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Making News:
Talking with the Media

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Lawyers sometimes speak publicly with the media about cases they are handling. In some instances, the lawyer may have initiated the contact—such as a law firm issuing a media release after filing a case. In others, the lawyer may be a more reluctant participant—such as a lawyer button-holed by a reporter in a courthouse hallway following a hearing. When lawyers and public media cross paths, many issues can arise. In this column, we'll look at three. First, we'll survey the ethics rule—RPC 3.6—governing public[1] statements to the media.[2] Second, we'll look at whether the litigation privilege, which generally shields lawyers from defamation claims for statements made in the courtroom, extends to statements to the media. Third, we'll examine whether communications with media consultants assisting with litigation are privileged or otherwise protected. Throughout, we'll use the term "media" to encompass both traditional news outlets and newer electronic platforms.

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

First, although this is inherently a topic where constitutional principles loom large, we'll take a narrower focus here on how the practical aspects of those constitutional principles play out from the perspective of law firm risk management.[3]

Second, we'll focus on situations where the lawyers involved are not constrained by either court orders or confidentiality agreements.[4] Prosecutors, in turn, are subject to additional specific constraints under RPC 3.8(f) oriented around protecting against heightened public condemnation of an accused rather than RPC 3.6's more general focus on protecting against material prejudice to a trial or similar proceeding.

Third, we'll address scenarios where lawyers are commenting on current cases they are handling (or have handled but the cases remain underway) rather than either offering independent commentary[5] or making statements about past work for marketing purposes.[6]

Finally, depending on the circumstances, remedies beyond regulatory discipline—ranging from sanctions to motions to change venue—may enter the procedural mix.[7]

RPC 3.6

Washington RPC 3.6 essentially mirrors the corresponding ABA Model Rule[8]—but with a local twist.[9] In 1987, Washington added a set of "guidelines" to the rule.[10] When the RPCs were comprehensively updated in 2006, the guidelines were moved to an appendix and cross-referenced to the rule with a

Washington-specific comment.[11] The guidelines essentially reinforce the text of the rule.

Read in tandem, the rule and the appendix broadly address four general areas.

First, RPC 3.6(a) states the nub of the rule and effectively puts the accent on public statements that will likely materially prejudice a proceeding:

> 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.

Although a "time clock" is not built into the rule, the requirement of substantial likelihood of material prejudice will more often be triggered when a jury trial is imminent than when it is months away.[12] The rule, it bears remembering, is entitled "Trial Publicity."

Second, RPC 3.6(b) creates exceptions generally permitting public statements based on specific categories of information—such as public records or public results. That said, the Court of Appeals in *Heckard v. Murray*, 5 Wn. App.2d 586, 428 P.3d 141 (2018), cautioned that a lawyer cannot improperly file documents and then claim that they qualify for the public record exception.

Third, RPC 3.6(c) recognizes that in some narrow circumstances a lawyer may need to publicly rebut information the lawyer (or the lawyer's client) did not initiate:

> Notwithstanding paragraph (a), 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. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

Fourth, RPC 3.6(d) clarifies that if a law firm or government agency lawyer is prohibited from making a public statement under RPC 3.6(a), the prohibition extends to other lawyers at the same firm or agency.[13]

Litigation Privilege

The Washington Court of Appeals recently summarized the litigation privilege:

> The "litigation privilege" is a judicially created privilege that protects participants—including attorneys, parties, and witnesses—in a judicial proceeding against civil liability for statements they make in the course of that proceeding. . . .
>
> Statements are "absolutely privileged if they are pertinent or material to the redress sought, whether or not the statements are legally sufficient to obtain that relief."[14]

In an easy example, the privilege would apply to a plaintiff's lawyer in a civil fraud case cross-examining the defendant at trial and asking: "You stole the

money, correct?" The Washington Practice Series notes, however, that "[t]he application of absolute privilege to defamatory statements made outside . . . [a] . . . judicial . . . proceeding . . . is more uncertain."[15] Outside the courtroom, showing "pertinence" to the litigation can be problematic. In *Demopolis v. Peoples Nat. Bank of Washington*, 59 Wn. App. 105, 796 P.2d 426 (1990), for example, the Court of Appeals found that the privilege did not apply when a lawyer in effect called a witness a liar in a hallway outside the courtroom. Absent clear authority from Washington's appellate courts, therefore, lawyers should not assume that media statements about a case necessarily meet the "pertinence" test required for the litigation privilege to apply.[16]

