# Ethics in 2021

## Federal Criminal Law Update

August 20, 2021

Presented by:

CYNTHIA EVA HUJAR ORR
GOLDSTEIN & ORR
310 S. ST. MARY'S STREET
29TH FLOOR TOWER LIFE BUILDING
SAN ANTONIO, TEXAS 78205
(210) 226–1463
whitecollarlaw@gmail.com

Advisory: Readers should exercise discretion when reading the portion of this paper concerning our clients' perception of justice since it cites artistic rap lyrics containing explicit language. It also contains offensive and inappropriate language used by defense counsel in a misguided attempt to defend his client in the Capitol events on January 6, 2021.

## Table of Contents

## I. Public Discourse

### A. "If It Bleeds, It Leads"

The media is not what it once was. Gone are the days when neighbors and families gathered around a tv screen at home, the local diner, or bar to hear breaking news or catch up on recent developments. The American public receives this information on multiple platforms instantaneously and daily, whether or not they intend to. From the Capitol protests/insurrection on January 6, 2021 to lawyers' pleadings and public comments about alleged election fraud in the 2020 Presidential election such content is broadcast over Twitter, Facebook, Snapchat, TikTok, Instagram, YouTube, WeChat and even instant messaging apps, such as WhatsApp and Kik. The pervasive dissemination of information provides even the least technologically advanced citizens real time pushed updates regarding the political, social, and cultural climate. These advances in technology and online media over the years have made it easier for the public to be informed and voice their opinions regarding crucial issues that affect our daily lives. Social media has been recognized by the United States Supreme Court as the new public square.[1] It has also allowed almost any influencer to try a case in the court of public opinion. This, the current reference to bigoted women as Karens.[2] With the advent of Zoom, some civil district courts in Bexar County were invaded with porn by

[1] *Packingham v. North Carolina*, 582 U.S. ___ (2017)."With one broad stroke, North Carolina bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge. Foreclosing access to social media altogether thus prevents users from engaging in the legitimate exercise of First Amendment rights.

[2] A woman in a public park falsely accused a black man (who was merely bird watching and who had asked her to leash her dog) of attacking her. Fortunately, as she made her false report to the police via a 911 call, the gentleman was video taping her on his phone; disproving her false claims. Her name was Karen. https://chicagocrusader.com/black-man-who-exposed-karen-in-central-park-dog-video-cites-ahmaud-arbery-for-recording-amy-cooper/

hijackers. And a criminal speeding ticket jury trial took place in JP Court, but not without significant problems. *See* Criminal Court Reopening and Public Health in the COVID 19 Era.

**B. Duty to Maintain Technological Competency**

The Rules of Ethics require counsel to maintain technological competency. Whether it concerns state and federal electronic filing, efficient word processing and document editing tools, the security of cloud data, virtual meeting platforms, or the niceties of cellular communication; counsel must have adequate technological knowledge to competently represent clients. Rule 1.01 of the Texas Disciplinary Rules of Professional Conduct requires counsel to be competent. Commentary expressly mentions this includes competence in relevant technology. While the most obvious application of this rule in the criminal context will involve competence in computer and cell phone technology with regard to search warrants, subpoenas, wire tap recordings and minimization techniques and motions to suppress; it also includes competence in public discourse and the extent that client's cases are publicized on social media.

**C. Public Comment to Correct Publicity Prejudicing an Adjudicative Proceeding**

Counsel must be aware of the extent to which a client's case is covered on social media sites that disperse immediate and sometimes harmful information. There is no longer a big or small case. Every case has the potential to "break the internet;" or receive such widespread coverage that your client may be convicted before even faced with formal charges. Entire shows are dedicated to hour long documentaries on pending cases—20/20, Dateline, and Discovery ID are only a few examples. Innumerable podcasts cover every detail of pending cases as well. This type of media can "go viral", publicizing your client's case world-wide; 24/7. In this environment, counsel must consider whether the silent and stoic response, that once assured that a story would not have

"legs,"[3] is any longer effective. Allowing such pervasive media coverage to go unanswered may, in fact, be ineffective. A lawyer may not make a public statement that will have a substantial likelihood of materially prejudicing an adjudicative proceeding. The goal of this rule is to prevent a lawyer from influencing a trial's outcome or prejudicing the jury venire.[4] A lawyer cannot make an extrajudicial statement that a reasonable person would expect to be dispersed by means of public communication. But this is counter balanced by the fact the rule recognizes that a lawyer can make a statement for public dissemination of it is made to counter the "unfair prejudicial effect of another public statement."[5]

The phenomenon of pervasive electronic dissemination of case information raises important questions regarding attorneys' ethical duties while advocating for their clients in the public realm. For instance, what actions may an attorney take when attempting to correct false information disseminated about their client? Do public pre-trial statements by the prosecution violate the Fair Trial vs. Free Discourse dichotomy? Is it appropriate for attorneys to publicly vouch for their clients? Do we, as attorneys, have a duty to wage a public defense in addition to the one we present in the courtroom? Are attorneys allowed to provide opinions regarding cases in which they are not counsel? Should they be allowed? When should judges issue gag orders in this environment? When does a client effectuate a waiver of attorney-client privilege in a statement to the media? These are just some of the ethical issues counsel faces in the electronic media rich environment. We will also cover the broader Texas attorney-client privilege, the ethical rules that govern conduct of lawyers in Texas federal courts, conflicts of interest both in multiple representation and regarding professional self-interests, and the disclosure required of federal prosecutors in Texas under the

[3] A reference to the length of time a story remains in the media.

