MEDIA MANIA: A PRACTICAL AND ETHICAL APPROACH FOR ATTORNEY CONTACTS WITH REPORTERS

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Would You Care To Comment?

Your client has just done something that attracts the attention of the media. Reporters call. They want to interview you. It's not just the local paper. Radio, television, and print media are all calling. The public demands to know. The reporters have deadlines. Your client wants to make sure the media have his side of the story. What do you do?

Many media outlets become quite aggressive pursuing legal stories. Given this, it is often difficult for lawyers to avoid responding to the media. But dealing with the media presents lawyers with certain ethical issues.

In some circumstances, revealing information about a forthcoming or pending proceeding may subject members of the bar to discipline. Thus, it is important to understand the various strictures contained in the Rules of Professional Conduct. Included among them are restrictions on extrajudicial comments. Lawyers should familiarize themselves both with these rules and with the rationale for them.

Do Lawyers Have Freedom Of Speech?

The First Amendment guarantees the right to free speech. It states:

> Congress shall make no law … abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the

> Government for a redress of grievances.

U.S. Const., Am. I. The First Amendment, the Supreme Court has held, applies to the states and their political subdivisions through the Fourteenth Amendment. *Wallace v. Jaffree*, 472 U.S. 38, 49 n. 34 (1985) (briefly reviewing cases endorsing this proposition). It even protects the free speech rights of lawyers. *See, e.g., Peel v. Attorney Registration and Disciplinary Com'n of Illinois*, 496 U.S. 91 (1990); *see also State ex rel. Oklahoma Bar Ass'n v. Porter*, 1988 OK 114, 766 P.2d 958.

Even without the First Amendment, Oklahomans still have free speech rights under state law. According to the Oklahoma Constitution:

> Every person may freely speak, write, or publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.

Okla. Const. Art. II, § 22. *See also* Okla. Const. Art. II, § 2 ("All persons have the inherent right to life, liberty, and the pursuit of happiness, and the enjoyment of the gains of their own industry."); Okla. Const. Art. II, § 3 (protecting right to assemble and to petition for redress of grievances); Okla. Const. Art. II, § 33 ("The enumeration in this Constitution of certain rights shall not be construed to deny, impair, or disparage others retained by the people.").

The right to speak freely is not unlimited. *Konigsberg v. State Bar of California*., 366 U.S. 36, 49-50 (1961) (state could deny applicant admission to bar for refusing to answer questions about Communist Party affiliation); *Near v. State of Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931) (prohibition against prior restraints is not absolute).

Lawyers have long been subject to limitations on their speech to which other citizens are not. *See, e.g., Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447 (1978) (holding

it constitutional for a state bar to discipline lawyer for soliciting clients in person); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (balancing state's interest in regulation of the bar against lawyer's First Amendment interests in advertising). As early as 1871, the Supreme Court held lawyers must refrain from making statements attacking the integrity of the judiciary. *Bradley v. Fisher*, 80 U.S. 335, 356 (1871). More recently, the Supreme Court has upheld state ethical limitations on what lawyers can say publicly about a pending or anticipated proceeding. *See, e.g., Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991).

Trial Publicity And Other Rules Restricting Lawyer Speech.

The primary portions of the Oklahoma Rules of Professional Conduct that directly place ethical restraints on the speech of members of the bar include Rules 3.6 and 3.8. Rule 8.2 also restricts speech by limiting the ability of attorneys to criticize members of the judiciary. Other provisions that one considers more as rules of practice than limitations on lawyer speech nevertheless restrict what a lawyer may say. For example, attorneys may not reveal client confidences. Okla. R. Prof. Cond. 1.6.

Rule 3.6, entitled "Trial Publicity," provides:

> (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 lawyer would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have an imminent and materially prejudicial effect on the fact-finding process in an adjudicatory proceeding relating to the matter and involving lay fact-finders or the possibility of incarceration.
>
> (b) 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.

