The Ethical Implications of High Profile Cases in the Media

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About the Presenter

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The Ethical Implications of High Profile Cases in the Media

This presentation discusses how lawyers and reporters in high profile cases can work together in a way that informs the public but does not jeopardize the rights of the individuals at the center of the case. These materials are designed to provide the ethical framework for that discussion.

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Introduction

The decision about whether a lawyer should make an extrajudicial or out-of-court statement about a client's case is not an easy one. In addition to the specific facts of the case, there are also constitutional, ethical, and legal standards that must be analyzed and weighed against each other. ABA Comment [1] to SCR 20:3.6 acknowledges that difficulty:

> [1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

As a practical matter, lawyers often decide against making an extrajudicial statement. In many of those cases, that is the appropriate decision: it is a decision that protects the client's right to a fair trial and minimizes the lawyer's risk of violating the Rules of Professional Conduct.[1] There may be cases, however, when failing to make an extrajudicial statement could violate the duty of competence under SCR 20:1.1 and the duty of diligence under SCR 20:1.3. In those cases, a lawyer's extrajudicial comments on his or her client's case may be necessary to zealous and skillful advocacy. ABA Comment [1] to SCR 20:1.3 instructs:

> [1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[1] The underlying policy for restricting a lawyer's extrajudicial statement that would be unobjectionable if made by a nonlawyer is that the public gives an involved lawyer's opinion much more credence. Through the lawyer's involvement in the case and his or her expertise, the lawyer knows more about the case than the general public. Consequently, what the lawyer says has the perception of greater authority and has a greater potential for prejudice than what a nonlawyer or a nonparticipant says. See, e.g., *Gentile v. Nevada State Bar*, 501 U.S. 1030 (1991) (opinion of Rehnquist, C.J.). The Rule does not apply to "outside" lawyers who may provide commentary on significant cases. ABA Comment [3] to SCR 20:3.6 notes that the "public value of informed commentary is great and the likelihood of prejudice to a proceeding is small."

This presentation examines the extent to which the disciplinary rules may insulate the courtroom from prejudice caused by publicity surrounding a case.

A. SCR 20:3.6 Trial Publicity

The trial publicity rule is SCR 20:3.6. It has five main parts: the general prohibition; a list of categories of statements that are more than likely to have a prejudicial effect; a safe harbor provision that lists categories of statements that would not ordinarily be considered to have a prejudicial effect; a provision that permits a lawyer to respond to adverse publicity not initiated by the lawyer or the client; and a provision that prohibits other lawyers in the firm or agency from making a statement that is prohibited.

1. The General Prohibition: SCR 20:3.6(a)

Lawyers may not use publicity to prejudice a case. SCR 20:3.6(a) prohibits a lawyer from making an extrajudicial or out-of-court 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."

This prohibition applies to a lawyer who is participating or has participated in the investigation or litigation of a matter.

2. Statements that Are Ordinarily Likely to Materially Prejudice an Adjudicative Proceeding: SCR 20:3.6(b)

SCR 20:3.6(b) provides guidance: it provides a list of six specific categories of statements that are ordinarily likely to have a substantial likelihood of materially prejudicing an adjudicative proceeding in a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in deprivation of liberty. These six categories relate to:

> (1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;
> (2) in a criminal case or proceeding that could result in deprivation of liberty, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;
> (3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;
> (4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in deprivation of liberty;
> (5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.[2]

These specific categories of statements are rebuttably presumed to have a substantial likelihood of materially prejudicing an adjudicative proceeding.

3. Safe Harbor: SCR 20:3.6(c)

SCR 20:2.6(c) provides a safe harbor: it provides a list of seven specific categories of statements that "would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a)." ABA Comment [4] to SCR 20:3.6. These seven specific categories relate to:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
(2) information contained in a public record;
(3) that an investigation of a matter is in progress;
(4) the scheduling or result of any step in litigation;
(5) a request for assistance in obtaining evidence and information necessary thereto;
(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
(7) in a criminal case, in addition to subs. (1) through (6):
    (i) the identity, residence, occupation and family status of the accused;
    (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
    (iii) the fact, time and place of arrest; and
    (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

4. Response to Adverse Publicity not Initiated by the Lawyer or the Client: SCR 20:3.6(d)

Extrajudicial statements that might otherwise be prohibited under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the client. SCR 20:3.6(d) states:

Notwithstanding par. (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial likelihood of 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.

[2] Paragraph (b) contains provisions found in ABA Comment [5] but not contained in the Model Rule itself. Because of the addition of paragraph (b), this Rule and the Model Rule have different numbering.

Paragraph (d) acknowledges that when prejudicial statements have been publicly made by others, responsive statements may lessen any resulting adverse impact on the adjudicative proceeding. Such responsive statements, however, should be limited to only information that is necessary to mitigate the undue prejudice created by the statements made by others. ABA Comment [7] to SCR 20:3.6.

In-court testimony is not "publicity" for purposes of this exception. *U.S. v. McGregor*, 838 F. Supp. 2d 1256, 1265 (M.D. Ala. 2012). The court held that defense lawyers' comments on the courthouse steps about witnesses' testimony did not fall within the right-to-respond exception. In rejecting the right-to-respond argument, the court explained that a right to respond to in-court testimony would eviscerate the Rule by allowing every defense attorney to "respond" to any witness testimony with a news conference. *Id.*

5. Prohibition Applies to Other Lawyers in the Firm or Government Agency: SCR 20:3.6(e)

SCR 20:3.6(e) prohibits lawyers associated in a firm or government agency with a lawyer subject to par. (a) from making a statement prohibited by par. (a). This provision is consistent with SCR 20:5.1, which requires that manager

B. "Information Contained in a Public Record" Safe Harbor: SCR 20:3.6(c)(2)

Many extrajudicial comments are made pursuant to the safe harbor in SCR 20:3.6(c)(2), which permits a lawyer to state without elaboration "information contained in a public record." What constitutes a "public record" has not always been clear.