[4] Rule 3.07 of the Texas Disciplinary Rules of Professional Conduct.

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

[5] Rule 3.07 of the Texas Disciplinary Rules of Professional Conduct, comment 3.

ethical rules. In addition, we will consider whether how we treat counsel who are women, minorities, or who are differently abled or oriented is governed by the Texas Rules. This presentation constitutes one attorney's view on these crucial issues, and how we as criminal defense attorneys, can best advocate for our clients' interests while protecting our own professional integrity.

American Bar Association Model Rule (Model Rule) 1.3 serves as a starting point in the analysis: "A lawyer shall act with reasonable diligence and promptness in representing a client."[6] Sounds easy enough to follow—provide zealous representation, and don't slack off. But just how far this underlying rule allows attorneys to go in their representation has been highly contested. With respect to public comments by attorneys involved in criminal proceedings, ABA Rule 3.6 is even more instructive:

> "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."[7]

The rule identifies types of public communication that do not constitute a violation of this rule:

> "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 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] (6) a warning of danger

[6] MODEL RULE OF PROF'L CONDUCT R. 1.3 (2018).

[7] MODEL RULE OF PROF'L CONDUCT R. 3.6(a)(2018)[emphasis added].

> concerning the behavior of a person involved…."[8]

Additional permitted disclosures in criminal cases are:

> "(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."[9]

Finally, 3.6 allows a lawyer to make statements that will protect the client from prejudice caused by publicity:

> "a reasonable lawyer would believe is required to protect a client from substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client."[10]

This exception opens the door to any response necessary to neutralize the prejudice. In almost every federal case, the U.S. Attorney's Office or Department of Justice will issue a press release. These press releases seldom are limited in scope to the exceptions for public comments. Coming from such an authoritative source, they appear to be a violation of the rule prohibiting a statement in the media that has a substantial likelihood of prejudicing an adjudicatory proceeding. They are guaranteed to lead the news.

Recognizing that public opinion is often shaped by media heads and outlets that persistently analyze the actions of public officials, attorneys, and the like, it is imperative to ensure prosecuting attorneys don't "cross the line" when issuing public commentary. Counsel should correct any misimpression these press releases foster and attempt to cure the prejudice they cause.[11] Thus, in the current environment, counsel may need

---

[8] MODEL RULE OF PROF'L CONDUCT R. 3.6(b)(2018).

[9] MODEL RULE OF PROF'L CONDUCT R. 3.6(b)(7) (2018).

[10] MODEL RULE OF PROF'L CONDUCT R. 3.6(c)(2018).

[11] Ira H. Raphaelson, "Press….Press…Pull": When "No Comment" No Longer Serves the

to issue a statement to level the playing field after a prosecution press release. It is notable that in Special Counsel Robert Mueller's tenure as Independent Counsel he issued factual press releases in his indictment, conviction, or guilty pleas of thirty-four people and three.[12]

However, in another case in which the prosecution and law enforcement pandered to the media by making the accused available for two perp walks, the federal court sustained the law suit against the authorities.

> "This court is convinced beyond doubt that the perp walk procedure is not designed nor intended for the purpose of information dissemination, but rather for the purposes of incident dramatization and arrestee humiliation."

*Lauro v. City of New York,* 39 F. Supp. 2d 351 (S.D.N.Y. 1999)[sustaining law suit].

**D. The Supreme Court Recognizes Our Duty to Speak**

In *Gentile v. State Bar of Nevada*, the Supreme Court held that attorneys are allowed to comment on a case in order to correct false.[13] Dominic Gentile, a Nevada attorney, held a press conference after his client was indicted. He alleged that a member of the Las Vegas Metropolitan Police Department was responsible for the offenses, not his client.

> "When this case goes to trial, and as it develops, you're going to see that the evidence will prove not only that [Defendant] is an innocent person and had nothing to do with any of the charges that are being leveled against him, but that the person that was in the most direct position to have stolen the drugs and money, the American Express Travelers' checks, is Detective Steve Scholl…. There is far more evidence

---

Client's Interests, 33RD ANNUAL NATIONAL INSTITUTE ON WHITE COLLAR CRIME (2019).

[12] Muller Investigation: All of the Indictments, Guilty Pleas, and Convictions from Robert Mueller's Investigation, Time, March 24, 2019, by Ryan Teague Beckwith.

[13] 501 U.S. 1030 (1991).

> that will establish that Detective Scholl [was responsible] than any other living human being."[14]

Justice Kennedy, writing for the majority, first characterized Gentile's speech as classic political speech—speech that lies at the very heart of the First Amendment.[15] He next noted that attorneys' responsibilities do not begin at court, and suggests that our duties extend far beyond that, both in time and location:

> "[Attorneys] cannot ignore the practical implications of a legal proceeding for the client. Just as an attorney may recommend a plea bargain or civil settlement to avoid the adverse consequences of a possible loss after trial, so too an attorney may take reasonable steps to defend a client's reputation and reduce the adverse consequences of indictment, especially in the face of a prosecution deemed unjust or commenced with improper motives. A defense attorney may pursue lawful strategies to obtain dismissal of an indictment or reduction of charges, including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried."

