Ethics and Media Relations in Criminal Corruption Cases
Professor Jessica A. Roth
Cardozo School of Law
Justice Oliver Wendell Holmes:

“The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.”

Doctor Balks At Lie Test; Retells Story

BY HOWARD BEAUFAIT

Slight variations in Dr. Samuel H. Sheppard’s version of the murder of his wife developed today as he returned to the scene of the July 4 crime to re-enact it for investigators.

County Detective Carl Rossbach, heading the investigation, revealed that the Bay Village osteopath had changed his story only in minor instances and that he had declined to take a lie detector test for the time being.

The distraught husband spent an hour and a half in his rambling lakeside home with Rossbach, Coroner Samuel R. Gerner and other police officers, re-enacting details of the crime as he said he saw them before dawn last Sunday.

The county detective said Dr. Sheppard was permitted to return to the home of his father after the second questioning session, but was advised to keep himself available for further interrogation.

Dr. Sheppard said he planned to return to Bay View Hospital immediately to look after his patients.

“We failed to refresh the doctor’s memory on some points in the murder that we wanted to clear up,” Rossbach said as they left the house.

Simultaneously a diver, William Virgin of Lorain, lowered into Lake Erie in front of the house to search a 200 by 250-foot area for the weapon used to club the comely housewife to death in her bedroom.

Rossbach said he concluded three hours of questioning Dr. Sheppard at Bay View Hospital with the question: “Will you submit to a lie detector test?”

The detective said the husband of the murdered woman replied: “I understand that instrument and in my emotional state and as sick as I am, it would show some disturbance . . . I might later on.”

Rossbach said he was not satisfied with the answers the doctor gave.

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SUSAN TELLS STORY TO POLICE

OWNER DIES IN BOWLING ALLEY FIRE

100 Firemen at $50,000 Blaze on Superior; Auto Agency Hit

(Photos on Picture Page)

A bowling alley proprietor died in a fire at his establishment yesterday afternoon. The fire was reported at 6 p.m. and the building was almost completely destroyed. Another man was injured.

The victim's body was found in a second-story office. The fire started in the office and spread to the bowling alley below.

Signs Statement After Revealing Details of Affair with Sheppard

'Other Woman' in Murder Case Is Questioned for Three Hours; Poses for Pictures After Seizure in Chief's Office; Stain Woman's Parents Also Dictate Account

BY JOHN C. BLAIR

Intimate details of her affair with murdered Marilyn Sheppard's husband—Dr. Sam—were revealed last night by brown-eyed Helen Hayes at Central Police Station.

The attractive, deeply tanned woman, a medical technician, was questioned for three hours, signed typewritten statements and posed for news photographers in the presence of Police Chief Frank W. Stroyster.

Accompanied by Policewomen Emma Neal and two detectives, Miss Hayes left the station in a police car at 11:50 p.m. for a downtown hotel.

The 21-year-old love child of Marilyn Sheppard left the station without being confronted by Thomas S. Bower, father of the woman's lover, Dr. Sam Sheppard.

Bower and his wife, Jean, atmosphere of the Shepards' living room, came to the police station yesterday morning and demanded to talk to Miss Hayes' husband.

They were taken to another room on the third floor of the building.

Detective Inspector James E. Black, with the help of Patrol Chief

CHIEF IS SUSAN'S VOICE FOR PRESS

Story Stands by, Parries Repeated Reports on Women's Affairs
Following the reversal of Sheppard’s conviction, the ABA heeds the Supreme Court’s call
Las Vegas Review-Journal:  
*Nevada lawyer gave us attorney news conferences*
MRPC 3.6 Trial Publicity

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(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).
MRPC 3.6 Trial Publicity

(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
MRPC 3.6 Trial Publicity

(b) Notwithstanding paragraph (a), a lawyer may state:

(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.
MRPC 3.6 Trial Publicity

(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.
Comments to Rule 3.6:
Subjects “more likely than not to have a material prejudicial effect on a proceeding”

- Credibility or character
- Criminal record
- Possibility of plea
- Confession or refusal to make statement
- Results of any tests or refusal to submit
- Nature of physical evidence
MRPC Rule 3.8 Special Responsibilities of a Prosecutor
The prosecutor in a criminal case shall:

(f) 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.
Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) 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;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;
Client-Lawyer Relationship
Rule 1.6 Confidentiality Of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

• AG Ashcroft reprimanded for stating that Ds were suspected of having knowledge of the 9/11 attacks; he also commented publicly on the value of cooperating W’s testimony during trial.

• “Despite his unquestioned duty to address the Nation on matters of public concern, and his more specific responsibility to keep the Nation informed of the Justice Department's efforts in the war on terror, the Attorney General has an equally vital and unyielding obligation, as the Nation's chief prosecutor, to ensure that defendants are accorded the fair trial guaranteed to them under our Constitution.”

