connected world, one filled with "fake news" and news that takes statements out of their true context, an unwise prosecutorial statement may well present a "substantial likelihood of prejudicing" a pending criminal trial that could well threaten the outcome of the trial and bring a disciplinary complaint against the prosecutor.

NEW AUTHORITY
LAWYER-JUDGE RELATIONSHIPS

On September 5, 2019, the ABA Committee on Ethics and Professional Responsibility issued Formal Opinion 488: Judges' Social or Close Relationships with Lawyers or Parties as Grounds for Disqualification or Disclosure. In this opinion, the Committee defines categories of relationships between lawyers and judges and attempts to set guidelines as to which categories may be problematic and trigger consideration of judicial recusal.

The starting point for this Opinion is Rule 2.11 of the Code of Judicial Conduct, which reads:

> **RULE 2.11**
> **Disqualification**
> **(A)** A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances: **(1)** The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding. **(2)** The judge knows that the judge, the judge's spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person is: **(a)** a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party; **(b)** acting as a lawyer in the proceeding; **(c)** a person who has more than a de minimis interest that could be substantially affected by the proceeding; or **(d)** likely to be a material witness in the proceeding. **(3)** The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, domestic partner, parent, or child, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding. **(4)** The judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits the judge to reach a particular result or rule in a particular way in the proceeding or controversy. **(5)** The judge: **(a)** served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the

> matter during such association; **(b)** served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy; **(c)** was a material witness concerning the matter; or **(d)** previously presided as a judge over the matter in another court. (B) A judge shall keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse or domestic partner and minor children residing in the judge's household. (C) A judge subject to disqualification under this Rule, other than for bias or prejudice under paragraph (A)(1), may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

Formal Opinion 488 deals with "relationships outside of those identified in Rule 2.11(A)." It states that:

> Judges are ordinarily in the best position to assess whether their impartiality might reasonably be questioned when lawyers or parties with whom they have relationships outside of those identified in Rule 2.11(A) appear before them.

And:

> Recognizing that relationships vary widely, potentially change over time, and are unique to the people involved, this opinion provides general guidance to judges who must determine whether their relationships with lawyers or parties require their disqualification from proceedings, whether the lesser remedy of disclosing the relationship to the other parties and lawyers involved in the proceedings is initially sufficient, or whether neither disqualification nor disclosure is required. This opinion identifies three categories of relationships between judges and lawyers or parties to assist judges in determining what, if any, ethical obligations Rule 2.11 imposes: (1) acquaintanceships; (2) friendships; and (3) close personal relationships.

According to the Opinion, a lawyer and a judge are acquaintances when "their interactions outside of court are coincidental or relatively superficial, such as being members of the same place of worship, professional or civic organization, or the like." They are the types of relationships where neither "seeks contact with the other, but they greet

each other amicably and are cordial when their lives intersect." This type of relationship should not implicate Rule 2.11.

But a friendship might. A relationship between a lawyer and a judge may fall in the friendship category if it involves a more significant connection than simply being acquainted:

> "Friendship" implies a degree of affinity greater than being acquainted with a person; indeed, the term connotes some degree of mutual affection. Yet, not all friendships are the same; some may be professional, while others may be social. Some friends are closer than others.

The Opinion offers examples of various levels of friendship, generally distinguishing the types of friendship according to the frequency with which the lawyer and judge are in contact and the intimacy of their communications. Building upon these examples, the Committee assures us: "Certainly, not all friendships require judges' disqualification." "Whether a friendship between a judge and a lawyer or party reaches that point and consequently requires the judge's disqualification in the proceeding is essentially a question of degree."

That, in turn, informs the Committee's comments about "close personal relationships" between lawyers and judges:

> A judge may have a personal relationship with a lawyer or party that goes beyond or is different from common concepts of friendship, but which does not implicate Rule 2.11(A)(2). For example, the judge may be romantically involved with a lawyer or party, the judge may desire a romantic relationship with a lawyer or party or be actively pursuing one, the judge and a lawyer or party may be divorced but remain amicable, the judge and a lawyer or party may be divorced but communicate frequently and see one another regularly because they share custody of children, or a judge might be the godparent of a lawyer's or party's child or vice versa.

Close personal relationships may require disqualification. It almost certainly triggers Rule 2.11's obligation to disclose the relationship to the parties. However, at footnote 25 of the Opinion, the Committee notes that "[a] judge who prefers to keep such a relationship private may disqualify himself or herself from the proceeding."

Basically, one may look at the categories set out in Opinion 488 and generalize by saying that and acquaintanceship between a lawyer and a judge should not trigger judicial disqualification. A friendship between a lawyer and a judge may or may not trigger judicial qualification depending upon the specific facts of the situation. And a "close personal relationship" between a lawyer and a judge is likely to trigger judicial qualification under Rule 2.11 of the Code of Judicial Conduct.

Lawyers, judges, or others who are concerned about the application of Rule 2.11 and the guidance provided by ABA Formal Opinion 288

should consult the full opinion available online at https://www.americanbar.org/groups/professional_responsibility/publications/ethics_opinions/.

TECH TIP
LEARNING YOUR VULNERABILITIES

Virtually every lawyer today is dependent on electronic and digital devices: cell phones, computers, tablets, scanners, printers, and the various software that operates on these devices. The fundamental problem is that most of these devices are connected to the Internet. That Internet connection carries with it potential vulnerability to breaches—breaches that can result in loss of client information and disruption of a lawyer's computer and other systems. Some Ransomware attacks are designed not simply to disrupt a lawyer's electronic and digital devices, but to destroy them. Others are designed to force a lawyer to pay a "ransom" to get his information (which may include privileged and confidential client information) "unlocked." Indeed, one cannot read the news today without finding a story on another serious digital attack on individuals, corporations, and even governments.

