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Protecting Client Confidences in an Environment of Ubiquitous Media: Rule 3.6 of the ABA Model Rules of Professional Conduct

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Abstract: In 1887 Alabama became the first state bar in the country to adopt an official code of legal ethics that, among other concerns, attempted to regulate a lawyer's relationship with the media. While the essence of that original rule—recognizing the need to curtail dissemination of certain information about a party prior to trial in order to preserve the right to a fair trial—has not changed, the notion of who or what comprises the "media" has. The media of 1887, or indeed the media of 1987, do not define the media landscape of 2015. This paper provides some insight for the practitioner on two levels: first, a dive into defining the myriad contributors to and sources for what we know as the media today; and second, an examination of how courts and bar associations are responding to the ethical implications of the lawyer's relationship with this dynamic media environment.

I. Introduction

Most lawyers understand the ethical issues presented when a journalist calls asking for information about a pending lawsuit or investigation: do not say anything that could materially prejudice the matter. More often than not, law firm and corporate counsel policies dictate a terse "no comment" as the appropriate response and nothing more. But when is "no comment" not enough? Should "no comment" continue to be your response when your client becomes the target of a social media campaign replete with inaccurate information? At what point must the lawyer respond in rebuttal fashion with the intent of mitigating the adverse and prejudicial effects of the publicity? And who are the bloggers, citizen journalists, and networked individuals who function outside traditional media outlets?

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