• Montgomery County State’s Attorney reprimanded under R. 3.6 for public statements at press conferences regarding defendant’s confession and his opinion of the defendant’s guilt, bolstered by specific items of evidence.

• In another case, he discussed offer of a plea.

• He is then subject to reciprocal sanction in DC in 2005 pursuant to R. 3.8(f), rejecting argument that Rule 3.8(f) imposes “substantially different, or lesser, limitations on a prosecutor in regard to extrajudicial statements than does Maryland's Rule 3.6(a).”
In re Soares (N.Y. 4th Dep’t 2012)

• Albany County DA had pending criminal case against Albany County residents operating a Florida pharmacy for illegal sales of prescription medicines.

• The defendants sued Soares, a member of his staff, and his office, in federal district court for unlawful arrest and conspiracy. The Albany judge then disqualified Soares’ office from the pending criminal case and appointed a special district attorney.

• Soares sent an electronic statement to members of the press, criticizing the trial judge’s decision as a “get-out-of-jail free card for every criminal defendant in New York State” that created a “dangerous loophole.”

• Soares was censured under R. 8.4(d) on grounds that the statement was false, reckless and misleading.

- Elected prosecuting attorney for country removed from office and publicly reprimanded for repeated statements to press during investigation of the county assessor, accusing him of forgery, illegal reduction of property taxes, and fraud.

- Sims “persistently and deliberately used pre-hearing publicity to prejudice adjudicative proceedings. This violates Rules 3.6(a) and 3.8(e). Sims' knowing and repeated violation of these rules falls within the ambit of Rule 8.4.”
Bd. of Prof. Resp. V. Murray (Wyo. 2006)

• Assistant prosecutor reprimanded under R. 3.6 for off-the-record, casual conversation on sidewalk with journalist, after mistrial declared, in which respondent expressed his view of the defendant’s guilt and character.

• Also reprimanded under R. 8.4(d) for derogatory comment made to discharged juror who had held out for acquittal.
In re Kline (Kan. 2013)
The Challenge of Social Media: In re Bowen (5th Cir. 2015)

• There is “no dividing line between the prosecutors’ professional and private lives” with respect to the duty of self-restraint in the name of doing justice.

• “Had [the Ds] frequented a bar or habitually called in to a radio show and blown off steam about the Danziger Bridge prosecution in the terms they used online, their misconduct would have been the same as it is with their anonymous online commentary.”

• “Preventing mob justice is precisely the goal of prosecutorial ethical constraints. The government here should not be able to shelter under a banner of ‘no prejudice proved’ while the prosecutors acted no better than, and indeed tried to inflame, the public.”
Disciplinary Counsel v. Brockler (Ohio 2016)

• One year suspension of Assistant County Prosecutor who created fictitious Facebook account to contact defendant's alibi witnesses and gave interviews to local news reporters.

• Court found that his conduct violated 8.4(d) but not R. 3.6.
Other Sources of Best Practices

• ABA Criminal Justice Standards
  • Fair Trial and Public Discourse (4th ed. 2016)
  • Prosecution Function (4th ed. 2014)

• National District Attorney’s Association Prosecution Standards (3d ed. 2009)

• U.S. Department of Justice Regulations, 50 C.F.R. § 50.2
• United States Attorney’s Manual
Highlights of the ABA Criminal Justice Standards

• Counsel prosecutors to consult with supervisors, and obtain appropriate authorization, before speaking with media (Fair Trial, 8-3.2(a); Pros. Function 3-1.10(g));
• Counsel against inserting statements into public documents solely to heighten condemnation of the accused (Fair Trial, 8-21.(c));
• Counsel against “perp walks” (Fair Trial, 8-3.2(a)):
  - prosecutors and law enforcement personnel “should not exercise their authority over an individual in a manner deliberately designed to increase the likelihood that images of the individual in custody will be disseminated by means of public communication.”
2-14.1 Media Relations
The prosecutor should seek to maintain a relationship with the media that will facilitate the appropriate flow of information to and from the public. An appropriate and professional relationship with the media is necessary to promote public accountability and transparency in government.
Highlights of The National District Attorneys Association Prosecution Standards (NDAA)

2-14.2 Balancing Interests.
The prosecutor should strive to protect both the rights of the individual accused of a crime and the needs of citizens to be informed about public dangers and the conduct of their government. The prosecutor may provide sufficient information to the public so that citizens may be aware that the alleged perpetrator of a crime has been arrested and that there exists sufficient competent evidence with which to proceed with prosecution.
Highlights of the NDAA Standards

2-14.3 Information Appropriate for Media Dissemination by Prosecutors
f. Information contained in a public record, the disclosure of which would serve the public interest.

