

DURHAM COUNTY
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STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE
COUNTY OF DURHAM SUPERIOR COURT DIVISION
7 CVS 6365

SEAN HAUGH, ET AL

Plaintiffs,

v.

COUNTY OF DURHAM, ET AL,

Defendants.

BRIEF OF *AMICUS CURIAE*

THE INTEREST OF THE *AMICUS* IN THIS CASE

The American Civil Liberties Union of North Carolina (“ACLU-NC”) is a statewide, nonprofit, nonpartisan organization with approximately 7,000 members. Since its inception, the purpose of the ACLU-NC and its Legal Foundation has been to defend the constitutional rights of all people through educational programs, public statements, opinion letters to public officials, and litigation. The rights guaranteed to individuals that are found in the First Amendment to the United States Constitution are fundamental rights that protect all Americans, even attorneys, from abuse of governmental power. Because these rights are indispensable to a free society, the ACLU-NC and its Legal Foundation have undertaken to defend and protect the rights of all citizens from violations of their right to freedom of speech. The ACLU-NC is particularly interested in the case at bar because of the potential impact the Court’s decision could have on the First Amendment rights of all attorneys to speak to the press about pending North Carolina lawsuits, as well as the right of the press to interview attorneys about lawsuits pending in North Carolina courts.



STATEMENT OF FACTS

On December 21, 2007, the North Carolina Institute for Constitutional Law (“NCICL”), on behalf of Plaintiffs Sean Haugh and J. Russell Capps, filed the present lawsuit against Durham County, its County Manager, its Board of Commissioners, and Nitronex Corporation, challenging “the constitutionality of certain grants awarded to Nitronex Corporation . . . in connection to its relocation from Wake County . . . to Durham County” Complaint and Petition for Declaratory Judgment at ¶ 1. On the day following the filing of this action, the *Durham Herald-Sun* reported a statement made by counsel for Plaintiffs regarding this case. Specifically, the *Herald-Sun* reported that counsel for Plaintiffs stated the following:

Here we have a case where the government is giving money to a company for doing something it committed to doing five years before it got a subsidy. With this handout, Durham is giving away \$100,000 and getting nothing in return. The public deserves better

The statement set forth above (the “Statement”) was quoted from a press release issued by NCICL on December 21, 2007, the same day the lawsuit was filed.

On February 5, 2008, counsel for Defendants, Durham County Attorney Charles Kitchen, filed a “Motion to Disqualify,” citing only the Statement and arguing that the Statement violates Rule 3.6 of the North Carolina Rules of Professional Conduct. Defense counsel further argued that the purported violation of Rule 3.6 necessitates disqualification of Plaintiffs’ counsel from this case. Defense counsel failed to cite to any authority for the argument that the Statement violates Rule 3.6. Further, even assuming that such a statement did violate Rule 3.6, which it does not, defense counsel failed to cite any authority for the proposition that wholesale disqualification from a case would be the proper sanction. Consequently, *Amicus* respectfully requests that this Court deny Defendants’ Motion to Disqualify.

ARGUMENT

I Application of Rule 3.6's Safe Harbor Provisions to Plaintiffs' Counsel's Statement

Initially, it is important to emphasize that Plaintiffs' counsel's Statement does not violate the plain language of Rule 3.6 of the North Carolina Rules of Professional Conduct, which provides:

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the manner.

Rule 3.6 provides certain "safe harbors" for attorneys, stating that the general rule set forth above does not apply to statements about, *inter alia*, (1) "the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;" and (2) "the information contained in the public record." See N.C. Rule of Prof. Conduct Rule 3.6(b)(1) & (2), respectively.

The Motion to Disqualify quotes only the one statement made by Plaintiff's counsel to a reporter with the *Durham Herald-Sun* newspaper. A cursory review of the complaint filed in this case will show that the Statement (1) explains the claim involved; and (2) mirrors allegations set forth in the complaint, which are now a part of the public record. Consequently, the Statement lies squarely within two different exceptions to the general rule set forth in Rule 3.6. Rule 3.6(b)(1) & (2) See *e.g.*, Complaint at ¶¶ 13, 17, 30, 31, and 33, 41, 43, 45, 47. Counsel for Durham County failed to explain why these exceptions do not apply to the Statement. Further, a decision by the Court to discipline Plaintiff's counsel for the Statement in spite of the safe harbor provisions set forth above would "raise[] concerns of vagueness and selective enforcement." See

Gentile v State Bar of Nevada, 501 U.S. 1030, 1034, 1048 (1991) (reversing disciplinary ruling against petitioner whose statement provided “the general nature of the . . . defense”).

II. The Statement is Protected Under the First Amendment

Even ignoring the application of Rule 3.6’s safe harbor provisions to the Statement, a finding that the Statement violates Rule 3.6 would implicate Plaintiffs’ counsel’s First Amendment rights, as well as the First Amendment rights of the public and the press. See *Gentile*, 501 U.S. at 1035-36. “At the very least, our cases recognize that disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment, and that First Amendment protection survives even when the attorney violates a disciplinary rule he swore to obey when admitted to the practice of law.” *Id.* at 1054 (Kennedy, J.).

