THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
OPINION NO. 683

March 2019

QUESTION PRESENTED

Does a lawyer violate the Texas Disciplinary Rules of Professional Conduct by making statements to the news media about a case pending on appeal when the lawyer criticizes the opponent's litigation tactics and reiterates the misconduct alleged in the underlying complaint?

STATEMENT OF FACTS

Following a summary judgment dismissing all of their claims for trade secret misappropriation, plaintiffs appealed to an intermediate Texas court of appeals and succeeded in reversing the summary judgment. Defendants filed a petition for review with the Texas Supreme Court in hopes of reinstating the summary judgment.

While the case was pending in the Texas Supreme Court, the plaintiffs' lawyer made statements to the news media that the filing of the petition for review is consistent with defendants' litigation strategy to "delay at all costs so their misconduct is never brought before a jury." The plaintiffs' lawyer also stated that the defendants "brazenly stole trade secrets worth millions of dollars from my clients and are now just as brazenly trying to take this case away from a Texas jury." The statements of the plaintiffs' lawyer were widely published by the media.

DISCUSSION

Rule 3.07 of the Texas Disciplinary Rules of Professional Conduct imposes certain limitations on what a lawyer may say publicly about a dispute in which the lawyer represents a client. Rule 3.07(a) provides in part that:

> "In the course of representing a client, a lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicatory proceeding."

Comment 1 to Rule 3.07 notes that this Rule is "premised on the idea that preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial." But the comments also note the "vital social

interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves," and the Rule therefore incorporates a "degree of concern for the first amendment rights of lawyers, listeners, and the media." *See* Comments 1 & 2 to Rule 3.07. This is a "difficult" balance to strike, and the existence of "material prejudice normally depends on the circumstances in which a particular statement is made." Comments 2 & 3 to Rule 3.07.

Rules 3.07(b) and (c) give some guidance on the types of statements that may or may not violate the "general standard of Rule 3.07(a)." *See* Professional Ethics Committee Opinion 631 (July 2013). Rule 3.07(b) identifies certain categories of statements that "ordinarily" violate the Rule, including those that refer to "the character, credibility, [or] reputation" of a party. Rule 3.07(c) identifies certain categories of statements that "ordinarily" do not violate the Rule, including those where the lawyer states "the general nature of the claim or defense" or "information contained in a public record." The statements presented here implicate both paragraphs (b) and (c). On the one hand, the lawyer's statements arguably attack the defendants' character and credibility by accusing them of theft and dilatory litigation tactics. On the other hand, these statements largely track the allegations at the heart of the plaintiffs' trade secret claims, therefore arguably stating the general nature of the claims and information already contained in the public record (i.e., plaintiffs' pleadings).

The Committee addressed a similar tension in Opinion 631. Citing Rule 3.07(c)(8), the Committee stated that, while it is not generally a violation of Rule 3.07 for a district attorney to publicly post the names of persons charged with a crime, the "manner in which the information is posted must also be considered to determine if the posting is in violation of Rule 3.07 because it has the likelihood to materially prejudice the accused." Opinion 631. In other words, Rule 3.07 imposes a flexible standard that must account for the "unique considerations" of a particular case. *See* Comment 3 to Rule 3.07.

That said, any resolution of this tension must be squared with the United States Supreme Court's opinion in *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991). There, the Supreme Court reversed on First Amendment grounds discipline imposed on a lawyer by the State Bar of Nevada under a pretrial publicity rule similar to Rule 3.07. *Id.* at 1048. *Gentile* arose from a press conference in which a lawyer representing a criminal defendant made statements criticizing the "crooked" police department, claiming a police officer committed the crime for which his client had been indicted, and calling several putative witnesses "liars." *See id.* at 1059-60, 1063-64.

In a fractured opinion, the Supreme Court held that the Nevada rule, as applied, was void for vagueness because the "safe harbor provision" in the Nevada rule—which is similar to Texas Rule 3.07(c)—contemplated that "a lawyer describing the general nature of the defense without elaboration need fear no discipline, even if he comments on the character, credibility, reputation or criminal record of a witness." *Id.* at 1048 (internal punctuation omitted). In so holding, the Court suggested that the disciplined lawyer's statements described the "general nature" of the defense, and thus the safe harbor provision "misled [him] into thinking that he could give his press conference without fear of

discipline." *Id.* at 1048. Because the statements at issue in the question presented here implicate the same tension resolved in *Gentile*—and in much the same way—similar constitutional infirmities could be in play for any application of Rule 3.07 to the statements made by the plaintiffs' lawyer.

Fortunately, a precise resolution of that tension is not necessary under the question presented because the timing of the statements here—made while the case is pending on appeal—renders them permissible under Rule 3.07. To be sure, Rule 3.07 by its terms applies to "adjudicatory proceeding[s]," which include cases pending on appeal. *See* Terminology to the Rules (defining "Adjudicatory Proceeding" and "Tribunal"). But Comment 1 to Rule 3.07 contemplates that the likelihood of material prejudice is highest where trial by jury is involved. *See also* Comment 6 to ABA Model Rule of Professional Conduct 3.6 (noting that the "likelihood of prejudice may be different depending on the type of proceeding" and that "[n]on-jury hearings" may be less affected than jury trials). And that makes sense because judges are trained to apply the law to the legally-relevant facts, and are therefore less susceptible to being materially prejudiced by extrajudicial statements. This is particularly true on appeal, where an appellate judge's analysis of the case is carefully confined by appellate standards of review. In short, the likelihood of a lawyer's statements "materially prejudicing" a proceeding on appeal is, as a general matter, fairly low.

This Committee has previously suggested that timing considerations could have an impact on the analysis under Rule 3.07. In Opinion 369 (August 1974), the Committee considered the actions of a district attorney who criticized a trial judge in a post-trial press conference, calling the judge's actions during trial "unethical and illegal and grounds for reversible error." The Committee concluded those statements, though ethically questionable, did not violate any disciplinary rule. But, the Committee noted: "Had the questioned remarks been made prior to the conclusion of the trial, a different result might obtain" under former Disciplinary Rule 7-107, which was the trial publicity rule before Rule 3.07. Opinion 369 does not answer the question presently before this Committee because there was no ongoing adjudicatory proceeding in that case, but it does highlight the importance of timing to this inquiry. *See also Gentile*, 501 U.S. at 1076 (noting the Nevada Rule, which is similar to the Texas Rule, "merely postpones the attorneys' comments until after the trial").

Under the facts presented here, the Committee concludes that the lawyer's statements do not have a substantial likelihood of materially prejudicing an adjudicatory proceeding given that the case is pending on appeal and it is unknown when (or if) the case will be tried. As in Opinion 369, this opinion does not address whether the outcome would be different if these statements had been made shortly before or during the trial. But any application of Rule 3.07 in that circumstance should take into consideration the constitutional concerns discussed in *Gentile*.

CONCLUSION

Extrajudicial statements about a case that is pending on appeal usually would not have a reasonable likelihood of materially prejudicing an adjudicatory proceeding—and thus usually would not violate the Texas Disciplinary Rules of Professional Conduct—particularly where the statements implicate the constitutional issues addressed by the U.S. Supreme Court in *Gentile v. State Bar of Nevada.*