

Legal Ethics and Speaking to the Media

May 2025

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<https://www.surveymonkey.com/r/media0525>

Basics of Media Response

- What is our objective?
 - What will the media's objective likely be?
- Who is/are our audience(s)?
- Who is our spokesperson?
- What is our message?
- How will we deliver that message?

Ethics Rules

Did/will the lawyer "participate[] in the investigation or litigation of" what may be an "adjudicated matter"

YES

NO


“Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper.”

Bridges v. California (US 1941)

Rule 4-3.6 – Trial Publicity

Gentile v. State Bar of Nevada (US 1991)

METRO MISSING \$1.3 MILLION IN DRUGS, CHECKS



Jury indicts vault owner on \$2.5 mil. theft charge

*By Pauline Bell and Harold Hyman
SUN Staff Writers*

The owner of the now defunct Western Vault Corp. was indicted by a Clark County grand jury Friday on charges he stole \$2.5 million in cash, coins, jewelry and other merchandise, including about \$1.3 million worth of drugs and travelers checks belonging to Metro Police, from safe deposit boxes at the business.

However, the attorney for businessman Grady Sanders said his client is being set up as "the scapegoat" for the Metro detective who really stole the checks and cocaine. Evidence presented at trial will prove Sanders innocent, said defense lawyer Dominic P. Gentile.

Sanders, accompanied by Gentile, was present in the courtroom of Chief District Judge Myron Leavitt when the indictment was returned. The 51-year-old Las Vegas surrendered to authorities, was formally booked on the charges

Staff photo by LEE ZACHNICK

Attorney Dominic Gentile says client is "scapegoat." **See INDICTMENT, Page 5A**

“QUESTION FROM THE FLOOR: Do you believe any other police officers other than Scholl were involved in the disappearance of the dope and—

“MR. GENTILE: Let me say this: What I believe and what the proof is are two different things. Okay? I'm reluctant to discuss what I believe because I don't want to slander somebody, but I can tell you that the proof shows that Scholl is the guy that is most likely to have taken the cocaine and the American Express traveler's checks.

“QUESTION FROM THE FLOOR: What is that? What is that proof?

“MR. GENTILE: It'll come out; it'll come out.” App. to Pet. for Cert. 9a.

“QUESTION FROM THE FLOOR: I have seen reports that the FBI seems to think sort of along the lines that you do.

“MR. GENTILE: Well, I couldn't agree with them more.

“QUESTION FROM THE FLOOR: Do you know anything about it?

“MR. GENTILE: Yes, I do; but again, Dan, I'm not in a position to be able to discuss that now.

“All I can tell you is that you're in for a very interesting six months to a year as this case develops.” Id., at 10a.

“QUESTION FROM THE FLOOR: Did the cops pass the polygraph?

“MR. GENTILE: Well, I would like to give you a comment on that, except that Ray Slaughter's trial is coming up and I don't want to get in the way of anybody being able to defend themselves.

...

“QUESTION FROM THE FLOOR: Do you think the police involved in this passed legitimate—legitimately passed lie detector tests?

“MR. GENTILE: I don't want to comment on that for two reasons:

“Number one, again, Ray Slaughter is coming up for trial and it wouldn't be right to call him a liar if I didn't think that it were true.

“But, secondly, I don't have much faith in polygraph tests.”

Trial Publicity

Rule 4-3.6(a)

A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

Risks of Material Prejudice

Rule 4-3.6 cmt [1]

It is difficult to strike a balance between protecting [the right to a fair trial](#) and [safeguarding the right of free expression](#).

Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved.

On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves.

The [public has a right to know](#) about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

Breaking Rule 4-3.6(a) Down

- A lawyer **who is participating or has participated in**
- **the investigation or litigation of a matter** [-- matter in adjudication]
- 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

Lawyer Who Has Participated

- Investigation or litigation
- What about general counsel?
- Rule 4-3.6(d) broadens prohibition to entire firm
- "No lawyer associated in a firm or government agency with a lawyer subject to [Rule 4-3.6](a) shall make a statement prohibited by paragraph (a).

