IN THE DISTRICT COURT IN AND FOR TULSA COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA,)
Plaintiff,)
)
vs.)
)
BETTY JO SHELBY,)
Defendant.) Case No. CF-16-5138

ORDER REGARDING RULES 3.6/3.8

The Court directs the attorneys in this case to follow Rules 3.6 and 3.8 of the Oklahoma Rules of Professional Conduct. This order is intended to assist the Court in conducting a fair jury selection process when the trial begins. It is currently scheduled for May 8, 2017.

In every criminal case, Courts instruct jurors that cases "must be decided solely upon the evidence in this courtroom, *free from any outside influence.*" *OUJI-CR 1-8A*. Jurors also are instructed not to read newspaper reports or watch or listen to television or radio reports. The reason is obvious: Irrespective of public opinion and/or comment, jurors must be able to fairly and impartially evaluate the case and reach a fair and impartial verdict based on admissible evidence they see or hear in the courtroom.

In much the same way, Courts are concerned with pretrial publicity. *Gannett Co. v. DePasquale, 443 U.S. 368, 99 S.Ct. 2898, 2904, 61 L.Ed.2d 608 (1979)* (Trial courts have "an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity.") Pretrial publicity may taint the jury

selection process, resulting in a jury that is biased toward one party or another. "Few, if any, interests under the Constitution," the United States Supreme Court writes, "are more fundamental than the right to a fair trial by ***'impartial'*** jurors, and an outcome affected by extrajudicial statements would violate that fundamental right." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 111 S.Ct. 2720, 2745, 115 L.Ed.2d 888 (1991). See, also, *Bridges v. California*, 314 U.S. 252, 62 S.Ct. 190, 197, 86 L.Ed. 192 (1941) ("Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper.")

The obligation to ensure a fair trial is not limited only to courts. Attorneys and parties to a criminal proceeding have "unique responsibilities" in assuring that pretrial publicity does not prejudice the Defendant's Sixth Amendment rights or the State's right to a fair trial. *United States v. Tijerina*, 412 F.2d 661, 666 (10th Cir.1969) (Although most cases of pretrial publicity concern prejudice to the Defendant, the concept of a fair trial applies both to the prosecution and the defense.)[1]

It is obvious this case has drawn significant media interest nationwide since the beginning. As a result, this Court sent a November 28, 2016 letter to all attorneys involved in this criminal case. The letter (attached as Exhibit A) respectfully requested the attorneys to be "cognizant" of Rules 3.6 and 3.8 of

[1] In *Sheppard v. Maxwell, 86 S.Ct. 1507 (1966)*, the U.S. Supreme Court emphasized that "neither prosecutors, counsel for defense, the accused, court staff nor law enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function [in the quest for a fair trial]."

the Oklahoma Rules of Professional Conduct throughout this case. Rule 3.6 states:

> **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 lawyer would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have an imminent and material prejudicial effect on the fact finding process in an adjudicatory proceeding relating to the matter and involving lay fact-finders or the possibility of incarceration.**[2]

Since the date of that letter, the public comments continued, either volunteered or in response to questions from the media. However, of particular concern – given the jury trial is scheduled May 8, 2017 -- is the potential impact of the Defendant's April 2, 2017 voluntary appearance on a national news show (60 Minutes), as well as her attorney's interviews with KFAQ (local news show) right before and right after the episode aired.[3] [4]

The Court is, at a minimum, hopeful that all parties and participants in this case (as well as the public at large) recognize that pretrial publicity

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[2] The rule does allow 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. The comments to Rule 3.6 provide additional guidance for attorneys, including prohibiting comments that "are more likely than others to have a material prejudicial effect on a proceeding." Those include when an attorney comments publicly on "the character, credibility, reputation or criminal record of a party...or the expected testimony of a party or witness." The comments also preclude an attorney publicly commenting on "information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create an imminent and material risk of prejudicing an impartial trial." The comments of Rule 3.6 also allow extrajudicial statements to be permissible in response to statements made publicly "where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client." However, the comments also mandate that "such responsive statements should be limited to contain only information as is reasonably necessary to mitigate undue prejudice created by the statements made by others."

[3] The appearance on 60 minutes also resulted in prominent coverage in the local media, including the Tulsa World.

[4] The Court is not privy to the totality of comments made by either side since the filing of this case, including Defendant's interview on 60 minutes or the interviews to KFAQ.

(especially those comments beyond the scope of the aforementioned rules) potentially hampers prospects for a fair and impartial trial for both sides. As with any other case, jurors should be able hear the admissible evidence (free from any outside influence) and then reach a verdict (whatever that verdict may be).[5] To help safeguard that goal, the Court – as part of its court management responsibilities – formally instructs the attorneys involved in this case to follow Rule 3.6 and/or Rule 3.8 of the Oklahoma Rules of Professional Conduct.[6] *See, generally, Commonwealth v. Lambert, 723 A.2d 684 (Pa. Sup. Ct. 1998)(Appellate Court affirmed a trial court order as a "proper balance between the First Amendment rights of attorneys in a pending criminal and Sixth Amendment rights of the criminal defendant."). See also, U.S. v.McGregor, 838 F.Supp.2d 1256, 1265 (M.D. Alabama).*[7]

Doug Drummond

JUDGE DOUG DRUMMOND

[5] This is another instruction read to jurors during jury selection: "Both the State of Oklahoma and the Defendant are entitled to jurors who approach this case with open minds and agree to keep their minds open until a verdict is reached. Jurors must be as free as humanly possible from bias, prejudice or sympathy. Jurors must not be influenced by preconceived ideas as to the facts or as to the law." OUJI CR 1-4.