> (c) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Rule 3.8 sets forth special responsibilities of prosecutors. In pertinent part, it provides:

> The prosecutor in a criminal case shall:
>
> (e) exercise reasonable efforts 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;
>
> (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

Finally, Rule 8.2(a) states:

> A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

Limits On Extrajudicial Statements And Variations From The Model Rule.

Rule 3.6 prohibits a lawyer, under certain circumstances, from making extrajudicial statements knowing they will be publicly disseminated. According to the Comment, the Rule is needed because "[p]reserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to litigation[.]"

Under Rule 3.6, the standard for determining what is prohibited is whether the statement "will have an *imminent* and *materially prejudicial* effect on the fact-finding process." (emphasis added). In this regard, Oklahoma's Rule 3.6 differs from Model Rule

3.6. Unlike the Oklahoma version, the Model Rule counterpart merely prohibits extrajudicial statements to the press that a lawyer knows or reasonably should know will have a "substantial likelihood of material prejudice."

There are other differences between the Model Rule and the Oklahoma Rule. Unlike the Model Rule, Oklahoma's Rule 3.6 does not distinguish between criminal cases and civil cases. Of course, Rule 3.8 places an added responsibility on prosecutors of taking reasonable efforts to prevent other persons, such as investigators and law enforcement officials, from making statements the prosecutor is prohibited from making under Rule 3.6.

***Gentile*.**

In *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), the Supreme Court addressed the issue of trial publicity by a lawyer. A seriously divided Court delivered two separate opinions, one by Justice Kennedy, another by Chief Justice Rehnquist. Each opinion contains a portion of the Court's holding regarding the Nevada rule regulating extrajudicial statements by lawyers.

Gentile held the press conference the day after his client was indicted. The defendant was acquitted six months later. The State Bar of Nevada then filed a complaint against Gentile.

In the Kennedy opinion, the Court held Nevada Supreme Court Bar Rule 177, which was based on the ABA Model Rule, was unconstitutional. The problem was the safe harbor provision. It provided that a lawyer could describe, without elaboration, the general nature of the defense. The Court held the Nevada Rule was void for vagueness because of its failure to provide fair notice to Gentile that he could be disciplined for

statements he made during a press conference. 501 U.S. at 1048.

In Rehnquist's portion of the Court's opinion, the majority held the stricter "clear and present danger" test applicable to restraints on the press, *see Nebraska Press Assn. v. Stuart*, 427 U.S. 539 (1976), did not apply to lawyer speech. *Gentile*, 501 U.S. at 1075-76. The Court held a lawyer could be disciplined for extrajudicial comments if he "knew or should have known that there was a substantial likelihood that his statements would materially prejudice the trial of his client." *Gentile*, 501 U.S. at 1062-63. This less stringent standard, the Court reasoned, is a constitutionally permissible balance between the First Amendment rights of attorneys and the Sixth Amendment right of an accused to, and the interests of the government in, a fair trial. *Gentile*, 501 U.S. at 1075.

As stated in the Comment, the imminent and material prejudice standard in the Oklahoma Rule approximates the stricter clear and present danger test. It is not the standard found in current Model Rule 3.6, which was amended in 1994 in light of *Gentile*. Oklahoma's version also clarifies that it is the "fact-finding process" that must be subject to prejudicial effect. And, unlike the Model Rule, the current Oklahoma Rule 3.6 requires that the adjudicatory proceeding involve lay fact-finders or the possibility of incarceration. Thus, it does not apply to administrative proceedings. But it does apply to grand jury proceedings, assuming they involve the possibility of incarceration.

Probably Permissible Publicity.

