Dealing with the Media and with Professionals as Clients: a US Perspective

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The federal prosecutor has just called and told you that your client, a business lawyer, has been indicted on multiple charges of defrauding the United States. In view of your best efforts to dissuade the US Government from pursuing its case, the prosecutor's call comes as a disappointment but not necessarily as a surprise. You know that a press release will undoubtedly be issued by the prosecutor's office, setting forth the allegations contained in the indictment. You anticipate that coverage of your client's case will appear in the morning newspapers and, perhaps, on the television nightly news. You also know that you must further prepare your client, as well as yourself, to deal with the anticipated media inquiries.

Your mind struggles to assess the situation and to re-evaluate your short-term strategies. Suddenly, your secretary enters your office and informs you that a local news reporter is calling to speak with you about the indictment. Do you take the call? If so, what do you say? What are the ethical parameters of what you can and cannot say if you do speak with the reporter? Perhaps most importantly, is it in the client's best interest for you to make a statement to the media at this time? Would a simple 'no comment' be the best way to proceed?

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The above scenario is not uncommon to white collar criminal defence counsel who represent other professionals, especially in the wake of recent, highly-publicised cases, including those involving Enron, Arthur Andersen, WorldCom, and Global Crossing. The roles of accountants, attorneys, and other professional advisers, whether they are located in the United States or abroad, have come under increased scrutiny from the US authorities conducting investigations into corporate crime and related forms of fraud and abuse.

Representing such professionals as clients and dealing with the media scrutiny surrounding their cases necessarily gives rise to a variety of concerns, challenges, and strategies, for which there are no easy approaches.

The purpose of this article is to present a brief overview of pertinent ethical rules and applicable case law, as well as identifying various practical considerations that criminal defence counsel should bear in mind when dealing with the media, especially when the client is a professional.

Applicable rules of professional conduct

The American Bar Association's (ABA's) Rules of Professional Conduct, adopted by a number of jurisdictions within the United States, seek to offer guidance to defence counsel, as well as prosecutors,

in their dealings with the media. ABA Model Rule 3.6, set out below, prohibits an attorney from making a statement that would have a 'substantial likelihood of materially prejudicing' the proceedings unless such statement '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'.

'**ABA Model Rule 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 the 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).'

The Comments to ABA Model Rule 3.6 provide as follows:

'[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. Rule 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 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 that 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 Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.'

ABA Model Rule 3.8, pertaining to special responsibilities of a prosecutor, provides in pertinent part, as follows:

'The prosecutor in a criminal case shall:

…

(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.'

The Gentile case: adequate guidance for counsel?

The day after Grady Sanders was indicted in February 1988, his attorney, Dominic P Gentile of Las Vegas, Nevada, held a televised news conference at which he proclaimed his client's innocence and identified a police detective as the probable thief of cocaine and traveller's cheques that were part of a law enforcement undercover operation.

Following the jury trial at which his client was acquitted, attorney Gentile was sanctioned by the state disciplinary board for making extrajudicial statements that he knew, or reasonably should have known, would have a substantial likelihood of materially prejudicing the proceedings. The Nevada rule, nearly identical with respect to the 'substantial likelihood of material prejudice' standard set forth in ABA Model Rule 3.6, also provided a safe harbour provision permitting an attorney to 'state without

elaboration ... the general nature of the ... defense'. Although the Nevada State Bar's reprimand of Gentile was upheld by that state's highest court, Gentile ultimately prevailed on further appeal. In *Gentile v State Bar of Nevada*, 501 US 1030 (1991), the US Supreme Court held that the Nevada rule was void due to vagueness with regard to its safe harbour provision, but also found that the substantial likelihood of material prejudice standard constitutes a 'constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials'.

In *Gentile*, the 'substantial likelihood of material prejudice' standard set out in ABA Model Rule 3.6 survived a challenge under the First Amendment's freedom of speech clause. But what reliable guidance does this really provide to criminal defence attorneys who choose to speak to the media about a pending case? Unfortunately, the case law and ethical rules are so broad and subject to such a wide range of interpretation that each situation must be analysed according to its individual merits.

Some practical considerations when dealing with the media

When criminal defence counsel deal with the media, numerous issues and practical considerations will undoubtedly arise. Matters to be addressed include the following:

- keep the client muzzled (remember, the only way the trophy fish came to be mounted on the wall was by opening its mouth!);
- ask yourself how speaking with the media will advance your client's best interests;
- during the course of an investigation, ask yourself what impact your public statements might have on the federal authorities – remember that they will ultimately decide whether to bring charges against your client;
- you must decide whether to speak to the media yourself or to retain a public relations firm that specialises in damage control and media relations;
- if you enlist the services of a media relations firm, you will need to know whether they will handle all media inquiries themselves or just advise you on how to proceed.

