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MEMBERS
OCDLA

RE: *President's Letter*

Team OCDLA:

This is a rant, not a pep-talk. As we move into the new year, we must be vigilant in protecting the rights of the accused. I have noticed that law enforcement PRESS RELEASES are occurring more and more. Most often, the communications far exceed the Rules of Professional Conduct. This is not a new problem; it is a growing old one. I don't want a war with the D.A.'s Council, the police or traditional or social media, but it is time to take a stand against law enforcement openly flaunting the pre-trial publicity rule.

In certain cases in the public eye, our members need to consider complaining across the board to the courts about pre-charge and pre-trial publicity. Raise it with the magistrate and then the District Court. Bar complaints against prosecutors may even be necessary because a change of venue does not remedy the effects of these modern-day Star Chambers, nor do disclaimers at the beginning or end of a news story ("these are allegations only" or "he is presumed innocent").

Police in large and small markets, but especially OKC and Tulsa, routinely give statements that go beyond the 'necessary' language in Rule 3.6. At least two Rules of Professional Conduct apply: Rules 3.6 (Trial Publicity) and 3.8(f) (Special Responsibilities of a Prosecutor). *These rules also apply to law enforcement and investigators reporting to the prosecutor* (Rule 3.8(f)).

Rule 3.8(f) draws a bright line:

> except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused
>
> AND
>
> 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 or this Rule;

Okla. Stat. tit. 5A, § 3.8(f). The special rules for prosecutors are not discretionary; they are mandatory (the "lawyer shall"….) The police cannot merely ignore these rules, and the District Attorney cannot side-step ethical violations by claiming deniability ("my office didn't make a statement"). The actions of the police are imputed to the D.A. under the ethical standards. It is critical to distinguish between First Amendment rights and the ethical duties of the lawyer. ("The Supreme Court has upheld state ethical limitations on what lawyers can say publicly about a pending or anticipated proceeding. *See, e.g., Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), cited by Andy Lester, *infra*. He also cites other authorities limiting the speech of lawyers.)

> The OBA has a rule on Pre-trial Publicity. Rule 3.6 reads in relevant part:
>
> (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable lawyer would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have an imminent and materially prejudicial effect on the fact-finding process in an adjudicatory proceeding relating to the matter and involving lay fact-finders or the possibility of incarceration.

Okla. Stat. tit. 5A, § 3.6. That rule, alone, doesn't snare law enforcement, but when combined with Rule 3.8, it does. Further, Rule 8.4(a) makes it professional misconduct for a lawyer to "violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another."

Oklahoma lawyer Andy Lester wrote the article, MEDIA MANIA: A PRACTICAL AND ETHICAL APPROACH FOR ATTORNEY CONTACTS WITH REPORTERS https://www.spencerfane.com/wp-content/uploads/2017/06/Media-Mania-A-Practical-and-Ethical-Approach-for-Attorney-Contacts-with-Reporters.pdf. His article cites to Oklahoma and SCOTUS law outlining the standards and making recommendations. The OBA has written ETHICS OPINION NO. 235 which addresses this as well. https://www.okbar.org/ethics/ethics-opinion-no-235/ writing:

> "We interpret these canons, particularly Canon 20, to ban statements to news media by prosecutors, assistant prosecutors and their lawyer staff members, as to alleged confessions or inculpatory admissions by the accused, or to the effect that the case is 'open and shut' against the defendant, and the like, or with reference to the defendant's prior criminal record, either of convictions or arrests. Such statements have the capacity to interfere with a fair trial and cannot be countenanced.
>
> "The ban on statements by the prosecutor and his aides applies as well to defense counsel. The right of the State to a fair trial cannot be impeded or diluted by out-of-court assertions by him to news media on the subject of his client's innocence. The courtroom is the place