As a result of the 1994 amendments, the Model Rule lists statements which are likely to be found permissible because they are not "materially prejudicial." The Oklahoma rule, by contrast, does not include such a list, at least not in the body of the rule. Much of what is contained in the Model Rule list is in the Comment to Oklahoma

Rule 3.6. There, the following categories of statements are identified as "ordinarily" allowed:

1. the claim, offense or defense involved, and except when prohibited, the identity of persons involved;

2. information contained in a public record;

3. whether an investigation of the matter is in progress;

4. the scheduling or result of any step in the litigation;

5. a request for assistance in obtaining evidence and information necessarily related;

6. a warning that a person involved poses a danger if there is reason to believe a likelihood of substantial harm to an individual or the public; and

7. certain additional information in criminal cases, such as whether the accused has been apprehended.

Probably Prejudicial Publicity.

Paragraph 5 of the Comment to Rule 3.6 provides a list of subjects that are likely to have a materially prejudicial effect on a proceeding. According to the Comment, subjects lawyers should generally avoid include:

1. statements about the character or credibility of a party, suspect or witness;

2. the expected testimony of a party of a witness;

3. the possibility of a plea in a criminal case;

4. the performance of tests or test results (e.g., an accused's refusal to take a polygraph);

5. an opinion regarding the guilt or innocence of a criminal defendant; or

6. the fact a person has been charged with a crime, unless there is a statement explaining it is merely an accusation and the person is presumed innocent.

Additionally, there is the vague, broad, catchall category the Comment identifies as apt to

prejudice. This is the one most likely to chill lawyers' speech. It is "information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence at trial and that would, if disclosed, create an imminent and material risk of prejudicing an impartial trial."

In *Gentile*, Chief Justice Rehnquist discussed the reasoning behind such a rule is that statements of lawyers are likely to be considered reliable and true because lawyers have unique access to information through discovery and client communications. 501 U.S. at 1074. "Extrajudicial comments on, or discussion of, evidence which might never be admitted at trial and *ex parte* statements by counsel giving their version of the facts obviously threaten to undermine [the] basic tenet" of trials being decided by impartial jurors, who know as little as possible about the case, based on the evidence admitted at trial. *Gentile*, 501 U.S. at 1070.

Judicial Determinations.

No Oklahoma court decisions or ethics opinions address the likely-to-be-inadmissible category or issue. Other states, however, have construed similar restrictions.

A lawyer in Pennsylvania sought advice regarding how to handle media inquiries about his clients and their daughter. The daughter had died after the hospital where she was being treated removed her, against the parents' wishes, from a ventilator. The media wanted medical records, depositions and videos taken by a family member showing the parents' hysteria and grief.

In an informal opinion, the Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility said the applicable rule, Rule 3.6, was vague as applied to the situation. The lawyer, the Committee said, must determine if the

information in the records and video is likely to be inadmissible in determining if it will be materially prejudicial. The Committee stated:

> Ultimately, you must use your best judgment as an attorney to make the determination of whether to disseminate information to the media. Whether you can release this information this information is not merely a question of ethics alone[.] [I]n making this decision, you must consider the facts of your case along with the rules of civil procedure, the rules of evidence, the rules of ethics, and the underlying moral and legal policies behind protecting the public interest. This should help you balance the interests between protecting the right to a fair trial and safeguarding the right to free speech.

Pa. Eth. Op 96-45, 1996 WL 928141. Given so many variables and the difficulty in knowing whether information will be admissible, there is little ethical guidance both regarding what falls in this category and whether the information could still be considered prejudicial even if not admissible.

Factors to consider in determining the likelihood and degree of prejudice include the nature of the proceeding and the timing of the statement, Comment, ¶ 6, Rule 3.6, as well as the extent of previous circulation of the information and the lawyer's intent in making the statement. American Bar Association, Center for Professional Responsibility, ANNOTATED RULES OF PROFESSIONAL CONDUCT, pp. 381-82, ABA (2nd ed.1993). In *Sheppard v. Maxwell*, 384 U.S. 333, 360-61 (1966), the Supreme Court had overturned a conviction finding the defendant had been denied a fair trial where the prosecutor disclosed inadmissible evidence to the media immediately prior to and during trial. In *Gentile*, Chief Justice Rehnquist observed that the "substantial likelihood of prejudice" standard would "rarely be met where the judge is the trier of fact." 501 U.S. at 1077. His reasoning is likely a reason that Oklahoma chose to restrict extrajudicial statements only where there are lay fact finders or where there is a possibility of incarceration.

