UPC 2015 Government Civil Practice Conference
October 16, 2015 – Moab, Utah

THAT DELICATE BALANCE
Pre-trial Publicity and Rule of Professional Conduct 3.6

A criminal defendant's Sixth Amendment right to a fair trial is balanced against an attorney's First Amendment right of free expression.

Utah Rules of Professional Conduct

3.6 Trial Publicity (attached)
3.8 Special Responsibilities of a Prosecutor (attached)

I. Hypothetical: Officer-involved shooting: Bucksnort City, Bonneville County, Utah

A. During drug surveillance plain clothes officers approached a woman suspect in her car, she began to back out, moving towards one officer, and they opened fire and killed her.

B. Extensive investigations by PD and County Attorney find that the officer mishandled illegal drugs and that the facts surrounding the shooting warrant manslaughter charges.

C. Three media incidents:
1. Based on PD drug investigation, County Attorney has to dismiss 114 drug cases: TV interview
2. County Attorney issues OICI opinion that the shooting is not justified: press release, release of the opinion, and news conference
3. County Attorney files manslaughter Information and Probable Cause Statement: TV stories and interviews

II. Question: Do press interactions violate Utah Rules of Professional Conduct?

A. What's the threat to the defendant?

B. What are the standards in Rule 3.8? How about 3.6?
1. Elements of the Rule
2. Definitions
3. Exceptions to Rule
4. Comments

III. Are we still queasy?

A. Does an attorney have 1st Amendment rights? Does a prosecutor?

B. Case Law:

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

Gentile's client was charged with various counts of racketeering and drug offenses and Gentile held a press conference the day the charges were filed, alleging police misconduct, including drug use, falsifying polygraph results and witness tampering. Gentile, the day after charges were filed, held a press conference making significant charges of misconduct by the police, including an allegation that the FBI was investigating the police on those charges. Trial was held six months later, resulting in an acquittal on all counts. The Nevada Bar subsequently disciplined Gentile for violating Nevada rule 177, which is substantially similar to Utah Rule 3.6.

The United States Supreme Court reversed the discipline, finding the Bar's interpretation of rule 177 was void for vagueness, as applied. The Court found the rule's requirement of a "substantial likelihood" of "material prejudice" helped balance the potential harm to a fair trial against the attorney's right to free expression, but held that the Bar had never adequately performed the balance, had never interpreted the rule, and had an inadequate record in Gentile's discipline. The Court further held that speech critical of misconduct by governments and their officers is entitled to a higher standard of First Amendment scrutiny. The Court also considered practical factors such as the timing of the trial and the size of the potential jury pool. Rule 177 requires a careful examination and clear limits in order to provide a safe harbor for an attorney's right to free speech – elements missing from Gentile's case.

IV. Other case law

A. 6th Amendment versus 1st Amendment cases:

1. **Bridges v State of Calif, 314 U.S. 252 (1941)**

   A California trial court found two newspapers in contempt for publishing news reports about ongoing trials in labor relations litigation, holding that the reports compromised a fair trial. The Supreme Court reversed, finding that the potential for danger to the judicial system must be a "substantial evil" and the danger must be imminent in order to justify a prior restraint on free speech.

2. **State v Sales, 537 P.2d 1031 (Utah 1975)**

   The defendant was convicted of first degree murder in a case characterized by considerable pre-trial publicity. The Supreme Court held that the defendant's right to have a trial free from the influence of publicity has to be balanced against the rights of free speech and free press and against the right of the people to know what's going on in public affairs. The trial court exercised "commendable care" in voir dire to ensure that jurors, even if they were aware of pretrial publicity, were able to set aside any prejudices and act fairly and impartially.

3. **KUTV v Conder, 668 P.2d 513 (Utah 1983)**
The trial court had issued a writ of prohibition preventing the press from using the term "Sugarhouse Rapist" in their reports of an ongoing trial. The Supreme Court invalidated the order, observing that in a competition between fair trial and free expression, the judicial branch has no favorites and must define a balance that will preserve both rights. Without a hearing and a record regarding the gag order, the trial court had not demonstrated any attempt to use a balancing test. Utah's constitutional equivalent of the First Amendment (Art 1, sec 15) grants broader protection to free speech than does the federal standard, as it also prohibits laws that would "restrain" free speech, not just those "abridging" free speech; the Court's research had found that every instance of a prior restraint on free speech had been invalidated.

