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Speaking Out:
Talking with the Media

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In today's multi-faceted media market, lawyers sometimes comment publicly on pending litigation they are handling. Examples include a press release issued on the filing of a case or an impromptu interview on the courthouse steps following a hearing. Whether carefully planned or spontaneous, three risk management issues can enter the mix when talking with the media—whether "traditional" outlets or newer platforms. First, RPC 3.6 outlines the ethical constraints on lawyers speaking with the media. Second, although the "litigation privilege" ordinarily shields lawyers from defamation claims for statements made in the courtroom, that protection does not generally follow outside the direct context of litigation. Finally, when clients have also retained media consultants, questions surrounding privilege over communications between a client's law firm and a media consultant can also arise. In this column, we'll briefly survey each of these areas.

Before we do, however, two qualifiers are in order.

First, we'll focus on situations where lawyers are free to discuss cases with the media. In some circumstances, by contrast, court orders or confidentiality agreements may prevent or limit media statements by lawyers.

Second, we'll address active cases that the lawyers involved are handling. Last November, the Oregon State Bar issued a comprehensive ethics opinion—Formal Opinion 2024-204—discussing the use of past client work in lawyer marketing.

RPC 3.6

The place to start when analyzing RPC 3.6 is the title: "Trial Publicity." Although the rule can arise at other points in a case, RPC 3.6 is weighted heavily toward constraining public comments that "will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." In other words, in most circumstances, the rule is oriented around public comments made close to trial that will likely influence jury selection or deliberations.

The leading Oregon State Bar ethics opinion discussing RPC 3.6—OSB Formal Opinion 2007-179 (rev. 2016)—notes (at 5) that "substantial" means "highly probable" and "materially" means "seriously." Formal Opinion 2007-179 also notes (at 8)—citing the Oregon Supreme Court in *In re Lasswell*, 296 Or. 121, 673 P.2d 855 (1983), interpreting RPC 3.6 predecessor's under the former DRs—that to ensure the regulatory restrictions under RPC 3.6 are consistent with free speech rights under the Oregon and federal constitutions, statements are only prohibited when they create a danger of both imminent and substantial

harm. Therefore, simply because a lawyer is quoted in a story about an upcoming trial will not necessarily trigger the rule. *Lasswell* also limits the rule to jury trials—not hearings or trials only involving a judge.

Litigation Privilege

Oregon has long accorded lawyers immunity from defamation and related claims if they need to, in essence, call someone a liar, a cheat, or a thief within the context of a judicial proceeding. *Chard v. Galton*, 277 Or. 109, 559 P.2d 1280 (1977), outlines the basic contours of the "litigation privilege" against the backdrop of a defamation claim and *Palmer v. Olson*, 335 Or. App. 586, 560 P.3d 79 (2024), includes more recent history of the privilege in an "anti-SLAPP" setting under ORS 31.150.

To qualify for protection under the litigation privilege, the statement involved does not necessarily have to occur in court. *Chard*, for example, involved a demand letter. Nonetheless, to fall within the privilege, the statement must generally be made in connection with a judicial (or the equivalent) proceeding. Although media statements may be about a case, they do not automatically qualify for protection because the media typically plays no direct role in the proceedings concerned. In *Brown v. Gatti*, 195 Or. App. 695, 99 P.3d 299 (2004), *rev'd on other grounds*, 341 Or. 452, 145 P.3d 130 (2006), for

example, the Court of Appeals found that the privilege did not apply to a media statement made after a trial had concluded. Although the Court of Appeals in *Gatti* was "unwilling to say categorically that an attorney's statements to the press can never qualify for absolute immunity," the court found that media statements typically lacked the requisite "connection" to proceedings to qualify generally. This equivocal posture suggests commensurate care in crafting the content of media statements.

Media Consultants

The potential reputational impact of a case may be significant enough for a client to hire a media consultant to help shape coverage or public perceptions. Although such consultants can play critical roles in advising clients, communications between law firms and media consultants are not automatically protected by either the attorney-client privilege or work product.

The U.S. District Court in Portland examined both threads in *12W RPO, LLC v. Victaulic Company*, 2017 WL 7312758 (D. Or. Mar. 7, 2017) (unpublished), which involved litigation over a building project. The plaintiff hired a media consultant to communicate with its tenants, investors and the public about both the project and the litigation. The defendant subpoenaed the consultant and later moved to compel when the consultant argued that the

documents involved were protected by privilege or work product. The court ordered the production of most of the documents. The court drew a distinction between a consultant hired to help shape litigation strategy with one retained to frame the litigation in the best public light. The court put the consultant at hand in the second camp, found no privilege and, except for documents reflecting impressions on potential witnesses, no work product protection.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP advises lawyers, law firms, and corporate and governmental legal departments throughout the Northwest on professional ethics and risk management. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark has served on the Oregon State Bar Legal Ethics Committee and is a member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the Ethics & the Law column for the WSBA *Bar News* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is the editor-in-chief and a contributing author for the WSBA *Legal Ethics Deskbook* and a principal editor and contributing author for the OSB *Ethical Oregon Lawyer* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.860.2163 and Mark@frllp.com.