Rule 3.6 is designed to encourage lawyers to be responsible regarding extrajudicial statements even when the rule does not strictly prohibited their statements. The Comment to the Rule contains strong aspirational language:

> [R]egardless of the likelihood of public dissemination of a statement, regardless of the timing of the statement, regardless of the vulnerability of a proceeding to prejudice as a result of the dissemination of a particular statement, and regardless of whether a lawyer is involved in a proceeding or associated with a lawyer who is involved in it, a lawyer should aspire to refrain from making statements that pose a substantial likelihood of prejudicing the fairness of a proceeding or unjustifiably casting doubt on the fairness of the proceeding or the legal system in general.

Comment , ¶ 6, Okla. R. Prof. Cond. 3.6.

Application Of Ethics Rules To Attorney Speech.

No reported judicial decisions or Ethics Committee findings directly apply Rule 3.6. However, in *Wright v. Grove Sun Newspaper Co., Inc.*, 1994 OK 37, 873 P.2d 983, the Oklahoma Supreme Court discussed the relationship between the Rule and the actions of a prosecutor. The Court held the newspaper was entitled to assert the fair report privilege, a defense against a claim of defamation.

The Court also reviewed the prosecutor's actions at a press conference. He had distributed a transcript of a conversation between two undercover narcotics agents, identifying the plaintiff in connection with a drug investigation. The prosecutor's conduct was within his official duties. Citing the old Rule 3.6, the Court stated:

> District attorneys in Oklahoma have historically used press conferences to distribute information about the activities of their offices to the citizenry they represent. Disseminating information to the public enhances, within the communities served by the prosecutor's office, confidence in and understanding of his governmental mission.

1994 OK 37, ¶ 7, 873 P.2d at 988 (citations omitted).

Although the Court looked approvingly at the prosecutor's actions, the version of

Rule 3.6 then in effect provided a lawyer involved in an investigation could state, without elaboration, the matter in progress, the general scope of the investigation and, unless prohibited, the identity of persons involved. It is unclear, however, whether statements regarding "the general scope of the investigation" are still permissible under current Rules 3.6 and 3.8. There is significant reason to doubt that they are.

The Comment to Rule 3.6 indicates statements regarding the identity and occupation of the accused, the fact of an arrest, including the time and place, the identity of investigating officers and the length of the investigation, ordinarily do not violate the Rule. However, the fact that a person has been charged with a crime is likely prejudicial, unless it is accompanied by a statement that the accused is presumed innocent. Additionally, Rule 3.8(f) provides a prosecutor shall refrain from making extrajudicial comments that have no legitimate law enforcement purpose and have a substantial likelihood of increasing public condemnation of the accused.

Alternatives To Restraints On Attorney Speech.

The primary rationale for limiting lawyers' speech about pending or expected litigation is to protect the right to a fair trial. Of course, the right to a fair trial must be balanced not only against a lawyer's First Amendment rights, but also against the public's right to know about judicial proceedings. But what proof is there that pretrial publicity actually adversely impacts a defendant's right to a fair trial?

Several commentators point out that no empirical data support the premise that pretrial publicity by attorneys actually prejudices trials. *See, e.g.,* Bell & Odysseos*, Sex, Drugs, and Court TV? How America's Increasing Interest in Trial Publicity Impacts our Lawyers and the Legal System*, 15 Geo. J. Legal Ethics 653, 662 (2002) ("Bell &

Odysseos”); Hellman, *The Oklahoma Supreme Court’s New Rules on Attorneys’ Trial Publicity: Realism and Aspiration*, 51 Okla. L. Rev. 1, 25 (1998) (“Hellman”); Drechsel, *An Alternative View of Media-Judiciary Relations: What the Non-Legal Evidence Suggests About the Fair Trial-Free Press Issue*, 18 Hofstra L. Rev. 1 (1989). In fact, they note, the empirical studies actually cut the other way. Extensive pretrial publicity generally has no effect on jurors. *Id.*; *see also Gentile*, 501 U.S. at 1054-55 (Kennedy, J., concurring).

