

A PRIMER: HOW TO KEEP THE DISTRICT ATTORNEY
FROM GAGGING YOU AND YOUR CLIENT

USING THE D.A.'S BATTLE PLAN TO WIN THE WAR:
FIGHTING AGAINST A PROSECUTOR'S
MOTION FOR A "GAG ORDER"

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This is a primer for fighting against a gag order. When the client is arrested and the first action of the district attorney is to hold a press conference and spew false and misleading statements, defense counsel may find it necessary to counter the unfair prejudicial effect of the district attorney's public statement. Texas Rules of Disciplinary Conduct Rule 3.07, comment 3, provides: "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."

As a defense attorney in Texas, in preparation for a hearing on a prosecutor's motion for a gag order, it is prudent to rely on the Texas District and County Attorneys Association's (TDCAA) manual entitled "Legal Ethics and Texas Criminal Law – Prosecution and Defense, 2006 Edition, by Edward L. "Chip" Wilkinson; edited by Diane Burch Beckham, Senior Staff Counsel for the TDCAA. A reading of Ms. Beckham's Editor's Note sets the tone for how a prosecutor should act, i.e., that "the responsibility of prosecuting criminals, announcing 'ready' for the State, and standing up for crime victims is an awesome burden, one that calls for scrupulously ethical behavior."

Editor Beckham likewise champions the efforts of Mr. Wilkinson, stating that he "has become *the* criminal law ethics expert in Texas, after compiling and digesting

thousands of cases, rules and statutes on prosecutor ethics.” Ms. Beckham further states that it is the TDCAA’s “hope that this book will become the go-to volume for both prosecutors and defense attorneys facing ethical issues in their practice.” Thus, using the TDCAA’s own manual and expert immediately establishes credibility and prevents the prosecution from demeaning your arguments. If you are quoting from their manual, how can you be wrong?

It is also imperative that a defense attorney keep in mind the role of the government prosecutor: the state’s interest “is not that it shall win a case, but that justice shall be done.” *Young v. United States*, 481 U.S. 787, 803 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). The words of Justice Sutherland set forth the parameters of ethical conduct for Assistant United States Attorneys in *Berger*, 295 U.S. 78 (1935), which is still quoted today:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.” *Berger* at 88.

The same applies to any Texas district attorney.

Ethics and Publicity in Criminal Trials

Chapter Three of the TDCAA’s Legal Ethics and Texas Criminal Law clearly sets out the Texas State standard for evaluating the propriety of a gag order against trial

participants. The Texas Supreme Court has additionally imposed a higher standard under the Texas Constitution for evaluating the propriety of a gag order.

In *Davenport v. Garcia*, 834 S.W.2d 4 (Tex. 1992)(orig. proceeding), the trial court appointed a guardian ad litem to represent juveniles among numerous plaintiffs who had brought civil suit. *Davenport* was a civil case and addressed the propriety of a gag order against counsel. The Texas Supreme Court ultimately found that the gag order issued by the trial court violated the guarantee of free expression contained in Article I, §8 of the Texas Constitution, which provided broader speech protections than the First Amendment of the United States Constitution. *Davenport* at 8-9. Under this broader guarantee, “it has been and remains the preference of this court to sanction a speaker after, rather than before, the speech occurs.” *Id.* at 9. Prior restraint on free speech is presumptively unconstitutional under the Texas Constitution and permissible “only when essential to the avoidance of an impending danger.” *Id.* Thus, a gag order will be subject to a higher standard of constitutional scrutiny under the Texas Constitution than under the United States Constitution. *Id.* at 10.

According to the TDCAA manual, under the holding of *Davenport*, a gag order will withstand constitutional scrutiny only where there are specific findings supported by evidence that: (1) an imminent and irreparable harm to the judicial process will deprive litigants of a just resolution of their dispute, and (2) the judicial action represents the least restrictive means to prevent that harm. *Davenport* at 10.

