American Bar Association
Forum on the Construction Industry

Don’t Tell Me What I Should Have Done – What Do I Do Now!:
Confronting the Unexpected

Media Do’s, Don’ts and Dangers: When Ethics, Strategies and Survival Appear to Be on a Collision Course

Carol J. Patterson
James H. Rowland
Zetlin & De Chiara, LLP
New York, New York

April 24, 2008 to April 26, 2008, La Quinta Resort, Palm Springs, CA

© 2008 American Bar Association

In the diverse and numerous media outlets available today, it is common to hear from attorneys who are commenting on behalf of their clients. The rapid pace of information exchange leads the public to expect prompt responses when serious allegations are made. While traditional principles of the legal profession have long held that a lawyer should not argue her case outside of the courtroom, as Justice Kennedy noted in *Gentile v. State Bar of Nevada*, [1] an attorney's duties do not simply begin inside a courtroom but often extend to the court of public opinion. In high profile cases which generate a flurry of media attention, attorneys are often faced with pressure from outside sources, as well as from their own clients, to advocate to the public at large. However, when doing so, an attorney must be aware of the ethical implications of these actions, as well as the potential dangers to a client's defense.

I. History of Ethical Rules and Guidelines Regarding an Attorney's Interaction with the Press

a. Early Ethical Canons concerning Attorney Interaction with the Press

In 1908, the American Bar Association published its initial Canons of Legal Ethics. Canon 20, titled Newspaper Discussion of Pending Litigation, provided:

> Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the Court; but even in extreme cases it is better to avoid any *ex parte* statement.

[1] 501 U.S. 1030 (1991).

Canon 20 attempted to address legitimate concerns about the impact of the press on the legal process by imposing a strict standard in which an attorney's interaction with the press was generally condemned. However, because the drafters of the Canon recognized that in certain situations complete silence is extremely prejudicial to a client, they included an exception to this rule where "extreme circumstances" could justify a statement.

b. The Sam Sheppard case

Although the potential negative impact of the press on the outcome of a legal proceeding was evident in the high profile cases of the Sacco and Vanzetti murder trial and the Lindbergh kidnapping trial, it was not until after the sensational murder trial of Dr. Sam Sheppard, who was convicted of killing his pregnant wife, that the Courts decided to address concerns about the role of attorneys and the judiciary in dealing with the press and the American Bar Association decided to review and possibly redraft Canon 20 to address these concerns.

Before any charges were even filed, the media attention surrounding the death of Marilyn Reese Sheppard was immense, with an obvious bias against her husband Sam Sheppard. The Cleveland Press ran headlines that included "Somebody Is Getting Away With Murder" and "Why Isn't Sam Sheppard in Jail?"[2] Newspapers published many details and rumors which were never presented in court.

[2] *Sheppard v. Maxwell*, 384 U.S. 333, 338 (1966).

The presiding trial judge, Judge Blythin, permitted his courtroom to be packed with reporters on both the national and local levels.[3] Judge Blythin allegedly told Hearst columnist Dorothy Kilgallen in a pretrial interview that Sam Sheppard was "guilty as hell."[4] He also took no action either to prevent or adequately address extrajudicial statements by lawyers, witnesses and/or court officials, who divulged prejudicial matters, including the refusal of Sheppard to submit to interrogation or take any lie detector tests, the identity of prospective witnesses and their probable testimony, opinions as to Sheppard's guilt or innocence and other statements concerning the merits of the case.[5]

The jurors were never sequestered or prohibited from using the phone or reading the newspaper during the trial. Given the prejudicial nature of the media coverage and the obvious bias against Sam Sheppard, his attorneys had moved to change venue. Judge Blythin denied the request. The jury found Sam Sheppard guilty of murder in the second degree. Upon hearing the guilty verdict, it took only a few minutes before Judge Blythin sentenced Sam Sheppard to life in prison.

The conviction of Dr. Sheppard was ultimately reversed by the Supreme Court in *Sheppard v. Maxwell*,[6] which held that "the state trial judge did not fulfill his duty to protect Sheppard from the inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom."[7] The Supreme Court also noted that "collaboration

[3] *Id.* at 343.
[4] *Id.* at 357.
[5] *Id.* at 360-361.
[6] 384 U.S. 333 (1966).
[7] *Id.* at 363.

between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures."[8]

c. The Reardon Report

In response to *Sheppard*, the American Bar Association established the Advisory Committee on Fair Trial and Free Press which was chaired by Paul Reardon, an associate justice of the Supreme Judicial Court of Massachusetts. While the Reardon Commission addressed concerns of the press, the Commission decided to focus its attention to the impact of statements made to the press by lawyers, prosecutors and police officials' statements. The Commission recognized that these statements would often "have the ring of authenticity" given their source and that these statements could taint potential jurors.[9] The result of the Committee's work was a proposed set of rules governing everyone from lawyers to court officials.