Washington has applied a related concept—the "fair report privilege"—to descriptions of court filings on a law firm's website. Unlike the litigation privilege, the fair report privilege is conditional in the sense that it only affords protection if the report is accurate. The Court of Appeals in *McNamara v. Koehler*, 5 Wn. App.2d 708, 716, 429 P.3d 6 (2018), drew the privilege from traditional media, but applied it to material—principally allegations in a wrongful death complaint—that essentially republished the information on the website of the law firm that was prosecuting the wrongful death claim:

> [N]either the type of media nor the entity republishing reports of official public proceedings is relevant to determining whether the fair report privilege applies. We hold that the fair report privilege applies to news media and other types of media, including websites, webpages, and blogs, reporting on official public proceedings, including judicial proceedings, so long as (1) the report is attributable to an official proceeding and (2) the report is an accurate or a fair abridgement of the official report.[17]

Even under the fair report privilege, prudent law firms will tether any statements to the public record as in *McNamara*.[18]

Media Consultants

Most cases don't involve media consultants. In some instances, however, the potential reputational harm or the risk of "bad news" may be significant enough for a client to hire a media advisor to help shape coverage or related public perceptions.

Although media consultants can play a key role, their advice is not automatically cloaked within either the attorney-client privilege or the work product rule. Results from courts around the country on these points have varied widely and the distinctions are typically influenced heavily by the facts of the given case involved.[19]

Pending more precise line-drawing by Washington's appellate or federal courts, the decisional law in this area suggests generally that if the consultant is hired to help the lawyers shape litigation strategy—roughly analogous to a jury

consultant—then the communications and related materials will more likely fall within privilege or work product. By contrast, if the consultant is hired primarily to put litigation developments in the best public light, protection is less likely.

A comparatively recent Oregon federal decision illustrates this admittedly indistinct line. *12W RPO, LLC v. Victaulic Company*, 2017 WL 7312758 (D. Or. Mar. 7, 2017) (unpublished), involved litigation over a building project. The plaintiff hired a media consultant to communicate with tenants, investors, and the public regarding the litigation rather than to assist lawyers with shaping case strategy. The consultant was later subpoenaed and argued that its file was protected by privilege or work product. The court ordered production of most of the documents involved. The court noted the distinction between assisting counsel and putting the best public spin on events—finding that most of the consultant's work was in the latter category. The only documents that the court accorded work product protection were impressions of potential witnesses the consultant shared with counsel.

The overall lack of precision in this area suggests that prudent lawyers consider the specific role a media consultant will play in the litigation involved and carefully calibrate any confidential information shared consistent with that role.

ABOUT THE AUTHOR

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[1] RPC 3.6(a) is framed in terms of lawyer statements that will be "disseminated by means of public communication[.]" In theory, therefore, simply speaking to a reporter "on background"—*i.e.,* when the lawyer will not be quoted and is simply providing background information that is not subject to a confidentiality order or other legal constraint—should not technically trigger the rule. That said, the rule was framed around a "legacy" media paradigm rather than today's "alternative" media platforms and lawyers should be prudently cautious even when speaking "on background."

[2] Depending on the circumstances, other rules can also enter the mix. Revealing confidential information about a current or past client may violate RPC 1.6 (duty of confidentiality to current clients) or RPC 1.9 (duties to former clients, including confidentiality). *See, e.g., In re Kim*, WSBA Disc. Bd. Case No. 17#00069, Order and Stipulation (Oct. 31, 2017) (available in the disciplinary notice database on the WSBA website) (attorney disciplined under (among other rules) RPC 1.9 for media comments about former client that revealed confidential information). RPC 8.2(a) also prohibits false statements made concerning the qualifications or integrity of a judge.

[3] *See generally Gentile v. State Bar of Nevada*, 501 U.S. 1030, 111 S. Ct. 2720, 115 L. Ed.2d 888 (1991) (addressing First Amendment considerations in lawyer statements to the media). Lawyers focused on the constitutional aspects in his area are encouraged to study the lifelong work of the late WSBA member Bruce E.H. Johnson, who passed away last year and was a nationally renowned scholar in this area. *See, e.g.,* Bruce E.H. Johnson, *Advertising and Commercial Free Speech: A First Amendment Guide* (3d ed. 2024).

[4] *See generally State v. Bassett*, 128 Wn.2d 612, 911 P.2d 385 (1996) (addressing "gag" orders); *Watness v. City of Seattle*, 11 Wn. App.2d 722, 457 P.3d 1177 (2019) (discussing confidentiality orders/agreements). Comment 2 to RPC 3.6 also notes that some special proceedings, such as those involving juveniles or mental health, may have specific rules governing confidentiality.

