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WHITE-COLLAR CRIME

Expert Analysis

Media: Defendant's Friend or Foe?

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The presumption of innocence is one of the bedrocks of our criminal justice system. As some recent cases demonstrate, however, the presumption receives only a passing nod, if any, in the public forum. Indeed, restrained judgment as to the culpability of a criminal suspect is hard to come by in this era of instantaneous access and dissemination of information. A suspect may be tried and condemned in the court of public opinion before even being charged in the court of law. Pronouncements by prosecutors as to the charges investigated or filed and the evil their offices boldly have confronted often contribute to the slanted picture. As observed by commentators, "The defense thus gets started with the playing field tilted negatively, with the presumption of innocence buried under official pronouncements of guilt…."[1]

As a result, defense attorneys increasingly are required to grapple with whether and how to present a client's story to the media. Recent interviews in connection with the Penn State scandal offer a glaring example of why (and how) not to do it and of the devastating impact a client's direct statement to the press can have on a case. Nevertheless, defense attorneys are forced to contemplate such possibilities in order to respond to the general frenzy of negative information published by the news media in cases of public interest and the frequent—and occasionally unethical[2]—sound bites offered by government attorneys. When dealing with a client in the public eye, defense attorneys must weigh ethical, legal, and tactical considerations to rebalance the tilted field.

Rules

The Supreme Court has held that a lawyer's right to free speech may be limited only if counsel's remarks create a "substantial likelihood of material prejudice."[3] The American Bar Association's Model Rule of Professional Conduct governing pretrial publicity, Rule 3.6, attempts to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression by providing that a lawyer participating 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."[4]

Rule 3.6 identifies certain types of statements as permissible, including information contained in the public record; identifying features of the accused; the fact, time and place of arrest; and the identity of investigating and arresting officers or government agencies.[5] In contrast, the Comment to Rule 3.6 provides a list of those subjects that are "more likely than not to have a material or prejudicial effect." These subjects include: (1) the character, credibility, reputation or criminal record of a suspect or witness in a criminal investigation; (2) the possibility of a guilty plea or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal to make a statement; (3) the performance or results of any examination or test; (4) any opinion as to the guilt or innocence of a defendant or suspect; (5) information a lawyer knows or reasonably should know is likely to be inadmissible at trial; or (6) the fact that a defendant has been charged with a crime, unless a statement is provided explaining that the charges are merely accusations and that the defendant is presumed innocent until proven guilty.[6]

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Rule 3.6 also contains a rebuttal provision that permits a lawyer to "make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effects of recent publicity not initiated by the lawyer or the lawyer's client." Such statements must be limited to that information necessary to mitigate the adverse publicity.[7] The ABA's ethics rules have been adopted by almost every state, including New York.[8]

• Special Rules for Prosecutors. ABA Model Rule 3.8 elaborates further on the special ethical duties of a prosecutor with respect to public statements made outside the courtroom. The rule provides that except for statements necessary to inform the public and that serve a legitimate law enforcement purpose, a prosecutor should "refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent [third parties assisting in the prosecution] from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule."[9] Federal regulations similarly prohibit government personnel from furnishing any statement to the media "for the purpose of influencing the outcome of a defendant's trial."[10]

Despite these rules and regulations, prosecutors rarely are punished for violations that occur as a result of their statements or those made by other investigators and law enforcement personnel assisting in the case.[11] An accused has few judicial remedies to combat the prosecutor's early press conference, flowery public indictment, or damning "perp walk," which often leaves the proverbial first impression on the public and potential jury pool. Generally, a defendant can only succeed in demonstrating that his constitutional rights have been infringed by making a showing of actual prejudice on the jurors who tried the case.[12] As a result, a defense attorney who for many well-thought-out reasons typically is loath to have the accused make any public refutation of the charges is often left with few options.

