MARCH 2022

# Lawyers' Public Comments on Pending Matters

DISCIPLINARY COMMISSION
OPINION #1-22

## Question

Can a lawyer's pretrial publicity or extrajudicial comments on social media platforms about a pending legal dispute in which the lawyer is participating (or has participated) have ethical implications?

## Short Answer

It depends on whether the lawyer has obtained client consent to make the comments and the nature of the statements.

### Recommended Rules for Review

**Indiana Rules of Professional Conduct: 1.6, 3.6, and 3.8(f)**

## Summary

In an age of omnipresent social media and press, attorneys must be conscious of the Indiana Rules of Professional Conduct's provisions regarding extrajudicial statements. When an attorney participates in pretrial publicity and makes comments on social media about pending legal matters, the attorney must consider the ethical obligations the attorney owes to clients, third parties, and the legal system generally. Ind. R. Prof. Cond. 1.6, 3.6, and 3.8 provide specific guidance for attorneys about the types of statements that are permissible with respect to pretrial publicity and those that have ethical implications. The purpose of Rule 3.6 is to preserve the impartiality of the justice system by only preventing attorneys from making statements that are likely to affect a party's right to a fair trial by prejudicing the proceedings.

## The Ethical Problems

Several rules guide attorneys on when, what, and how to address the public regarding the attorney's participation in ongoing adjudicative proceedings.

- Attorneys should not make extrajudicial comments without the consent of their client. Indiana Professional Conduct Rule 1.6(a).

- Attorneys should not make extrajudicial statements about cases in which they are participating (or had participated) that will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter. Indiana Professional Conduct Rule 3.6(a); see also Rule 3.8(f) (regarding special responsibilities of prosecutors).
- Attorneys may make extrajudicial statements that a reasonable attorney would conclude is necessary to combat negative publicity not initiated by the client. This information should be limited to only that which is needed to mitigate adverse publicity. Indiana Professional Conduct Rule 3.6(c).

## Application of Professional Conduct Rule 3.6 (Pretrial Publicity)

To assure that client confidences are maintained and that the fair and impartial adjudication of legal disputes is preserved, Rule 3.6 requires lawyers who are participating in legal matters to be aware of the lawyers' responsibilities when making public comments about those matters. By only restricting attorney extrajudicial speech that will have a substantial likelihood of materially prejudicing a legal proceeding, Rule 3.6 strikes a balance between protecting the right to a fair trial and safeguarding an attorney's right of free expression. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1075-76 (1991); *see also Attorney Grievance Com'n. of Maryland v. Gansler*, 835 A.2d 548, 558-69 (Md. 2003) *cited with approval in In re Brizzi*, 962 N.E.2d 1240 (Ind. 2012).

Rule 3.6(a) does not require that actual prejudice result from the public comments; rather, the proper analysis focuses on the likelihood that a particular statement, at the time it was made, will cause prejudice. *Brizzi*, 962 N.E.2d at 1245. Subsection (d) provides a non-exhaustive list of subjects that are rebuttably presumed to be materially prejudicial. Subsection (b) then provides a list of "safe harbor" subjects that an attorney may comment on without running afoul of the general prohibition in Rule 3.6(a). Subsection (c) further authorizes an attorney, in limited circumstances and in a limited fashion, to respond to adverse publicity to protect the client's interest. Such responses should be tailored to what is necessary to cure the prejudicial effect while still preserving a fair adjudication of the matter on the merits. Ind. Prof. Cond. R. 3.6, Comment 7.

In the area of pretrial publicity, several minefields exist that can create ethical problems for an attorney.

## Ethical Minefield #1 – Commenting on Inadmissible Evidence or Credibility

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*Hypothetical #1: Lawyer D represents a professional athlete charged with sexually assaulting a woman. The athlete's defense is that the encounter was consensual. At the attorney's direction, the athlete submitted to a polygraph test.*

*Lawyer D makes statements at a press conference pronouncing that his client is more credible than the victim and has passed a polygraph test.*

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Pursuant to Rule 3.6(d)(3), attorneys should not discuss the results of an individual's participation in a test or examination because such extrajudicial statements are presumed to create prejudice, and polygraph results are inadmissible at trial. *See* *In re Litz*, 721 N.E.2d 258, 259 (Ind. 1999). Likewise, a lawyer should avoid making extrajudicial comments about a witness' credibility, as this too has substantial potential to contaminate a jury pool. Ind. Prof. Cond. R. 3.6(d)(1).