The Indiana Supreme Court concluded that the phrase "public record" in this safe harbor refers only to public government records—that is, the records and papers on file with a government entity to which an ordinary citizen would have lawful access. "On file" does not, however, mandate formalities such as file stamping or entry on a case docket. *In re Brizzi,* Ind., No. 49S00-0910-DI-425 (3/12/12)(citing *Maryland Attorney Grievance Comm'n v. Gansler*, 835 A.2d 548 (Md. 2003)).

The term "public record" does not, however, include publicly available media reports. "A more expansive concept of a public record that includes the unfiltered and untested contents of all publicly accessible media would permit the public record safe harbor to swallow the general rule of restricting prejudicial speech," the court reasoned. To be protected by the "public record" safe harbor, a lawyer may not provide information beyond quotations from or references to the contents of the public record. Moreover, the court concluded that a prosecutor must make clear that the statement being disclosed is the content of the public document, so that the statement cannot be misunderstood to be the prosecutor's own opinion about the evidence or the suspect's guilt. *Id.*

C. Actual Prejudice not Necessary

SCR 20:3.6 and SCR 20:3.8 do not require a finding that an improper statement has caused actual prejudice to a criminal defendant or an adjudicative proceeding. SCR 20:3.6 requires "a substantial likelihood of materially prejudicing an adjudicative proceeding," and SCR 20:3.8(f) expressly incorporates SCR 20:3.6. What matters is the likelihood that a particular statement will cause

prejudice when the statement is made, not whether, in hindsight, the statement actually worked to the detriment of a defendant. *In re Brizzi,* Ind., No. 49S00-0910-DI-425 (3/12/12)(citing *Maryland Attorney Grievance Comm'n v. Gansler*, 835 A.2d 548 (Md. 2003)).

D. Timing of Statement

The timing of the statement is an important criterion in assessing the potential for prejudice. *See, e.g. Iowa Supreme Court Bd. Of Prof'l Ethics & Conduct v. Visser*, 629 N.W.2d 376 (Iowa 2001) (a single newspaper article generated by a lawyer's letter published almost two years before, and in a city more than 50 miles from, trial was not reasonably likely to affect the proceedings); *Maldonado v. Ford Motor Co.,* 719 N.W.2d 809 (Mich. 2006) (plaintiff's lawyer's public descriptions of excluded evidence, coupled with plaintiff's statement five days before trial that Metro Detroit judges were biased, were substantially likely to materially prejudice the proceeding).

E. Nonlawyer Assistants

Pursuant to SCR 20:5.3, a lawyer who possesses managerial authority or supervisory authority in a law firm must make reasonable efforts to ensure that the conduct of a nonlawyer assistant is compatible with the professional obligations of the lawyer. Consequently, a lawyer who possesses managerial authority or supervisory authority must make reasonable efforts to ensure that a nonlawyer assistant will not make an extrajudicial statement that the lawyer would be prohibited from making under SCR 20:3.6(a).

F. Prosecutors

SCR 20:3.8(f)(2) also imposes obligations regarding extrajudicial statements. Prosecutors, other than municipal prosecutors, must 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 SCR 20:3.6(a). Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals. ABA Comment [6] to SCR 20:3.8.

Selected Rules of Professional Conduct

SCR 20:3.6 Trial publicity

(a) 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.

(b) A statement referred to in par. (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in deprivation of liberty, and the statement relates to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in deprivation of liberty, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in deprivation of liberty;

(5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

(c) Notwithstanding pars. (a) and (b)(1) through (5), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subs. (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(d) Notwithstanding par. (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial likelihood of 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.

(e) No lawyer associated in a firm or government agency with a lawyer subject to par. (a) shall make a statement prohibited by par. (a).

WISCONSIN COMMITTEE COMMENT

Paragraph (b) contains provisions found in ABA Comment [5] but not contained in the Model Rule. Because of the addition of paragraph (b), this rule and the Model Rule have differing numbering, so that care should be used in consulting the ABA Comment.

ABA COMMENT

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.

[3] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the Rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

[5] There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

[8] See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

SCR 20:3.8 Special responsibilities of a prosecutor

(a) A prosecutor in a criminal case or a proceeding that could result in deprivation of liberty shall not prosecute a charge that the prosecutor knows is not supported by probable cause.

(b) When communicating with an unrepresented person in the context of an investigation or proceeding, a prosecutor shall inform the person of the prosecutor's role and interest in the matter.

(c) When communicating with an unrepresented person who has a constitutional or statutory right to counsel, the prosecutor shall inform the person of the right to counsel and the procedures to obtain counsel and shall give that person a reasonable opportunity to obtain counsel.

(d) When communicating with an unrepresented person a prosecutor may discuss the matter, provide information regarding settlement, and negotiate a resolution which may include a waiver of constitutional and statutory rights, but a prosecutor, other than a municipal prosecutor, shall not:

(1) otherwise provide legal advice to the person, including, but not limited to whether to obtain counsel, whether to accept or reject a settlement offer, whether to waive important procedural rights or how the tribunal is likely to rule in the case, or

(2) assist the person in the completion of (i) guilty plea forms (ii) forms for the waiver of a preliminary hearing or (iii) forms for the waiver of a jury trial.

(e) A prosecutor shall not subpoena a lawyer in a grand jury or other proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information.

(f) A prosecutor, other than a municipal prosecutor, in a criminal case or a proceeding that could result in deprivation of liberty shall:

(1) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information

known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

(2) 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 SCR 20:3.6.

(g) When a prosecutor knows of new, credible, and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall do all of the following:

(1) promptly disclose that evidence to an appropriate court or authority; and

(2) if the conviction was obtained in the prosecutor's jurisdiction:

(i) promptly make reasonable efforts to disclose that evidence to the defendant unless a court authorizes delay; and

(ii) make reasonable efforts to undertake an investigation or cause an investigation to be undertaken, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

WISCONSIN COMMENT

The Wisconsin Supreme Court Rule differs from the Model Rule in several respects: (1) paragraph (b) adds the reference to "in the context of an investigation or proceeding"; (2) paragraphs (c) and (d) expand the rule by deleting a reference to communications occurring only "after the commencement of litigation"; (3) paragraphs (d) and (f) exempt municipal prosecutors from certain requirements of the rule. Care should be used in consulting the ABA Comment.

