CLE SEMINAR

Ethics in Criminal Defense Practice and the Media

Presented by:
Federal Public Defender's Office

Discussion Leaders:
AFPD Alison Clark
KOIN 6 anchor Dan Tilkin
Stephen A. Houze - Criminal Defense Attorney

Portland, Oregon
Live on November 16, 2016
12:00pm to 1:00pm

Eugene, Oregon
Live via videoconference
November 16, 2016
12:00pm to 1:00pm

Medford, Oregon
Live via videoconference
November 16, 2016
12:00pm to 1:00pm

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 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.

(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

(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.

(c) Notwithstanding paragraph (a), a lawyer may:

(1) reply to charges of misconduct publicly made against the lawyer; or

(2) participate in the proceedings of legislative, administrative or other investigative bodies.

(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).

(e) A lawyer shall exercise reasonable care to prevent the lawyer's employees from making an extrajudicial statement that the lawyer would be prohibited from making under this rule.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"Firm"
"Knows"
"Matter"
"Reasonable"
"Reasonably should know"
"Substantial"

Comparison to Oregon Code

Paragraph (a) replaces DR 7-107(A).

Paragraph (b) has no counterpart in the Oregon Code.

Paragraphs (c)(1) and (2) retain the exceptions in DR 7-107(B) and (C).

Paragraph (d) applies the limitation of the rule to other members in the subject lawyer's firm or government agency.

Paragraph (e) retains the requirement of DR 7-107(C).

Comparison to ABA Model Rule

This is essentially the ABA Model Rule, although the Model Rule has an exception in (c) that allows a lawyer to make statements to protect the client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the client. Model Rule 3.6 has no counterpart to paragraphs (c)(1) and (2) or (e) .

RULE 3.7 LAWYER AS WITNESS

(a) A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a witness on behalf of the lawyer's client unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case;

(3) disqualification of the lawyer would work a substantial hardship on the client; or

(4) the lawyer is appearing pro se.

(b) A lawyer may act as an advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness on behalf of the lawyer's client.

(c) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer or a member of the lawyer's firm may be called as a witness other than on behalf of the lawyer's client, the lawyer may continue the representation until it is apparent that the lawyer's or firm member's testimony is or may be prejudicial to the lawyer's client.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"*Firm*"
"*Substantial*"

Comparison to Oregon Code

This rule retains DR 5-102 in its entirety.

Comparison to ABA Model Rule

This rule is similar to the ABA Model Rule. Paragraph (a) of the Model Rule applies only when the lawyer is likely to be a necessary witness. In the Model Rule, paragraph (b) does not apply if the witness lawyer will be required to disclose information protected by Rule 1.6 or 1.9. Paragraph (c) has no counterpart in the Model Rule.

RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause; and

(b) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"*Known*"
"*Knows*"
"*Tribunal*"

Comparison to Oregon Code

Paragraph (a) is essentially the same as DR 7-103(A).

Paragraph (d) is essentially the same as DR 7-103(B), with the addition of an exception for protective orders.

Comparison to ABA Model Rule

The ABA Model Rule contains four additional provisions: prosecutors are (1) required to make reasonable efforts to ensure that accused persons are advised of the right and afforded the opportunity to consult with counsel; (2) prohibited from seeking to obtain a waiver of important pretrial rights from an unrepresented person; (3) prohibited from subpoenaing a lawyer to present evidence about current or past clients except when the information is unprivileged, necessary to successful completion of an ongoing investigation or prosecution, and there is no other feasible means of obtaining the information; and (4) prohibited from making extrajudicial public statements that will heighten public condemnation of the accused. The Model Rule also requires prosecutors to exercise reasonable care that other people assisting or associated with the prosecutor do not make extrajudicial public statements that the prosecutor is prohibited from making by Rule .3.6.

RULE 3.9 ADVOCATE IN NONADJUDICATIVE PROCEEDINGS

A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.

Adopted 01/01/05

Comparison to Oregon Code

This rule has no counterpart in the Oregon Code.

Comparison to ABA Model Rule

This is the ABA Model Rule.

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting an illegal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"*Fraudulent*"
"*Knowingly*"

Comparison to Oregon Code

This rule has no direct counterpart in Oregon, but it expresses prohibitions found in DR 1-102(A)(3), DR 7-102(A)(5) and DR 1-102(A)(7).

Comparison to ABA Model Rule

This is the ABA Model Rule, except that MR 4.1(b) refers to "criminal" rather than "illegal" conduct.

RULE 4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

In representing a client or the lawyer's own interests, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer on that subject unless:

(a) the lawyer has the prior consent of a lawyer representing such other person;

(b) the lawyer is authorized by law or by court order to do so; or

(c) a written agreement requires a written notice or demand to be sent to such other person, in which case a copy of such notice or demand shall also be sent to such other person's lawyer.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"Knows"
"Written"

Comparison to Oregon Code

This rule retains the language of DR 7-104(A), except that the phrase "or on directly related subjects" has been deleted. The application of the rule to a lawyer acting in the lawyer's own interests has been moved to the beginning of the rule.

Comparison to ABA Model Rule

This rule is very similar to the ABA Model Rule, except that the Model Rule does not apply to a lawyer acting in the lawyer's own interest. The Model Rule also makes no exception for communication required by a written agreement.

RULE 4.3 DEALING WITH UNREPRESENTED PERSONS

In dealing on behalf of a client or the lawyer's own interests with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client or the lawyer's own interests.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"Knows"
"Matter"
"Reasonable"
"Reasonably should know"

Comparison to Oregon Code

This rule replaces DR 7-104(B). It is expanded to parallel Rule 4.2 by applying to situations in which the lawyer is representing the lawyer's own interests. The rule is broader than DR 7-104(B) in that it specifically prohibits a lawyer from stating or implying that the lawyer is disinterested. It also imposes an affirmative requirement on the lawyer to correct any misunderstanding an unrepresented person may have about the lawyer's role. The rule continues the prohibition against giving legal advice to an unrepresented person.

Comparison to ABA Model Rule

This is essentially identical to the ABA Model Rule, with the addition "or the lawyers own interests" at the beginning and end to make it clear that the rule applies even when the lawyer is not acting on behalf of a client.

RULE 4.4 RESPECT FOR THE RIGHTS OF THIRD PERSONS; INADVERTENTLY SENT DOCUMENTS

(a) In representing a client or the lawyer's own interests, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, harass or burden a third person, or knowingly use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

Adopted 01/01/05

Amended 12/01/06: Paragraph (a) amended to make applicable to a lawyer acting in the lawyer's own interests.

Amended 01/01/14: Paragraph (b) amended to expand scope to electronically stored information.

Defined Terms (see Rule 1.0):

"Knowingly"
"Knows"
"Reasonably should know"
"Substantial"

Comparison to Oregon Code

This rule had no equivalent in the Oregon Code, although paragraph (a) incorporates aspects of DR 7-102(A)(1).

Comparison to ABA Model Rule

This is essentially the ABA Model Rule, except that the MR does not include the prohibition against "harassment" nor does it contain the modifier "knowingly" at the end of paragraph (a) which makes it clear that a lawyer is not responsible for inadvertently violating the legal rights of another person in the course of obtaining evidence.

LAW FIRMS AND ASSOCIATIONS

RULE 5.1 RESPONSIBILITIES OF PARTNERS, MANAGERS, AND SUPERVISORY LAWYERS

A lawyer shall be responsible for another lawyer's violation of these Rules of Professional Conduct if:

(a) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(b) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"Knowledge"
"Knows"
"Law Firm"
"Partner"
"Reasonable"

Comparison to Oregon Code

This rule is essentially the same as DR 1-102(B) although it specifically applies to partners or others with comparable managerial authority, as well as lawyers with supervisory authority.

Comparison to ABA Model Rule

ABA Model Rule 5.1 contains two additional provisions. The first requires partners and lawyers with comparable managerial authority to make reasonable efforts to ensure that the firm has in place measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct. The second requires lawyers having direct supervisory authority over another lawyer to make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

RULE 5.2 RESPONSIBILITIES OF A SUBORDINATE LAWYER

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"Reasonable"

Comparison to Oregon Code

Paragraph (a) is identical to DR 1-102(C).

Paragraph (b) has no equivalent in the Oregon Code.

Comparison to ABA Model Rule

This is the ABA Model Rule.

RULE 5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANCE

With respect to a nonlawyer employed or retained, supervised or directed by a lawyer:

(a) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(b) except as provided by Rule 8.4(b), a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Adopted 01/01/05

Amended 01/01/14: Title changed from "Assistants" to "Assistance" in recognition of the broad range of nonlawyer services that can be utilized in rendering legal services.

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THE UNEASY ALLIANCE OF ATTORNEY AND REPORTER, OR WHEN PERRY MASON MEETS LOIS LANE

Richard **Stack** [a1]

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Countless news stories are produced daily about aspects of the legal system. Court coverage is evidenced many ways — seven-second sound bites, feature stories with cover photos, in-depth analysis. No matter the account, there is at least one common thread: To unearth the story, journalists gathered information speaking to attorneys.

When members of these professions meet, it is the lawyer's responsibility to explain legal issues to the reporter. It becomes the journalist's job to analyze the information, assess newsworthiness, and distill information into accurate, comprehensible accounts.

The process isn't simple. Several variables interact — from the lawyer's jargon to the reporter's level of understanding. The dynamics of this transaction are: (1) how do attorneys convey information so that messages are received clearly? And (2) how do reporters translate the data into accurate stories?

Trends in court coverage compel journalists and lawyers to work together. This is so even though members of the legal and journalistic communities may not have true understandings of each other's operations.

Need for a solid working relationship

It is useful to analyze how reporters and attorneys interact because the American public relies so heavily on the media to provide information about the judicial process. Research indicates that the public depends on the media for accounts of the legal system. Stories concerning

crime garner extensive media attention because they open a window about subjects people might otherwise be uncomfortable discussing.

A Hearst Foundation survey revealed that 54 percent of nearly 1000 respondents said they frequently obtained information about the legal system from television. Thirty-one percent replied they sometimes gained such information through TV, while 14 percent said they rarely did. Fifty-one percent ranked newspapers as one of the most frequently relied upon sources of information, with 28 percent saying they sometimes relied on newspapers, and 20 percent answering that they rarely or never did. Those surveyed also indicated they relied on radio news, television dramas, and magazines for information to varying degrees. The Hearst investigation led to the conclusion that the media, "is a much more important source of information about the courts than are lawyers, the public's own personal experience, schools, or libraries." [1]

Another study supporting this position examined media coverage of the law. The researchers cited the cultivation analysis theory to explain why the public derives information about the legal system through the media. The cultivation analysis theory addresses "the long-term, cumulative consequences of exposure to media messages ... it examines the relationships between exposure to media messages and audiences' beliefs and behaviors." [2] The researchers contend that individuals who have never stepped inside a courtroom already possess composite pictures of the legal system based on their accumulated media images of judges, attorneys and litigants from both fictional and factual television. Perhaps the *Baltimore Sun's* Lyle Denniston, considered the dean of Supreme Court correspondents, captured it best saying, "[T]he average citizen reads no court opinions, watches few court proceedings in court, studies no law review articles, has no regular contact with judges or attorneys, and handles no legal problems himself. The press is his law reporter." [3]

If trends in coverage continue, there is a good chance that at some point in an attorney's career he or she will be interviewed by a reporter. According to Herbert Gans, journalists view individuals as sources of information, and sources see interviews as "a chance to provide information that promotes their interests, to publicize their ideas, or ... get their names in the news ...." The source-jounalist relationship, says Gans, "is a tug of war: while sources attempt to manage news, putting the best light on themselves, journalists manage the sources to extract the information they want." [4]

Nowhere is this more evident than when a lawyer serves as primary source for a story, especially when trying to affect the outcome of a case through publicity.

