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Extrajudicial Statements and Prejudice in the Digital Age: Creating Factors to Preserve the Balance Between Attorney and State Interests in Trial Litigation

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EXTRAJUDICIAL STATEMENTS AND PREJUDICE IN THE
DIGITAL AGE: CREATING FACTORS TO PRESERVE THE
BALANCE BETWEEN ATTORNEY AND STATE INTERESTS IN
TRIAL LITIGATION

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INTRODUCTION

As social media's prevalence and usage grows within the United States, people and organizations capitalize on new media to send news to users.¹ In 2017, 67 percent of people consumed their news from social media websites, and the rate continues to grow.² Local and national news sources bring newsworthy stories to active users on social media sites such as Twitter, where users can communicate and interact with one another to promote ideas and spread information.³ These online accounts cover not only mundane, day-to-day news, but also salacious stories relating to civil and criminal lawsuits.⁴

In April 2018, attorney Neal Katyal used his Twitter account to advocate for his client leading up to oral argument before the Supreme Court in *Trump v. Hawaii*.⁵ Katyal posted personal statements voicing his opinion about the case and retweeted posts linking to news articles and amicus briefs that supported his

1. See, e.g., Jacob Kastrenakes, *Twitter Will Live Stream Local Broadcasts During Breaking News Events*, VERGE (Feb. 15, 2018, 11:55 AM), <https://www.theverge.com/2018/2/15/17016434/twitter-local-news-broadcasts-breaking-events> [<https://perma.cc/EPG4-ZMEB>]; see also Elizabeth Thornburg, *Twitter and the #So-Called-Judge*, 71 SMUL. REV. 249, 298-99, 302 (2018).

2. Elisa Shearer & Jeffrey Gottfried, *News Use Across Social Media Platforms 2017*, PEW RES. CTR. (Sept. 7, 2017), <http://www.journalism.org/2017/09/07/news-use-across-social-media-platforms-2017/> [<https://perma.cc/Y4NG-58HC>]; see also Jefferey Ogden Katz & Alexander I. Passo, *Attorneys, the Internet, and Hate Speech: An Argument for an Amended Model Rule 8.4*, 13 SEATTLE J. SOC. JUST. 65, 68 (2014).

3. See, e.g., Montgomery County DA (@MontcopaDA), TWITTER (Apr. 26, 2018, 10:48 AM), <https://twitter.com/MontcopaDA/status/989561953558331394> [<https://perma.cc/RP4G-8ET8>]; see also Katz & Passo, *supra* note 2, at 66-67; Thornburg, *supra* note 1, at 254; *Our Values*, TWITTER, https://about.twitter.com/en_us/values.html [<https://perma.cc/98FH-7VZ2>] (“We believe in free expression and think every voice has the power to impact the world.”).

4. See, e.g., Emma Bazilian, *Casey Anthony Trial Blows Up Social Media*, ADWEEK (July 6, 2011), <https://www.adweek.com/digital/casey-anthony-trial-blows-social-media-133198/> [<https://perma.cc/4TR2-M77A>] (“[T]here were 325,283 Twitter posts on Tuesday about the Casey Anthony trial.”); Walter Pacheco, *Casey Anthony Trial: Social Media Revolutionized Coverage*, ORLANDO SENTINEL (July 5, 2011, 9:01 PM), <https://www.orlandosentinel.com/news/orange/os-casey-anthony-twitter-facebook-20110704-story.html> [<https://perma.cc/9M7L-2TSA>] (“[T]he keywords ‘caseyanthony’ were used 34,000 times and ‘notguilty’ appeared 20,000 times an hour after the ... not-guilty verdict.”).

5. See *infra* note 6 and accompanying text. See generally *Trump v. Hawaii*, 138 S. Ct. 2392, 2405 (2018).

argument.⁶ With nearly 284,000 followers,⁷ many people could view and perceive the arguments Katyal would make at oral argument. Katyal's persistent tweeting enabled him to have "extra" argument time in the court of public opinion, as advocates are allowed only a specific number of minutes to argue before the Supreme Court.⁸

Attorneys also post statements on Twitter referring to criminal cases when an alleged offender stands trial for a crime in a local venue.⁹ Scholars and practitioners voice additional concerns about an attorney's extrajudicial statements made during criminal trials in local venues because laypeople serve on juries.¹⁰ The media's publishing of a lawyer's out-of-court comment could prejudice jurors

6. See, e.g., Neal Katyal (@neal_katyal), TWITTER (Apr. 24, 2018, 3:25 PM), https://twitter.com/neal_katyal/status/988906774827761665 [<https://perma.cc/GDQ4-T5AL>] ("The backgrounds and perspectives of those articulating arguments against the travel ban in #TrumpvHawaii are remarkable.... Their chorus is deafening: the ban is unconstitutional, unprecedented, unnecessary and un-American."); Neal Katyal (@neal_katyal), TWITTER (Apr. 9, 2018, 6:30 PM), https://twitter.com/neal_katyal/status/983517554508468224 [<https://perma.cc/9JHJ-SGRF>] ("I'll be arguing the travel ban case An impt [sic] facet is the huge number of amicus ... briefs.... I'll highlight 1 brief every day until then."); Neal Katyal (@neal_katyal), TWITTER (Apr. 3, 2018, 6:59 AM), https://twitter.com/neal_katyal/status/981169418330767368 [<https://perma.cc/8BSN-PC4G>] (linking to Reuters article and stating "Snubbing Trump DOJ, Big Law firms back Hawaii amici in SCOTUS travel ban case").

7. Neal Katyal (@neal_katyal), TWITTER, https://twitter.com/neal_katyal [<https://perma.cc/AGT5-PPBW>].

8. See Transcript of Oral Argument at 75, *Trump*, 138 S. Ct. 2392 (No. 17-965); *OT2017 #2: "Who is the River Master?"*, FIRSTMONDAYS (Oct. 9, 2017, 50:15), <http://www.firstmondays.fm/episodes/2017/10/9/ot2017-2-who-is-the-river-master> [<https://perma.cc/E5JG-DDCW>] (suggesting that the online podcasts are media that advocates use to explain arguments they did not have time to make at oral argument); see also *The Court and Its Procedures*, U.S. SUP. CT., <https://www.supremecourt.gov/about/procedures.aspx> [<https://perma.cc/3WHY-M2J2>] ("With rare exceptions, each side is allowed 30 minutes argument.").

9. See, e.g., Kaitlyn Foti, *Judge Rejects Cosby Request to Disqualify DA Kevin Steele from Case*, TIMES CHRON. (Feb. 4, 2016), http://www.montgomerynews.com/timeschronicle/news/judge-rejects-cosby-request-to-disqualify-da-kevin-steele-from/article_78560945-4452-5f76-94f4-d0a20c69b9d8.html [<https://perma.cc/89CZ-TMC4>]; Anna Massoglia, *Why Are Lawyers and Judges Still Tweeting About Trial?*, LAWYERIST.COM (Mar. 10, 2016), <https://lawyerist.com/lawyers-and-judges-tweeting-trial/> [<https://perma.cc/TM7P-M2YU>] (DA retweeting a *Rolling Stone* article that implicates guilt of defendant Bill Cosby).

10. See *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1074 (1991); *In re Hinds*, 449 A.2d 483, 489 (N.J. 1982); Mattei Radu, *The Difficult Task of Model Rule of Professional Conduct 3.6: Balancing the Free Speech Rights of Lawyers, the Sixth Amendment Rights of Criminal Defendants, and Society's Right to the Fair Administration of Justice*, 29 CAMPBELL L. REV. 497, 513 (2007).

before and during a trial.¹¹ Because of this concern, the American Bar Association (ABA) enacted Model Rule of Professional Conduct 3.6 (Rule 3.6), which attempts to limit the types of speech attorneys can make while involved in litigation.¹²

Although a state seeks to protect a criminal defendant's right to a fair trial and its own interest in the fair administration of justice,¹³ courts and disciplinary boards must balance these interests against an attorney's First Amendment free speech right when determining whether an attorney has violated Rule 3.6.¹⁴ Comment 1 to Rule 3.6 notes that a lawyer's statements have value, as a lawyer is often in the best position to disseminate pertinent case-related information to the public.¹⁵ Attorneys may need to release this information to expose government abuse, ensure that citizens remain safe, or promote discussions about changing public policy.¹⁶ To effectively balance these rights, the standard described in Rule 3.6 requires courts and disciplinary boards¹⁷ to consider various factors in determining whether an attorney's statement results in a "substantial likelihood of prejudice" to the proceeding.¹⁸ By requiring courts to consider the factors, the ABA and the adopting states ensure that the rule is narrowly tailored to protect

11. *Gentile*, 501 U.S. at 1074; *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966); *Hinds*, 449 A.2d at 489-90, 496.

12. MODEL RULES OF PROF'L CONDUCT r. 3.6 (AM. BAR ASS'N 2019). The Model Rules and ABA advisory opinions are not binding on state proceedings. *See* Cheryl B. Preston, *Lawyers' Abuse of Technology*, 103 CORNELL L. REV. 879, 884, 888 (2018). However, most states have ethical codes that are similar or identical to the ABA Model Rules. *Id.* at 884 & n.10.

13. *See* *Chi. Council of Lawyers v. Bauer*, 522 F.2d 242, 248 (7th Cir. 1975); *Hinds*, 449 A.2d at 490, 494.

14. *See Hinds*, 449 A.2d at 489 (asserting that an attorney's right to free speech is not absolute, but that the interest must still be acknowledged throughout a proceeding); *see also Bauer*, 522 F.2d at 250.

15. *See* r. 3.6 cmt. 1.

16. *See Bauer*, 522 F.2d at 250; r. 3.6 cmt. 1.

17. This Note is primarily focused on a court's interpretation of Rule 3.6. It is important to note that decision makers of a state bar's disciplinary board often must interpret the rule to make an initial sanctions determination. These decision makers, too, would benefit from this Note's proposal.

18. *See, e.g., Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1044 (1991) (time of statement); *Bauer*, 522 F.2d at 256-58 (nature of the proceeding); r. 3.6 cmt. 6 (nature of the proceeding); *see also* r. 3.6(b)-(c) (listing specific statements an attorney may make during trial).

as much attorney speech as possible while still promoting state and defendant interests.¹⁹

For over thirty years, these factors have enabled decision makers to balance these rights effectively when faced with attorney statements published in traditional media outlets.²⁰ Yet in a new age of Internet communication and social media, the original factors noted in the ABA rule and comments do not sufficiently protect attorney speech posted on online forums.²¹ This Note argues that a new technological-focused comment to Rule 3.6 will remedy this problem.