Wisconsin prosecutors have long embraced the notion that the duty to do justice requires both holding offenders accountable and protecting the innocent. New Rule 20:3.8(g) and (h) reinforces this notion. The Wisconsin rule differs slightly from the new ABA rule to recognize limits in the investigative resources of Wisconsin prosecutors.

This rule was not designed to address significant changes in the law that might affect the incarceration status of a number of prisoners, such as where a statute is declared unconstitutional.

ABA COMMENT

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing pro se with the approval of the tribunal.

Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] 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).

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

[7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (g) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court-authorized delay, to the defendant. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate.

[8] Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

SCR 20:5.1 Responsibilities of partners, managers, and supervisory lawyers

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

ABA COMMENT

[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. See Rule 1.0(c). This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.

[2] Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

[3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.

[4] Paragraph (c) expresses a general principle of personal responsibility for acts of another. See also Rule 8.4(a).

[5] Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a

particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

[6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

[7] Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

[8] The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See Rule 5.2(a).

SCR 20:5.3 Responsibilities regarding nonlawyer assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

ABA COMMENT

[1] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

[2] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct. See Comment [1] to Rule 5.1. Paragraph (b) applies to lawyers who have supervisory authority over the work of a nonlawyer. Paragraph (c) specifies the circumstances in which a lawyer is responsible

for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

SCR 20:8.2 Judicial and legal officials

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the code of judicial conduct.

ABA COMMENT

[1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

[2] When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

[3] To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

SCR 20:8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

….

ABA COMMENT

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

….

PRESENT: All the Justices

HORACE FRAZIER HUNTER

v. Record No. 121472

OPINION BY
JUSTICE CLEO E. POWELL
February 28, 2013

VIRGINIA STATE BAR,
EX REL. THIRD DISTRICT COMMITTEE

FROM THE CIRCUIT COURT OF THE CITY OF RICHMOND
Kenneth R. Melvin, Alfred D. Swersky,
and Von L. Piersall, Jr., Judges Designate

In this appeal of right by an attorney from a Virginia State Bar ("VSB") disciplinary proceeding before a three judge panel appointed pursuant to Code § 54.1-3935, we consider whether an attorney's blog posts are commercial speech, whether an attorney may discuss public information related to a client without the client's consent, and whether the panel ordered the attorney to post a disclaimer that is insufficient under Rule 7.2(a)(3) of the Virginia Rules of Professional Conduct.

I. FACTS AND PROCEEDINGS

Horace Frazier Hunter, an attorney with the law firm of Hunter & Lipton, PC, authors a trademarked blog[1] titled "This Week in Richmond Criminal Defense," which is accessible from his law firm's website, www.hunterlipton.com. This blog, which is

[1] A "blog" is a shortened, colloquial reference for the term "weblog," and is defined as " 'a Web site that contains an online personal journal with reflections, comments, and often hyperlinks provided by the writer; also: the contents of such a site.' " White v. Baker, 696 F.Supp.2d 1289, 1310 (N.D. Ga. 2010) (quoting Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/blog (last visited January 31, 2013)).

not interactive, contains posts discussing a myriad of legal issues and cases, although the overwhelming majority are posts about cases in which Hunter obtained favorable results for his clients. Nowhere in these posts or on his website did Hunter include disclaimers.

As a result of Hunter's blog posts on his website, the VSB launched an investigation. During discussions with the VSB about whether his blog constituted legal advertising, Hunter wrote a letter to the VSB offering to post a disclaimer on one page of his website:

> "This Week in Richmond Criminal Defense is not an advertisement[;] it is a blog. The views and opinions expressed on this blog are solely those of attorney Horace F. Hunter. The purpose of these articles is to inform the public regarding various issues involving the criminal justice system and should not be construed to suggest a similar outcome in any other case."

However, the negotiations stalled and no disclaimers were posted at that time.

On March 24, 2011, the VSB charged Hunter with violating Rules 7.1, 7.2, 7.5,[2] and 1.6 by his posts on this blog. Specifically, the VSB argued that he violated rules 7.1 and 7.2 because his blog posts discussing his criminal cases were

[2] The District Committee ultimately did not find by clear and convincing evidence that Hunter violated Rule 7.5 and dismissed that charge.

inherently misleading as they lacked disclaimers.[3] The VSB also asserted that Hunter violated Rule 1.6 by revealing information that could embarrass or likely be detrimental to his former clients by discussing their cases on his blog without their consent.

In a hearing on October 18, 2011, the VSB presented evidence of Hunter's alleged violations. The VSB presented a former client who testified that he did not consent to information about his cases being posted on Hunter's blog and believed that the information posted was embarrassing or detrimental to him, despite the fact that all such information had previously been revealed in court. The VSB investigator testified that other former clients felt similarly. The VSB also entered all of the blog posts Hunter had posted on his blog to date. At that time, none of the posts entered contained disclaimers. Of these thirty unique posts, only five discussed legal, policy issues. The remaining twenty-five discussed cases. Hunter represented the defendant in twenty-two of these cases and identified that fact in the posts. In nineteen of these twenty-two posts, Hunter also specifically named his law firm. One of these posts described a case where a family hired

[3] Although some of Hunter's blog posts now contain disclaimers, not all do and the disclaimers that are present were not added until after the VSB brought disciplinary charges against Hunter.

Hunter to represent them in a wrongful death suit and the remaining twenty-one of these posts described criminal cases. In every criminal case described, Hunter's clients were either found not guilty, plea bargained to an agreed upon disposition, or had their charges reduced or dismissed.

At the hearing, Hunter testified that he has many reasons for writing his blog - including marketing, creation of a community presence for his firm, combatting any public perception that defendants charged with crimes are guilty until proven innocent, and showing commitment to criminal law. Hunter stated that he had offered to post a disclaimer on his blog, but the offered disclaimer was not satisfactory to the VSB. Hunter admitted that he only blogged about his cases that he won. He also told the VSB that he believed that using the client's name is important to give an accurate description of what happened. Hunter told the VSB that he did not obtain consent from his clients to discuss their cases on his blog because all the information that he posted was public information.