Justice Kennedy further explains that if anybody should be authorized to make public statements about the nature of a criminal case, it should be attorneys who are trained, well-informed, credible, and qualified to speak about the intricacies of the case.[16] This analysis is right in line with the American Bar Association's Criminal Justice Standards for Fair Trial and Public Discourse which espouse the view that an open and transparent criminal justice system is crucial to democracy, and that attorneys and other officials involved in the criminal justice system must ensure proceedings are conducted fairly.[17]

At the very center of the *Gentile* opinion is the notion that public comment is often times

[14] Id. at 1059.
[15] Id. at 1034.
[16] Id. at 1056.
[17] ABA CRIM. JUST. STAND. ON FAIR TRIAL AND PUBLIC DISCOURSE 8.1.1(a)(b)(i)-(ii)(2016).

necessary to safeguarding our client's rights and mitigating use of the courts for improper purposes.[18] Dominic Gentile felt his commentary was imperative, due to concerns that repetitive pre-trial publicity from the state and law enforcement would affect potential jurors. In other words, "he sought only to counter publicity already deemed prejudicial."[19]

*Gentile* is one instance where an attorney's press statements properly protected his client's interests.

What if a former lawyer discusses his client's case? In *United States v. Scarfo*, the Third Circuit considered whether a heightened reason for restricting attorney speech needed to be shown when the attorney involved no longer represented the criminal defendant who was the subject of the speech. [20] The Court determined that the fact that the attorney no longer represented Scarfo did not prevent them from applying the Supreme Court's reasoning in Gentile.[21] The attorney in question was not just an ordinary citizen.

> "[He] was the beneficiary of extensive client communication, and his statements were received by the press as especially authoritative…. [the attorney here] was, for all intents and purposes, in the same position as the attorney referred to in the Gentile case—an insider privy to facts, and a public status removing him from the leagues of common observers or uninvolved attorneys. He was not merely a lawyer with a passing interest in the case."[22]

Applying the Gentile framework in this case, the court determined that the former attorney's statements to the press did not jeopardize the fairness of the trial or materially prejudice or impair the court's judicial power.[23] Where the Court had issued a gag order in the Scarfo case, the Court of Appeals found it was improper.

---

[18] Id. at 1058.
[19] Id. at 1042.
[20] 263 F.3d 80, 93 (3d Cir. 2001).
[21] Scarfo, 263 F.3d at 92-93 (2001).
[22] *Scarfo*, 263 F.3d at 93 (2001).
[23] *Scarfo*, 263 F.3d at 95 (2001).

## E. Vouching for Clients is a Dangerous Game

The lawyer who advanced a defense for the QAnon Shamin, Albert Watkins, made a bid for his client's release from pretrial detention by claiming he and all January 6, 2021 protesters had problems like people who ride the "short bus" and explained, using profanity, that his client was led to believe he was ordered to attack the capitol by former President Trump.[24] It may have garnered him attention, but his client was… DETAINED. He also revealed client confidences. Subsequently, a much more quiet mental health evaluation of his client ordered by the Court provided valuable defense evidence.[25]

Vouching essentially involves, to some degree, revelation of client confidences. As demonstrated by the QAnon Shamin case, vouching for a client can backfire, especially when information given to the press subsequently turns out to be false or unfavorable. Attorneys who have to retract their statements not only risk losing credibility, but they may also make their clients look like liars. This is so even if the client didn't ask their attorney to make the public statement in the first place. Attorneys who do decide to make public statements should limit their comments only to remarks based on their own indisputable observations, rather than information from a client or information that could change in the future.

## F. Not Being Blinded by the Glare of Your Rolex

Another issue attorneys who choose to speak publicly must be cautious regarding is their motive or perceived motive for public exposure. On one end of the spectrum is damage control—shielding your client's

[24] Vanity Fair Hive, Levin Report, "THEY'RE ALL FUCKING SHORT-BUS PEOPLE": CAPITOL RIOT ATTORNEY MANAGES TO INSULT AT LEAST THREE DIFFERENT GROUPS WHILE DEFENDING 1/6 ACTIONS https://www.vanityfair.com/news/2021/05/albert-watkins-jacob-chansley-capitol-attack

[25] Exclusive: 'QAnon Shman' in plea negotiations after mental health diagnosis. Reuters, July 23, 2021 by Sarah N. Lynch. https://www.reuters.com/world/us/exclusive-qanon-shaman-plea-negotiations-after-mental-health-diagnosis-lawyer-2021-07-23/

freedom and reputation from harmful information media attention that carries the potential of infecting the jury pool.[26] On the other end of the spectrum, there is the desire to be in the limelight at all costs.

Michael Avenatti, the former attorney representing Stormy Daniels, was a frequent figure in the national media in high-profile cases. He was known for making public claims that he has damaging information about public figures, which garnered mass media attention.[27] Avenatti was eventually convicted of extortion arising out of a meeting with attorneys for Nike in which he allegedly threatened to release harmful information about the brand, unless he was paid millions of dollars.[28] He has been sentenced to 2 ½ years and is now on trial for embezzling client funds. These allegations among others have put Avenatti in the public eye, but at what cost? Were his entreaties to Nike settlement negotiations? A jury found that they were not. Did every press conference about President Trump advance Ms. Daniel's case?

Immediately talking to the cameras and social media each time the opportunity presents itself will detract from one's credibility as an attorney. Even assuming revelations are of some public interest and might benefit a client in some way, one might question counsel's motive to routinely appear before the public. Is it to hold entities who engage in misconduct accountable, or is it really about one's own public image and obtaining popular recognition?

### G. Commenting on Cases That Aren't Yours

The ABA in its Standards on Fair Trial and Public

[26] *See Skilling v. United States*, 561 U.S. 358 (2010) [Defendant alleging pretrial publicity and prejudice prevented him from a fair trial had to show a presumption of juror prejudice or that actual bias so infected the jury].

