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When Prosecutors Take Liberties With the First Amendment

By Joel Cohen

Here's a juicy one: Jim Letten, the U.S. Attorney in New Orleans, was an aggressive prosecutor of corruption for the past 12 years. He had been the longest serving federal prosecutor in a place where his talents were reportedly in need.

One of his more recent targets was Fred Heebe, a local landfill magnate and one-time candidate for Letten's position. In 2011, Letten indicted Heebe's chief financial officer, Dominick Fazzio, on charges of fraud and money laundering—presumably to gain his cooperation against Heebe. But in March of the same year, Heebe—get this—filed a defamation lawsuit against a commenter on nola.com (a news website affiliated with *The Times-Picayune*) who identified himself only as "Henry L. Mencken1951," and whose posts say things like "Heebe comes from a long line of corruptors"—hardly the kind of thing Heebe lawyers, if he is ever indicted, would want the jury pool to have read.[1]

Heebe was convinced that "Mencken" was actually Sal Perricone, a veteran prosecutor in Letten's office who was working on the Fazzio case.[2] He was right. In fact, after he filed suit, Perricone admitted that he was Mencken and promptly "resigned."

After Letten's office began looking into the matter, it was revealed that the attorney in charge of the investigation, Letten's First Assistant, Jan Mann, was also making comments online about the corruption cases that her office was prosecuting ("Don't you ever wonder how they get rich in public office? Not possible unless stealing").[3] In November 2012, Heebe filed a second lawsuit, this time against Mann. She was soon demoted and in December announced her retirement.[4] As for Letten? The buck stopped with him—he understandably resigned a few days later.[5]

Now, Perricone claims that he was acting as a private citizen, since he (almost) never posted any comments while at work. But how far can the right to free speech go, and what happens when a prosecutor crosses the line?

Thou Shalt Not Prejudice an Adjudicative Proceeding

To get provincial, let's say this happened in New York State. Professional Conduct Rule 3.6 provides that an attorney participating in an investigation or litigation shall not make an extrajudicial statement about a matter that the lawyer knows or reasonably should know will be publically disseminated and will have a "substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."[6] In other words, an investigating or prosecuting attorney is ethically bound not to make any public statements that could affect the outcome of the proceeding.

What type of statement might "materially prejudice an adjudicative proceeding"? Rule 3.6(b) provides that the statement must ordinarily refer to a civil matter (if triable to a jury), or a criminal matter or any other proceeding that could result in incarceration apparently even if a jury is not involved. The statement, to be verboten, must also relate to: (1) the character or criminal record of a party, suspect or witness; (2) the possibility of a guilty plea or a confession in a criminal matter; (3) the performance or results of an examination or test; (4) any opinion as to a defendant or suspect's guilt or innocence; (5) information the lawyer knows is likely to be inadmissible as evidence in a trial and would create a substantial likelihood of prejudicing an impartial trial; or (6) the fact that the defendant has been charged with a crime, unless also included is a statement that the charge is merely an accusation and that the defendant is presumed innocent until proven guilty.[7]

Consider the 1991 U.S. Supreme Court decision in *Gentile v. State Bar of Nevada*.[8] Dominic Gentile, a Las Vegas defense attorney, was charged with an ethical violation after holding a press conference immediately after his client's indictment, but six months prior to trial, in order to counter increasingly negative press coverage.[9] During the conference, he maintained that his client was "an innocent person" and basically claimed that the real culprit was the lead detective on the case. He also attacked the veracity and character of several potential witnesses.

Nevertheless, the Supreme Court overturned the sanctions. Writing for a split court, Justice Anthony Kennedy explained that "[a]n attorney's duties do not begin inside the courtroom door."[10] Gentile "sought only to stop a wave of publicity that he perceived as damaging to his client," and his "reasonable steps" in this regard were appropriate. The court also found that the statements did not meet the "substantial likelihood" threshold, since (1) Gentile's statements were offered to counter the prosecution's far more damning comments; (2) a jury would not be empanelled for nearly six months; and (3) any future jury would be drawn from the county's 600,000 residents, many of whom either never heard, or would have completely forgotten, Gentile's press conference.[11] The inquiry, it seems, tends to be somewhat fact-specific.

A Higher Standard of Conduct

There are other rules at play. Federal prosecutors like Perricone and Mann are obliged to "see that the defendant is accorded procedural justice."[12] Indeed, comment 5 of Rule 3.8 cautions that "a prosecutor can, and should, avoid comments that have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium against the accused."[13] So not only are prosecutors ethically bound to avoid prejudicing the legal proceeding, but also to avoid making the accused look worse in the public eye.