Making an Extrajudicial Statement

- Statements made to or filed in court usually not covered
- "Litigation privilege" may be informative
- Sharing court documents with third parties may create liability

Disseminated by "Public Communication"

- Original focus was on traditional media
- Lawyer knew or should have known of dissemination

- Now includes blogs and other Web 2.0 communications

Substantial Likelihood → Material Prejudice

- Content of statement
- Nature of proceeding – criminal or civil or regulatory?
- Admissibility of information disclosed
- Timing of statement
- New or shocking information

Nature of the Proceeding

Rule 4-3.6 cmt [6]

Another relevant factor in determining prejudice is the nature of the proceeding involved. **Criminal jury trials** will be most sensitive to extrajudicial speech. **Civil trials** may be less sensitive. **Non-jury hearings** and **arbitration** proceedings may be even less affected. Rule 4-3.6 will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

Subjects at Risk for Prejudicial Effect

Rule 4-3.6 cmt [5]

in a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration...

- (1) the character, credibility, reputation, or criminal record of a party, suspect in a criminal investigation, or witness, or the identity of a witness, or the expected testimony of a party or witness;
- (2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;
- (3) the performance or results of any examination or test, or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;
- (4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;
- (5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or
- (6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

Beware Special Protections – cmt [2]

Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations, and mental disability proceedings, and perhaps other types of litigation. Rule 4-3.4(c) requires compliance with such rules.

Rule 4-3.6(b) Content Safe Harbors

Safe-Harbor "Guideposts" – Rule 4-3.6(b)

Notwithstanding paragraph (a), a lawyer may state:

- (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
- (2) information contained in a public record;
- (3) that an investigation of a matter is in progress;
- (4) the scheduling or result of any step in litigation;
- (5) a request for assistance in obtaining evidence and information necessary thereto;
- (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and . . .

Criminal Prosecution Exception – Rule 4-3.6(b)(7)

In a criminal case, in addition to subparagraphs (1) through (6):

- the identity, residence, occupation and family status of the accused;
- if the accused has not been apprehended, information necessary to aid in apprehension of that person;
- the fact, time and place of arrest; and
- the identity of investigating and arresting officers or agencies and the length of the investigation

Rule 4-3.6(b) cmt [4]

Rule 4-3.6(b) identifies specific matters which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice and should not be considered prohibited by the general prohibition of Rule 4-3.6(a).

Rule 4-3.6(c)
Responding to Adverse
Publicity

Response to Publicity – Rule 4-3.6(c)

Notwithstanding Rule 4-3.6(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 Rule 4-3.6(c) shall be limited to such information as is **necessary to mitigate the recent adverse publicity.**

Responding to Public Statements

Rule 4-3.6 cmt [7]

Finally, extrajudicial statements that might otherwise raise a question under Rule 4-3.6 may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client.

When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

Need for Protection

- Possible influence on the "actual outcome of the trial"
- Possible prejudice to the jury venire "even if an untainted panel can ultimately be found"

Federal Rule of Civil Procedure 11

or Missouri Rule 55.03(c)

Whitehead v. Food Max of Mississippi, Inc. (5th Cir. 2003)

- Lawyer obtained \$3.4 million judgment against Kmart
- With media in tow, lawyer attempted to execute on local store's vault and cash register
- Court imposed sanctions for filing a pleading for "any improper purpose, such as to harass" an opposing party: found public execution was to "embarrass Kmart and advance his personal position"

FRCP 11 – No "improper purpose"

- By presenting to the court a pleading, written motion, or other paper – whether by signing, filing, submitting, or later advocating it – an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
- it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; . . .