In today's online world, scholars and practitioners constantly remind attorneys to take caution when posting statements online, because confidential and inappropriate information will spread across the web and reach large numbers of people at accelerated speeds.²² With this perception prevalent within the legal community, a judge—ruling on a case involving attorney statements made on social media—could find that there is a substantial likelihood that the online statements will prejudice a trial.²³

Although Internet communications and social media outlets give users the opportunity to spread information to more people at faster rates,²⁴ it does not necessarily follow that all attorney statements posted online about litigation will be seen by potential jurors within the court's jurisdiction. Numerous factors make it less likely that a potential juror will see an online statement, including the attorney's social media account privacy settings, the attorney's number of followers, the functions the attorney uses on a specific medium to

19. See Katz & Passo, *supra* note 2, at 83-84, 87-88.

20. See *Gentile*, 501 U.S. at 1037-38; *United States v. McGregor*, 838 F. Supp. 2d 1256, 1264-65 (M.D. Ala. 2012).

21. See *infra* notes 22-25 and accompanying text. Other authors have made similar arguments about an attorney's use of social media altering the balance between a lawyer's speech rights and the state's interest in the fair administration of justice. See, e.g., Emily Anne Vance, Note, *Should Prosecutors Blog, Post, or Tweet?: The Need for New Restraints in Light of Social Media*, 84 *FORDHAM L. REV.* 367, 406 (2015). However, other authors noted that the advancement of social media technologies required increased limitations on lawyers' speech. See *id.* This Note argues that additional factors must be implemented to better protect a lawyers' speech rights on social media.

22. See Katz & Passo, *supra* note 2, at 67; Preston, *supra* note 12, at 893, 898-99.

23. See, e.g., *Jackson v. Deen*, No. CV412-139, 2013 WL 1911445, at *3, n.11 (S.D. Ga. May 8, 2013); *United States v. Koubriti*, 305 F. Supp. 2d 723, 738 (E.D. Mich. 2003).

24. Thornburg, *supra* note 1, at 257-58.

make a statement more searchable, and the ability of a potential juror to be inundated with statements from nonfollowers.²⁵

This Note argues that by creating a new, additional comment to Rule 3.6 that lists the factors to consider when faced with an attorney's social media statement, judges will be in a better position to determine if an attorney's statement reaches and prejudices a jury. The inclusion of such factors can aid decision makers who may be unfamiliar with how attorneys can protect information on social media.²⁶ The new considerations, designed for a new age of social media use, can help shift back into place the balancing of rights that judges have achieved when applying the rule to statements presented in traditional media.

In applying Rule 3.6 to social media statements, a judge must first understand how courts have applied Rule 3.6 to traditional media statements and the factors that make traditional media statements different from social media statements.²⁷ Part I discusses Rule 3.6 and explains how courts apply the rule to statements that lawyers make in traditional-media outlets. Part II describes the problems that derive from a judge's application of Rule 3.6 to statements lawyers make online. Part III lists and describes new factors for a judge to consider when ruling on a case that involves an attorney's social media statements. Using these factors, a judge achieves a better balance between an attorney's speech interests and a state's interest in obtaining fair and just proceedings.²⁸ Lastly, Part IV analyzes counterarguments and assures readers that new factors will not unjustly promote lawyer speech interests at the expense of state interests.

25. See *infra* Part III.

26. Judges may be unfamiliar with how information spreads on social media, or the precautions users take to prevent dissemination of statements on social media, because many judges do not have social media accounts. See Stephen Dillard, *It's Time for Judges to Tweet, Like, and Share*, A.B.A. (Oct. 20, 2017), <https://abaforlawstudents.com/2017/10/20/time-for-judges-to-use-social-media/> [<https://perma.cc/4HPP-HMPX>] (noting that many judges do not have social media accounts because they consider their roles as neutral arbiters to limit their abilities to have a significant presence as public figures). *But see* Thornburg, *supra* note 1, at 258-62, 264 (listing prominent judges who have Twitter accounts, and advocating for judges to use social media outlets to promote transparency).

27. See *infra* Parts I-III.

28. See *infra* Part III.

I. BACKGROUND: COMPETING INTERESTS, SPEECH RESTRICTIONS, AND THE TRIAL PUBLICITY RULE

Before reviewing the history and legal standards of Rule 3.6, one must understand the purpose of the rule.

A. *Purposes and Balancing of Conflicting Rights*

Rule 3.6 seeks to balance conflicting interests: an attorney's right to free speech, a state's interest in the fair administration of justice, and a defendant's right to a fair trial in a criminal proceeding.²⁹ Each interest and right serves an important function for democracy and the American justice system.

1. *State Interests*

When applying Rule 3.6, judges must consider state interests, such as the fair administration of justice and a defendant's right to a fair trial.³⁰ A court must ensure that a judicial proceeding is fair.³¹ Additionally, a defendant's Sixth Amendment right requires that a defendant be given a fair trial.³² A fair trial is "the most fundamental of all freedoms,"³³ and is "particularly acute in the criminal context" in which a defendant's physical liberty is at stake.³⁴ Because of the high stakes, a jury must ascertain the truth and reach the correct determination based solely on admissible evidence presented at trial.³⁵

29. See *In re Hinds*, 449 A.2d 483, 489 (N.J. 1982); Radu, *supra* note 10, at 497; Vance, *supra* note 21, at 372; see also U.S. CONST. amends. I, VI.

30. Other interests include preserving public confidence in the judiciary and maintaining the integrity of the profession. See Katz & Passo, *supra* note 2, at 83-84. However, these interests are protected by other Model Rules. See MODEL RULES OF PROF'L CONDUCT r. 8.1-8.5 (AM. BAR ASS'N 2019).

31. See *Hinds*, 449 A.2d at 489.

32. See U.S. CONST. amend. VI; *Hinds*, 449 A.2d at 490.

33. *Chi. Council of Lawyers v. Bauer*, 522 F.2d 242, 248 (7th Cir. 1975) (citing *Estes v. Texas*, 381 U.S. 532, 540 (1965)).

34. *Hinds*, 449 A.2d at 490.

35. *Id.*; Radu, *supra* note 10, at 513.

Jurors should be impartial and know little about a case before a trial begins.³⁶ For these reasons, professional rules limit the amount of influence out-of-court statements have on trial participants to prevent frustrating the functions of the jury and the adversarial system.³⁷ An attorney's extrajudicial statements may potentially influence jurors and other participants who actively contribute to ongoing litigation.³⁸ By acquiring knowledge about a case that is not in a public record or presented in the courtroom, the public could be misled by the statements, a juror could become biased, or the jury could find the defendant guilty based on grounds that were not presented at trial.³⁹ The information could impair the jury's ultimate factfinding mission and "wreck the intricate machinery of the criminal justice system."⁴⁰ Additionally, the risk of harm may increase when an attorney makes statements to the press because an attorney holds great influence that could cause a juror to accept that statement as reliable and true.⁴¹

2. Attorney Interests

The competing interest Rule 3.6 recognizes is an attorney's freedom of expression.⁴² Even while participating in the legal profession, attorneys as U.S. citizens "are entitled to the ... protection of the First Amendment."⁴³ The drafters of Rule 3.6 recognized this when writing comment 1, which states that "there are vital social interests served by the free dissemination of information about ... legal proceedings [The public] has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern."⁴⁴ Further, the comment states that "the

36. See Radu, *supra* note 10, at 513.

37. See Sheppard v. Maxwell, 384 U.S. 333, 363 (1966).

38. See *Hinds*, 449 A.2d at 494; see also Vance, *supra* note 21, at 370.

39. See Vance, *supra* note 21, at 370.

40. *Hinds*, 449 A.2d at 494.

41. See *id.* at 489 (recognizing an attorney's "special status" as an officer of the court); Radu, *supra* note 10, at 531 (citing *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1044, 1074 (1991)).

42. See MODEL RULES OF PROF'L CONDUCT r. 3.6 cmt. 1 (AM. BAR ASS'N 2019).

43. *Hinds*, 449 A.2d at 489.

44. R. 3.6 cmt. 1.

subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.”⁴⁵

By speaking about litigation, lawyers keep government officials accountable and aid in increasing safety, governmental transparency, and debate about public policy.⁴⁶ A lawyer’s statement made during litigation facilitates these goals, as a lawyer will already have the public’s attention when the media covers the alleged crime and trial.⁴⁷

Additionally, defense attorneys are obligated to zealously advocate for their clients.⁴⁸ Lawyers are skilled in giving voice to their clients’ cases by disputing misconceptions and discouraging speculation.⁴⁹ Based on negative information found in public records or statements made by the prosecution during a press conference, the public may already presume the accused is guilty of the alleged crime.⁵⁰ A defense attorney must be able to counter presumptions of guilt by portraying the defendant’s innocence to the press and citizens within the jurisdiction.⁵¹

Some scholars contend that attorneys automatically waive their free speech rights when joining the legal profession, suggesting that any balancing between a lawyer’s right to free expression and a defendant’s right to a fair trial will always weigh in favor of defendant and state interests.⁵² This simply is not the case. Although an attorney may be subject to more speech restrictions than a nonattorney citizen, attorneys still retain rights to free expression that “cannot be restricted unless certain conditions apply.”⁵³ Traditionally, when a government regulation directly

45. *Id.*

46. *See id.*

47. *See* Chi. Council of Lawyers v. Bauer, 522 F.2d 242, 250 (7th Cir. 1975).

48. *See* Radu, *supra* note 10, at 531.

49. Nicola A. Boothe-Perry, *The “Friendly” Lawyer: Professionalism and Ethical Considerations of the Use of Social Networking During Litigation*, 24 U. FLA. J.L. & PUB. POL’Y 127, 129 (2013).

50. *See* Bauer, 522 F.2d at 250.

51. *See id.*

52. Preston, *supra* note 12, at 891-92 (“Attorneys knowingly and willingly enter into a highly regulated profession, implicitly waiving the right to ... expression.”).

53. Katz & Passo, *supra* note 2, at 83. The Court’s statement in *Gentile v. State Bar of Nevada* that “during a judicial proceeding, whatever right to ‘free speech’ an attorney has is extremely circumscribed,” shows that the Court does acknowledge an attorney’s right to free speech. 501 U.S. 1030, 1071 (1991); *see also id.* at 1082 (O’Connor, J., concurring) (“This does

prescribes what a person may and may not say, courts must determine whether the state has a compelling interest in restricting speech and whether the rule regulating the speech is narrowly tailored to achieve the state interest.⁵⁴ As described above, the interests implicated when attempting to limit an attorney's extrajudicial statements are sufficiently important to warrant regulation.⁵⁵ The question thus becomes, is "this disciplinary rule ... broader than necessary or essential to protect [the] governmental interest."⁵⁶

3. *Balancing Conflicting Interests*

In considering whether state variations of Rule 3.6 are sufficiently tailored, courts must determine whether the regulations are too vague or too broad.⁵⁷ The language of Rule 3.6 and the subsequent comments provide great detail so that lawyers may recognize the types of speech they can express in a public forum, the standard of review the court will apply, and the factors a court will consider when determining whether a statement is likely to prejudice a proceeding.⁵⁸ The detailed language of the rule suggests that, in traditional media, courts can strike an appropriate balance between conflicting rights because the only speech prohibited is that which is "necessary" or "essential" to protect the fair administration of justice and the right to a fair trial.⁵⁹

However, as discussed below, with the rise of social media technologies, the factors and exceptions listed in Rule 3.6 no longer

not mean, of course, that lawyers forfeit their First Amendment rights."); *In re Hinds*, 449 A.2d 483, 489 (N.J. 1982) ("Like other citizens, attorneys are entitled to the full protection of the First Amendment."); *cf.* *Thornburg*, *supra* note 1, at 297 ("Judges do not forfeit the right to freedom of speech when they assume office. They do agree, however, that the right must be balanced against the public's legitimate expectations of judicial impartiality." (quoting *In re Sanders*, 955 P.2d 369, 370 (Wash. 1998) (en banc))).