This *Davenport* test is also applicable to criminal cases, pursuant to *San Antonio Express News v. Roman*, 861 S.W.2d 265 (Tex. App.-San Antonio 1993, orig. proceeding). In *S.A. Express News*, the newspaper sought mandamus to review a trial

court order prohibiting the newspaper from publishing the names of two minor witnesses in a criminal trial. The Court of Appeals held that the order violated the constitutional rights of the newspaper under the State Constitution, and that mandamus was the appropriate remedy. *Express News* at 268.

The TDCAA manual further states that in resolving both whether the alleged harm is imminent and irreparable and whether the proposed judicial action is the least restrictive means to prevent that harm, a court must look to the injury asserted, the relief requested, and the underlying evidence. See *Ex parte Tucci*, 859 S.W.2d 1, 5-6 (Tex. 1993). Speculative testimony of mere fear, apprehension, or the possibilities of harm is not sufficient to establish an “imminent and irreparable” injury. See *Markel v. World Flight Inc.*, 938 S.W.2d 74, 79 (Tex. App.-San Antonio, 1996). Rather, there must be clearly established evidence in the record of the media coverage, as well as evidence of the potential and actual threats to the rights of the parties. *Markel* at 79.

It has been a somewhat usual practice in Texas for the government prosecutor to file a State’s Motion to Restrict Publicity, which oftentimes is taken almost word for word from *In re Houston Chronicle*, 64 S.W.3d 103 (Tex. App. 2001). *In re Houston Chronicle* distinguishes *S.A. Express News*, supra. The *In re Houston Chronicle* court refused to extend the *Davenport* standard to media attacks upon a gag order, which was issued by the trial court after the trial judge grew concerned about the effect the media interviews were having on defendant Andrea Yates’ right to a fair trial.

The State did not request the gag order in *Houston Chronicle* – it was the trial court’s concern which led to the gag order. Yet, oftentimes, the government prosecutor will request that the trial court issue a gag order after the prosecutor’s own office has

clearly engaged in the questionable pretrial publicity that they then seek to restrict. A defense attorney should be wary of a district attorney that holds a press conference, gives television interviews, and makes comments quoted in local newspapers regarding often prejudicial aspects of your client's character or alleged crime, because after the defense offers a public response to the false statements and accusations leveled against him, the prosecutor may then seek a gag order from the trial court. This amounts to the prosecutor poisoning the air, then filing a motion for a gag order to deny a defendant a chance to respond to false and inflammatory statements and accusations made against him.

It is the usual practice for the prosecutor to cite a Press Release issued by defense counsel as the basis for their request for a gag order restricting publicity. This is done by claiming that the defense's press release contains "extrajudicial statements that a reasonable person would expect to be disseminated by means of public communication" and that defense counsel knew or reasonably should have known that these statements "will have a substantial likelihood of materially prejudicing an adjudicatory proceeding" and thereby violates Rule 3.07 of the Texas Disciplinary Rules of Professional Conduct. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 3.07(a), reprinted in TEX. GOV'T. CODE, tit.2, subtit. G, app. A (TEX. STATE BAR R. art 10 sec. 9). This claim is easily shown to be unfounded and lacking merit.

Examples of what a prosecutor might claim as "prejudicial" statements could include: (1) information about your client's awards or accomplishments, including any military service (2) a statement that your client had been attempting to cooperate fully with investigators; (3) a statement that witnesses have provided exculpatory information to the government investigators; (4) if there is evidence of a violation of your client's

civil rights, a statement that notice has been sent to the NAACP and the Civil Rights Division of the Department of Justice; and (5) A request that all persons who were treated unfairly or had agreements broken by the district attorney's office should contact your client or his defense counsel.

Arguably, all information and statements contained in a press release, as the examples above show, should be accurate, and best if they are already a matter of public record. In addition, statements in a defense press release might be made to show the district attorney what a mess he has made of the investigation and prosecution of your client - to show how he has trampled on your client's civil rights. Accordingly, the information and statements given in the example are well within the limits imposed on attorneys by Rule 3.07. Expert witness testimony should be sought to confirm this defense position.