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Exchanges between lawyer and reporter have spawned a burgeoning subspeciality, litigation public relations. The contention of those who practice this discipline is that a public communication expert can play a critical role in dialogue between media and attorneys. If properly managed, litigation public relations may influence coverage of a case. A mistake made by many attorneys is failing to recognize that while silence should be accorded the presumption of innocence in the courtroom, it may be taken as a sign of guilt in the pressroom. It is essential for lawyers to understand reporters' roles and realize why speaking to the press is important.

Examining the professional connection between attorneys and journalists is significant because the media are the pivotal resources for the American public to obtain information about the legal system. A shared understanding of the two professions is critical. The judicial process is gaining more media attention with the advent of law-dedicated cable stations and the proliferation of high drama courtroom encounters. Lawyers are more likely to find themselves interviewees for journalists. A lawyer needs to know how to respond when a microphone or notepad is thrust into his or her face.

A positive working relationship between the media and the ***23** lawyer could demystify the legal process, making it more accessible to the average citizen. Court coverage that is clearer, more complete, and more objective could balance the scales of justice in the court of public opinion. This is the jurisdiction that renders verdicts on individual reputation and public policy.

At the root of troubled communication

How did the rift develop between reporters and attorneys? Possible explanations involve failure on the part of universities to train students of journalism and students of law on this subject; restrictions of the American Bar Association's Code of Professional Conduct; and an attorney's obligation to honor client confidentiality. Law students rarely deal with the media. Academicians seem to believe that few lawyers ever will encounter reporters. From this premise, it makes little sense to law professors to examine media relations skills or strategies.

Journalism students may have the option of studying techniques for reporting on the legal system. This is rarely required. The thinking goes that journalists are generalists, so students shouldn't leave school only with the tools to report a specific subject.

Some contend that the “school of hard knocks” provides the true post-graduate education. This reasoning holds that the only way for an attorney to acquire media relations skills and for a reporter to develop court coverage technique is for each to experience it first hand. A

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lawyer lucky enough to have a mentor with vast media relations expertise will benefit from observing the old hand in action. The same is true for journalists assigned to cover a legal beat. This approach holds that practice and guidance are key to mastering skills required to report on judicial process.

Another explanation for the emergence of this divide is that not all attorneys are willing to be interviewed by the media. Standards set by bar associations theoretically restrict what lawyers are able to say publicly prior to trial. One of the basic restraints is the American Bar Association's Model Rules of Professional Conduct. Specifically, Code 3.6 “forbids a lawyer from making a statement to the media if he reasonably should know that it will have a substantial likelihood of materially prejudicing the proceeding.” The same section of the code prevents attorneys from revealing to the media a wide range of information pertaining to proceedings.

Improved discourse between scribes and lawyers

The benefits of attorneys' establishing working relationships with the media are evident. It is advantageous for lawyers to be conduits so the workings of the judicial system can be known to non-legally trained citizens. In an article entitled “Using the Media to Your Advantage,” noted criminal defense attorney Robert Shapiro writes that “by answering simple questions [of the media], a lawyer not only can develop a relationship with the press, but can also educate the public of the true workings of our justice system.” [5]

California lawyer Robert Wieder, in his piece, “How to Manipulate the Media,” advises that journalists and attorneys have something to gain by using each other for information. Wieder observes that a new twist to a story will please a reporter who is on the lookout for fresh angles. Having curried favor with a reporter allows the lawyer to tell his tale to a sympathetic ear. [6]

The motivation driving improved media relations for attorneys takes various forms. One is “manipulative publicity.” This is “publicity that is welcome, sought and used to attain more specific personal ends as opposed to more general, system-oriented ends. An example of manipulative publicity would be that desired because it might help an attorney win a case.” [7]

Non-manipulative publicity is attention that would be desired because it might enhance the general public's comprehension of the legal system. That which makes the judicial process more easily understood makes the institution more accessible to the average citizen. Disciplines that have the potential to increase the democratization of society are noble in themselves, and certainly worthy of examination.

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Suggestions when the spotlight beckons

Although a trial takes place behind courtroom doors, its events, people and ideas belong to the public. As declared by the Supreme Court, "Courtroom proceedings are in the public domain; a trial is a public event; what transpires in the courtroom is public property." [8] Journalism is the vehicle by which this information is conveyed. Work with the media should coincide with work inside the courthouse. Legal information affects the social fabric of the country (*e.g.* rights of criminal defendants). Decisions affecting one party can go beyond that person to influence larger segments of society.

What follows is a list of tips to aid attorneys in their quest for productive media relations.

Either you work with the press or they'll work without you

The media's spotlight is strong, focused, unrelenting. Journalists catch the scent of a story. That scent draws them to the source — you and your ***24** client. Before publicity control is seized by reporters, you should lay out your case. If you can regulate as much information as possible, the tide is more likely to turn in your favor. Reporters seek information from credible sources. The PR-savvy lawyer can show the client from a positive perspective. Public relations protection of the client flows from this understanding.

Don't cede the high ground

When public opinion is running against you, or the opposition publicly defines the case from its perspective (*i.e.* the prosecution proclaims "the crime's been solved and the perpetrator caught"), you must fight press with press. The bare facts of a situation can be adorned to improve their appearance. Always be positive. Rather than, "This accident is devastating for "Fly-by-Night Airways," say, "This is the first such mishap in company history."

Learn the art of interviewing

The interview process isn't simple. Complex twists in question-and-answer sessions can occur in an instant. Don't be lulled into a false sense of security as a friendly reporter turns you down a path of defensiveness and misunderstanding. Be prepared for any question. Understand the position you and your client are in politically and socially, as well as legally. Maintain a strong focus on the dialogue's direction.

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Preparing for your press appearance is as critical as preparation for trial. Write down key message points. Rehearse delivering them as responses to likely questions. Anticipate journalists will ask the sorts of questions the average citizen would if given the chance.

Study the style of master politicians. Heed Henry Kissinger's query at a press conference, "Are there any more questions for my answers?"

Anything you say can be used against you

If a reporter calls, stipulate what's on and off the record. Do not say anything "off the record" or "on background" unless you have complete, time-tested trust in the journalist. Even then establish what can and cannot be printed. The rules are vague as to what is "on the record" and what is "background." Attorneys have treatises on ethics in their libraries; reporters do not.

'No comment,' is not acceptable

Refusing to answer or avoiding a question raises suspicion and the specter of guilt. Lawyers resort to "no comment" when they don't know the answer, lack the skills to articulate responses, or are hiding something. Journalists are trained to be investigators. They sniff out the truth. Lose control of an interview by evading an answer, and a good reporter will detect it. *A relationship with the press needs your integrity, honesty, and words*. When your client's innocence is questioned in court and in the media, perhaps the most damaging phrase you can utter is "No comment." As soon as this is heard on the air or read in print, people ignore the principle of innocent until proven otherwise and quickly attach blame. A direct response, focusing the question on an area you feel more comfortable, is more productive and protective.

If you've nothing to say to reporters, fine; tell them so. But do it in words other than, "No comment." The public will read "no comment" as an admission or evasion. It invites adverse inferences. Instead, provide a plausible explanation for not responding. Acceptable alternatives include: "I can't go into that because I'm bound by attorney-client confidentiality"; "We'll state our position with supportive evidence at the appropriate time"; "We do not want to add to the numerous misconceptions that already surround this case"; "We'll not try this matter before the trial starts; you'll hear our arguments in the courtroom."

Know the media

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Garner individual reporter information and impressions of specific outlets, previous coverage, and the general grind of journalism. Develop the habit of reading articles with an eye towards the byline. Note who covers your area. This is key in deconstructing monolithic media institutions into their approachable, human components.

Maintain a current media list. This aids your communication with the press. Know with whom you are talking and you are better able to talk with them. You'll understand the goals they're pursuing in covering your client's story.

Respect reporters' deadlines. Concern yourself with the time constraints placed on members of the media. Journalists labor under strict deadlines. Avoiding them annoys reporters and provokes them to write, "Repeated attempts to reach defendant's counsel were to no avail."

To really rile reporters, promise them information and then withhold it. Courtesy in answering questions promptly shows respect. Just as you are responsible to appear in court on time, so must reporters meet their deadlines. Cooperating with their schedules extends your relationship to a more dependable level of professionalism.

Deal calmly with the media

Anger does not bring desirable results. A heated emotional matter that generates a whirlwind of coverage may cause sensibilities to boil. Although a story casts you and your client in a negative light, keep your anger and frustrations in check. A journalist likes nothing more than a high-strung lawyer or a dramatic scene. Maintain dignity and an even temper in the public arena. Positive coverage flows from this.

When dealing with journalists that you think are out to undermine you, don't be antagonistic or argumentative. Even if their reporting disturbs you, taking on the media is a losing battle. They have the last word.

Stick to your principles in a hostile environment. Media animosity reflects public antipathy toward your case. When you're representing an especially unpopular position, try invoking the principle of judicial fair play. If the question posed is, "How could you defend a known felon against new criminal charges?" you might reply that our system of justice protects everyone's right to legal representation. While defining your role in the process, you might explain that the strength of the Constitution is best measured by how it safeguards rights in controversial and singularly unlovely situations.

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Keep it simple; eschew legalese

This is a kinder variation of the self-admonishment, "keep it simple, stupid." Do not lapse into legal jargon; people won't comprehend your message. Legal language is lost on the untrained ears of the public. Once you ramble in the Latin-laced language of the law, eyes will glaze and reporters will go elsewhere for the story. Message comprehension is the goal. If the language you use disguises your point, time and breath are wasted. ***25** Your client's cause is not furthered. A *New York Times* survey found that attorneys most quoted are those who speak plain English. Ask yourself, "How would I explain this to my 12-year-old niece?"

Tell the truth or say nothing

Representing your client to the media and public requires intelligence, patience and honesty. Present yourself and the case with integrity, answering questions with the truth. The truth provides your answers. Derived from the facts of the case, the truth is the source of information from which your responses can be carefully crafted. Relying on the truth helps you in the present and protects you in the future. Three of the strongest reasons never to lie to the media: (a) They will find out. (b) They will be furious. (c) Remember Nixon?

Dealing with the press means dealing with perception

After a professional, ongoing relationship develops with the media, do not lose sight of the blurry boundaries surrounding you. What you say and what the media report can be the same, entirely different, or somewhere in between. The public will take your information and the format in which it is presented and draw its own conclusions. Perceptions rule media influence.

Accuracy is the attorney's responsibility

Journalists are fallible. After an interview, request to have your statements read back to you to correct errors or clarify your message. Subsequently, if you feel you were misquoted, inform the reporter - without acrimony. Good journalists will double check their notes and, if there is a misquote, will write a retraction or clarification. *Monitor all media and correct any misinformation the moment it is detected.* The media often function in copycat mode. What appears on the front page of the morning newspaper is frequently repeated in broadcasts throughout the day. This makes it imperative to catch mistakes early so other outlets won't repeat them. The responsibility of accuracy rests with the lawyer. The assurance of vigilance in media observation and correction as needed is the attorney's duty as well.

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No courtroom is an island

Never underestimate public opinion's power to influence a trial outcome. When the doors of a courtroom open during and after trial, journalists will be there to question you and transmit your information and impressions to the public. The line of communication does not end there. The public rarely accepts legal information in silence. Rather, responses from readers and viewers are directed towards media outlets, politicians, and other opinion leaders. The cycle of communication continues, with influence and public opinion affecting how trials are conducted and, quite possibly, what verdicts are rendered.

Footnotes

a1 Richard **Stack** is Associate Professor and Director of the Public Communications Division at American University, Washington, D.C. He applies his theories of litigation communication as consultant to the National Coalition to Abolish the Death Penalty. He has written numerous articles and two books including *Courts, Counselors & Correspondents: A Media Relations Analysis of the Legal System* (Wm. Hines Co., Buffalo, NY, 1998).
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1 Frank A. Bennack Jr., THE AMERICAN PUBLIC, THE MEDIA AND THE JUDICIAL SYSTEM, (1983) at 5.

