FORMAL OPINION NO 2007-179

Trial Publicity

Facts:

1. *The Civil Case*.

Lawyer *P* has filed a civil action against the well-known *XYZ* Corporation alleging negligence and other misconduct resulting in injury to Lawyer *P*'s client. Lawyer *P* reasonably believes the allegations to be true. Before any discovery has been conducted, Lawyer *P* wishes to call a press conference in which he intends to assert as fact the allegations of *XYZ* Corporation's negligence and misconduct.

Later, during discovery, Lawyer *P* obtains documents produced by *XYZ* Corporation that tend to establish negligence and other misconduct by *XYZ* Corporation. Lawyer *P* would like to call another press conference to tout the documents as proof of his case against *XYZ* Corporation.

Lawyer *D*, the lawyer representing *XYZ* Corporation in the action, wishes to advise *XYZ* Corporation to hire a public relations firm to contact local news media in order to publicly dispute or downplay the allegations in the civil action. Based on her own investigation, Lawyer *D* has learned that the allegations of negligence and misconduct are true, but believes *XYZ* Corporation may have an affirmative defense based on the statute of limitations.

2. *The Criminal Cases.*

a. *The Sex Crime.*

A major crimes task force investigating the disappearance of a young woman focuses on a suspect charged with and held for other crimes, after the task force has discovered sexual predilections of the suspect, which it considers highly relevant. A prosecutor is assigned to and is supervising the investigation. Investigators reveal the suspect's sexual predilections to the press. No charging decision is imminent with respect to the young woman's disappearance. The revelation to the press

has a substantial impact on the proceedings in the suspect's other, unrelated cases.

The task force continues investigating and, later, charges a second individual with the young woman's abduction and murder. No body has been located. The trial is contentious. The jury deliberates for a week before returning a guilty verdict. Sentencing is pending. The obviously relieved prosecutor is met by a bank of news cameras as she leaves the courthouse after receipt of the verdict; her comments—including the emotionally delivered charge that the defendant is the most evil man she has encountered in her decade as a prosecutor—are broadcast throughout the state.

b. *The Eco-Terrorists.*

Terrorism task force representatives, including supervising lawyers, hold press conferences announcing the indictment of several individuals for a series of environmental crimes, based on a reopened "cold case" criminal investigation. Some of the individuals are newly arrested; others are in custody for similar charges brought in an earlier case. Government lawyers term the defendants "terrorists" and announce that the government will not stop in its effort to root out terror attacks on U.S. soils.

A defense lawyer allows a reporter to quote him asserting his client's innocence and, also, asserting that his client's actions were justified and in keeping with Oregon values. The defense lawyer casts aspersions on the perceived motives of the government.

The defense lawyer files pretrial motions relating to the admissibility of certain prosecution and defense evidence. After a hearing on the motions but before a ruling is issued, the defense lawyer holds a press conference on the courthouse steps, using stronger language than is used in the official record to characterize the government's action. When called by the media, the defense lawyer responds by telling reporters that his client has passed a polygraph test. Immediately before trial, and still before the evidentiary motions have been decided, the prosecutor uses the occasion of a codefendant's plea bargain to foreshadow evidence the prosecutor intends to attempt to introduce during the trial.

Questions:

1. May Lawyer *P* call a press conference in which he asserts as fact the allegations forming the basis of the civil action?

2. May Lawyer *P* call a second press conference to discuss the documents produced by *XYZ* Corporation?

3. May Lawyer *D* advise *XYZ* Corporation to hire a public relations firm to contact local news media in order to publicly dispute or downplay the allegations forming the basis of the civil action?

4. In the sex-crime case, is the prosecutor subject to discipline for the investigator's statement to the press regarding the suspect's sexual predilections?

5. Is the prosecutor's statement after the verdict but before sentencing, that the defendant is the most evil man she has encountered as a prosecutor, unethical?

