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The Victim's Attorney and the Media: Rules of Professionalism Regarding Extrajudicial Statements

With increased access to the Internet and 24-hour television, opportunities for public discourse on court cases are ever-present. Although there may be benefits to (and sometimes a necessity for[1]) attorneys' public comments on a criminal case, attorneys' use of publicity is subject to restraints. These restraints are grounded in the courts' recognition that extrajudicial statements made by attorneys involved in court proceedings "pose a threat to the fairness of a pending proceeding since lawyers' statements are likely to be received as especially authoritative."[2] Recognizing the risks of extrajudicial statements, many jurisdictions have adopted ethical rules limiting the scope of what an attorney may say about an active criminal case outside the courtroom.[3]

The United States Supreme Court has held that such restrictions are constitutional so long as they are narrowly tailored for the purpose of protecting the rights to an impartial jury and a fair trial.[4] The American Bar Association's Model Rule of Professional Conduct 3.6[5] is an example of an allowable restraint. This Rule provides that:

> 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.[6]

Effective advocacy for crime victims requires understanding the ethics rules, specifically if, how and when they bind victims' attorneys.

1. Trial Publicity Rule's Application to Victims' Attorneys

Under its plain language, Rule 3.6 is applicable to "[a] lawyer who is participating or has participated in the investigation or litigation of a matter."[7] Although the ABA commentary to the rule does not address the definition of "participation," it is likely that the rule governs victims' attorneys even though they may only have a limited involvement in a proceeding.[8] Significantly, all states and the federal government have constitutional or statutory victims' rights that grant victims certain participatory rights in a criminal case. The likelihood of its application is heightened if the attorney has filed a notice of appearance in the case. The Model Rule's revisions in 1994 were intended to bring the Rule into compliance with the Supreme

Court's decision in *Gentile v. State Bar of Nevada*, and the language in *Gentile* is generally applicable to speech by any attorney representing any trial participant.[9]

2. The Limit of Attorney Speech: Material Prejudice

The Supreme Court held in *Gentile* that a state may prohibit an attorney from making a statement that the attorney knows or reasonably should know is "substantially likely to have a materially prejudicial effect"[10] on a proceeding. In determining whether an attorney would reasonably know that a statement[11] has the potential to materially prejudice a criminal proceeding, courts look to a combination of factors, including: (1) the timing of the statement; (2) the extent of media dissemination; and (3) the content of the statement.

First, there is no standard amount of time that must follow a statement or media appearance before a criminal proceeding occurs to minimize or eliminate prejudice. Generally, however, the closer in time a statement is to a proceeding the greater the likelihood of finding prejudice.[12] For example, one court found that an attorney knew or should have known that a nationally televised interview would create a significant impact on the audience within the venire and that the impact of the interview was maximized being "only 97 days before the scheduled trial."[13] Another court found that a nine-month interval between the publicity and proceedings was sufficient to dissipate any prejudice.[14]

Second, the more prevalent the publicity, the more likely there will be a finding of prejudice. Courts are concerned that greater media coverage (professional and social) creates a greater risk that a venire person will see the extrajudicial statement.[15] As one court explained, with intense media interest, even "[a] scrupulous juror who has sought actively to avoid television and news media reports on the case may nevertheless be thwarted by a text alert or an unexpected Tweet."[16] Prevalence of publicity is not limited to the sheer number of outlets or appearances; where the information is disseminated is also important. For instance, a story limited to a small local paper may be more prejudicial than a lot of publicity in a major market outside where the venire pool is located.[17]

Finally, the content of a statement is significant in a prejudice analysis.[18] The commentary to Model Rule 3.6 provides a list of "subjects that are more likely than not to have a material prejudicial effect" if introduced in an extrajudicial statement. These subjects include:

- a defendant's or witness' character, credibility, criminal record or reputation;
- a witness' identity, or the expected testimony of a defendant or witness;
- the possibility of a guilty plea;
- the existence and contents of a defendant's admission, confession or other statement, or a defendant's failure or refusal to make any statement;
- the results of an examination, any person's failure or refusal to submit to an examination, or the nature or identity of evidence expected to be introduced;

- an opinion concerning the guilt or innocence of a defendant;[19]
- information concerning likely inadmissible evidence that would, if disclosed, create "a substantial risk of prejudicing an impartial trial"; or
- the fact that a person has been charged with a crime, unless the statement also includes an explanation that the charge is simply an accusation and that a "defendant is presumed innocent until and unless proven guilty."[20]

3. Permissible Extrajudicial Statements

Countering this list of prohibited topics that may seem at first blush appear to be all-inclusive, Rule 3.6 provides an explicit list of permissible topics.[21] In addition, the Rule provides two main exemptions frequently recognized by case law that attorneys may take advantage of in using trial publicity. They are: (1) the public record exception; and (2) the fair reply exception.