2-14.5 Public Responses
The prosecutor may make a reasonable and fair reply to comments of defense counsel or others. A public comment made by a prosecutor pursuant to this paragraph shall be limited to statements reasonably necessary to mitigate the effect of undue prejudice created by the public statement of another. In no event should a prosecutor make statements prohibited by Standard 2-14.4 or applicable rules of ethical conduct.
2-14.4 Restraints on Information
Prior to and during a criminal trial the prosecutor should not make any public, extrajudicial statement that has a substantial likelihood of materially prejudicing a judicial proceeding. In particular, from the commencement of a criminal investigation until the conclusion of trial, the prosecutor should not make any public, extrajudicial statements about the following matters, unless the information is part of the public record of the criminal proceeding:

a. The character, reputation, or prior criminal conduct of a suspect, accused person or prospective witness;
b. Admissions, confessions, or the contents of a statement or alibi attributable to a suspect or accused person;
c. The performance or results of any scientific tests or the refusal of the suspect or accused to take a test;
d. Statements concerning the credibility or anticipated testimony of prospective witnesses;
e. The possibility of a plea of guilty to the offense charged or to a lesser offense, or the contents of any plea agreement.
Commentary to the NDAA Standards:

• The prosecutor should take an active role in training law enforcement agencies in his or her jurisdiction on the limitations on public statements. By conducting such advance training, the prosecutor proactively reduces the possibility of comments by law enforcement personnel that are in conflict with the law and legal rules. By that means, the prosecutor also reduces the incidents of challenges to venue and other matters relating to the ability of a defendant to receive a fair trial.
Highlights from the DOJ Regulations, 28 C.F.R. § 50.2

(b) (3) Disclosures should include only incontrovertible, factual matters, and should not include subjective observations. In addition, where background information or information relating to the circumstances of an arrest or investigation would be highly prejudicial or where the release thereof would serve no law enforcement function, such information should not be made public.

(4) Personnel of the Department shall not disseminate any information concerning a defendant’s prior criminal record.
• (5) Because of the particular danger of prejudice resulting from statements in the period approaching and during trial, they ought strenuously to be avoided during that period. Any such statement or release shall be made only on the infrequent occasion when circumstances absolutely demand a disclosure of information and shall include only information which is clearly not prejudicial.

• (9). . . If a representative of the Department believes that in the interest of the fair administration of justice and the law enforcement process information beyond these guidelines should be released, in a particular case, he shall request the permission of the Attorney General or the Deputy Attorney General to do so.
1-7.220 - Designation of Media Representative

Each United States Attorney's Office and each field office of the various components of the Department shall designate one or more persons to act as a point of contact on matters pertaining to the media. In United States Attorneys' offices or field offices where available personnel resources do not permit the assignment of a full time point of contact for the media, these responsibilities should be assigned to a clearly identified individual. (This, of course, could be the United States Attorney or field office head.)
The following guidance should be followed when Department of Justice components or investigative agencies consider conducting a press conference or other media contact:

The use of a press release which conforms to the approval requirements of USAM 1-7.400 is the usual method to release public information to the media by Department of Justice components and investigative agencies. Press conferences should be held only for the most significant and newsworthy actions, or if a particularly important deterrent or law enforcement purpose would be served. Prudence and caution should be exercised in the conduct of any press conference or other media contact.
Highlights from the US Attorney’s Manual

• Any public communication by any Department component or investigative agency or their employees about pending matters or investigations that may result in a case, or about pending cases or final dispositions, must be approved by the appropriate Assistant Attorney General, the United States Attorney, or other designate responsible for the case. In joint or multi-district cases, the approving official should consult with other districts or divisions affected. If it is a national case, press conferences must be approved by the Director, Office of Public Affairs.

• The use of displays or handouts in either press conferences or other media outreach when it involves a pending case or an investigation that may lead to an indictment requires separate and specific approval.
1-7.530 - Disclosure of Information Concerning Ongoing Investigations

• A. Except as provided in subparagraph B. of this section, components and personnel of the Department of Justice shall not respond to questions about the existence of an ongoing investigation or comment on its nature or progress, including such things as the issuance or serving of a subpoena, prior to the public filing of the document.

• B. In matters that have already received substantial publicity, or about which the community needs to be reassured that the appropriate law enforcement agency is investigating the incident, or where release of information is necessary to protect the public interest, safety, or welfare, comments about or confirmation of an ongoing investigation may need to be made. In these unusual circumstances, the involved investigative agency will consult and obtain approval from the United States Attorney or Department Division handling the matter prior to disseminating any information to the media.
Highlights from the US Attorney’s Manual

1-7.700 - Freedom of Information (FOIA)

• Nothing contained herein is intended to control access to Department of Justice records which are publicly available under provisions of the Freedom of Information Act (FOIA).
Other Things To Bear in Mind

Possible sanctions for prosecutorial statements to the media:
- Dismissal of charges;
- Reversal of conviction;
- Professional discipline;
- Civil liability;
- Criminal sanction (especially for violation of Grand Jury secrecy rules)