[5] *See generally* ABA Formal Op. 480 (2018) (discussing lawyer confidentiality obligations in blogging and other public commentary). Comment 3 to RPC 3.6 notes that it only applies to lawyer-participants in a proceeding rather than public commentators who have not been involved.

[6] *See generally* ABA Formal Op. 10-457 (2010) (addressing lawyer website content).

[7] For a survey of other potential remedies, *see* Thomas R. Andrews, *The Law of Lawyering in Washington* at 8-26 through 8-27 (2012) (Andrews). *See also* RCW Ch. 4.105 (Uniform Public Expression Protection Act of 2021, Washington's modified "anti-SLAPP" statute).

[8] For an outline of the history of ABA Model Rule 3.6, *see* ABA, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2013* at 499-514 (2013). For a survey of the application of Model Rule 3.6 from a national perspective, *see* ABA. *Annotated Model Rules of Professional Conduct* at 445-454 (10th ed. 2023).

[9] *See* WSBA, *Reporter's Explanatory Memorandum to the Ethics 2003 Committee's Proposed Rules of Professional Conduct* at 183-184 (2004) (Reporter's Memo) (discussing then-proposed amendments to the Washington RPCs, including RPC 3.6); Washington Supreme Court Order 25700-A-851 (July 10, 2006) (adopting amendments to RPC 3.6 (among others), adding an appendix, and adopting official comments to Washington RPCs). Comment 7 to RPC 3.6 was updated in 2015 to include a reference to limited license legal technicians. *See* Washington Supreme Court Order 25700-A-1096 (Mar. 23, 2015) (updating RPCs to conform to LLLT practice).

[10] *See* Andrews, *supra*, 8-24 (surveying history of Washington RPC 3.6); *see also* Robert H. Aronson, *An Overview of the Law of Professional Responsibility: The Rules of Professional Conduct Annotated and Analyzed*, 61 Wash. L. Rev. 823, 871-72 (1986) (addressing RPC 3.6 as adopted in 1986).

[11] Reporter's Memo, *supra*, at 184; *see* RPC 3.6, cmt. 9 (cross-referencing the appendix). Additional resources from the Washington Bench-Bar-Press Committee are available on the Washington courts' website at: https://www.courts.wa.gov/committee/?committee_id=77.

[12] *See In re Lindquist*, WSBA Disc. Bd. Case No. 17#00087, Order (Nov. 27, 2018) and Stipulation (Nov. 26, 2018) (available in the disciplinary notice database on the WSBA website) (disciplining lawyer for statements made during media interviews conducted both before and during jury trial). Although the rule does not categorically exclude bench trials or arbitrations, Comments 5 and 6 to RPC 3.6 note that judge-alone proceedings are not typically subject to the same concerns as jury trials.

[13] RPC 3.8(f) also imposes duties of reasonable supervision on prosecutors in this regard for nonlawyers working with them such as investigators and other law enforcement personnel. *See also* RPC 5.1 and RPC 5.3 addressing lawyer responsibility for the conduct of, respectively, other law firm or law department lawyers and nonlawyer staff. RPC 8.4(a) also prohibits a lawyer from violating the RPC through the acts of another.

[14] *Young v. Rayan*, 27 Wn. App.2d 500, 508-09, 533 P.3d 123 (2023) (footnote and citation omitted).

[15] 16A Wash. Prac., Tort Law and Practice § 20.14 (rev. ed. 2024).

[16] Although state law around the country varies, two national summaries by respected commentators note that the litigation privilege usually does not protect media statements. *See* Ronald E. Mallen, 1 *Legal Malpractice* § 6:58 at 815 (rev. ed. 2021) ("Statements beyond the bounds of the litigation privilege, such as press releases and interviews may be actionable."); Douglas R. Richmond, *Lawyers' Rare Privilege of Litigating in the Media*, 128 Penn. St. L. Rev. 701, 707 (2024) ("When lawyers speak with the press or provide information to the media, however, the litigation privilege will rarely shield them against defamation allegations or other tort claims arising out of those communications.").

[17] Because the Court of Appeals in *McNamara* decided the case based on the fair report privilege, it did not reach a related argument the law firm made under the litigation privilege.

[18] *See also Jha v. Khan*, 24 Wn. App.2d 377, 400-404, 520 P.3d 470 (2022) (discussing *McNamara* approvingly).

[19] *See generally Grand Canyon Skywalk Development LLC v. Cieslak*, 2015 WL 4773585 at *8-*17 (D. Nev. Aug. 13, 2015) (unpublished) (including a lengthy discussion of cases nationally).