THE RISING PROBLEM OF ABUSIVE ATTORNEYS AND 
TRIAL PUBLICITY

I. INTRODUCTION

For better or for worse, the American media just is not what it used to be. Gone are the days when even the most important news took hours or even days to spread to the eyes and ears of the public. Today, news and information spread like wildfire through satellite links, the air waves, and even the on-line information superhighway. Gone too are the days when only the privileged elite could gain access to the news media. Now, almost anyone can broadcast via the Internet or find some desperate reporter, photographer or talk-show host to provide them with a half hour in the national limelight; even William Randolph Hearst would likely be amazed.

The contemporary mass media, with a lot of help from a small but growing host of unscrupulous attorneys, may also be ushering out traditional notions of the fair administration of justice. Though the adversarial system of advocacy has long been a touchstone of the American judicial process and has helped guarantee both a zealous prosecution and defense, this same system has seemingly encouraged overzealous attorneys to use the increasing accessibility of the media as a newfound weapon of litigation. Acting Justice Harold J. Rothwax of State Supreme Court of Manhattan, who tried and failed to silence lawyers at the outset of the sensational murder trial of Joel Steinberg in 1988, framed the situation as such: "Lawyers now feel it is the essence of their function to try the case in the public media. It is no longer courtroom-based, and that's astonishing. It is a whole new ethic that needs to be looked at carefully."

Though the issue of media publicity is not entirely new to the legal profession, it is true that recent years have seen an explosion of abusive and excessive uses of the media to win favorable verdicts in courts of law. These practices have been condemned by some and admired by others, but in any case the courts have not been overly successful in quelling the problem. The American Bar Association has promulgated ethical rules to deal with this situation, but they, being mere model

rules, are not enforceable in the judicial system without being formally adopted as binding law by Congress or the various state legislatures. This has been done in varying forms and degrees in some forty states, but ethical rules regarding abuses of the media have not been implemented across the board and are clearly not uniform. In any case, Justice Rothwax is correct—the use of pretrial publicity by contemporary attorneys is astonishing and is an ethical problem that requires close scrutiny.

II. REMEDYING RUNAWAY TRIAL PUBLICITY WITH EXISTING RULES: A LOOK AT KRAMER v. TRIBE

Though curbing abusive attorneys from trying their cases in the media seems to have been difficult for many courts, it is still a task that may be accomplished if courts and judges are pushed far enough. In the Kramer v. Tribe decision, District Judge William G. Bassler of the United States District Court for the District of New Jersey illustrates just how far one attorney can go before being met with a sharp reprisal from the bench.

In 1987, plaintiff Steven M. Kramer was retained as counsel to represent Lightning Lube, Inc., in a case against Witco Corporation. In the spring of 1992, Kramer successfully litigated a three-month jury trial resulting in a May 4, 1992, verdict in favor of Lightning Lube for approximately $11.5 million in compensatory damages and $50 million in punitive damages. On June 23, 1992, Lightning Lube retained defendant Laurence H. Tribe as appellate counsel in the matter of Lightning Lube v. Witco. Soon thereafter, the court reduced Lightning Lube’s total recovery to approximately $11.5 million. Witco deposited that sum in the court registry and applications laying claim to the amount were filed with the court. Among the claims were Lightning Lube’s motion for withdrawal of the entire amount, Kramer’s claim for his disputed fee of $2.3 million, and the disputed claim of Tribe and his associates for appellate counsel fees amounting to $2.75 million. Eventually, all but Tribe’s $2.75

5. See id. at 97.
6. See id. at 98.
8. See Kramer, 156 F.R.D. at 98.
million claim was distributed from the amount in the court registry. As a result of numerous problems regarding the amount claimed by Tribe, the parties involved agreed to have the matter submitted to binding arbitration before a mutually agreed upon neutral arbitrator.9

