

TALKING WITH THE MEDIA

CLIENT RELATIONS IN A HIGH PROFILE CASE

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I. ARIZONA RULES OF PROFESSIONAL CONDUCT

Rule 42, Rules of the Arizona Supreme Court:

ER 3.6 TRIAL PUBLICITY

(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), 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;

(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), 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).

Amended June 9, 2003, effective Dec. 1, 2003.

COMMENT [2003 AMENDMENT]

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and

measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. ER 3.4(c) requires compliance with such rules.

[3] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. 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.

[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and that should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

[5] There are, on the other hand, certain subjects which are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial

statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

[8] See ER 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

II. ABA MODEL RULES OF PROFESSIONAL CONDUCT

Rule 42, Rules of the Arizona Supreme Court, ER 3.6 now tracks verbatim ABA Model Rule 3.6.

III. RULES OF PRACTICE FOR THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

The local Arizona federal District Court rules address the matter separately in civil and criminal cases.

LRCiv 83.8 provides:

(a) Prohibition of Extrajudicial Statements.

A lawyer or law firm associated with a civil action shall not during its investigation or litigation make or participate in making an extrajudicial statement, other than a quotation from or reference to public records, which a reasonable person would expect to be disseminated by means of public communication, if there is a reasonable likelihood that such dissemination will interfere with a fair trial and which relates to:

- (1) evidence regarding the occurrence or transaction involved;
- (2) the character, credibility, or criminal record of a party, witness or prospective witness;

- (3) the performance or results of any examination or tests or the refusal or failure of a party to submit to such;
- (4) his or her opinion as to the merits of the claims or defenses of a party except as required by law or administrative rules; or
- (5) any other matter reasonably likely to interfere with a fair trial of the action.

(b) Reference to Rule 57.2(f), Local Rules of Criminal Procedure.

In a widely publicized or sensational case, the Court on motion of either party or on its own motion, may issue a special order similar to that provided for by Rule 57.2(f), Local Rules of Criminal Procedure.

LRCrim 57.2 is entitled "Free Press -- Fair Trial Directives," and provides:

These guidelines are proposed as means of balancing the public's right to be informed with the accused's right to a fair trial before an impartial jury. While it is the right of a free press to report what occurs in a public proceeding, it is also the responsibility of the bench to take appropriate measures to ensure that the deliberations of the jury are based upon what is presented to it in Court. It is the duty of the lawyer or law firm not to release or authorize the release of information or opinion which a reasonable person would expect to be disseminated by any means of public communication in connection with a pending or imminent criminal litigation with which a lawyer or law firm is associated, [if] there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice.

(a) Prior to Arrest.

With respect to a Grand Jury (consistent with the provisions of Rule 6, Federal Rules of Criminal Procedure) or other pending investigation of any criminal matter, a lawyer participating in or associated with the investigation shall refrain from making any extrajudicial statement which a reasonable person would expect to be disseminated by any means of public communication that goes beyond the public record or that is not necessary to inform the public that the investigation is under way, to describe the general scope of the investigation, to obtain assistance in the apprehension of a suspect, to warn the public of any dangers, or otherwise to aid in the investigation.

(b) From Time of Arrest.

From the time of arrest, issuance of an arrest warrant, or the filing of a complaint, information, or indictment in any criminal matter until the commencement of trial or disposition without trial, a lawyer or law firm associated with the prosecution or defense shall not release or authorize the release of any extrajudicial statement which a reasonable person would expect to be disseminated by any means of public communication relating to that matter and concerning:

- (1) The prior criminal record (including arrests, indictments, or other charges or crime), or the character or reputation of the accused, except that the lawyer or law firm may in their discretion make a factual statement of the accused's name, age, residence, occupation, and family ties, and, if the accused has not been apprehended, a lawyer associated with the prosecution may release any information necessary to aid in his or her apprehension or to warn the public of any dangers he or she may present;
- (2) The existence or contents of any confession, admission, or statement given by the accused, or the refusal or failure of the accused to make any statement;

- (3) The performance of any examinations or tests, or the accused's refusal or failure to submit to an examination or test;
- (4) The identity, testimony, or credibility of prospective witnesses, except that the lawyer or law firm may announce the identity of the victim, if the announcement is not otherwise prohibited by law;
- (5) The possibility of a plea of guilty to the offense charged or a lesser offense; or
- (6) Any opinion as to the accused's guilt or innocence, or as to the merits of the case or the evidence in the case.

