Ethics & Professionalism

American Bar Association Litigation Section

March 29, 2021

Post-Election Litigation and Rule 3.6 Restrictions on Trial Publicity

As courts dismissed complaints challenging the outcome of the 2020 presidential election, a myriad of private individuals and bar associations filed disciplinary complaints against the lawyers crying fraud in public but not in court.

By Daniel Harrington

The surge of litigation challenging the outcome of the 2020 presidential election has finally come to an end without changing the electoral outcome in any state. It did, however, engender a countersurge of disciplinary grievances filed by elected officials, state and local bar associations, present and former bar leaders, and other public figures, as well as, no doubt, many private citizens, against lawyers who represented the Trump campaign or who otherwise sought to overturn the election.

One such grievance, not directly related to the merits of a specific lawsuit, was filed with the Office of Disciplinary Counsel of the District of Columbia Court of Appeals by Representatives Kathleen M. Rice (D-N.Y.) and Ted W. Lieu (D-Cal.) against Trump campaign lawyer Joseph E. diGenova. Letter from Kathleen M. Rice and Ted W. Lieu, Reps., to D.C. Ct. of Appeals Off. of Disciplinary Couns. (Dec. 2, 2020). Representatives Rice and Lieu charged diGenova with a number of violations of the *D.C. Bar Rules of Professional Conduct* (RPCs) for highly publicized statements diGenova made on a call-in radio show to the effect that Christopher Krebs, a former Trump administration official, "should be drawn and quartered" and "[t]aken out at dawn and shot" for assuring the American public that the 2020 election was secure. *Id.*

Among the RPC violations asserted by Representatives Rice and Lieu was a violation of D.C. Rule 3.6, relating to "Trial Publicity." This article addresses whether the charge is likely to stick. (This article does not address the many other RPCs potentially applicable to the Trump campaign lawyers' efforts to overturn the popular vote in certain swing states, including other RPCs potentially applicable in particular to the conduct of diGenova, who

reportedly also faces civil liability via suit brought by Krebs and lost his membership in the Gridiron Club.)

The Text And Parameters of ABA Model Rule 3.6

The relevant prohibition in Rule 3.6 of the ABA's *Model Rules of Professional Conduct* is contained in paragraph (a), which provides thus:

> 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.

The case law pertaining to the threat of "material prejudicing an adjudicative proceeding" essentially focuses exclusively upon the risk of tainting the jury or the jury pool. *United States v. Scarfo*, 263 F.3d 80, 94 (3d Cir. 2001); *Hirschkop v. Snead*, 594 F.2d 356, 371–72 (4th Cir. 1979); *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1075 (1991). Judges, whether sitting as fact finders or addressing issues of law, are generally perceived as being immune from influence by the press or other extraneous factors. As the U.S. Court of Appeals for the Third Circuit stated in *United States v. Scarfo*: "Judges are experts at placing aside their personal biases and prejudices, however obtained, before making reasoned decisions. Judges are experts at closing their eyes and ears to extraneous or irrelevant matters and focusing only on the relevant in the proceedings before them." 263 F.3d at 94. However, after allowing that "judges are human," *Chicago Council of Lawyers v. Bauer* suggests that preventing needless disclosure of extraneous, potentially prejudicial material to a judge presiding over a bench trial would be beneficial. 522 F.2d 242, 257 (7th Cir. 1975). Presumably for this reason, and perhaps with an eye toward First Amendment issues associated with restrictions on trial publicity, the counterparts to Model Rule 3.6 in New Mexico and Virginia are expressly limited in scope to matters that will or may be tried to a jury, with Virginia's rule further limited to criminal matters.

As to the rest of Model Rule 3.6, paragraph (b) enumerates certain "safe harbor" statements or disclosures that a lawyer may make notwithstanding the prohibition in paragraph (a). Paragraph (c) authorizes a limited right to respond to adverse recent publicity not initiated by the lawyer or client that might otherwise subject the client to substantial undue prejudice. And paragraph (d) imputes the restrictions of paragraph (a) to other lawyers in the lawyer's firm or government agency.

Notably, while Model Rule 3.6(b)(2)'s authorization of disclosure of "information contained in a public record" would seemingly afford lawyers vast leeway to discuss the subject of

litigation, a frequent criticism levied against the Trump campaign's lawyers was that their public allegations did not appear in their court filings.

D.C. Rule Distinctions and Applicability to diGenova Matter

Model Rule 3.6(a) has been adopted, with little or no change, in most U.S. jurisdictions. However, because the grievance of Representatives Rice and Lieu was submitted to the Office of Disciplinary Counsel for the D.C. Court of Appeals, it is appropriate to note that District of Columbia's version of Rule 3.6 consists, in its entirety, of the following modified version of Model Rule 3.6(a):

> A lawyer engaged in a case being tried to a judge or jury shall not make an extrajudicial statement that will be disseminated by means of mass public communication and create a serious and imminent threat of material prejudice to the proceeding.

D.C. Bar Rules of Pro. Conduct r. 3.6 (2007). Thus, unlike Model Rule 3.6, D.C. Rule 3.6 expressly includes a case "being tried to a judge" within its scope.

In the diGenova matter, statements were not made in connection with a case being tried to either a judge or a jury. Hence, the D.C. version of Model Rule 3.6 would appear to be inapplicable.

Other Factors Related to Model Rule 3.6 and the diGenova Matter

While the existing case law under Model Rule 3.6 regarding prejudicing an adjudicative proceeding focuses on prejudicing a jury, the *Restatement (Third) of the Law Governing Lawyers* not only refers to the potential that a statement "will have a substantial likelihood of materially prejudicing a juror" but also refers to the risk that a lawyer's extrajudicial statements might "influence" or "intimidate" a prospective witness. Restatement (Third) of the Law Governing Lawyers § 109 (2000). Again, given the absence of an ongoing trial, this issue will not be reached in the diGenova matter.

Furthermore, some commenters have casually suggested that Trump campaign lawyers should be "disbarred" for their conduct in challenging the outcome of the 2020 election. That seems an unlikely result for a Model Rule 3.6 violation—and thus an unlikely result for a D.C. rule 3.6 violation—although a Model Rule 3.6(a) violation played at least a partial

role in a lawyer's disbarment involving the prosecutor in the infamous Duke lacrosse team case.

Conclusion

In sum, while the D.C. Bar's version of Rule 3.6 seems unlikely to apply to diGenova's comments, lawyers should be mindful of their state bar's version of Rule 3.6 to avoid incurring a court's wrath, much less a bar grievance.

Daniel Harrington is with Cozen O'Connor in Philadelphia, Pennsylvania.