COPO[SM] STRATEGIES

NJ RPC 3.6 (Trial Publicity): The Ethics of Making Your Client's Case in the Court of Public Opinion

NJAJ Boardwalk Seminar: Social Media, Trial Publicity, and Professionalism
April 28, 2017

Our agenda

1. Rule 3.6 of the New Jersey Rules of Professional Conduct
2. *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991)
3. Applicable NJ case law, court rules, and ethics opinions/decisions
4. A word about gag orders
5. A word about defamation
6. Conclusion: “Court Interference” theory

Additional considerations for outside-of-court statements

1. Rule 1.6 (Confidentiality of Information)
2. Rule 2.1 (Advisor)
3. Rule 3.8 (Special Responsibilities of a Prosecutor)
4. Rule 8.2 (Statements Concerning Judges and Other Adjudicatory Officers)
5. Rule 8.4 (Misconduct)
6. The interplay between the First Amendment and the Sixth Amendment
7. Strategy
8. Gag orders
9. Defamation

We will touch on 8 and 9 in this presentation.

NJ Rule of Professional Conduct 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~~.

NJ Rule of Professional Conduct 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;

NJ Rule of Professional Conduct 3.6

(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

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

(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;

NJ Rule of Professional Conduct 3.6

(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.

NJ Rule of Professional Conduct 3.6

c) Notwithstanding paragraph (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 paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

NJ Rule of Professional Conduct 3.6

~~d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).~~

NJ Rule of Professional Conduct 3.6

Official Comment by Supreme Court:

A statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:

NJ Rule of Professional Conduct 3.6

1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness other than the victim of a crime, 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;

NJ Rule of Professional Conduct 3.6

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;

NJ Rule of Professional Conduct 3.6

5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and 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.

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

Facts (via Rehnquist's majority opinion joined by White, O'Connor, Scalia, Souter)

On the day after client's criminal indictment--and six months before his trial--Dominick Gentile held a press conference during which he said

1. The evidence would prove that his client was innocent;
2. A police detective was in the most direct position to have stolen certain items;
3. There was "far more evidence" that will establish the detective's acts "than any other living human being"
4. Four victims were known drug dealers and convicted money launderers and drug dealers; and
5. He represented an innocent man.

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

Facts (via Rehnquist's majority opinion joined by White, O'Connor, Scalia, Souter)

Gentile's admitted purpose for calling the press conference was to:

1. Counter public opinion which he perceived as adverse to his client;
2. Fight back against the perceived efforts of the prosecution to poison the prospective juror pool; and
3. Publicly present his client's side of the case

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

Facts (via Rehnquist's majority opinion joined by White, O'Connor, Scalia, Souter)

After his client was acquitted, the Nevada Disciplinary Board brought a proceeding against Gentile and found that in light of the statements, their timing, and Gentile's purpose, he knew or should have known that there was a substantial likelihood that the statements would materially prejudice his client's trial.

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

Facts (via Rehnquist's majority opinion joined by White, O'Connor, Scalia, Souter)

Nevada Supreme Court affirmed, noting that

1. The case was "highly publicized";
2. The press conference, held the day after the indictment and the same day as the arraignment, was "timed to have maximum impact"; and
3. That Gentile's comments "related to the character, credibility, reputation or criminal record of the police detective and other potential witnesses"; and held that the "absence of actual prejudice does not establish that there was no substantial likelihood of material prejudice"

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

Court held "substantial likelihood" standard was constitutional (via Rehnquist's majority opinion joined by White, O'Connor, Scalia, Souter)

The "substantial likelihood of material prejudice" standard strikes "a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials."

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

Court held "substantial likelihood" standard was constitutional (via Rehnquist's majority opinion joined by White, O'Connor, Scalia, Souter)

Court said that attorneys' extrajudicial comments on evidence that might never be admitted and statements that give their own version of the facts could undermine the "theory upon which our criminal justice system is founded."

That theory being criminal trials are to "be decided by impartial jurors, who know as little as possible of the case, based on material admitted into evidence before them in a court proceeding."

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

Court held "substantial likelihood" standard was constitutional (via Rehnquist's majority opinion joined by White, O'Connor, Scalia, Souter)

The "substantial likelihood" test is constitutional because "it is designed to protect the integrity and fairness of a State's judicial system, and it imposes only narrow and necessary limitations on lawyers' speech."

