LAWYERS AND PUBLICITY: ARE THERE LIMITS?

by Kenneth Labowitz
Dingman Labowitz P.C.
Alexandria, Virginia

What can a lawyer say in public about a pending case?

The rules are clear for what a lawyer can say in a pending criminal case, thanks to a series of cases and a specific Rule of Professional Conduct applicable in Virginia to criminal cases.

However, there appears to be no guidance as to what an attorney may say about a pending civil case without fear of facing disciplinary action from the Bar or contempt from the trial judge.

With profound changes in the application of the First Amendment to lawyer advertising in the last 40 years, there are simply no reported cases or other guides delineating what lawyers can say to the media about their pending civil cases. It can be suggested that the profession has evolved from strict vigilance of attorney-media conduct to one where we can all name lawyers who not only seek out publicity but have public relations professionals on staff or on speed dial to get their current cases and clients in the press and on social media (I admit to thinking of a particular lawyer in California who dresses exclusively in red in this regard).

Into the 1970s, attorneys were basically prohibited from advertising their services, and the few cases that addressed

attorney publicity focused on an ill-defined line that disciplined excessive self-promotion. What now seems positively quaint was seriously contested by bar officials against those pushing the concept of self-promotion too far.

So through the mid-1970s attorneys who promoted themselves through their own laudatory media news releases about professional accomplishments and practice specialties were sanctioned or suspended for such "unprofessional conduct". *See, among several examples*, Bushman v. State Bar of California, 522 P.2d 312 (Calif. 1974); In re Tall, 93 SW2d 922 (Mo. 1936); In re L.R., 81 A.2d 725 (N.J. 1951); *and generally* Lawyer Publicity as a Breach of Legal Ethics, 4 ALR4th 306.

These opinions cannot be read without regard to the then-applicable absolute prohibition against advertising by attorneys. What appears innocuous to us today was obviously perceived in that time and place as a strong stand against anything that might open the door to the scourge of *attorneys promoting themselves in paid commercials on television* or similar horribles.

Beginning with the significant attitude-shift set forth in Bates v. State Bar of Arizona, 433 U.S. 350 (1977), the world changed regarding the perception of the application of the First Amendment to lawyers and their right to speak, including self-promotion. While not directly addressing attorney publicity, the Supreme Court made the critical point that lawyers, like others,

have a constitutional right to speak, including about themselves, their activities, and their past and current clients. The Court found that lawyers may only be subject to discipline for false, deceptive, or misleading advertising.

The conclusion in Bates was predicted by the Supreme Court of California in a case earlier in 1977 in Jacoby v. State Bar, 562 P.2d 1326 (Calif. 1977). For those younger than a certain age, a context is important: Jacoby and Meyers were lawyers four and five years out of law school when they decided to open a chain of legal clinics offering simple legal services at extremely low prices. This revolutionary concept created much hand wringing within the profession and ultimately a disciplinary proceeding was started with the obvious goal of putting the clinics out of business.

One of the grounds for discipline against the lawyers was that they participated in interviews with news media about their plans and the opening of the clinic offices. They issued a press kit explaining their plans and fee structure (another relic of the past: the State Bar in California as well as Virginia enforced strict fee schedules as to what lawyers were *required* to charge for their services, so undercutting regular law firms on price was a big deal. These fee schedules were monopolistic, anti-competitive, and highly unfavorable to the clients, and were appropriately struck down after a futile attempt at their defense, the cost of which was imposed on the members of the Virginia State Bar, not

that I am bitter. *See* Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975)).

Jacoby and Meyers appealed their suspensions from practice for 45 days for their actions, and the California court had many important things to say in finding that they had rights to do what they were doing:

> The First Amendment protects the freedom of expression of all citizens, including lawyers. Petitioners have a right not only to respond to questions from the media on important issues, but also a right to seek out the media to express their views. Insofar as the present proceedings effectively inhibit petitioners from speaking their mind on an important issue- the delivery of inexpensive legal services ti middle income persons- they infringe on important First Amendment rights.
>
> Moreover, just as petitioners have a right to air their beliefs, society has a right to hear them. . . . [S]ince the threat of discipline has in many cases deterred lawyers from talking to journalists, [that threat] has prevented laymen from learning important facts about the legal profession. While this aura of secrecy may create a mystique about lawyers, surely it is preferable to encourage freedom of information; such knowledge is 'helpful, perhaps indispensable, to the formation of an intelligent opinion by the public on how well the legal system is working and whether it should be regulated or even altered.'

