

Dealing with the Media in High Profile Cases

Bell County Bar Association Bench Bar Conference
September 2022

Susan Criss
Criss & Rousseau Law Firm, L.L.P.

High Profile

Parties

Bizarre or Shocking Facts

Controversial Laws involved

MEDIA

TRADITIONAL

- PRINT
- Newspapers
- Magazines

ELECTRONIC

- Newspapers
- Magazines
- Television
- Radio

SOCIAL MEDIA

- Twitter
- Facebook
- Instagram
- Tik Tok
- YouTube
- Podcasts
- Blogs
- Comments

Fear of Traditional Media

Unfair

Biased

Inaccurate

Gotcha journalism

Only out to get pre-determined story

Consequences of Bad Publicity

Jury contamination

Additional litigants

Reputation & relationships

Future or present employment or income

Brand/Face of the company

Political office or government position

Free Press v. Fair Trial

1st Amendment v. 6th Amendment

Texas Constitution Art. 1 Sections 8 & 10

Texas Code of Criminal Procedure Art 1.05

Texas Code of Civil Procedure 18 c

Texas Code of Judicial Conduct Canons 2A; 3B (3) & (8), (10) & (11); 4B (1) & 6H

Texas Disciplinary Rules of Professional Conduct 3.07 & 3.09

Texas Government Code Chapter 552

Attorney & Judicial Oaths to protect entire Constitutions

Duty to minimize prejudicial effect of publicity on due process rights of accused

Democracy depends on free press

Media protects the public's right to be informed about government and the justice system

Constitutional Guarantees

6th Amendment to the United States Constitution:

“In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury”

Texas Constitution Art. 1 Sec. 8 Freedom of Speech & Press:

“Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press.”

Texas Constitution Art. 1 Sec. 10 Rights of Accused in Criminal Prosecutions:

“In all criminal prosecutions the accused shall have a speedy public trial by an impartial jury.”

Texas Code of Criminal Procedure Art. 1.05 Rights of Accused

In all criminal proceedings the accused shall have a speedy public trial by an impartial jury.

Sheppard v. Maxwell
384 U.S. 333,350 (1966)

The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.

Skilling v. United States

561 U.S. 358, 382-83 (2010)

For pretrial publicity to interfere with an accused's right to a fair trial by an impartial jury, the publicity must be so inflammatory that any juror exposed to it could not be expected to render an impartial verdict.

Court must consider

1. the time elapsed between the coverage and the trial
2. whether the coverage contains “confessions or other blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight and
3. whether the coverage invites prejudgment of, or expresses opinions about, a particular defendant's guilt

Preparation by the Court

Meet with courthouse personnel involved- Clerk, Sheriff, IT, Facilities

Extra costs, budget & personnel

Space & facilities- overflow room, equipment storage, witness seclusion, parking, & media areas

IT audio-visual needs

Jury seclusion & transportation

Minimize disruption to rest of court business & courthouse

Text or email system for quick notification of schedule changes

Media rules & policies & enforcement plan

Distribution of information & documents

Safety & security

Media Policies & Rules

Court & county rules approved by the Texas Supreme Court

Publication & Distribution

Each agency is responsible for making sure all employees know rules

Enforce evenly and quickly

Need to know competitors will not gain advantages by breaking rules

Expedient & equal access

Intense pressure to “get the get”-the story no one else has

Pass & credential system with application process

Reserve number of courtroom seats for victim’s family, accused family, and support staff of State and Defense

Traditional v. Social

Access to Court v. Closure of Courts

Open court presumption--6th Amendment guarantee of public trial

Implied but not explicit in Constitution

Right to access by the media is not absolute

Closure is constitutional under certain limited circumstances

Courts may impose reasonable
restrictions on media access when
necessary to protect and facilitate
the proper administration of justice.

To Justify Closure of the Court

Written motion filed at least the day before hearing

Public/media must be given reasonable notice of the hearing

Party seeking closure must advance overriding interest likely to be prejudiced

Trial court must consider reasonable alternatives to closure

Closure must be no broader than necessary to protect that interest

Trial court must make findings adequate to support the closure

Gag Orders

Court cannot prohibit press from reporting what happens in court

Restrain witnesses and attorneys if restraint is necessary

Strong presumption against prior restraint

Notice must be given to media & their attorneys & hearing set

Must find no measures short of restraint will suffice

Record must contain evidence to support findings

United States v. Ford
830 F. 2d 596, 600 (6th Cir. 1987)

A restrictive order must be narrowly tailored, and restrictions on speech must be no greater than essential to prevent toe specific harm identified.

Blanket “no comment “ rules are not likely to be held constitutional.

Davenport v. Garcia

834 S.W.2d 4 (1992)

To withstand scrutiny the order must be supported by specific findings based on evidence that

- (1) an imminent and irreparable harm to the judicial process will deprive litigants of a just resolution of their dispute
- (2) the judicial action represents the least restrictive means to prevent the harm

Alternatives must be shown to be insufficient

Alternatives may include:

Venue change, jury questionnaires, juror instructions, extending voir dire, individual voir dire examinations, larger jury pool, media rules, public information officers, reminding attorneys of TRCP 3.07 and asking lawyers for discretion & cooperation to avoid contaminating the jury pool

In re Graves

217 S.W. 3d 744,749 (Tex.App.-Waco 2007,no.pet.)

The standard set forth in Davenport applies in criminal cases.