Following the hearing, the VSB held that Hunter violated Rule 1.6 by "disseminating client confidences" obtained in the course of representation without consent to post. Specifically, the VSB found that the information in Hunter's blog posts "would be embarrassing or be likely to be detrimental" to clients and he did not receive consent from his clients to post such

information. The VSB further held that Hunter violated Rule 7.1. The VSB's conclusion that Hunter's website contained legal advertising was based on its factual finding that "[t]he postings of [Hunter's] case wins on his webpage advertise[d] cumulative case results." Moreover, the VSB found that at least one purpose of the website was commercial. The VSB further held that he violated Rule 7.2 by "disseminating case results in advertising without the required disclaimer" because the one that he proposed to the VSB was insufficient. The VSB imposed a public admonition with terms including a requirement that he remove case specific content for which he has not received consent and post a disclaimer that complies with Rule 7.2(a)(3) on all case-related posts.

Hunter appealed to a three judge panel of the circuit court and the court heard argument. The court disagreed with Hunter that de novo was the proper standard of review and instead applied the following standard: "whether the decision is contrary to the law or whether there is substantial evidence in the record upon which the district committee could reasonably have found as it did." The court further ruled that the VSB's interpretation of Rule 1.6 violated the First Amendment and dismissed that charge. The court held VSB's interpretation of Rules 7.1 and 7.2 do not violate the First Amendment and that the record contained substantial evidence to support the VSB's

determination that Hunter had violated those rules. The court imposed a public admonition and required Hunter to post the following disclaimer: "Case results depend upon a variety of factors unique to each case. Case results do not guarantee or predict a similar result in any future case." This appeal followed.

II. ANALYSIS

A. Whether "[t]he Ruling of the Circuit Court finding a violation of Rules 7.1(a)(4) and 7.2(a)(3) conflicts with the First Amendment to the Constitution of the United States."

Rule 7.1(a)(4), which is the specific portion of the Rule that the VSB argued that Hunter violated, states:

> (a) A lawyer shall not, on behalf of the lawyer or any other lawyer affiliated with the lawyer or the firm, use or participate in the use of any form of public communication if such communication contains a false, fraudulent, misleading, or deceptive statement or claim. For example, a communication violates this Rule if it:
>
> . . . .
>
> (4) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law.

The VSB also argues that Hunter violated the following subsection of Rule 7.2(a)(3):

> (a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through

> written, recorded, or electronic communications, including public media. In the determination of whether an advertisement violates this Rule, the advertisement shall be considered in its entirety, including any qualifying statements or disclaimers contained therein. Notwithstanding the requirements of Rule 7.1, an advertisement violates this Rule if it:
>
> . . . .
>
> (3) advertises specific or cumulative case results, without a disclaimer that (i) puts the case results in a context that is not misleading; (ii) states that case results depend upon a variety of factors unique to each case; and (iii) further states that case results do not guarantee or predict a similar result in any future case undertaken by the lawyer. The disclaimer shall precede the communication of the case results. When the communication is in writing, the disclaimer shall be in bold type face and uppercase letters in a font size that is at least as large as the largest text used to advertise the specific or cumulative case results and in the same color and against the same colored background as the text used to advertise the specific or cumulative case results.

In response to these allegations, Hunter contends that speech concerning the judicial system is "quintessentially 'political speech'" which is within the marketplace of ideas. Hunter asserts that the Supreme Court of the United States has twice declined to answer whether political speech is transformed into commercial speech simply because one of multiple motives is commercial. Specifically, he argues that his blog posts are not commercial because

> (1) the [Supreme Court of the United States'] formal commercial speech definitions focus

> heavily on whether the speech does *no more* than propose a commercial transaction; (2) the [Supreme Court of the United States'] commercial speech decisions, to the extent that they discuss motivation at all, have focused on whether the speech is *solely* driven by commercial interest; (3) the [Supreme Court of the United States] has repeatedly insisted that the existence of a commercial motivation does not disqualify speech from the heightened scrutiny protection it would otherwise deserve; (4) the [Supreme Court of the United States] has warned that when commercial and political elements of speech are inextricably intertwined, the heightened protection applicable to the political speech should be applied, lest the political speech be chilled; and (5) the constitutional policy arguments that undergird the reduction of protection for commercial speech have no persuasive force when the content of the speech is political.

The VSB responds that Hunter's blog posts are inherently misleading commercial speech.

"Whether the inherent character of a statement places it beyond the protection of the First Amendment is a question of law over which . . . this Court . . . exercise[s] de novo review." Peel v. Atty. Registration & Disciplinary Comm'n, 496 U.S. 91, 108 (1990). An appellate Court must independently examine the entire record in First Amendment cases to ensure that " 'a forbidden intrusion on the field of free expression' " has not occurred. Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 499 (1984) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 284-86 (1964)).

Turning to Hunter's argument that his blog posts are

political, rather than commercial, speech, we note that "[t]he existence of 'commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment.' " Bigelow v. Virginia, 421 U.S. 809, 818 (1975) (quoting Ginsburg v. United States, 383 U.S. 463, 474 (1966)). However, when speech that is both commercial and political is combined, the resulting speech is not automatically entitled to the level of protections afforded political speech. Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 474 (1989).

While it is settled that attorney advertising is commercial speech, Bates v. State Bar of Arizona, 433 U.S. 350, 363-64 (1977), Bates and its progeny were decided in the era of traditional media. In recent years, however, advertising has taken to new forms such as websites, blogs, and other social media forums, like Facebook and Twitter. See generally Spirit Airlines, Inc. v. United States Dep't of Transp., 687 F.3d 403 (D.C. Cir. 2012); QVC Inc. v. Your Vitamins Inc., 439 Fed. Appx. 165 (3d Cir. 2011); Athleta, Inc. v. Pitbull Clothing Co., 2013 U.S. Dist. LEXIS 6867 (C.D. Cal. Jan. 7, 2013).