54. See *Katz & Passo*, *supra* note 2, at 75.

55. See *supra* notes 30-41 and accompanying text.

56. *Hinds*, 449 A.2d at 490.

57. See *Chi. Council of Lawyers v. Bauer*, 522 F.2d 242, 249, 251 (7th Cir. 1975) (noting that lawyers must be aware of prohibited areas of speech and stating that a rule cannot prohibit more speech than necessary to protect the other right at stake).

58. See MODEL RULES OF PROF'L CONDUCT r. 3.6(a)-(c) cmts. 3, 5-7 (AM. BAR ASS'N 2019).

59. See *id.*

effectively protect a lawyer's speech rights.⁶⁰ Thus, the rule permits courts to unjustly tip the balance in favor of the state interests and prohibit more speech than necessary to prevent jury prejudice.⁶¹ Yet before reviewing the faults of Rule 3.6, one must understand how courts have traditionally regulated a lawyer's extrajudicial speech.

B. Rule 3.6 and Extrajudicial Statements

Model Rule 3.6(a) provides:

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.⁶²

For this rule to apply, a person must (1) be a lawyer, who (2) participates in the litigation, and (3) makes a statement that he or she (4) knows or should know will be released to a public audience, and (5) the public statement must be substantially likely to prejudice the outcome of a trial or the jury venire.⁶³ In past extrajudicial statement cases involving traditional media, lawyers have mostly disputed the "substantial likelihood of material prejudice" element.⁶⁴ As discussed below, with the advancement of social-media technologies, attorneys may contest additional elements.⁶⁵

The American Bar Association began regulating pretrial publicity in 1908 by enacting Canon 20 of the Canons of Professional

60. See *infra* Parts II-III.

61. See *infra* Parts II-III.

62. R. 3.6(a). For more information about presumed prejudicial and nonprejudicial communications, see r. 3.6(b) cmt. 5.

63. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1075 (1991); r. 3.6(a); Radu, *supra* note 10, at 517.

64. See, e.g., *Gentile*, 501 U.S. at 1036; *Graham v. Weber*, No. CIV13-4100, 2015 WL 5797857, at *8-9 (D.S.D. Oct. 5, 2015). However, some cases have disputed other factors, including whether an attorney is a participant of the ongoing investigation or litigation. See *In re Goode*, 821 F.3d 553, 557-58 (5th Cir. 2016); *In re Hinds*, 449 A.2d 483, 496-97 (N.J. 1982).

65. See *infra* Part II.A.

Ethics.⁶⁶ The ABA intended for the 1908 rule to deter lawyers from speaking to the press; however, such deterrence was minimal because courts rarely enforced the rule.⁶⁷ After the assassination of President John F. Kennedy and the subsequent murder of the assassin Lee Harvey Oswald, the Warren Commission analyzed the media's coverage of the J.F.K. assassination and suggested that if Lee Harvey Oswald had never been killed, he likely would not have received a fair trial due to the widespread media coverage following the assassination.⁶⁸ After assessing the Warren Commission's concerns, the ABA House of Delegates revised the extrajudicial statement ethical rule and used a "reasonable likelihood of prejudice" standard to determine whether a court could restrict a lawyer's speech.⁶⁹ In 1969, the ABA incorporated the rule into its newly formed Model Code of Professional Responsibility.⁷⁰

Many states incorporated this model rule into their own state codes of conduct, and federal and state courts began ruling on whether the "reasonable likelihood" standard passed constitutional muster.⁷¹ Some courts found that the low standard prohibited too much attorney speech and ruled that decision makers use a "clear and present danger" test to determine whether a lawyer's speech prejudiced a jury.⁷² As a result of these cases, the ABA Task Force on Fair Trial and Free Press drafted new language codifying an "imminent threat" standard; however, the ABA House of Delegates never approved the change.⁷³

Rather, in 1983, the ABA codified the "substantial likelihood of material[] prejudic[e]" standard when it issued its Model Rules of Professional Conduct and implemented Model Rule 3.6.⁷⁴ Practitioners and scholars viewed the standard as a middle ground, attempting to split the difference between jurisdictions that were using the

66. Radu, *supra* note 10, at 499.

67. *Id.* at 499-500 (explaining that judges determined the rule was too vague for enforcement).

68. *Id.* at 500.

69. *Id.* at 503-04 (emphasis added).

70. *Id.* at 505.

71. *Id.* at 505-06.

72. *In re Hinds*, 449 A.2d 483, 492 (N.J. 1982); Radu, *supra* note 10, at 506.

73. Radu, *supra* note 10, at 508-09.

74. *Id.* at 509 (emphasis added).

“reasonable likelihood” and “imminent threat” standards.⁷⁵ Thirty-one states immediately codified Rule 3.6, and practitioners began challenging the constitutionality of the rule.⁷⁶ One Nevada case, *Gentile v. State Bar of Nevada*, reached the Supreme Court in 1991.⁷⁷

C. *The Substantial Likelihood of Prejudice Formulation in Gentile*

The Supreme Court found that Nevada’s “substantial likelihood” standard was constitutional in *Gentile v. State Bar of Nevada*.⁷⁸ There, the defendant’s lawyer, Dominic Gentile, spoke at a press conference after his client was indicted on criminal charges.⁷⁹ Gentile said that his client was innocent of all charges.⁸⁰ He then described his strategy for arguing the case at trial, noting specific pieces of evidence that placed guilt on other suspects.⁸¹ The jury acquitted Gentile’s client at trial six months later.⁸² The Nevada State Bar filed a complaint against Gentile for violating Nevada’s rule of professional conduct.⁸³ Gentile was sanctioned, and as a result, he filed a claim stating the rule’s “substantial likelihood of prejudice” standard was unconstitutional.⁸⁴ The Court ultimately ruled that Nevada’s substantial likelihood standard was the appropriate standard to use in the case; the Court then found in favor of Gentile by holding that his statements were not substantially likely to prejudice a jury.⁸⁵

In the opinion, the Justices noted that the substantial likelihood standard is an effective standard to use because the rule, if “[i]nterpreted in a proper and narrow manner,” can “prevent an attorney ... from releasing information of grave prejudice on the eve

75. *Id.*; see also *Hinds*, 449 A.2d at 492.

76. Radu, *supra* note 10, at 509; see *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1036-37 (1991).

77. See 501 U.S. at 1030.

78. *Id.* at 1036.

79. See *id.* at 1033.

80. *Id.* at 1059 app. a.

81. *Id.* at 1060 app. a.

82. *Id.* at 1033.

83. *Id.* Nevada’s extrajudicial statement rule was “almost identical to” the then-existing ABA Model Rule 3.6. *Id.*

84. *Id.*

85. See *id.* at 1037-38.

of jury selection.”⁸⁶ The rule, therefore, is meant only to prohibit attorney speech that causes “substantial harm.”⁸⁷

Courts and practitioners have interpreted the “substantial likelihood of prejudice” standard in different ways. For example, the Oregon State Bar considers prejudice to be substantial when it is “highly probable” and when there is a “likelihood of materiality.”⁸⁸ The Oregon State Bar further describes substantiality as “denot[ing] a material matter of clear and weighty importance.”⁸⁹ Some courts note that the state must have clear and convincing evidence that the attorney’s statements *truly* jeopardized the fairness of a trial.⁹⁰ In determining whether evidence is clear and convincing, a court cannot sanction an attorney based on a “vague feeling that his statement could possibly, or even foreseeably, have affected the trial.”⁹¹ Although some state bar associations and courts appear to protect much attorney speech, other courts consider the substantial likelihood standard to be lower, and do not require a showing of actual prejudice.⁹²

States have interpreted the “substantial likelihood” standard in multiple ways,⁹³ however, the Court in *Gentile* was not concerned with differentiating between these interpretations, or the three standards that the ABA proposed and courts used throughout the twentieth century.⁹⁴ Although the Court upheld the “middle ground” standard, the Court noted that “[t]he difference between the requirement of serious and imminent threat ... and the more common formulation of substantial likelihood of material prejudice could prove mere semantics.”⁹⁵ Rather, courts point to a review of

86. *Id.* at 1036.

87. *Id.*

88. Or. State Bar, Formal Ethics Op. No. 2007-179, 519 (2007).

89. *Id.* at 521 (quoting OR. RULES PROF'L CONDUCT 1.0(o) (2007)).

90. *In re Hinds*, 449 A.2d 483, 495 (N.J. 1982).

91. *Id.* at 500 (Pashman, J., concurring).

92. *See In re Brizzi*, 962 N.E.2d 1240, 1245 (Ind. 2012) (noting that a judge must ask whether the statement *could* cause prejudice, rather than whether the statement *actually* caused prejudice).

93. *See supra* notes 88-92 and accompanying text.

94. *See Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1037 (1991); *see also supra* notes 72-76 and accompanying text.

95. *Gentile*, 501 U.S. at 1037; *see Hinds*, 449 A.2d at 493 (majority opinion) (“The clear and present danger standard is no more self-defining or self-revealing than are any of these alternative formulations.”).

the rule's factors as the most important determination in deciding whether an attorney has violated Rule 3.6.⁹⁶

D. Factors Considered in Gentile and Other State Proceedings

In *Gentile*, the Court noted that certain factors should be considered when determining whether an attorney's statements substantially prejudiced the jury venire.⁹⁷ In analyzing Gentile's intent, the Court stated that Gentile did not intend to sway the jurors' opinions before trial.⁹⁸ The Court also noted that time was an important factor to consider when determining prejudicial impact.⁹⁹ The Court stated that Gentile's statement was less likely to reach "the attention of the venire on the eve of *voir dire*" because Gentile spoke to the press six months before trial when his client was first indicted.¹⁰⁰

Another factor the Court considered was the size of the community.¹⁰¹ In considering this factor, the Court noted that in a jurisdiction that included over 600,000 potential jurors, the attorney's statements were less likely to prejudice a jury because the defense attorney and prosecutor likely could find twelve jurors out of 600,000 who had not been exposed to the press release.¹⁰² Additionally, the Court stated that television news stations and newspapers only broadcasted and published a small portion of the attorney's remarks.¹⁰³ By applying these factors to the case, the Court determined that the attorney's remarks did not have a substantial likelihood of prejudicing the jury or the jury venire.¹⁰⁴

Lower courts and state bars have also applied these factors (time and size of community) to their cases and have added factors (frequency, intensity, likelihood of admissibility, and nature of the proceeding) to determine whether an attorney should be sanctioned for his or her speech. One federal district court considered the

96. *Hinds*, 449 A.2d at 493.

97. *See Gentile*, 501 U.S. at 1042, 1044-45.

98. *See id.* at 1042.

99. *Id.* at 1044.

100. *Id.*

101. *See id.*

102. *Id.*

103. *Id.* at 1045.

104. *See id.* at 1037-38.

frequency and intensity of the attorney's statements when determining whether they were substantially likely to be prejudicial.¹⁰⁵ Similarly, the State Bar of Pennsylvania considered the likelihood of admissibility at trial in its determination of prejudice.¹⁰⁶ The nature of a proceeding also plays a role in a decision maker's determination of prejudice.¹⁰⁷ By applying these factors on a case-by-case basis, decision makers have effectively weighed an attorney's free speech interest against the state's interest in the fair administration of justice by only prohibiting speech that is truly likely to prejudice a trial.

