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Expert Analysis

Pretrial Publicity in Criminal Cases: Media Sound Bites, Justice?

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Recent press coverage of Governor Rod Blagojevich's indictment has not lacked for comments from the U.S. Attorney, Patrick Fitzgerald. Among the statements made by Mr. Fitzgerald in announcing the case against Mr. Blagojevich are references to the governor's conduct as a "political corruption crime spree [that] would make Lincoln roll over in his grave." Mr. Fitzgerald also has stated that "the breadth of corruption laid out in the[] charges is staggering," has "taken us to a truly new low," and that Mr. Blagojevich "put a 'for sale' sign on the naming of the United States senator."[1]

Mr. Fitzgerald's public comments may well pale in comparison to those made by former Durham County District Attorney Mike Nifong in the rape case brought against three Duke University lacrosse players in 2006.

During the course of that case, Mr. Nifong made various inaccurate and misleading statements to the media about the team members' alleged failure to cooperate with law enforcement, the results of tests performed during the investigation, and the evidence and testimony expected to be presented in the case.

The outcome of that case is widely known—the charges against the players were dismissed, and Mr. Nifong was disbarred in April 2007 for a host of ethics violations.[2] But both prosecutors' statements raise the question: are media sound bites like these consistent with the sound administration of justice?

There are a number of rules that govern what and how much prosecutors are permitted to say publicly about a case.

Those rules are in place for a reason, namely, to balance the need to protect the rights of the accused with the public's need to know about and understand the government's efforts to control crime.

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> Neither prosecutors, counsel for the defense, the accused, witness, court staff, nor law enforcement officers should be permitted to frustrate [the trial court's] function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.[3]

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The Rules

The American Bar Association's Model Code of Professional Responsibility provides that "[a] lawyer participating in or associated with the investigation of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that does more than state without elaboration: (1) information contained in a public record; (2) that the investigation is in progress; (3) the general scope of the investigation, including a description of the offense and, if permitted by law, the identity of the victim; (4) a request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto; [or] (5) a warning to the public of any dangers."[4]

The ABA's Model Rules of Professional Conduct similarly state that a government attorney may not make any statement that "will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." The rules note the same acceptable exceptions as the code—the nature of the claim, the status of the investigation, a request for assistance and any warning of danger. In addition, the rules state that in a criminal case, a prosecutor also may reveal:

(1) the identity, residence, occupation and family status of the accused;

(2) if the accused has not been apprehended, information necessary to aid in the apprehension of that person;

(3) the fact, time and place of arrest; and

(4) the identity of investigating and arresting officers or agencies and the length of the investigation.

The rules also provide that prosecutors may make a statement that "a reasonable lawyer" would believe is required to respond to recent publicity not initiated by the prosecutor or the government, but which may cause "substantial undue prejudice."[5]

The ABA further elaborates on the types of statements ordinarily likely to have a substantial likelihood of prejudicing a criminal proceeding in its Standards Governing the Conduct of Attorneys in Criminal Cases. Prejudicial statements include: (1) the prior criminal record of a suspect or defendant; (2) the character or reputation of a suspect or defendant; (3) the possibility of a guilty plea; (4) the performance of any examinations or tests conducted during the investigation or the accused's refusal to submit to such an examination or test; and (5) the opinion of the government lawyer on the guilt of the defendant, the merits of the case or the merits of the evidence in the case.[6]

The Department of Justice also has issued guidelines to its employees governing trial publicity. Noting the need to "balance" the interests of the accused with the government's interests in communicating information to the public, the DOJ rules prohibit prosecutors from

"furnish[ing] any statement or information for the purpose of influencing the outcome of a defendant's trial." Rather, DOJ employees are permitted only to release identifying information regarding the defendant, the substance of the charges, the identity of the investigating agency and the circumstances immediately surrounding an arrest. "Disclosures should include only incontrovertible, factual matters, and should not include subjective information."[7] Additional nonbinding, supplemental guidelines have been promulgated in the U.S. Attorney's Manual, which vests responsibility for all DOJ media matters with the director of the Office of Public Affairs, who must be consulted in basically all circumstances prior to media comment by individual prosecutors.

Finally, both state and federal district courts have similar rules, aimed at preventing extrajudicial statements that may prejudice an accused or otherwise impair a court's ability to conduct a fair trial. Quoted frequently in recent press accounts is the rule of the U.S. District Court for the Northern District of Illinois, the court in which Mr. Blagojevich is charged, which dictates that a lawyer "shall not make an extrajudicial statement the lawyer knows or reasonably should know is likely to be disseminated by public media and, if so disseminated, would pose a serious and imminent threat to the fairness of an adjudicative proceeding." The U.S. district courts for the Southern and Eastern districts of New York have a similar rule, prohibiting the dissemination of any public communication that "will interfere with a fair trial or otherwise prejudice the due administration of justice."[8] New York's Disciplinary Rule 7-107 regarding trial publicity is almost identical to the ABA Rules in terms of its restrictions on the information that properly can be disclosed in a criminal matter.

When Are Rules Violated?

In addressing a defendant's claim that a prosecutor has engaged in misconduct with respect to pretrial publicity, courts focus on whether the government has deprived the defendant of his constitutional right to a fair trial before an impartial jury. There are a number of factors courts look at in answering this question. Primarily, the defendant must make a showing that the jury was actually prejudiced as a result of the pretrial publicity. In addition, the court will examine whether the defendant challenged jurors in a timely manner and exhausted all of their available preemptory challenges. Finally, the court will consider the length of time between the commencement of the trial and the publicity, as well as the nature of the publicity itself and whether it was inflammatory.