6. In the eco-terrorism case, are any of the following statements unethical:

a. The prosecutor's announcement of the indictments?

b. The prosecutor's labeling of the defendants as "terrorists" and the statement that the government will "root out terror attacks on U.S. soils"?

c. The defense lawyer's assertion of his client's innocence and of his defenses?

d. The defense lawyer's aspersions on the government's motives?

e. The defense lawyer's press conference using stronger language than is used in the official record to characterize the government's action?

f. The prosecutor's foreshadowing of evidence that he hopes to use at trial, but which is subject to a pending motion *in limine*?

g. The defense lawyer's statement that his client has passed a polygraph test?

Conclusions:

1. Yes.
2. See discussion.
3. See discussion.
4. See discussion.
5. No, qualified.
6. a. No.
   b. No, qualified.
   c. No.
   d. No, qualified.
   e. See discussion.
   f. See discussion.
   g. See discussion.

Discussion:

Pretrial statements implicate primarily Oregon RPC 3.6. As we shall explain below, Oregon RPC 3.6 is clearer about what it does not prohibit than it is regarding what it does.

Oregon RPC 3.6 provides:

> (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.
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> (b) Notwithstanding paragraph (a), a lawyer may state:
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> (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
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> (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 subparagraphs (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.

(c) Notwithstanding paragraph (a), a lawyer may:

(1) reply to charges of misconduct publicly made against the lawyer; or

(2) participate in the proceedings of legislative, administrative or other investigative bodies.

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

(e) A lawyer shall exercise reasonable care to prevent the lawyer's employees from making an extrajudicial statement that the lawyer would be prohibited from making under this rule.

Unless permitted outright by Oregon RPC 3.6(b) or (c), whether a lawyer's statement is prohibited by Oregon RPC 3.6(a) will turn on whether the lawyer knows or reasonably should know that the extrajudicial statement will have a substantial (i.e., highly probable), likelihood of materially (i.e., seriously), prejudicing an imminent fact-finding process in a matter in which the lawyer is involved. This inquiry is

always going to depend on the details of the specific statements and the context in which they are made.

Statements that would otherwise violate Oregon RPC 3.6(a) may nonetheless be permitted under Oregon RPC 3.6(b).[1] We first examine whether, under the factual scenarios posited, there would be any statement that, in the absence of an exception, would subject a lawyer to discipline under Oregon RPC 3.6(a), and then examine whether any of the savings provisions of Oregon RPC 3.6(b) would make the statements permissible.

Oregon RPC 3.6 is matter-specific; it does not directly address the propriety of a statement made by a lawyer in one case that has a tendency to prejudice the fact-finding process in another case. It is possible that a lawyer making such a statement will violate Oregon RPC 8.4(a)(4) (conduct prejudicial to the administration of justice). If both cases are being handled by the same office or firm, a lawyer responsible for a statement in one case that has a strong likelihood of prejudicing the other case may violate Oregon RPC 3.6(d). Some of the hypothetical statements we have been asked to review are made by people other than lawyers. We will explore the lawyer's vicarious liability for those statements under Oregon RPC 3.6(e) and under Oregon RPC 5.3.

Oregon RPC 3.6 is the successor to *former* DR 7-107, which "had its origin in the recommendations made by the American Bar Association's Advisory Committee on Fair Trial and Free Press after *Sheppard v. Maxwell*, 384 US 333 [, 86 S Ct 1507, 16 L Ed 2d 600] (1966)." *In re Richmond*, 285 Or 469, 475, 591 P2d 728 (1979). In *Sheppard*, the United States Supreme Court granted habeas relief to the defendant in a notorious murder case because, in part, of the

[1] None of the hypothetically contemplated statements raises a question about their permissibility under Oregon RPC 3.6(c), which protects statements responding to charges of misconduct on the part of the lawyer or made in the course of participation in a legislative, administrative, or other investigative process.