E. Modern Application in Traditional Media

In 1991, the Court effectively balanced lawyers' speech against state interests to ensure both rights were protected.¹⁰⁸ Courts continue to implement the substantial likelihood of prejudice standard and use the *Gentile* factors.¹⁰⁹ By applying the *Gentile* rule and factors in *Graham v. Weber*¹¹⁰ and *United States v. McGregor*,¹¹¹ courts effectively balanced the rights of the involved parties in instances where lawyers made statements to traditional media sources.

1. Graham v. Weber

In the context of traditional media, courts protect a lawyer's speech by considering the *Gentile* factors and applying the substantial likelihood standard. For example, in *Graham v. Weber*, the court found that the Attorney General's statements about a murder case were not substantially likely to prejudice the defendant's criminal proceeding.¹¹² After a jury convicted John Graham of murder,

105. *United States v. McGregor*, 838 F. Supp. 2d 1256, 1265 (M.D. Ala. 2012).

106. Pa. Bar Ass'n, Informal Ethics Op. 96-45, *3 (1996).

107. MODEL RULES OF PROF'L CONDUCT r. 3.6 cmt. 6 (AM. BAR ASS'N 2019); see *Chi. Council of Lawyers v. Bauer*, 522 F.2d 242, 256-58 (7th Cir. 1975).

108. See *supra* Part I.C.

109. See *Graham v. Weber*, No. CIV13-4100, 2015 WL 5797857, at *13-15, *21-26 (D.S.D. Oct. 5, 2015); *McGregor*, 838 F. Supp. 2d at 1264-65.

110. 2015 WL 5797857, at *21.

111. 838 F. Supp. 2d at 1265.

112. 2015 WL 5797857, at *8.

Graham filed numerous habeas corpus petitions.¹¹³ While one habeas corpus action was pending, the Attorney General gave presentations at a university and benefit fundraiser where he talked about the case and the defendant's suspected involvement in another murder.¹¹⁴ Due to the continued national interest in the case, newspapers published statements from the Attorney General's presentations.¹¹⁵

The defendant sought a court-issued gag order to prohibit the Attorney General from speaking further about the case during the defendant's habeas corpus petition.¹¹⁶ To issue a gag order, the court first had to review Rule 3.6 and *Gentile* to determine whether the attorney's statements were substantially likely to prejudice the proceeding.¹¹⁷ In applying the *Gentile* factors, the court found that the statements were not likely to prejudice the proceeding.¹¹⁸ First, in reviewing the nature of the proceeding, the court noted a judge, rather than a jury, would decide the defendant's habeas corpus claim; this reduced the potential for prejudice because a judge is in a better position to remain impartial.¹¹⁹ Additionally, the court considered timing when determining whether the statements would likely prejudice a jury venire of a potential new trial.¹²⁰ The court noted that since there was no jury or jury venire to be considered at that time (because the habeas corpus petition was still under review), there was no pressing, substantial likelihood of prejudicing that future jury.¹²¹

Ultimately, when the court balanced the defendant's right to a fair proceeding against the lawyer's right to free speech, the court held that the lawyer's speech right must be upheld because the

113. *See id.* at *1.

114. *See id.*

115. *Id.*

116. *Id.* Plaintiffs often name attorneys general as defendants in habeas corpus actions. *Federal Habeas Corpus Review*, FINDLAW, <https://corporate.findlaw.com/litigation-disputes/federal-habeas-corpus-review.html> [<https://perma.cc/VF2Y-JWRG>]. Thus, attorneys general participate in litigation and are susceptible to Rule 3.6. *See* MODEL RULES OF PROF'L CONDUCT r. 3.6(a) (AM. BAR ASS'N 2019).

117. *Graham*, 2015 WL 5797857, at *4, *8. South Dakota's Rule 3.6 "closely tracks" the ABA's Model Rule 3.6. *Id.* at *4.

118. *Id.* at *8.

119. *Id.* at *9.

120. *Id.* at *9-10.

121. *Id.*

lawyer's statement enabled the public, who had a "legitimate interest in the functioning of its criminal justice system," to become educated on the topic.¹²² By using the factors described above, the court effectively balanced the rights of the parties and allowed the attorney's nonprejudicial speech to benefit the public.¹²³

2. *United States v. McGregor*

Using the *Gentile* factors, courts can protect attorney speech in traditional media outlets; likewise, the *Gentile* factors enable courts to proscribe lawyers' speech when statements are substantially likely to prejudice a jury. For example, in *United States v. McGregor*, the court stated that the defense attorney's statements made during the defendant's first trial likely prejudiced the proceeding.¹²⁴

In that case, multiple defendants, including state senators and casino owners, were charged with bribing officials to vote for a bill that would enact a referendum on the legalization of electronic bingo.¹²⁵ During the first trial, the court granted McGregor a new trial due to a hung jury determination on some of his charges.¹²⁶ During the second trial, the prosecution filed a motion to implement a gag order against the parties to prevent them from consistently speaking to the press, as was done in the first trial.¹²⁷ Ultimately, the court held that a gag order was unnecessary because both attorneys were subject to Alabama's Rule 3.6, which "mirrors" Model Rule 3.6.¹²⁸

Yet, in arriving at the ultimate conclusion that a gag order was unnecessary because less restrictive means of limiting attorney speech were possible,¹²⁹ the court first had to consider the "substantial likelihood of material prejudice" standard and the *Gentile* factors to determine whether the attorney's comments were

122. *Id.* at *10.

123. *See id.* at *9-10.

124. 838 F. Supp. 2d 1256, 1265 (M.D. Ala. 2012).

125. *Id.* at 1258.

126. *Id.* at 1259.

127. *Id.* at 1260.

128. *Id.* at 1263, 1267.

129. *See id.* at 1267.

permissible.¹³⁰ Although the court found the defense attorney's statements nonprejudicial in the second trial, the court found that the defense attorney's statements made during the first trial were substantially likely to prejudice a jury.¹³¹ In analyzing the defense's extrajudicial statements, the court considered the timing, frequency, context, and intensity of the attorney's statements.¹³²

The timing of the defense's statements increased the likelihood that the statements would prejudice the jury because the defense attorney spoke to the press on multiple days during the trial on the courthouse steps.¹³³ There, the attorney speculated about the prosecution's witnesses and denounced those witnesses' credibility by stating "God himself" could not rehabilitate them.¹³⁴ The court noted that the context of the comments, arising from opinion rather than fact, combined with the frequency and intensity of the statements, made it far more likely that a jury would become aware of and influenced by the defense attorney's statements.¹³⁵

By applying the *Gentile* factors to their gag-order analysis, the court suggested that the defense attorney would be responsible under Rule 3.6 if the government were to file charges against the attorney for the extrajudicial statements made during McGregor's first trial.¹³⁶ Such a ruling would strike an effective balance between the defense attorney's First Amendment rights and the government's interest in a fair and just trial.¹³⁷

By reviewing these two cases that protect a lawyer's right to free speech and the fair administration of justice, it becomes more apparent that courts can effectively balance the rights of the parties when applying the *Gentile* standard and factors to extrajudicial statements made in traditional media.

130. *Id.* at 1263-64.

131. *See id.* at 1265.

132. *Id.* at 1259, 1264-66.

133. *See id.* at 1259.

134. *Id.* at 1264-66.

135. *Id.* at 1265-66.

136. *See id.* at 1265 ("[T]he government satisfied the prejudice prong of the *Gentile* test.").

137. *See id.* at 1267.

II. APPLICATION OF THE TRADITIONAL RULE ON SOCIAL MEDIA

As technologies advance, courts must apply Rule 3.6 and the *Gentile* factors to online statements.¹³⁸ Scholars and practitioners have suggested that courts may continue applying the ABA Model Rules of Professional Conduct as they are currently written, without modification.¹³⁹ Comment 8 to Rule 1.1 notes that the ABA Model Rules apply when an attorney posts online.¹⁴⁰ The comment states that a lawyer is responsible for understanding current technologies in order to provide competent counsel to clients and maintain ethical obligations.¹⁴¹ Further, the ABA has reminded practitioners that Rule 3.6, specifically, applies to blog posts.¹⁴² ABA Opinion 480 suggests that courts can apply Rule 3.6 to online statements in the exact same way that courts apply the rule to statements published in traditional media.¹⁴³ Yet there are several differences between statements made on social media and traditional media that suggest new factors must be implemented to gain an effective balance between lawyer and state interests in an online setting.¹⁴⁴ Courts must consider additional factors to keep an effective balance between attorney and state interests.¹⁴⁵

A. *Is a Retweet a Statement?*

In traditional media, practitioners and courts mostly analyze the “substantial likelihood of prejudice” element of Rule 3.6.¹⁴⁶ However, as statements are created on online media, new issues may arise. In a world where attorneys “retweet” and “like” content created by

138. *See, e.g., In re Goode*, 821 F.3d 553, 556-57, 560-61 (5th Cir. 2016); *United States v. Silver*, 103 F. Supp. 3d 370, 374-75 (S.D.N.Y. 2015); *State v. Polk*, 415 S.W.3d 692, 694-96 (Mo. Ct. App. 2013).

139. Shannon Awsumb & Hon. Karen Wells Roby, *The Intersection of Online Communications and Legal Ethics*, FED. LAW., Aug. 2012, at 33.

140. *See* MODEL RULES OF PROF'L CONDUCT r. 1.1 cmt. 8 (AM. BAR ASS'N 2019).

141. *Id.*; *see, e.g.,* ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 466, 5-6 (2014).

142. ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 480, 6 (2018).

143. *See id.*

144. *See infra* Part II.B.

145. *See infra* Part III.C.

146. *See supra* Part I.D.

other social media users, practitioners must first ask a threshold question to determine if Rule 3.6 even applies: Is the content posted on the lawyer's account a statement?

1. Retweets as Statements—Modern Examples

For attorneys who use social media sites such as Twitter, retweeting other users' information is common practice.¹⁴⁷ For example, in the spring of 2018, while posting multiple tweets advocating for his position in *Trump v. Hawaii*, Neal Katyal retweeted links to articles that supported his arguments.¹⁴⁸

Practitioners and potential decision makers may also view attorney tweets in the context of criminal cases. In *Commonwealth v. Cosby*, District Attorney Kevin Steele retweeted a *Rolling Stone* article about Cosby's criminal acts only two months before filing criminal charges against him.¹⁴⁹ The article, which emphasized words such as "dozens of women" and "Cosby" in bold, red typeface, focused on Cosby's criminal conduct, the women he harmed, and Steele's advocacy for obtaining justice for victims.¹⁵⁰ Determining whether the retweet was the attorney's speech could have had real implications in the *Cosby* case. The defense counsel presented the court with a motion to disqualify Steele as prosecutor, due to, in part, his retweet.¹⁵¹ Although the judge dismissed this motion in the *Cosby* case,¹⁵² other cases reveal how displaying third-party content on social media could impact whether a court considers the content to be a lawyer's own speech.