2 Valerie Hans & Juliet Dee, *Media Coverage of Law*, AM. BEHAVIORAL SCIENTIST, Nov./Dec. 1991, at 136-49.

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Cite to Supreme Court case

Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991)

111 S.Ct. 2720, 115 L.Ed.2d 888, 59 USLW 4858

Rule 3.6: Trial Publicity

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 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.

(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

(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.

(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.

(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).

Comment | Table of Contents | Next Rule

Comment on Rule 3.6

Advocate
Rule 3.6 Trial Publicity - Comment

Comment

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, 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. Rule 3.4(c) requires compliance with such rules.

[3] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. 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] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

[5] There are, on the other hand, certain subjects that are more likely than not to have a material 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 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 a substantial 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 that the defendant is presumed innocent until and unless proven guilty.

[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[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 necessary to mitigate undue prejudice created by the statements made by others.

[8] See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

Back to Rule | Table of Contents | Next Comment

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Feature

TALK TO THE MEDIA ABOUT YOUR CLIENT? THINK AGAIN.

Elisabeth Semel [a1] Charles M. Sevilla [aa1]

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***T**he "Trial of the Century" is becoming a mainstay of national entertainment. We get one now every few months. One week it's Jeffrey Dahmer, the next William Kennedy Smith, or Lorena Bobbitt, then Joey Buttafucco comes along followed by Susan Smith; then it's the Brothers Menendez, or the World Trade Center bombing, or McVeigh and Nichols, or the apparent gold standard, the O.J. Simpson Show. It's a 90s kind of thing.

Show trials are good for the economy, the dream of every news-entertainment mogul who lusts after high interest TV vehicles capable of making a few zillion dollars. Show trials garner the ratings because they deliver what the voyeuring public wants to see: raw human emotion openly discharged through murder, sex and greed.

A star of these spectacles is the trial attorney as commentator on his or her own case. [1] At times, these interviews have proven embarrassing to the attorney, harmful to the client, and damaging to the legal profession. It is as if the attorneys believe that the more high profile the case, the fewer rules of professional conduct apply. That is what prompts this article. The normalization of such media commentary by lawyers about their own cases causes some to lose sight of their core responsibilities to their client.

In hyping these "Trials of the Century" shows, one questions whether the media is giving the public what the public truly wants, or dictating to the public what the media wants to sell. Perhaps there exists a more complex supply-and-demand relationship. Without doubt, a criminal case does not captivate attention without one--and preferably all three--of these elements: violence, sex, and celebrity status.

George Gerbner, former dean of the Annenberg School for Communication at the University of Pennsylvania, has been monitoring and analyzing television violence for more than 30

years. In a recent profile of Gerbner, the writer argues that "[i]f television violence is a problem, and most agree it is, then it is a systemic problem." ***11** The market-driven bottom line makes violent programming most profitable; viewers watch these shows because they are unavoidable and because they are "conditioned to accept the corporate violence doled out to them." [2]

For the infotainment industry, nothing except the number zero could beat the costs of show trials. There are no expensive sets to build or rent, no writers from whom a daily script must be coaxed, no temperamental actors to coddle into reading their lines, no flamboyant directors to lord it over everyone, and no understudies, underlings, or hangers-on to get in the way of everything except a paycheck. No. It's all free, courtesy of the taxpayer who foots the bill for the set, courtroom, judges, prosecutors, jurors, bailiffs, and clerks-- sometimes even the defense attorney. All that is needed for a ratings bonanza is a television camera, cable, and the sedentary viewers to take it all in.

As former senior vice president of NBC News (now a professor of communications at the University of Miami), Joseph Angotti, stated recently, "Most of that crime coverage is not editorially driven, it's economically driven.... It's the easiest, cheapest, laziest news to cover...." [3]

Gerbner's profiler reaches a similar conclusion, "[T]here's an overwhelming global marketing imperative in favor of the simple, the naked and the bloody. Cheap to produce, easy to distribute--violence is the surest road to profit. It becomes part of the global formula that is, in Gerbner's words, 'imposed on creative people and foisted on the children of the world.'" [4]

Gerbner himself urges that media monopolies have distorted the debate about television violence by casting it in First Amendment terms. In his view, the market is a plutocracy controlled by corporate giants who "use the First Amendment as a shield while denying it to the disenfranchised." [5]

Duty of Loyalty

Motivated by ratings and profits, the media obsession with pursuing crime stories has become overwhelming. Courtrooms across America have become the national entertainment and the lawyers instant celebrities. Unfortunately, a number of lawyers have been blinded to their professional obligations by the kleig lights.

The following examples demonstrate the problem of attorneys talking to the press and breaching their obligations to the client.

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After police Detective Mark Fuhrman's attorney, Robert Tourtelot, "fired" his client after the notorious "N-word" tapes were made public in the *Simpson* trial, attorney Tourtelot then publicly blasted Fuhrman with the following statement:

> When I listened to the tapes, I was profoundly disgusted and horrified ... I never saw anything that indicated to me he was a racist or bigot. My personal impression, up until the tapes, was that Mark was being unfortunately maligned, his character assassinated. [6]

Tourtelot's revelations of privileged matters his client told him went even further: "Fuhrman reassured his attorney that he had no skeletons in the closet, Tourtelot said." He complained that the year he represented his client was now wasted: "That was a year of my life, a lot of time spent and for what?" As to whether his client demonstrated "remorse" for his words, the attorney said, "That's going to be in my book." [7] The same day as the article containing these disclosures appeared, another one stated that "Tourtelot suddenly found himself with a client that even he, as attorney, could not stand to represent." [8]

Fuhrman has written that after making these statements, Tourtelot called him and explained, "I have to live in this city." [9] Coincidentally, Tourtelot also had been representing victim Ron Goldman's father and sister. [10]

In his book, *Murder in Brentwood,* [11] Fuhrman relates that before Tourtelot notified his client that he was dumping him, Tourtelot made his press statements about being "shocked and sickened" by the tapes. [12] Fuhrman's account is surprisingly gracious, writing, "I wish he hadn't done it, or had done it differently, but I can't say that I blame him." [13] Instead of Tourtelot's "knee jerk reaction, the same kind of response that many people had after hearing the tape excerpts," [14] Tourtelot could have continued repeating his client's version of the story that these "... were the words of fictional characters I had created based on my imagination and experience. I knew I had to exaggerate things to make the screenplay dramatic and commercially appealing." [15]

This instance of disloyalty would seem difficult to match. But, egregious as it was, it was soon exceeded by another player in the same case, Robert Kardashian, O.J. Simpson's attorney and friend. After the criminal trial, and just before the jury selection in the civil trial commenced, he went on national television and gave a lengthy interview to inform the public that he held grave concerns about his client's innocence, that Simpson had failed a polygraph, that Simpson was suicidal the week of his arrest, that another defense attorney in the case, Robert Shapiro, had wanted Simpson to plead guilty to accessory to murder, and that before

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the jury toured the Simpson house at Rockingham the lawyers did a "make-over" of it to take such things as photos of white women off the walls. [16]

Another illustration of the willingness of a lawyer to sacrifice a client's confidences for the sake of his own reputation is found in an interview that Paula Jones' counsel, Daniel Traylor, gave to a journalist when he announced his planned resignation from the case. Traylor apparently offered what the writer described as "a rambling two-hour interview," at a time when "he still technically represents Jones." [17] His confessional included the revelation that his client *had not* made statements to him concerning her alleged meeting with President Clinton in which she claimed to have observed a unique feature of the First Penis, but that she had accepted money from a conservative film maker for her contribution to an anti-Clinton video. Traylor then characterized the client and her husband as being "on the nut circuit." No wonder the journalist described attorney Traylor as having spoken to her "with surprisingly critical candor" when he acknowledged "it was a mistake for him to have taken the case." [18]

Mark Fuhrman, O.J. Simpson and Paula Jones were each entitled to expect that their counsel would abide by the rules of professional conduct even after terminating their professional relationships. [19]

*13 Duty Extends To Entire Defense Team

A different, but no less important issue, involves defense-retained experts who become legal commentators. It has long been recognized that the work of an expert-consultant is protected by the attorney's work-product privilege. [20]

For example, a member of the *Simpson* criminal defense team, jury consultant Jo-Ellan Demitrius, was a television commentator during Simpson's civil trial. In an earlier, memorable segment of *The Today Show,* a panel of attorneys and reporters were queried about the plaintiff's strategy in cross-examining Simpson when he took the stand in the civil case.

Several days later, when Demitrius was interviewed on *Today,* she volunteered tips to plaintiffs' counsel. If she were representing the plaintiffs, she suggested that the most likely way to reveal Simpson's "ragged edges," would be to "keep him up there [on the witness stand] as long as I possibly could." [21] She expressed concern that, having been silent for so long, Simpson might want "to tell everything all at one time," and that "I don't care who you are; it can be picked apart very, very carefully" by the plaintiffs' lawyers. [22] In closing,

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Demitrius said this about O.J. Simpson's testimony, "it will truly be the acting role of his life." [23]

Did Demitrius have unique insights into the civil proceedings? No doubt. Was she likely to have been able to offer some informative comparisons between the criminal and civil trials? Certainly. But the last thing a client or defense counsel would expect is to see a defense expert giving media interviews about the client's vulnerabilities.

For purposes of the applicable privileges, the expert-consultant stands in the same shoes as the attorney. Defense attorneys have an ethical obligation to put into every written contract with hired experts that the latter are working within the attorney-client privilege and that all communications and work-product are deemed confidential. [24]

It Is Not Only a Matter of Client Consent

Unless the clients in the above examples consented to such revelations and breaches of loyalty, [25] the attorney statements violated rules of professional conduct concerning maintaining client loyalty and the secrets of the client, to say nothing of attorney-client communications. They also undermine public confidence and the reasonable expectation that attorneys, as well as their experts, will not publicly trade on the experiences they were privileged to have with a client. Trust is the sacred obligation every attorney guarantees the client, the bedrock of the relationship. Yet, it is being publicly sacrificed on the altar of attorney ego.

There are other ethical considerations as well. For example, the *California Rules of Professional Conduct* state that counsel must provide effective assistance to his or her client and not violate the following rules: first and foremost, counsel must act competently (Rule 3-110); [26] second, counsel must refrain from taking a position adverse to the client's interests (Rule 3-300); and the attorney must maintain at all times complete fidelity to the client's interests. As stated in *De Luca v. Whatley,* "When an attorney defends a person accused of crime he has but one intended beneficiary--his client." [27]

Most disturbing about these examples is the attitude they demonstrate toward the client. Ethical rules and case law are unambiguous in stating that counsel cannot abruptly and unilaterally end an attorney-client relationship *and* then proceed to publicly disparage the client.

The attorney-client relationship places an attorney in a fiduciary relationship "of the very highest character" with the client, which "makes it improper for an attorney to act contrary

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to, or assume a position inconsistent with, the interests of his present or former client." [28] This duty of loyalty is akin to a primary tenet of the Hippocratic Oath: "The regimen I adopt shall be for the *benefit of my patients* according to my ability and judgment, *and not for their hurt or for any wrong.*" [29] In other words, a lawyer, like a physician, should do no harm to the client. Making speeches, handing out press releases and giving TV comments contrary to one's client's interests obviously is conduct that does injury to the client.

Loyalty is one of the most important aspects of a lawyer's relationship with his or her client. [30] In an adversary system, the client depends upon the attorney's undiluted loyalty to his client's interests. The potential variety of interests which might dilute a lawyer's loyalty to his client includes the attorney's personal interests (*e.g.,* financial security, prestige, and self-esteem....) [31]

These attorneys may not have thought about it, but the duty of loyalty continues after the case has concluded and requires more than protecting privileged matter. It means the lawyer perform no act of disloyalty whatsoever. [32] The actions of these attorneys obviously breached this duty. [33]

Another recent, and altogether more problematic, illustration of the attorney-client schism occurred in San Jose, California during the capital trial of four alleged members of the Nuestra Familia prison gang. According to news accounts, one of the defendants threatened his attorney during the course of the trial. The client was brought into court in shackles, with both hands chained. The manacles were removed after the lawyer "volunteered to sit well away from the client" when the guilty verdicts were read. The defense attorney was quoted as saying later, "I'd have to be a fool to expose myself to that kind of threat." [34] The press also reported that " a nxious jurors sent a letter" to the judge "expressing fear for their safety" after the verdicts were announced. [35] The lawyer's client still faced the penalty phase of the trial, which was not set to commence until the following month.

