



Crisis Management 101 for the Transit Lawyer

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Not a New Problem for the Legal Profession





The Supreme Court Explores Balance between a Fair Trial and a Free Press

- It used to be viewed as “unprofessional” to deal with the press
- As late as the 1970s, ABA issues ethics opinions limiting an attorney’s dealings with the press
- *Sheppard v. Maxwell*, 384 U.S. 333 (1966) – lawyers may be subject to restrictions on speech that may not be applied to the press or an ordinary citizen

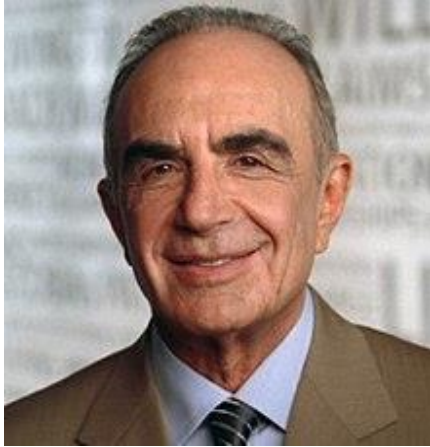


Justice Clark in *Sheppard* ruling:

“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.”

The People v OJ Simpson

A watershed moment in so many ways





RULE 3.6 MODEL RULES OF PROFESSIONAL CONDUCT

Subpart (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.”

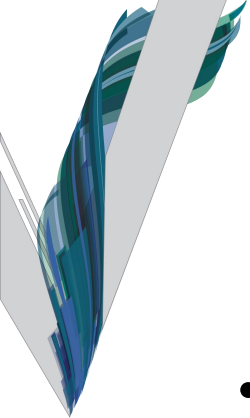
Rule provides fairly limited exceptions to what a lawyer may state without sanction

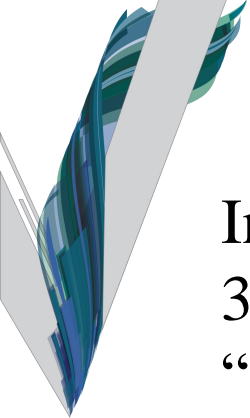


The Supreme Court Chimes in Again

Gentile v. State Bar, 501 U.S. 1030 (1991)

- Nevada attorney disciplined for holding a post-indictment press conference
- State bar of Nevada filed a complaint that Gentile's statements were "substantially likely" to prejudice the ongoing proceeding
- Court ruled that restrictions were void for vagueness, but Court for the first time recognized dual roles that counsel plays in these sorts of matters

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- Justice Kennedy held that the attorney “sought only to stop a wave of publicity that he perceived as damaging to his client.”
 - Chief Justice Rehnquist held based on the facts, the attorney would not have known that there was a “substantial likelihood” that the statements would materially prejudice his client’s trial.



In light of this ruling, the ABA created an exception in Rule 3.6 (then adopted by most states), sometimes known as the “fair reply” exception.

Subsection (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.”




Relevance for Transit Agencies/Corporate Entities

An attorney may wish to involve herself in publicity and/or coordination on public statements related to a crisis for several reasons:

- Contain the crisis;
- If there is to be legal action, keep it in the civil realm and avoid criminal prosecution;
- Reduce chances of escalation of charges;
- Maintain a client's or a client's product's reputation in the marketplace

Moses, "Legal Spin Control: Ethics and Advocacy in the Court of Public Opinion," 95 Colum. L. Rev. 1811 (1995)



Relationship Between Rule 3.6 and Other Ethics Rules

RULE 1.6 MODEL RULES OF PROFESSIONAL CONDUCT

- Subpart (a): “A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).”
- Comment 3 on Rule: rule applies not just to information obtained from the client, but ALL information obtained during representation, whatever its source.



Practice Pointers:

ALWAYS document consent to using information



Practice Pointers: (cont'd)

- Consider use of public relations firm and relationship to counsel.
- ALWAYS document the nature of the relationship between the PR firm and counsel. Think of the PR firm as an expert witness and consider have the retention of the PR firm run through counsel.
- Attorney-client privilege could apply if the communication is related to legal advice as opposed to “business advice.”
- In general, the PR firm is not bound by the same sorts of rules as counsel, for better or for worse.



RULE 4.1 OF THE MODEL RULES OF PROFESSIONAL CONDUCT – Truthfulness in Statements to Others

“In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.”



Rudy Giuliani from an Ethics Perspective

<https://www.youtube.com/watch?v=sDaYm-Ae9qs>



Commentary on Giuliani's Role

- “His role is largely in the court of public opinion. Giuliani's goes is to tell the American public that this is political, not legal. He's succeeded in doing that with some blips along the way.”

Alan Dershowitz, quoted in Washington Post, January 23, 2019, “Giuliani's Missteps Frustrate Trump but Underscore the Unique Role he Plays for the President”



The Duty to Zealously Advocate on Behalf of a Client

RULE 1.3 MODEL RULES OF PROFESSIONAL CONDUCT

“A lawyer shall act with reasonable diligence and promptness in representing a client.”



Comment [1] on Rule 1.3

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

See also, Hooker and Lange, Hooker and Lange, “Limiting Extrajudicial Speech in High-Profile Cases”; Georgetown Journal of Legal Ethics, Volume 16, Page 655, Vol. XVI, No. 4, Summer 2003



Conclusion

What is the role of counsel in these dynamic and fluid circumstances?

“Lawyers are not asked to do justice. They participate in what everyone hopes is a system of justice, a system that seeks justice by asking lawyers on both sides to represent their clients zealously.”

See Floyd Abrams, “Why Lawyers Lie,” NY Times, October 9, 1994 (Magazine)



*"Your case has been turned down by Oprah, but we're
appealing to Sally Jessy Raphael."*