Last month's "Tech Tip" discussed the dangers of lawyers' use of mobile phones and ABA Ethics Opinions 477R and 483 regarding lawyers' ethical responsibilities regarding the use of digital devices. Obviously, ABA Opinions 477R and 483 apply to devices other than mobile phones and lawyers must be concerned with ensuring that their electronic devices are protected against attack by those who seek to steal or destroy client information. These opinions require that lawyers "reasonably safeguard" client information so as not to violate Rules 1.6 and 1.15.

The first step in safeguarding client information in regard to digital devices is to know one's vulnerabilities and to provide all the lawyers and staff members in a law firm with guidance on how to reduce them. To do so, either a lawyer or staff member of a law firm should be assigned primary responsibility for "auditing" how the firm protects digital information, or the firm should hire an outside specialist in digital security. In the case of solo practitioners and small law firms, this may impose a difficult financial burden. Digital security is not inexpensive, but it is necessary nonetheless. At the very least, every lawyer and law firm should do periodic audits of digital security and provide all partners and employees with written guidelines on how to protect client information in the digital work environment.

ETHICS & MALPRACTICE RESEARCH TIP
MISSOURI ETHICS ADVISORY OPINIONS

Missouri practitioners in need of answers to ethical questions that are not addressed in published case law should consult the Missouri Bar webpage for Legal Ethics Opinions: https://mobar.org/site/Lawyer_Resources/Legal_Ethics_Opinions/site/content/Lawyer-Resources/Legal_Ethics_Opinions.aspx?hkey=06b5595d-c0b3-4d8c-bf7d-dbf770a948b4.

Through this website, those interested in legal ethics in Missouri can search for or request informal advisory opinions authored by the Legal Ethics Counsel under Missouri Supreme Court Rule 5.30(c), which states:

> The ethics counsel on behalf of the advisory committee on request may give a member of the bar an informal opinion on matters of special concern to the lawyer. Informal opinions are not binding. Written summaries of informal opinions may be published for informational purposes as determined by the advisory committee.

Missouri does not publish the full text of opinions. Instead, it only publishes summaries.

Summaries of informal advisory opinions from July 1, 1993, forward are available online. They are searchable by keyword, opinion number, or topic, making it quite easy for lawyers to find relevant opinions. Older opinions are included in *Missouri Advisory Opinions,* a desk book published in 1995. The Missouri Bar's webpage provides a link to the electronic version of the desk book and its supplement, which was published in 1996. Practitioners can request a new informal opinion through Missouri Bar's webpage.

Formal opinions are governed by Missouri Supreme Court Rule 5.30(a):

> The advisory committee may give formal opinions as to the interpretations of Rules 4, 5, and 6, and the amendments or additions thereto. Formal opinions of the advisory committee shall be published in the Journal of The Missouri Bar after adoption thereof.

The Missouri Bar's website suggests that "a formal opinion is the appropriate way to address a matter of general importance, not necessarily related to a specific fact situation." The site warns that formal opinions may take "more than a year" to produce after a request is received.

The site also contains links to the Missouri *Rules of Professional Conduct* and other ethics related sites.

BLAST FROM THE PAST
CIVILITY AT THE BAR

David Hoffman, a Maryland lawyer and law professor, first published his *Fifty Resolutions in Regard to Professional Deportment* in 1836 as part of his *A Course of Legal Study*. Hoffman's notion of professional deportment was more expansive than our modern notion of legal ethics and, among other matters, dealt with issues of civility among lawyers:

> Resolution 5: In all intercourse with my professional brethren, I will always be courteous. No man's passion shall intimidate me from asserting fully my own or my client's rights, and no man's ignorance or folly shall induce me to take any advantage of him. I shall deal with them all as honorable men, ministering at our common altar. But an act of unequivocal meanness or dishonesty, though it shall wholly sever any personal relation that may subsist between us, shall produce no change in my deportment when brought in professional connection with them. My client's rights, and not my own feelings, are then alone to be consulted.
> . . .
> Resolution 9: Any promise or pledge made by me to the adverse counsel shall be strictly adhered to by me; nor shall the subsequent instructions of my client induce me to depart from it, unless I am well satisfied it was made in error, or that the rights of my client would be materially impaired by its performance.
> . . .
> Resolution 17: Should I attain that eminent standing at the bar which gives authority to my opinions, I shall endeavor, in my intercourse with my junior brethren, to avoid the least display of it to their prejudice. I will strive never to forget the days of my youth, when I too was feeble in the law, and without standing. I will remember my then ambitious aspirations (though timid and modest) nearly blighted by the inconsiderate or rude and arrogant deportment of some of my seniors; and I will further remember that the vital spark of my early ambition might have been wholly extinguished, and my hopes forever ruined, had not my own resolutions, and a few generous acts of some others of my seniors, raised me from my depression. To my juniors, therefore, I shall ever be kind and encouraging; and never too proud to recognize distinctly that, on many occasions, it is quite probable their knowledge may be more accurate than my own, and that they, with their limited reading and experience, have seen the matter more soundly than I, with my much reading and long experience.

For more on Hoffman, see, M. Ariens, "Lost and Found: David Hoffman and the History of American Legal Ethics," *Arkansas Law Review,* v. 67 (2014) 571.

Hoffman's *Resolutions* may be found online at https://lonang.com/commentaries/curriculum/professional-deportment/.

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