Defense Considerations

Although a client may push to issue a response, "[t]he lawyer, not the client, bears responsibility for deciding whether, when, and how to respond to, or in the rare instance, seek out the press."[13] The onus rests with the defense attorney because such a decision is directly related to trial strategy and tactics and the professional expertise for which the lawyer has been hired. First, of course, defense counsel should be guided by the ethical rules that govern pretrial publicity, as well as those dictating that an attorney act in the best interest of his client, refrain from knowingly making a false statement of material fact or law,[14] and maintain the integrity of the profession.[15]

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Second, before speaking to the media, a defense attorney must engage in a cost-benefit analysis to determine whether such a move truly benefits the client as opposed to his or her own chance at fame. Making a public statement offers the client an opportunity to satisfy the understandable desire to mitigate damage to his personal and professional reputation, an instinct compounded in high-profile cases where the client already has a known public persona or may hold public office. In addition, as courts and commentators have recognized, a positive public reaction to a defendant's media response may influence a prosecutor's charging decisions.[16]

Potential rewards must be weighed against the potential risks. The most obvious risk is that press statements by the defendant or his representative will negatively impress the public or prosecutor, or, worse, be used as an admission against the client. Finally, counsel should be especially alert that any statements made on behalf of the client do not result in the waiver of attorney-client privilege or put the attorney in conflict with the client.[17]

• Use of Public Relations Firms. An assessment of strategy and of the benefits and risks can be aided by consultation with a public relations firm. Counsel opting for such assistance should keep in mind the possibility that information shared with such a third party may inadvertently result in a waiver of the attorney-client privilege. Courts have disagreed as to whether communications shared with a public relations firm qualify for protection under the privilege. Typically, disclosure to a third-party public relations consultant does not result in an automatic disclosure of the privilege if: 1) the third party is deemed an agent of the attorney hired to assist in the provision of legal advice; or 2) the third party is found to be the "functional equivalent" of the client's employee.

Public Relations Consultant as Attorney's Agent. Pursuant to *United States v. Kovel*, the attorney-client privilege is not waived by disclosure of confidential communications to a third party acting as an agent to an attorney.[18] In *In re Grand Jury Subpoenas*,[19] Southern District of New York Judge Lewis A. Kaplan applied *Kovel* to conclude that communications among defense attorneys, the target of a grand jury investigation, and public relations consultants hired by the target's attorneys, were protected by the attorney-client privilege where the public relations firm's primary responsibility was "defensive" in that it was hired to communicate with the media in an attempt to neutralize negative media coverage that might pressure prosecutors and regulators to bring charges.

Judge Kaplan noted that the hiring of a public relations firm was no different from the various other scenarios in which defense attorneys hire non-testifying experts for assistance in preparing a case and that privilege applies in such circumstances because of the "close nexus" between the consultant's role and the attorney's role in advocating the client's cause. "Questions such as whether the client should speak to the media at all, whether to do so directly or through representatives, whether and to what extent to comment on specific allegations, and a host of others can be decided without careful legal input only at the client's extreme peril.… [The target] and her lawyers cannot be faulted for concluding that professional public relations advice was needed."[20]

Other courts have declined to extend the privilege to communications with a public relations firm where the public relations firm had a relationship with the client that predated the litigation and was "simply providing ordinary public relations advice."[21] The primary issue contemplated by courts in determining whether the privilege extends to a public relations firm as an agent of the attorney is whether the communication facilitated the giving of "legal advice" or was merely "business advice."[22] Accordingly, counsel retaining a public relations consultant should clearly document that the third-party relationship is necessary to provide legal advice to the client.

Public Relations Consultant as an Extension of Client. The second recognized exception to the rule that disclosure of confidential attorney-client communications to a third party results in waiver of the privilege applies to disclosures made to third-party contractors who serve as the "functional equivalent" of a client's employee.[23] This exception also has been applied to external public relations firms.

In *In re Copper Market Antitrust Litigation*,[24] Southern District of New York Judge Laura T. Swain held that privileged communications disclosed to a public relations firm, Robinson Lerer & Montgomery (RLM), hired to assist the defendant company, Sumitomo, in handling issues arising from a high-profile litigation remained privileged because "RLM was, essentially, incorporated into Sumitomo's staff to perform a corporate function that was necessary in the context of the government investigation, [and] actual and anticipated private litigation." Judge Swain noted that Sumitomo had a small presence in the United States with very few English-speaking employees and that RLM served as an "in-house public relations department with respect to Western media relations, having authority to make decisions and statements on Sumitomo's behalf, and seeking and receiving legal advice from Sumitomo's counsel with respect to the performance of its duties."[25]

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The court distinguished the relationship among third-party, RLM, the corporate defendant, and defense counsel from that typically presented in a *Kovel*-type situation. Rather than having a third party acting as a conduit of attorney-client communications as the attorney's agent, in *Cooper Market*, the third party was equated with the defendant for purposes of analyzing the applicability of attorney-client privilege. Judge Swain opined that the analysis set forth in *Kovel* was "inapposite," recognizing an independent exception to the rule that disclosure to a third party constitutes a waiver of privilege.

