

# The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2012

PHILADELPHIA, FRIDAY, FEBRUARY 3, 2012

VOL 245 • NO. 23

An **ALM** Publication

## PROFESSIONAL CONDUCT

### Jumping on the Media Bandwagon: Unsafe at Any Speed?

BY ELLEN C. BROTMAN  
AND MICHAEL HAYES

*Special to the Legal*

The commonwealth of Pennsylvania might never see a more explosive legal drama than the prosecution of former Penn State assistant coach Jerry Sandusky that continues to unfold in State College. Some see Joe Paterno as the latest victim in the Sandusky saga, having first lost the head coaching position he held for more than half a century and, more recently, his brief battle with lung cancer. Others point to the many children whom Sandusky allegedly abused/sexually assaulted over an extended period of time and argue the Penn State Board of Trustees had no choice but to fire Paterno. Wherever you fall on that spectrum of feeling or conviction, Paterno's passing is a great, great loss to his family, friends, former colleagues and players, Penn State and the commonwealth — for which we offer our sincere condolences.

From a professional responsibility and legal ethics perspective, the Sandusky prosecution is a veritable bonanza, magnified exponentially by the massive media coverage it attracts. From the Pennsylvania Attorney General's Office to the accused, the alleged victims, witnesses and Penn State University, lawyers are involved in virtually every aspect of the sordid affair — and the media is all over it.

No doubt, the lawyers representing the various individuals and entities involved



**BROTMAN**  
**ELLEN C. BROTMAN** is a partner with Montgomery McCracken Walker & Rhoads and a member of its white-collar crime and government investigations group and chairwoman of its professional responsibility group, after several years of being a principal in the firm of Carroll & Brotman. She is also a former assistant federal defender with the Philadelphia Community Defenders Organization.

**HAYES**  
**MICHAEL HAYES** is a partner with the firm and is a member of the firm's professional responsibility practice group. Prior to joining the firm, he served as a law clerk to Justice Russell Nigro of the Pennsylvania Supreme Court.

will have a very difficult time wading through the sensitive substantive legal issues presented. They are on center stage and their every misstep — perceived or real — will be published and republished via tweet, blog, news reports, op-eds and talking heads ad nauseum. At the same time, the media will continue to hound the lawyers for juicy quotes and whatever tidbits of “exclusive, breaking news” they can. The public is eating the scandal up and it is the media's job, some would say, to feed the beast.

Lawyers make statements to the media

all the time, and the Sandusky prosecution is no different. For the prosecutors, press access is a given. For example, in the Sandusky case, the grand jury report was widely disseminated in the press and posted on the Attorney General's Office website. For defense lawyers, using the media for strategic purposes in the representation of a client is always a difficult and delicate business. The size of the stage and nature of the alleged criminal conduct makes it even more so in the Sandusky case. Let's examine some examples of how the lawyers have used the press so far.

According to at least one published article, after waiving the preliminary hearing, Sandusky's lawyer, Joseph Amendola, stated that “[w]e have enough inconsistencies at this point to totally wipe [witness Michael McQueary] off of this case.” In addition, Amendola was reported to have said, “[T]o the extent that we destroy [McQueary's] credibility we put everybody else's credibility on the case in question.” Amendola also reportedly noted that some of the alleged victims already had civil attorneys and asked, “[W]hat greater motivation could there be than the financial motivation of saying, ‘I'm a victim’?”

Attorney Slade McLaughlin, who represents one of the alleged victims, was quoted as saying of Sandusky's waiver that “I think you'll see this come to an end fairly quickly now ... [t]his was [Sandusky's] only chance to find out what kind of case the state had and they gave it up.” McLaughlin also

reportedly stated, “[W]hat my client wants is justice to be served and for Sandusky to spend a long time in prison ... [t]here is a public outcry to get this done.”

This presents the perfect opportunity for us to discuss Rule 3.6 of the Pennsylvania Rules of Professional Conduct, titled “Trial Publicity.” Rule 3.6 prohibits lawyers participating in a matter from making extrajudicial statements that the lawyer reasonably should know will be publicly disseminated and that have “a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.” The rule does, however, allow statements a “reasonable lawyer would believe [are] required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer’s client,” so long as the statements are “limited to such information as is necessary to mitigate the recent adverse publicity.”

The explanatory comment to Rule 3.6 identifies several subjects that are “more likely than not to have a material prejudicial effect on a proceeding,” particularly when they involve a “criminal matter, or any other proceeding that could result in incarceration.” Among the subjects identified is the “character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness” and “the possibility of a plea of guilty to the offense.”

Rule 3.6 presents an interesting constitutional issue as well, because it expressly limits the scope of free speech on the part of lawyers. No Pennsylvania court has passed on the constitutionality of the rule, but in 1991 the U.S. Supreme Court, in *Gentile v. State Bar of Nevada*, determined that a local rule prohibiting attorney speech that had a “substantial likelihood of material prejudice” on a criminal trial did not violate the First Amendment. It is worth noting, however, that the Pennsylvania Supreme Court has repeatedly determined Article 1, Section 7 of the Pennsylvania Constitution

affords greater protection for speech than does the First Amendment.

Putting aside the constitutional issue, statements made by involved counsel concerning the credibility and character of witnesses (including alleged victims) as well as the possibility of a guilty plea, naturally raise questions as to whether they cross the line under Rule 3.6. The subject matter of such statements are specifically identified in the explanatory comment to Rule 3.6 as being “likely” to have a material prejudicial effect on a proceeding, and the matter involved is, obviously, criminal in nature — raising the stakes for all parties involved and the corresponding potential for a “material prejudicial effect.”

---

*Our general advice  
is to be cautious in  
making any extrajudicial  
statements concerning  
the matters in which  
you are involved.*

---

Do counsel’s extrajudicial statements have a “substantial” likelihood of materially prejudicing the adjudicative proceedings in the Sandusky prosecution? Or were counsel’s comments instead reasonably calculated responses designed to protect their clients from “the substantial undue prejudicial effect” of then-recent publicity in the matter? Arguments can be made on either side, but it’s worth noting that our research failed to uncover a single case where a Pennsylvania lawyer has been suspended or disbarred based on a Rule 3.6 violation.

Our general advice is to be cautious in making any extrajudicial statements concerning the matters in which you are involved, whether or not you think the case presents issues of potential interest to the public. In addition, we counsel strongly against making the types of comments identified as particularly problematic in the explanatory comment to Rule 3.6 unless, in your reasoned judgment, the specific statement you intend to make is necessary to “protect [the] client from the substantial undue prejudicial effect of recent publicity” not initiated by you or the client. And finally, you must consider whether your statement includes any information protected under Rule 1.6 requiring informed consent or implied authorization from the client to disclose.

Like many others across the country and around the world, we will be watching and reading about the upcoming proceedings in the Sandusky prosecution with great interest. To the likely delight of the media, it does not appear that any sort of gag order has been imposed against counsel or their clients. Will counsel involved in the matter continue to use the press in an effort to advance their clients’ interests? Will the pursuit of justice get lost in the media circus? Stay tuned, because this could be a very bumpy ride. •