147. See *supra* note 6.

148. See *supra* notes 6-7 and accompanying text.

149. See Kevin Steele (@Steele4DA), TWITTER (Nov. 2, 2015, 6:23 PM), <https://twitter.com/Steele4DA/status/661368156724830208> [<https://perma.cc/39E3-STTC>]; see also Complaint, *Commonwealth v. William H. Cosby, Jr.*, No. CP-46-CR-0003932-2016 (Pa. Ct. C.P., Montgomery Cty., Crim. Div., filed Dec. 30, 2015).

150. Tara Murtha, *Bill Cosby's Fate Could Hinge on a Small-Town Election*, ROLLING STONE (Nov. 2, 2015, 5:28 PM), <https://www.rollingstone.com/politics/politics-news/bill-cosbys-fate-could-hinge-on-a-small-town-election-65896> [<https://perma.cc/327U-JQNY>].

151. See Massoglia, *supra* note 9.

152. Foti, *supra* note 9.

2. Expressive Conduct as Speech—Retweeting on Twitter

The U.S. Supreme Court has altered its conception of free speech over time.¹⁵³ The Constitution not only protects pure speech, but also expressive conduct.¹⁵⁴ To decide whether a person's conduct is significantly expressive, a court must apply the *Spence* test to determine whether (1) a person intends to convey a message and (2) that message is likely to be understood by others.¹⁵⁵ Using the Court's *Spence* test, lower courts have analyzed whether a user's retweets and likes on social media are considered speech.¹⁵⁶

Circuit courts have held that an individual's Facebook "like" constitutes speech.¹⁵⁷ Scholars have suggested that "retweeting" a post on Twitter is analogous to "liking" a page on Facebook.¹⁵⁸ Retweeting a post places another user's words on one's own Twitter account.¹⁵⁹ In applying the *Spence* test to retweets, a court could find that the user who retweeted a statement intended to convey a message with which she agrees and accepts, because the message will appear on her account.¹⁶⁰ Additionally, viewers will understand that the user is approving of the message.¹⁶¹ In applying the test, a court would likely find that these retweeted statements are the

153. See Ira P. Robbins, *What Is the Meaning of "Like"?: The First Amendment Implications of Social-Media Expression*, 7 FED. CTS. L. REV. 127, 130 (2013).

154. See *id.*

155. See *id.* at 134, 145; *Spence v. Washington*, 418 U.S. 405, 410-11 (1974) (per curiam).

156. See, e.g., *Bland v. Roberts*, 730 F.3d 368, 386 (4th Cir. 2013); *United States v. Yassin*, No. 16-03024-01-CR-S-MDH, 2017 WL 1324141, at *5 (W.D. Mo. Feb. 23, 2017).

157. See, e.g., *Bland*, 730 F.3d at 386 (explaining that in liking a political candidate's Facebook page, "[t]he distribution of the universally understood 'thumbs up' symbol ... conveyed that [the individual] supported [the politician's] candidacy").

158. Bethany C. Stein, Comment, *A Bland Interpretation: Why a Facebook "Like" Should Be Protected First Amendment Speech*, 44 SETON HALL L. REV. 1255, 1276-77 (2014).

159. *Id.* at 1277.

160. See *id.*

161. See *Spence v. Washington*, 418 U.S. 405, 415 (1974) (per curiam).

user's own speech.¹⁶² A district court ruled exactly this way in *United States v. Yassin*.¹⁶³

In *Yassin*, the court analogized a Facebook “like” with a Twitter “retweet” in holding that a jury could find that a retweet constituted the defendant’s endorsement of a true threat.¹⁶⁴ In that case, the defendant was charged with making threats to FBI agents on Twitter.¹⁶⁵ Yassin argued that she could not be held liable for the retweets because she was not the person who wrote the threatening language.¹⁶⁶ In assuming that Yassin shared the statement,¹⁶⁷ the court analyzed the retweet as expressive conduct.¹⁶⁸ The court noted there is a general understanding that by sharing another user’s post, the defendant agreed with the tweet, and viewers would understand the user as agreeing with the tweet.¹⁶⁹ The court further noted that the retweet could be understood as pure, or “substantive,” speech because the words, regardless of where they came from, appeared on the defendant’s account and, therefore, could be perceived as her own words.¹⁷⁰ Ultimately, although the defendant simply shared another person’s statement, the court found the

162. *But see* Anne Johnson, *The Ethics of Retweeting and Whether It Amounts to Endorsement*, NPR (July 31, 2014, 5:30 PM), <https://www.npr.org/sections/ombudsman/2014/07/31/336921115/the-ethics-of-retweeting-and-whether-it-amounts-to-endorsement> [<https://perma.cc/3NNQ-XRU3>]; PJ Vogt, *A Retweet Can Send You to Jail, a Like Is Free Speech*, WNYCSTUDIOS (Sept. 19, 2013), <https://www.wnycstudios.org/story/retweet-can-send-you-jail-free-speech> [<https://perma.cc/P4LJ-GGBY>] (explaining that retweeting a statement about a user’s sick grandmother is not an endorsement of her illness).

163. No. 16-03024-01-CR-S-MDH, 2017 WL 1324141, at *5 (W.D. Mo. Feb. 23, 2017).

164. *Id.*

165. *Id.* at *2.

166. *See id.* at *5.

167. There was a discrepancy over whether Yassin retweeted the statement from another person’s account or wrote the words herself. *Id.* This is because Yassin used the “old fashioned way” to retweet, by simply posting “RT” at the beginning of her tweet, copying and pasting the shared words to her account, and using the “@” symbol to link to the original poster’s account. *See* Ray Beckerman, *Retweet the Old Fashioned Way, Using ‘Classic’ or ‘Traditional’ Retweets Only*, RAY’S 2.0 BLOG (Sept. 3, 2013, 11:09 AM), <http://rays20.blogspot.com/2010/06/traditional-retweet-tr-key-to.html> [<https://perma.cc/SN6V-XSM8>]. Twitter does not endorse this type of retweeting, suggesting instead that people use the “Retweet Icon.” *Retweet FAQs*, TWITTER, <https://help.twitter.com/en/using-twitter/retweet-faqs> [<https://perma.cc/PGP5-VWG2>].

168. *See Yassin*, 2017 WL 1324141, at *5.

169. *Id.*

170. *Id.*

statement to be the defendant's speech, subject to a true threats analysis.¹⁷¹

Courts have determined that likes and retweets are statements for the purposes of analyzing a person's free speech claim.¹⁷² Because courts have viewed retweets as a user's own statements in this context, a court likely would consider that a retweet is a statement for the purpose of Rule 3.6 as well. Yet as technology advances, courts will likely have to continue to consider whether an attorney's conduct on social media counts as a "statement" when analyzing a lawyer's online speech.

B. Substantial Likelihood of Prejudice Analysis in the Online World

As more attorneys create social media statements, courts must consider whether the statements will substantially prejudice juries or jury venires. A court's application of Rule 3.6 and the *Gentile* factors is not exhaustive enough to protect an attorney who makes extrajudicial statements on social media.

1. Modern Examples of Rule 3.6 Applied to Online Statements

In some cases, challenges to an attorney's online statements will fail because the traditional *Gentile* analysis effectively balances lawyer and state interests.¹⁷³ For example, in *State v. Polk*, the attorney's tweets were not considered to substantially prejudice the jury.¹⁷⁴ There, the court considered the timing and content of the statement to find that, although the attorney's statements were made directly before and during the trial, the tweets stated public, factual information that was unlikely to substantially prejudice the jury.¹⁷⁵

Similarly, in *United States v. Silver*, the prosecutor's statements on the U.S. Attorney's Office Twitter account did not satisfy the

171. *See id.* at *4-5.

172. *See, e.g.*, *Bland v. Roberts*, 730 F.3d 368, 385-86 (4th Cir. 2013); *Yassin*, 2017 WL 1324141, at *5.

173. *See Vance*, *supra* note 21, at 387.

174. 415 S.W.3d 692, 694 (Mo. Ct. App. 2013).

175. *Id.* at 695-96.

substantial likelihood of prejudice test.¹⁷⁶ There, the court considered the content and the timing of the statements in making its final determination.¹⁷⁷ Ultimately, the court heavily relied on the “nature of the proceedings” factor and concluded that because grand jurors are allowed to have access to more information than a trial juror, there was less likelihood that the attorney’s statements would have substantially prejudiced the proceeding.¹⁷⁸

The courts’ holdings in these cases suggest that judges can apply the traditional *Gentile* analysis to online statements. However, courts have not always protected attorney speech on the Internet. In *United States v. Bowen*, the Department of Justice prosecuted murder crimes that occurred in New Orleans following Hurricane Katrina.¹⁷⁹ In an attempt to excite the public about the case, two prosecutors within the U.S. Attorney’s Office anonymously posted comments about the murders on an online news article.¹⁸⁰ The court considered the totality of the evidence—the quantity, content, and timing of the comments—in making its determination that the statements were substantially likely to prejudice a jury venire.¹⁸¹

Ultimately, the court ruled in favor of the defendant in the case and granted him a new trial, basing part of its decision on the prosecution’s comments’ ability to substantially influence the jury venire.¹⁸² The court analogized the online environment to a “carnival” and stated that the online statements were ferocious and egregious attacks that created a “poisonous atmosphere” that could taint the potential jury pool, even if the statements were not as “overt” as statements released directly to the press.¹⁸³

The *Bowen* court crossed the line by infringing on too much attorney speech. Although the court noted that the online news source was popular in the jurisdiction,¹⁸⁴ the court did not consider the effects of anonymity or the quantity of other comments in

176. 103 F. Supp. 3d 370, 382 (S.D.N.Y. 2015).

177. *See id.* at 378-79.

178. *Id.* at 376, 380.

179. 969 F. Supp. 2d 546, 550 (E.D. La. 2013), *aff’d*, 799 F.3d 336 (5th Cir. 2015), *reh’g denied* 813 F.3d 600 (5th Cir. 2016).

180. *Id.* at 552.

181. *Id.* at 551.

182. *Id.* at 621-22, 627.

183. *Id.* at 575, 578, 617, 620.

184. *Id.* at 621.

determining whether a juror would likely see and be influenced by the attorneys' statements.¹⁸⁵

First, if multiple users commented on the articles, it is less likely that a potential juror would even see the few comments left by the anonymous attorneys. Additionally, it is important for courts to consider anonymity in determining the substantial likelihood for prejudice. One reason to limit an attorney's speech during litigation is to prevent attorneys, or skilled professionals who jurors perceive as having expertise in the case, from influencing jurors.¹⁸⁶ If a potential juror does not know that an attorney made a comment, then this concern is not raised, and there is less reason to restrict an attorney's speech. The fear that was settled in *Gentile* arises again—that “totally innocuous statement[s] could be a violation” of Rule 3.6.¹⁸⁷ Although the lawyers in *Bowen* are not the most sympathetic parties, one could see how the *Gentile* analysis fails to adequately balance lawyer and defendant rights in the online world by preventing more attorney speech than is justified by the rule.

2. Different Outcomes Based on the Perceptions of Access to Information Online

The court's ultimate conclusion in *Bowen* might have been influenced by the fact that judges are skeptical of the “online carnival type atmosphere” where attorneys are posting statements.¹⁸⁸ Judges may not thoroughly consider the technological functions and capabilities of Internet sites that affect a juror's ability to perceive a lawyer's online statement because judges are likely to think that potential jurors can easily view attorney statements online.