Assuming that the defendant made these threats and that the lawyer was genuinely fearful for his safety, there were ethical and practical court measures available, which were apparently taken. This was a difficult situation, no doubt, but making the comment to the press was wrong. In a high-profile case with non-sequestered jurors, the odds are that one or more jurors will hear of the comments in a manner that may never be discovered by counsel but will be harmful to the client.

Proactive Media Attorney

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What about those attorneys who think soliciting media coverage will help their clients? They seek to become media personalities as their cases are in progress. The assumptions behind such a tactic are highly questionable and seldom result in a tangible benefit to the client. This strategy also creates a whole new set of problems.

For a number of years, the view-from-the-inside coverage of criminal cases has been a regular feature of the CBS program *48 Hours.* During the one-hour broadcast, the cameras follow defense counsel and the prosecutor as they prepare for trial. The coverage includes witness and even client interviews, strategy sessions and each advocate's thoughts on the case, along with footage from the trial itself. So as not to influence the proceedings, and particularly the jury, the program typically does not air until the verdict is in.

Delayed broadcast does not cure the evil. A lawyer should never allow the media to film confidential and privileged meetings such as client conferences or strategy sessions with experts or other members of the defense team.

Lest the reader think the danger to the accused exists only in the exploitation of this material on retrial, a prosecutor in San Diego earlier this year attempted to use a clip from a *48 Hours* pretrial interview of the defendant as evidence in aggravation at the sentencing hearing. Indeed, the defendant's comments to the press in that case, before and after the verdict, were a constant thorn in the side of the judge, who did not disguise his ***15** belief that the accused and his defense counsel were trying the case in the court of public opinion rather than the court of law. [36]

Sometimes, a lawyer's comments simply vent personal frustration with absolutely no possible benefit to the client. In the *Simpson* case, before the trial was even concluded, several co-counsel began publicly criticizing each other's tactics. Jeffrey Toobin, a journalist whose steady diet seems to be lawyers, drawn and quartered, wrote a lengthy piece for the *New Yorker* describing Robert Shapiro's very public disaffection with the defense team. [37]

Sadly, the *Simpson* case is not the only situation in which a lawyer vented his/her personal disapproval of the team's trial approach by launching public fire balls at targets of opportunity. When that happens, it is the client who goes up in flames.

In any multiple-defendant case, the individual interests of each defendant may warrant this type of antagonism in the courtroom, although prosecutors look fondly upon attorneys who point the finger at each other's clients. Attorneys involved in single and multiple-defendant capital cases with co-counsel have seen the best of lawyer relationships near the breaking point because of the strain of such high-stakes trials. But when team members remain bound

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to one another by their mutual responsibility to the client, the press remains where it should be, outside the wall of confidentiality.

Conflict of Interest

The lawyer, not the client, bears responsibility for deciding whether, when, and how to respond to, or in the rare instance, seek out the press.[38] These tactical choices, as most others, should be the product of thoughtful consultation with the client. They fall into the category of what one legal writer described as the "means" portion of a "'means-ends' division of authority between defense counsel and client" whereby "the lawyer holds exclusive authority to determine trial strategy and tactics--the 'means'-- whereas the client enjoys the exclusive authority to define the purposes or objectives--the 'ends'--of representation, within the bounds of the law."[39]

Little has been written about the potential conflict of interest that may arise when defense counsel pursues a strategy of trial by jury while the client favors a trial by press. This type of conflict is one that will exist when the defendant comes into the relationship with a premium on his public image, as is the case with indicted elected officials who routinely deal with the media in their jobs. This client's previous success in jousting with the media poses a host of problems for defense counsel. First, as a general proposition, the client may have a harder time understanding and accepting the lawyer's role as primary decision-maker in the litigation. Even when warranted, he or she may have difficulty relinquishing the limelight and respecting the defense attorney's judgment that *restrained* press comment will actually increase the likelihood this once-celebrated-public-figure-now-criminal-defendant will receive a fair trial.

With the rise of the monthly "Trial of the Century," clients without media savvy may expect to engage the press themselves, or at least have their counsel do it. This is a phenomenon that is relatively new, but may spread to the extent the public sees the media as a force that can expose injustice. It is understandable for clients to have unrealistic expectations about what press coverage can do for their cases, to be unaware of the pitfalls of public comment, not to mention the prosecution's ability to use the defendant's extra-judicial statements in court. Lawyers are now able to give tragic examples of how colleagues' attempts to shape the story through the media have harmed their clients.

This and almost every other conflict that arises between the accused and the defender can be avoided when there exists a relationship of trust and confidence, one in which the client sees the attorney acting as his diligent and vigorous advocate who is focused on the trial of the case.

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When attorneys decide to take on the press, they had best level with themselves about whose interests are paramount. Every self-promotional media piece that is premised on the representation of a high-profile client raises the potential for yet another, more important, conflict of interest.[40] The separation between self-interest and client loyalty can be lost in the process. Advancing the client's cause may be the verbal justification, but that cause can become lost beneath the weight of attorney ego gratification, higher book royalty advances, inflated lecture fees, and invitations to host one's own talk show--all possible consequences of achieving celebrity status.

There may be even more loathsome, not to mention unethical, reasons behind the choice to enmesh oneself with the press during a high-profile case, as when the defense attorney goes on television to distance himself from his unpopular client and make sure that the public knows that the lawyer is "only doing a job" in representing the accused.

Considerations in Dealing with the Media

Before speaking publicly about their cases, attorneys must carefully calculate the ramifications. Many of the suggestions made here come from watching and listening to those defense attorneys who deal ethically and effectively with the press.

First, one must always ask *qui bono?* Who benefits from speaking to the press? If it is not clearly in the client's interest, don't do it. In the courtroom, the only "win" or "loss" that matters to the client is decided by the jury and the judge. In the course of defending the individual client, it is his or her interests that dictate the extent to which the lawyer should tangle with public or press opinion.

Another way to ask this question is somewhat more rhetorical: Why is the press interested in the case? If the case has gangland overtones, involves the killing of a child or the fall from grace of a celebrity, you have your answer.[41] Certainly there are occasional, welcome instances when reporters become captivated by the prospect that someone has been wrongfully accused. However, this is rarely what provokes media attention at the trial level. A miscarriage of justice story is more often the pay-off following years of uncompensated labor by lawyers and investigators pursuing post-conviction relief.

Reflecting upon the hostility expressed by all too many white Americans to the acquittal of O.J. Simpson, Gerald Uelmen put the verdict in its rightful place by cautioning the public that "[j]uries are not empowered to deliver 'messages.'" If they deliver a verdict, they have only one of two choices-- guilty or not guilty. He reminds us that during the *Simpson* trial,

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"[i]t became impossible for those who were exposed to all three rings of the circus to purge their minds and remember only the evidence being admitted in the center ring." [42]

Increasingly, one does not have a choice about dealing with the press, as when the microphones are jabbed into one's face leaving the courthouse. If one is to talk publicly about the case, the following mortal sins should not be committed: 1) never be disloyal to the client; 2) never put oneself in a conflict with the client; and 3) never reveal privileged communications, work-product or strategic thinking.

With these considerations in mind, the attorney must be prepared for the assault of the media and be prepared to deal with it. To paraphrase Churchill, they will hunt you on the beaches, on the streets, in your home, office, or car, they will call you on your phones, they will send you faxes, and most assuredly, they will find you on the courthouse steps. They will never give up.

These confrontations cannot be escaped and rarely can or should they be met with a surly, "no comment." In his 1993 article, "Using the Media to Your Advantage," [43] ***64** Robert Shapiro makes many suggestions about dealing with the press. The article is intended to help lawyers who find themselves in the midst of a case "the media deems newsworthy." [44] It was written before California adopted a rule of professional responsibility, Rule 5-120, governing lawyer comment on pending cases, [45] before *Court TV* was so pervasive, and, of course, before the fallout from the *Simpson* trial.

While a number of Shapiro's ideas are quite helpful, particularly those advising preparation, honesty, and always urging the humanity of the client, [46] to follow even a few of his many proposals would consume the trial attorney's time, delude him or her about the likelihood of favorable coverage, and detract from trial preparation. [47] Most defense lawyers have neither the time, resources, nor the inclination to cultivate such relationships with the press, and the legitimate media is perceptive enough to know when manipulation is being attempted. An attorney's new-found interest in bonding with a member of the Fourth Estate during the midst of a high-profile case is likely to be seen as insincere.

Far from being successful, lawyers who believe they can control the media fail to understand that however sympathetic reporters may appear to be, their agenda is not that of the advocate for the accused. Journalists are answerable to the First Amendment and defense counsel to the Sixth. That difference is paramount.

Those who think they can manipulate the press to their advantage should take heed from what journalist Janet Malcolm has written. "Every journalist who is not too stupid or too

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full of himself to notice what is going on knows that what he does is morally indefensible. He is a kind of confidence man, preying on people's vanity, ignorance or loneliness, gaining their trust and betraying them without remorse.... Journalists justify their treachery in various ways according to their temperaments. The more pompous talk about freedom of speech and 'the public's right to know;' the least talented talk about art; the seemliest murmur about earning a living." [48]

The above quote comes from her 1990 book, *The Journalist and the Murderer,* in which she writes about author Joe McGinniss and his book, *Fatal Vision.* The latter was about the Dr. Jeffrey MacDonald murder case. MacDonald and his counsel allowed McGinnis into the defense camp and treated him like a member of the defense team so he could write a book about the client's innocence. McGinnis repeatedly affirmed his faith in McDonald's innocence even while telling his publishers the doctor was guilty. So, instead of the promised book proclaiming his wrongful conviction, what appeared in 1984 was a chronicle of a family murderer. MacDonald sued and won some money, but the damage was done.

Yet another vital reason for restraint and caution by defense counsel is the unlikelihood that the courts will offer protection for the client's right to a fair trial when media coverage runs amok.

In the July 1994 edition of *The Champion,* Professor Alfredo Garcia laid out his sobering assessment that the United State Supreme Court "has failed to produce a workable method for protecting a criminal defendant's right to a fair trial by an impartial jury when freedom of speech and press potentially infringes on that precious right." [49] His survey of cases in which First and Sixth Amendment rights have clashed led Professor Garcia to conclude that the Supreme Court has 1) failed to acknowledge "the connection between freedom of expression and the ideal of a fair trial"; 2) refused to place restraints on press access or reporting of courtroom proceedings in criminal cases; and 3) "not compensated for this freedom by according more leeway to a defendant who has been the subject of pretrial publicity. [50]

Professor's Garcia's thesis was recently validated by a California appellate court's ruling in favor of a news reporter who was held in contempt for violating a gag order during the trial of Richard Allen Davis, the defendant convicted of killing Polly Klaas. [51] The trial judge held the reporter in contempt for refusing to reveal the "source close to the investigation" who had leaked information, published on the eve of jury selection, that Davis had "confessed." [52] The court of appeal tipped its hat to the principle that the reporter's shield "must yield to a criminal defendant's constitutional right to a fair trial when the newsperson's refusal to disclose information would unduly infringe on that right." [53] It then went on to conclude that it was not obliged to weigh Davis' fair trial rights against the reporter's right to non-disclosure

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of the source because it was the court, not the accused, that was seeking the information "in order to preserve its ability to control the judicial process and maintain an unbiased jury pool." [54] One can only speculate whether the outcome would have been different had defense counsel subpoenaed the reporter for production of the source information.