In 1968, the ABA adopted the Reardon Report, which included the proposed set of rules. The overriding message of the Reardon Report was that a lawyer's place was in the courthouse, not the public arena. The Reardon Report further recommended that the standard applied to restrict an attorney's disclosure of potential prejudicial information need only be a "reasonable likelihood" that the statement would interfere with the fair administration of justice. The Committee was concerned that attorney statements could have a disproportionate impact in shaping public opinion. It articulated this concern in the commentary to Rule 1.1:

> The reason this broad prohibition on the attorney as an officer of the Court should be readily apparent. His proper function at this point is

[8] 384 U.S. at 363.
[9] American Bar Association, Standards Relating to Fair Trial and Free Press 77 (1966) at 76.

> to present his case in the Courtroom, not to make extrajudicial statements interpreting or explaining evidence or attempting to build a favorable climate for public opinion.

In effect, the rules generated by the Reardon Report were not substantially different from the restrictive impact of Canon 20.

d. The Goodwin Committee

Faced with growing criticism of the Reardon Rules by the Bar, as well as numerous Court decisions in several states which held that state rules, which mirrored Rule 1.1 of the Reardon Report, were either too vague or an impermissible restriction on free speech, the American Bar Association appointed a new committee chaired by Ninth Circuit Judge Alfred T. Goodwin to address these concerns. In 1978, the Goodwin Committee issued a report finding that the legal community had gone too far in restraining a lawyer's speech. The Goodwin Committee was particularly concerned with the chilling effect of the Reardon Rules on an attorney's First Amendment rights. To address these concerns, the Goodwin Committee rejected the Reardon Committee's "reasonable likelihood" standard, and instead recommended a "clear and present danger" standard, the standard generally applied to any restriction of an individual's First Amendment right to free speech.[10] A few years later it was decided that this new standard did not go far enough.

[10] *Schenk v. United States*, 249 U.S. 47, 52 (1919)

e. ABA Model Rule 3.6

In 1983, the American Bar Association added Rule 3.6, entitled “Trial Publicity” o the Model Rules of Professional Conduct. In adopting Rule 3.6, the ABA directly rejected the Goodwin Committee’s recommendation of using a “clear and present danger” standard for curtailing a lawyer’s speech, and instead included a lower standard prohibiting attorneys from speaking to the press when the “lawyer knows or reasonably should know” that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

Rule 3.6 did not define “substantial likelihood” but did provide examples of statements that would violate the Rule in section 3.6(b). The identified statements included statements addressing:

(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.

f. *Gentile v. State Bar of Nevada*

In the Supreme Court's landmark decision in *Gentile v. State Bar of Nevada*[11], the Supreme Court considered for the first time the extent to which the modern trial publicity rules affected the First Amendment rights of an attorney to make extrajudicial statements on behalf of a client. Dominic Gentile, a Nevada criminal defense attorney, faced disciplinary proceedings brought by the Nevada State Bar pursuant to Nevada Supreme Court Rule 177. The proceeding concerned a press conference scheduled by Mr. Gentile immediately after the indictment of his client for stealing drugs from a police department storage facility. At the press conference, Mr. Gentile not only asserted his client's innocence but also suggested that police officers were responsible for the theft of the drugs. Mr. Gentile's client was ultimately acquitted at trial six months after the press conference. Nevada Supreme Court Rule 177 mirrored ABA Rule 3.6 and prohibited out-of-court commentary that had a "substantial likelihood" of prejudicing a trial. At his disciplinary proceeding, Mr. Gentile was found to have violated Nevada's ethical guidelines.[12]

In a closely divided opinion, the Supreme Court overturned the disciplinary sanction of Dominic Gentile. The decision in *Gentile* included two separate opinions addressing separate issues before the Court. Chief Justice Rehnquist wrote the majority opinion addressing the first two issues before the Court, concerning the constitutionality of the "substantial likelihood" test applied by Nevada. Justice Kennedy wrote the majority opinion as whether Nevada Supreme Court Rule 177 was unconstitutionally vague.