[6] The November 28, 2016 letter from this Court was not issued as a Court order and certainly, based on what public comments have taken place, it did not resolve the issue.

[7] Other options available to the Court would include continuing the trial date, sequestering the jury, extensive voir dire and/or sufficient jury instructions. This Court believes instructing the attorneys to follow their ethical responsibilities seems like a logical step, perhaps in combination with other options, depending on the circumstances. *But see, Gentile, supra* ("Even if a fair trial can ultimately be ensured through *voir dire,* change of venue, or some other device, these measures entail serious costs to the system. Extensive *voir dire* may not be able to filter out all of the effects of pretrial publicity, and with increasingly widespread media coverage of criminal trials, a change of venue may not suffice to undo the effects of statements such as those made by petitioner. The State has a substantial interest in preventing officers of the court, such as lawyers, from imposing such costs on the judicial system and on the litigants.")

CERTIFICATE OF MAILING

I do hereby certify that I mailed/electronically mailed/delivered a true and correct copy of the foregoing Order on the ___5___ day of April 2017:

Ms. Shannon McMurray
1811 S. Baltimore Avenue
Tulsa, OK 74119

Mr. Scott Wood
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Tulsa, OK 74105

Kevin Gray/Steve Kunzweiler
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Tulsa, OK, 74103

DISTRICT COURT OF THE STATE OF OKLAHOMA

14TH JUDICIAL DISTRICT
TULSA COUNTY COURTHOUSE
500 S. DENVER AVE.
TULSA, OK 74103-3832

DOUG DRUMMOND
DISTRICT JUDGE

TELEPHONE
918-596-5300

November 28, 2016

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Re: State of Oklahoma v. Betty Jo Shelby
Case No. CF-2016-4138.

SENT VIA REGULAR MAIL AND EMAIL

I am calling your attention to Rules 3.6 and 3.8 of the Oklahoma Rules of Professional Conduct. Please be cognizant of these rules (as well as the corresponding comments).

Sincerely,

Doug Drummond

Ex. A

Oklahoma Rules of Professional Conduct
Chapter 1, App. 3-A
Advocate
Rule 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 a reasonable lawyer would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have an imminent and materially prejudicial effect on the fact-finding process in an adjudicatory proceeding relating to the matter and involving lay fact-finders or the possibility of incarceration.

(b) 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.

(c) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Committee Comments

[1] Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to litigation in which incarceration may result or lay persons will serve as fact-finders. While this proposition applies in civil cases, it is particularly salient with respect to criminal prosecutions. If there were no such limits, the result would be practical nullification of the protective effect of the constitutionally-grounded presumption of innocence and the exclusionary rules of evidence. At the same time, there 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.

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Such rules may be adopted by a tribunal to be generally applicable, to apply to a specific class of litigation, or to govern a particular case, by way of special order. Rule 3.4(c) governs compliance with all such rules; however, a statement in violation of such a rule or order may constitute a violation of Rule 3.6(a), depending on the circumstances.

[3] Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been, involved in the investigation or litigation of a case, and their associates.

[4] Notwithstanding paragraph (a), many statements about a matter made by participating lawyers and their associates are unlikely to materially prejudice the fact-finding process in an adjudicative proceeding. While circumstances can result in an otherwise innocuous statement's having a materially prejudicial effect, accurate, factual statements of the following matters will not ordinarily violate the standard of Rule 3.6(a):

Ex B

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved; (2) the information contained in a public record; (3) that an investigation of the 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 the public interest; and (7) in a criminal case, in addition to items (1) through (6): (i) the identity and occupation 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. This list is illustrative, not exhaustive.

[5] There are, on the other hand, certain subjects which are more likely than others to have a materially prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or other proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create an imminent and material risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and the defendant is presumed innocent until and unless proven guilty;

[6] The likelihood of prejudice due to a public statement is different depending on the type of proceeding and the timing of the statement. Statements which may be innocuous when not made in close proximity to an adjudicatory proceeding may be materially prejudicial if made on the eve or in the midst of the proceeding. Criminal jury trials in which laypersons serve as fact-finders and other proceedings that could result in incarceration are most sensitive to extra-judicial speech. Civil trials in which laypersons serve as fact-finder(s) may also be quite sensitive. Non- jury hearing and arbitration proceedings are far less prone to be affected by such speech. The rule places limitations on prejudicial comments only with respect to the most sensitive cases. However, regardless of the likelihood of public dissemination of a statement, regardless of the timing of the statement, regardless of the vulnerability of a proceeding to prejudice as a result of the dissemination of a particular statement, and regardless of whether a lawyer is involved in a proceeding or associated with a lawyer who is involved in it, a lawyer should aspire to refrain from making statements that pose a substantial likelihood of prejudicing the fairness of a proceeding or unjustifiably casting doubt on the fairness of the proceeding or the legal system in general. A lawyer should be especially mindful of the likelihood of such effects when the lawyer's statement is reasonably likely to be disseminated by means of public communication.

[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another

party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is reasonably necessary to mitigate undue prejudice created by the statements made by others.