The appellate court emphasizes "the elevation of the [reporter's] protection to [state] constitutional status, [55] precludes the trial judge from ordering a reporter to divulge his or her source absent a "substantial probability" that disclosure is required to ensure the defendant's right to a fair trial. [56]

Suggestions for Dealing With the Media

When interaction with the media cannot, or should not, be avoided before or during trial, the following suggestions may prove helpful.

1. Beware What You Say. Attorneys cannot control what the press asks, televises, or writes. Particularly with television and radio, there is little or no opportunity for preparation, much less reflection, to respond to questions. Because attorneys are trained for the courtroom, not the press conference, mistakes are likely even if one is prepared. There will be no chance to delete an ill-chosen word or regrettable answer given off the top of the head when put on the spot by a surprise question.

Nothing compels the lawyer facing a tangle of microphones to answer every question, and, as noted above, rules of professional conduct will preclude defense counsel from responding to some that are most likely to be asked. When confronted by a question that intrudes into matters of privilege, work product, or strategy, or seeks information the attorney simply does not have, there are firm and forthright responses that an aggressive advocate can give to: 1) serve the client and 2) remind the public that no attorney should violate the rules of ethics for the sake of a 15-second sound bite. Then tell the reporter what subjects one is prepared to discuss and stick to them.

Understand that there is no control over how the words are edited and appear on the television or radio news or in the paper. Seldom will an interview be published verbatim. The more likely result is that very few words are chosen by the editor to tell the story that the media wishes to tell. [57] Either way, whether one has stuck one's proverbial foot in one's mouth, or the words are distorted and taken out of context, the comments can hurt the client.

It may appear the reporter is interested in every word the attorney says and is even anxious to help convey the defense message in the story. Betwixt the reporter and publication--

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whatever the medium--stand an array of editors and producers, the "front office" at the major networks. Each can alter the substance and slant of the piece, not to mention reduce coverage of the case by column inches or minutes.

***65** It is here that an important distinction exists between comment given about matters of public interest such as pending or newly enacted legislation or a judicial decision and commentary on trials. In the former, a misstatement, misquote or an editor's selection of the most provocative and least informative utterance may make a fool of the speaker, but the likelihood of harm to an accused is usually remote.

One way to insure that what is reported is what has been said is to prepare a short written statement to send by fax to press callers. This release would state what one wishes to say but within the applicable rules or court orders. This is an especially helpful way to respond when the attorney's office is besieged with press calls for information.

2. Be Aware That There Are Rules. The days of regular press conferences on the steps of the courthouse may be over. Trial counsel's comments to the media given before or during trial are now governed by state bar rules in many states.[58] Also, judges may impose a gag order to stop all press contact, violation of which may bounce the attorney from the case.[59]

Attorneys facing gag orders may be inclined by their internal First Amendment alarms to challenge them. They need to ask the same question: *qui bono*? If it is not advantageous to the client to seek relief from the gag order, the lawyer must resist the temptation.

Consider defense attorney Dominic Gentile's carefully measured response to the extensive publicity mill generated by the government during the months before his client was indicted.[60] The price of the eventual acquittal of his client was a complaint filed against him by the State Bar of Nevada for violation of that state's Rule 177, which prohibited extrajudicial statements to the press the lawyer "knows or reasonably should know ... will have a substantial likelihood of materially prejudicing an adjudicative proceeding."[61] Dominic Gentile was saved from censure for his comments by a "safe-harbor" provision in the rule which allowed some comment to protect the client. But the Supreme Court upheld the notion that attorneys in trial have fewer First Amendment rights than the rest of the citizenry, and can be sanctioned when they run afoul of the rules in the area.

While not endorsing the California state bar "gag" rule as constitutional, it, and applicable codes in other jurisdictions, must be taken into consideration by counsel when talking to the media about their cases. The restrictions imposed by these rules of professional conduct, as well as "gag" orders in specific cases, have been addressed by other authors and, consistent

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with the guidelines suggested here, may well merit constitutional challenge in the appropriate case. [62]

3. Don't Stimulate Interest Where it Does Not Exist. In other words, don't hype the hype. In almost every case where the media is either disinterested or slightly interested, it does the client no good to encourage greater media attention by soliciting interviews or giving "leaks" that promote coverage of the case. When the "whole world is not watching," there is a greater chance for the defendant to be treated equal to any other anonymous person who stands accused of a crime. Judges, prosecutors and witnesses who feel their every act is being monitored by the entire nation may well alter their behavior. That difference does not necessarily translate into a fairer trial for the client, especially in jurisdictions where judges may want to appear tough to appease a "law and order" electorate.

Obviously, there will be exceptions as when the judge or prosecutor or police are acting outrageously and media attention may put an end to the conduct, or at least inform the community that its civil servants are abusing the power of their position and the basic rights of the accused. The advantage of a public trial in these instances will be to cast light on what is happening in court to help insure an atmosphere of fairness.

The issue of cameras in the courtroom is distinct from counsel's interaction with the press. However, in deciding whether to vigorously object to *Court TV* or other media presence, the client's interests--not counsel's desire to have his aunt in Paramus finally see him in action--dictate the response. [63]

Sometimes, the case is too big for such self-suppression, and the attorney must be prepared to deal with media contacts. There will be no choice in the matter. What to do? When prepared and armed with something informative and beneficial to the client, say it--carefully.

A cautious approach is always best when counsel deal with the media about their own cases. These suggestions apply to cases in all stages of litigation--pretrial, trial, appeal and post-conviction proceedings. The exception may be in post-conviction capital litigation, particularly in an age when state and federal *habeas* review has been eroded to the point of near-extinction. Then, gathering public attention and aggressively seeking support through the media may be the only means of gaining the political momentum needed for a favorable court action or clemency review.

Walter McMillian, Clarence Brandley, Randall Dale Adams, Joseph Green Brown, Clarence Chance and Benjamin Powell, Kirk Bloodsworth, Rolando Cruz and Alejandro Hernandez, and Verneal Jimerson and Dennis Williams may owe their liberty, in part, to favorable media

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coverage. But even in these noted cases the positive press attention would not have been stimulated without the tireless efforts of attorneys, paralegals and investigators. [64]

4. How to Deal with the Opponent Who Is Making the Case in the Press. If the case is big, before the defense attorney is even hired, the prosecutor and the police have probably used the arrest, the "perp. walk" of the defendant in prison garb coming to arraignment, press releases, leaks, and news conferences to feed negative information to the media. In federal court, the indictments are so lengthy and filled with detail that they alone serve this objective. In addition, the prosecution now uses victims and family members, who are not subject to court controls, to regularly vilify the defendant in the press.

The defense thus gets started with the playing field tilted negatively, with the presumption of innocence buried under official pronouncements of guilt or the castigation by the victim and his or her family.

There are two arenas in which responses should be made. As suggested above, one is with the media. This should be measured to make enough points to respond to the hostile, inflammatory press coverage, but not such that a tit-for-tat media battle is triggered.

The courtroom is the other forum to deal with an opponent who is actively using the press to harm the client by prejudicing the judge and potential jurors. Suggestions here include collecting and filing in court all press and television coverage of the case. If the leaks are egregious enough, consider using the press revelations by "a source closely connected to the investigation" as a basis for a gag order, and spending the rest of the case seeking evidentiary hearings on the inevitable violations of the court's order by the prosecutor or prosecutorial agents. [65] This, and the threat of a contempt sanction, may stop future leaks.

Further, filing pleadings and litigation over pretrial publicity will also pave the way for *voir dire* on prejudicial publicity, if not a change of venue motion. And while a measured defense response to the media is warranted pragmatically and under ethical rules, a vigorous litigation strategy in the face of prosecutorial misuse of the press also serves the client's interests where it may count the most--in the courtroom.

*66 Advance the Client's Interest

The role of attorney as professional commentator on cases other than their own has been recently addressed elsewhere. [66] While many of the legal, ethical and practical considerations are equally applicable to attorneys who choose to talk to the media about their own cases, professional commentators are more akin to members of the press than members of the

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defense bar. It is questionable whether practicing defense lawyers should abandon their unique and valuable point of view to opt for "even-handedness" when offering analysis as commentators about legal developments in such cases. The public too little understands the defense role as it is, and having expertise in criminal defense should prompt the commentator to provide that vital perspective.

The First Amendment will always guarantee the media the right to coverage of sensational cases and the attorneys handling them. Defense attorneys may have the right and sometimes the duty to participate in this forum, but only to advance the client's interests.

Footnotes

a1 ELISABETH SEMEL *recently left private practice to become the Director of the ABA Death Penalty Representation Project in Washington, D.C. She is a member of the NACDL Board of Directors and a Past President of California Attorneys for Criminal Justice (CACJ). She is a member of* The Champion *Advisory Board.*

aa1 CHARLES M. SEVILLA *is in private practice in San Diego with the firm of Cleary and Sevilla. He is a Past President of CACJ and a member of NACDL. He is also the author of two novels about an irrepressible criminal defense lawyer:* Wilkes: His Life & Crimes *and* Wilkes on Trial (*Ballantine 1990 and 1993*).

1 Two thoughtful law review articles on lawyers as media commentators-- not the subject of this piece--were published in the last year. *See* Erwin Chemerinsky and Laurie Levenson, *The Ethics of Being a Commentator,* 69 S. CAL. L. REV. 1303 (May 1996 herein *Ethics*) and *The Ethics of Being a Commentator II,* 37 SANTA CLARA L. REV. 913 (1997) (hereinafter *Ethics II*) In their view, lawyers who are commentators "... are a part of the press much more than a part of the legal system." (*Ethics,* at 1316.) "The commentator's contribution is as an independent party without ties to either side in the proceedings." (*Ethics II,* at 923.)

2 Scott Stossel, *The Man Who Counts the Killings,* THE ATLANTIC MONTHLY, May 1997, at 100.

3 Lawrie Miflin, *Crime Falls, But Not on TV,* NEW YORK TIMES, July 6, 1997, at E3.

4 Stossel, *supra* note 2, at 99.

5 *Id.* at 98. George Soros, one of America's wealthiest and most philanthropic individuals, concurs, "Although I have made a fortune in the financial markets, I now fear that the untrammeled intensification of *laissez-faire* capitalism and the spread of market values into all areas of life is endangering our open and democratic society. The main enemy of the open society, I believe, is no longer the communist but the capitalist threat." George Soros, *The Capitalist Threat,* THE ATLANTIC MONTHLY, February 1997, at 45.

6 Nora Zamichow, *How the Case Changed the Lives of Those it Touched,* LOS ANGELES TIMES, October 11, 1995, at S2.

7 *Id.*

8 Greg Krikorian, *Blindsided by Fame; Sudden Prominence Was a Boon to Some, a Burden to Others, But None Had a Choice,* LOS ANGELES TIMES, October 11, 1995, at S2.

9 MURDER IN BRENTWOOD, at 286.

10 *See* J. Michael Kennedy, *Goldman Sister, Father File Suit,* LOS ANGELES TIMES, May 6, 1995, at A25 noting, "Goldman's father and sister have hired Robert H. Tourtelot, the same attorney who is representing Los Angeles Police Detective Mark Fuhrman, to represent them in their case against Simpson."

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11 Regnery Publishing, Inc., Washington, D.C., 1997.

12 *Id.* at 286.

13 *Id.*

14 *Id.*

15 *Id.* at 270.

16 *20/20* (ABC television broadcast, October 11, 1996, transcript on file with authors). Kardashian states he was "devastated" upon learning Simpson failed the polygraph test. On the day of his arrest, he quotes Simpson as saying he would kill himself and that he had a gun with him when he said it. He calls Simpson "spoiled" for having someone come to see him in jail each day, states that Robert Shapiro thought his client was guilty and encouraged a plea bargain, and reveals that a majority of the defense team including himself had doubts as to Simpson's innocence. THE CALIFORNIA BAR JOURNAL, July 1997, at 5, states that the investigation into this matter is still on-going.

