

Ethics and the High-Profile Case - Arkansas' "Unconstitutionally Vague" Rule 3.6

by Morgan E. Welch, Esquire¹

[Writer's Note: This article was commissioned well in advance of the current Clinton/Starr scandal. While the subject matter is relevant to that controversy, suffice it to say, the conduct of Special Prosecutors and defense lawyers with the media, when read in the context of these rules is perplexing. Obviously, different rules apply when one party is the President of the United States. Hopefully, however, that level of spectacle will be limited before it becomes necessary to codify specific, separate rules! The reader is free to draw his or her own comparison between the Washington/Little Rock Presidential Lawsuit/Criminal Crusade and the rules of ethics for the rest of us.]

In almost every lawyer's practice, at some time or other, he or she will be called on by a representative of the media for a comment or an explanation about some pleading which has been filed in some clerk's office. Maybe the lawyer is asked for a quote because the facts of the particular case make it "newsworthy." The decision whether to discuss a case with media representatives has to be made by the lawyer on the front line. Does he give a dignified "No Comment?" Does he talk to the reporter and answer questions? Is he going to go to "Lawyer Hell" when he does?

In Arkansas, pleadings (including discovery) are publicly filed and so are tantalizing tidbits of information for the bloodhounds of the Fourth Estate: excerpts from depositions, motions with declaratory statements of zealous counsel, and occasionally, copies of exhibits showing the juicy answer to the proverbial question: "Who shot John?" News organizations know where the documents are filed and stored. Information concerning cases regularly becomes public through the print media, radio or television.

In law school, we are taught that lawyers are guided by "Ethical Rules" consisting of "Canons," "Disciplinary Rules," etc. Lawyers are an introspective, self-questioning lot, and are continually setting standards for themselves (and their adversaries) to live by. Standards of ethics governing communication with the press, however, are difficult to define, as the notions of "right and wrong" become blurred. The interests of fair trial, fair comment, and fair retort are all arguably worthy of protection, as are the interests of ethics and seamliness.

I.

THE ARKANSAS RULE, AS WRITTEN, IS UNCONSTITUTIONAL

The incarnation of Rule 3.6 of the Model Rules as adopted by the Arkansas Supreme Court was declared to be unconstitutional in 1991 by the U.S. Supreme Court. *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991). Subsequently, the A.B.A. Committee revised Model Rule 3.6 in August, 1994. Although the Arkansas Supreme Court is considering a revision to reflect that which has been adopted by the American Bar Association Committee, the current Arkansas rule is still modeled on A.B.A. standards, originally amended in 1978, and thus is a pre *Gentile* version.

Arkansas' Rule 3.6 of the Model Rules of Professional Conduct states:

Rule 3.6 Trial Publicity

"(a) A lawyer shall not make an extra-judicial 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.

(b) A statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or

(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 the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and 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.

"(c) Notwithstanding paragraph (a), a lawyer involved in the investigation or litigation of a matter may state without elaboration:

(1) the general nature of the claim or defense;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved, and, except where prohibited by law, the identity of the persons involved;

(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:

(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.

At issue is the so-called "safe harbor" provision contained at sub-paragraph (c) of the Arkansas (and Nevada) rule which seems to allow a lawyer to make a statement "notwithstanding paragraph (a)" and thereafter the conflict with paragraph (b) which seeks to define those statements "ordinarily . . . likely to have an effect" of prejudicing the proceeding.

In short, the old rule appeared to invite the advocate to 'take up for' his client when bashed by unfair and prejudicial media comments, but to then define any such effort as unethical and substantially likely to disrupt the legal process. 'Damned if you do, and damned if you don't!'

A. THE GENTILE CASE

Dominic Gentile was disciplined by the State Bar of Nevada because he held a press conference the day after a Grand Jury indicted his client on criminal charges. His client was accused of stealing cocaine and traveler's checks from a deposit vault that he had rented to undercover police officers. Before indictment, the case had received wide-spread publicity. Some reports containing information leaked by police and prosecutors indicated that Gentile's client had refused to take a lie detector test, and that the police officers had been ruled out as suspects.

When Gentile held his press conference, he offered an alternative scenario: that a certain police detective might have taken the drugs and money, and that his client was being used as a scapegoat. He also questioned certain witnesses' reliability.

Gentile's client was acquitted six months later. The court apparently had no difficulty seating a jury. In fact, no prospective juror questioned in voir dire could recall hearing or reading of the press conference! Gentile, however, was haled before the State Bar Disciplinary Board.

Though the attorney argued that he was covered and protected by the "safe harbor" provision of the rule, the Board, reviewing a tape of the press conference and his testimony, ruled that Gentile had violated the ethical rule. The Nevada Supreme Court affirmed, and the U. S. Supreme Court granted certiorari.

The Supreme Court of the United States held that the first part of the rule (the same as Arkansas' sub-paragraph (a)) prohibiting statements having "a substantial likelihood of materially prejudicing an adjudicative proceeding" was constitutional. The court went further, however, in finding conflict between the "safe harbor provision" (Arkansas' subsection (c)) and the definitions (subsection (b)) which seek to define improper conduct and statements. The Nevada (same as Arkansas') rule was found, therefore, to be unconstitutionally vague.