> to settle the issue and comments before or during the trial which have the capacity to influence potential or actual jurors to the possible prejudice of the State are impermissible." (43 N.J. 369, 204 A.2d 841, 852.)
>
> * * * *
>
> The Supreme Court of Nevada, In Re: Marshall, No. 4972, in a landmark opinion handed down in September, 1965, used the following language and we quote the following excerpts:
>
> "It is indeed an unpleasant task for a court to disci1pline a member of the legal profession. One who is not a lawyer may tend to view Mr. Marshall's statements as an exercise of his right of free speech, and not subject to sanction. However, this is not true. As Mr. Justice Frankfurter once wrote: The Bill of Rights is not self-destructive. Freedom of expression can hardly carry implications that nullify the guarantees of impartial trials. And since courts are the ultimate resorts for vindicating the Bill of Rights, a state may surely authorize appropriate historic means to assure that the process for such vindication be not wrenched from its rational tracks into the more primitive melee of passion and prejudice. The need is great that courts be criticized, but just as great that they be allowed to do their duty.
>
> "A lawyer knows to the depths of his soul that he belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards.
>
> "The government of the legal profession is a judicial function. Authority to admit to practice and to discipline is inherent and exclusive in the courts.

Id. I have merely done a GOOGLE search and not engaged in any deep dive research yet. I have not even read the following articles, but the presence of these articles shows that there is a growing problem. *See*,

> THE PROSECUTOR AND PRE-TRIAL PUBLICITY THE NEED FOR A RULE https://www.law.ua.edu/pubs/jlp_files/issues_files/vol11/vol11art12.pdf
>
> PRETRIAL PUBLICITY IN CRIMINAL CASES OF NATIONAL NOTORIETY: CONSTRUCTING A REMEDY FOR THE REMEDILESS WRONG https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1365&context=aulr
>
> PROSECUTORS BEWARE: PRETRIAL PUBLICITY MAY BE HAZARDOUS TO YOUR CAREER (DOJ Publication) https://www.ojp.gov/ncjrs/virtual-library/abstracts/prosecutors-beware-pretrial-publicity-may-be-hazardous-your-career

BEYOND PRETRIAL PUBLICITY: LEGAL AND ETHICAL ISSUES ASSOCIATED WITH CHANGE OF VENUE SURVEYS https://pubmed.ncbi.nlm.nih.gov/11868616/

LOST IN COMPROMISE: FREE SPEECH, CRIMINAL JUSTICE, AND ATTORNEY PRETRIAL PUBLICITY
https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1205&context=flr

When police departments vilify our clients in public, it influences the charges filed and the possible resolution options. It adversely impacts our clients in many ways (whether it involves the amount of bail required, losing a job, interfering with family custodial rights, destroying a reputation, or even pushing the client to the brink of suicide, etc.) These actions water-down our client's rights and the criminal justice system as a whole.

I am aware that a clever D.A. can attempt an end-around by drafting a PC Affidavit serving as a pretrial harpoon. We have to trust that they will exercise professionalism and some prosecutorial discretion (and many do). However, these routine 'uncontrolled' press releases emanating from police officers and law enforcement media representatives violate the rules. They cannot go unchecked. It must stop before the presumption of innocence is eroded fully.

This is noble profession. Mr. Lester cited to the Comment to Rule 3.6 that contains strong aspirational language:

> [R]egardless of the likelihood of public dissemination of a statement, regardless of the timing of the statement, regardless of the vulnerability of a proceeding to prejudice as a result of the dissemination of a particular statement, and regardless of whether a lawyer is involved in a proceeding or associated with a lawyer who is involved in it, a lawyer should aspire to refrain from making statements that pose a substantial likelihood of prejudicing the fairness of a proceeding or unjustifiably casting doubt on the fairness of the proceeding or the legal system in general.

Comment, ¶ 6, Okla. R. Prof. Cond. 3.6. We need to aspire to these exacting standards.

The defense must unite. The OCDLA gives us a forum. Keep up the fight, even if we must tilt at windmills from time-to-time.

Sincerely,

Bob Wyatt

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