Of course, Rule 3.6, as with all the Rules of Professional Conduct, applies only to lawyers. It does not restrain clients, law enforcement authorities or others who are not lawyers from making extrajudicial, potentially prejudicial comments. But *cf.* Okla. R. Prof. Cond. 8.4(a) (“It is professional misconduct for a lawyer to ... violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another[.]”).

Courts have other methods of limiting trial publicity or of mitigating its effects. A judge may transfer venue in both criminal and civil cases if a party cannot receive a fair trial where the case is pending due to pretrial publicity. *Gregg v. State*, 1992 OK CR 82, 844 P.2d 867; 12 O.S. § 140. Courts can use *voir dire*, and even individual or sequestered *voir dire* in extraordinary cases, to find jurors who are able to be fair and impartial and willing to set aside impressions from publicity. *See* 7 Okla. Prac., Trial Practice §§ 3.16, 3.43 (2006). Under some circumstances, judges can use gag orders or can limit the press from televising trials. In rare situations, a sequestration order may control pretrial publicity and its effects. Bell & Odysseos, 15 Geo. J. Legal Ethics at 653, 666-67.

Oklahoma has had its share of cases generating tremendous pretrial publicity. In

the Murrah Building prosecutions, judges employed several tools to combat pretrial publicity. Changes of venue and gag orders, for example, helped ensure fair trials. *United States v. McVeigh*, 931 F. Supp. 756 (D. Colo. 1996) (order imposing restrictions on extrajudicial comments); *United States v. McVeigh*, 918 F. Supp. 1467 (W.D. Okla. 1996) (order granting change of venue); *Nichols v. District Ct. of Okla. Cty.*, 2000 OK CR 12, 6 P.3d 506 (ruling there should be selective sealing of records regarding fees and expenditures for Nichols' defense). In *McVeigh*, the government agreed that a transfer of venue was appropriate. 918 F. Supp. at 1470. Ironically, it was the government that requested an order restricting extrajudicial statements by all counsel.

The prosecution accused lead defense counsel of ethical improprieties in generating publicity. The Court discussed Rule 3.6 of the Colorado Rules of Professional Conduct (venue was moved from Oklahoma to Colorado), but avoided directly addressing whether counsel's conduct had violated ethical rules. Instead, saying it had relied to that point on the integrity of the lawyers, the court concluded it was "now necessary for the court to articulate the particular standards to be followed in this litigation ... for future guidance in all forms of extrajudicial statements about this litigation." 931 F. Supp. at 760.

The court issued an order regarding the release of information based on Local Criminal Rule 27 of the Western District of Oklahoma, which is similar in many respects to Model Rule 3.6. Generally, it provided that no lawyer appearing in the case or person associated with the lawyer could release or authorize the release of information, if there was a reasonable likelihood that such disclosure would interfere with a fair trial and all court personnel were prohibited from disclosing information that was not part of the

public record. 931 F. Supp. at 760-61.

The courts used multiple tools to combat the unusually extensive and controversial publicity and to ensure a fair trial. Nevertheless, the cases, as others have noted, were unusual. *See* Hellman, 51 Okla. L. Rev. at 24. As Oklahoma City University School of Law Dean Lawrence Hellman observed, trial publicity is controversial in only a small fraction of cases and courts are generally reluctant to see it as a serious problem. *Id.* at 23-25 (noting that only four times has the Supreme Court reversed a conviction because of trial publicity affecting the fairness of the proceeding).