17 Jane Mayer, *Distinguishing Characteristics: Why the Paula Jones Story Changed Again,* THE NEW YORKER, July 7, 1997, at 36.

18 *Id.*

19 *Compare* California Business & Professions Code § 6060(e), which states that an attorney must preserve the secrets and confidences of the client. The responsibility of preserving such "secrets" is in addition to the duty to preserve client confidences made in attorney-client communications. California Evidence Code §§ 952, 954.

20 Williamson v. Superior Court, 21 Cal. 3d 829, 834 (1978).

21 *The Today Show* (NBC television broadcast, November 27, 1996, transcript on file with the authors.)

22 *Id.*

23 *Id.*

24 *See* Shadow Traffic Network v. Los Angeles Superior Court, 24 Cal. App. 4th 1067, 1083 n.11 (1994), citing with approval the suggestions in Wang Laboratories, Inc. v. Toshiba Corp., 762 F. Supp. 1246 (E.D. Va. 1991) (setting forth the steps to be taken when a lawyer engages an expert consultant which include a written confirmation of the confidential nature of the relationship and that all correspondence be labeled "WORK PRODUCT COMMUNICATIONS"). An attorney's support staff must also be instructed by the attorney that all work within the office is privileged. *See, e.g.,* CALIFORNIA RULES OF PROFESSIONAL CONDUCT, Rule 3-110 ("The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorney and non-attorney employees or agents.")

25 In their second article proposing a code of ethics for legal commentators, law professors Erwin Chemerinsky and Laurie Levenson argue that "the lawyers from the *Simpson* criminal case should be disqualified from serving as commentators in the civil proceedings unless they receive express written consent from their former client. *Ethics II, supra* note 1.

26 "A member shall not intentionally, or with reckless disregard, or repeatedly fail to perform legal services competently." The standard of performance, at least for purposes of ineffective assistance of counsel claims on appeal or habeas review, is that defense counsel must act in a manner expected of reasonably competent attorneys. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

27 42 Cal. App. 3d 574, 576 (1974).

28 1 Witkin, CAL. PROCEDURE, ATTORNEYS §§95, 103 at 113, 122 (3d ed. 1985) "[I]t is an attorney's duty to "*protect his client in every possible way,* " and it is a violation of that duty for the attorney to "assume a position adverse or antagonistic to his clien ...." (Day v. Rosenthal, 170 Cal. App. 3d 1125, 1143 (1985) quoting Betts v. Allstate Ins. Co., 154 Cal. App. 3d 688, 714 (1984); emphasis in original.) This duty is owned to former as well as present clients. (David Welch Co. v. Erskin & Tulley,

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203 Cal. App. 3d 884, 891 (1988); Kallen v. Delug, 157 Cal. App. 3d 940, 950-951 (1984); 1 Witkin CAL. PROCEDURE, ATTORNEYS, *supra,* § 121, at 141-142.

29 *Quoted in* Torres v. Superior Court, 221 Cal. App. 3d 181, 186 (1990); italics in original.

30 Comment, ABA RULES OF PROFESSIONAL CONDUCT 1.7, 5 (ABA CODE OF PROFESSIONAL RESPONSIBILITY CANON 5).

31 Aronstein & Weckstein, PROFESSIONAL RESPONSIBILITY IN A NUTSHELL, p. 225 (West 2nd Ed. 1991).

32 *Damron v. Herzog,* 67 F.3d 211 (9th 1997) (duty of loyal and confidentiality continue after the case concludes). In People *ex rel.* Deukmejian v. Brown, 29 Cal. 3d 150 (1981), the California Attorney General took an adverse position against one of his statutory clients in a court proceeding. The California Supreme Court observed two professional violations in this conduct: one of continued loyalty even after the relationship formally concluded, and the other a violation of the prohibition against doing anything that would injure the client irrespective of reliance on privileged material:
Conduct of attorneys has also been discussed in contexts other than State Bar discipline. In *Wutchumna Water Co., v. Bailey* (1932) 216 Cal. 564, 573-574 [15 P.2d 505], this court declared that "an attorney is forbidden to do either of two things after severing his relationship with a former client. He may not do anything which will injuriously affect his former client in any manner in which he formerly represented him nor may he at any time use against his former client knowledge or information acquired by virtue of the previous relationship." (Italics added.) While the record here does not reveal whether the Attorney General acquired any knowledge or information from his clients, the prohibition is in the disjunctive: he may not use information or "do anything which will injuriously affect his former client." Unquestionably the Attorney General is now acting adversely to the position of his statutory clients, one of which consulted him regarding this specific matter. (*Id.* at 155-156).

33 Tourtelot received only a "directional letter" letter from the California State Bar telling him that his conduct toward his client might have violated state statutes. *See* Nancy McCarthy, *Bar Reproves 2 Simpson Lawyers,* CALIFORNIA BAR JOURNAL, July 1997, at 5.

34 Maria Alicia Guara, *Anxious Jury Convicts 4 In San Jose Gang Killings,* SAN FRANCISCO CHRONICLE, July 15, 1997 at A15.

35 *Id.*

36 After the defendant was convicted, he substituted a new counsel who, with the client's full cooperation, put a halt to the media comment until the conclusion of proceedings in the trial court.

37 Jeffrey Toobin, *A Horrible Human Event,* THE NEW YORKER, October 23, 1995, at 40. Toobin does not especially blame Shapiro for what he calls "spinning his reaction to Cochran," even at the expense of the client. *Id.* at 42. The article savages the *Simpson* defense and the lawyers who presented it. Thus, the author "compliments" Johnnie Cochran by labeling him a master at press manipulation and "racial politics" and a courtroom trickster. (*Id.* at 44, 46).

38 As stated in People v. Hamilton, 48 Cal. 3d 1142, 1163 (1989), "When the accused exercises his constitutional right to representation by professional counsel, it is counsel, not defendant, who is in charge of the case. By choosing professional representation, the accused surrenders all but a handful of "fundamental" personal rights to counsel's complete control of defense strategies and tactics." These include the right to plead not guilty, the right to present a guilt-phase defense, the right to a jury trial and the right to testify over counsel's objections.

39 George E. Bisharat, *Pursuing a Questionable Suppression Motion, Ethical Problems Facing the Defense Lawyer: Practical Answers to Tough Questions,* at 66 (ABA Criminal Justice Section, 1995 Ed.). Bisharat goes on to discuss the ways in which the Model Rule (particularly rules 1.2 and 3.1) and Standard 4-5.2 of the Defense Function Standards (ABA House of Delegates, 1991 Ed.) give defense counsel the authority to "control the case." *Id.* at 67. He emphasizes, of course, that these key decisions "be made by counsel after consultation with the client, 'where feasible and appropriate.'" (*Id.*)

40 The American Bar Association Standards Relating to the Administration of Criminal Justice: Prosecution and Defense Function (2 Ed. 1979), Standard 4-1.16 (Client Interest Paramount), states: "The duties of a lawyer to a client are to represent the client's legitimate interests, and considerations of personal and professional advantage should not influence the lawyer's

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advice or performance." Broadly speaking, conflicts of interest "'embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a third person *or by his own interests.*"' (People v. Castillo, 233 Cal. App. 3d 36, 59 (1991) emphasis added, citing People v. Bonin, *supra,* 47 Cal. 3d [808] at 835 [1989], citing ABA, Model Rules. Prof. Conduct (1983) rule 1.7 and comment.

41 "Violent news also generates higher ratings, and since the standards for television news are set by market researchers, what we get is lots of conformity, lots of violence." *See* Stossel, *supra* note 2, at 95.

42 Gerald Uelmen, *It's Public Perception That's Skewed,* LOS ANGELES TIMES, October 10, 1995 at B9; *see also,* Cathleen Decker and Sheryl Stolberg, *Half of Americans Disagree with Verdict,* LOS ANGELES TIMES, October 4, 1995, at A1. In the annals of *Simpson* post-mortems, Uelmen's book, LESSONS FROM THE TRIAL (Andrews & McMeel 1996), stands out as a thoughtful legal analysis of the case that is free of personality, gossip, and breaches of confidentiality.

43 THE CHAMPION, Jan-Feb. 1993, at 7-12.

44 *Id.* at 7.

45 It reads in part: "(A) A member who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the member knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." Part B provides exceptions which, as relevant to the defense, include describing the defense involved in the case, public record information, stating that an investigation is in progress, noting court scheduling or the "results" thereof, requesting information and evidence from the public. Part C permits the attorney to respond, notwithstanding part A, to prejudicial recent publicity by making a statement "that a reasonable member would believe is required to protect a client." Rule 5-120 (October 1995).

46 The importance of "humanizing" one's client deserves more than a passing mention in a brief footnote. That "humanizing" should be one of counsel's central tasks is sad, but necessary given the speed with which an individual becomes demonized at the moment of accusation. The expression itself is offensive because, of course, the conduct of which clients stand accused is all too human.

47 Thus, for example, defense counsel are urged to return all calls from the press as quickly as possible to avoid the negative inference from failing to do so, to notify the press of upcoming court appearances, to take the time to explain all motions and theories being advanced, and to welcome and participate in end of the court day press conferences. *See supra* note 43, at 8-11.

48 *Quoted in* David Rieff, *Hoisting Another by Her Own Petard: The Journalist and the Murderer,* LOS ANGELES TIMES, Book Review section, March 11, 1990, at 4.

49 Alfredo Garcia, CLASH OF THE TITANS: THE DIFFICULT RECONCILIATION OF A FAIR TRIAL AND A FREE PRESS IN MODERN SOCIETY, *The Champion,* July 1994 at 4.

50 *Id.* at 12.

51 *In re* Beth Willon, 47 Cal. App. 4th 1080 (1996).

52 *Id.* at 1086.

53 *Id.* at 1092 (citations omitted). The California Shield Law was first codified in 1935. It became a constitutional protection in 1980, set forth in Article I, section 2(b), and is also found in Evidence Code section 1070, which provides immunity from contempt citation to reporters who refuse to reveal sources or source material.

54 *Id.* at 1093.

55 *Id.* at 1096.

56 *Id.* at 1099.

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57 As Uelmen's book states, high profile cases are the media's "hype heaven" where exaggeration knows no limits and truth is always a casualty. Uelmen, *supra* note 42, at 95.

58 *See, e.g.,* CALIFORNIA RULE OF PROFESSIONAL RESPONSIBILITY, 5-120.

59 *See, e.g.,* the recent Delaware case where a judge removed lead attorney Robert Gottlieb from representing his client, Amy Grossberg, for violating a gag order in giving an interview, with his client and her parents to ABC's *20/20. See* Matthew Futterman, *Judge Dumps Grossberg Lawyer,* NEWARK N.J. STAR-LEDGER (July 4, 1997).

60 Gentile v. State Bar of Nevada, 501 U.S. 1030, 111 S.Ct. 2720 (1991). In Justice Kennedy's concurring opinion, he details the widespread and hostile publicity that preceded the indictment, Gentile's thorough tracking of the press reports, his research of the applicable rule of court, and his circumscribed statement to the media. *Id.* at 1041-1045. Justice Kennedy concluded that "[Gentile] did not blunder into a press conference, but acted with considerable deliberation." *Id.* at 1041. Note that while the Court substantially curtailed attorney's rights for cases in which they are involved, this type of restriction would not apply to commentators' discussion about cases in which they were uninvolved. *See* Standing Comm. On Discipline of the U.S. Dist. Court v. Yagman, 55 F.3d 1430, 1443 (9th Cir. 1995)("We conclude, therefore, that lawyers' statements unrelated to a matter pending before the court may be sanctioned only if they pose a clear and present danger to the administration of justice.").

61 *Id.* at 1061.