---

[11] 501 U.S. 1030 (1991).
[12] *Id*. at 1037

While Gentile had argued that the Nevada ethical rule was an unconstitutional infringement on his First Amendment right of free speech, the Court, upheld the use of the "substantial likelihood" standard in Nevada's ethical rules. In a plurality opinion, Chief Justice Rehnquist found that the "clear and present danger" standard generally applied to restrictions of an individual's First Amendment right to free speech did not have to be applied to attorney speech, as the public's need to be informed could be satisfied by the media's access to the courts. Justice Rehnquist further noted that few interests, if any, were more fundamental than the right to a fair trial by impartial jurors and the potential negative impact on that fundamental right required some restrictions on an attorney's free speech.[13]

The Supreme Court did, however, find Rule 177 unconstitutionally vague as its safe harbor provision misled Gentile into thinking that he could give a press conference without fear of discipline.[14] Justice Kennedy held that the safe harbor provision in Rule 177(3)(a), which permitted an attorney to state, without elaboration, the general nature of the defenses "notwithstanding" the earlier restrictions imposed by Rules 177(1) and 177(2) contemplated that:

> a lawyer describing the general nature of the defense without elaboration need fear no discipline, even if he comments on the character, credibility, reputation or criminal record of a witness, even if he knows or reasonably should know that the statement will have a substantial likelihood of materially prejudicing an adjudicative proceeding.[15]

[13] *Id.* at 1074.
[14] *Id.* at 1048.
[15] *Id.* at 1048.

Justice Kennedy further held that, under Rule 177, a lawyer "has no principle for determining when his remarks pass from the safe harbor of the general to the forbidden sea of the elaborated."[16]

The Supreme Court in *Gentile* was divided on the issue of how a lawyer should act outside a courtroom. In his opinion, Chief Justice Rehnquist adhered to the traditional principle that an attorney, as an officer of the court, has a responsibility to limit her remarks outside the courtroom. In his opinion, Justice Kennedy noted that a lawyer's role extends beyond the court room:

> An attorney's duties do not begin inside the courtroom door. He or she cannot ignore the practical implications of a legal proceeding for the client. Just as an attorney may recommend a plea bargain or civil settlement to avoid the adverse consequences of a possible loss after trial, so too an attorney may take reasonable steps to defend a client's reputation and reduce the adverse consequences of an indictment, especially in the face of a prosecution deemed unjust or commenced with improper motives. A defense attorney may pursue lawful strategies to obtain dismissal of an indictment or reduction of charges, including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried.[17]

g. Changes in Rule 3.6 after *Gentile.*

In response to the *Gentile* decision, the ABA revisited the issue of trial publicity and, in August 1994, approved a number of amendments to Rule 3.6. The revised Rule 3.6 provides:

---

[16] *Id.* at 1049

[17] *Id.* at 1043.

(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).

The new Rule 3.6 removes the examples of statements identified in the previous 3.6(b), that could have a substantial likelihood of materially prejudicing a proceeding. The six identified statements were removed from the text of the rule and included in the commentary. The commentary to Rule 3.6 further advises that an additional factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech, while civil trials may be less sensitive. Further, non-jury hearings and arbitration proceedings may be even less affected. While Rule 3.6 still places limitations on prejudicial comments in these cases, the commentary noted that the likelihood of prejudice may differ depending on the type of proceeding.

While the revised Rule 3.6 maintains the "substantial likelihood of material prejudice" standard, it attempted to clarify the scope of lawyers covered by the Rule 3.6. Rule 3.6 now applies not only to a lawyer who "is participating or has participated in the investigation or litigation of a matter" but also to any lawyer associated in a firm or government agency with a lawyer who is participating or has participated in the investigation or litigation of a matter. This vicarious association provision extends the reach of the Rule 3.6 limitations on speech.

The revised Rule 3.6 also includes, for the first time, a "right to reply" provision which permits an attorney a second safe harbor to respond to negative publicity against her client. Rule 3.6(c) permits a lawyer to make tailored replies to detrimental publicity not initiated by the lawyer or her client. Pursuant to Rule 3.6(c), "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 his client." Rule 3.6(c) limits

any such reply statements to "such information as necessary to mitigate the recent adverse publicity".

Although the Rule 3.6 commentaries attempt to provide more definitive guidance to attorneys, critics have noted that the ambiguity of such terms as "reasonable lawyer" and "such information as necessary" of Rule 3.6(c) only increase the confusion faced by attorneys when determining the ethical ramifications of addressing inquiries from the press.[18]

II. Avoiding Potential Ethical Violations When Communicating With the Media: The Impact of Rule 3.6

While the traditional principle of avoiding litigating a case in public is still the preferred course of action for an attorney, in this age of instant communication an attorney is often faced with outside pressures to advocate in the court of public opinion. Clients facing intense media scrutiny over a crisis or severe damage to their reputations may not appreciate an attorney's recommendation that they not respond in the media and wait until they have an opportunity to address the matter in a court of law. A prompt and appropriate response to a crisis may be necessary to enable the client to emerge with its reputation and personal or commercial interests intact. When faced with a crisis, an attorney may be required to decide what is more important, winning the damages suit or saving the client from the potentially devastating effects of a barrage of bad publicity. A lawyer must realize that, in the arena of public opinion, a refusal to comment can appear suspicious and can make the lawyer and her client seem indifferent to the public's welfare.

