Cyber Ethics: Part 3

Ethical Restrictions on Commenting About a Case

By John G. Browning*

In the second article of this three-part series, we discussed some examples of lawyers' use of social media that went beyond the ethical boundaries. For some attorneys, it resulted in drastic consequences, ranging from disciplinary review to disbarment. These cautionary tales beg a review of current national and local guidance on the ethical boundaries for a lawyer's social media use, from pre-trial publicity to sharing already-public information online or crowdsourcing legal questions.

I. A National Perspective.

Any discussion of what lawyers may discuss about their cases in the media must usually begin with a review of the landmark U.S. Supreme Court opinion in the area, *Gentile v. State Bar of Nevada*.[1] At issue in *Gentile* was the constitutionality of the State Bar of Nevada's disciplinary action against a criminal defense lawyer who held a press conference in which the lawyer criticized the "crooked" police department, claimed a police officer committed the crime for which his client had been indicted, and referred to several putative witnesses as "liars."[2] The State Bar's disciplinary action was based on a pretrial publicity rule,[3] similar to Rule 3.07 of the Texas Disciplinary Rules of Professional Conduct and then current Model Rule 3.6.[4] The Court ultimately reversed the State Bar's imposed discipline on First Amendment grounds.[5]

In its opinion, the Supreme Court held that Nevada's rule, as applied, was void for vagueness because the "safe harbor provision" in the rule contemplated that, "[A] lawyer describing the *'general nature of the defense'* 'without elaboration' need fear no discipline, even if he comments on '[t]he character, credibility, reputation or criminal record of a witness.'"[6]

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[1] Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991).
[2] *Id.* at 1059–60, 1063–64.
[3] NEV. SUP. CT. R. 177 (voided for vagueness by *Gentile*, 501 U.S. at 1048).
[4] *Gentile*, 501 U.S. at 1033; *see also* MODEL RULES OF PROF'L CONDUCT r. 3.6 (AM. BAR ASS'N 1983)
[5] *Gentile*, 501 U.S. at 1033.
[6] *Id.* at 1048 (ellipses omitted) (emphasis added).

In holding this way, the Court reasoned that the disciplined lawyer's statements described the general nature of the defense, and thus the safe harbor provision "misled [him] into thinking he could give his press conference without fear of discipline."[7]

Against the backdrop of the Supreme Court's holding in *Gentile*, other jurisdictions have struggled with how a lawyer's statements online about a case are impacted by rules of professional conduct. For example, in 2013, the Supreme Court of Virginia held that a lawyer is not prohibited from writing a blog that includes information relating to a representation that was disclosed in an open judicial proceeding after that public proceeding had concluded.[8] The court held that the application of Virginia Rule of Professional Conduct 1.6(a) to Hunter's blog posts was an unconstitutional infringement of Hunter's free speech rights.[9] Contrarily, just a year later, the Pennsylvania Bar Association issued its Formal Opinion 2014-300 addressing lawyers' use of social media, which stated that a lawyer who is involved in a pending matter may not post about that matter on social media, regardless of whether a particular statement might have "a substantial likelihood of materially prejudicing an adjudicative proceeding" within the meaning of Model Rule 3.6.[10]

In early 2018, the American Bar Association ("ABA") addressed this issue.[11] In its Formal Opinion 480, entitled "Confidentiality Obligations for Lawyer Blogging and Other Public Commentary," the ABA imposes a heightened duty of confidentiality for lawyers who communicate publicly on the internet, holding that lawyers may not reveal information relating to a representation, *including information contained in a public record*, unless authorized by a provision of the Model Rules.[12] In other words, for lawyers considering commenting about their cases in any online or live medium, the ABA may find that information shared by the attorney that is publicly and easily obtained can still fall under the protection of confidentiality in the attorney-client relationship.[13]

Indeed, the foundation of this Formal Opinion is Model Rule of Professional Conduct 1.6(a),[14] which states, "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b)."[15] If you think this is a sweeping prohibition with a scope arguably broader than the attorney-client privilege or the attorney-work product doctrine, you are correct.[16] This Rule encompasses everything related to