A. Explicit List of Permissible Topics

An attorney involved in a criminal case may make extrajudicial statements concerning the following:

- the claim, offense or defense
- the identity of the persons involved unless prohibited by law;
- information contained in a public record;
- that an investigation of the crime is occurring;
- the schedule or outcome of any part of the litigation;
- a request for assistance in obtaining evidence and information necessary thereto;
- a warning of danger when there is reason to believe that there exists the likelihood of substantial harm;
- the accused' identity, residence, occupation and family status;
- information necessary to aid in apprehending the accused;
- timing and location of arrest; and
- identification of investigating and arresting officers or agencies and the length of the investigation's length.[22]

B. The Public Record Exception

An attorney may make extrajudicial statements containing information that is part of a public record, including information released in a preliminary hearing;[23] information contained in a memorandum supporting a motion;[24] and information within a probable cause affidavit.[25] The term "public record" is not defined, however, so whether the exception encompasses information that is in the public domain (*e.g.*, information previously reported by the media) as well as contained in public records is unclear.[26] In addition, an attorney's attempts to interpret the record, offer an opinion regarding the record, or elaborate upon information in the record may move the extrajudicial statement beyond the scope of the exception.[27] If an attorney is concerned about the scope of this

exception a safe option is to simply provide a copy of the record or direct the reporter to the record without providing additional comment.[28]

C. The Fair Reply Exception

All too often victims' attorneys will encounter information in the public sphere that paints their clients in a negative light. Unfortunately, this often occurs in high-profile sexual assault cases where the victim's credibility is made central to the case and there is an attempt to destroy the victim's reputation in the media. In such instances, an attorney may make extrajudicial statements that the attorney believes are necessary to counter recent adverse publicity.[29] It is important that the prior negative publicity was not initiated by the attorney or the attorney's client. Although the scope of this "fair reply exception" is yet to be determined, comments to the Model Rule state that any responsive statements should be limited to information "necessary to mitigate undue prejudice created by the statements made by others."[30]

Conclusion

Being a victim's attorney often requires navigating the public's voracious desire for information, the rules limiting pretrial publicity, and the need to zealously advocate for one's client. This can be a challenging path but once an attorney understands the scope of the ethical rules, leveraging pretrial publicity can be an effective tool of advocacy.

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[1]*See Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1058 (1991) (Kennedy, J., concurring) (stating that "in some circumstances press comment is necessary to protect the rights of the client and prevent abuse of the courts"); *see also* John C. Watson, *Litigation Public Relations: The Lawyers' Duty to Balance News Coverage of Their Clients*, 7 Comm. L. & Pol'y 77 (2002).

[2]*Gentile*, 501 U.S. at 1074; *see also In re Goode*, 821 F.3d 553, 559–60 (5th Cir. 2016) (internal citations omitted) ("In the context of criminal trials, an individual's right to free speech must be balanced with the state and the defendant's interest in a fair trial. Intense publicity surrounding a criminal proceeding, otherwise referred to as trial by newspaper, poses significant and well-known dangers to a fair trial. The most significant of these dangers is the possibility that pretrial publicity will taint the jury venire. Courts must therefore balance the First Amendment rights of trial participants with our affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity. Citing this concern, the Supreme Court has upheld stronger limitations on the speech of those participating before the courts as compared to members of the press.").

[3] *See, e.g.,* Am. B. Ass'n, CPR Policy Implementation Committee, *Variations of the ABA Model Rules of Professional Conduct*, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_6.authcheckdam.pdf.

[4] *Gentile*, 501 U.S. at 1075-1076.