The foregoing shall not be construed to preclude the lawyer or law firm during this period, in the proper discharge of his or its official or professional obligations, from announcing the fact and circumstances of arrest (including time and place of arrest, resistance, pursuit, and use of weapons), the identity of the investigating and arresting officer or agency, and the length of the investigation; from making an announcement at the time of the seizure of any physical evidence other than a confession, admission, or statement, which is limited to a description of the evidence seized; from disclosing the nature, substance, or text of the charge, including a brief description of the offense charged; from quoting or referring without comment to public records of the Court in the case; from announcing the scheduling or result of any stage in the judicial process; from requesting assistance in obtaining evidence; or from announcing without further comment that the accused denies the charges made against him or her.

(c) During the Trial.

During the jury trial of any criminal matter, including the period of selection of the jury, no lawyer or law firm associated with the prosecution or defense shall give or authorize any extrajudicial statement or interview relating to the trial or the parties or issues in the trial which a reasonable person would expect to be disseminated by means of public communication if there is a reasonable likelihood that such dissemination will

interfere with a fair trial, except that the lawyer or law firm may quote or refer without comment to public records of the court in the case.

(d) Other Information.

Nothing in this Rule is intended to preclude the formulation or application of more restrictive rules relating to the release of information about juvenile or other offenders to preclude the holding of hearings or the lawful issuance of reports by legislative, administrative, or investigative bodies or to preclude any lawyer from replying to charges of misconduct that are publicly made against him or her.

(e) Disclosure by Others.

All court personnel, including, among others, marshals, deputy marshals, court clerks, bailiffs, court reporters and employees or subcontractors retained by a court-appointed official reporter, are prohibited from disclosing to any person without authorization by the court, information relating to a pending grand jury or criminal case that is not part of the public records of the court. The divulgence of information concerning arguments and hearings held in chambers or otherwise outside the presence of the public is also forbidden.

(f) Duty of Court in Special Cases.

In a widely publicized or sensational criminal case, the Court on motion of either party or on its own motion, may issue a special order governing such matters as extrajudicial statements by parties and witnesses likely to interfere with the rights of the accused to a fair trial by an impartial jury, the seating and conduct in the courtroom of spectators and news media representatives, the management and sequestration of jurors and witnesses, and any other matters which the Court may deem appropriate for inclusion in such order. Such a special order might be addressed to some or all of the following subjects:

- (1) A proscription of extrajudicial statements by participants in the trial (including lawyers, parties, witnesses, jurors, and court officials) which might divulge prejudicial matters not of public record in the case.
- (2) Specific directives regarding the clearing of entrances to and hallways in the courtroom and respecting the management of the jury and witnesses during the course of the trial, to avoid their mingling with or being in the proximity of reporters, photographers, parties, lawyers, and others, both in entering and leaving the courtroom or courthouse and during recesses in the trial.
- (3) A specific direction that the jurors refrain from reading, listening to, or watching news reports concerning the case, and that they similarly refrain from discussing the case with anyone during the trial and from communicating with others in any manner during their deliberations.
- (4) Sequestration of the jury on motion of either party or by the Court, without disclosure of the identity of the movant.
- (5) Direction that the names and addresses of jurors or prospective jurors not be publicly released except as required by statute, and that no photograph be taken or sketch made of any juror within in the environs of the Court.
- (6) Insulation of witnesses during the trial.
- (7) Specific provisions regarding the seating of spectators and representatives of news media, including:

- (a) an order that no member of the public or news media representative be at any time permitted within the bar railing;
- (b) the allocation of seats to news media representatives in cases where there are an excess of requests, taking into account any pooling arrangement that may have been agreed to among the news reporters.