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[7] *Id*.
[8] Hunter v. Virginia State Bar, 285 Va. 485, 503 (Va. 2013).
[9] *Id.* at 621 (affirming circuit court's determination that the Virginia State Board's interpretation of its Rule 1.6 violated the First Amendment).
[10] Penn. Bar Ass'n, Formal Op. 2014-300 (Sept. 2014), https://www.pabar.org/members/catalogs/ethics%20opinions/formal/f2014-300.pdf.
[11] *See* ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 480 (Mar. 6, 2018), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_opinion_480.pdf (hereinafter ABA Formal Op. 480).
[12] *Id.* at 3 (emphasis added).
[13] *See generally id*.
[14] *Id.* at 2 (citing text of Rule 1.6(a)).
[15] MODEL RULES OF PROF'L CONDUCT r. 1.6(a) (AM. BAR ASS'N 1983)
[16] ABA Formal Op. 480, *supra* note 11, at 3.

the representation – not just information learned directly from the client but even details that are a matter of public record.[17] As the opinion explains, "[T]he duty of confidentiality extends generally to information related to a representation whatever its source and without regard to the fact that others may be aware of or have access to such knowledge."[18] In the wake of this opinion, lawyers need to be careful to avoid violating Rule 1.6 when posting on social media about a case without client consent, regardless of the nature and source of information. Moreover, as the opinion points out, a lawyer's public commentary about a case may impact other Rules as well, including Model Rule 3.5[19] and Model Rule 3.6.[20] The opinion acknowledges that new online platforms provide "a way to share knowledge, opinions, experiences, and news."[21] However, it is careful to point out, "While technological advances have altered how lawyers communicate, and therefore may raise unexpected practical questions, they do not alter lawyers' fundamental ethical obligations when engaging in public commentary."[22]

II. The Texas Perspective

The Professional Ethics Committee of the State Bar of Texas ("PEC") has issued two opinions in the last year, Opinion No. 683 and Opinion No. 673, that directly bear on what a lawyer may say in the media regarding a pending case.

A. Opinion No. 683: What is a "substantial likelihood of materially prejudicing an adjudicatory proceeding"?

In Opinion No. 683, issued in March 2019, the PEC considered the question of whether a lawyer violates the Disciplinary Rules of Professional Conduct by making statements to the media about a case pending on appeal in which the lawyer criticizes the opponent's litigation tactics and reiterates the misconduct alleged in the underlying lawsuit.[23] The PEC began its opinion by reviewing Rule 3.07 of the Texas Disciplinary Rules of Professional Conduct,[24] which provides in pertinent part that:

> In the course of representing a client, a lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a *substantial likelihood of materially prejudicing an adjudicatory proceeding*.[25]

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[17] *Id.*
[18] *Id.*
[19] *Id*. at 5 (citing MODEL RULES OF PROF'L CONDUCT r. 3.5 (AM. BAR ASS'N 1983) (regarding impartiality and decorum of the tribunal)).
[20] *Id.* (citing MODEL RULES OF PROF'L CONDUCT r. 3.6 (AM. BAR ASS'N 1983) (regarding trial publicity)).
[21] *Id.* at 1.
[22] *Id.* at 1–2.
[23] Prof'l Ethics Comm. State Bar Tex., Op. No. 683 at 1 (Mar. 2019), https://www.legalethicstexas.com/getattachment/f424bd8a-35d5-47ca-993f-dd155e098409/Opinion-683 (hereinafter Op. No. 683).
[24] *Id.* (citing to TEX. DISCIPLINARY RULES OF PROF'L CONDUCT r. 3.07 (TEX. BAR ASS'N 2018) (regarding limitations on a lawyer's public communications)).
[25] *Id.* at 1 (emphasis added).

The PEC reviewed a specific case, in which plaintiffs had lost their misappropriation of trade secrets case at the trial court level via summary judgment.[26] The plaintiffs then successfully appealed and obtained reversal of summary judgment—only to then see the defendants file a petition for review with the Texas Supreme Court in hopes of reinstating the original finding.[27] While the case was pending before the Supreme Court, plaintiffs' counsel made statements in the media to the effect of the defense litigation strategy is to "delay at all costs so their conduct is never brought before a jury."[28] The lawyers went on to state that the defendants "brazenly stole trade secrets worth millions of dollars from my clients and are now just as brazenly trying to take this case away from a Texas jury."[29]

The PEC opinion uses this fact pattern to differentiate between types of statements that would normally violate Rule 3.07, like those referring to "'the character, credibility, or reputation' of a party,"[30] and those that usually do not violate the Rule, like those about "the general nature of the claims or defense' or 'information that's contained in a public record."[31] The opinion then discusses the determining factor in the fact pattern before it: the timing of the statements.[32] Observing that the likelihood of material prejudice is highest where there is a trial by jury involved, the PEC concluded since the lawyer's comments were made while an appeal was pending, the statements "do not have a substantial likelihood of materially prejudicing an adjudicatory proceeding."[33] Thus, Texas attorneys should consider the types of statements and the procedural context in which they are made before engaging in discussions about the case.