[27] Brennan Weiss et al., Meet Michael Avenatti, the Former Professional Sports Car Driver Who Represented Stormy Daniels and Was Just Charged for Attempting to Extort More Than $20 Million from Nike, BUS. INSIDER (Mar. 25, 2019, 4:22 PM), https://www.businessinsider.com/michael-avenatti-bio-lawyer-representing-stormy-daniels-2018-3.

[28] Criminal Complaint at 3, United States v. Avenatti, No. 19MAG2927 (S.D. N.Y. March 24, 2019). See also https://ktla.com/news/local-news/michael-avenatti-faces-embezzlement-trial-in-california/

Discourse recognized that lawyers will comment on others' cases as news commentators. They advise that, in this circumstance, counsel should be competent to provide information about the law, legal procedure, and information that enhances the public understanding of criminal matters. However, the rules caution that counsel should not express opinions on the performance of counsel or predict outcomes.[29]

## H. Are Lawyer's Always Lawyers?

We saw Rudy Giuliani comment on the news about the January 6, 2021 capitol events alleging election fraud in the 2020 Presidential elections and asserting that we should have "Trial by combat." He spoke in manner that appears more intended to appeal to the President's base from the standpoint of a future election campaign than aimed at factual representations and encouraging participation in the election processes. When a person is a lawyer, is the individual always bound by the rules of ethics? Or can a lawyer wear another hat and perform the functions of a political adviser or a legislator without being bound by attorney rules of conduct. Was Giuliani's call to combat acting as a promotor of the Republican party and its leader? Or was he obstructing Congress Congress in its duty to certify the election results?

Giuliani claims to have been acting as a political promotor.[30] Do the rules of ethics and professional conduct apply to us in every role in which we appear as a representative?

The preamble to the ABA Model Rules suggests that the rules of ethics and professional conduct still apply.[31] And the current Bar complaint against him seems to support that view.

---

[29] Standard 8-2.4, Criminal Justice Standards on Fair Trial, Public Discourse.

[30] One who provides publicity like a press agent or public relations professional.

[31] Preamble to ABA Model Rules of Professional Conduct provides that "[T]here are rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity." See eg Rule 8.4.

## I. Press Releases by the Government

Prosecutors often make pre-trial press statements regarding investigations. An interesting question is to what degree do these statements violate Model Rule 3.6 and its state counterpart, Rule 3.06 of the Texas Disciplinary Rules of Professional Conduct, which prohibit a lawyer from seeking to influence jurors concerning the merits of a pending case by means prohibited by law or other rules of procedure.[32]

Ethics rules and standards in any given jurisdiction provide special guidance regarding such statements. The American Bar Association's Criminal Justice Section Standards on Fair Trial and Public Discourse is one such source. [33] They identify topics that pose a risk of prejudicing the criminal proceeding such that they should generally be avoided by prosecutors. Those areas include: (1) the defendant's prior criminal record; (2) character, credibility or reputation; (3) race, ethnicity, creed, religion, or sexual orientation; (4) personal opinion as to guilt or innocence, (5) existence or contents of any confession or statement, or failure to make a statement; (6) results of or failure to submit to any examination or test; (7) nature of physical evidence; (8) race, ethnicity, creed, religion, or sexual orientation, expected testimony, criminal record, and reputation of a witness or victim; (9) the possibility of a plea; and (10) information the prosecutor knows or has reason to know would be inadmissible.[34]

The Supreme Court in Gentile recognized that "extrajudicial statements [by attorneys] pose a threat to a pending proceeding's fairness, since they have special access to information through discovery and client communication, and since their statements are likely to be received as especially authoritative."[35] Limitations on such speech are necessary to ensuring Defendants are not condemned by negative publicity arising from prosecutorial statements. As the ultimate goal of a prosecutor is to serve justice,

[32] Tex. Disciplinary R. of Prof. Conduct 3.06(a)(2).
[33] ABA CRIM. JUST. STAND. ON FAIR TRIAL AND PUBLIC DISCOURSE (2016).
[34] ABA CRIM. JUST. STAND. ON FAIR TRIAL AND PUBLIC DISCOURSE 8-2.2 (a)(i)-(ix)(2016).
[35] 501 U.S. 1030 (1991).

even when that means dismissing a case, we hope that prosecutors abide by these standards, and value the presumption of innocence.

As discussed above, when the government is in the initial phases of pre-trial investigations of a high-profile case, and the grand jury has returned an indictment, a press conference will often follow. We see no commentary however, when the defense prevails and obtains an acquittal after trial.

When prosecutors do decide to make a press statement after an unfavorable disposition, it is usually to stand behind their initial investigation and decisions made before and during the trial, if any. Seldom do these subsequent statements contain apologies or an acknowledgement that justice has been done.

Jussie Smollett was recently charged with filing a false police report claiming he was a victim of a hate crime. Law enforcement involved in the investigation gave lengthy press conferences, detailing their investigation prior to him being charged. The press responded with wonderment at how guilty Smollett was and speculated how much jail time he could be expected to serve. When his case was resolved in a manner consistent with other false report cases (by a diversion), the news and outrage spread via public comments by the police department handling the case, the Mayor of Chicago, and even the President of the United States.