"deplor[able] manner in which the news media inflamed and prejudiced the public." *Sheppard*, 384 US at 356 (footnote omitted).[2]

The Oregon Supreme Court's most comprehensive treatment of the former rule is in *In re Lasswell*, 296 Or 121, 673 P2d 855 (1983). There, the court attempted to clarify the reach of the former rule (or at least of *former* DR 7-107(B), which specifically applied to prosecutors), in light of its potential conflict with a lawyer's free speech rights under Oregon Constitution article I, section 8. *In re Lasswell*, 296 Or at 124–25. The court held that the rule could be valid only if narrowly applied as a sanction for the abuse of the right of free speech. *In re Lasswell*, 296 Or at 125. The court then attempted to state more precisely the test it had applied in its prior decisions on the scope of the prohibition. *In re Lasswell*, 296 Or at 126:

> The disciplinary rule deals with purposes and prospective effects, not with completed harm. It addresses the prosecutor's professional responsibility at the time he or she chooses what to speak or write. At that time it is incompatible with his or her professional performance in a concrete case to make extrajudicial statements on the matters covered by the rule either with the intent to affect the fact-finding process in the case, or when a lawyer knows or is bound to know that the statements pose a serious and imminent threat to the process and acts with indifference to that effect. In a subsequent disciplinary inquiry, therefore, the question is not whether the tribunal believes that the lawyer's comments impaired the fairness of an actual trial, which may or may not have taken place. The question, rather, is the lawyer's intent or knowledge and indifference when making published statements that were highly likely to have this effect.

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[2] Sheppard was prejudiced both by pretrial publicity and by a "carnival atmosphere" at the trial itself. The Court concluded that, "[s]ince the state trial judge did not fulfill his duty to protect Sheppard from the inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom, we must reverse the denial of the habeas petition." *Sheppard*, 384 US at 363.

In a footnote, the court said that "the accused's statements must intend or be knowingly indifferent to highly probable serious prejudice to an imminent procedure before lay fact finders." *In re Lasswell*, 296 Or at 126 n 3. Oregon RPC 3.6 largely codifies *In re Laswell*, with one important qualification. Although the language of *Laswell* might be read to permit finding a disciplinary violation under the former rule if the prosecutor intended the proscribed effect, irrespective of whether or not his statements were substantially likely to cause it, there is no violation of Oregon RPC 3.6 unless the statement actually has "a substantial likelihood of materially prejudicing" an imminent fact-finding process.

Oregon RPC 3.6 is a blend of the language of *former* DR 7-107 and the ABA Model Rule of Professional Conduct (RPC). Oregon RPC 3.6(a), subject to certain exceptions, proscribes extrajudicial statements that a "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." Oregon RPC 1.0(o) provides: "'Substantial' when used in reference to degree or extent denotes a material matter of clear and weighty importance." Although that definition does not transpose gracefully into the usage of the word *substantial* in Oregon RPC 3.6, it is apparent that, in context, "a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter" means the same thing as what the Oregon Supreme Court, in *Laswell*, described as "a serious and imminent threat to the [fact-finding] process" or "highly probable serious prejudice to an imminent procedure before lay fact finders." *In re Lasswell*, 296 Or at 126 & n 3.

In order for Oregon RPC 3.6 to pass constitutional muster, it must be read to proscribe only "speech that creates a danger of imminent *and* substantial harm." *Gentile v. State Bar of Nevada*, 501 US 1030, 1036, 111 S Ct 2720, 115 L Ed 2d 888 (1991) (emphasis added); *accord Gentile*, 501 US at 1076 (Rehnquist, C.J., concurring in part and dissenting in part), and 501 US at 1082 (O'Connor, J., concurring).

There can be no violation of Oregon RPC 3.6 unless all of the following are true:

(1) There is an actual matter that is being investigated or litigated;

(2) The lawyer (or someone vicariously bound to the lawyer under Oregon RPC 3.6(d)) is a participant in the investigation or litigation;

(3) At the time the lawyer (or someone whom the lawyer is bound to control under Oregon RPC 3.6(e)) makes it, the lawyer either knows or reasonably should know that the extrajudicial statement will be disseminated by means of public communication;

(4) There is an imminent fact-finding process in the matter; and

(5) At the time the statement is made, the lawyer either knows or reasonably should know that the extrajudicial statement will have a substantial (i.e., "highly probable") likelihood of materially (i.e., "seriously") prejudicing that imminent fact-finding process.