Did/will the lawyer "participate[] in the investigation or litigation of" what may be an "adjudicated matter"

YES

NO

No Participation in Adjudicative Matter

- Statements that are false or prejudicial to the administration of justice
- Limits on
 - Client decision-making and confidentiality
 - Prosecutors
 - Criticism of judges
 - General limits on conduct

Rule 4-8.4

Rule 4-8.4 – "Catch-All" Rule

It is professional misconduct for a lawyer to:

- a) 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;
- b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- d) engage in conduct that is prejudicial to the administration of justice; . .

Rule 4-8.4(c) – No "fraud, deceit, misrepresentations"

Iowa Supreme Court Board of Professional Ethics & Conduct v. Visser (Iowa 2001) – lawyer admonished under Rule for letter stating inaccurately judge had "already determined [the opposing party was] unlikely to succeed on the merits of his far-fetched claims"

Rule 4-8.4(d) – "Conduct prejudicial to the administration of justice"

Mississippi Bar v. Lumumba (Mississippi 2005) lawyer disciplined for post-trial statement to local newspaper that a judge "had the judicial temperament of a barbarian"

Scope of Representation

4-1.2(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.

Does the client want or expect the lawyer to make statements to the media?

What Does the Client Want?

- Consult with clients regarding media strategy – if one is needed
- Clients can grant permission or place limits on how much press they want their lawyers to do or the amount of information that is put out by their lawyers

Confidentiality

Rule 4-1.6(a)

A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by Rule 4-1.6(b).

Special Limits for Prosecutors

Former Duke Prosecutor Nifong Disbarred



By LARA SETRAKIAN (@Lara) and CHRIS FRANCESCANI
ABC News Law & Justice Unit
RALEIGH, N.C., June 16, 2007

Durham County District Attorney Mike Nifong has been disbarred after being found guilty of a battery of ethics violations for his handling of the Duke Lacrosse investigation, a North Carolina Bar disciplinary committee announced Saturday evening.

"We are in unanimous agreement that there is no discipline short of disbarment that would be appropriate in this case," said F. Lane Williamson, the committee's chairman.



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Rule 4-3.8(f)

The prosecutor in a criminal case shall: . . .

except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 4-3.6 or this Rule 4-3.8.

Criticizing Judges

"Evil, Unfair Witch"

A Legal Battle: Online Attitude vs. Rules of the Bar

By JOHN SCHWARTZ
Published: September 12, 2009

Sean Conway was steamed at a Fort Lauderdale judge, so he did what millions of angry people do these days: he blogged about her, saying she was an "Evil, Unfair Witch."

 [Enlarge This Image](#)



Scott Dalton for The New York Times

Judge Susan Criss said a Facebook page said a lawyer was drinking, not grieving, after a funeral.

Readers' Comments

Readers shared their thoughts on this article.
[Read All Comments \(33\)](#) »

But Mr. Conway is a lawyer. And unlike millions of other online hotheads, he found himself hauled up before the Florida bar, which in April issued a reprimand and a fine for his intemperate blog post.

Mr. Conway is hardly the only lawyer to have taken to online social media like [Facebook](#), [Twitter](#) and blogs, but as officers of the court they face special risks. Their freedom to gripe is limited by codes of conduct.

"When you become an officer of the court, you lose the full ability to criticize the court," said [Michael Downey](#), who teaches legal ethics at the [Washington University](#) law school.

 TWITTER

 LINKEDIN

 COMMENTS
(33)

 SIGN IN TO E-MAIL

 PRINT

 REPRINTS

 SHARE



Criticizing Judges – Rule 4-8.2(a)

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.