This perception is understandable, as scholars and practitioners frequently warn attorneys of social media dangers. In recent years,

185. The court did consider the defendant's anonymity to be a factor that damaged the integrity of the judicial proceedings and the profession. *Id.* at 626. However, the court did not consider anonymity when determining whether such statements would substantially influence a juror. *Id.* Although the Government in an opposition memorandum requested that the court consider the defendant's anonymity as a fact that mitigated the likelihood of substantial prejudice to a jury, the court refused to consider the fact for this purpose. *Id.*

186. *See supra* note 41 and accompanying text.

187. *Chi. Council of Lawyers v. Bauer*, 522 F.2d 242, 251 (7th Cir. 1975).

188. *See Bowen*, 969 F. Supp. 2d at 578.

scholars have warned practitioners to be cautious when posting online or engaging in discussions.¹⁸⁹ Legal professionals tell law students to use caution with regard to their social media presence when applying for jobs and registering for the Bar.¹⁹⁰ Even the ABA has commented on social media interaction when addressing judges specifically; one formal opinion noted that judges must not assume that statements will stay private online.¹⁹¹

The ABA has warned that comments can be “disseminated to thousands of people.”¹⁹² Other scholars have noted that one message can be “broadcast ... to untold millions”¹⁹³ in a “matter of seconds.”¹⁹⁴ The ability to communicate quickly, without edits from a reputable publisher, also creates the fear that more prejudicial information may reach jurors’ eyes.¹⁹⁵ A lawyer’s use of the vast, expansive Internet is seen as an amplified way to influence and prejudice jurors who are browsing through content on their social media accounts.¹⁹⁶

One blogger describes how one statement can gain great notoriety on Twitter.¹⁹⁷ Patrick Antinozzi notes that “at any moment” one tweet can be seen “by thousands ... even *millions*” with a few simple tricks of the trade.¹⁹⁸ By using a hashtag, powerful imagery, and engaging with other users who had more followers than him, his tweet went “viral,” and was seen by many people who normally would not have seen his statement.¹⁹⁹ A judge who is aware of the rhetoric surrounding online communications likely perceives a

189. Awsumb & Roby, *supra* note 139, at 34 (“Because any information posted using social media ... can be easily spread to a large number of people, lawyers should be careful in their social networking and online habits.”).

190. See, e.g., Kathryn Rubino, *Law School Grads Agree: Social Media Is ‘Fair Game’ for Employers*, ABOVE THE LAW (Aug. 16, 2017, 12:43 PM), <https://abovethelaw.com/2017/08/law-school-grads-agree-social-media-is-fair-game-for-employers> [<https://perma.cc/HGF2-LHTX>].

191. ABA Comm’n on Ethics & Prof’l Responsibility, Formal Op. 462, 1 (2013).

192. *Id.* at 2.

193. Preston, *supra* note 12, at 932.

194. Vance, *supra* note 21, at 381.

195. See *id.* at 379-80.

196. See *id.* at 383-84.

197. See Patrick Antinozzi, *How One Tweet I Posted Was Seen by Over 150,000 People*, RAPIDWEBLAUNCH BLOG (Jan. 5, 2017), <https://blog.rapidweblaunch.com/2017/01/05/how-get-noticed-twitter> [<https://perma.cc/87NC-7568>].

198. *Id.*

199. *Id.*

lawyer's online statement as being more influential, and therefore more dangerous to a proceeding.

3. Limiting Lawyer Speech Online Because of Perceptions About the Spread of Information Across the Internet

This ideology affected attorneys' speech interests in other cases where judges appeared skeptical about granting lawyers more speech rights when they posted their statements online. In *United States v. Koubriti*, the court placed a gag order on the parties after indicting defendants who had been on the terrorist watchlist after 9/11.²⁰⁰ Despite the order, the prosecution continued to make statements to the press and post statements online.²⁰¹ While the jurors were subject to extensive voir dire that ensured they had not been subjected to the attorney's statements, the court held that the attorney's statements were likely to prejudice the jury, in part, because electronic statements "could very easily have been inadvertently discovered by one of the jurors in the case" and "jurors' families and friends [could] happen upon the improper comments and mention them to a juror in [the] case."²⁰²

Without further analysis to determine where the attorney posted the statement and how available those statements were to public eyes, the court seemed to presume that online statements could easily reach potential jurors and influence proceedings.²⁰³ By functioning under this presumption, courts limit more attorney speech than is necessary to protect the states' interest of a fair and just proceeding.

Another example that affected a lawyer's online speech is *Jackson v. Deen*.²⁰⁴ There, the defense attorney for Paula Deen filed a motion to disqualify the plaintiff's attorney because the attorney posted opinionated Twitter comments calling the defendant a racist and sexist during the litigation.²⁰⁵ While the court refused to disqualify

200. 305 F. Supp. 2d 723, 725 (E.D. Mich. 2003).

201. *Id.* at 729-30, 738.

202. *Id.* at 738.

203. *See id.* at 738, 744.

204. *See* No. CV412-139, 2013 WL 1911445, at *1, *3 (S.D. Ga. May 8, 2013).

205. *Id.* at *1, *3, & n.11.

the attorney from the case, the court ruled that the tweets prejudiced the proceeding.²⁰⁶

Analyzing the content of the tweets, the court found that the rude opinions could cause potential jurors to treat the defendant in a negative manner.²⁰⁷ However, the court failed to analyze this information in light of the attorney's Twitter account details.²⁰⁸ The attorney raised the issue that he had a limited number of Twitter followers.²⁰⁹ Because he had so few Twitter followers, it was likely that only a few people saw his tweet.²¹⁰ Therefore, the probability of a potential juror "inadvertently discover[ing]" the tweet while on social media was low.²¹¹

In *Jackson* too, the court presumed that a lawyer's online statement was more likely to reach potential jurors than a statement made to the traditional media.²¹² Ultimately, these perceptions make it less likely that a lawyer's online statements will be protected because judges will think that a lawyer's online statement will spread more rapidly and reach more people. However, this is almost never the case.²¹³

4. *The Reality of Online Access and Distribution*

It is extremely difficult for information to spread on certain online media. Cumulatively, Twitter users tweet over 500 million tweets per day.²¹⁴ The chance of having one tweet noticed out of 500 million is very small.²¹⁵ There are certain ways users of this particular medium spread information.²¹⁶ To spread a tweet, a user can increase his number of followers, post tweets that are emotional, tweet often, use a distinctive voice, post at busy times, use popular

206. *Id.* at *3.

207. *See id.* at *1, *3.

208. *See id.* at n.11.

209. *Id.*

210. *See infra* Part III.C.2.

211. *United States v. Koubriti*, 305 F. Supp. 2d 723, 738 (E.D. Mich. 2003).

212. *See* 2013 WL 1911445 at *3 & n.11; Vance, *supra* note 21, at 383-84.

213. *See infra* Parts II.B.4-III.

214. Robert Wynne, *Why It's So Hard to Go Viral*, FORBES (July 31, 2017, 4:46 PM), <https://www.forbes.com/sites/robertwynne/2017/07/31/why-its-so-hard-to-go-viral/> [<https://perma.cc/2U9N-H67M>].

215. *See id.*

216. *See* Thornburg, *supra* note 1, at 299.

hashtags, interact with other users via mentions and retweets, and promote his Twitter account on other platforms.²¹⁷ Scholars and users of the medium have noted that it is particularly difficult for a statement to spread across the medium—as “[e]ven prolific judicial tweeters may not get much [of a] visible reaction.”²¹⁸

Patrick Antinozzi admits that he had to work hard so that his tweet could reach multiple audiences across Twitter.²¹⁹ While his hashtag and the content of the tweet itself resulted in the distribution to a handful of his nonfollowers, it was not until Antinozzi took an additional assertive step and “mentioned” influential users (by asking them to retweet his tweet) that his statement went viral.²²⁰ Even with his relative success in distributing his idea on Twitter, Antinozzi admits that he was lucky and could never predict whether a tweet would go viral.²²¹

Although a lawyer’s statement does not need to go viral for it to influence a jury venire, it seems that the statement must spread beyond a lawyer’s direct “friends” or “followers” because a potential juror probably is not interested in the lawyer’s day-to-day activities, and therefore likely does not follow the lawyer on social media.²²² Thus, using Twitter as an example, a statement would have to gain enough popularity from followers to be retweeted to people who did not directly follow the lawyer.²²³ As noted, it takes a concerted effort for one statement to gain notoriety on social media.²²⁴ A court should consider a social medium’s functions and a lawyer’s affirmative actions, which can help limit a potential juror’s access to the statement, when determining which online statements are likely to substantially prejudice a trial.

217. *Id.* at 299-301.

218. *Id.* at 301; *see also* Antinozzi, *supra* note 197.

219. *See* Antinozzi, *supra* note 197.

220. *See id.*

221. *Id.*

222. The ABA prohibits attorneys and judges involved in litigation from “friending” or “following” potential jurors. *See* ABA Comm’n on Ethics & Prof’l Responsibility, Formal Op. 466, 4 & n.6 (2014). Lawyers may research jurors’ social media presences during the voir dire process. *Id.* at 5. Judges can prohibit jurors from using social media during a trial, which limits the likelihood that a juror will “follow” an attorney on social media. *Id.* at 6.

223. *See id.*

224. *See supra* notes 214-21 and accompanying text.

III. ANALYZING NEW TECHNOLOGICAL FACTORS

To determine whether an online statement is likely to substantially prejudice a proceeding, courts must consider additional factors that pertain to a medium's technological abilities that could limit the dispersal of an attorney's message. This Part begins with an analysis of the differences between online statements and statements made in traditional media.²²⁵ Then, this Part analyzes factors that will help guide judges to properly balance attorney and state interests for statements made in the online forum.²²⁶ Finally, the Part explains why these factors should be codified in a new comment to Rule 3.6.²²⁷

A. *The Old Factors Are Still Relevant*

Before detailing the additional factors that courts should consider when deciding a case that involves online statements, it is important to note that the traditional *Gentile* factors should still be used in a court's determination.²²⁸ For example, in both *United States v. Silver* and *State v. Polk*, the use of these factors in the online cases helped the courts efficiently balance the attorney's rights and the states' interests.²²⁹ However, the factors of intensity and frequency must be reevaluated in the wake of online communication technologies.²³⁰

225. See *infra* Part III.A-B.

226. See *infra* Part III.C.

227. See *infra* Part III.D.

228. See *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1044 (1991) (noting that the attorney's statement was less likely to influence a jury that was impaneled six months after the attorney's press release); see also MODEL RULES OF PROF'L CONDUCT r. 3.6 cmt. 6 (AM. BAR ASS'N 2019).

229. See *United States v. Silver*, 103 F. Supp. 3d 370, 376, 379-80 (S.D.N.Y. 2015) (considering the factors of time and nature of the proceeding in the court's analysis); *State v. Polk*, 415 S.W.3d 692, 695-96 (Mo. Ct. App. 2013) (considering the factor of time in the court's analysis).