Conclusion

The Constitution guarantees the media the right to cover criminal cases. Defense attorneys have the right and, in certain instances, the responsibility to participate in the media forum to advance the client's interests.[26] With the privilege of free speech, however, attorneys have the additional duty imposed by codes of professional responsibility and will be held to a higher standard than newsmen or others commenting on a criminal case.

1. Elisabeth Semel and Charles M. Sevilla, "Talk to the Media About Your Client? Think Again," Champion Magazine (November 1997).
2. See, e.g., Duff Wilson, "Prosecutor in Duke Case Is Disbarred for Ethics Breaches," New York Times (June 16, 2007) (prosecutor in highly publicized "Duke Lacrosse case" committed ethical violations in making pretrial comments such as "I'm convinced there was a rape" and "the guilty will stand trial"); Laurie L. Levenson, "Prosecutorial Sound Bites: When Do They Cross the Line?" Georgia Law Review at 1023 (Spring 2010) (detailing questionable prosecutorial statements in the Anna Nicole Smith and Rod Blagojevich cases).
3. *Gentile v. Nevada*, 501 U.S. 1030 (1991).
4. See also Local Criminal Rule 23.1 of the United States District Courts for the Southern and Eastern Districts of New York (effective July 11, 2011) (setting forth similar "Free Press-Fair Trial Directives").
5. Model Rule 3.6(b).
6. Model Rule 3.6, Comment [5].
7. Model Rule 3.6(c).
8. American Bar Association, Alphabetical List of States Adopting Model Rules, available on ABA website (last viewed on Nov. 21, 2011). See New York Rules of Professional Conduct, 22 NYCRR Part 1200, Rule 3.6.
9. Model Rule 3.8(f).
10. 28 C.F.R. §50.2(b)(2).
11. See Ronald D. Rotunda and John S. Dzienkowski, "Legal Ethics: Lawyer's Deskbook on Professional Responsibility" at §3.8-2(e) n.38 (2007 ed).
12. Jeffrey L. Kirchmeier and Stephen R. Greenwald, "Vigilante Justice: Prosecutor Misconduct in Capital Cases," Wayne Law Review at 1343-44 (Fall 2009).
13. Elisabeth Semel and Charles M. Sevilla, "Talk to the Media About Your Client? Think Again," Champion Magazine (November 1997).
14. Model Rule 4.1(a).
15. Model Rule 8.4.
16. See *In re Grand Jury Subpoenas*, 265 F.Supp.2d 321, 330 (S.D.N.Y. 2003); Kevin C. McMunigal, "The Risks, Rewards, and Ethics of Client Media Campaigns in Criminal Cases," Ohio Northern University Law Review at 688 (2008).
17. Model Rule 1.7(a)(1) provides that a lawyer should avoid a situation posing "a significant risk that the representation of…[a] client[] will be materially limited…by a personal interest of the lawyer." Attorneys should not engage in a media campaign merely to promote their own reputation or gain free advertisement.
18. 296 F.2d 918 (2d Cir. 1961).
19. 265 F.Supp.2d 321.
20. Id. at 330.
21. *Calvin Klein Trademark Trust v. Wachner*, 198 F.R.D. 53 (S.D.N.Y. 2000). See also, *Amway Corp. v. The Procter & Gamble Co.*, 2001 WL 1818698 (W.D.Mich. April 3, 2001) (no privilege where purpose of documents was to "assess the public relations aspects of the lawsuits, not their legal import or merit"); *Haugh v. Schroder Investment Mgmt North America Inc.*, 2003 WL 21998674 (S.D.N.Y. Aug. 25, 2003) (privilege did not apply where plaintiff failed to demonstrate that public relations consultant performed anything than "standard public relations service" or that communications were necessary for the provision of legal advice).
22. See, e.g., *In re Grand Jury Subpoenas*, 265 F.Supp.2d at 331-32 (declining to extend the privilege to communications between target and public relations consultants that were neither made at the behest of lawyers nor directed at helping the lawyers formulate their strategy).
23. *In re Bieter*, 16 F.3d 929 (8th Cir. 1994).
24. 200 F.R.D. 213 (S.D.N.Y. 2001).
25. Id. at 216.
26. Semel and Sevilla, "Talk to the Media About Your Client? Think Again."