Cameras in the Courtroom

1st Amendment does not guarantee right to televise inside the courtroom

Inside of the courthouse reporters do not have greater rights than the public

In re Express News Corp., 695 F.2d. 807,809 (5th Cir. 1982)

PER SE BAN is unconstitutional

Concerns about Cameras in the Courtroom

Positive or negative impact on justice system

Empirical data from Court TV shows no harm

Educational value

Professional and public perceptions

Security and safety

Effect on behavior of witnesses, jurors, attorneys, accused , judge and court staff

Can make retrial challenging

Extends public access if courtroom is full

Electronic v. print media disadvantage (still cameras, lap tops)

Distraction

Texas Rule of Civil Procedure 18 c

Recording and Broadcasting of Court Proceedings

A trial court may permit broadcasting, televising, recording, or photographing of proceedings in the courtroom only in the following circumstances:

(a) in accordance with guidelines promulgated by the Supreme Court for civil cases or

(b) when broadcasting, televising, recording, or photographing will not unduly distract participants or impair the dignity of the proceedings and the parties have consented, and consent to be depicted or recorded is obtained from each witness whose testimony will be broadcast, televised, or photographed, or

(c) the broadcasting, televising, recording or photographing of investiture or ceremonial proceedings

In Re BP Products North America Inc.,
263 S.W.2d 117 (Tex. App.2006)

Texas Supreme Court found that the county in question did not have local media rules approved by the Texas Supreme Court

Considerations if broadcasting from courtroom is allowed

Pool camera for still photos and broadcasting

No artificial lighting

No recording bench conferences or in chamber conversations

No recording conversations between attorneys and client/witnesses

No filming or recording images of jurors

Open Court & Records

Media will file open records request to get transcripts of in camera hearings & sealed court files & appeal if need be.

Tex.R.Civ. 76a (1)

Documents filed in court records maintained by clerk are presumed to be open and available for the public to inspect & copy

Eli Lilly & C 868 S.W.2d at 809

Party seeking to seal had burden to show

1. A specific, serious and substantial interest clearly outweighs the presumption of openness
2. Any probable adverse effect that sealing will have on the general public health or safety
3. No less restrictive means than sealing will adequately & effectively protect the specific interest asserted

Texas Government Code Chapter 552 Open Records Statute a.k.a. Public Information Act

Request is made to governmental body for records

Government has 10 days to write Attorney General of the State of Texas for opinion declaring statutory exception exists allowing denial of request

Opinion request must indicate which exception is believed to apply

Governing body must give written notice to requestor of challenge and that opinion is being sought

Governing body has 15 days upon receipt of request to provide AG with copy of information requested and written reason for denial

Failure to meet these deadlines waives right to contest

Litigation may ensue if governing body does not get answer they want. Governing body sues A.G.

Open Government Hotline 512-478- OPEN (6736) 877-OPEN-TEX (673-6839)
Public Information Handbook is available upon request

Office of the Texas Attorney General
Open Records Division
P.O. Box 12548
Austin, TX 78711
Fax 512 463 2092

Jury Selection

Questionnaires

Individual

Auditions

Mock Jury

Venue change

High Profile Realities

Coverage is inevitable

Risk of unfair treatment is higher

Jury pool exposure

Witness exposure

Demands for information are very time consuming

Disrupts docket, courthouse, practice and personal life

Working under spotlight and microscope is stressful

Information will leak

Safety and security concerns

Texas Disciplinary Rules of Professional Conduct

3.07 Trial Publicity

(a) 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.



Texas Disciplinary Rules of Professional Conduct

3.07 Trial Publicity (b)

more “guidance” than disciplinary standards” per comment 4

character, credibility, reputation or criminal record of a party, criminal suspect or witness or expected testimony of party or witness

possibility of plea, existence or contents of confession, admission or statement by defendant or suspect or refusal to make statement

performance, refusal to perform or results of examination or test
identity or nature of physical evidence

opinion as to guilt or innocence

information likely to be inadmissible that if disclosed could create substantial risk of prejudicing impartial trial

Texas Disciplinary Rules of Professional Conduct

3.07 Trial Publicity (c)

Not violations:

general nature of offense, claim or defense

information in public record

identity of persons involved unless prohibited by law

identity, residence, occupation & family status of accused

investigation is in progress & general scope of investigation & length of investigation

warning of danger & reason to believe likelihood of substantial harm to person or public
& information necessary to aid in apprehension

fact, time and place of arrest & identity of investigation & arresting officers or agencies

scheduling or step in litigation

Comment 3: countering unfair prejudicial effect of public statement by opposing counsel

Gentile v. State Bar of Nevada

501 US 1030 (1991)

The United States Supreme Court approved the “substantial likelihood of material prejudice” standard but recognized that lawyers are sometimes ethically bound to make public statements defending their clients.