562 P.2d at 1332-1333, quoting the trial court decision in Bates, footnotes omitted.

A final 1970s era opinion is worthy of study, when Alexandria lawyer Phil Hirschkop sued over the constitutionality of then Virginia State Bar rule essentially prohibiting any comment by a lawyer during a pending criminal or civil trial. Interestingly, the discussion of the Virginia rule in Hirschkop v. Snead, 594 F.2d

356 (4th Cir. en banc 1979) is the single examination on the topic of lawyer publicity to be found in the modern, post-Bates era.

The Fourth Circuit found that the general "appropriate" standard governing discipline over lawyer extrajudicial conduct during trials is whether "the publication [of the lawyer's comments] present a reasonable likelihood that it will be prejudicial to the fair administration of justice." *Id.*, at 362.

The Court in its opinion in Hirschkop examines the implications of lawyer conduct in the context of criminal jury trials, criminal bench trials, sentencing, disciplinary hearings, and civil trials, all in the context of the then-applicable Disciplinary Rule 7-107. That Rule was extraordinarily restrictive over lawyers' extrajudicial actions, and, it must be noted, is entirely omitted from the current Rules of Professional Conduct; the only RPC reference is to criminal trials, as discussed below.

The Court noted the significant differences in the concerns for fairness in criminal versus civil cases. The Court disposed of the threat of discipline over lawyer publicity concerning civil cases in few words, noting that the "dearth of evidence that lawyers' comments taint civil trials and the courts' ability to protect confidential information establish that the rule's restrictions on freedom of speech are not essential to fair civil trials." *Id.*, at 373.

A thorough search of case decisions since 1979 has revealed no

reported case in which a lawyer has been disciplined for out-of-court conduct in a civil case. Frankly, there have not been more than a handful of decisions reported for misconduct in criminal cases, either.

It is impossible to conclude that, in every civil and criminal case in every jurisdiction since 1979, the conduct of the lawyers involved have kept within the defined boundaries. What is certain is that our collective tolerance for lawyer conduct during trials has become more accepting; we accept the idea that a noteworthy case, particularly involving celebrity misconduct, will generate a news conference or media blitz or website or hashtags or all of the above and then some.

There are public relations firms available for hire to assist lawyers in the management of cases with great media value. Contrast this with the concern expressed through the Bates era that lawyers would purchase favorable coverage from the media, to the point that the American Bar Association promulgated Model Disciplinary Rules to prohibit this evil. *See* 4ALR4th at 309.

To restate the obvious: there is no Rule of Professional Conduct that is comparable to the repealed Disciplinary Rule 7-107 in Virginia. There appear to be no inhibitions on a lawyer during the course of the pretrial investigation or during the trial of a civil case beyond those imposed by orders of the trial judge.

There remain, however, the limitations on a lawyer's conduct

during a criminal prosecution:

> Rule 3.6: Trial Publicity
>
> (a) A lawyer participati9ng in or associated with the investigation or the prosecution or the defense of a criminal matter that may be tried to a jury shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication that the lawyer knows, or should know, will have a substantial likelihood of interfering with the fairness of the trial by a jury.
>
> (b) [Imposing the duty on the lawyer to prevent such extrajudicial statements by employees or associates of the lawyer.]

The Comments to Rule 3.6 acknowledge the balance required between protecting the right to a fair trial and safeguarding the right to free expression. The omission of parallel limitations on lawyers in civil cases as are in place for those in criminal prosecutions shows the tilt in favor of lawyer free expression in civil cases.

Notwithstanding the ever-shifting and -expanding universe of social media, it is difficult to envision that there may be *some* statements or conduct by a lawyer during a trial in the press conference following the day's proceedings that would trigger a disciplinary proceeding. In the 40 years since the Hirschkop examination of the scope of lawyer rights to comment during trial, no lawyer appears to have generated a Bar complaint, or at least one that resulted in a reported decision.

It is clear that, as with many aspects of free expression, there is a range of practices tolerated and accepted among legal communities across the country. The recent HBO series *Making a*

Murderer was extraordinary to me for the press conferences conducted in the courthouse after each day's trial proceedings, with the prosecutor and defense lawyers commenting on how the day's witnesses performed and what the next day held. I can't imagine such a scene in a case in the courts in which I practice or in a case I was trying (who has the time or the energy?). Obviously, the legal community in northern Wisconsin found that practice acceptable.

Similarly, I have seen Texas lawyers interviewed on television news following injuries on a State Fair attraction as to their past successes in similar cases and their availability as counsel for those most recently injured. Whether that coverage is considered news in those markets or was the product of work by sharp P.R. professionals is impossible to say.

There is a genre of non-fiction writing known as true detective, which includes works in which lawyers write about their experiences as counsel in noteworthy and newsworthy cases. Where the Bar disciplinary authorities in the distant past would see those books as self-promoting, today they are seen simply as entirely benign and not worthy of disciplinary concern.