1. *The Civil Case.*

Lawyer *P* contemplates calling press conferences at two separate times: before discovery (presumably early on in the litigation process), "to assert as fact the allegations of [the defendant's] negligence and misconduct"; and, during or after discovery, "to tout the documents as proof of his case against [defendant]." In both events, the first three elements of Oregon RPC 3.6 are met: there is a matter actually being litigated; Lawyer *P* is involved in the litigation; and, by calling a press conference, Lawyer *P* clearly knows and intends that the statements will be disseminated by means of public communication.

A press conference at or near the time of the filing of the lawsuit, at which the plaintiff's lawyer asserts as fact the allegations of his complaint, is unlikely to "pose[ ] a serious and imminent threat to the fair conduct of [the ultimate] trial." *In re Lasswell*, 296 Or at 129. It is not clear from *Lasswell* whether any trial had actually been scheduled at the time the prosecutor there made his comments, but the court concluded that the case did not demonstrate that Lasswell "intended his remarks . . .

to create seriously prejudicial beliefs in potential jurors in an impending trial, or that he was knowingly indifferent to a highly likely risk that they would have this effect." *In re Lasswell*, 296 Or at 130.[3] The cases do not address precisely how close in time the statement must be to the trial before the statement can violate the rule. But *Lasswell* and *Gentile* appear to require the trial or other fact-finding process to be imminent before a lawyer may be disciplined for making such a statement.

On the limited facts posited, the lawyer's stating as fact his allegations against the defendant would not be highly likely to create seriously prejudicial beliefs in potential jurors in an *impending* trial, and would not violate Oregon RPC 3.6.

Moreover, under Oregon RPC 3.6(b)(1), the lawyer may make extrajudicial statements that state "the claim," and, under Oregon RPC 3.6(b)(2), the lawyer may state information contained in the public record. To the extent that the lawyer calls a press conference to describe his claim, and particularly if he limits his comments to the allegations in the complaint, which are a matter of public record, and as long as the lawyer reasonably believes the allegations to be true, Oregon RPC 3.6(b) permits the lawyer to make the extrajudicial statements regardless of the lawyer's knowledge of or disregard for their likely impact.[4]

The propriety of the second contemplated press conference is more problematic. If the trial were "imminent," and the disclosures sufficiently inflammatory, it could well be that Lawyer *P* could either intend to create or be indifferent to a high likelihood of creating seriously prejudicial beliefs in potential jurors in an impending trial, such that the disclosure

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[3] A violation of *former* DR 7-107 required a finding that the lawyer either intended the statement to affect the fact-finding process or reasonably should have known the statement posed such a threat. By contrast, Oregon RPC 3.6 does not require that the lawyer intend to influence the factfinder, only that the lawyer knows or reasonably should know there is substantial likelihood of material prejudice.

[4] As noted above, a lawyer disciplined on the theory that his or her statements concerning the claim or defense exceeded what was permissible under Oregon RPC 3.6(b) would have a potential defense that the rule is unconstitutionally vague. *Gentile*, 501 US at 1036.

would violate Oregon RPC 3.6(a). However, if the documents are in the public record (e.g., if they are proper exhibits in a summary judgment motion), then Lawyer *P* is permitted by Oregon RPC 3.6(b) to state what is in the documents.[5]

Lawyer *D* wants to advise her client to retain a public relations firm to publicly dispute or downplay the allegations forming the basis of the action. Lawyer *D* knows the allegations against her client to be true, but believes the defendant may have a defense based on the statute of limitations.

Lawyer *D* may not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law." Oregon RPC 8.4(a)(3).[6] *See* OSB Formal Ethics Op No 2005-170. Lawyer *D* may not counsel her client to hire a public relations firm to make statements that she knows to be false. If "publicly disput[ing] or downplay[ing]" the allegations involves knowingly mis-stating the facts, or denying what Lawyer *D* knows to be true, her participation in such a scheme would not be ethical, irrespective of its likely impact on the adjudicative process.