After the Cook County State's Attorney's office dismissed charges against actor Smollett, prosecutor Joseph Magats explained that the decision to drop charges was just that—not an exoneration. Magat further made clear: "[a]n alternative disposition does not mean that there were any problems or infirmities with the case or the evidence. We stand behind the Chicago Police Department's investigation and our decision to approve charges in this case. We did not exonerate Mr. Smollett. The charges were dropped in return for Mr. Smollett's agreement to do

community service and forfeit his $10,000…."[36]

After a jury acquitted East Pittsburgh Police Officer Michael Rosfeld of the shooting of 17-year-old Antwon Rose, [37] Alleghany County District Attorney Stephen A. Zappala Jr. issued a statement to the cameras, in light of the immediate demonstrations that erupted locally following the verdict:

> "While I respectfully disagree with their verdict, it is the people of this commonwealth who decide guilty or not guilty, and they have spoken to this matter…. In the interest of justice, we must continue to do our job of bringing charges in those situations where charges are appropriate, regardless of the role an individual holds in the community."[38]

This statement was issued among demonstrators who called for the DA's ouster: "Hey hey, ho ho, [DA] Steve Zappala has got to go!"

In both instances the statements of the Chicago police before charge and after resolution tainted the jury pool for the Smollett and other cases. In contrast, the statements of DA Zappala fostered respect for the law and the criminal justice process. However, he should have refrained from disagreeing with the jury's verdict and placing those jurors in the public eye and exposing them to harassment. Such statements threaten to intimidate future jurors and discourages them from voting

---

[36] Prosecutors on Dropping Smollett Charges: 'We Did Not Exonerate' Him, NBC CHI., https://www.nbcchicago.com/news/local/jussie-smollett-charges-dropped-reaction-507673291.html (last updated Mar. 26, 2019, 4:53 PM).

[37] P.R. Lockhart, Officer Who Shot Antwon Rose is Accused of Past Civil Rights Violations, VOX (July 5, 2018), https://www.vox.com/identities/2018/7/5/17537150/antwon-rose-police-shooting-pittsburgh-michael-rosfeld-civil-rights-lawsuit.

[38] Megan Guza & Renatta Signorini, *Not Guilty Verdict in Rosfeld Trial Sparks Demonstrations in Downtown, East Liberty*, TRIB LIVE (Mar. 22, 2019, 4:000 AM), https://triblive.com/local/pittsburgh-allegheny/what-to-expect-on-day-4-of-the-michael-rosfeld-trial/.

their honestly held beliefs in deliberations.

George Floyd, Breonna Taylor, Sandra Bland, and Eric Garner and many other incidents have caused us to reexamine our charging, sentencing, and trial decisions. We must do better and we must do more.

### J. Judicial Gag Orders—When Should They Be Issued?

Trial judges presiding over criminal cases have an affirmative duty to safeguard against potentially prejudicial pretrial publicity.[39] This safeguard can be manifested in the form of "gag" orders which restrict attorneys, parties, and witnesses from making extra-judicial statements about a case. The United States Supreme Court and Courts of Appeal follow different standards when reviewing gag orders, depending on the subject of the order.[40] In the Fifth Circuit, "gag" orders targeting attorneys are only permitted where there is a substantial likelihood that extrajudicial commentary will undermine a fair trial.[41] The Northern District of Texas has further analyzed that standard. "Gag" orders will issue when:

> "(1) there is a clear or serious threat to the fairness of the trial; (2) less restrictive alternatives are not adequate to mitigate the harm; and (3) the order would effectively prevent the threatened danger."[42]

Gag orders might provide protection and assurance that our clients receive a fair trial. But, when existing prejudice threatens a fair trial, gag orders acrt as a barrier to protecting clients' interests and reputations.

---

[39] *Pedini v. Bowles*, 940 F.Supp. 1020, 1023 (N.D. Tex. 1996) [citing *The News–Journal Corporation v. Foxman*, 939 F.2d 1499, 1512 (11th Cir. 1991)]; ABA CRIM. JUST. STAND. ON FAIR TRIAL AND PUBLIC DISCOURSE 8-4.1(a)(2016)["[J]udges…should not make, cause to be made, or condone or authorize the making of any public extrajudicial statement about a criminal matter other than one concerning the processing of the case."].

[40] *United States v. Scarfo*, 263 F.3d 80, 92 (3d. Cir. 2001).

[41] *United States v. Brown*, 218 F.3d 415 (5th Cir. 2000).

[42] *Pedini v. Bowles*, 940 F.Supp. 1020, 1024 (N.D. Tex. 1996) [citing *Nebreska Press Ass'n v. Stuart*, 427 U.S. 539, 563 (1976)].

Gag orders have become more prevalent and may be excessive when applied to the media. When applied to individual citizens involved in the proceedings, they may also be excessive based on the scope of the order.[43] "Because a gag order on the parties does not affect the media's rights, and is narrower than a blanket gag order on all the media, it's considered a less restrictive means of protecting fair trial rights."[44]

In *United States v. Brown*, the district court imposed a gag order on the parties and witnesses mandating that they refrain from

> "any public communications media about the case which could interfere with a fair trial, including statements intended to influence public opinion regarding the merits of this case, with exceptions for matters of public record and matters such as assertions of innocence."[45]

On review, the Fifth Circuit held that "gag" orders may be issued when there is a substantial likelihood that extrajudicial commentary will threaten a fair trial and that the "gag" order in question did not violate the First Amendment.[46]

Conversely, in United *States v. Scarfo*, the Third Circuit held that a gag order prohibiting former defense counsel from speaking to the press was unconstitutional. [47] Scarfo's initial defense attorney was disqualified from representation and subsequently revealed to the press that he expected the filing of a motion to suppress arising from the government's questionable surveillance

---

[43] Ruth Ann Strickland, *Gag Orders*, FIRST AMENDMENT, https://www.mtsu.edu/first-amendment/article/961/gag-orders (last visited Apr. 7, 2019).