Thus, we must examine Hunter's speech to determine whether it is commercial speech, specifically, lawyer advertising.

> Advertising, like all public expression, may be subject to reasonable regulation that serves a legitimate public interest. To the extent that

> commercial activity is subject to regulation, the relationship of speech to that activity may be one factor, among others, to be considered in weighing the First Amendment interest against the governmental interest alleged. Advertising is not thereby stripped of all First Amendment protection. The relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas.

Bigelow, 421 U.S. at 826 (internal citations omitted). Simply because the speech is an advertisement, references a specific product, or is economically motivated does not necessarily mean that it is commercial speech. Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 67 (1983). "The combination of all these characteristics, however, provides strong support for the . . . conclusion that [some blog posts] are properly characterized as commercial speech" even though they also discuss issues important to the public. Id. at 67-68 (emphasis in original).

Certainly, not all advertising is necessarily commercial, e.g., public service announcements. See id. at 66 (holding "[t]he mere fact that these pamphlets are conceded to be advertisements clearly does not compel the conclusion that they are commercial speech"). However, all commercial speech is necessarily advertising. See Webster's Third New International Dictionary 31 (1993) (defining "advertisement" as "a calling attention to or making known[;]an informing or notifying[;] a calling to public attention[;] a statement calling attention to something[;] a public notice; esp[ecially] a paid notice or

announcement published in some public print (as a newspaper, periodical, poster, or handbill) or broadcast over radio or television"). Indeed, the Supreme Court of the United States has said that "[t]he diverse motives, means, and messages of advertising may make speech 'commercial' in widely varying degrees." Bigelow, 421 U.S. at 826.

Here, Hunter's blog posts, while containing some political commentary, are commercial speech. Hunter has admitted that his motivation for the blog is at least in part economic. The posts are an advertisement in that they predominately describe cases where he has received a favorable result for his client. He unquestionably references a specific product, i.e., his lawyering skills as twenty-two of his twenty-five case related posts describe cases that he has successfully handled. Indeed, in nineteen of these posts, he specifically named his law firm in addition to naming himself as counsel.

Moreover, the blog is on his law firm's commercial website rather than an independent site dedicated to the blog. See Howard J. Bashman, How Appealing Blog (Feb. 11, 2013, 9:40 AM), http://howappealing.law.com (an independent blog by a Pennsylvania appellate attorney that is accessible through Law.com at http://legalblogwatch.typepad.com/). The website

uses the same frame[4] for the pages openly soliciting clients as it does for the blog, including the firm name, a photograph of Hunter and his law partner, and a "contact us" form. The homepage of the website on which Hunter posted his blog states only:

> **Do you need Richmond attorneys?**
>
> Hunter & Lipton, CP [sic] is a law practice in Richmond, Virginia specializing in litigation matters from administrative agency hearings to serious criminal cases. As experienced Richmond attorneys, we bring a genuine desire to help those who find themselves in difficult situations. Our partnership was founded on the idea that everyone, no matter what the circumstance, deserves a zealous advocate to fight on his or her behalf.
>
> People make mistakes, and may even find themselves in situations not of their own making. And for these people, the system can be extraordinarily unforgiving and unjust—but you do not have to face this system alone.
>
> **If you find yourself in a difficult legal situation, the Richmond attorneys of Hunter & Lipton, LLP would consider it a privilege to represent you. Please contact our office with any questions or to schedule a consultation.**

This non-interactive blog does not allow for discourse about the cases, as non-commercial commentary often would by allowing readers to post comments. See, e.g., Law.com Legal Blog Watch,

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[4] See Joan M. Reitz, Online Dictionary for Library and Information Science, http://www.abc-clio.com/ODLIS/odlis_F.aspx?#frame (last visited February 25, 2013) (defining frame as "[a] separately scrollable area in the window of a computer application or in a Web page that has been divided into more than one scrollable area").

http://legalblogwatch.typepad.com/; Above the Law, http://abovethelaw.com/. See also June Lester & Wallace C. Koehler, Jr., Fundamentals of Information Studies 102 (2d ed. 2007) (observing that "[i]n contrast to the interaction possible in some other forms of web-published information, blog readers are most frequently permitted to leave comments and create threads of discussion"). Instead, in furtherance of his commercial pursuit, Hunter invites the reader to "contact us" the same way one seeking legal representation would contact the firm through the website.

Thus, the inclusion of five generalized, legal posts and three discussions about cases that he did not handle on his non-interactive blog, no more transform Hunter's otherwise self-promotional blog posts into political speech, "than opening sales presentations with a prayer or a Pledge of Allegiance would convert them into religious or political speech." Fox, 492 U.S. at 474-75. Indeed, unlike situations and topics where the subject matter is inherently, inextricably intertwined, Hunter chose to comingle sporadic political statements within his self-promoting blog posts in an attempt to camouflage the true commercial nature of his blog. "Advertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues." Bolger, 463 U.S. at 68. When considered as a

whole, the economically motivated blog overtly proposes a commercial transaction that is an advertisement of a specific product.

Having determined that Hunter's blog posts discussing his cases are commercial speech,

> we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980); Adams Outdoor Advertising v. City of Newport News, 236 Va. 370, 383, 373 S.E.2d 917, 923 (1988).

The VSB does not contend, nor does the record indicate, that Hunter's posts do not concern lawful activity; rather, the VSB argues that the posts are inherently misleading. While we do not hold that the blog posts are inherently misleading, we do conclude that they have the potential to be misleading. "[B]ecause the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising." Bates, 433 U.S. at 383. Of the thirty posts that were on his blog at the time of the VSB

hearing, twenty-two posts named himself as counsel and discussed cases that he handled. With one exception, in all of these posts, he described the successful results that he obtained for his clients.[5] While the States may place an absolute prohibition on inherently misleading advertising, "the States may not place an absolute prohibition on certain types of potentially misleading information, . . . if the information also may be presented in a way that is not deceptive." In re R.M.J., 455 U.S. 191, 203 (1982). Here, the VSB's own remedy of requiring Hunter to post disclaimers on his blog posts demonstrates that the information could be presented in a way that is not misleading or deceptive.