Kramer's settlement with Lightning Lube in his own fee dispute included an agreement in which Kramer would receive 25 percent of any amount by which he could reduce Tribe's appellate counsel fee from the disputed amount of $2.75 million.10 However, instead of negotiating with Tribe or pursuing legitimate legal theories to reduce the amount of appellate counsel's recovery, Kramer resorted to extortionate litigation tactics. In November of 1993, Kramer contacted one of Tribe's associates and threatened lawsuits and unfavorable publicity if there was not a settlement with Lightning Lube for a fee in the $600,000 range. Shortly thereafter, Kramer threatened to "go to the press and ruin Tribe's reputation" if appellate counsel would not agree to a substantially reduced fee.11 When Kramer received no settlement offer, he initiated a lawsuit naming Tribe, a number of his associates, and Harvard Law School as defendants. Among the numerous allegations in the complaint were counts of fraud, slander, and breach of contract.12 Kramer also began to make good on his threats by launching a smear campaign against Tribe by sending copies of his complaint to newspapers, law journals, and numerous members of the legal community. Articles concerning Kramer's complaint appeared in the Wall Street Journal, the Harvard Crimson, the Harvard Law Record, and the New Jersey Law Journal, among others.13

In response to Kramer's actions, Tribe and other defendants in the lawsuit filed a motion to dismiss the complaint and to impose sanctions against Kramer.14 After citing its inherent disciplinary authority to supervise and monitor the conduct of attorneys admitted to practice,15 the Court proceeded to critically examine the conduct of Kramer. In its analysis, the Court called attention to 36 instances in which Kramer had been criticized, admonished or sanctioned for unethical litigation practices.16 Furthermore, the Court concluded that the lawsuit initiated by Kramer

9. See id. at n.2.
10. See id. at 99.
11. See id. at 102.
12. See id. at 99.
13. See Kramer, 156 F.R.D. at 102-103.
14. See id. at 99.
and his subsequent media campaign against Tribe ran afoul of Rules of Professional Conduct 3.1, 3.2, and 3.6.\textsuperscript{17} Judge Bassler stated in his opinion:

Kramer's actions reveal a pattern of behavior wherein he takes whatever steps are necessary to dragoon a settlement. He has threatened his adversaries with meritless harassing lawsuits and when those threats fail to motivate them to act in conformity with his desires, files the suits, resulting in a waste of time and resources for the parties as well as the courts... This kind of conduct cannot be tolerated from a practicing attorney. The Court can only conclude, based upon the record before it, that Kramer has either lost the capacity to practice law in the discerning and responsible manner required of practicing attorneys, or that he has purposely ignored his responsibilities as an officer of the court.\textsuperscript{18}

Judge Bassler also called particular attention to Kramer's flagrant abuse of the media as a litigation tactic, stating:

The Court notes with dismay that Kramer's apparent approach to litigating the case and negotiating its settlement, not in the court room, but in the media, is not an isolated incident in his career, nor, by and large, in the legal profession. With increased frequency practicing attorneys are using the media to publicize their cases as a litigation tactic. This must stop if the integrity of the judicial enterprise is to be preserved.\textsuperscript{19}

After issuing its scathing review of Kramer's conduct, the Court imposed a substantial sanction. Pursuant to Federal Rule of Civil Procedure 11, the Court (1) dismissed Kramer's complaint, (2) referred the matter to the appropriate authorities for disciplinary proceedings, (3) referred the matter to the U.S. Attorney's Office for possible criminal extortion violations, and (4) ordered Kramer to pay a $70,289 penalty for attorneys' fees and costs.\textsuperscript{20}

\textsuperscript{17} See id. at 110.
\textsuperscript{18} Id.
\textsuperscript{19} Id. at 109.
\textsuperscript{20} See id. at 111.
III. THE COURTS’ ABILITY TO SANCTION ABUSIVE ATTORNEYS MAY BE MORE DIFFICULT THAN KRAMER V. TRIBE SUGGESTS: EXAMINING OTHER HIGH-PUBLICITY CASES AND THE PROBLEMS THAT ARISE WHEN COURTS TRY TO SILENCE ATTORNEYS