The U.S. Court of Appeals for the Second Circuit's decision in *United States v. Rosado*[9] demonstrates how high a hurdle this is for defendants to clear. In *Rosado*, the defendants were convicted in the Eastern District of New York of criminal contempt of court for failure to testify during a grand jury investigation into certain bombings attributed to a Puerto Rican terrorist group known as FALN. Shortly after obtaining an indictment against the defendants, the assistant director-in-charge of the FBI's New York office issued a press release and held a news conference in which he referred to the defendants as "the remaining unincarcerated leadership of the FALN."

The defendants appealed their conviction alleging, in part, that they were denied a fair trial because of prejudicial publicity by the government. On review, the Second Circuit held that "notwithstanding substantial pretrial publicity, appellants' trial satisfied the due process requirement of 'a fair trial in a fair tribunal.'" Specifically, the court found that the trial court had taken extraordinary measures to ensure that an impartial jury was empaneled. Thus, the trial court questioned potential jurors individually, insulating other prospective jurors from publicity to which some may have been exposed. As a result of his questioning, the trial judge excused 10 jurors in total. The court also noted that the appellants raised no substantial objections to the trial judge's questioning or method of ferreting out hidden biases.

In conclusion, the court of appeals noted that although there may be a legitimate public interest in identifying an indicted individual as a member of a terrorist group, "release of this fact arguably contravened Justice Department guidelines" as set forth in 28 C.F.R. §50.2. "In any event, [the trial judge] more than adequately guarded against the risk of trial prejudice from this pretrial disclosure by his meticulous care during jury selection and his exclusion of evidence of FALN membership."[10]

The rule of the Northern District of Illinois, the court in which Mr. Blagojevich is charged, says a lawyer "shall not make an extrajudicial statement the lawyer knows…is likely to be disseminated by public media and, if so disseminated, would pose a serious and imminent threat to the fairness of an adjudicative proceeding."

The trial court's efforts to ensure a fair trial, the defendants' failure to object to the jurors empaneled, and their failure to demonstrate actual prejudice of at least one juror all played a part in the court's decision in *Rosado*. Accordingly, even where it is clear that a government attorney violated rules and regulations regarding improper pretrial statements, a defendant may not have any recourse.

United States v. Capra[11] provides an even more extreme example of improper pretrial publicity by the government, also determined not to prejudice the defendants. In *Capra*, the government arrested the defendants as part of a large drug bust of over 80 alleged narcotics dealers. Prior to the arrests, members of the media were permitted to attend a police briefing at which prosecutors were present. The reporters took pictures at this meeting that subsequently were published in local papers. In addition, certain reporters were allowed to accompany the police on the night of the arrest, and a New York Daily News reporter entered the house with the police, while a New York Magazine reporter and a New York Times photographer were outside the house. The information obtained by these reporters later was published in the local New York papers.

At trial, the judge extensively questioned the potential jurors to determine whether any had prior knowledge of the case. The court also allowed the defendants six additional preemptory challenges to insure impartiality. Although the defendants did not argue that the jurors had been improperly influenced by the publicity, they did contend that the trial court should exercise its supervisory powers to dismiss the indictment because the government actively sought the publicity.

Although the trial court said that the government's conduct was ill-conceived, it found that the circumstances did not require the dismissal of the indictment. On review, the Second Circuit affirmed the trial court's decision, finding no showing of prejudice in this particular case. "Absent proof of bias on the part of individual members of a jury, reversal, because of extensive publicity adverse to the accused, is required where, after reading or hearing it, a resulting conclusion of guilt in the minds of the general public would be practically certain, or where improper pressure on a jury was clear from the record itself."[12]

Conclusion

Despite the apparent difficulty in showing that pretrial statements made by the government have resulted in real prejudice, defense counsel should be diligent in seeking appropriate remedies where his client's right to a fair and impartial trial has been threatened by government-initiated publicity. Remedies for such violations include a change of venue or continuance or, possibly, a new trial. Further, counsel should seek such relief promptly in order to avoid a finding that the failure to seek such remedies is a tacit approval of the jury actually empaneled.

1. Barry Coburn, "The Prosecution Should Give It a Rest," New York Times (Dec. 13, 2008).
2. Lara Setrakian and Chris Francescani, ABC News (June 16, 2007) (available at http://abcnews.go.com/TheLaw/story?id=3285862).
3. *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966).
4. ABA Model Code of Prof. Resp. DR 7-107 (A).
5. ABA Model Rules of Prof. Conduct Rule 3.6.
6. ABA Standards on the Conduct of Attorneys in Criminal Cases, Standard 8-1.1(b).
7. 28 C.F.R. §50.2(b).
8. Local Criminal Rules of the United States District Courts for the Southern and Eastern Districts of New York, Rule 23.1, Free Press—Fair Trial Directives (2007).
9. 728 F.2d 89 (2d Cir. 1984).
10. Id. at 95.
11. 501 F.2d 267 (2d Cir. 1974).
12. Id. at 279 (citing *Sheppard v. Maxwell*, *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Estes v. Texas*, 381 U.S. 532 (1965)).