



## TRIAL PUBLICITY: LAWYERS AND THE MEDIA

BY EDWARD J. CLEARY

### “Mistrial Cost Prosecutor a Judgeship and Now His Job.”

Late last year, the U.S. Attorney for the Northern District of California, appointed by President Clinton in 1993, withdrew his nomination for the federal bench and soon thereafter resigned as U.S. Attorney. What led to this “downhill slide” as the *National Law Journal* referred to it? Intemperate remarks made to the media by the U.S. Attorney in question, Michael Yamaguchi. A mistrial was declared in the high profile prosecution of a defendant charged with cocaine conspiracy violations after Yamaguchi’s remarks concerning the case were published in the *San Francisco Chronicle*. In the end a promising legal career was short-circuited by ill-considered observations that endangered another’s right to a free trial.<sup>1</sup>

For over three decades, the legal community and the judicial system have attempted to carve out reasonable restrictions on the exercise by trial counsel of their free speech rights. Periodically, a “trial of the century,” or at least of the moment, results in close scrutiny of the participants, an opportunity that a number of lawyers find overly intoxicating. Many handle themselves with dignity and in a professional manner; others bring to mind infomercials on late-night television — you know you don’t want to buy what they are selling and you feel a headache coming on. Such trials in the 1960s led to the first real attempt to muzzle some of our more loquacious brethren. The result was DR 7-107, an unconstitutionally overbroad attempt to dictate to lawyers what categories of information were off limits for discussion. By the mid-1980s an initial version of MRPC 3.6 came into existence, a valiant but largely unsuccessful attempt to draw more reasonable parameters for discussion of cases by lawyers.

Then, seven years ago, in the case of *Gentile v. State Bar of Nevada*, the U.S. Supreme Court reversed a disciplinary sanction given to an attorney for prejudicial pretrial remarks.<sup>2</sup> In that case, defendant’s counsel in a criminal matter had been reprimanded for making statements to the press concerning the evidence and witnesses, and for identifying the “likely” guilty party (a police officer). After the Nevada Supreme Court upheld the discipline, the U.S. Supreme Court issued a badly fragmented opinion addressing the

free speech rights of trial counsel, with the majority suggesting, in Justice Anthony Kennedy’s words, that “blanket rules restricting speech of defense attorneys should not be accepted without careful First Amendment scrutiny.”<sup>3</sup>

#### EVOLUTION OF THE RULE

In Minnesota prior to 1985 and the adoption of the Rules of Professional Conduct, an attorney was subject to discipline if the attorney offered any opinion as to the guilt or innocence of his defendant client. That is no longer the case. Since then, the Minnesota rule has read as follows:

A lawyer shall not make 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 a pending criminal jury trial.

ABA Model Rule 3.6 is substantially longer and addresses two areas of concern not covered by the Minnesota rule. First, it narrows the focus of the rule to a lawyer “who is participating or has participated in the investigation or litigation of a matter” (or other lawyers in the same office). Second, it frees a defense attorney to make a limited statement of response when it is necessary to mitigate “substantial undue prejudice” occurring as a result of recent publicity “not initiated by the lawyer or the lawyer’s client.”

In these days of “Court TV”, when every lawyer and his cousin is offering an appraisal of various legal proceedings, the narrow application of the prohibition to

immediate trial counsel (and her associates) makes good sense. Likewise, as more and more prosecutors nationwide call press conferences to announce indictments (often sprinkled with suggestions of guilt), defense counsel should be allowed (if not encouraged) to maintain her client’s innocence while suggesting the unfairness of a rush to judgment.

It should be noted that Minnesota’s version of Rule 3.6 (unlike the model rule) is limited to criminal jury trials. This is where most of the media interest lies and where the concern for a fair trial predominates. There are other areas where a lawyer can find himself in serious trouble for talking to the media about ongoing litigation.