To the extent Lawyer *D* wishes to counsel the client and its public relations firm only to make truthful statements that "dispute" or "downplay" the allegations, the first question is the extent of Lawyer *D*'s ethical responsibility for the acts of others. Oregon RPC 3.6(a) prohibits statements only by the lawyer; Oregon RPC 3.6(e) makes the lawyer only responsible for exercising "reasonable care to prevent *the lawyer's employees* from making an extrajudicial statement that the lawyer would

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[5] Filing frivolous motions or attaching materials that are clearly not admissible in support of those motions, for the sole purpose of making the discovered materials public record, would be unethical under Oregon RPC 3.1 and Oregon RPC 8.4(a)(4). Even with properly filed documents, it could be appropriate for the court to issue a protective order prohibiting public comment on potentially prejudicial matters.

[6] Depending on the extent to which the lawyer "employed or retained, supervised or directed" the public relations firm, Oregon RPC 5.3 also could be implicated. The rule is discussed more fully below.

be prohibited from making under this rule" (emphasis added). Oregon RPC 5.3 imposes vicarious responsibility on the lawyer for the conduct of "a nonlawyer employed or retained, supervised or directed by [the] lawyer" if "the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved." Oregon RPC 5.3(b)(1).[7]

If Lawyer *D* merely counsels her client to hire a public relations firm, through truthful statements, to dispute or downplay the allegations, but Lawyer *D* does not herself employ, direct, or supervise the firm or ratify its conduct, she will not be responsible for the firm's conduct under Oregon RPC 5.3. If Lawyer *D* counsels her client to hire the firm to do something Lawyer *D* knows, or reasonably should know, that she herself could not do without violating Oregon RPC 3.6(a), she may be guilty of "violat[ing] the Rules of Professional Conduct . . . through the acts of another," in violation of Oregon RPC 8.4(a)(1), or of "conduct that is prejudicial to the administration of justice," in violation of Oregon RPC 8.4(a)(4).

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[7] Oregon RPC 5.3 provides:

> With respect to a nonlawyer employed or retained, supervised or directed by a lawyer:
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> (a) 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
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> (b) except as provided by Rule 8.4(b), 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:
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> (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
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> (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.

The ultimate question is whether the extrajudicial statements Lawyer *D* wants her client to engage the firm to make would violate Oregon RPC 3.6(a) if Lawyer *D* made them herself. From the facts hypothesized, it is not possible to say with any certainty whether they would, because there is no indication of what specifically will be said or of the point in the process at which these statements will be made. The statements would be improper if, in the context of their nature and their proximity to the trial, they are highly likely to create seriously prejudicial beliefs in potential jurors in the impending trial. Again, to the extent the statements are limited either to statements of the defense or to information contained in a public record, they would be expressly permitted by Oregon RPC 3.6(b). Also, in appropriate circumstances, judges can guard against undue prejudice by crafting orders that limit pretrial publicity.

2. *The Criminal Cases.*

a. *The Sex Crime.*

The hypothetical criminal case involves two extrajudicial statements. The first is made by investigators supervised by a prosecuting attorney, at a time when no charging decision is imminent. The investigators reveal to the press the suspect's sexual predilections, which revelation has a substantial impact on proceedings in an unrelated matter for which the suspect has been charged and is being held.

As discussed above, the prosecutor's responsibility for the investigator's statements depends on the level of the prosecutor's authority over the investigator. In this case, assuming the prosecutor's supervision of the investigation included direct supervisory authority over the investigators, the prosecutor was obligated to "make reasonable efforts to ensure that the [investigator's] conduct is compatible with the professional obligations of the lawyer." Oregon RPC 5.3(a). If the prosecutor failed to do so, and if the statements would have violated Oregon RPC 3.6(a) had the prosecutor made them, then the prosecutor would be subject to discipline. Similarly, Oregon RPC 5.3(b)(1) would subject the prosecutor to discipline if the prosecutor "order[ed] or, with the knowledge of the specific conduct, ratifie[d] the conduct involved" by the

investigator in making statements that would have violated Oregon RPC 3.6(a) had the prosecutor made them.