230. See, e.g., *United States v. McGregor*, 838 F. Supp. 2d 1256, 1265 (M.D. Ala. 2012).

B. Perceptions of Intensity and Frequency of Statements Must Change

In *Gentile*, the Court referred to the intensity and frequency factors when describing the size of the community where the trial would take place.²³¹ The Court noted that with 600,000 potential jurors residing within the trial court’s jurisdiction, it was unlikely that all 600,000 would have been exposed to the attorney’s statements in the newspaper and on television.²³² Because of this, the Court reasoned that “only the most damaging” statements would have likely influenced the jury and the jury venire.²³³ Applying this concept to an online social medium such as Twitter, the population of potential jurors who have Twitter accounts will affect the likelihood of jury prejudice, because if the number of people in the jury venire who do not use Twitter is large, then the likelihood that all people in the jury venire will see a lawyer’s Twitter statement is small.²³⁴

However, it is also important to note that the more prevalent a statement’s publicity, the more likely it is that a potential juror will see the statement and be influenced by it.²³⁵ Therefore, a court must also consider how easy it is for a potential juror—who does not have direct access to an online medium—to be inundated with an attorney’s statement.

1. Frequency and Intensity in Old Media

When a statement is broadcast on local television channels and radio stations, or published in local newspapers, an attorney’s statement has the potential to reach multiple people in that jurisdiction who are eligible for jury duty.²³⁶ By reading a local

231. See 501 U.S. at 1044.

232. *Id.*

233. *Id.*

234. See *id.*

235. See NAT’L CRIME VICTIM LAW INST., THE VICTIM’S ATTORNEY AND THE MEDIA: RULES OF PROFESSIONALISM REGARDING EXTRAJUDICIAL STATEMENTS 2 (2017), <https://law.lclark.edu/live/files/25188-ncvli-newsletter-the-victims-attorney-and-the> [https://perma.cc/PC3L-YXSK].

236. See, e.g., *Gentile*, 501 U.S. at 1045 (newspaper and television); *United States v. Brown*, 218 F.3d 415, 419 (5th Cir. 2000) (television and radio); *United States v. McGregor*, 838 F. Supp. 2d 1256, 1259 (M.D. Ala. 2012) (local newspaper and television).

newspaper, watching the nighttime news, or listening to the radio on the way to work, a juror could “inadvertently come upon” an attorney’s statements about impending litigation without intending to research the case.²³⁷

2. Frequency and Intensity in New Media

Yet a potential juror is less likely to be inadvertently inundated with information found on social media.²³⁸ As the ABA has stated, “many blogs, websites, and other electronic media are readily accessible by anyone *who chooses to access them*.”²³⁹ Therefore, turning on one’s television is not analogous to searching the web because a potential juror must actively choose to search for an attorney’s information.²⁴⁰ A story found in a “small local paper” is “more prejudicial than a lot of publicity in a major market outside ... the venire pool.”²⁴¹ The World Wide Web, with its wide reach,²⁴² is more analogous to a market outside the court’s jurisdiction than a local newspaper.

It is true that on social media, a potential juror’s connections with other users may form an online community that looks more local in nature. A person can view all posts and statements on their “friends” and “followers” profiles, and many friends and followers may be known by the user from his local community.²⁴³ However, since it is unlikely that a potential juror “follows” or is “friends” with an attorney before a case’s litigation, the likelihood of seeing the attorney’s statement, even in a more localized social media setting, is small.²⁴⁴

237. See *United States v. Bulger*, No. 99-10371-DJC, 2013 WL 3338749, at *6 (D. Mass. July 1, 2013).

238. See *supra* Part II.B.

239. ABA Comm’n on Ethics & Prof’l Responsibility, Formal Op. 466, 1 (2014) (emphasis added).

240. See *id.* at 1-2.

241. NAT’L CRIME VICTIM LAW INST., *supra* note 235, at 2.

242. See *supra* notes 192-94 and accompanying text.

243. See *Boothe-Perry*, *supra* note 49, at 134.

244. See *supra* note 222 and accompanying text.

C. New Factors in a New Comment

If a potential juror does not follow an attorney, the likelihood of that juror seeing the attorney's statement is low, but not impossible. This is why a judge must consider the following factors to effectively determine whether an online statement will substantially influence a jury or the jury venire.²⁴⁵ The ABA has recognized some of these technological functions that control the public's access to a user's online information; however, the factors have not been applied to Rule 3.6.²⁴⁶ The following factors are presented in a manner that is broad enough to apply to both current and future online communication technologies.²⁴⁷ These factors include: an attorney's social-media account privacy settings; an attorney's number of followers; the functions an attorney uses on a specific medium to make a statement more searchable; and the ability of a potential juror to be inundated with statements from nonfollowers.

1. Privacy Mode

A court should consider a lawyer's privacy setting when determining whether his statements are likely to substantially prejudice a proceeding. On Twitter, if a lawyer's tweets are public, then the attorney's statements are visible to any Twitter user (if the user searches for the attorney, or the statement is shared by someone who the user follows), and to any researcher using a search engine such as Google.²⁴⁸ A lawyer whose account is private only displays his statements to "fellow subscriber[s]," or people who follow his account on that social medium.²⁴⁹ If an attorney's statements are private, only people with whom he chooses to connect may view his statements.²⁵⁰ Further, these "followers" cannot retweet, or share,

245. See *infra* notes 248-68 and accompanying text.

246. See ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 466, 2-3 (2014).

247. See Jessica Weltge & Myra McKenzie-Harris, *The Minefield of Social Media and Legal Ethics: How to Provide Competent Representation and Avoid the Pitfalls of Modern Technology*, 2017 ABA SEC. LAB. & EMP. L. ETHICS & PROF'L RESP. COMM. REP. 26-27.

248. *About Public and Protected Tweets*, TWITTER, <https://help.twitter.com/en/safety-and-security/public-and-protected-tweets> [<https://perma.cc/PD92-F87B>].

249. ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 466, 2 (2014); *About Public and Protected Tweets*, *supra* note 248.

250. See *About Public and Protected Tweets*, *supra* note 248.

the statements with their connections.²⁵¹ This makes it significantly less likely that a statement will spread across the online medium.²⁵² If an attorney's account is private, this factor weighs against the statement's substantial likelihood of prejudicing a proceeding.

2. *Number of Followers*

If a lawyer's Twitter account is open for public viewing, a court should consider how many people are following the lawyer's account.²⁵³ The more followers a lawyer has, the more likely that statement will spread to other users as the lawyer's followers retweet the lawyer's statement with their connections.²⁵⁴ Further, Twitter's algorithm influences which statements a follower sees and subsequently shares.²⁵⁵ The more followers a lawyer has, the more likely his or her statement will appear at the top of that follower's newsfeed.²⁵⁶ The higher the lawyer's statement appears on a follower's newsfeed, the more likely that follower will engage with the post and share it with *his* followers who may not directly follow the lawyer's account.²⁵⁷ In summary, a low number of followers weighs against a substantial likelihood of prejudice, while a high number of followers weighs in favor of there being a substantial likelihood of prejudice.

3. *Unsolicited Inundation*

A court should review the online medium where the lawyer posted his or her statement to determine how easy it is for a nonfollower to view the lawyer's statement. There are many ways to communicate and spread information on social media.²⁵⁸ On Twitter, a user may

251. *Id.*

252. *See* Thornburg, *supra* note 1, at 255.

253. *See id.* at 298-99.

254. *See id.* at 300.

255. *See* Will Oremus, *Twitter's New Order: Inside the Changes that Could Save Its Business—and Reshape Civil Discourse*, SLATE (Mar. 5, 2017, 8:00 PM), http://www.slate.com/articles/technology/cover_story/2017/03/twitter_s_timeline_algorithm_and_its_effect_on_us_explained.html [<https://perma.cc/C6D6-LCSE>].

256. *See id.*

257. *See id.*

258. For a review of Twitter's communication functions and capabilities, see Thornburg, *supra* note 1, at 254.

see statements that are retweeted, or shared, even if the user is not friends with the person who posted the original statement.²⁵⁹ Additionally, users enter into public debate more easily by posting their statements with hashtags, which allow other users to easily search Twitter and look at multiple users' statements that refer to the same, specific subject.²⁶⁰ A court should analyze these functions, which are particular to the online medium, when determining whether or not a statement is likely to influence a judicial proceeding. The more sharing capabilities that are available on a medium, the more likely it is that the statement could substantially prejudice a proceeding.

4. A Lawyer's Use of Technology in an Attempt to Inundate Nonfollowers

A court must look not only to the sharing capabilities of a particular online medium, but also to whether a lawyer *uses* the available functions. For example, if a lawyer's statement has been retweeted multiple times and the lawyer uses a hashtag, there is an increased likelihood that this statement will reach more people, including potential jurors.²⁶¹

The ability for a nonfollower to see a lawyer's statements increases with the use of Twitter's algorithm.²⁶² Twitter's algorithm no longer posts tweets chronologically on a user's newsfeed.²⁶³ Certain statements appear at the top of a follower's newsfeed, making it more likely that a statement will be seen and shared across the medium.²⁶⁴ The algorithm ranks multiple conditions to determine which statements appear at the top of a follower's newsfeed.²⁶⁵ A lawyer who has numerous followers, uses inflammatory rhetoric, tweets often, uses a distinctive voice, posts at busy times, uses popular hashtags, and has multiple followers interacting with his

259. *Id.* at 300.

260. *See id.* at 255.

261. *See supra* Part III.C.3.

262. *See Oremus, supra* note 255.

263. *Id.* Before Twitter's algorithm, statements were posted in reverse chronological order.
Id.

264. *See supra* notes 253-55 and accompanying text.

265. *See Oremus, supra* note 255.

tweet, is more likely to be featured on a follower's newsfeed.²⁶⁶ If a follower sees the attorney's statement, then that follower can easily retweet and share the post with that follower's network (i.e., a lawyer's nonfollowers). Therefore, a lawyer's use of these features weighs in favor of a substantial likelihood of prejudice.

It is important to note that a social media site's use of an algorithm does not always weigh in favor of increasing the likelihood of prejudice. An algorithm that incorporates a user's preferences may actually keep a lawyer's statement away from a potential juror's eyes if that potential juror expresses no interest in the law or the criminal justice system on Twitter.²⁶⁷ The Twitter algorithm gives each individual user a personal news-viewing experience by showcasing posts that the user will be interested in at the top of the user's newsfeed.²⁶⁸ This "filter bubble" results in a user seeing only what the user wants to see, rather than posts from users who have differing viewpoints.²⁶⁹ Because the algorithm takes the user's preferences into account, the user may or may not see a lawyer's statement on Twitter. Any weighing of the factors must be considered in light of this information.

D. How the New Factors Help

Other scholars have proposed additional comments to the Rules of Professional Conduct to resolve issues lawyers may face when using the Internet and social media.²⁷⁰ While some courts may already be using this Note's proposed factors in determining whether or not a lawyer's online statement is likely to prejudice a proceeding,²⁷¹ codifying these factors in a new comment to Rule 3.6 could be beneficial for the following reasons.

266. See Thornburg, *supra* note 1, at 299-301; Oremus, *supra* note 255.

267. See Oremus, *supra* note 255.

268. See Thornburg, *supra* note 1, at 302; Oremus, *supra* note 255.

269. Oremus, *supra* note 255.

270. See Boothe-Perry, *supra* note 49, at 153 (analyzing Rule 1.6); Angela O'Brien, Comment, *Are Attorneys and Judges One Tweet, Blog or Friend Request Away from Facing a Disciplinary Committee?*, 11 LOY. J. PUB. INT. L. 511, 534 (2010) (analyzing Rule 3.5).

