

DEALING WITH THE FRENZIED MEDIA: THE IMPACT
OF PUBLICITY ON JURY SELECTION IN CHILD VICTIM CASES

Overview

Michael Jackson, Kobe Bryant and other famous individuals show up in the news as part of criminal scandals on an everyday basis. The media pounce on them. Publishing empires thrive on them. These people are protected by their fame and fortune but you and I may be called upon to represent a doctor, a teacher, coach, therapist, or just your next door neighbor who is equally at risk but doesn't enjoy the same feelings of safety as celebrity individuals. If the crime involves a child, or sex, then the public reaction is immediately polarized. Because of the emotional nature of the public's reaction, attorneys often feel overwhelmed when undertaking to defend an accused in the glare of the media spotlight. The impact of this media attention both on the prosecutorial decision making process and in the selection of the jury panel cannot be underestimated.

I. MEET THE PRESS - CLOSE ENCOUNTERS OF THE MOST DANGEROUS KIND

- A. Expanded number of available television channels has increased competition among news media.
- B. Criminal trials are subjected to detailed commentary on a host of channels and network shows.
- C. The internet, special websites, offering up almost daily instances of miscarriages of justice.
- D. Every criminal act is news and every attorney is fair game.
- E. The only control is the competition of other news sources, and therefore you must be sure that your message is made available to all of the media.
- F. Anticipate the special concerns of your case and look for opportunities to advance your cause.

II. TRIAL BY MEDIA

- A. Court TV - On a regular basis, the American people have the opportunity to view trials from gavel to gavel.
- B. Cable News networks cover snippets of the most inflammatory aspects of trials, thus poisoning the community to what is in fact taking place inside the Courtroom.
- C. Who would dare say that there was one person in that Courtroom: Judge, jury, prosecutor or defense attorney, whose mindset was not substantially affected by the intensive publicity.

III. COMMUNICATION BARRIERS

- A. There are three major impediments which must be overcome:
 - 1. Effective communication is clouded by attitudes.
 - 2. People no longer respond well to authority figures or their pronouncements. We as Americans are highly experienced propaganda consumers. After all, we followed the war in Iraq with our favorite "imbedded" reporters. The American public has feasted on crime shows which include all of the new forensic techniques in crime investigation.
 - 3. To communicate effectively in this climate, you must engage your audience's self interest at the first opportunity and make your points as succinctly as possible.

IV. EFFECTIVE DEFENSE MUST BE INCLUSIVE

- A. In every case, especially in high profile cases, any defendant has a right to a legal defense which requires protection of the public reputation of the defendant, the bar, and the defense attorney.
- B. The old "mouthpiece" image is past. Many observers believe that society perceives the defense attorney as an adversary. When the defense succeeds they feel that society is cheated.
- C. Your audience is predisposed to discount your communications while the media is

licensed to treat you and your client any way they wish.

V. UNIQUE PROBLEMS IN ABUSER - VICTIM CASES

1. The unique problems in defending cases that include abuser-victim, do not derive from the repugnant nature of the alleged acts for the attention of the press.
2. Even though many loathsome crimes are reported daily, unique aspects of child abuse of sex cases highlight them and almost certainly, engage the sympathy of the public as well as the Court.
3. This disposition to sympathy stimulates the interest of the press and tends to preclude all but the most delicate efforts at securing a fair and impartial jury not otherwise swayed by the media.
4. The witness roster may include mothers, teachers, child care or health professionals who have unimpeachable motives and impeccable credentials.
5. In the media and before the Court, the victim and the prosecutor are elevated to a moral high ground while the accused may appear hapless and harried.
6. With all of this hype earnest Judges are apt to strain the rules of evidence to accommodate the difficulties of prosecution.
7. As a result, the rights of the accused are often compromised and there is danger to his reputation as well as a significant potential for prejudice in jury selection. A battle lost in the media may well doom your efforts at attempting to select a fair and impartial jury.

VI - THE NEED TO REGULATE THE PRESS

A. The Supreme Court in Sheppard v. Maxwell, 384 U.S. 333(1966), acknowledge that regulating trial coverage is a valid way to protect a defendant's right to a fair trial before an untainted jury. Sheppard was granted a new trial since the Trial Court failed to control news coverage which impacted this famous murder case.

B. Nebraska Press Association v. Stewart, 427 U.S. 539 (1976) which imposed on the Trial Court the heavy burden to demonstrate that prior restraints of news media is essential to a fair trial. The ABA initially adopted model code of professional responsibility DR 7-107 which after challenge was replaced by Rule 3.6 of the Rules of Professional Conduct. The current Rule is attached.

