TRIAL PUBLICITY

WHEN DO YOU CROSS THE LINE?

Presented by:

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[E]ven where the utterance is false, the great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse consequences to any except the knowing or reckless falsehood. Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth. *Garrison v, Louisiana*, 379 U.S. 64, 73 (1964) (Conviction reversed for famed Louisiana DA who held a press conference criticizing the judges.)

I. INTRODUCTION

The adversary system assumes that cases will be tried on their merits and not be influenced by outside information. However, persons' First Amendment rights can, at times, collide with this notion. Thus, protecting the adjudicative process must be accomplished within the constitutional framework. Criminal trials raise additional concerns since tension exists between First Amendment rights to free speech and petition and a defendant's right to a fair trial as embodied in the Sixth Amendment.

The risk of making comments to the press in cases where you represent a litigant is receiving a letter from the disciplinary authorities asking you to explain why you did not violate the trial publicity rules by the comments you made. The Colorado Rules of Professional Conduct, Rules 3.6 and 3.8(f) proscribe the general categories of out-of court statements lawyers can make. The general principle is that a lawyer representing one of the parties can only be disciplined for making extra-judicial statements if there is a substantial likelihood of material prejudice to adjudicate proceeding. These Rules have been amended over the years to address constitutional issues raised by lawyers who were prosecuted for making alleged improper statements.

II. RULES OF PROFESSIONAL CONDUCT

A. RULE 3.6 TRIAL PUBLICITY[1]

(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 matter.

(b) Notwithstanding paragraph (a) and Rule 3.8(f), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

[1] Rules 3.6 and 3.8 were amended in 2011.

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a) and Rule 3.8(f), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

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

B. RULE 3.8 – SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information;

(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 unless such comments are permitted under Rule 3.6(b) or 3.6(c), 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.

(g) When a prosecutor knows of new, credible and material evidence creating a reasonable profitability that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall within a reasonable time:

(1) disclose that evidence to an appropriate court or prosecutorial authority, and

(2) if the judgment of conviction was entered by a court in which the prosecutor exercises prosecutorial authority

(A) disclose the evidence to the defendant, and

(B) if the defendant is not represented, move the court in which the defendant was convicted to appoint counsel to assist the defense concerning the evidence.

(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant was convicted in a court in which the prosecutor exercises prosecutorial authority, of an offense that the defendant did not commit, the prosecutor shall take steps in the appropriate court, consistent with applicable law, to set aside the conviction.

III. CASE LAW

The Supreme Court in *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), recognized that any state disciplinary rule had to balance a lawyer's constitutional right of free speech and protection of the adjudicative process. The Court held that state disciplinary authorities can prosecute lawyers for improper trial publicity if the comments have a "substantial likelihood" of materially prejudicing the adjudicative proceeding. *Id* at 1075. After *Gentile*, the ABA rewrote Rule 3.6 to comply with the Court's ruling. For state disciplinary prosecutors, the standard articulated in Rule 3.6 can be difficult to meet. Oftentimes, disciplinary complaints will be dismissed at the initial stages of the investigation because the civil or criminal case is still pending. Even when the case is concluded, many disciplinary agencies may find it difficult to prove the comments had a substantial likelihood of materially prejudicing the trial.

The Nifong case (prosecutor in the Duke LaCrosse case) is an exception but no appellate court reviewed the North Carolina disbarment order. Some of Mr. Nifong's public comments which lead to his disbarment, were his characterization of the rape as "totally abhorrent" and "reprehensible," his analogizing the case to a "cross burning," his expression of personal confidence and satisfaction that a rape had in fact occurred, and his criticism of the targets for "refusing to speak to investigators" upon "advice [of] counsel. As the Chairman of the disciplinary panel noted:

> As I think anyone who has sat through this entire proceeding – we've been here now on the fifth day – that you can't do justice in the media, you can't do justice on sound bites. The way to arrive at a determination of the facts is to hear in a fair and open proceeding, all of the evidence and then for the trier of fact to determine what the facts are. And we've done that this week.
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> That did not happen and was not going to happen apparently in the Duke Lacrosse case. The justice system righted itself somehow so that at the end of the day there was indeed a declaration of innocence of these three young men. But it was done with backup systems in a way that was never designed to work as the justice system should work. **Perhaps that was set in motion by the state bar's initial complaint, filed on December 28, 2006, that shortly thereafter led to the recusal of Mr. Nifong from the Duke Lacrosse cases. That was a controversial decision, I believe. Certainly unprecedented that the state bar would take disciplinary action against a prosecutor during the pendency of the case when indeed the presiding judge had concurrent and coextensive disciplinary jurisdiction. That was the step — although we were not privy to the decision to do that — I am sure that was a matter of serious debate as to whether to do that because that in itself took the justice system off track.** (Emphasis added).