Likewise, a defense attorney should argue that there is no evidence that the statements made in the defense press release, or any statements made by defense counsel for that matter, will materially prejudice an adjudicatory proceeding or the defendant's right to a fair trial. It should be argued that it is absurd that the prosecutor would find the defense press release unfair or prejudicial, especially in light of the misleading and false statements issued by the prosecutor's office, and that the defense press release was issued in direct response to the negative media blitz initiated by the prosecutor and his office in an attempt to stop the prosecutorial madness.

It is clear that the goal of any order restricting pretrial publicity is to protect, primarily, a defendant's right to a fair trial. Often, a defendant will not wish the trial court sustain any government motion to restrict publicity. The media is typically the only

available outlet for a wrongfully accused defendant to offset the misleading statements made by the prosecutor and to seek defense witnesses.

Texas Rules of Disciplinary Conduct: Rule 3.07 and 3.09

Typically, in a prosecutor's motion for a gag order restricting publicity, the prosecutor will state, as discussed above, that defense counsel has violated Rule 3.07 of the Texas Rules of Disciplinary Conduct. However, be wary if only one section of the rule, or part of the rule is cited by the prosecutor. Statements made by defense counsel conform to Rule 3.07 by either including: (1) information contained in a public record; (2) information about the conduct of a judicial proceeding; (3) information about matters of public concern; and/or (4) information calculated to counter the unfair prejudicial effect of another public statement.

In section (c), the rule provides a list of permitted statements. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 3.07(c). Permitted statements include: "the information contained in a public record." *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 3.07(c)(2). This section of Rule 3.07 can be used to argue, if applicable, that the statements made by defense counsel contain information that is a matter of public record, or could be located by any competent investigative reporter.

Also, comment 1 of Rule 3.07 states that although a lawyer's right to free speech is subordinate to the constitutional requirements of a fair trial,

[t]here 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. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 3.07 cmt. 1.

Because of a prosecutor's vast discretion at all stages of the criminal process, the public has an interest in its responsible exercise. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1036 (1991). In *Gentile*, the Supreme Court held that an attorney who held a press conference after his client was indicted on criminal charges did not violate a Nevada Supreme Court rule prohibiting lawyers from making extrajudicial statements to the press that he knew or reasonably should have known had a substantial likelihood of materially prejudicing adjudicative proceedings. *Gentile* at 1036.

In *Gentile*, the Court stated,

an attorney may take reasonable steps to defend a client's reputation and reduce the adverse consequences of indictment, especially in the face of prosecution deemed unjust or commenced with improper motives. A defense attorney may pursue lawful strategies to obtain dismissal of an indictment or reduction of charges, including an attempt to demonstrate in the **court of public opinion** that the client does not deserve to be tried. *Gentile*, at 1043 (emphasis added).

Justice Kennedy acknowledged that "public awareness and criticism have an even greater importance where... the criticism questions the judgment of an elected public prosecutor." *Gentile* at 1035-36.

Statements by defense counsel regarding the motives behind a prosecutor's tactics, including an excessively high bond recommendation, improper investigative procedures used on witnesses, and possible civil rights violations, are certainly matters of public concern. Defense counsel's statements regarding these types of issues are classic examples of political speech in that they are critical of the government and its officials. "Speech critical of the exercise of the state's power lies at the very center of the First Amendment." *Gentile* at 1034. Do you have a corrupt district attorney and an office that

needs to be investigated? Whether corrupt or not, this is potentially a matter of great public concern, and should be freely debated.

Most importantly, comment 3 of Rule 3.07 states that “. . . an otherwise objectionable statement may be excusable if reasonably calculated to counter the unfair prejudicial effect of another public statement.” See TEX. DISCIPLINARY R. PROF’L CONDUCT 3.07 cmt. 3. As noted above, if statements made by defense counsel are in direct response to the statements made to the media by the prosecution, or are an attempt by defense counsel to educate the prosecutor about ethical violations or unfair investigative tactics, they are arguably within the bounds of Rule 3.07.