The question remains whether making the statement would violate Oregon RPC 3.6(a). Again, there is an actual matter being investigated, the prosecutor is participating in the investigation, and the statements are revealed to the press, so that their public dissemination is known or obvious. Although the hypothetical assumes that the revelations in fact have a substantial impact, Oregon RPC 3.6(a), as did its predecessor, "deals with purposes and prospective effects, not with completed harm." *In re Lasswell*, 296 Or at 126. The question is not whether there was actual harm, but whether the prosecutor knew of or was indifferent to the serious risk of prejudice. If the prosecutor knew of the pending matter, then, depending on the precise nature of the "sexual predilections," it is probable that, at a minimum, indifference to a serious risk would be established. But that risk is to the process in a different matter, and, by its terms, Oregon RPC 3.6(a) is matter-specific. Oregon RPC 3.6(a) does not expressly prohibit the making of extrajudicial statements that would have a prejudicial impact on fact-finding in an unrelated matter in which the lawyer (or the lawyer's agency or firm) is not participating.

Oregon RPC 3.6(d), however, provides, "No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a)." Under this rule, if the same agency is investigating and/or prosecuting both cases, and if the prosecutor investigating the first case is responsible for the investigator's statement, and if the statement would violate Oregon RPC 3.6(a) if it had been made by a lawyer in the same prosecutor's office who was prosecuting the other matter, then the prosecutor responsible for the investigator's statement would be guilty of a violation of Oregon RPC 3.6(a).[8]

[8] Furthermore, under Oregon RPC 5.1(b), if both matters are being handled by the same prosecutor's office, the lawyer's supervisor or manager could be vicariously responsible for the statements if the managing or supervising lawyer "knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action."

The prosecutor alternatively may be guilty of conduct prejudicial to the administration of justice, in violation of Oregon RPC 8.4(a)(4). A finding of conduct prejudicial to the administration of justice requires

> the existence of each of three elements: (1) the lawyer engaged in "conduct," that is, the lawyer did something that he or she should not have done or failed to do something that the lawyer should have done; (2) the conduct occurred during the "administration of justice," that is, during the course of a judicial proceeding or another proceeding that has the trappings of a judicial proceeding; and (3) the lawyer's conduct resulted in "prejudice," either to the functioning of the proceeding or to a party's substantive interests in the proceeding.

In re Lawrence, 337 Or 450, 465, 98 P3d 366 (2004) (citations omitted). "Prejudice may result from repeated acts that cause some harm to the administration of justice or from a single bad act that causes substantial harm." *In re Lawrence*, 337 Or at 464–65. Conduct in the course of one proceeding that prejudices another proceeding may violate this rule. *In re Gustafson*, 333 Or 468, 484, 41 P3d 1063 (2002) (release of juvenile's records in a bar disciplinary matter resulted in prejudice to the administration of justice in juvenile's expunction proceeding). In the case presented by this hypothetical, it is arguable that the statement was not made in the course of a judicial proceeding, because the statement was made in connection with an investigation that had not led to the commencement of any prosecution. Although the prejudice to the administration of justice is just as substantial as it would have been had the statement been made in connection with the matter that it affected, unless there was some "judicial proceeding" in the course of which the statement was made, Oregon RPC 8.4(a)(4) does not reach that conduct.

The second extrajudicial statement in this scenario occurs after another individual has been convicted of murdering the missing victim. Upon leaving the courthouse after receiving the verdict, and before sentencing, the prosecutor delivers to the press an "emotionally delivered charge that the defendant is the most evil man she has encountered in her decade as a prosecutor."