Of course, Kramer v. Tribe is not the only example of an attorney’s abusive use of the press, nor is it even among the best known high-profile cases that have been litigated most heavily in the news media. In recent memory, the legal community has seen copious amounts of media hype in criminal trials across the nation. In the recent murder trial of O.J. Simpson, pretrial publicity hit a fever pitch long before the trial ever got under way. At some points it was even difficult to sort out which media “leaks” came from prosecutors and police and which ones originated from the defense attorneys. In Colin Ferguson’s trial for the slaying of six Long Island Railroad commuters, notorious defense attorney William M. Kunstler and his partner Ronald L. Kuby relied heavily on invoking public sympathy through the media in a vain attempt to win Ferguson an acquittal based on a “black rage” insanity defense. After taking over the defense of Ferguson, Kunstler and Kuby quickly held a press conference, appeared on talk shows, and wrote an op-ed article in the Daily News to advance their defense theories.

In Ferguson’s trial, as with the trials of the Menendez brothers, Joey Buttafuoco, mobster John Gotti, and more recently in O.J. Simpson’s civil lawsuit, the respective trial judges responded to the high publicity situations by issuing gag orders forbidding lawyers from speaking with representatives of the media. Much to the chagrin of news reporters, this seems to be an overall common reaction when judges are faced with cases involving media-pantering attorneys. According to Jane Kirtley of the Reporters Committee for Freedom of the Press, this “seems to be happening much more automatically than it did even three to five years ago.”

21. See Nina Burleigh, Preliminary Judgements: The strategy to try O.J. Simpson first in the court of public opinion makes his scheduled murder trial more than a search for the truth. It raises questions about tactics that could influence a verdict and forces the justice system to confront issues of fairness, race and media manipulation, A.B.A. J., Oct. 1994, at 55.

22. See Hoffman, supra note 1.

23. Id.
However, attempts by the bench to bring an end to runaway pretrial publicity through gag orders and similar tactics have often been in vain. In spite of the fact that judges are more readily disposed to issuing a gag order on attorneys, few attorneys are ever sanctioned for violating them. There may be several reasons why gag orders are rarely enforced by judges: One, enforcing gag orders may be low on the list of priorities in an underfunded judicial system. Two, the First Amendment can pose serious limitations on the implementation of gag orders. And third, as in Simpson’s murder trial, it may be practically difficult to ascertain the source of media leaks on whom to impose sanctions.24 As a final caveat, it should also be noted that appellate courts do not look favorably upon gag orders imposed by trial judges. They challenge the silencing orders for many reasons, including that they are too broad and, by extension, impinge on the news media’s First Amendment rights.25 Because gag orders have been difficult to enforce at the trial court level and because they occupy shaky ground with many appellate courts, they have, in the final analysis, proven to be an extremely ineffective tool for curbing media publicity.

Given the difficulty in enforcing rules designed to curtail litigation publicity, Kramer v. Tribe seems to hold particular significance in that it is an example of a court’s ability to hold a lawyer accountable for his unscrupulous use of media publicity against his opposition. Such a situation has rarely been the case in more high-profile cases. In fact, of all the highly publicized cases mentioned previously, only one resulted in serious sanctions being imposed against an attorney. In the murder and racketeering trial of John Gotti, defense attorney Bruce Cutler was found to be in criminal contempt for ignoring a judge’s order to stop talking to the news media about his client.26 Cutler’s conviction was subsequently upheld on appeal against a First Amendment constitutional challenge.27 Though cases involving sanctions against attorneys such as Kramer and Cutler are few and far between, they do exhibit the fact that, at least under certain conditions, strict judges may be able to enforce restrictions against litigating in the media by imposing harsh sanctions against unscrupulous attorneys who break the rules.

24. See Burleigh, supra note 21.
26. See id.
IV. EXISTING RULES TO CONTROL MEDIA PUBLICITY AND HOW THEY HAVE BEEN IMPLEMENTED AND INTERPRETED

The American Bar Association has specifically drafted Rule of Professional Conduct 3.6 to deal with the problem of trial publicity. In its entirety, the rule as amended in 1994 states:

(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 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 adjudicative proceeding in the matter.

(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;
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;
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.