These necessary limitations are aimed at two principal evils:

1. Comments that are likely to influence the actual outcome of the trial, and

2. Comments that are likely to prejudice the jury venire, even if an untainted panel can ultimately be found

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

Court held Rule 177 was void for vagueness (via Kennedy's majority opinion joined by Marshall, Blackmun, Stevens, O'Connor)

Nevada Rule 177 was held unconstitutionally void for vagueness because of this language:

> "3. Notwithstanding subsection 1 and 2(a-f), a lawyer involved in the investigation or litigation of a matter may state ***without elaboration***:
>
> (a) ***the general nature*** of the claim or defense;
> (b) the information contained in a public record;"

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

Rehnquist dissent to Court's holding that Rule 177 was void for vagueness (joined by White, Scalia, Souter)

Rule 177 is constitutional because disputed language conveys "the very definite proposition that the authorized statements must not contain the sort of detailed allegations that [Gentile] made . . . ."

Dissent would have held that Gentile violated Rule 177:

> "We find it persuasive that, by his own admission, petitioner called the press conference for the express purpose of influencing the venire. It is difficult to believe that he went to such trouble, and took such a risk, if there was no substantial likelihood that he would succeed.

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

Additional guidance (via Kennedy's opinion joined by Marshall, Blackmun, Stevens)

Putting aside the vagueness of Rule 177, Kennedy would have reversed the decision of the Nevada Supreme Court because:

1. The size of the community from which a jury venire would be drawn (600,000+ people)

2. Much of what Gentile said had been published in one form or and the rest was "available to any journalist willing to do a little bit of investigative work"

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

Additional guidance (via Kennedy's opinion joined by Marshall, Blackmun, Stevens)

3. Unlike the police, Gentile refused to comment on polygraph tests, confessions, and evidence from searches or test results; and refused to elaborate on victims' credibility except to say they were pressured to testify and asserted claims to collect insurance money

4. Trial took place on schedule with no request by either party for a venue change or continuance, jury was empaneled without difficulty, and not one juror recalled Gentile's press conference

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

Additional guidance (via Kennedy's opinion joined by Marshall, Blackmun, Stevens)

5. "Exposure to [a] statement six months prior to trial would not result in prejudice, the content fading from memory long before the trial date."

6. All material information disseminated during Gentile's press conference was admitted in evidence before the jury

"While it is true that Rule 177's standard for controlling pretrial publicity must be judged at the time a statement is made, *ex post* evidence can have probative value in some cases."

New Jersey state case law

In re Inquiry of Broadbelt, 683 A.2d 543 (N.J. 1996)

Sitting M.C. judge appeared on television (including "Court TV" and "Geraldo Live") and commented on cases pending in other jurisdictions

Violated NJ Code of Judicial Ethics Canons 2B and 3A(8)

Endorsement of *Gentile*/"substantial likelihood" standard as constitutional basis for applying these Canons to the speech here [despite difference in application of rules]

New Jersey federal case law/court rules

United States v. Wecht, 484 F.3d 194 (3d Cir. 2007)

- Court held that the "substantial likelihood" standard was constitutionally-permissible
- Required District Courts to change their Local Rules to comply with ruling

D.N.J. Local Civil Rule 105.1 - Extrajudicial Statements

New Jersey ethics opinions

N/A

A word about gag orders

Is the proposed gag order really a “gag order”?

Or is it a case-specific application of Rule 3.6?
See, e.g., Commonwealth v. Lambert, 723 A.2d 684 (Pa. Super. Ct. 1998)

Does it apply to attorneys, parties, or both?

Consider whether a Rule 3.6-type gag order is worth fighting over

A word about defamation

As a matter of law, attorneys may not be able to obtain the benefit of the "judicial privilege" exception to defamation when they send copies of pleadings containing defamatory allegations to members of the media:

Citizens State Bank of NJ v. Libertelli, 521 A.2d 867 (N.J. Super. Ct. 1987)

Bochetto v. Gibson, 860 A. 2d 67 (Pa. 2004)

Conclusion: “Court Interference” theory

Attorneys’ statements seem most likely to run afoul of Rule 3.6 when they interfere with or usurp the fact-finding power/responsibilities judges and juries have during a trial.

1. Credibility or reputation of witnesses
2. Expected testimony of witnesses
3. Information about guilty pleas, confessions, other statements
4. Test results
5. Guilt or innocence of criminal defendant or suspect
6. Inadmissible evidence
7. Nonpublic information obtained solely through litigation