Stricter still are the federal regulations applicable to the Justice Department—which apply from the time a person is the subject of a criminal investigation. First, they prohibit prosecutors from rendering statements in order to influence the outcome of a trial, or which might be publically disseminated if

they could be expected to influence the outcome of a trial. Second, they instruct prosecutors that public statements in the period before trial "ought strenuously be avoided" and that any disclosure shall only be made "when circumstances absolutely demand a disclosure of information." Third, the regulations specifically prohibit disclosures about a defendant's prior criminal record. Fourth, they list certain categories of disclosure that are per se prejudicial, such as observations about a defendant's character, statements concerning evidence or argument in the case, and any opinion as to guilt or innocence.[14]

Similarly, the U.S. Attorney's Manual, which echoes New York Rule 3.6, provides that no person shall "furnish any statement or information that he or she knows or reasonably should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding."[15] It also provides that Department of Justice personnel "shall not respond to questions about the existence of an ongoing investigation," except for several narrowly defined categories, among them the defendant's name, the substance of the charge, the time and place of arrest, and a description of the items seized at arrest.[16]

Did Perricone violate these rules? At the outset, he certainly ran afoul of the federal regulations as to Fazzio, since the circumstances did not demand a disclosure and his statements indeed included opinions about Fazzio's guilt ("Fazzio is going down.").[17] His comments may also have had a substantial likelihood of "increasing public opprobrium" (comment 5 to Rule 3.8) and "materially prejudicing an adjudicative proceeding" (Rule 3.6 and the U.S. Attorney Manual), despite the fact that only four statements mentioned Fazzio and a jury will not be seated for a while. As for Heebe—while he accused Heebe of bribing a local judge ("Letten shouldn't give up on Jefferson Parish. But appears, sadly, that Heebe got the judge in his pocket. Good Luck Feds!!!"),[18] and a radio host ("[W]hen Heebe needed to corrupt the airways, he bought you."),[19] Heebe has not yet even been indicted.

A Bridge Too Far

But the cover-up is always worse than the crime. In November 2012, Judge Kurt Engelhardt of the Eastern District of Louisiana ruled on a motion for retrial in *United States v. Bowen*, filed as the result of Perricone's comments concerning the trial of six police officers involved in a spate of horrendous police shootings occurring in the aftermath of Katrina, on New Orleans' Danziger Bridge.[20] In particular, the defendants focused on the plea bargain of Lieutenant Michael Lohamn, a cooperating witness who testified at trial and whose impending plea deal had been leaked to the media prior to rearraignment, despite a closed record.

Remember the second commenter, Jan Mann, Letten's First Assistant? Well, she was part of the Danziger Bridge trial team and took charge of a court-ordered investigation into the leak—originating from Perricone and anyone else—to determine the veracity of the defendants' accusations. Over the course of six months, Mann denied all prior knowledge of Perricone's activities and concluded in her reports that any leak came from outside the U.S. Attorney's office. Imagine the court's surprise when it became clear that Mann had also been generating online comments. A classic instance of the wolf guarding the henhouse.

In a scathing 50-page opinion, Engelhardt eviscerated both Perricone and Mann. First, it called into question Mann's entire investigation: "Quite simply, no one, especially this Court, could reasonably find it credible that Perricone and former First AUSA Mann, while posting under the same nola.com articles, and responding to and echoing each other's posts, were unaware of the identity of each other."[21] Second, it reprimanded Perricone, whose "grandstanding" comments were publically available

to witnesses in the Danziger case, any of whom may have been monitoring the media and nola.com.[22] Indeed, Perricone had commented about the Danziger Bridge case 10 minutes prior to jury selection ("None of these guys [the defendants] should have ever been given a badge") and during a defendant's testimony ("You let your ego control your emotions.... I hope the jury ignores your lame explanation").

The court ultimately recommended that the duo face disciplinary charges. Mann's attempts to conceal her own involvement, the court explained, were possible violations of Louisiana Rules 3.3(a)(1) (forbidding attorneys from making a false statement to a tribunal) and 3.4(b) (proscribing the falsification of evidence). She also likely breached Rule 8.4(c) (prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation). Meanwhile, Perricone almost certainly violated the prosecutor-specific provisions of Rule 3.8 against "increasing public opprobrium of the accused," as well as the prohibitions in the federal regulations against rendering statements concerning the legal argument and against rendering statements intended to influence the outcome of a trial.

The court also implied that both may have materially prejudiced the proceeding, thereby establishing a violation of both Rule 3.6 and the similarly worded proscription in the U.S. Attorney's Manual. As the court surmised, witnesses may have reviewed Perricone's remarks before testifying. Therefore, his comments may have affected their testimony. And although Mann has not yet been found to have commented on the Danziger Bridge case, the court explained such a discovery may be cause to ultimately grant defendants' motion for retrial.[23] It might also mean yet another ethical violation for Mann.

We've unfortunately seen this sort of behavior in New York. Think back to 1991—the John Gotti prosecution. Bruce Cutler was representing Gotti at the time, and attempted to fight back against what he perceived as an overaggressive prosecution and negative press coverage, albeit not in the social media context. In violation of multiple gag orders, Cutler repeatedly and aggressively denounced the government in the print and television media. He was eventually convicted of criminal contempt and sentenced to a three-year probation, a 90-day house arrest, 180-day suspension from practicing in the Eastern District, and 600 hours of community service.[24] Upholding the conviction, the U.S. Court of Appeals for the Second Circuit emphasized that Cutler's "statements were dipped in venom and deliberately couched to poison the well from which the jury would be selected."[25] "Substantially likely to materially prejudice an adjudicative proceeding"? The court certainly thought so. And this in the case of a defense lawyer!