In *Gentile*, the Supreme Court interpreted Nevada’s “extrajudicial statement” rule in the context of First Amendment analysis, focusing on the Nevada Supreme Court’s interpretation of the phrase “substantial likelihood of materially prejudicing an adjudicative proceeding.” *Id.* at 1034, 1076. Justice Kennedy explained that, “[p]roperly applied, the test requires a court to make its own inquiry into the imminence and magnitude of the danger said to flow from the particular utterance and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression.” *Id.* at 1036.

The Court in *Gentile* noted that the requirement of “substantial likelihood of material prejudice” is not constitutionally problematic in and of itself. *Gentile*, 501 U.S. at 1036, 1076, 1082. However, the requirement must be “[i]nterpreted in a proper and narrow manner.” *Id.* at 1036. As an example, the Court explained that the Rule could be applied “to prevent an attorney of record from releasing information of grave prejudice on the eve of jury selection.” *Id.* The Court explained that, while the phrase might not require “clear and present danger,” “the phrase

substantial likelihood of material prejudice might punish only speech that creates a danger of imminent and substantial harm.” *Id.* at 1036 (emphasis supplied).

In the instant case, counsel for the Defendants has failed to “explain[] any sense in which [the Statement] had a substantial likelihood of causing material prejudice.” *Gentile*, 501 U.S. at 1038. Rather, the Motion summarily concludes that the statement would have a substantial likelihood of materially prejudicing an adjudicative proceeding. Motion to Disqualify at 1. This complete lack of factual support is not “consistent with First Amendment standards.” *Gentile*, 501 U.S. at 1038.

In determining whether a statement has a substantial likelihood of causing material prejudice, various factors should be considered. For example, as noted in *Gentile*, the “timing of a statement [is] crucial in the assessment of possible prejudice” *Gentile*, 501 U.S. at 1039 (noting that “the Nevada court’s conclusion that petitioner’s abbreviated, general comments six months before trial created a ‘substantial likelihood of materially prejudicing’ the proceeding is, to say the least, most unconvincing”); see also *Patton v Yount*, 467 U.S. 1025, 1035 (1984) (rejecting assertion of prejudice from pretrial publicity that occurred four years prior to jury trial). Here, the Statement was likely made well before any potential trial in this case.

Further, the distinctions between criminal and civil trials and between jury trials and non-jury trials are crucial. See N.C. Rule of Professional Conduct 3.6, Comment 6 (“Criminal jury trials will be the most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected.”). Indeed, Justice Rehnquist even noted in his dissenting opinion in *Gentile* that the requirement of a substantial likelihood of material prejudice “will rarely be met where the judge is the trier of fact, since trial judges often have access to inadmissible and highly prejudicial information and are presumed to

be able to discount or disregard it.” *Gentile*, 501 U.S. at 1077 (Rehnquist, J., dissenting). See also *Craig v Harney*, 331 U.S. 367, 376 (1947) (stating that trial judges need not be protected from pre-trial publicity because they are people of “fortitude, able to survive in a hardy climate”); *Hirschtop v Sneed*, 594 F.2d 356, 371 (4th Cir. 1979) (noting that a judge in a bench trial is presumed to disregard evidence that she has ruled inadmissible, and it is therefore illogical to conclude that the same judge is unable to disregard a lawyer’s statements to the press). Certainly, defense counsel is not suggesting that this Court cannot disregard any potential inadmissible information that it learned through one statement made to the press¹ that mirrored allegations already set forth in the complaint.

Additionally, as in *Gentile*, the Statement in this case constitutes “pure speech in the political forum” – Plaintiffs’ counsel’s “words were directed at public officials and their conduct in office.” *Gentile*, 501 U.S. at 1034. “There is no question that speech critical of the exercise of the State’s power lies at the very center of the First Amendment.” *Id.* Like the Bar in Nevada, counsel for Defendants in the instant case “seeks to punish the dissemination of information relating to alleged government misconduct, . . . ‘speech which has traditionally been recognized as lying at the core of the First Amendment.’” *Id.* at 1034-35 (quoting *Butterworth v Smith*, 494 U.S. 624 (1990)).

Finally, to the extent that defense counsel in the instant case argues that “attorney contact with the press somehow is inimical to the attorney’s proper role,” such an assertion was rejected in *Gentile*. See *Gentile*, 501 U.S. at 1056 (noting that the extrajudicial statement rule “permits all comment to the press absent ‘a substantial likelihood of materially prejudicing an adjudicative proceeding’”). As in *Gentile*, defense counsel in the instant case “does not articulate the

¹ This assumes that this Court read the *Herald-Sun* article in the first place and did not learn of this statement for the first time in Defendants’ Motion to Disqualify.