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**M E M O R A N D U M**

November 22, 2019

TO: DJ Pascoe  
Division Chief Opinions Division

FROM: Frank J. Monticello  
Special Assistant Attorney General for Ethics

RE: Ethics Opinion Concerning the Release of Investigation Reports

**Question Presented**

You have asked my opinion on whether releasing, to the public, Department of Attorney General investigative reports, consisting of numerous interviews by department investigators, could be considered a violation of the Michigan Rules of Professional Conduct (MRPC), if charges are subsequently filed.

**Background**

The investigative reports were generated after Attorney General Nessel ordered a formal review of a series of events involving department staff. Concerns had been raised that certain staff engaged in unethical conduct and possibly criminal wrongdoing. The Michigan State Police is currently engaged in at least one criminal investigation of a former Assistant Attorney General related to these events.

Approximately 26 interviews were conducted by department investigators. The reports consist of statements from potential witnesses including individuals whose statements would likely be prejudicial to their defense if charged with a crime. Because the Michigan State Police investigation remains active and another prosecutorial agency will be making all charging decisions, it is unclear if criminal charges related to these events will be filed. To properly assess the Department's ethical obligations however, it is presumed criminal charges will be forthcoming.

## Michigan Rules of Professional Conduct

Michigan's Rules of Professional Conduct (MRPC), like most other states, were largely drawn from the American Bar Association's "Model Rules of Professional Conduct." MRPC 1.0. Michigan's Rule 3.6, Trial Publicity, expanded on the model rule and provides in relevant part:

(a) A lawyer who is participating or has participated in the investigation...of a matter shall not make an extrajudicial statement that the lawyer knows...will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter. A statement is likely to have a substantial likelihood of materially prejudicing an adjudicative proceeding when it refers to...a criminal matter...and the statement relates to:

(1) ...the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case...that could result in incarceration, ...the existence or contents of any confession, admission, or statement given by a defendant or suspect...

\* \* \*

(c) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

"[T]he rule applies only to lawyers who are, or who have been, involved in the investigation or litigation of a case, and their associates." See Comment to Rule 36.

Rule 3.6 is designed to encourage lawyers to be responsible regarding extrajudicial statements. The following comment can be found under Oklahoma's Rule 3.6, similar to Michigan's Rule 3.6(a):

[R]egardless of the likelihood of public dissemination of a statement, regardless of the timing of the statement, regardless of the vulnerability of a proceeding to prejudice as a result of the dissemination of a particular statement, and regardless of whether a lawyer is involved in a proceeding or associated with a lawyer who is involved in it, a lawyer should aspire to refrain from making statements that pose a substantial likelihood of prejudicing the

fairness of a proceeding or unjustifiably casting doubt on the fairness of the proceeding or the legal system in general. A lawyer should be especially mindful of the likelihood of such effects when the lawyer's statement is reasonably likely to be disseminated by means of public communication.

Comment, ¶ 6, Okla. R. Prof. Cond. 3.6.

Prosecutors are specifically cautioned about extrajudicial statements. Rule 3.8 of the Model Rules of Professional Conduct, *Special Responsibilities of a Prosecutor*, provides in relevant part:

The prosecutor in a criminal case shall:

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**(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused** and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule. (emphasis added).

Michigan's Rule 3.8 is slightly different from the Model Rule but also provides that a prosecutor in a criminal case shall:

(e) exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.

The comments to Michigan's Rule 3.8 provide that paragraph (e), "imposes upon a prosecutor an obligation to make reasonable efforts and to take reasonable care to assure that a defendant's rights are protected."

Further, "[i]t is professional misconduct for a lawyer to: . . . (c) engage in conduct that is prejudicial to the administration of justice." See MRPC 8.4. [See also Michigan Court Rule, MCR 9.104, *Grounds for Discipline in General*, "The

following acts or omissions . . . are misconduct and grounds for discipline, whether or not occurring in the course of an attorney-client relationship: (1) conduct prejudicial to the proper administration of justice;”]

## Discussion

The United State Supreme Court, in the often cited case of *Gentile v State Bar of Nevada*<sup>1</sup>, discussed the validity of Nevada’s State Bar regulation restricting free speech rights of lawyers. The State Bar of Nevada had cited *Gentile* for violation of Nevada’s Supreme Court rule that prohibited a lawyer from making an “extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a ‘substantial likelihood of materially prejudicing an adjudicative proceeding.’”<sup>2</sup> Although the Court found Nevada’s rule void for vagueness, it held that states are permitted to restrict attorney speech that has a substantial likelihood of prejudicing pending legal proceedings. Quoting from *Sheppard v Maxwell*<sup>3</sup>, the *Gentile* decision outlined the court’s concern:

“The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutor, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. *Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation but is highly censurable and worthy of disciplinary measures.*”  
(emphasis added in *Gentile*<sup>4</sup>).

In *Attorney Grievance Commission of Maryland v Gansler*<sup>5</sup>, the Maryland Court of Appeals reviewed whether the State’s Attorney for Montgomery County, Douglas Gansler, had violated Maryland’s rule 3.6, a rule very similar to MRPC 3.6. Gansler had made extrajudicial statements concerning different criminal matters. While discussing the parameters of rule 3.6 the Court stated:

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<sup>1</sup> *Gentile v State Bar of Nevada*, 501 US 1030, 111 S Ct 2720, 115 L Ed 2d 888 (1991).

<sup>2</sup> *Gentile*, 501 US at 1033.