[5] This article focuses on Rule 3.6 of the ABA Model Rules of Professional Conduct because many states have adopted this Rule or have a rule with substantially similar language. *See, e.g., supra* note 3. Even in jurisdictions that adopt language different than the Model Rule, there may not be a difference in application. *See, e.g., Zimmermann v. Bd. of Prof'l Responsibility*, 764 S.W.2d 757, 763 (Tenn. 1989) (observing that there are "three tests adopted severally by courts in various jurisdictions to be used in such cases, that is, whether comments of counsel posed: (1) '[A] serious and imminent threat;' (2) 'a clear and present danger;' or (3) 'a reasonable likelihood,' ... of interfering with the fair trial of a defendant"; and opining "that the above differences are more semantical than real").

[6] Model Rules of Prof'l Conduct r. 3.6(a).

[7] *Id.*

[8] *See, e.g., People v. Buttafuoco*, 599 N.Y.S.2d 419, 422 (Co. Ct. 1993) (finding that New York's former Disciplinary Rule 7-107 of the Code of Professional Responsibility—which contained similar language to that of ABA Rule 3.6 requiring lawyers "participating in or associated with a criminal or civil matter" to refrain from making extrajudicial statements to the media—applied to an attorney representing defendant's wife because a "sufficient nexus" existed to associate the attorney with this criminal case due to "[t]he very nature of the relationship between his client and the defendant" and the fact that the client "is also a possible witness" in the case).

[9] *See* Ellen J. Bennett, Elizabeth J. Cohen & Helen W. Gunnarsson, Annotated Model Rules of Professional Conduct 399 (8th ed. 2015) (commenting that the 1994 revisions to Rule 3.6 were intended to address the *Gentile* opinion); *Gentile*, 501 U.S. at 1074 ("Lawyers representing clients in pending cases are key participants in the criminal justice system, and the State may demand some adherence to the precepts of that system in regulating their speech as well as their conduct.").

[10] *Gentile*, 501 U.S. at 1043,1076 (analyzing the constitutionality of Nevada Supreme Court Rule 177 "that prohibits an attorney 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.'"); *see* Lisa M. Fantino, *Flexing Your Media Muscle: A Guide to Working Out with the Media*, N.Y. St. B.J., Oct. 2002, at 52, 54 ("Although attorneys do not check their free speech rights at the courthouse door, they are held to a higher standard under the First Amendment. Because lawyers have special access to information through discovery and client communications, the U.S. Supreme Court has held that attorneys who represent clients in pending cases may be regulated under a less demanding standard

('substantial likelihood of material prejudice') than that established for regulation of the press ('clear and present danger').").

[11] Generally, the statement is evaluated at the time it was made. *See, e.g., Attorney Grievance Comm'n of Md. v. Gansler*, 835 A.2d 548, 571 (Md. 2003) (emphasis added) ("In considering the propriety of a statement under MRPC 3.6, we determine the likelihood that a particular statement will cause prejudice *at the time the statement was made*, not whether that statement, in hindsight, actually worked to the detriment of a defendant."). *But see Iowa Sup. Ct. Bd. of Prof'l Ethics & Conduct v. Visser*, 629 N.W.2d 376, 382 (Iowa 2001) (emphasis in original) ("In applying the rule as so interpreted, we look to the facts surrounding the statements at the time they were made, but we also look to the *ex post* evidence that relates to the likelihood of prejudice.").

[12] In *Gentile*, Justice Kennedy's concurrence suggested that statements made six months prior to trial were far enough removed so that the attorney could not reasonably have known his comments to the press would create a substantial possibility of prejudice as the content would "fad[e] from memory long before the trial date." *Gentile*, 501 U.S. at 1044 (Kennedy, J., concurring).

[13] *State v. Grossberg* 705 A.2d 608, 613 (Del. Super. Ct. 1997).

[14] *Commonwealth v. McCullum*, 602 A.2d 313, 318 (Pa. 1992) (holding that prejudice due to pretrial media coverage had dissipated over nine months' time).

[15] *See, e.g., Stroble v. California*, 343 U.S. 181, 193 (1952) (upholding trial court's ruling that inflammatory newspaper accounts of trial were not prejudicial, reasoning that defendant did not offer any evidence to counter trial court's finding that there was no evidence that any juror saw or read the papers, and, without such proof, the Court found it could not find prejudice where the newspaper accounts appeared approximately six weeks before the beginning of petitioner's trial, and the most prominent features of the newspaper accounts–defendant's confession– was introduced at the trial itself).