B. Opinion No. 673: Can Lawyers Crowdsource Legal Questions Without Violating Ethical Rules?

In August 2018, the PEC issued Opinion No. 673, which answered whether a lawyer violated the Disciplinary Rules of Professional Conduct by seeking advice for the benefit of the lawyer's client from other lawyers in an online discussion group.[34] In that opinion, the PEC implicitly acknowledged the growing presence of online forums,[35] like the Texas Lawyers

[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.* at 2 (brackets omitted); *see also* Prof'l Ethics Comm. State Bar Tex., Op. 631 (July 2013).
[31] Prof'l Ethics Comm. State Bar Tex., Op. No. 683, at 2.
[32] *Id.* at 3.
[33] *Id.*
[34] Prof'l Ethics Comm. State Bar Tex., Op. No. 673 at 1 (Aug. 2018), https://www.legalethicstexas.com/getattachment/bcea78e4-748f-4bc7-b811-af1f986c01d1/Opinion-673 (hereinafter Op. No. 673).
[35] *Id.* at 1.

Facebook Group.[36] With over 11,000 members,[37] this Facebook group has "answered more than 1 million interactions on thousands of questions since it began on Facebook in 2014."[38] Like the Listservs of specialty bars, this group provides an online forum where "less-seasoned lawyers [can] seek advice from veteran Texas lawyers all over the state in a private, judgment-free environment.[39]

Noting that it is common for lawyers to have informal, lawyer-to-lawyer consultations touching on client-related issues in order to "test their knowledge, exchange ideas, and broaden their understanding of the law,"[40] the PEC opinion provides that lawyers must comply with Rule 1.05[41] and refrain from knowingly revealing confidential information of a client without the client's consent.[42] However, according to the PEC, going onto an online forum with a general or abstract inquiry that does not identify the client and does not disclose information relating to the representation does not implicate Rule 1.05.[43] Even so, if a hypothetical is used that might match or identify a specific person or entity, the online discussion done without the client's consent may violate the Disciplinary Rules.[44]

III. Conclusion

In today's digital environment, social media allow commentators incredible reach with the blinding speed of a search engine. Attorneys need to be mindful of that when they express opinions online or on social media platforms—even when acting in a purely personal capacity. Lawyers face heightened public and ethical scrutiny when they make statements on social media, so if you would not put it in a letter or pleading or publish it in a newspaper, you certainly should not post it on Facebook or tweet about it. And while digital marketing tools like geo-fencing may have gained at least one court's tacit approval for use by a party itself, lawyers face greater accountability.

When considering what to say online (including on platforms like Facebook, Instagram, and Twitter) about a pending case, lawyers are best advised to heed the cautionary advice of ABA

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[36] *See, e.g.*, Debra Cassens Weiss, *Facebook Group Becomes Texas' Largest Voluntary Bar Association; Can Lawyers Use Advice Ethically?*, ABA J. (Nov. 27, 2018, 1:15 PM), http://www.abajournal.com/news/article/facebook_group_becomes_texas_largest_volunteer_bar_association_can_lawyers_ (noting that the Texas Professional Ethics Committee addressed the question of whether attorneys could use the Texas Lawyers Facebook group to help their clients without violating Texas ethics rules when it issued its Opinion No. 673 in August 2018).

[37] *Id.*

[38] John Council, *Texas Lawyers Facebook Group, With 1 Million Interactions, Has Become State's Largest Volunteer Bar Association*, TEX. LAWYER (Nov. 26, 2018), https://www.law.com/2018/11/26/social-media-mentoring-texas-lawyers-facebook-group-with-1-million-questions-answered-has-become-states-largest-volunteer-bar-association/.

[39] *Id.*

[40] Op. No. 673, *supra* note 34, at 1–2.

[41] *Id* at 2 (citing to TEX. DISCIPLINARY RULES OF PROF'L CONDUCT r. 1.06 (TEX. BAR ASS'N 2018) (regarding confidential information)).

[42] *Id* at 2.

[43] *Id* at 4–5.

[44] *Id* at 3.

Formal Opinion 480[45] as well as the relevant PEC ethics opinions and Disciplinary Rules of Professional Conduct. Not only should you take care when you comment about a case, but you should make sure not to disclose confidential information, and to have your client's informed consent about anything that you post, even if that post is drawn from publicly available information.

[45] *See generally*, ABA Formal Op. 480, *supra* note 11.