62 *See, e.g.,* Gerald F. Uelmen, *Leaks, Gags, and Shields: Taking Responsibility,* 37 SANTA CLARA L. REV. 943 (1997) (giving a history and analysis of the Nevada and California rules and raising questions about the constitutionality of such rules of professional conduct and gag orders in specific cases). When Rule 5-120 was under consideration by the California State Bar, the authors helped draft the letter of opposition on behalf of California Attorneys for Criminal Justice. (Letter from James S. Thomson, President, CACJ, to Katherine McMahon, State Bar Office of Professional Competence, Planning and Development (Nov. 28, 1994)(on file with the authors).

63 Gerald Uelmen's book contains some cautionary advice about the cases in which television cameras are most likely to prejudice a fair trial. *See, Cameras in Court, in* LESSONS FROM THE TRIAL, 92-101.

64 Such use of the press may be inconsistent with the ideal of a nation governed by a rule of law by attempting to direct public pressure to impact the behavior of judges.

65 Courts examining claims of prejudice arising from adverse pretrial publicity will consider whether that publicity is generated by acts of the prosecution or its agents. *See* Delaney v. United States, 199 F.2d 107, 113-115 (1st Cir. 1952) (it is an important consideration whether the government was responsible for the publication of the objectionable material or if it emanated from independent sources); Silverthorne v. United States, 400 F.2d 627, 633 (9th Cir. 1968)("... federal courts have been sensitive to claims of prejudice arising from publicity when that publicity is created by acts of the Government."); United States v. Denno, 313 F.2d 364, 373 (2nd Cir. 1963) ("The publicity partly sponsored by the prosecution, created opinions of guilt long before trial ...."); Coleman v. Kemp, 778 F.2d 1487, 1539 (11th Cir. 1985) ("significantly, the community's ranking law enforcement officer made widely reported and outrageous statements...."); State v. Bell, 315 So.2d 307, 31 (Sup. Ct. La. 1975) (prosecution-emanated publicity considered in reversing trial court's venue decision); State v. Stiltner, 491 P.2d 1043, 80 Wash.2d 47, 52 n.1 (1971) (conviction reversed after "astonishing" fact that state released prejudicial material to news media); People v. Martin, 19 A.D.2d 804, 243 N.Y.S.2d 343, 344 (1963) (change of venue ordered after police sponsored televised media interrogation of defendants).

66 *See supra,* note 1.

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Feature
Cover Story

EXTRAJUDICIAL STATEMENTS: DON'T GET BITTEN BY YOUR OWN SOUNDBITE

G. Jack King, Jr. [a1]

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Over the past decade, *The Champion* has printed a number of articles examining the sometimes-gridlocked intersection where lawyers, fair trials, a free press and free speech meet. In my short career as assigned counsel in the District of Columbia in the 1980s, only one of my cases made the newspapers — and no reporter ever called me for a comment I'd prepared: "Mere presence is not a crime." In retrospect, I see now that that kind of statement could have been an admission that my client *had* been present if the issue of identity had come up at trial. A great public educational soundbite in general, but immediately following the arrest would have been the wrong time to make it. Fortunately for my client, I was never asked.

In the decade or so since, as a journalist for several legal publications and also as NACDL's public affairs director in the late 1990s, I became more aware of the power and danger of extrajudicial statements made by lawyers on both sides of the courtroom. As a reporter, I was sometimes entertained with a great quote or anecdote, only to be stung with the disappointment of later hearing, "but that's off the record. You can't print that." Well, I never did, but only because of my sensitivity to the system as a whole, and in particular, to the attorney-client relationship. I recall a high-energy lunch with the late Michael "Mad Dog" Metzger while I was writing for the Bureau of National Affairs, where I was treated to a lengthy rant about how he'd been burned for the last time by the media, how he was never talking to the press again, and how all reporters are "whores," when he suddenly stopped and looked at me across the table, and said, "Ah, except for you Jackie. You know how to keep your mouth shut."

"Don't bet on it," I replied. The fact is, an after-the-fact "but that's off the record" is closing the barn door after the horse has bolted. The assumption some people have that a good

reporter does not burn his sources is wrong. In high-profile cases, one-time sources end up as one more log in the community bonfire.

Some lawyers never talk to the media. Others devoutly believe in concerted public relations campaigns (as do many clients who were already public figures before their "perp-walk" in front of the television cameras). The fact of the matter, as I see it, is that interaction between criminal lawyers and the media, while risky, is necessary sometimes. But there are costs and benefits, and the benefit of the usually futile attempt to advance a client's interest through the media must be very thoughtfully weighed against the potential damage to the case, the client, and even your license to practice. [1]

'Inappropriate and inflammatory'

Unless you practice in the Middle Atlantic region, you probably do not recognize the name Douglas Gansler. In all likelihood, though, you've seen him on television, probably more than once. Doug Gansler is the state's attorney for Montgomery County, MD, where "D.C. sniper" suspects John Allen Muhammad and Lee Boyd Malvo were arrested in October 2002. Long fond of press conferences, Gansler surrounded himself with worldwide media to announce that he would be the first prosecutor to file charges in the sniper cases, to the apparent chagrin of some of his colleagues in neighboring jurisdictions. Two weeks later, the Maryland Attorney Grievance Commission charged Gansler with violating Maryland's professional conduct rule regarding extra-judicial statements in three *earlier* high-profile cases.

Gansler's trouble with bar counsel goes back to early 2000, when he told reporters on several occasions that he planned to extend a plea bargain to James Edward Perry, whose murder conviction had been overturned on appeal. Perry was the alleged hitman in a murder-for-hire scheme that resulted in the execution-style slayings of an 8-year-old quadraplegic boy, his mother, and his nurse, so that the boy's father could inherit the child's $1.5 million trust fund set up from a medical malpractice award. Perry's attorneys complained vociferously at the time, finally prompting the trial judge in July to impose a gag order in the case. Gansler defended himself in a newspaper interview, insisting he abided by all ethical rules — and that he was considering appealing the gag order. [2]

In June 2000, Gansler again thrust himself into the news when Montgomery County Police Chief Charles Moose — also no stranger to news conferences — announced the arrest of a homeless man in the murder of a Catholic priest. According to *The Washington Post*, Gansler, noting that the arrest was on Father's Day, called the dead monsignor a "spiritual father" to the community and called the slaying "a crime of pure evil." [3]

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The third incident cited in the complaint was the June 5, 2001, arrest of Albert Walter Cook Jr. for first-degree murder in the death of preschool teacher Sue Stottmeister, who was found in the snow barely alive off a neighborhood bicycle and jogging path. Stottmeister later died.

Cook was arrested after he ambushed a woman in front of his home and tried to drag her inside. Three neighbors ran to her aid. Police later found Cook and arrested him for the assault; under interrogation, he quickly admitted assaulting Stottmeister and even led police to the site where her body was found. Gansler and Moose immediately held a press conference announcing Cook's arrest.

"He confessed in just a few hours with incredible details that only the murderer would have known," Gansler announced, according to *The Washington Times*.[4] "This was a deep, detailed, long, lengthy confession as if he had just committed the crime 10 minutes ago," *The Washington Post* quoted him as saying. "It was very gratifying, and we have a strong sense of closure."[5]

***17** In its complaint, the grievance commission stated that it had repeatedly advised Gansler that his news conferences were "inappropriate and inflammatory" and that "advice and consultation notwithstanding, [Gansler] has made, and continues to make, extrajudicial statements."[6] Naturally, Gansler's defended himself in the media, only now sounding more like a defendant than self-promoting prosecutor. "The media-friendly Gansler yesterday denied any wrongdoing, calling the charges 'ridiculous' and 'a waste of time,'" *The Washington Post* reported.[7]

How should he have responded? "A simple 'no comment' is the least appropriate and least productive response," advises NACDL member Robert Shapiro in a 1993 article in *The Champion*.[8] "It adds absolutely nothing and leaves the public with a negative impression." On the other hand, Shapiro continues, "a cliche response that 'these are trumped-up charges, politically motivated,' accomplishes little good."[9]

Gentile-ing the media

As Richard **Stack** points out in his article elsewhere in this issue, while silence should always be acorded the presumption of innocence as it is in the courtroom, "it may be taken as a sign of guilt in the pressroom."[10] In 1986, a NACDL member fought fire with fire and found himself back in the frying pan. Las Vegas criminal defense lawyer Dominic Gentile was disciplined by the Nevada state bar for holding a televised press conference, hours

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after his client was indicted and six months before trial, to dispute weeks of stories in the media speculating on his client's indictment, and proving no good and necessary deed goes unpunished, he was disciplined by the state bar. Five years later, in a plurality decision, the U.S. Supreme Court reversed the sanction, in part, on First Amendment grounds. [11]

Speaking at a legal conference later that year, Gentile explained, "I am the Lorax - I speak for my clients. We *are* mouthpieces. And 'attorney' means to speak for someone. There's a difference between being an attorney and being a lawyer." [12] Grady Sanders, Gentile's client, was a Las Vegas police detective accused of stealing drugs from the evidence locker. The investigation had already generated a great deal of pre-trial publicity, with parallels to the *French Connection* ripoff. Gentile stated that he would prove not only that his client was innocent, but that the evidence would indicate that another police officer was the likely suspect. [13]

Speaking at the legal seminar, Gentile advised that, as a practical matter, it's easier to just keep your mouth shut, but sometimes it's necessary to fight fire with fire. "You have to think about that whenever you're going to make a statement .... It's important to prepare for any statement that you make [which Gentile did]. Spontaneity is not a good idea. If I had this to do over again, I wouldn't have answered any of the reporters questions." [14]

The plurality opinion quoted the part of the press conference that caused the state bar to initiate proceedings to put Gentile out of business:

"**QUESTION FROM THE FLOOR**: Dominick [*sic*], you mention you question the credibility of some of the witnesses, some of the people named as victims in the government indictment.

"Can we go through it and elaborate on their backgrounds, interests -

"**MR. GENTILE**: I can't because ethics prohibit me from doing so.

"Last night before I decided I was going to make a statement, I took a good close look at the rules of professional responsibility. There are things that I can say and there are things that I can't. Okay?

"I can't name which of the people have the drug backgrounds. I'm sure you guys can find that by doing just a little bit of investigative work." App. to Pet. for Cert. 11a [15]

In footnote 2, the Court gets to the nitty-gritty — the spontaneous comments:

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"**QUESTION FROM THE FLOOR**: Do you believe any other police officers other than Scholl were involved in the disappearance of the dope and -

"**MR. GENTILE**: Let me say this: What I believe and what the proof is are two different things. Okay? I'm reluctant to discuss what I believe because I don't want to slander somebody, but I can tell you that the proof shows that [another police officer] is the guy that is most likely to have taken the cocaine and the American Express traveler's checks.

"**QUESTION FROM THE FLOOR**: What is that? What is that proof?

"**MR. GENTILE**: It'll come out; it'll come out."

"**QUESTION FROM THE FLOOR**: I have seen reports that the FBI seems to think sort of along the lines that you do.

"**MR. GENTILE**: Well, I couldn't agree with them more.

"**QUESTION FROM THE FLOOR**: Do you know anything about it?

"**MR. GENTILE**: Yes, I do; but again, Dan, I'm not in a position to be able to discuss that now.

"All I can tell you is that you're in for a very interesting six months to a year as this case develops."

***18** "**QUESTION FROM THE FLOOR**: Did the cops pass the polygraph?

"**MR. GENTILE**: Well, I would like to give you a comment on that, except that Ray Slaughter's trial is coming up and I don't want to get in the way of anybody being able to defend themselves.

"**QUESTION FROM THE FLOOR**: Do you think the Slaughter case — that there's a connection?

"**MR. GENTILE**: Absolutely. I don't think there is any question about it, and —

"**QUESTION FROM THE FLOOR**: What is that?

"**MR. GENTILE**: Well, it's intertwined to a great deal, I think.

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"I know that what I think the connection is, again, is something I believe to be true. I can't point to it being true and until I can I'm not going to say anything.