271. See Michael Downey, *Ethical Rules for Litigating in the Court of Public Opinion*, A.B.A. (July 18, 2012), <http://apps.americanbar.org/litigation/committees/ethics/email/summer2012/summer2012-0712-ethical-rules-litigating-court-public-opinion.html> [<https://perma.cc/Y88P-MWJ2>].

First, implementing a comment to Rule 3.6 can help guide judges across all jurisdictions. With codification, judges can look to one place instead of sifting through persuasive case law from various jurisdictions to determine whether a factor applied to a traditional-media case can be effectively applied in the same way to an online-media case.

Second, a more unified approach to considering extrajudicial statements in an online world can give much needed guidance to attorneys who seek to advocate for clients and express opinions without violating their ethical obligations. By knowing which factors the court will consider when determining whether a lawyer's statement has gone too far, a lawyer can preemptively take the needed precautions to ensure his or her statement will not prejudice a proceeding. Clearly defined factors have helped courts effectively balance lawyer and state interests in the past.²⁷² In the wake of technological advancement, the addition of these new factors will lead to the same result.

Two examples demonstrate why these factors can help courts strike an appropriate balance between a lawyer's speech interest and a state's interest in fair and just proceedings. First, assume, for example, that Neal Katyal is a criminal defense attorney preparing for trial in a local venue. Mr. Katyal decides to post tweets about the ongoing litigation, referring to the arguments he will make during trial.²⁷³ Using the proposed factors, a judge can easily rule that this attorney's statements are substantially likely to prejudice the jury. The attorney's tweets are not private.²⁷⁴ Therefore, his statements may be shared with his followers and nonfollowers.²⁷⁵ Further, Twitter's algorithm is likely to feature Mr. Katyal—who posts often and uses passionate language and hashtags in his tweets—on followers' newsfeeds.²⁷⁶ Lastly, because Mr. Katyal has over 200,000 followers, there is an increased likelihood that more followers will like, comment on, and retweet his statement to their followers (i.e.,

272. See *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1034, 1036, 1044, 1046 (1991).

273. Cf. Neal Katyal (@neal_katyal), TWITTER (Apr. 9, 2018, 6:30 PM), https://twitter.com/neal_katyal/status/983517554508468224 [<https://perma.cc/9JHJ-SGRF>] (“I’ll be arguing the travel ban case An impt [sic] facet is the huge number of amicus ... briefs.... I’ll highlight 1 brief every day until then.”).

274. See *supra* Part III.C.1.

275. See *supra* Part III.C.1.

276. See *supra* Part III.C.3-4.

Mr. Katyal's nonfollowers).²⁷⁷ Mr. Katyal's travel ban tweet that promoted his upcoming argument received 236 retweets and 768 likes from Twitter users,²⁷⁸ making it more likely that the tweet would be featured on the platform and spread to others.²⁷⁹ Such factors weigh in favor of this attorney's statement prejudicing potential jurors who may be inundated with popular tweets on their own social media accounts.

On the other hand, using these same factors, a judge could easily rule that District Attorney (DA) Kevin Steele's statements do not substantially prejudice Bill Cosby's jury trial.²⁸⁰ Assuming that Mr. Steele retweeted the *Rolling Stone* article after litigation had commenced, a judge could hold that DA Steele did not prejudice the jury because the DA has few Twitter followers,²⁸¹ and only two people reacted to his tweet.²⁸² Steele did not use any inflammatory language or hashtags in retweeting the article.²⁸³ For these reasons, Twitter's algorithm likely would not feature this tweet on followers' newsfeeds, and few people within the jury venue would have the opportunity to see the statement.²⁸⁴ These factors weigh in favor of allowing the attorney to speak on the issue because his speech will not likely prejudice the jury venire.

IV. ADDRESSING COUNTERARGUMENTS

There are several counterarguments that suggest an additional comment regarding technological factors protects too much attorney speech at the expense of the state's interests.

A. *A Juror May Still See a Lawyer's Online Statement*

One counterargument could be that, despite analyzing a lawyer's followers, privacy settings, and use of sharing functions, a lawyer's

277. See *supra* Part III.C.2.

278. See Neal Katyal (@neal_katyal), TWITTER (Apr. 9, 2018, 6:30 PM), https://twitter.com/neal_katyal/status/983517554508468224 [<https://perma.cc/9JHJ-SGRF>].

279. See *supra* Part III.C.4.

280. See Steele, *supra* note 149.

281. See *supra* Part III.C.2.

282. See Steele, *supra* note 149; *supra* Part III.C.3-4.

283. See Steele, *supra* note 149; *supra* Part III.C.4.

284. See *supra* Part III.C.4.

statements may still reach a potential juror. However, as the court stated in *In re Brizzi*, a “court determines the likelihood that a particular statement will cause prejudice at the time made, not whether, in hindsight, it actually worked to the detriment of [the adverse party].”²⁸⁵

Additionally, other procedural elements can aid in preventing an extrajudicial statement from prejudicing a judicial proceeding. A strong voir dire process enables lawyers to eliminate jurors who are likely to research litigation online.²⁸⁶ Attorneys may ask potential jurors specific questions about Internet usage, and attorneys are encouraged to use the Internet to research jurors’ social media presences prior to trial.²⁸⁷

Further, judges can issue jury instructions limiting or prohibiting a jury member’s social media use throughout a trial.²⁸⁸ Lastly, in extremely notorious cases with high publicity, judges can sequester juries or transfer the cases to other venues to ensure that defendants receive fair trials.²⁸⁹ These procedural protections further ensure that a lawyer’s statements will not prejudice a jury.

B. A Lawyer’s Bad Speech May Not Be Sanctioned

One might also argue that these factors protect inflammatory attorney speech.²⁹⁰ Even if a lawyer’s online statements are only accessible to his followers and not likely to prejudice a jury, the statements may still prejudice the state’s interests in protecting the integrity of the court system. Although this is surely a legitimate

285. 962 N.E.2d 1240, 1245 (Ind. 2012).

286. Amanda McGee, *Juror Misconduct in the Twenty-First Century: The Prevalence of the Internet and Its Effect on American Courtrooms*, 30 LOY. L.A. ENT. L. REV. 301, 317-18 (2009).

287. See ABA Comm’n on Ethics & Prof’l Responsibility, Formal Op. 466, 3, 9 (2014); McGee, *supra* note 286, at 317-18.

288. Amy J. St. Eve et al., *More from the #Jury Box: The Latest on Juries and Social Media*, 14 DUKE L. & TECH. REV. 64, 66 (2014) (“[J]ury instructions are the most effective tool to mitigate the risk of juror misconduct through social media.”).

289. Andrew W. Lester, *Media Mania: A Practical and Ethical Approach for Attorney Contacts with Reporters* 12 SPENCER FANE LLP (2017), <https://www.spencerfane.com/wp-content/uploads/2017/06/Media-Mania-A-Practical-and-Ethical-Approach-for-Attorney-Contacts-with-Reporters.pdf> [<https://perma.cc/Z4KJ-CTEP>].

290. See *United States v. Bowen*, 969 F. Supp. 2d 546, 621, 626 (E.D. La. 2013) (stating that the misconduct is so “egregious” that a court should not consider prejudice).

interest, this interest is not the main interest protected by Rule 3.6.²⁹¹

Other Model Rules of Professional Conduct account for a lawyer's indiscretions. For example, Model Rule 8 describes a lawyer's ethical obligation to preserve the integrity of the judiciary.²⁹² Furthermore, jurisdiction rules and firm policies may sanction an attorney for statements made on social media.²⁹³ Although Rule 3.6 might not prevent all inflammatory or inappropriate online statements from reaching community members, other rules effectively proscribe such conduct.

C. The Rule May Limit a Judge's Discretion

The last main counterargument related to the implementation of a new technology-focused comment to Rule 3.6 is that implementing this comment will limit a court's discretion in determining whether an attorney's statement is likely to prejudice a jury. However, as can be seen from the rule itself, the ABA has created and added comments to the rule in the past to incorporate important factors a court should consider in its determination.²⁹⁴

Courts have always considered multiple factors in weighing attorney and state interests, using the totality of the evidence to make their final determinations.²⁹⁵ Because courts already consider different factors and weigh them against one another in making a decision, the implementation of a few more factors will not likely increase a court's administrative burden.²⁹⁶ In an already fact-specific, evidentiary inquiry, the consideration of additional factors will help, not harm, the court's ability to effectively assess an attorney's statements made in an online setting.

291. See *supra* Part I.A.1.

292. See MODEL RULES OF PROF'L CONDUCT r. 8.4 (AM. BAR ASS'N 2019); Preston, *supra* note 12, at 961-74.

293. See, e.g., Preston, *supra* note 12, at 966-67 (describing Reed Smith's social media policy after an attorney posted offensive, inappropriate commentary online).

294. See MODEL RULES OF PROF'L CONDUCT r. 3.6 cmts. 1-7 (AM. BAR ASS'N 2019).

295. See *Sheppard v. Maxwell*, 384 U.S. 333, 352-53 (1966).

296. See *supra* Parts I.C-D (discussing cases that perform the multifactor prejudice analysis).

CONCLUSION

The ABA has provided only limited guidance on how attorneys can fulfill their ethical obligations when using the Internet.²⁹⁷ Although the Ethics Committee has met to address technological changes, the Committee has done little to resolve attorneys' impending concerns.²⁹⁸ Without proper guidance, attorneys must continue "to bridge the gap between the existing rules of professional conduct and the ethical use of social media in the legal profession."²⁹⁹ The rising number of reported ethical violations relating to social media use suggests that something more must be done to protect both attorney and state interests.³⁰⁰

Rule 3.6 enables courts to effectively balance state and attorney interests. However, the rule, in its current state, does not protect a lawyer's statements in an online setting. Rather, the rule leaves open the potential for a lawyer to be sanctioned—merely because the statement is posted in an online forum—even if the statement is not substantially likely to prejudice a judicial proceeding.

Attorneys need clearer guidance than the generalized cautionary message provided in Comment 8 of Rule 1.1³⁰¹ to advocate for clients while still fulfilling their ethical obligations. By considering new technology-specific factors, such as an attorney's online privacy settings and number of followers, the functions the attorney uses on a specific medium to make a statement more searchable, and the ability of a potential juror to be inundated with statements from nonfollowers, the court can better determine whether a statement is truly substantially likely to negatively impact a proceeding.

By using these new factors, courts can better tailor their decisions to promote the expression of ideas relevant to the public while still limiting the most salacious speech to protect the state's interest in a fair trial. With the additional guidance, courts can implement

297. Boothe-Perry, *supra* note 49, at 145.

298. Preston, *supra* note 12, at 881-82.

299. Weltge & McKenzie-Harris, *supra* note 247, at 4.

300. See Awsumb & Roby, *supra* note 139, at 33.

301. See MODEL RULES OF PROF'L CONDUCT r. 1.1 cmt. 8 (AM. BAR ASS'N 2019) ("[A] lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology."); Preston, *supra* note 12, at 886, 905.

more uniform decisions that appropriately balance attorney and state interests in an online setting.

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