(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).28

The current version of RPC 3.6 is very similar to ABA ethical rules that have been in place for many years. However, Rule 3.6 was revised in August 1994 just as the media frenzy surrounding the Simpson trial was getting into full swing. Undoubtedly, the Simpson case played some role in the decision to change the ABA's trial publicity rule, but other factors have certainly played a much larger role in the revision. ABA Ethics Committee Chair David S. Isbell stated that the purpose of amended Rule 3.6 was to strike a better balance between the fundamental interests to a fair trial and to free speech.29 However, the desire to find that balance was due in large part to the 1991 United States Supreme Court ruling in Gentile v. State of Nevada30 that struck down Nevada Supreme Court Rule 177, which was identical to the existing Rule 3.6, as being unconstitutional.31

In the Gentile case, the Court found that even though the "substantial likelihood" standard incorporated in Rule 3.6 was not violative of First Amendment rights, the rule was nonetheless unconstitutionally vague.32 Writing for the Court, Justice Kennedy found that a safe harbor provision contained in the original version of Rule 3.633 was impermissibly vague as it failed to provide "fair notice to those to whom it is directed."34 The safe harbor at issue allowed an attorney to "state without elaboration" regarding "the general nature of the claim or defense." Concerning the safe harbor, Kennedy stated:

The right to explain the "general" nature of the defense without "elaboration" provides insufficient guidance because "general" and "elaboration" are both classic terms of degree . . . [T]hese terms have no settled usage or tradition of interpretation in law. The lawyer has no principle for determining when his remarks pass from the safe harbor of the general to the forbidden sea of the elaborated.35

As a result of the Gentile decision's partial invalidation of Rule 3.6

31. See id.
32. See id. at 1048.
33. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1992).
34. Gentile, 501 U.S. at 1048.
35. Id. at 1048-49.
as it existed in 1991, the ABA has since implemented some important changes to the model rule. Chief among these was the deletion of the impermissibly vague terms “general” and “elaboration.” The ABA also totally deleted subsection (b) of the existing model rule, which prescribed a list of statements that would ordinarily be deemed to have a substantial likelihood of materially prejudicing an adjudicative proceeding. In addition, a new subsection (c) was added to the rule to provide attorneys with a “right of reply” which could be utilized whenever a public statement would be necessary to mitigate adverse publicity not initiated by the attorney or the attorney’s client. And finally, subsection (d) was added to extend the pretrial publicity prohibitions to other attorneys associated in a firm or governmental agency with an attorney generally subject to the restrictions of the rule. 36

V. CONCLUSION AND PROPOSALS FOR CHANGE

As a whole, Rule 3.6 seems well-adapted to the task of thwarting unnecessary pretrial publicity. Though the rule is clearly targeted at preventing prejudicial statements, its “substantial likelihood” standard poses no First Amendment infringements and has been upheld in the Gentile decision. Moreover, the amended rule’s right-of-reply provision further bolsters First Amendment rights by allowing attorneys to mitigate the effects of adverse publicity directed toward their clients.

Unfortunately, the ABA’s amended version of Rule 3.6 can have little practical effect on the bar and the judicial system until it is officially adopted in the various states. Currently, though, the vast majority of state ethics codes have not incorporated the 1994 changes to Rule 3.6. Thus, many of the existing trial publicity rules run the risk of being declared unconstitutionally vague, just as Nevada Supreme Court Rule 177 was struck down in Gentile. The clear solution would be to encourage all the states to adopt the revised Rule 3.6 as a uniform trial publicity rule. If this could be accomplished, the legal profession would be benefited by having a strong but fair prophylactic rule that would simultaneously be able to withstand constitutional muster.

Of course, a strong trial publicity rule would be of little practical value unless judges and state bar associations are willing to vigorously enforce it. In doing so, judges must also be ready to report violations and,

if necessary, impose Rule 11 sanctions as was the case in *Kramer*. If it becomes apparent that bar associations and judges are firm in their commitment to ending abusive publicity tactics, perhaps the legal profession can possibly regain control over attorneys who litigate their cases in the media to gain an unfair advantage in the courtroom. If bar associations and judges are willing to be assertive, cases like *Kramer* may become a rarity not because sanctions are imposed, but because they exist at all.

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