Application of Rule 4-8.2

- Applies to public and private comments
- "Reckless disregard," not "know or should know"
- Subjective versus objective
- Colorado requires malice
- No limit on "true" statements
- No (?) limit on opinion statements

Statements from (Nonlawyer) Representatives

Non-Lawyer Spokesperson

- Possible jury tampering
- Rule 4-8.4 prohibits violating rules "through act of another"
- Rule 4-5.3 – and specific provision in Rule 4-3.8(f) – require lawyers to exercise reasonable supervision over nonlawyers

Privilege and PR Consultants

Case law quite inconsistent

Leading case – *In re Grand Jury Subpoenas Dated March 24, 2003*, 265 F. Supp. 2d 321 (SDNY 2003) (involving Martha Stewart) suggests Kovel doctrine should govern

Is PR consultant "reasonably necessary" for representation

Likened to interpreter

But, e.g., Haugh v. Schroder Investment Management, 2003 WL 21998674 (SDNY August 25, 2003), found privilege did not apply

Suggestions to Protect PR Consultations

- Have lawyer serve as primary conduit to consultant including on hiring and billing
- Hire litigation-focused consultant for the litigation
- Make sure documents reflect litigation focus (specific matters, specific files, specific bills)
- Limit who can access PR consultant's work
- Don't disclose PR consultants to adversaries
- Limit information shared with PR consultant
- Make sure tasks relate to actual litigation
- Use separate matters and files for litigation-related matters

Settlements to Avoid Publicity

ISBA Advisory Opinion 93-19

A med mal case approaches trial. The defendant doctor is convinced he did not commit malpractice and is prepared to go to trial.

Doctor's attorney receives a letter with an offer from plaintiff's counsel, which also states that he believes doctor's case will be highly publicized.

The plaintiff's offer includes a confidentiality provision that would prohibit plaintiff's attorney from speaking to the media. This letter upsets doctor and he reconsiders going to trial.

ISBA Advisory Opinion 93-19

A settlement proposal to sign a release and confidentiality agreement as an alternate to projected media publicity if a judgment is obtained against the defendant is not *per se* professionally improper.

- Rule 3.6 concerned almost entirely with pre-trial statements
- Strategic negotiating maneuver meant to apply pressure – used routinely by lawyers

Closing Thoughts

Planning Your Litigation PR Strategy

- Be careful what is said outside court
- Be truthful
- Leave judges alone
- Consider using nonlawyer – or uninvolved lawyer – spokesperson
- Decide whether PR consultant's work will be privileged

Is Litigation Pending/Expected?

- If “yes,” Rule 4-3.6 applies
- If “no,” still need to be careful based upon nature of matter and general regulations

Other Considerations

- Does your law firm or organization have media policies or procedures?
- Is there a gag order?
- What are your goals/objectives for speaking with the media?
- Retain a marketing company to help
- Other ways to "talk" to the media
 - Preliminary statement in pleadings

General Tips

- Take a media training course
 - Some are tailored toward lawyers and law firm leaders
- Understand client objectives
 - Is talking to the media going to benefit your client?
- Know what issues reporters will likely ask about
- Use a public release statement or consider using a preliminary statement in the initial pleading
- Know the pertinent ethical rules and local rules

Conclusory Matters

- **Questions** – If you have questions after the program, please email them to Paige Tungate at ptungate@DowneyLawGroup.com
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Timed Agenda

- 0-5 Introduction
- 5-55 Discussion of legal ethics rules that regulate interactions with the media

Future Programs

May 20 - Tuesday at 3:00 PM CT - *Legal Ethics When Dealing with Non-Clients*

June 4 - Wednesday at 12:00 Noon CT - *Addressing Bias - Ableism and Disability Discrimination*

June 12 - Thursday at 12:00 Noon CT - *Legal Ethics Update 2025 - Part 2*

June 17 - Tuesday at 3:00 PM CT - *Addressing Bias - Ableism and Disability Discrimination*

June 27 - Friday at 12:00 Noon CT - *Legal Ethics and Artificial Intelligence*

June 30 - Monday at 12:00 Noon CT - *Addressing Bias - Ableism and Disability Discrimination*

June 30 - Monday at 3:00 PM CT - *Legal Ethics Update 2025 - Part 2*

www.DowneyEthicsCLE.com

Thank you



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