[44] Isabel Farhi, *When Silence Isn't Golden: How Gag Orders Can Evade First Amendment Protections*, YALE L. SCHOOL, MEDIA FREEDOM & INFO. ACCESS CLINIC (Oct. 24, 2017), https://law.yale.edu/mfia/case-disclosed/when-silence-isnt-golden-how-gag-orders-can-evade-first-amendment-protections.

[45] *United States v. Brown*, 218 F.3d 415, 418 (5th Cir. 2000)[internal quotations omitted].

[46] *United States v. Brown*, 218 F.3d 415 (5th Cir. 2000).

[47] *United States v. Scarfo*, 263 F.3d 80, 83 (3d. Cir. 2001).

methods.[48] The district court rendered the order preventing "anybody from talking to the press about the motion that [the court hadn't] seen and…[knew] nothing about."[49] As an issue of first impression, *Scarfo* was unique, because it examined the ability of the court to "gag" a criminal defendant's former attorney, rather than the current attorney or the defendant.[50] In support of its holding, the court reasoned that the former defense counsel's comments posed no threat to the fairness of the trial nor to the jury pool.[51]

Roger Stone, "[r]epublican operative and longtime Trump friend," was faced with trouble after a judge learned that the book he was planning to publish carried the potential of violating a "gag" order to which Stone was subject. Although Stone is not an attorney, and the court merely issued a warning, U.S. District Judge Jackson stated that she had "'serious doubts whether [Stone] learned any lesson at all,' and warned she would order him to jail for future violations."[52] Clearly, Stone cannot be prevented from publishing a book he had written before he was charged with any offense. He has a First Amendment right to engage in free speech. It may have been wise to advise the Court of the impending publication at the time the gag order issued. However, a gag order should not extend so far.

## II. Implicit and Other Biases

The Texas Lawyers Creed is one all counsel swear to uphold when they become lawyers. Under the Creed, lawyers promise that their "word is [their] bond." That they will support the constitution, demean themselves in the practice of law, discharge duties to clients to the best of

---

[48] *United States v. Scarfo*, 263 F.3d 80, 83 (3d. Cir. 2001).
[49] *United States v. Scarfo*, 263 F.3d 80, 83 (3d. Cir. 2001).
[50] *United States v. Scarfo*, 263 F.3d 80, 91 (3d. Cir. 2001).
[51] *United States v. Scarfo*, 263 F.3d 80, 95 (3d. Cir. 2001).
[52] Spencer S. Hsu & Manuel Roig-Franzia, *Judge Orders Roger Stone to Explain Imminent Release of Book That May Violate Gag Order*, WASH. POST (Mar. 3, 2019), https://www.washingtonpost.com/local/legal-issues/judge-orders-roger-stone-to-explain-imminent-release-of-book-that-may-violate-gag-order/2019/03/01/c5302c0e-3c80-11e9-aaae-69364b2ed137_story.html?utm_term=.46778db7d62c.

their abilities, and conduct themselves with integrity and civility when dealing or communicating with all courts and parties. Under the Creed, counsel should treat all differently abled and persons different from themselves with the same respect and courtesy counsel desire for themselves.

Recent studies show that women lawyers are dismissed, harassed, and treated in a paternalistic manner in courts. Long standing statistics show that more African Americans are sentenced to prison than expected in light their percentage of the population and commission of similar crimes by white defendants. And disabled persons are overlooked or incorrect assumptions are made about their abilities. An example is my observation during the time that I was wheel chair bound that persons would stand in front of me, blocking my view or egress, and would speak to me loudly as if I were hearing disabled as well.

The Texas Lawyers Creed requires that we treat all court participants well. We should be mindful of our own implicit biases. Once we become aware of them, we self-correct. Becoming aware of implicit biases is simple with readily available through internet testing (IAT tests)[53] and recognition of current stereotypes.

## III. Conflicts of Interest

We are all familiar with the conflict of interest created by multiple representation. Where one lawyer (or one firm)[54] endeavors to represent two persons in one case. Each client has different interests and criminal exposure. It is the rare case in which the lawyer would be able to represent more than one person in a case because of counsel's duty of loyalty to the client and the competing interests of each client. For example, in *Wheat v. U.S.,* 486 U.S. 153 (1988) case, Eugene Iredale sought to represent Wheat after previously representing a co-defendant. The United States Supreme Court upheld the disqualification of Iredale because his position representing both co-defendants

[53] Implicit Association Test available online through Harvard.

[54] If one lawyer in a firm has a conflict of interest, all lawyers in that firm share the same conflict of interest. In such situation, when the lawyer is disqualified, the entire firm is disqualified.

would become "untenable" particularly because he could not cross-examine his former client, one of the co-defendants, in any meaningful way[55]

An additional conflict of interest arises because of the placement of Criminal Justice Act (CJA) vouchers under the authority of federal district judges and the Fifth Circuit Court of appeals to regulate.[56] The Cardone Report noted that unwarranted voucher cutting takes place in Texas and that placement of CJA regulation under the judiciary creates a conflict of interest. If counsel are neglecting to ask for expert witnesses, immigration counsel, or investigative assistance in cases where it is needed because a judge disfavors such requests; then counsel is functioning with an actual conflict of interest. Because a judge disfavors such requests or will voucher cut fees in cases where such requests are made, the lawyer under these circumstances is looking out for their own reputational or economic best interests with the judge and, thus, are acting adversely to the client.