Justice Kennedy authored the part of the majority decision on this point, and stated that because the "safe harbor" provision said a lawyer could make certain statements "notwithstanding" the prohibited conduct, it necessarily implied that a lawyer whose statements fell under the earlier categories would not be sanctioned, even if in doing so, he commented on topics prohibited under prior sections of the rule.

In the 5 to 4 decision, the court upheld the "substantial likelihood of material prejudice" standard, but also observed that a lawyer had no guidance for evaluating when his comments would "pass from the safe harbor of the general to the forbidden sea of the elaborated." The charges against Gentile were overturned, but the "fun" of interpreting the opinion was just beginning for ethical commentators.

B. THE 1994 REVISION OF THE MODEL RULES

As might be anticipated, pressure was put upon the A.B.A. and many state bars to drop or amend Rule 3.6 following Gentile. The Arkansas Supreme Court's Professional Conduct Committee is said to be working on proposed amendments at this time. Other states have not amended their rules which are identical with Nevada, but recognize the fundamental problems attendant in enforcing unconstitutionally vague standards. The amendment created by the American Bar Association in 1994, omits what is sub-paragraph (b) in Arkansas' Rule 3.6 and adds other sections. The amendment adopted by the A.B.A. Committee on Model Rules states:

"Rule 3.6 Trial Publicity 2

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter 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 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, 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)."

The A.B.A. made three substantive changes and, additionally, created a new rule:

First, the change seeks to make it clear that only lawyers who have participated in the investigation or litigation are covered. There is no gag on lawyers (or, as we have seen on television, lawyer-commentators) who have no connection with the case.

Secondly, examples of prohibited conduct [(b) in the Arkansas Rule] which the Supreme Court found to be conflicting or vague in *Gentile* have been eliminated. The rule now describes permitted commentary (such as the claim, events, or defense involved). The rule no longer seeks to proscribe certain types of speech leaving that to a case-by-case analysis.

Third, an entirely new section has been added, giving lawyers a right to respond, authorizing statements to protect clients from substantial undue prejudice. The statement is to be limited to the information necessary to mitigate recent adverse publicity.

Lastly, a new Model Rule 3.8(g) has also been added elsewhere, cautioning Prosecutors from substantially heightening "public condemnation of the accused."

II.

LIFE IN THE "REAL WORLD"

All of us have had our own experiences with the press and the danger of prejudice which can flow therefrom (all over our clients). Clearly, the ethical rules are in flux, although the standards prohibiting blatant attempts at "material prejudice" are alive and well.

Perhaps it is well that we review these rules and their history each time we are faced with a case with potential public interest. The U.S. Supreme Court and the modified rules are designed to allow attorneys to

press agent, however. The fact is, we're not that good at it in the first place!

Lawyers tend to over-explain and their explanations rarely fit the fifteen second "sound bite" too often sought after by the press. The current state of the law seems to suggest that counsel now have the "safe harbor" from disciplinary action for comments which are responsive or reactive in nature. Lawyers are privileged to respond to questions on behalf of their clients or to explain. They may react to adverse publicity, even to the extent of making statements to the press as Mr. Gentile did.

Nowhere in the rules, however, does there appear to be a manifest intent by anyone to sanction counsel mounting press campaigns in advance. In other words, no one has authorized the lawyer in the media gun fight to "fire the first shot."³

It must also be remembered that press conferences and press statements designed to counteract perceived unfair publicity are double-edged swords. Any press conference or media "event" always has the potential of back-firing. Counsel's statements concerning his or her client may end up creating media prejudice, all best intentions to the contrary notwithstanding. Also, newspapers have space limitations, editors 'chop' stories, and headline writers sometimes write headlines having no rational relationship to the story contained thereunder. All these things can hurt the client's case if they misfire.

CONCLUSION

In short, the amended rules and the meaning of Gentile may well be that the attorney is given a new "weapon" with which he can either protect and defend his client, . . . or shoot himself in the foot!

Bibliography:

1. The New Model 3.6: An Old Pair of Shoes, 44. U. Kan. L. Rev. 837 (July 1996)
2. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 111 S. Ct. 2720, 115 L. Ed. 2d 888 (1991)
3. Arkansas Model Rules of Professional Conduct, Rule 3.6 (1978)
4. A.B.A. Model Rules of Professional Conduct, Rule 3.6 (1994)
5. A.B.A. Model Rules of Professional Conduct, Rule 3.8(g)
6. Dealing With the Media: Ethical, Constitutional, and Practical Parameters, 84 Ill. B. J. 614 (1996)
7. *Gentile v. State Bar and Model Rule 3.6: Overly Broad Restrictions on Attorney Speech and Pre-Trial Publicity*, 6 Geo. J. Legal Ethics, 583 (Winter, 1993)
8. Gillers, Regulation of Lawyers: Statutes and Standards, (1995)

ENDNOTES

1 Morgan E. "Chip" Welch is a Past President of the Arkansas Trial Lawyers Association, member of the Board of Governors of the Association of Trial Lawyers of America, and the 1997 recipient of the Roxanne Wilson Award for Trial Advocacy.

2 New additions are underlined

3 The exception to the above (you knew there'd be one) is found in both the old and new rule provisions permitting a "request for assistance in obtaining evidence and information necessary thereto." This part often justifies ads relating to products cases, among other types.