"**QUESTION FROM THE FLOOR**: Do you think the police involved in this passed legitimate — legitimately passed lie detector tests?

"**MR. GENTILE**: I don't want to comment on that for two reasons:

"Number one, again, Ray Slaughter is coming up for trial and it wouldn't be right to call him a liar if I didn't think that it were true.

"But, secondly, I don't have much faith in polygraph tests.

"**QUESTION FROM THE FLOOR**: Did [Sanders] ever take one?

"**MR. GENTILE**: The police polygraph?

"**QUESTION FROM THE FLOOR**: Yes.

"**MR. GENTILE**: No, he didn't take a police polygraph.

"**QUESTION FROM THE FLOOR**: Did he take one with you?

"**MR. GENTILE**: I'm not going to disclose that now." [16]

Justice O'Connor's brief concurrence was the vote that saved Gentile's license and livelihood, he noted. "She really saved my bacon." [17]

If you are not prepared when someone sticks a microphone under your nose on the courthouse steps, Gentile advised, "then don't make a statement." [18]

Concluding, Gentile gave the best advice for dealing with the media that this author ever heard: Forget the question. Tell the microphones and the cameras the answer you want the public to hear, no matter what they ask. "The problem is, we live in a 'soundbite' society — when they get back to the station or the newsroom, if all they have is one answer, that's the one they're going to run." [19]

"Be brief," he advised. Inside every long statement there's a short one trying to get out. [20]

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Qui bono?

Doug Gansler justifies his press conferences with protestations that announcing every arrest in a high- or medium-profile case is necessary to educate the public as to the "workings of the criminal justice system."[21] NACDL members Elisabeth Semel and Charles Sevilla, in their comprehensive article published in *The Champion* in 1997, remind lawyers to ask themselves when talking to the press about a case, *qui bono*? — why are you doing it? For whose benefit?[22]

Prosecutors must know better

It is worth noting that Robert Shapiro's article, adapted from a presentation at the NACDL 1992 Midwinter meeting, was published after *Gentile* was decided, but more than a year before O.J. Simpson's arrest, lengthy preliminary hearing and trial, and well before California adopted the current version of Disciplinary Rule 5-120 governing extra-judicial statements.[23] The language of Cal. DR 5-120 tracks ABA Model Rule 3.6; since the widespread adoption of the ABA Model Rules in the 1980s and 1990s, that is the standard most lawyers, criminal and civil, will be held to — the "reasonable person" standard. That standard also comports with *Gentile*.

Prosecutors, however, have an additional duty beyond that of most lawyers to ensure that the defendant's rights are not compromised, even while respecting the oft-bandied "public's right to know"[24] (paging Justice Black[25]). In announcing an arrest or charging of an individual, prosecutors are required by Rule 3.6(b)(6) to include a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.[26] Whether this inconvenient little additional public education regarding the criminal justice system is observed in the breach by prosecutors, or omitted as irrelevant by hard-bitten crime reporters, it seldom makes the morning papers or the evening news.

So where did Doug Gansler slip up? *The Champion* asked NACDL Ethics Advisory Committee Chair John Wesley Hall, Jr. for comment. Hall is the author of *Professional Responsibility of the Criminal Lawyer, 2d Ed.*, and is also familiar with Gansler's current predicament; in early May, he addressed Gansler's professional conduct and propensity for press conferences at a CLE sponsored by the Maryland Public Defender Agency.

"Gansler's conduct was clearly intended to prejudice the jury pool that will be trying the case, and no other conclusion can be drawn as to his intent," Hall explained in an e-mail interview.

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"If defense counsel made similar statements on behalf of the defense about prosecution witnesses, the prosecutor would be on us immediately."

In particular, Hall said that in his analysis, Gansler violated several rules, although after hearing and argument the court only sustained the Rule 3.6(a)(2) violation for discussing the possibility of a plea offer in the Perry "hitman" case. According to Hall, he also violated rule 3.6(a) (character of the accused) when he characterized the priest-murder as a "crime of pure evil" and in all likelihood Rule 3.6(a)(2) again (contents of a confession) when he discussed Albert Cook's confession to the previously unsolved Stottmeister murder.

"Lawyers have a First Amendment right of free speech, but it has to be balanced against the Sixth Amendment right of the accused to a fair trial (which often wins out), which is probably the last thing that Gansler wants. A gag order was appropriate.

"Too bad a 'Gansler Standing Gag Order' would be a prior restraint and invalid; but maybe not if he has a propensity to shoot from the lip every chance he gets," Hall opined.

The last word? Not likely.

Gansler has said he can only speculate who lodged the complaint against him.[27] But true to form, the day of Judge Stevenson's ruling, Gansler fought back in the court of public opinion, on the evening news broadcasts and in the next morning's papers, saying he was confident he'd be vindicated by the state's highest court. "It is an attempt to close down the information given by prosecutors [to the public] about the workings of the criminal justice system," he told the *Post*.[28]

There's a rumor going around Annapolis that Gansler might make a bid for state attorney general.[29] Maryland hasn't heard the last of him by a longshot.

Footnotes

a1 Jack King is an attorney and freelance writer in Washington, D.C. An editorial consultant to *The Champion* and a former NACDL Public Affairs Director, he has edited and written for a number of general interest and legal publications, including *Criminal Justice Weekly, BNA Criminal Law Reporter, BNA Criminal Practice Manual*, and *ABA Mental and Physical Disability Law Reporter*.
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1 A lawyer I've known for over 20 years says her policy is never to return reporter's phone calls, *never* talk to the press. “My clients would kill me,” she said on condition of anonymity.“Or *fire* me” (a fate apparently worse than death).

2 Katherine Shaver, *Rare Montgomery gag order issued in triple slaying retrial*, WASH. POST, 7/20/00 at B7.

3 Katherine Shaver and April Witt, *Suspect arrested in priest's slaying; homeless Md. Man held without bond*, WASH. POST, 6/19/00 at A1.

4 Gerald Mizejewski, *Police make arrest in slaying of jogger left to die in woods; Aspen Hill man, 25, confesses to crime*, WASH. TIMES, 6/6/01 at C1.

5 Phuong Ly, *Md. man charged in jogger's slaying; attack at his home prompted arrest*, WASH. POST, 6/6/01 at B1.

6 Jo Becker, *Md. panel accuses Gansler of breaking conduct rules*, WASH. POST, 11/15/02 at B5.

7 *Id.*

8 Robert Shapiro, *Using the media to your advantage*, THE CHAMPION (Jan./Feb. 1993) 7,8.

9 *Id.*

10 Richard **Stack**, *The uneasy alliance of attorney and reporter, or when Perry Mason meets Lois Lane*, THE CHAMPION (July 2003) at 22.

11 Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991)

12 *NORML program features press, conspiracy, juveniles, evidence*, 5 BNA CRIMINAL PRACTICE MANUAL 608 (CURRENT REP. 12/25/91). Symposium article also features remarks by NACDL members and former members Helen Leiner, the late Michael Metzger, and Marvin Miller. Not available online.

13 The text of Gentile's statement is reproduced at 501 U.S. at 1059-60, app. A (Kennedy, J., concurring):
“MR. GENTILE: I want to start this off by saying in clear terms that I think that this indictment is a significant event in the history of the evolution of the sophistication of the City of Las Vegas, because things of this nature, of exactly this nature have happened in New York with the French connection case and in Miami with cases - at least two cases there - have happened in Chicago as well, but all three of those cities have been honest enough to indict the people who did it; the police department, crooked cops.
“When this case goes to trial, and as it develops, you're going to see that the evidence will prove not only that Grady Sanders is an innocent person and had nothing to do with any of the charges that are being leveled against him, but that the person that was in the most direct position to have stolen the drugs and money, the American Express Travelers' checks, is Detective Steve Scholl.
“There is far more evidence that will establish that Detective Scholl took these drugs and took these American Express Travelers' checks than any other living human being.
“And I have to say that I feel that Grady Sanders is being used as a scapegoat to try to cover up for what has to be obvious to people at the Las Vegas Metropolitan Police Department and at the District Attorney's office.
“Now, with respect to these other charges that are contained in this indictment, the so-called other victims, as I sit here today I can tell you that one, two—four of them are known drug dealers and convicted money launderers and drug dealers; three of whom didn't say a word about anything until after they were approached by Metro and after they were already in trouble and are trying to work themselves out of something.
“Now, up until the moment, of course, that they started going along with what detectives from Metro wanted them to say, these people were being held out as being incredible and liars by the very same people who are going to say now that you can believe them.
“Another problem that you are going to see develop here is the fact that of these other counts, at least four of them said nothing about any of this, about anything being missing until after the Las Vegas Metropolitan Police Department announced publicly last year their claim that drugs and American Express Travelers' c[h]ecks were missing.
“Many of the contracts that these people had show on the face of the contract that there is $100,000 in insurance for the contents of the box.

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"If you look at the indictment very closely, you're going to see that these claims fall under $100,000.
"Finally, there were only two claims on the face of the indictment that came to our attention prior to the events of January 31 of'87, that being the date that Metro said that there was something missing from their box.
"And both of these claims were dealt with by Mr. Sanders and we're dealing here essentially with people that we're not sure if they ever had anything in the box.
"That's about all that I have to say."
[Questions from the floor followed.]

14 5 BNA CRIMINAL PRACTICE MANUAL 608, n.12, *supra*.

15 501 U.S. at 1049.

16 *Id.* n.2 (internal citations omitted).

17 Author's recollection. Unlike Jayson Blair, the author of this article was actually there.

18 5 BNA CRIMINAL PRACTICE MANUAL 608, n.12, *supra*.

19 *Id.*

20 *Id.*

21 Fredrick Kunkle, *Gansler is found in violation*, WASH. POST, 4/25/03 at B5.

22 Elisabeth Semel and Charles M. Sevilla, *Talk to the media about your client? Think again*, THE CHAMPION (Nov. 1997) 19,65.

23 Rule 5-120, promulgated in October 1995, reads in relevant part, "(A) A member who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the member knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." The 1995 revision tracks the language of ABA Model Rule, Rule 3.6(a). *See* American Bar Association, Center for Professional Responsibility, MODEL RULES OF PROFESSIONAL CONDUCT 69 (1999). Presumably Gansler meets the reasonable person standard. Whether one *intends* to prejudice a proceeding when calling a press conference or granting an interview is irrelevant; the reasonable person standard presumes a person engages the brain before revving the mouth. Guilty as charged? But wait — there's more: *See* n.26 *infra*.

24 *See, e.g.*, Press Enterprise Co. v. Superior Court (Press Enterprise I), 464 U.S. 501, 504 (1984) (order closing jury selection to press reversed); Press Enterprise Co. v. Superior Court (Press Enterprise II), 478 U.S. 1 (1986) (preliminary hearing may be closed to public only if "substantial probability" defendant's rights will be compromised). For a comprehensive discussion of the tension between a free press and fair trials, see Alfredo Garcia, *Clash of the Titans: The difficult reconciliation of a fair trial and a free press in modern American society*, THE CHAMPION (July 1994) at 5.

25 *See, e.g.*, Sheppard v. Maxwell, 384 U.S. 333, 363 (1966) (Black, J., dissenting). The "Sam Sheppard case" held that a circus-like atmosphere deprived Sheppard of a fair trial and pitted due process against the First Amendment. Justice Hugo Black, a First Amendment absolutist, dissented without opinion, his views already well known. Acquitted on retrial, Dr. Sheppard gave up chiropractic and became a professional wrestling villain.

26 J.W. Hall, Jr., PROFESSIONAL RESPONSIBILITY OF THE CRIMINAL LAWYER 2D ED. (1996) § 12:7.

27 *See* n.6 *supra*.

28 Fredrick Kunkle, *Gansler is found in violation*, WASH. POST, 4/25/03 at B5.

29 Matthew Mosk and Michael H. Cottman, *Montgomery notebook: Subin considers run for state's attorney*, WASH. POST, 5/1/03 at T2.

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