This is because the voucher cutting process is preventing the lawyer from zealously representing his client. Rule 9.3 of the ABA Model Rules of Professional Responsibility states that "A lawyer shall represent a client zealously within the bounds of the law." "The duty of zealousness is a duty not just to the client, but to the system of justice as well in putting the government to its proof in assuring that no one is unjustly convicted of a crime" … "in criminal cases, a defense lawyer may…put the government to its proof in every case and require the prosecutor to prove every element of the offence to assure that no one is unjustly convicted." This means that Lawyers can ask

---

[55] This is because he could not use any information that he learned by virtue of representing his former client to assist his current client and could not act adversely to his former client in favor of his current client. Please note that the *Wheat v. U.S.*, 486 U.S. 153 1988) has been overruled in part by *U.S. v. Gonzales-Lopez*, 548 U.S. 140 (2006), which held that one's right to counsel of choice is not satisfied by the fact that other competent counsel is available to try the case. Depriving one of their counsel of choice is structural error. *U.S. v. Gonzales-Lopez,* 548 U.S. 140, 151 (2006)[concerning co-counsel].

[56] See generally 2017 Report of the Ad Hoc Committee to Review the Criminal Justice Act (the Cardone Report) pages xviii-xix; The Crisis in Federal Criminal Law

for the government to prove its case and lawyers have a duty to zealously act to make sure their client is not wrongfully convicted. Judges that restrict the necessary resources of appointed counsel undercut this principle and undermine justice when they do so to save money. Attorneys, by folding to the authority of such judges, violate their duty of loyalty. Because the accused in a criminal case is entitled to counsel to represent his or her interest "single-mindedly" without loyalty divided between the client and another that might restrain or interfere with the lawyer's judgement or actions on behalf of the client." Counsel should always request the necessary resources regardless of the popularity of such requests.

Our clients have little faith in the justice system and justice perceived is as important and justice received. Recent rap lyrics show the public popular impression that justice is only available to those with substantial assets. Jay Z raps that when he is stopped by the police he has "99 problems but the bitch ain't one, hit me." "Plus I got a few dollars, I could fight the case." Reflecting that because he has money, Jay Z does not feel he will be convicted of an offense or given an enhanced penalty. In addition, Ice Cube raps "Public Defender, Public Pretender" indicating his lack of confidence in an attorney who is not paid. And TayK47 raps that he needs "a hunnit bands" [lots of money], to "tryna beat a case" but that "I ain't beat a case, bitch, I did the race," indicating that he had to flee because he did not have the funds to defend himself.

Lil Baby raps that it is not all Black and White, not all black people are dumb and not all white people are racists. It is the content of a person's character and not the hue of their faces that we should judge. But he also expresses the view that the justice system does not afford respect to minorities. They are not seen or protected. And Joey Bada$$ concludes that minorities are just organ donors. He says that the justice system engages in trickery, views minorities as historically inferior, and that even divine intervention cannot result in an acquittal for them. He concludes that living under supervision is no way to live. He is referring to the fact that about

1/3 of young black men are under correctional supervision.[57]

To begin to engender confidence in our criminal justice system, we must address these popular realities.

## IV. Attorney-Client Privilege

The attorney-client privilege in Texas is much broader than the privilege in other states. Texas Rule of Evidence 503 states, "In a criminal case, a client has a privilege to prevent a lawyer or lawyer's representative from disclosing any other fact that came to the knowledge of the lawyer or the lawyer's representative by reason of the attorney-client relationship." Tex. R. E. 503(b)(2). This rule broadens the attorney-client privilege, which protects information relating to the representation, to include client confidences. Client confidences are any information learned by virtue of the representation. For example, when Michael Cohen, President Trump's attorney, testified before Congress that the President was a bigot, he violated the Texas attorney-client privilege. The specific instances that Mr. Cohen mentioned to support his claim that President Trump is a racist, he learned while spending time with the President as his attorney.

Any other legal advice or work that Mr. Cohen testified regarding, that did not fall under the crime/fraud exception, was also a betrayal of client confidences and the privilege. There is a video in the presentation where President Trump denies knowledge of a payment made to Stormy Daniels and directs the press to speak to his lawyer, Michael, about it. This relayed to the press and the public that Trump had not engaged Cohen as counsel to arrange a non-disclosure agreement in exchange for consideration. Thus, Trump was advising the public and Special Counsel Robert Mueller that any information Michael Cohen had about the Stormy Daniels payment was his own information and not subject to the attorney client privilege. Was that waiver of the attorney-client privilege, does this example fall under the crime /fraud exception[58], or does

[57] https://bjs.ojp.gov/library/publications/correctional-populations-united-states-2017-2018

[58] The crime/fraud exception applies when a client or lawyer seeks to use a lawyer's services or advice to commit a crime or fraud.

it merely indicate that Cohen's Stormy Daniels records were not privileged in the first place?

Either way, Cohen's testimony violated the attorney-client privilege. The crime/fraud exception did not extend to all matters in which Cohen represented the President. Thus, his testimony about those other matters (the auction of a portrait) and confidences (that Trump is a racist) revealed client confidences and privileged communications.

## V. Federal Prosecutors' Duty to Disclose Relevant Favorable Evidence Under the Texas Rules

The Michael Morton Act is a unique law designed to prevent and combat prosecutorial misconduct in the discovery process.[59] The Texas legislature enacted the Michael Morton Act to radically change the criminal discovery process in Texas, which previously disadvantaged defendants by placing a burden on defense counsel to show good cause why extremely limited information might be ordered disclosed by a court.[60] Prior discovery in Texas was similar to discovery under the federal rules. See Rule 16 of the Federal Rules of Criminal Procedure. But the Michael Morton Act, codified in Rule 39.14 of the Texas Rules of Criminal Procedure now requires relevance-based discovery of favorable matters relevant to the matter. It is very broad, far reaching, and requires only a request by defense counsel.