This statement would violate Oregon RPC 3.6(a) if it is likely to prejudice the sentencing factfinder. If the defendant is going to be sentenced by the same jury that convicted him, and if the lawyer knows or reasonably believes that the jury will follow the judge's admonition against reading, viewing, or listening to news reports regarding the trial, then the statement would not violate the rule. And, if the sentencing is to be decided by the judge, the statement would not violate Oregon RPC 3.6(a). *In re Lasswell*, 296 Or at 126 n 3 (holding that statements would violate *former* DR 7-107 if they posed a substantial risk of "prejudice to an imminent procedure before *lay* factfinders" (emphasis added)). But if a second jury were to be empaneled to sentence the defendant, and if the sentencing hearing was going to be close in time to the conviction, then the statement could have a substantial (i.e., highly probable), likelihood of materially (i.e., seriously), prejudicing an imminent fact-finding process in a matter in which the lawyer is involved, such that it would violate Oregon RPC 3.6(a).

b. *The Eco-Terrorists.*

We are asked to review three hypothetical statements by the prosecutor: the announcement of the indictments; reference to the defendants as "terrorists" while announcing that the government will not stop in its efforts to root out terror attacks in the United States; and a statement just before trial regarding the evidence that the prosecutor hopes to introduce, though rulings on a pending motion may exclude some or all of the evidence.

We also are asked to review statements from a defense lawyer asserting his client's innocence; asserting justification and that the defendant's actions were in keeping with "Oregon values"; casting aspersions on the motives of the government; using "stronger language" than is in the public record to characterize the government's actions; and telling reporters, immediately before trial, that his client has passed a polygraph test.

The prosecutor's announcement of the indictments and the defense lawyer's assertions of his client's innocence and defense of justification are permitted by Oregon RPC 3.6(b)(1). The reference to the defendants

as "terrorists" and the statement that the government will not stop in its efforts to root out terrorism are not substantially likely to have a prejudicial impact on an impending fact-finding proceeding because no trial has yet been scheduled. The same is true of the defense lawyer's statement that the defendants' actions were in keeping with Oregon values.

The cases do not seem to express concern for the possible effect of pretrial publicity on judges, as opposed to on potential jurors. Therefore, the fact that the judge is still considering the motions regarding the defenses is not enough to implicate Oregon RPC 3.6(a). Even if the trial is imminent, and even if the defenses may be disposed of before the trial and might not be considered by the factfinders, Oregon RPC 3.6(b)(2) would permit the lawyer to state information that was contained in the public filings. If, however, the lawyer knows that the "stronger language" will prejudice the ultimate factfinders, or if it were so inflammatory that it was substantially likely to do so, the statement would violate Oregon RPC 3.6(a).

It is not clear from the hypothetical exactly how the prosecutor "uses the occasion of a codefendant's plea bargain to foreshadow evidence the prosecutor intends to attempt to introduce at trial." Presumably, in announcing the plea bargain, the prosecutor makes statements regarding the evidence the prosecutor intends to use against the remaining defendant(s). The evidence is, at this point, subject to a motion *in limine*, and, to the extent it is contained in the public record, the reference to it is permitted by Oregon RPC 3.6(b)(2). If the lawyer's purpose in making the statements is to prejudice the factfinder, the statements could violate Oregon RPC 8.4 (see discussion above). To the extent the evidence is not contained in a public record, if the lawyer knows that public dissemination of it will prejudice the imminent trial, or if it is so inflammatory that it is substantially likely to do so, the statement would violate Oregon RPC 3.6(a).

Finally, there is the question of the defense lawyer's telling the media that his client has passed a polygraph test. This statement would be improper if the lawyer knows or reasonably should know that the extrajudicial statement will have a substantial (i.e., highly probable),

likelihood of materially (i.e., seriously), prejudicing the imminent fact-finding process. It is difficult, without more information regarding the existing climate of publicity regarding the trial and the mood of the community, to gauge what the reasonably predictable effect of this statement would be.

Approved by Board of Governors, September 2007.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 8.8 (trial publicity), § 8.11 (conduct prejudicial to the administration of justice) (OSB Legal Pubs 2015).