Sometimes have a duty to “take reasonable steps to defend a client’s reputation...including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried.” *id* at 1043

3.07 Comment 5

“Special rules of confidentiality may govern proceedings in juvenile, domestic relations and mental disability proceedings and perhaps other types of litigation

Rule 3.04 (c) (1) & (d) and Rule 1.05 may apply” (fairness & confidential and privileged information)

Texas Disciplinary Rules of Professional Conduct

3.09 Special Responsibilities of a Prosecutor (e)

The prosecutor shall exercise reasonable care to prevent persons employed or controlled by the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.07

Comment 6:

This does not apply to law enforcement or others not in prosecutor's employ or under his or her control. But to the extent feasible prosecutor are encouraged to make reasonable efforts to discourage such persons from making such statements

Limitations on Judicial Communications with Media

Code of Judicial Conduct

Recusal Risk

Political--Minnesota v. White

Confidential & Privileged Information

Contaminate Jury Pool

Texas Code of Judicial Conduct

Canon 2 A

A judge should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary

Canon 3 B (3)

A judge shall require order and decorum in proceedings before the judge

Canon 3 B (8)

A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law

Texas Code of Judicial Conduct

Canon 3 B (10)

A judge shall abstain from public comment about a pending or impending proceeding which may come before the judge's court in a manner which suggests to a reasonable person the judge's probable decision on any particular case

A judge shall require similar abstention on the part of court personnel

This does not prohibit public statements regarding official duties or explaining court procedures

This does not apply if the judge is a litigant

Canon 6 H

Any lawyer who contributes to violating 3 B (10) is subject to disciplinary action by the State Bar of Texas

Canon 3 B (11)

A judge shall not disclose or use nonpublic information acquired in a judicial capacity

Texas Code of Judicial Conduct

Canon 4 B (1)

A judge may speak, write, lecture, teach and participate in extra-judicial activities concerning the law, the legal system, the administration of justice subject to the requirements of this Code

Advice for Attorneys

Use your pleadings to tell your story

Return calls

Ask about deadlines

Do not run from the camera

Do not overpromise, over predict or misrepresent

Instead of “No Comment” say you cannot answer that question at this time because of the rules of your profession

If you can direct them to another source who can provide the information

Speak in short complete sentences or sound bites

Someone is always recording

Notice if the red light on the camera is on

Never lose your cool

Be aware if whether you are tethered to the mic

Do not vent or bad mouth anyone involved in the case

Politely inform reporter if something in a story is incorrect.

Treat news agencies evenly

Establish an understanding before interview begins as to whether the interview is on or off the record, background or for attribution

Off the Record- not to be reported on but no recourse

On Background –source is not named

helps reporter understand what is going on but not associated with a particular person especially with procedural aspects

Not For Attribution-information may be reported but source is not named

“The information on-background is not for attribution to me”

Assume you are being recorded- okay to ask

laws differ per state and reporter may be out of state

May be okay for you to record depending on laws of state all speakers are during the call

ok to ask for questions in writing

Who are you? Who do you work for?

What is your deadline

Publicity Management

Get someone to help gather clippings & recordings & monitor social media

Review information shared by firm with PR team to ensure privilege is not waived

Public Relation Firms or in house public relations departments or
Litigation Communication Specialists

Purpose of sharing (litigation or earning potential & business reputation)
determines if privilege is waived *Calvin Klein Trademark Trust v. Wachner*, 198
F.R.D. 53 (S.D.N.Y. 2000); *In Re Copper Market Antitrust Litigation*, 200 F.R.D.213
(S.D.N.Y. 2001) at 392

Professional Relationships based on Mutual Respect

Recognize that press, judiciary and bar perform essential & important functions

Look for ways to protect both fair trial and free press, both 1st & 6th Amendments

Fulfill duties without *unnecessarily* hindering other's performance of their duties

Treat each other as professionals with respect

Be careful about trusting too much

Rusty Hardin's Media Relation Rules

1. Always return their calls.
2. Always tell them the truth.
3. If you can't talk to them, explain why.

Client Control and Consent

Obtain consent to speak to the media even to confirm that you have been hired

Establish that there is one spokesperson for the media and that it is not your client or anyone in his family

Convince your client to set all of his social media accounts to the most private settings

Make certain your client does not delete anything from his accounts that pertain to the litigation

Make certain your client does not post anything on anyone's account about any litigation

Make certain his family members and close friends do not post about the litigation

Rule 3.4 Fairness to Opposing Party & Counsel

A lawyer shall not unlawfully obstruct another Party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act.

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to

- (a) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (b) engage in conduct that is prejudicial to the administration of justice;

Susan Criss
Criss & Rousseau Law Firm, L.L.P.
100 W. Central Texas Expy
Suite 302
Harker Heights, Texas 75648

office 254 699 9999
cell 409 771 4069

susan.criss@crissrousseau.com