Thus, we must examine whether the VSB has a substantial governmental interest in regulating these blog posts. Central Hudson, 447 U.S. at 566. The Supreme Court of the United States has recognized that " '[i]f the naiveté of the public will cause advertising by attorneys to be misleading, then it is the bar's role to assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective.' " Peel, 496 U.S. at 110 (quoting Bates, 433 U.S. at 375). Indeed, the Supreme Court of the United States expressed concern that

[5] In the one case that he does not describe favorable results he has received, he discusses how he has been retained by a family in a wrongful death lawsuit against a police department.

the public may lack the sophistication to discern misstatements as to the quality of a lawyer's services. Bates, 433 U.S. at 383. Therefore, the VSB has a substantial governmental interest in protecting the public from an attorney's self-promoting representations that could lead the public to mistakenly believe that they are guaranteed to obtain the same positive results if they were to hire Hunter.

Because the VSB's governmental interest is substantial, we must now determine "whether the regulation directly advances the governmental interest asserted." Central Hudson, 447 U.S. at 566. The VSB's regulations permit blog posts that discuss specific or cumulative case results but require a disclaimer to explain to the public that no results are guaranteed. Rules 7.1 and 7.2. This requirement directly advances the VSB's governmental interest.

Finally, we must determine whether the VSB's regulations are no more restrictive than necessary. Central Hudson, 447 U.S. at 566. The Supreme Court of the United States has approved the use of disclaimers or explanations. Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 651 (1985); In re R.M.J., 455 U.S. at 203; Bates, 433 U.S. at 384. The disclaimers mandated by the VSB

> shall precede the communication of the case results. When the communication is in writing, the disclaimer shall be in bold type face and

> uppercase letters in a font size that is at least as large as the largest text used to advertise the specific or cumulative case results and in the same color and against the same colored background as the text used to advertise the specific or cumulative case results.

Rule 7.2(a)(3). This requirement ensures that the disclaimer is noticeable and would be connected to each post so that any member of the public who may use the website addresses to directly access Hunter's posts would be in a position to see the disclaimer. Therefore, we hold that the disclaimers required by the VSB are "not more extensive than is necessary to serve that interest." Central Hudson, 447 U.S. at 566.

Hunter's blog posts discuss lawful activity and are not inherently misleading, but the VSB has asserted a substantial governmental interest to protect the public from potentially misleading lawyer advertising. See Central Hudson, 447 U.S. at 566. These regulations directly advance this interest and are not more restrictive than necessary, unlike outright bans on advertising. Id. We thus conclude that the VSB's Rules 7.1 and 7.2 do not violate the First Amendment. As applied to Hunter's blog posts, they are constitutional and the panel did not err.

B. Whether the circuit court erred in holding that the VSB's application of Rule 1.6 to Hunter's blog violated his First Amendment rights.

Rule 1.6(a) states, that with limited exceptions,

> [a] lawyer shall not reveal information protected by the attorney-client privilege under applicable

> law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation . . . .

The VSB argues that the circuit court erred in holding that its interpretation of Rule 1.6 violates the First Amendment and that Hunter violated that rule by disclosing potentially embarrassing information about his clients on his blog "in order to advance his personal economic interests." VSB argues that lawyers, as officers of the Court, are prohibited from engaging in speech that might otherwise be constitutionally protected. Thus, the VSB's interpretation of Rule 1.6 involves two types of information: 1) that which is protected by the attorney-client privilege, and 2) that which is public information but is embarrassing or likely to be detrimental to the client. Hunter is charged with disseminating the later type of information. In response to these allegations, Hunter argues that the VSB's interpretation of Rule 1.6 is unconstitutional because the matters discussed in his blogs had previously been revealed in public judicial proceedings and, therefore, as concluded matters, were protected by the First Amendment. Thus, we are called upon to answer whether the state may prohibit an attorney from discussing information about a client or former client that

is not protected by attorney-client privilege without express consent from that client. We agree with Hunter that it may not.

The cases cited by VSB in support of its position differ from this case in a substantial way; the cases relied upon by VSB involve pending proceedings. It is settled that attorney speech about public information from cases is protected by the First Amendment, but it may be regulated if it poses a substantial likelihood of materially prejudicing a pending case. Gentile v. State Bar of Nevada, 501 U.S. 1030, 1076 (1991).

"[A] presumption of openness inheres in the very nature of a criminal trial under our system of justice." Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573 (1980). Moreover,

> [a] trial is a public event. What transpires in the court room is public property. If a transcript of the court proceedings had been published, we suppose none would claim that the judge could punish the publisher for contempt. And we can see no difference though the conduct of the attorneys, of the jury or even of the judge himself, may have reflected on the court. Those who see and hear what transpired can report it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it.

Craig v. Harney, 331 U.S. 367, 374 (1947). All of Hunter's blog posts involved cases that had been concluded. Moreover, the VSB concedes that all of the information that was contained within

Hunter's blog was public information and would have been protected speech had the news media or others disseminated it. In deciding whether the circuit court erred, we are required to make our "own inquiry into the imminence and magnitude of the danger said to flow from the particular utterance and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression." Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 843 (1978). "At the very least, [the] cases recognize that disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment, and that First Amendment protection survives even when the attorney violates a disciplinary rule he swore to obey when admitted to the practice of law." Gentile, 501 U.S. at 1054. The VSB's interpretation of Rule 1.6 fails these standards even when we

> balance "whether the 'practice in question [furthers] an important or substantial governmental interest unrelated to the suppression of expression' and whether 'the limitation of First Amendment freedoms is no greater than is necessary or essential to the protection of the particular governmental interest involved,' "

Id. (quoting Seattle Times Co. v. Rhinehart, 467 U.S. 20, 32 (1984)). State action that punishes the publication of truthful information can rarely survive constitutional scrutiny. Smith v. Daily Mail Pub. Co., 443 U.S. 97, 102 (1979).