Necessity of the restrictions

With the many tools available and the empirical research suggesting there is little relationship between extensive pretrial publicity, it is questionable whether rules restricting extrajudicial comments of lawyers are necessary. At least "broad prohibitions seem unnecessary to serve a substantial state interest." *Id.* at 26. In his memorandum to the RPC Committee accompanying the suggested revisions to Rules 3.6 and 3.8, Dean Hellman stated:

> If there is little to be gained from such rules in terms of trial fairness, any costs attributable to them in terms of First Amendment values is especially troubling[.] Because unfettered speech, especially truthful speech critical of the government, is considered to be beneficial to the public interest, unnecessary restrictions are unwise.

51 Okla. L. Rev. at 28.

Are any restrictions necessary or wise? At the time of drafting, the Oklahoma Bar Association's Rules of Professional Conduct Committee apparently believed some restrictions were necessary, but wanted fewer than those imposed by the Model Rule and other States. Dean Hellman reports that, when the modifications were adopted, the

Committee had not completed its drafting. *See* Hellman, 51 Okla. L. Rev. at 14-19.

However, members of the bar currently have an opportunity to weigh in on the issue of necessity of the restrictions. The OBA RPC Committee has conducted a comprehensive review of the Rules of Professional Conduct. It has recommended significant changes to the Rules, the Comments and the Preamble. The OBA has given notice it is accepting comments. The proposed rule changes can be viewed at www.okbar.org/ethics/ORPC.htm.

The Board of Governors plans to schedule public hearings on the proposed changes in the summer of 2006. Interestingly, no change is proposed to Rule 3.6 or its Comment. Only minor changes to Rule 3.8 have been proposed.

Criticism of the Judiciary

In *State ex rel. Oklahoma Bar Ass'n v. Porter*, 1988 OK 114, 766 P.2d 958, the Oklahoma Supreme Court considered discipline of an attorney for criticizing a member of the judiciary. E. Melvin Porter, a lawyer and state senator, made public, out of court statements to the media, accusing a federal judge of "show[ing] all the signs of being a racist." He claimed that he had "never tried a case before him that I felt I got an impartial trial out of him." Referring to the judge, he concluded, "if he wants to practice his racism that way that's his business." 1988 OK 114, ¶ 2, 766 P.2d at 960-61.

Porter testified before the Professional Responsibility Tribunal that he believed his remarks were true. The Bar Association did not dispute the truthfulness of the statements. The Tribunal concluded that the attorney's actions violated the predecessors to Rule 8.2 and recommended discipline. D.R. 1- 102(A)(5), stated that "A lawyer shall not … [e]ngage in conduct that is prejudicial to the administration of justice." D.R. 1-

102(A)(6) also prohibited a lawyer from [e]ngag[ing] in any other conduct that adversely reflects upon his fitness to practice law."

The Court refused to impose discipline. First, the Court stated:

> [T]he First Amendment is clearly offended by such a restriction on the free exchange of information pertinent to the functioning of government embodied by this prohibition of attorney criticism. Thus, utilization of disciplinary rules to sanction the speech here in question is a significant impairment of First Amendment rights. Where, as here, a prohibition is directed at speech itself, and the speech is ultimately related to the process of self government, the state may prevail only upon showing a subordinating interest which is compelling.

1988 OK 114, ¶ 24, 766 P.2d at 967. Amazingly, the Court continued, stating:

> The right of the public to receive this information occupies a critical citadel of the First Amendment rights. We have not been shown, nor can we at present conceive, of an interest sufficiently imperative to justify such a restriction of core First Amendment rights, at least where the statements made are not shown to be incorrect statements of fact. In the record before this Court no evidence was introduced to demonstrate that the statements were false or that they were insincerely uttered by a speaker having no basis upon which to found them.

1988 OK 114, ¶ 26, 766 P.2d at 968. See also *Standing Committee on Discipline of U.S. Dist. Court for Cent. Dist. of California v. Yagman*, 55 F.3d 1430, 1441-42 (9th Cir. 1995) (without proof of falsity, lawyer's allegation that judge was "drunk on the bench" cannot support imposition of sanctions).

