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July 2010 OSB *Bar Bulletin Managing Your Practice* Column

Making News:
Talking with the Media

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Imagine this scene:

> You just filed a major case against Big Company alleging fraudulent business practices. The filing was spotted by the local news media. Big Company quickly put out a press release describing your client and you in unflattering terms. Reporters from print, TV and "new" media are now calling for your side. You wonder what you can say and start wondering if you should hire your own public relations firm to combat Big Company's media blitz?

In today's hyperactive media market, scenarios like this one are becoming increasingly common. Although publicity about court proceedings is certainly not new, technologies ranging from specialized cable channels to legal news blogs have made legal news a staple in the diets of many media outlets. In this column, we'll look at three aspects of "making news" from the perspective of law firm risk management. *First*, we'll survey the ethics rule governing statements to the media. *Second*, we'll look at whether the "litigation privilege" that shields us from defamation claims for statements made in the courtroom extends to our statements to the media. *Third*, we'll examine whether communications with public relations firms assisting with litigation fall within the attorney-client privilege.

The Ethics Rule

RPC 3.6 governs "trial publicity." It is patterned generally on the corresponding ABA Model Rule. RPC 3.6 is limited by the free speech provisions of both the United States Constitution (*see, e.g, Gentile v. State Bar of Nevada*, 501 US 1030, 111 S Ct 2720, 115 L Ed2d 888 (1991)) and the Oregon Constitution (*see, e.g., In re Lasswell*, 296 Or 121, 673 P2d 855 (1983)). The Oregon State Bar issued a comprehensive ethics opinion addressing both the rule and the associated constitutional limitations in 2007. The opinion, 2007-179, is available on the OSB's web site at www.osbar.org.

RPC 3.6 has four broad component parts.

First, subsection (a) states the nub of the rule and, in doing so, sets a high bar for prohibited statements:

> "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."

Second, subsection (b) carves out a number of exceptions to the general rule that permit a lawyer to discuss a comparatively wide array of public record information in the media. Subsection (b) also contains further exceptions specific to criminal cases that allow a lawyer to discuss information about an accused and to make statements in aid of the apprehension of a criminal suspect.

Third, subsection (c) allows a lawyer to reply to charges of misconduct made publicly against the lawyer and to participate in legislative or investigative proceedings.

Fourth, subsections (d) and (e) extend the restrictions to, respectively, other lawyer and nonlawyer members of the lawyer's firm or agency.

To pass constitutional muster, the restrictions in RPC 3.6 are in practical effect "back loaded" in the sense that they are oriented around trial—where constitutional considerations for fair trials may limit otherwise permitted speech—rather than earlier stages of litigation. Therefore, statements made early in litigation are accorded wide latitude because they usually have little practical impact on an eventual trial. By contrast, statements made on the eve of jury deliberation should be tailored carefully in light of the restriction.

Content & the "Litigation Privilege"

The United States Supreme Court in *Gentile* noted the practical importance of defending a client's reputation in the media:

> "An attorney's duties do not begin inside the courtroom door. He or she cannot ignore the practical implications of a legal proceeding for the client. . . . A defense attorney may pursue lawful strategies to obtain dismissal or an indictment or reduction of charges, including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried." 501 US at 1043.

At the same time, although lawyers are generally accorded great protection from defamation claims by the "litigation privilege" for statements

made inside the courtroom, the application of the privilege is more problematic for statements made to the media.

The Oregon Supreme Court in *Chard v. Galton*, 277 Or 109, 112, 559 P2d 1280 (1977), quoted the Restatement of Torts in explaining the privilege: "'The privilege stated in this Section is based upon a public policy of securing to attorneys as officers of the court the utmost freedom in their efforts to secure justice for their clients.'" The privilege is what protects us when we need to call someone a liar, a cheat or a thief during trial. The Supreme Court in *Chard* recognized that the privilege extends to statements outside the courtroom when they are sufficiently related to the litigation, such as the letter from a law firm to an insurance adjuster at issue in *Chard*.

Courts around the country have reached varying conclusions on the boundaries of the privilege when applied to media statements. Two recent federal decisions both applying California law illustrate the uncertainty. *Cargill, Inc. v. Progressive Dairy Solutions, Inc.*, 2008 WL 2235354 (ED Cal May 29, 2008), found that a news release posted on a company web site and emailed to media outlets fell within the privilege. *Neuralstem, Inc. v. StemCells, Inc.*, 2009 WL 2412126 (D Maryland Aug. 4, 2009), by contrast, held that news releases posted on a company web site and publicized at an industry conference fell outside the privilege.

Oregon's appellate courts have not yet fully explored the contours of the privilege in the media context. In *Brown v. Gatti*, 195 Or App 695, 99 P3d 299 (2004), the Court of Appeals discussed the divergent case law from around the country and found that, at minimum, the privilege did not apply to media statements made after a judicial proceeding is over. The Court of Appeals decision in *Brown* was then reversed on other grounds by the Supreme Court (341 Or 452, 145 P3d 130 (2006)).

The varying results nationally and the lack of definitive authority in Oregon counsel prudence in crafting the content of media statements.

Media Consultants & the Attorney-Client Privilege

The public aspects of a case may be critical enough to suggest using a media consultant in an effort to shape either coverage or public opinion. This, in turn, raises the question of whether law firm communications and other work product shared with a media consultant are discoverable. Again, there is no uniform answer.

Two cases from the Southern District of New York highlight the competing considerations and results. *Calvin Klein Trademark Trust v. Wachner*, 198 FRD 53 (SDNY 2000), held that general public relations advice did not assist the law firm involved in rendering legal advice and, therefore, fell outside the attorney-client privilege and the work product rule. *In re Grand Jury Subpoena*, 265 F Supp2d 321(SDNY 2003), in turn, found that communications between a law firm

and a public relations firm hired to assist it fell within both the attorney-client privilege and the work product rule.

Grand Jury Subpoena distinguished *Calvin Klein* in two key respects. First, the media consultant in *Grand Jury Subpoena* was hired for specific use on the case rather than the law firm using the client's longstanding public relations firm as in *Calvin Klein*. Second, the target audience was narrower: it was aimed at dissuading the prosecution from indicting the client rather than the broader media relations involved in *Calvin Klein*. These varying results counsel having the law firm rather than the client hire the consultant and tying the retention to assisting the law firm with the specific legal proceeding involved. They also suggest that recognition of protection (whether the attorney-client privilege or the work product rule) is not automatic and, consequently, confidential information should be shared judiciously with a consultant.

Summing Up

As the U.S. Supreme Court observed in *Gentile*, there are certainly times when lawyers must consider media strategy hand-in-hand with legal strategy. In those situations, however, lawyers need to carefully consider the timing and content of media statements and what they share with media consultants.

ABOUT THE AUTHOR

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