[16] *Doe v. Rose*, No. CV-15-07503-MWF-JCX, 2016 WL 9107137, at *4 (C.D. Cal. Sept. 30, 2016) (imposing a gag order because the widespread publicity of the case on blogs and news websites created a substantial likelihood of material prejudice if the parties and their attorneys were not restrained from further contact with the media).

[17] *See, e.g., Ruggieri v. Johns-Manville Products Corp.*, 503 F. Supp. 1036, 1040 (D.R.I. 1980) (holding that the civil attorney's extrajudicial statements were not prejudicial as there was no evidence that the nationally televised program containing the attorney's interview was broadcast in the court's district, and even assuming it was viewed in the district, there was no evidence as to the percentage of potential jurors who viewed it); *Visser*, 629 N.W.2d at 382 (holding that the civil attorney's extrajudicial statements, which were printed once in a newspaper 50 miles from the trial location, did not violate the state's trial publicity rule).

[18] *See Gansler*, 835 A.2d at 572 (agreeing that timing of an extrajudicial statement may affect its prejudicial effect, but that the timing element will not neutralize an obvious prejudicial content of a statement, such as statements relating to guilt or innocence).

[19] *See id*.

[20] Model Rules of Prof'l Conduct r. 3.6 cmt. 5 (listing topics that are more likely than not to materially prejudice a proceeding).

[21] *See* Model Rules of Prof'l Conduct R. 3.6(b).

[22] *Id.*

[23] *See, e.g., Zimmerman*, 764 S.W.2d at 759 (noting that a hearings panel concluded that a portion of a prosecutor's statements to media regarding a defendant's confession was permissible because the confession was in the public record due to its introduction at a preliminary hearing).

[24] *See, e.g., United States v. Pasciuti*, 803 F. Supp. 563, 566 (D.N.H. 1992) (finding that the Assistant United States Attorney did not act inappropriately by making statements to an Associated Press reporter that implied defendants committed acts of violence because his statements contained information available in the public record in a previously filed memorandum in support of a motion for anonymous jury).

[25] *See, e.g., Muex v. State*, 800 N.E.2d 249, 252 (Ind. Ct. App. 2003) (finding that the prosecutor's statement revealing DNA test results in the probable cause affidavit was permissible because the affidavit is a public record).

[26] For example, in *Attorney Grievance Commission of Maryland v. Gansler*, an attorney was charged with violating Maryland's trial publicity rule, and he argued that his statements were permissible because they concerned "'information contained in a public record.'" 835 A.2d at 566. The attorney contended that "public record" included anything in the public domain, including not only court documents, but also anything previously reported in the media. *Id.* at 566-67. The court in *Gansler* found that there was no settled definition of "information contained in a public record" in Maryland and therefore the rule did not provide adequate guidance for an attorney attempting to determine what statements would qualify under the exception. *Id.* at 567.

[27] *See Cox Ariz. Publ'ns, Inc. v. Collins*, 852 P.2d 1194, 1198 (Ariz. 1993) (stating that "[s]imply handing over public records to reporters without comment is not necessarily an 'extrajudicial statement'" within the meaning of the ethics rules); *Gansler*, 835 A.2d at 569 (observing that the public record exception is contingent upon the lawyer not "provid[ing] information beyond quotations from or references to public government records"); *see also State v. Ploof*, 2003 WL 21999033, at *2 (Del. Super. Ct. Aug. 20, 2003) (emphasis added) (finding that the prosecutor's post-trial, pre-sentence comments "referring to Defendant as a 'cold blooded killer' *mirrored* language used" in closing arguments and were therefore part of the public record).

[28] *See* Ruth E. Piller, *Dealing With the Press During Trial: A Primer*, 37 Hous. Law. 42 (2000).

[29] *See* Model Rules Of Prof'l Conduct r. 3.6(c) ("[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.").

[30] *See* Model Rules of Prof'l Conduct r. 3.6, cmt. 7 ("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 statement should be limited to contain only such information as is necessary to mitigate undue prejudice created by others.").