To be protected, "the statement must be held to be speech on vital issues of self government protected by the First Amendment." 1988 OK at ¶ 32, 766 P.2d at 969. See also *Craig v. Harney*, 331 U.S. 367, 376 (1947) (judge may not hold in contempt one who publishes anything that tends to make him unpopular or to belittle him," even one who uses strong, intemperate language). However, the court made clear that false statements are not entitled to protection and the remarks were in bad form and were not

condoned. 1988 OK at ¶ 33, 766 P.2d at 970; cf. *Yagman*, 55 F.3d at 1438 ("Attorneys who make statements impugning the integrity of a judge are … entitled to certain First Amendment protections applicable in the defamation context.").

One case currently pending before the Michigan Supreme Court involves a grievance filed against a lawyer who, on a radio talk show, insulted three appellate judges. He "used numerous obscenities, called the justices 'three jackass court of appeals judges,' declared war on them and referred to them as 'Nazis.'" *Insulting judges escalates into speech case*, 28 The National Law Journal, No. 27, at 5 (March 13, 2006).

The Oklahoma Supreme Court concluded by advising lawyers to remember that their special duties as lawyers are not completely co-extensive with the protections of the First Amendment:

> First Amendment license to comment is broader than the traditional correct demeanor expected of an officer of the court. Nothing said in this opinion changes those expectations.

1988 OK at ¶ 33, 766 P.2d at 970. Citing the Oklahoma Statutes, the Court added that all lawyers have taken an oath "to act in the office of attorney of this Court according to best learning and discretion, and with all good fidelity as well to the court and to client." *Id.*, quoting 5 O.S. § 2.

Practical Considerations.

So what do you do when the media come calling? Well, much depends on the desires and needs of your client. Cf. Okla. R. Prof. Cond. 1.2(a) ("A lawyer shall abide by a client's decisions concerning the objectives of representation … and shall consult with the client as to the means by which they are to be pursued."). Especially if you can anticipate media interest in the matter, you should discuss media relations with your

client at the outset, to make sure that you and the client agree on appropriate approaches.

Let's assume you and the client have properly and appropriately agreed to talk with the media. What do you do?

First, you should know what your message is. Stick with your message. Don't let the reporter control your message or get you off message. Don't get into a shouting match with your adversary in the media.

Don't forget the 15-second rule. These days, the media, especially broadcast media, use short snippets. The public has become accustomed to hearing news in quick responses. If it takes much longer than 15 seconds to explain it, you may lose your audience.

Don't use legalese. It's a language no one else understands (for that matter, a lot of lawyers don't understand it, either). There's plenty of distrust of lawyers. Legalese makes it worse.

Instead, use simple English. Boil away the rhetoric. Make your statement comprehensible to the general public (who, after all, when you are talking through the media, is your audience,). Make it simple.

As a rule of thumb, don't say, "No comment." That kind of response always looks worse than any other response, or even no response at all.

If possible, put onto paper what you are going to say. If appropriate, issue it as a press release. If not, refer to it as you speak to the reporter.

Remember that editors, not reporters, generally write the headlines. Also keep in mind that editors sometimes edit a reporter's story. Moreover, journalists generally must express a long story in few words. All of these things can have a significant impact on the

tone of a story.

Certain terms of art define your contacts with the media. You should become familiar with at least three of them: “on the record;” “on background;” and “off the record.”

“On the record” is easy. The reporter is free to use your comments and to attribute them to you. You may be quoted to other sources. You may be quoted for publication. If you don’t otherwise specify, all comments you make to a reporter will be considered as “on the record.”

“On background” is a little more problematic. Some reporters use “on background” to mean that they can use your material, and even quote you, but without attribution to you. They may identify you as “a source close to the case,” though they generally would try not to make your identity obvious. Others think of “on background” as meaning that they cannot quote you, whether for attribution or otherwise, but they can use the information you provide to make their story make sense.