Following the Texas discovery rule, Rule 3.09(d) of the Texas Rules of Professional Conduct requires prosecutors in criminal cases to timely disclose "all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense[.]"

---

[59] Codified in amended article 39.14, the Michael Morton Act shifts the prosecution's duty to disclose evidence in Texas from a discretionary decision based on good cause to a relevance-based decision based on counsel's request [TEX. CODE CRIM. PROC. ANN. §39.14 (West 2014)]. The victory in the Michael Morton case places the prosecution under a statutory duty to continually disclose exculpatory evidence regardless of materiality [Francis v. State, 428 S.W.3d 850, 856 n.12 (Tex. Crim. App. 2014) (noting the prior version of article 39.14 was in effect at the time of trial)]; See also Cynthia E. Hujar Orr & Robert G. Rodery, The Michael Morton Act: Minimizing Prosecutorial Misconduct, 46 ST. MARY'S L.J. 407, 419 (2015).

[60] See Cynthia E. Hujar Orr & Robert G. Rodery, The Michael Morton Act: Minimizing Prosecutorial Misconduct, 46 ST. MARY'S L.J. 407, 409 (2015).

Materiality is not a component of this test.

Rule 3.09(d) encompasses a prosecutor's duty to disclose exculpatory evidence imposed under Brady v. Maryland, 373 U.S. 83 (1963) but it goes much further than that. In *Shultz v. Comm'n. for Law. Discipline*, OP. 55649 (Tex. Bd. Disp. App. 55649, Dec. 17, 2015) the Texas Board of Disciplinary Appeals held that rule 3.09(d) is broader than Brady based on the plain language of the rule and the different purpose of the duty to disclosure favorable evidence under the disciplinary rule. The purpose for disclosure under the ethical rule is to impose on the prosecutor the professional obligation to "see that the defendant is accorded procedural justice, that the defendant's guilt is decided upon the basis of sufficient evidence, and that any sentence imposed is based on all unprivileged information known to prosecutor." Tex. Disciplinary Rules Prof'l Conduct R. 3.09(d) cmt. 1. Unlike Brady, this obligation is regardless of the anticipated impact. While the purpose of disclosure under the *Brady* constitutional duty is to merely assure a fair trial under the due process clause and requires materiality.

All prosecutors practicing in Texas courts, both state and federal, are subject to Rule 3.09(d). The Texas Disciplinary Rules of Professional Conduct provide this in its jurisdictional rule. Rule 8.05(a): Jurisdiction states "[a] lawyer is subject to the disciplinary authority of this state, if admitted to practice in this state or if specifically admitted by a court of this state for a particular proceeding." And the United States District Court for the Western District of Texas, as well as other districts in Texas, requires "[m]embers of the Bar of this court and any attorney permitted to practice before this court [to] comply with the standards professional conduct set out in the Texas Disciplinary Rules of Professional Conduct" in Rule 7 Discipline of Attorneys.

What this means is that regardless of where a lawyer is licensed, they are bound by the broad disclosure requirements contained in Rule 3.09 that reflects the disclosure scheme set out in the Michael Morton Act. I have included a motion and order acknowledging this in your materials for your use from one of my cases in the Southern District of Texas.

## VI. The New Texas Rules of Ethics

There are eight new Texas Rules of Ethics, effective July 1, 2021. They provide that a lawyer may take a broader range of protective action than is currently permitted when the lawyer reasonably believes that a client has diminished capacity and is at risk of substantial physical, financial, or other harm. Rule 1.16. They allow a lawyer to disclose confidential information to secure legal advice about the lawyer's compliance with the Texas Disciplinary Rules of Professional Conduct. Rule 1.05 (C)(9). And they allow a lawyer

to disclose confidential information when that is reasonably necessary to prevent a client from dying by suicide. Rule 1.05(C)(10). They now recognize that a lawyer working in a pro bono capacity or clinic environment will not have a conflict of interest unless there exists an actual conflict and that

no conflict of interest will be imputed to the layer's firm under the above circumstances. Rule 6.05. New Rules 7.01 and 7.05 have been added to make clear that information disseminated to the public or the poor that is not intended for pecuniary gain is not a solicitation or advertisement. These rules make clear that the use of trade names that are not misleading are permitted. And they set out that providing legal information to experienced law consumers is not solicitation either.

The assignment of judges to hear disciplinary matters has changed under Rule 6.05. And lawyers are now allowed to assign their cases to designated counsel in order to wrap up their practices under Rule 13.04.

## VI. Conclusion

While ethical rules provide no affirmative duties on prosecutors to act in a given case and Department of Justice Policies create no rights for defendants, they do provide incentive for prosecutors to provide broad discovery. Each prosecutor seeks to avoid an encounter with the Office of Professional Responsibility or the State Bar of Texas if they are licensed here.

In addition, counsel should be mindful that their areas of required competence and effective practice have changed with advance technology and pervasive public discourse. And they should consider that avoiding conflicts of interest include not only avoiding multiple representation, but also obtaining necessary resources despite the fact that judges may disfavor such request. Most importantly, it is the duty of every criminal justice participant to reform and restore confidence in the greatest criminal justice system in the world; that of the United States of America.