4. **Madsen v United Television, 797 P.2d 1083 (Utah 1990)**
A police officer brought a defamation action against a newspaper in response to reports about the officer shooting and killing a fleeing suspect. In affirming dismissal, the Supreme Court observed that a person who kills another is an appropriate focus for public examination – even more so, a police officer who takes a life is a legitimate target of extensive public scrutiny. The people have a right to examine the use of deadly force by a peace officer.

B. Jury selection and voir dire cases:

1. **State v Bebee, 175 P.2d 478 (Utah 1946)**
Bebee killed a popular town marshal and narrowly escaped retribution by an angry lynch mob. Later news reports and a funeral sermon by a church leader strongly condemned the murder. In confirming a trial court decision to not change venue, the Supreme Court examined the voir dire process and found the judge had "no great difficulty" in seating a jury who could render a verdict untainted by public opinion.

2. **Andrews v Shulsen, 600 F. Supp 408 (Dist Ct Utah 1984)**
In a federal habeas corpus review of the trial in the infamous Ogden Hi-Fi Shop murders, the court examined the issue of a change of venue. The case was the subject of some of the most extensive and dramatic publicity in recent times. Reviewing the voir dire process, the federal court commended the trial court's jury selection process, observing that the fact a panel member was aware of the crimes and the publicity is not a sufficient disqualification, if a venire member is able to set aside that knowledge and render a fair verdict. The court also noted that over six months had passed between the most dramatic publicity and the trial, there was a large population from which the jury pool would be drawn, and the press reports had used terms like "suspects" and "allegedly."

3. **See also, State v Moton, 749 P.2d 639 (Utah 1988), and State v Woolley, 810 P.2d 440 (Utah 1991).**

Rule 3.6. Trial Publicity.

(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.

(b) Notwithstanding paragraph (a), a lawyer may state:

(b)(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(b)(2) information contained in a public record;

(b)(3) that an investigation of a matter is in progress;

(b)(4) the scheduling or result of any step in litigation;

(b)(5) a request for assistance in obtaining evidence and information necessary thereto;

(b)(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

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

(b)(7)(i) the identity, residence, occupation and family status of the accused;

(b)(7)(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(b)(7)(iii) the fact, time and place of arrest; and

(b)(7)(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(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.

(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).

Comment

[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. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. 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 ensuring 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.

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

[3] This Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, this Rule applies only to lawyers who are, or who have been, involved in the investigation or litigation of a case and their associates.

[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

[5] There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter or any other proceeding that could result in incarceration. These subjects relate to:

(i) 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;

(ii) 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;

(iii) 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;

(iv) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(v) 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

(vi) 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.

[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. Nonjury hearings and arbitration proceedings may be even less affected. This Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule 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.

[8] See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

Rule 3.8. Special Responsibilities of a Prosecutor.

The prosecutor in a criminal case shall:

(a) Refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) Make reasonable efforts to ensure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) Not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) Make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

(e) 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 3.6.

Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. See Rule 3.3(d), governing ex parte proceedings, among which grand jury proceedings are included. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2] Paragraph (c) does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspect who has knowingly waived the rights to counsel and silence.

[3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[3a] Utah has not adopted the ABA version of Rule 3.8. ABA Model Rule 3.8(d), requiring the prosecution to inform the tribunal of mitigating information related to sentencing, creates an unreasonable burden and is not deemed workable where the same information is required to be disclosed to the defense counsel who should be in the best position to decide what to present to the tribunal. The ABA's paragraph (e) regarding limitations on subpoenaing lawyers to grand juries or other legal proceedings is viewed as unnecessary, as there are adequate safeguards in place for federal prosecutors, and the Utah criminal justice system does not typically use the grand jury procedure. Utah has not adopted the ABA's proposed paragraph (f), because the changes are either unnecessary because of, or are potentially inconsistent with, the provisions of Rule 3.6.