#### RELATED CONSTRAINTS

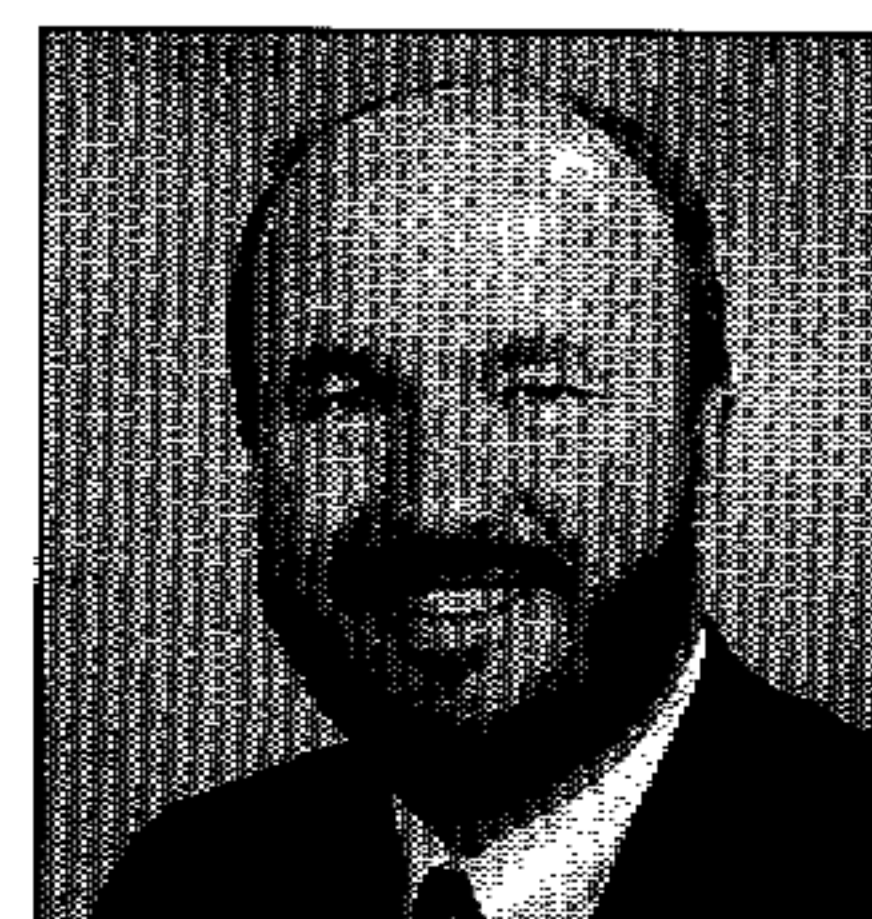
Federal Rule 6(e) prohibits prosecutors, grand jurors, and certain individuals other than witnesses from discussing “matters occurring before the Grand Jury.” This section was recently in the news when a federal judge in Washington, D.C. ordered hearings on whether the office of special prosecutor Ken Starr had leaked information to a number of media outlets including NBC, CBS, and the *New York Daily News* in violation of Rule 6(e).<sup>4</sup>

In addition, while lawyers are immune from civil liability for almost all communications made in the course of litigation (pleadings, discovery, and in judicial proceedings), increasingly they are being subjected to liability for statements made outside of the courtroom in the form of civil actions based upon defamation.<sup>5</sup>

They may also be subject to discipline under MRPC 1.6 for indiscreet comments regarding clients’ confidences or secrets wherever they make them, including in

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the courtroom. Other provisions of the Rules of Professional Conduct might also apply to statements made inside or outside of the courtroom.

Although the ethical restrictions of Rule 3.6 focus on both prosecutors and criminal defense attorneys, an observer might well conclude that the primary focus should be on prosecutors. Recently, a local prosecu-

tor, after obtaining a conviction of a rapist, stated that she believed the defendant was also guilty of an unsolved murder, although the defendant had never been charged with that homicide. Since the defendant had not been charged and since the homicide is believed to have taken place in another jurisdiction, the impact of the prosecutor's inappropriate statements was not great.

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Nevertheless, it could subject her to civil liability if the defendant should choose to pursue such a remedy (unlikely for a convicted rapist). On the other hand, if a prosecutor directly involved in a high-profile case spoke to the media about criminal evidence that she knew or should have known would most likely not be admitted at trial, or if she implied knowledge of the defendant's guilt, the effect could be to endanger the defendant's right to a fair trial by "materially prejudicing," and possibly tainting, the jury pool. A complaint based on such a fact situation would be investigated as a possible violation of MRPC 3.6. The more immediate impact of such public statements might well be a change of venue or a mistrial, depending on the stage of the proceedings.

## CONCLUSION

Because of concerns for free speech, MRPC 3.6 is seldom enforced. Indeed, this office receives very few complaints in this area. Furthermore, Rule 3.6 should be considered for revision using the narrower parameters of the equivalent ABA Model Rule. Nevertheless, under limited circumstances, the free speech rights of certain lawyers may give way when they collide with the right to a fair trial of one charged with a criminal offense. As the former U.S. Attorney and federal judge nominee in Northern California found out recently, there is a price to be paid for ill-considered remarks to the media if those comments endanger a defendant's right to a fair trial. Sometimes the cost is political; sometimes the cost is professional.

## NOTES

1. Victoria Slind-Flor, "U.S. Attorney Quits After Downhill Slide," *The National Law Journal*, 8/10/98, A7.
2. 501 U.S. 1030 (1991).
3. William J. Wernz, "Free Speech v. Fair Trial . . .," *Bench and Bar* (October 1991) p. 13.
4. "Excerpts From Order Regarding Leaked Grand Jury Information," *The New York Times*, 8/8/98, A6.
5. Marshall H. Tanick, "Lawyers and the Media: Legal Liability Looming?" *CLE materials*, 8/21/98. □