## Ethical Minefield #2 – Commenting on Prejudicial Matters Outside the Public Record

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*Hypothetical #2: Lawyer P filed a negligence suit against the State on behalf of his client, a construction worker who was seriously injured in a bridge collapse. Lawyer P recently acquired an internal report from a federal agency that warned State officials that the age of certain bridges in the State made them potentially dangerous. This report was not publicly issued and has not yet been admitted as evidence in the lawsuit. Lawyer P provides a copy of the report to the media and quotes the report in a press statement.*

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Lawyer P's actions are inconsistent with Rule 3.6. Although Rule 3.6(b)(2) permits a lawyer to provide information contained in the public record (e.g. papers filed on a public docket), such information must be the type to "which an ordinary citizen would have lawful access." *Brizzi*, 962 N.E.2d at 1247. Information that is only accessible to insiders, such as agency internal investigative reports or background checks, does not fall into the safe harbor public records exception. Moreover, for a lawyer's statements to be protected under the public records exception, a lawyer may not provide information beyond quotations from or references to the contents of the public record. *Id.*

## Ethical Minefield #3 – Expressed Opinions on Guilt of Defendant or Suspect

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*Hypothetical #3 – After filing criminal charges on a triple homicide alleged to be a murder-for-hire, Prosecutor S made statements during a press conference that the defendant was "cold blooded and ruthless" and that "he wouldn't trade any*

*money in the world for one life, let alone three." Prosecutor S also announced that he would be seeking the death penalty against the defendant. Prosecutor S did not state that the charges are merely an accusation and that the defendant is presumed innocent unless and until proven guilty.*

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Most of Prosecutor S's statements are inconsistent with Rule 3.6 and 3.8(f) because Prosecutor S used inflammatory language when describing the crime and the defendant, did not specifically refer to the public record, and did not include the precautionary presumption of innocence language. *See* *Litz*, 721 N.E.2d at 258; *Brizzi*, 962 N.E.2d at 1246. Prosecutors are limited to statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose. Ind. Prof. Cond. R. 3.8(f). Therefore, the announcement that the death penalty would be sought is not problematic. However, the remaining statements have a substantial likelihood of heightening public condemnation of the accused and thus would be prohibited.

## Ethical Minefield #4 – Commenting on Matters Extending Beyond Exception (Adverse Publicity)

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*Hypothetical #4 – Attorney Z represents a client in a civil action against Officer B and the police department for excessive force. Officer B was the subject of a grand jury investigation regarding the incident, and the grand jury did not indict. The Chief of Police holds a press conference, announcing that the grand jury has fully exonerated Officer B of any wrongdoing. The Chief of Police's remarks are widely publicized. Attorney Z responds the next day by issuing a press release and posting on the firm's social media page the following: "This isn't over yet. Officer B has a history of violence that will come out in the end, so Officer B just better watch himself."*

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Although Attorney Z was not involved in the investigation of Officer B's criminal matter, the Chief of Police's remarks could impact public perception of Attorney Z's pending civil suit against Officer B. Per Rule 3.6(c), a responsive statement might be warranted. Nonetheless, Attorney Z's response was not directed at dispelling the assertion that Officer B had been cleared of all wrongdoing. Rather than de-escalating the impact of pretrial publicity, Attorney Z's remarks potentially further fanned the flames; therefore, the remarks are problematic under Rule 3.6.

Attorneys have an obligation to consider the political and social climate in which they make an extrajudicial statement. Extrajudicial statements made about a case in a politically or socially charged atmosphere can increase the likelihood that the statement will materially prejudice the proceeding. Attorneys should be cautious when making statements that could be politicized by the public and contaminate the potential jury pool.

### Ethical Minefield #5 – The Reactive Post

> *Hypothetical #5 – Lawyer D has a social media page on which other lawyers, court employees, and friends post and comment on a variety of subjects, including social and political issues. After one of Lawyer D's friends posts an item about gun control, Lawyer G comments in a reactive post: "The only time the State gives two figs about gun control is when it promotes its social agenda against the underprivileged. Take, for example, the case against my client. All he was doing was defending his property against drug dealers, but he's poor, so the State wants to convict him anyway. What a crock! Thank goodness they haven't found his prior conviction in KY, so at least the State isn't trying to hang a habitual charge on him."*

Lawyer D's social media post is unlikely to generate the type of publicity that posts from official government agency or a press release will. Moreover, Lawyer G did not name her client; therefore, Rule 3.6 is not likely to be implicated. However, the implications to Lawyer G's client could be devastating if the State were to learn of the comment and connect the comment to the client. Further, Lawyer G's comments would be problematic under Ind. Prof. Cond. R. 1.6; *see also* Opinion #1-20 about third-party comments on social media posts.

## Conclusion

The above minefields do not form an exhaustive list. A lawyer with a high-profile case who intends to engage in pretrial publicity would be well advised to review Indiana Professional Conduct Rule 3.6, in addition to other applicable ethics rules, to ensure ethical compliance.