There are variations on the “on background” theme. Some national reporters may take information “on deep background.” In that situation, apparently, the reporter may still use the information, but will make extra gyrations to protect the identity of the source.

“Off the record” is the last option. When talking with a reporter “off the record,” the reporter is not free to use the information, or the fact that you said it. Some reporters believe that they can look for the information from someone else.

There are a couple of rules on talking with reporters, whether “on the record,” “off the record,” or any other way. First, if you don’t specify ahead of time, your

comments are "on the record." Asking that something you've already said be taken "off the record" is akin to asking the jury to disregard the highly prejudicial comment the witness just blurted out. It's possible that the reporter will disregard what you'd just said, but don't count on it.

Second, if your comments are not all going to be "on the record," discuss what the ground rules are ahead of time. These terms of art are not hard and fast rules. If you want something to be "off the record," spend a few minutes discussing with the reporter what you mean by the term, as well as what the reporter understands it to mean. Make sure the reporter agrees with your understanding ahead of time.

Reporters work on deadlines. Most deadlines are minutes, or at most hours, away. If you cannot talk when the reporter contacts you, find out what the deadline is and undertake to contact the reporter sufficiently ahead of time for the story to run. If you will have on-going contact with the reporter, learn the reporter's deadlines and arrange to make yourself available in a timely manner.

There is nothing wrong with asking the reporter, "before we go on the record, what topic are you calling me about?" And don't be afraid to tell the reporter that you need to call back or that you need to consult with your client before commenting.

Remember your reputation. Reporters do. They keep lists, just like lawyers do. They remember who treated them well, and who didn't.

The converse is true, as well. Remember the reporter's reputation. Has a reporter treated you professionally? Remember that. Has a reporter treated you poorly? Remember that, too. Even if the reporter has not acted properly, that doesn't necessarily mean that you should refuse to talk with that reporter. But you shouldn't forget, for

example, when a reporter previously failed to abide by an "off the record" agreement.

Remember General Singlaub. Jack Singlaub was recalled from his post commanding American forces in Korea after he criticized, in a conversation he thought was "off the record," President Carter's proposal for cutting the American commitment of forces there.

Even when speaking "off the record," be judicious. Always assume that what you say will find its way to the public. Don't forget that "off the record" comments cannot include client confidences. *See* Okla. R. Prof. Cond. 1.6(a) ("A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation"); *see also State ex rel. Oklahoma Bar Ass'n v. Porter*, *supra*.

Don't forget that the job of a newspaper publisher is, ultimately, to sell newspapers. Naturally, the same is true in broadcast media – the job is to gain viewers or listeners. The more papers sold or people tuning in, the greater the revenue. Their desire to maximize revenue may not always be compatible with your desire for what you consider a fair report of your client's matter.

Finally, be cautious of getting in the media for the sake of publicity. Although we all know the old *dictum* that "for a lawyer, any publicity is good publicity," it's not necessarily so. In any event, because your primary duty is to the client and the system of justice, being judicious in this regard is vital. Cf. Okla. R. Prof. Cond., Preamble ("A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.").

McLuhan's Medium?

In *Understanding Media*, Marshall McLuhan in 1964 wrote that "[t]he medium is

the message." Many have debated the point. What is beyond debate, though, is that the media are ubiquitous, especially as concerns matters many lawyers handle.

Being prepared to deal with reporters in an ethical and professional manner should lead to good media relations and, hopefully, a reasonable report of the matter the lawyer is handling. Perhaps it is appropriate to conclude with a statement from the Oklahoma Supreme Court:

> [I]t should be a personal point of honor for each attorney to keep faith with himself and the oath he has taken, cognizant of the fact that one's own word and professional pride should be a sufficient principle upon which to base one's conduct.

State ex rel. Oklahoma Bar Ass'n v. Porter, 1988 OK at ¶ 33, 766 P.2d at 970.