<sup>3</sup> *Sheppard v Maxwell*, 384 US 333 at 363 (1966).

<sup>4</sup> *Gentile*, 501 US at 1072.

<sup>5</sup> *Attorney Grievance Comm of Maryland v Gansler*, 377 Md 656, 674; 2003 Md LEXIS 744 (2003).

Criminal justice must be carried out in the courtroom. As Justice Holmes declared in *Patterson v Colorado*, (citations omitted) ‘the theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.’ The constitutional underpinnings for this concept reside in the Sixth Amendment’s right to a fair trial made applicable to our State through the Fourteenth Amendment.<sup>6</sup>

Gansler’s statements to the media related to the anticipated prosecution of murder suspect Cook, including Cook’s confession and that Cook knew details of the murder that only the killer would have known. In the Lucas matter, prosecutor Gansler offered several remarks about the evidence against Lucas, which he described as “a confession from the perpetrator as well as scientific and forensic evidence to corroborate that confession.” Gansler also expressed his opinion that they had found the person who had committed the crime.<sup>7</sup>

After citing to *Rideau v Louisiana*,<sup>8</sup> a United States Supreme Court decision that found a local television station’s broadcast of defendant’s confession violated the fundamental due process rights of the accused, the *Gansler* opinion went onto state:

One outside circumstance that may affect a defendant’s right to a fair trial and, specifically, his right to an impartial jury, occurs when an attorney makes a publicized, out-of-court statement about the defendant’s case. This is particularly true because attorneys occupy a special role as participants in the criminal justice system, and as a result the public may view their speech as authoritative and reliable. ...*Comments by prosecuting attorneys, in particular, have the inherent authority of the government and are more likely to influence the public. When such seemingly credible information reaches the ears or eyes of the public, the jury pool may become contaminated, greatly diminishing the court’s ability to assemble an impartial jury.*<sup>9</sup> (emphasis added).

Although Gansler successfully defended some of his extrajudicial comments relating to Cook and Lucas by arguing the information was already in the public record, the court granted him a pass only because the rule’s definition of public record had not been previously defined. The court held, however, that such a broad interpretation

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<sup>6</sup> *Gansler*, 377 Md at 674.

<sup>7</sup> *Gansler*, 377 Md at 667-669.

<sup>8</sup> *Rideau v Louisiana*, 373 US 723, 83 S Ct 1417, 10 L Ed2d 663 (1963).

<sup>9</sup> *Gansler*, 377 Md at 67.

of public record would not be tolerated in the future. In addition, the court reiterated the unique role that prosecutor's play in our system of justice, stating:

**Prosecutors are held to even higher standards of conduct than other attorneys due to their unique role as both advocate and minister of justice... When the prosecutor speaks publicly about a pending case, he cannot separate his representational role from his speech, and he thereby involves the state in the extrajudicial comment.<sup>10</sup> (emphasis added)**

## Conclusion

All lawyers, especially prosecuting attorneys, are required to ensure the proper administration of justice. A criminal defendant's sixth amendment right to a fair trial, including the right to an impartial jury, are hallmarks of American jurisprudence. For this reason, public statements made outside the courtroom by lawyers involved in the matter must be carefully scrutinized to ensure compliance with the rules of professional conduct.

Michigan, Rule 3.6 first looks at how the lawyer making the extrajudicial statement is involved; *a lawyer who is participating or has participated in the investigation... of a matter*. Here, the reports at issue relate to the Department of Attorney General's investigation of department staff concerning matters that may result in criminal proceedings.

The rule prohibits extrajudicial statements that will have a *substantial likelihood of materially prejudicing an adjudicative proceeding in the matter*. Currently, one criminal investigation is underway, and information provided by witnesses suggest additional criminal investigations are possible. As noted by the rule, a statement is likely to have a substantial likelihood of materially prejudicing an adjudicative proceeding when it *identifies a witness* or provides *expected testimony of a party or witness*. Further, if the statement relates to *the existence or contents of any confession, admission, or statement given by the defendant or suspect* it will be considered as having a substantial likelihood of materially prejudicing an adjudicative proceeding. Without question, the investigative reports at issue are replete with information that meets the threshold of having a *substantial likelihood of prejudicing an adjudicative proceeding in the matter*.

Although Rule 3.6 refers to material prejudice to an *adjudicative proceeding*, it does not explain whether the adjudicative proceeding must be pending at the time the

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<sup>10</sup> *Gansler* 377 Md at 697-698.

extrajudicial statements are publicized. There is no known case law or comment for MRPC 3.6 that provides guidance here. Although the time between a statement's publication and the subsequent adjudicative proceeding may diminish its prejudicial impact, it is unlikely the rule intends to disregard extrajudicial statements made prior to charges being filed.

MRPC 3.8 also admonishes prosecutors to take reasonable precautions to avoid the publication of extrajudicial statements by investigators, law enforcement, and employees of the prosecutor. Further, MRPC 8.4 and Michigan Court Rule 9.104(1) admonish attorneys to avoid any conduct that is prejudicial to the administration of justice.

For the reasons outlined above, a public release of the Department of Attorney General investigative reports, consisting of numerous interviews by department investigators, could be considered a violation of the Michigan Rules of Professional Conduct and possibly conduct prejudicial to the administration of justice, should criminal charges arise from this matter.<sup>11</sup>

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<sup>11</sup> The investigative reports did not involve any of the safe harbor provisions of MRPC 3.6 and thus MRPC 3.6(b) was not addressed in this opinion.