Comments of F. Lane Williamson, chairman of the North Carolina disciplinary panel that voted unanimously to disbar Michael Nifong, as recorded by The New York Times and published on June 17, 2007.

Some scholars have suggested that discipline for some of Mr. Nifong's public statements would not withstand constitutional scrutiny. *See, e.g.,* R. Michael Cassidy, *The Prosecutor and the Press: Lessons (Not) Learned from the Mike Nifong Debacle,* Boston College Law School Faculty Papers (2008) (suggesting that discipline for violating Rule 3.8(f) would not survive First Amendment scrutiny).

A factor in determining whether a statement made has a substantial likelihood of materially prejudicing a proceeding is the timing of when the statement was made. For example, in *Iowa Supreme Court BD of Prof'l. Ethics & Conduct v. Visser* 629 N.W.2d 376 (Iowa, 2001),the Court determined that a single newspaper article generated by a lawyer's letter published almost two years earlier and in a city more than 50 miles from where the trial would take place, was not reasonably likely to have affected the proceedings. *See also Guerrini v. Statewide Grievance Comm.* No. CV000503192, 2001 WL 417337 (Conm. Super. Ct. Apr. 3, 2001).

The Annotated Model Rules, the Restatement (Third) of the Law Governing Lawyers and other Commentary indicate that the statements prohibited by subsection (a) of Model Rule 3.6 are those made by an advocate in the litigation that is likely to reach a lay fact-finder or lay witness through the media. Accordingly, Rule 3.6(a) does not apply to lawyers who are involved in the matter tangentially.

The purpose of Model Rule 3.6 is to avoid a substantial likelihood of contaminating a jury. Restatement (Third) of the Law Governing Lawyers, §109 (2000). The Restatement explains that if the same information is available to the media from other sources, the lawyer's out-of-court statement alone ordinarily would not cause a substantial likelihood of material prejudice in the lawsuit. *Id* §109, Comment c.

One of the issues raised by Rule 3.6(b)(2) and Rule 3.8(f) is the public records exception. Counsel can comment on documents that appear in the public records, regardless of what impact that may have on the case. This ability to comment on public records "could become a license for the prosecutor to read from a detailed indictment at a news conference." *See, e:g.,* 2 G. Hazard & W. Hodes, *The Law of Lawyering,* § 32.6 (3d. ed.) Likewise, "defense counsel may file pleadings and other papers with the court that tells the story from the defendant's perspective." A. Bernabe-Riefkohl, *Symposium, Silence is Golden: The New Illinois Rules on Attorney Extrajudicial Speech,* 33 Loy. U. Chi. L.J. 323, 373 (Winter 2002) (footnotes and internal citations omitted).

The Colorado Supreme Court Standing Committee on the Rules of Professional Conduct analyzed this issue and concluded that any potential changes to the public exception provision in Rules 3.6 and 3.8 would most likely not withstand constitutional muster and therefore recommended the exception remain.

IV. ETHICAL IMPLICATIONS OF LEGAL COMMENTARY

Rule 3.6 only applies to lawyers involved in the trial matter. It does not apply to individuals who act as legal commentators.

> Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the Rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates. Comment 3 to Colo. RPC 3.6.

In 1998, the American College of Trial Lawyers suggested guidelines for legal commentators. For example, one of the guidelines provides that commentators should refrain from providing opinions or evaluations concerning rulings or testimony or public participation. Likewise in 1998, National Association of Criminal Defense Lawyers issued guidelines for legal commentators. The purpose behind both sets of guidelines is to ensure that the commentator does not have a conflict and be neutral. Whether some other rule of professional conduct could be applicable to a lawyer's conduct who is acting a commentator will depend on the circumstances.