



TENANTS PROJECT

Ethics CLE Outline

1. Why use media at all?
 - A. Media can be key part of lawsuit/legal campaign. Essential when there are asymmetric strengths of parties and for public interest campaigns.
 - B. Media both shield and sword, inhibits opposing side, puts them under pressure, informs the public and helps gain supporters. Winning your case in media and with public helps win case in court, plus public opinion can often trump courts in long run.
 - C. Not appropriate for all cases, need to gauge public's response to your case, not all parties desire or are suitable for media exposure.

2. Rules of Professional Conduct
 - A. Baseline rule, Rule 32:4.1 "In the course of representing a client, a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person"
 - B. Trial Publicity Rule 32:3.6: "(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."
 - C. Safe Harbor Publicity Provisions:

32:3.6: (b) Notwithstanding paragraph (a), 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

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

Public record provision very helpful, we post all pleadings in media cases. Also use investigation and request for assistance provisions.

D. Nature of Proceedings-comment to Rule 32:3.6

“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.”

This is key provision! Current media cases are civil non-jury and in the preliminary stages. Unlikely for judge to admit to prejudice anyhow.

E. Advertising, in public campaign case, particularly class actions, real need for additional clients.

RPC 32:7.1 no false statements.

RPC 32:7.2(a)(3) “(3) communications by a lawyer that are in reply to a request for information by a member of the public that was not prompted by unauthorized advertising by the lawyer; information available through a hyperlink on a **lawyer's Web site** shall constitute this type of communication.”

Class Action solicitation Rule 32:7.8 (c) “If success in asserting rights or defenses of a client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but shall not seek, employment from those contacted for the purpose of obtaining their joinder.”

No direct solicitation of clients, however, lawyers can use any of the normal indirect types of advertising in class actions, ISBA ethics opinion # 07-03.

3. First Amendment

Attorney advertising first allowed in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977)

“Commercial speech that is not false or deceptive and does not concern unlawful activities may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest. Since state regulation of commercial speech may extend only as far as the interest it serves state rules that are designed to prevent the potential for deception and confusion may be no broader than reasonably necessary to prevent the perceived evil.”

Shapero v. Kentucky Bar Association, 486 U.S. 466, 472 (1988)

4. Examples

Postville-comments by Cole

Juweid case

Tenants Project

Newspaper, TV, website and Facebook, etc.