The VSB argues that it can prohibit an attorney from repeating truthful information made in a public judicial proceeding even though others can disseminate this information because an attorney repeating it could inhibit clients from freely communicating with their attorneys or because it would undermine public confidence in the legal profession. Such concerns, however, are unsupported by the evidence. To the extent that the information is aired in a public forum, privacy considerations must yield to First Amendment protections. In that respect, a lawyer is no more prohibited than any other citizen from reporting what transpired in the courtroom. Thus, the circuit court did not err in concluding that the VSB's interpretation of Rule 1.6 violated the First Amendment.

C. Whether the circuit court erred in requiring Hunter to post a disclaimer on his website that does not comply with the requirements of Rule 7.2(3) and therefore does not eliminate the misleading nature of his blog posts.

The VSB argues that the single disclaimer that the circuit court ordered Hunter to post on his blog was insufficient to comport with Rule 7.2(a)(3) because it did not eliminate the misleading nature of the posts.

As we have already concluded, Hunter's blogs are commercial speech and, thus, constitute lawyer advertising. When advertising cumulative or specific case results, Rule 7.2 requires that a disclaimer

> shall be in bold type face and uppercase letters in a font size that is at least as large as the largest text used to advertise the specific or cumulative case results and in the same color and against the same colored background as the text used to advertise the specific or cumulative case results.

Rule 7.2(a)(3).

Here, the VSB required Hunter to post a disclaimer that complies with Rule 7.2(a)(3) on all case-related posts. This means that Hunter's disclaimers "shall be in bold type face and uppercase letters in a font size that is at least as large as the largest text used to advertise the specific or cumulative case results and in the same color and against the same colored background as the text used to advertise the specific or cumulative case results." Rule 7.2(a)(3). The circuit court, however, imposed the following disclaimer to be posted once: "Case results depend upon a variety of factors unique to each case. Case results do not guarantee or predict a similar result in any future case."

While the substantive meaning of the imposed disclaimer may conform to the requirements stated in Rule 7.2(a)(3)(i) through (iii), it nevertheless is less than what the rule requires. In contrast to the committee's determination, there is no provision in the circuit court's order requiring that the disclaimer be formatted and presented in the manner required by Rule 7.2(a)(3), and the text of the disclaimer prescribed by the

circuit court is not itself formatted and presented in that manner. Even so, Hunter does not argue that the disclaimer required by the circuit court is an appropriate, less restrictive means of regulating his speech and, therefore, we decline to so hold. Based on the arguments presented to it, the circuit court erred by imposing a disclaimer that conflicted with the rule. See, e.g., Rosillo v. Winters, 235 Va. 268, 272, 367 S.E.2d 717, 719 (1988) (concluding that a circuit court abuses its discretion by "enter[ing an] order . . . dispens[ing] with the requirements of [a] Rule"); Zaug v. Virginia State Bar, 285 Va. ___, ___, ___ S.E.2d ___, ___ (2013) (this day decided) ("The Virginia Rules of Professional Conduct are Rules of this Court.").

III. CONCLUSION

For the foregoing reasons, we hold that Hunter's blog posts are potentially misleading commercial speech that the VSB may regulate. We further hold that circuit court did not err in determining that the VSB's interpretation of Rule 1.6 violated the First Amendment. Finally, we hold that because the circuit court erred in imposing one disclaimer did not fully comply with Rule 7.2(a)(3), we reverse and remand for imposition of disclaimers that fully comply with that Rule.

Affirmed in part,
reversed in part,
and remanded.

JUSTICE LEMONS, with whom JUSTICE McCLANAHAN joins, dissenting in part.

I agree with the majority's resolution of the Rule 1.6 issue. However, I dissent from the majority's determination that Hunter is guilty of violating Rules 7.1(a)(4) and 7.2(a)(3) and that Hunter must post a disclaimer that complies with Rule 7.2(a)(3).

Rule 7.1 governs communications concerning a lawyer's services. Rule 7.1(a)(4) states:

> (a) A lawyer shall not, on behalf of the lawyer or any other lawyer affiliated with the lawyer or the firm, use or participate in the use of any form of public communication if such communication contains a false, fraudulent, misleading, or deceptive statement or claim. For example, a communication violates this Rule if it:
>
> . . . .
>
> (4) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law.

Rule 7.2 is only applicable to advertisements. Rule 7.2(a)(3) states:

> (a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded, or electronic communications, including public media. In the determination of whether an advertisement violates this Rule, the advertisement shall be considered in its

> entirety, including any qualifying statements or disclaimers contained therein. Notwithstanding the requirements of Rule 7.1, an advertisement violates this Rule if it:
>
> . . . .
>
> (3) advertises specific or cumulative case results, without a disclaimer that (i) puts the case results in a context that is not misleading; (ii) states that case results depend upon a variety of factors unique to each case; and (iii) further states that case results do not guarantee or predict a similar result in any future case undertaken by the lawyer. The disclaimer shall precede the communication of the case results. When the communication is in writing, the disclaimer shall be in bold type face and uppercase letters in a font size that is at least as large as the largest text used to advertise the specific or cumulative case results and in the same color and against the same colored background as the text used to advertise the specific or cumulative case results.

Hunter's blog contains articles about legal and policy issues in the news, as well as detailed descriptions of criminal trials, the majority of which are cases where Hunter was the defense attorney. The articles also contain Hunter's commentary and critique of the criminal justice system. He uses the case descriptions to illustrate his views.

The First Amendment

I believe that the articles on Hunter's blog are political speech that is protected by the First Amendment. The Bar concedes that if Hunter's blog is political speech, the First

Amendment protects him and the Bar cannot force Hunter to post an advertising disclaimer on his blog.

Speech concerning the criminal justice system has always been viewed as political speech. "[I]t would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted." Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575 (1980). As political speech, Hunter uses his blog to give detailed descriptions of how criminal trials in Virginia are conducted. He notes how the acquittal of some of his clients has exposed flaws in the criminal justice system.

