Wednesday, Oct. 13, 2021 - 4:45pm: ***You Won Your Big Case & Now Your Phone is Ringing; A Lawyer's Guide to Speaking with the Press.***

Panelists: Wes Hill, Ward, Smith & Hill, PLLC; Tom Melsheimer, Winston & Strawn LLP; Morgan Chu, Irell & Manella, LLP;
Co-Moderators: Michael Smith, Scheef & Stone, & Eric Findlay, Findlay Craft P.C.

Panel Discussion Outline v. 4

Introductions (name and firm only to save time)

Do you wait until you get a call from the press?

No, need a plan.

When do you put the plan together?

Who is involved in making the plan?

Client and PR firm

What needs to be in the plan?

Primarily who talks to the press and strategy for communications

Some firms have policies or even manuals for communicating with the press. Have you seen those?

Let's take a step back – why does communicating with media matter?

Are there ever differences between what the client wants and what the law firm does?

Does it matter if the client is publicly traded?

What about after pretrial rulings – same as after a verdict?

No – panelist explain TDR 3.07 re: statements before adjudication (highlighted copy of 3.07 below)

Under TDR 3.07 what can you say while the case is still pending?

See rule attached

But the worst thing that can happen as a result of an overexuberant press release is that there's potential ethical complaint, right? We still have immunity from suit for statements about cases.

No – you can lose the judicial-proceedings and attorney immunity protections when repeating allegations for publicity purposes. See Landry decision.

Everyone likes the call after a big verdict. What about after a loss?

Presumably reporters don't have the same goals the lawyers do. How are they different?

What's helpful from a lawyer from a reporter's perspective? *(from Scott Graham – panlists will explain)*

- *Don't just say "no comment" – send reporter to person who can respond, or at least explain why can't comment*
- *Let the reporter know you recognize the importance of their deadline and try to get them an answer within it*
- *Press releases with relevant info are useful, if available*
- *Attach verdict forms (even atty's w/annotations with findings are helpful)*
- *Send public transcripts if help explain what happened – closings particularly helpful*
- *Send trial brief or pretrial order if helps explain issues*
- *Legal reporters may prefer comments from the lawyer, not the client*
- *Explain significance of verdict – ex. "willful" means damages can be increased up to 3x.*

What's not helpful from a lawyer from a reporter's perspective?

- *Partial info – give favorable parts of verdict, but not unfavorable*
- *Credibility is crucial*

What's the biggest mistake you've seen a lawyer make talking to the press?

- *Don't go "off the record" with reporter you just met*
- *Make sure reporter agrees off the record*
- *Try to group OTR comments so no risk reporter's notes fail to show OTR – don't go back and forth*

Any differences in considerations between/and for national and local counsel?

We've seen cases with reporters in the courtroom; what about questions posed then? Ever answer those?

- *Helpful to explain what's happened during breaks*
- *Great opportunity to establish rapport with reporter – beneficial to both*

Other questions/comments:

Rule 3.07. Trial Publicity

(a) In the course of representing a client, a lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicatory proceeding. A lawyer shall not counsel or assist another person to make such a statement.

(b) A lawyer ordinarily will violate paragraph (a), and the likelihood of a violation increases if the adjudication is ongoing or imminent, by making an extrajudicial statement of the type referred to in that paragraph when the statement refers to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness; 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; 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;

(3) the performance, refusal to perform, or results of any examination or test; the refusal or failure of a person to allow or 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; or

(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.

(c) A lawyer ordinarily will not violate paragraph (a) by making an extrajudicial statement of the type referred to in that paragraph when the lawyer merely states:

(1) the general nature of the claim or defense;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense, claim or defense involved;

(4) except when prohibited by law, the identity of the persons involved in the matter;

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

(6) a request for assistance in obtaining evidence, and information necessary thereto;

(7) a warning of danger concerning the behavior of a person involved, when there is a reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(8) if a criminal case:

(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;

(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.

Comment:

1. Paragraph (a) is premised on the idea that preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial. This is particularly so where trial by jury or lay judge is involved. If there were no such limits, the results would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. Thus, paragraph (a) provides that in the course of representing a client, a lawyer's right to free speech is subordinate to the constitutional requirements of a fair trial. 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 assuring 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. Because no body of rules can simultaneously satisfy all interests of fair trial and all those of free expression, some balancing of those interests is required. It is difficult to strike that balance. The formula embodied in this Rule, prohibiting those extrajudicial statements that the lawyer knows or reasonably should know have a reasonable likelihood of materially prejudicing an adjudicatory proceeding, is intended to incorporate the degree of concern for the first amendment rights of lawyers, listeners, and the media necessary to pass constitutional muster. The obligations imposed upon a lawyer by this Rule are subordinate to those rights. If a particular statement would be inappropriate for a lawyer to make, however, the lawyer is as readily subject to discipline for counseling or assisting another person to make it as he or she would be for doing so directly. See paragraph (a).
3. The existence of "material prejudice" normally depends on the circumstances in which a particular statement is made. For example, an otherwise objectionable statement may be excusable if reasonably calculated to counter the unfair prejudicial effect of another public statement. Applicable constitutional principles require that the disciplinary standard in this area retain the flexibility needed to take such unique considerations into account.
4. Although they are not standards of discipline, paragraphs (b) and (c) seek to give some guidance concerning what types of statements are or are not apt to violate paragraph (a). Paragraph (b) sets forth conditions under which statements of the types listed in subparagraphs (b)(1) through (5) would likely violate paragraph (a) in the absence of exceptional extenuating circumstances. Paragraph (c), on the other hand, describes statements that are unlikely to violate paragraph (a) in the absence of exceptional aggravating circumstances. Neither paragraph (b) nor paragraph (c) is an exhaustive listing.
5. Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.04(c)(1) and (d) govern a lawyer's duty with respect to such Rules. Frequently, a lawyer's obligations to the client under Rule 1.05 also will prevent the disclosure of confidential information.