The district attorney and his office conceivably could release numerous statements reported by the media that are littered with misrepresentations and innuendos. These reports will likely cast your client in a false light. Free access to the press is sometimes the only way your client can counter the unfair prejudicial effect of the prosecutor’s statements and attempt to locate witnesses who have suffered a similar fate at the hands of the prosecutor, to try and bring an end to this miscarriage of justice. If the media is cut off, the public is cut off.

If applicable to your situation, make the argument that the district attorney’s office has violated Rule 3.07 of the Texas Rules of Disciplinary Conduct by providing numerous false statements and misrepresentations to newspaper and television reporters. Review all television news broadcasts carefully, and make a transcript of what the reporter and any person interviewed says. Attach these media reports and newspaper articles to your response to the prosecutor’s motion requesting a gag order.

Make the argument that the statements given by the prosecutor are “extrajudicial statements that a reasonable person would expect to be disseminated by means of public communication” that they knew or should have known would “have a substantial likelihood of materially prejudicing an adjudicatory proceeding,” clearly violating Rule 3.07. *See* TEX. DISCIPLINARY R. PROF’L CONDUCT 3.07(a). More specifically, these statements have a substantial likelihood of heightening public condemnation of your client.

If the statement was made by the news reporter, but was obtained by an interview of the prosecutor, an argument could be made that the statement appears to be the result of the prosecutor counseling and/or assisting the news reporter to make such a statement, in violation of Rule 3.07. *See* TEX. DISCIPLINARY R. PROF’L CONDUCT 3.07(a).

It should also be remembered that defense counsel has an additional argument at his disposal if the prosecutor and his office have also violated Rule 3.09 of the Texas Rules of Disciplinary Conduct, which requires prosecutors to “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.” TEX. DISCIPLINARY R. PROF’L CONDUCT 3.09, reprinted in TEX. GOV’T. CODE, tit.2, subtit. G, app. A (TEX. STATE BAR R. art 10 sec. 9).

Defendant’s Right to a Fair Trial and Free Access to the Media

Texas has a strong and long-standing commitment to free speech. *Davenport v. Garcia*, 834 S.W.2d 4, 7 (Tex. 1992). Throughout this state’s history, freedom of expression has been a priority. *Id.* The scope of Texas Constitution article 1, section 8, is broader than that of the First Amendment of the U.S. Constitution. *Davenport* at 7-8.

The presumption in all cases under Article 1, Section 8 is that pre-speech sanctions, or “prior restraints,” are unconstitutional. *Ex parte Price*, 741 S.W.2d 366, 369 (Tex. 1987) (Gonzalez, J., concurring) (“Prior restraints ... are subject to judicial scrutiny with a heavy presumption against their constitutional validity.”).

Limitations on attorney speech should be no broader than necessary to protect the integrity of the judicial system and the defendant’s right to a fair trial. *United States v. Salameh*, 992 F.2d 445, 447 (2nd Cir. 1993). In *Salameh*, the United States Court of Appeals for the Second Circuit vacated a gag order barring any public statements by the parties in the infamous 1993 World Trade Center bombing case. The court said that “[a] prior restraint on constitutionally protected expression, even one that is intended to protect a defendant’s Sixth Amendment right to trial before an impartial jury, normally carries a heavy presumption against its constitutional validity.” *Id.* at 446-47. The court continued that although “the speech of an attorney participating in judicial proceedings may be subjected to greater limitations than could constitutionally be imposed on other citizens or on the press . . . the limitations on attorney speech should be no broader than necessary to protect the integrity of the judicial system and the defendant's right to a fair trial.” *Salameh* at 447.

A court may issue a gag order **only** if, after a hearing, it finds (1) there is danger of an **imminent** and **irreparable** harm to the judicial process that will deprive litigants of a just resolution of their dispute, and (2) the judicial action represents the least restrictive means to prevent that harm. *Davenport* at 10.