When dealing directly with the media, the following questions must be answered:

- Do you ensure that your client's representatives speak with one voice if and when dealing with the media?
- Is 'no comment' always or never the best response when contacted by a reporter?
- If you choose to speak with a reporter, do you know his or her reputation?
- Should it matter whether you know the reporter or not?
- Can you trust the reporter to be accurate and ethical?
- If you are surprised by a reporter's call and are unprepared to give an immediate statement, do you ask them when their deadline is so that you can call them back?
- Do you speak on the record or off?
- Do you provide 'background' to advance your client's interest?
- If you decide to offer no comment, do you change your mind when the reporter tells you what they have heard and what they intend to report (the substance of which you know to be untrue) unless you correct it?

Practical considerations when representing a professional as a client

As noted at the outset, lawyers, accountants and other professional advisers are increasingly under attack by law enforcement authorities investigating allegations of various forms of fraud and abuse. Penetrating the attorney-client privilege by a showing of the crime-fraud exception is among the techniques used by law enforcement authorities to negate a client's assertion of good faith reliance on the advice of professionals. The Internal Revenue Service, in particular, has recently increased its enforcement efforts against the promoters (who include attorneys and accountants) of allegedly illegal offshore tax shelters. In view of the US Government's continuing efforts to target professionals engaged in fraudulent conduct, much of which is transnational in nature, white collar criminal defence counsel in the United States and abroad may expect an increasing number of professionals to seek their services.

It is of the utmost importance, when representing accountants, lawyers, and other licensed professionals, that criminal defence counsel should anticipate the collateral consequences that are likely to befall the client during the various stages of a criminal case, beginning with the investigation and, if prosecution is pursued, continuing through indictment, guilty plea or trial, conviction or acquittal. If prosecution is pursued, counsel must decide what approach to take in negotiating a plea bargain or proceeding to trial. In assessing what course of action is in the client's best interest during

the criminal investigation or after indictment, among the questions that defence counsel should consider are the following:

(1) What impact will the simple existence of a criminal investigation have on the professional's practice or business?
(2) If negative information about the investigation is spreading among the clients of the professional client, should defence counsel send a carefully-worded letter to those clients in the hope of assuaging their concerns?
(3) What contacts, if any, should defence counsel initiate with media representatives during the course of the criminal investigation?
(4) What will the answers to questions (1) to (3) above be *after* indictment?
(5) What effect would a criminal conviction have on the client's professional licence and future ability to make a living?
(6) Would the effect of a 'misdemeanor' conviction differ from that of a felony in terms of the client retaining his or her professional licence?
(7) What if the offence or conviction does not involve an element of 'fraud', 'deceit', or 'dishonesty' – might the client keep the licence?
(8) What special adjustments under the federal sentencing guidelines might apply to the client, if convicted, because he or she is a professional?

Conclusion

In the United States, conscientious criminal defence counsel will undoubtedly look to ABA Model Rule 3.6 and its comments, as well as to applicable case law and local rules of court, for guidance in dealing with the media. Unfortunately, as noted above, it is not always clear when a particular statement may be regarded as materially prejudicial to a proceeding. Counsel seeking to represent professional clients and to right the wrong of prejudicial statements made by a third party, must tread with caution when determining the limits of the information that is necessary to mitigate such undue prejudice. While it may be of small comfort to criminal defence attorneys in their dealings with the media, each case must be evaluated on its own merits by applying applicable ethical rules and case law, exercising sound reason and good judgment, and, perhaps, hoping for a little luck along the way. ■

MEDICALLY ASSISTED HUMAN REPRODUCTION

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deceased human being'. The Act stipulates that reproductive cloning is prohibited but no penalties are specified as being applicable if any cases of human cloning arise. It would be reasonable for penal, civil and administrative sanctions to be enforced against anyone who asks to be cloned, as well as any doctor involved in human cloning procedures.

Although the Act expressly prohibits the cloning of human beings, the cloning of stem cells may be considered as permitted for scientific research or therapeutic uses. In other jurisdictions, the use of early-stage cloned embryos to create stem cells for research is permitted.

In general, it would be desirable for the Act to require the adoption of a code of practice, providing guidelines to clinics about the proper conduct of licensed activities, as well as the establishment of an authority to supervise the performance of medically assisted human reproduction methods, and to control the storage, handling and use of gametes, fertilised ova and embryos. ■