The Court may also consider making more extensive use of techniques to insure an impartial jury, to include use of change of venue, sequestration of jurors, sequestration of witnesses, individual voir dire of prospective jurors, cautionary instructions to the jury, the sealing of pretrial motion papers and pleadings, and the holding of side bar conferences between the judge and the attorneys during the trial in order to rule upon legal and evidentiary issues without being overheard by the jury.

(g) Closure of Pretrial Proceedings.

Unless otherwise provided by law, all preliminary criminal proceedings, including preliminary examinations and hearings on pretrial motions, shall be held in open court and shall be available for attendance and observation by the public; provided that, upon motion made or agreed to by the defense, the Court, in the exercise of its discretion, may order a pretrial proceeding be closed to the public in whole or in part on the grounds:

- (1) that there is a reasonable likelihood that the dissemination of information disclosed at such proceeding would impair the defendant's right to a fair trial; and
- (2) that reasonable alternatives to closure will not adequately protect defendant's right to a fair trial.

If the Court so orders, it shall state for the record its specific findings concerning the need for closure.

(h) No Direct Restraints on Media.

No rule of court or judicial order should be promulgated by a United States District Court which would prohibit representatives of the news media from broadcasting or publishing any information in their possession relating to a criminal case.

IV. GENTILE v. NEVADA STATE BAR

In *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), the United States Supreme Court held that the "substantial likelihood of material prejudice" standard was a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the state's interest in fair trials. However, a different majority of the divided Court held that the portion of Nevada's rule containing an itemized list of impermissible and permissible extrajudicial statements was unconstitutionally vague. In response, the ABA's Model Rule was amended to delete similar provisions and relegate them to the comment to the rule. Arizona's ER 3.6 was amended similarly in 2003.

V. NINTH CIRCUIT CASE LAW

In *Levine v. United States District Court for the Central District of California*, 764 F.2d 590 (9th Cir. 1985), the Ninth Circuit held that gag orders are a form of prior restraint and can only be justified by the existence of a serious and imminent threat to the administration of justice.

VI. OTHER JURISDICTIONS

The rules and the case law governing trial publicity vary from jurisdiction to jurisdiction. For example, in *Twohig v. Blackmer*, 918 P.2d 332 (N.M. 1996), the New Mexico Supreme Court discussed Rule 16-306 of the Rules of Professional Conduct which provides that a "lawyer shall not make any extrajudicial ... statement in a criminal proceeding that may be tried to a jury that the lawyer knows or reasonably should know ... creates a clear and present danger of prejudicing the proceeding." The Court noted that the rule had its underpinnings in Article 2, § 17 of the New Mexico Constitution which provides that "every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right" This provision is virtually identical to Article 2, § 6 of the Arizona Constitution and Article 1,

§ 9 of the Nevada Constitution, so an argument can be made that these rules are unconstitutional on state grounds because the lesser standard of having a "substantial likelihood of materially prejudicing an adjudicative proceeding" unduly restricts too much speech.

VII. SUGGESTED READING FOR SPOTLIGHT SEEKERS

R. Shapiro, USING THE MEDIA TO YOUR ADVANTAGE, *The Champion*, January-February 1993; E. Semel and C. Sevilla, TALK TO THE MEDIA ABOUT YOUR CLIENT? THINK AGAIN, *The Champion*, November 1997; E. Chemerinsky & L. Levenson, THE ETHICS OF BEING A COMMENTATOR, 69 *So. Cal. L. Rev.* 1303 (1996) and THE ETHICS OF BEING A COMMENTATOR II, 37 *Santa Clara L. Rev.* 913 (1997).