A trial court should not issue a gag order if the State has not established there is danger of an imminent and irreparable harm to the judicial process that will deprive the

litigants of a just resolution in this case. The State must provide evidence to support its' contention that the media coverage of the case will harm the judicial process. Further, the prosecution must show that statements made by defense counsel have had a prejudicial impact on potential jurors.

It is valid to argue that defense counsel's public statements or press release were not formulated to prejudice potential jurors- they were made to defend your client's reputation and reduce the adverse consequences of an unjust and improper indictment. They could also be in criticism of the district attorney's abuse of power.

The trial court should not issue a gag order if the State cannot establish that a gag order represents the least restrictive means to prevent imminent and irreparable harm to the judicial process. The test for granting a gag order, established in *Davenport*, balances free speech and press while holding each person responsible to the law for a misuse of that freedom. *Davenport* at 9. When free speech is abused, the appropriate remedy is to punish the abuse, not to deny the right to speak. *Id.*

In fighting the state's motion for a gag order, defense counsel should ask that the court make no publicity restrictions on the defendant, defense counsel, witnesses, or others involved in this case. Defense counsel may need access to the media to locate witnesses. A gag order restricting media publicity would disadvantage the defendant if the prosecutor has already taken advantage of the various media outlets to call on and locate witnesses. Defense counsel should be given equal access to the media to locate potential witnesses.

Defense counsel also needs access to the media to defend the client's reputation in the wake of an unjust and improper indictment. Most importantly, access to the media

may help educate the prosecutor as to why this prosecution is a raw abuse of power that does not serve the law or justice. All of these matters arguably need to be brought to the attention of the public for debate.

A court should not grant a gag order that is overly broad. *See Grigsby v. Coker*, 904 S.W.2d 619, 620 (Tex. 1995). If the gag order requested by the prosecutor doesn't provide notice as to what kind of statements would be in violation of the order or would be prejudicial to an adjudicatory proceeding, then a defense attorney should argue that it is overly broad pursuant to the reasoning of *Grigsby*, supra. Likewise, a gag order is arguably overly broad if it covers witnesses who have already given statements to the media; thus, the order would be ineffective because it is not drawn to accomplish what it purports to accomplish.

Conclusion

A court may issue a gag order **only** if, after a hearing, it finds (1) there is danger of an **imminent** and **irreparable** harm to the judicial process that will deprive litigants of a just resolution of their dispute, and (2) the judicial action represents the least restrictive means to prevent that harm. *Davenport* at 10.

Defense counsel should argue against the trial court issuing a gag order if the State has not established there is danger of an imminent and irreparable harm to the judicial process that will deprive the litigants of a just resolution in this case. The State must provide evidence to support its contention media coverage of a case will harm the judicial process.

Statements by defense counsel that have no prejudicial impact on potential jurors, are made well in advance of trial, are not formulated to prejudice potential jurors, but,

instead, to defend the client's reputation and reduce the adverse consequences of an unjust and improper indictment, or are statements in criticism of the prosecutor's abuse of power, will not harm the judicial process or affect the defendant's right to a fair trial.

Indeed, a trial court should not issue a gag if the State cannot establish that a gag order represents the least restrictive means to prevent imminent and irreparable harm to the judicial process. The test for granting a gag order, established in *Davenport*, balances free speech and press while holding each person responsible to the law for a misuse of that freedom. *Davenport* at 9. When free speech is abused, the appropriate remedy is to punish the abuse, not to deny the right to speak. *Id.*

The goal of any gag order restricting pretrial publicity is to protect, primarily, a defendant's right to a fair trial. Often, a defendant will not wish the trial court sustain any government motion to restrict publicity. The media is typically the only available outlet for a wrongfully accused defendant to offset the misleading statements made by the prosecutor and to seek defense witnesses. If this is the case, defense counsel should vigorously oppose any government motion for a gag order restricting pretrial publicity. And in this fight to keep the district attorney from gagging you and your client, using the district attorney's own battle plan – the TDCAA manual on ethics – you have immediately established credibility in your argument. Again, if you quoting from their own manual, how can you be wrong?