The Attorney's Role

The point is this: Prosecutors are uniquely positioned to unfairly tilt the scales and must be extremely circumspect. They are commanded to do so not only by the ethics rules, but also by the federal regulations and the U.S. Attorney's Manual. The more any attorney cavalierly brings a trial into the public spotlight, the greater the risk of a biased jury.

Prosecutor-driven publicity, however, is worse. But not only for the obvious reasons. When the media swarm threatens to prematurely condemn the accused, an advocate is permitted to take "reasonable steps" to counter potentially prejudicial condemnation. The back-and-forth could be enough to mangle a prosecution and eliminate any possibility of a fair trial for both sides. Indeed, prosecutors who believe they can hide behind pseudonymous usernames on the web ought to remember that the First Amendment has its limitations. And they need to bear in mind what is happening to our colleagues at the Big Easy bar.

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1. Campbell Robertson, "In New Orleans, Comments by Assistants Imperil Job of Federal Prosecutor," N.Y. TIMES, Nov. 22, 2012, at A27.
2. Gordon Russell, "Federal Prosecutor Sal Perricone Resigns," NOLA.COM, March 20, 2012, available at http://www.nola.com/crime/index.ssf/2012/03/federal_prosecutor_sal_perrico.html.
3. See Laura Maggi, "Federal Judge Reorders U.S. Attorney's Office to Investigate Leaks in Danziger Bridge Case," NOLA.COM, Nov. 26, 2012 (explaining that Mann compiled the initial report about government leaks, before it was known that she herself was a source of the leaks), available at http://www.nola.com/crime/index.ssf/2012/11/federal_judge_re-orders_us_att.html; see also Robertson, supra note Error! Bookmark not defined. (quoting Mann's online statements).
4. Gordon Russell, "Jan Mann, Jim Mann Have Retired from U.S. Attorney's Office," NOLA.COM, Dec. 17, 2012 at 9:23 AM, available at http://www.nola.com/crime/index.ssf/2012/12/jan_mann_jim_mann_have_retired.html.
5. Campbell Robertson, "Crusading New Orleans Prosecutor to Quit, Facing Staff Misconduct," N.Y. TIMES, Dec. 6, 2012, at A17.
6. The full text is as follows: "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." NEW YORK STATE RULES OF PROFESSIONAL CONDUCT R. 3.6(a) (2009).
7. NEW YORK STATE RULES OF PROFESSIONAL CONDUCT R. 3.6(b) (2009).
8. 501 U.S. 1030, 1048 (1991).
9. The rule in question provided that "[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 adjudicative proceeding." Id. at 1061 (quoting NEV. SUP. CT. R. 177(1) (repealed eff. 2006)).
10. Id. at 1043.
11. Id. at 1044. Ultimately, the court found that the disciplinary rule was void for vagueness. It specifically objected to the rule's "safe harbor" provision, which provided that a lawyer "may state without elaboration the general nature of the defense." This provision is not in the New York equivalent. Id. at 1048 (quoting NEV. SUP. CT. R. 177(3)(a) (repealed eff. 2006)).
12. NEW YORK STATE RULES OF PROFESSIONAL CONDUCT R. 3.8 cmt. 1 (2009).
13. NEW YORK STATE RULES OF PROFESSIONAL CONDUCT R. 3.8 cmt. 5 (2009).
14. 28 C.F.R. §50.2(b)(1), (2), (4), (5), (6). The complete list of per se improper statements is as follows: (1) observations about a defendant's character; (2) statements attributable to the defendant; (3) references to investigative procedures; (4) statements concerning prospective witnesses; (5) statements concerning evidence or argument in the case; and (6) any opinion as to the guilt of the accused.
15. U.S. ATTORNEY'S MANUAL tit. 1 §7.500.
16. U.S. ATTORNEY'S MANUAL tit. 1 §7.520, .530.
17. Comments—Henry L. Mencken1951, NOLA.com, available at http://connect.nola.com/user/Mencken1951/index.html (comment dated Jan. 13, 2012).
18. Comments—Henry L. Mencken1951, NOLA.com, available at http://connect.nola.com/user/Mencken1951/index.html (comment dated Oct. 15, 2011).
19. Comments—Henry L. Mencken1951, NOLA.com, available at http://connect.nola.com/user/Mencken1951/index.html (comment dated Sept. 8, 2011).
20. *United States v. Bowen*, No. 2:10-CR-00204-KDE-SS, at *3-4 (E.D. La. Nov. 26, 2012) (order denying without prejudice motion for retrial).
21. Id. at *27.
22. Id. at *44.
23. Id. at *38 n.32.
24. *United States v. Cutler*, 58 F.3d 825, 832 (2d Cir. 1995) (upholding Cutler's conviction).
25. Id. at 840.

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