The majority asserts that because Hunter only discusses his victories, his blog is commercial. The majority does not give sufficient credit to the fact that Hunter uses the outcome of his cases to illustrate his views of the system. Hunter testified that one of the reasons he maintained the blog was to combat "the public perception that is clearly on the side that people are guilty until they're proven innocent." For example, when discussing one of the cases where his client was found not guilty, he concludes the post by explaining that this case is an "example of how innocent people are often accused of committing some of the most serious crimes. That is why it is important not to judge the guilt of an individual until all the evidence has been presented both for and against him."

The majority compares Hunter's detailed discussion of criminal trials and how these outcomes illustrate the need to hold government to its burden of proof, with "opening [a] sales presentation[] with a prayer or a Pledge of Allegiance." The majority proposes that his blog is not transformed into political speech simply because he included eight posts about legal issues and cases he was not involved in. However, the twenty-two posts discussing criminal trials in Virginia are political speech in their own right, and are not dependent upon the content of the other eight posts.

The majority also focuses on the location of Hunter's blog, and asserts that because the blog is accessed through the law firm's website and is not interactive, that demonstrates the blog is commercial in nature. While going through the law firm's website is one way to access the blog, it is also possible to go directly to the blog without navigating through the firm's website. Further, the fact that the blog is not interactive in no way commercializes the speech.

Many businesses have websites. It is not uncommon for websites to include links to related news articles or editorials. Merely because an article may be accessed through a commercial portal does not change the content of the article. It is the content of speech and the motivation of the speaker

that determines the level of protection to which speech is entitled.

Hunter conceded that one of the purposes of the blog was marketing. Although the United States Supreme Court has never clearly decided whether political speech is transformed into commercial speech because one of the multiple motivations of the speaker is marketing and self-promotion, its jurisprudence leads to the conclusion that Hunter's speech is not commercial.

The traditional test for determining whether speech is commercial is if the speech "[does] no more than propose a commercial transaction." Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376, 385 (1973)(emphasis added); Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976); Board of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 473-74 (1989). Hunter's articles clearly do more than propose a commercial transaction. They contain detailed discussions of criminal trials in this Commonwealth, and Hunter's commentary and critique of the criminal justice system.

The United States Supreme Court has held that commercial speech is "expression related solely to the economic interests of the speaker and its audience." Central Hudson Gas & Elec. Corp. v. Public Service Comm'n. of N.Y., 447 U.S. 557, 561 (1980) (emphasis added). Marketing is not Hunter's sole

motivation for maintaining this blog. As discussed above, one of Hunter's motivations in maintaining the blog is to disseminate information about "the criminal justice system, the criminal trials and the manner in which the government prosecutes its citizens."

Even if marketing was Hunter's sole motivation, economic motivation cannot be the basis for determining whether otherwise political speech is protected. The United States Supreme Court recognized in Pittsburgh Press Co. that merely having some economic motivation does not create a basis for regulation. "If a newspaper's profit motive were determinative, all aspects of its operations – from the selection of news stories to the choice of editorial position – would be subject to regulation if it could be established that they were conducted with a view toward increased sales. Such a basis for regulation clearly would be incompatible with the First Amendment." 413 U.S. at 385.

The mere existence of some commercial motivation does not change otherwise political speech into commercial speech. "[S]peech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another." Virginia Pharmacy, 425 U.S. at 761. In discussing the economic motivations at issue in Sorrell v. IMS Health, Inc., 564 U.S. __, 131 S.Ct. 2653 (2011), the United

States Supreme Court recognized that "[w]hile the burdened speech results from an economic motive, so too does a great deal of vital expression." Id. at 2665.

Even if there is some commercial content to Hunter's speech, any commercial content is intertwined with political speech. When commercial and political elements are intertwined in speech, the heightened scrutiny test must apply to all of the speech.

> It is not clear that a professional's speech is necessarily commercial whenever it relates to that person's financial motivation for speaking. But even assuming, without deciding, that such speech in the abstract is indeed merely "commercial," we do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech. Our lodestars in deciding what level of scrutiny to apply to a compelled statement must be the nature of the speech taken as a whole and the effect of the compelled statement thereon.

Riley v. National Federation of the Blind of N.C., Inc., 487 U.S. 781, 795-96 (1988) (internal citation omitted).

In this case, the policies the Bar advances have no persuasive force when applied to Hunter's blog. The purposes of Rules 7.1 and 7.2 are to protect the public from misleading communications and advertisements concerning a lawyer's services. Hunter's articles contain detailed descriptions of the trials, along with his commentary on the criminal justice system. The Bar produced no evidence that anyone has found

Hunter's articles to be misleading. There appears to be little benefit, if any, to the public by requiring Hunter to post a disclaimer that concedes his articles are advertisements. Hunter disagrees that his articles are advertisements, and claims they are political speech. He objects to cheapening his political speech by denominating it as advertisement material.

Accordingly, I would hold that Hunter's speech is political, is entitled to the heightened scrutiny test, and that he cannot be forced to include the advertising disclaimer under Rule 7.2 that the Bar seeks to force upon his writings.

SOME SELECT REFERENCE MATERIALS

Compiled by Atty. Ray Dall'Osto

1. Wisconsin Supreme Court Rule 3.6, and its equivalent ABA Model Rule 3.6

2. ABA *Annotated Model Rules of Professional Conduct, 7th ed.*, pp. 363-370

3. United State Supreme Court decision in *Gentile v. State Bar of Nevada,*

   501 U.S. 1030, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991)

4. Michael Downey, ABA Litigation Section, "Ethical Rules for Litigating in the Court of Public Opinion" (July 2012)

http://apps.americanbar.org/litigation/committees/ethics/email/summer2012/summer2012-0712-ethical-rules-litigating-court-public-opinion.html

5. ABA Criminal Justice Section Standards on Fair Trial and Free Press

http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_fairtrial_tocold.html

http://www.americanbar.org/groups/criminal_justice/standards/crimjust_standards_fairtrial_blk.html

http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_standards_fairtrial.authcheckdam.pdf

6. Reporters Committee for Freedom of the Press, Media Law Resources & Guides

http://www.rcfp.org/browse-legal-resources/guides