C. The Rule was originally tested in Gentile v. State Bar of Nevada, 111 S Ct., 2720 (1991) which came before the Court as a result of the claim that the Nevada rule was unconstitutional under the First Amendment. The Nevada Rule prohibited attorneys from making extra-judicial statements to the press that they know or reasonably should know will have a "substantial likelihood of materially prejudicing and adjudicative proceeding". Gentile's infraction was a statement he made at a press conference claiming that a Las Vegas police Detective stole drugs and traveler's checks from Gentile's client who was accused of taking these drugs by the prosecutor.

The attorney spoke in response to 17 articles in a major Las Vegas newspaper as well as a media onslaught on local TV. This opinion was somewhat complex but for present purposes, it will suffice to say that the combined opinions endorse restrictions on attorneys' speech, especially on grounds that attorneys are held to a higher standard because of their special skills and increased access to privileged trial information as officers of the court, but Gentile also acknowledged that attorneys would find that the Nevada Rule was impermissibly vague and difficult to apply. The Court made it clear that it did not seek to expand the regulation of attorneys' speech and emphasized that the limitations it affirmed were "narrow" and "aimed at two principle evils: (1) comments that are likely to influence the outcome of the trial, and, (2) comments that are likely to prejudice the jury venire. The Court confirmed the right of an attorney to publically state "the general nature of the claim or defense," but not make a detailed allegation such as naming a police officer as the guilty party.

VII - THE AFTERMATH

Gentile and other publicized cases resulted ¹in the amendment to Rule 3.6 by permitting an attorney to make an extra judicial statement - not otherwise allowed.... to rebut public statements that unduly prejudice the client. These rebuttals however, are limited to include only what is "necessary to mitigate the recent adverse publicity".

¹ US v Aisenberg 247 F. Supp 2d 1272 (M.D. Fla., 2003); U.S vs. Scarfo 263 F 3d So. (3rd Cir 2001); and In Re Morrissey 168 F. 3d 134 (4th Cir 1999)

VIII - COMMUNICATING WITH THE MEDIA

A. Cooperate with calculated caution.

1. A simple "no comment" is the least appropriate and least productive response because the public is left with nothing but a negative.
2. If you define your objectives and make your presentation to the media with the same care that you approach a jury, most difficulties will disappear.

IX - NUTS AND BOLTS OF MEDIA RELATIONS TO DEFUSE NEGATIVE PUBLICITY THAT CAN INFECT A JURY PANEL

A. Cooperate to the extent that you can with the news media since "no comment" means the reporter makes the news.

B. Set the rules and don't be bullied. Cooperate but maintain control. You may occasionally find it useful to call press conferences. Treat them as simultaneous interviews.

X - RULES FOR INTERVIEWS

1. Emphasize the importance of a responsible exchange of ideas and ask the reporter to read to you what he perceives you just told him. Get an agreement from the reporter in advance for this read back so as to correct any inaccuracies.
2. Ask how many facts will be checked. Make it a part of the record that you expect the facts to be verified and that the reporter has indicated that they will go to reliable sources.
3. See that the Reporter's sources are given an accurate portrayal of your position before the reporter makes contact. Let the reporter know you are doing this. Let him have the materials favorable to your position so he will be armed with authoritative questions when he speaks to your opponent and others. For example, in a case involving a child and repressed memory, the entire story might be changed if you provide the reporter with authoritative articles which show reservations that prominent professionals hold in such matters. Reporters have written many abuse stories, but may not have had the information to write the story of the debate within the mental health profession on repressed memories.

4. Briefing. In a complicated case, reporters may welcome a background briefing to acquaint them with the legal issues. If you provide honest information you may make friends.
5. Exclusive Story. Equal treatment of all media is important but you should try to cooperate when a reporter works on an exclusive story. If you compromise the exclusive, you will be "out of the loop" in the future. Let other reporters know that you cooperated but did not give an exclusive.
6. Handling Inquiries. Establish simple, precise procedures for responding to media inquiries in your absence. If possible, this should include assurances that someone will provide the desired assistance in time to accommodate the reporter's needs.
7. Presenting your client. Avoid the sensational media. The tabloids, in print and on TV, and the numerous talk and interview programs are mostly show business and not journalism. It is hard to justify cooperation with any of them.

IX - VOIR DIRE

- A. Motion Strategy - To sensitize the Judge.
 1. Motion to change venue.
 2. Motion to sequester jurors and question them individually
- B. Sensitive Issues regarding cases of this nature need to be addressed up front so that you can gauge the juror's reactions.
- C. Consider a jury questionnaire tailored specifically to your theory of defense. Several examples are attached.