[18] Gabriel G. Gregg, *ABA Rule 3.6 and California Rule 5-120: A Flawed Approach to the Problem of Trial Publicity*, 43 UCLA L. Rev. 1321 (1996).

There are situations in which a client may decide to respond proactively to a crisis by making public statements which could be used against it in litigation. For example, a company that sells consumer products that appear to have caused injury may decide that it must preserve consumer confidence by promptly taking action to prevent further harm and to reimburse victims for their expenses. Attorneys are not typically lead spokesmen in such situations, but they are part of the team evaluating and advising clients of the legal risks involved. A well-known example of this is the recall of Tylenol in 1982, and more recently the Odwalla Juice recall in 1996.

a. Tylenol Cyanide Tampering

In the fall of 1982, seven people who had taken Tylenol died from cyanide contained in the capsules. In the hours following the first news of the crisis, Johnson & Johnson made the decision to go public with everything it knew about the poisoning. Johnson & Johnson's General Counsel, George Frazza, has stated that Johnson & Johnson decided it "was going to communicate and be active. . .We were determined to find out what the facts were and, whether we liked them or not, communicate them without gloss to our constituencies."[19] Johnson & Johnson also decided to recall immediately all of its Tylenol capsules. Analysis of the over eight million (8,000,000) recalled capsules revealed that seventy-five (75) contained cyanide. During the course of the investigation of the cyanide tampering, the FBI, FDA and law enforcement agencies determined that the cyanide was not introduced into the bottles at the factory and that the cyanide was most likely the result of tampering with the capsules during

[19] Anthony Krulwich, *Recalls: Legal and Corporate Responses to FDA, CPSC, NHTSA and Products Liability Considerations*, 39 Bus. Law 757, 767 (1984)

distribution. Having been cleared of any direct cause of the cyanide poisoning, Johnson & Johnson's decision to champion better safety standards and packaging of pharmaceutical products helped to divert media scrutiny away from Tylenol and toward the need for increased safety requirements and standards in the pharmaceutical industry.[20]

b. Odwalla Juice[21]

In the fall of 1996, Odwalla Juice, a leading supplier of unpasteurized, fresh juices received word that its products may have been contaminated by E. Coli bacteria. On October 30, 1996, Odwalla was notified by the Seattle Department of Health that several people who reported they had consumed Odwalla apple juice had been stricken with illness associated with the E. Coli bacteria. Although Odwalla juices were distributed in only six states and one Canadian province, news of the bacteria contamination spread though out the world via traditional wire services as well as the internet. Faced with the potential of numerous lawsuits, Odwalla, a company whose reputation was based on providing consumers with health conscious products, faced serious risk that the contamination crisis could result in the collapse of the company.

In response to the crisis, Odwalla sought both legal and public relations advice in developing a course of action. Despite the obvious danger that any initial comments by Odwalla could adversely affect liability in the numerous lawsuits that had already been filed, Odwalla

[20] Harvey L. Pitt & Karl A. Groskaufmanis, *When Bad Things Happen to Good Companies: A Crisis Management Primer*, 15 Cardoza Law Rev. 951 (1994).
[21] Kathleen A. Martinelli and William Briggs, *Integrating Public Relations and Legal Responses During Crisis: The Case of Odwalla, Inc.*, Public Relations Review, 24(4): 443-460, presents a detailed analysis of the Odwalla Juice matter.

chose to address the crisis in the media directly. On October 31, 1996 Odwalla issued a nationwide recall of its products containing apple juice. The following day, the CEO of Odwalla, Stephen Williamson, provided a statement in which he emphasized that Odwalla's first concern was for the health and safety of those affected by the contamination and that Odwalla was working in full cooperation with the Department of Health to determine the cause of the contamination. Odwalla also announced it would pay medical costs for customers who became ill as a result of the juices.[22]

In the days that followed, media coverage became highly critical of the non-pasteurization of apple juice. In response, Odwalla announced that it would not make any more apple juice products until it could ensure that they were bacteria-free. Odwalla Public Relations Director Stephen Fisher stated that this decision was the only responsible thing to do and Odwalla called on its competitors to stop selling unpasteurized juice.[23] Analysts believe these public statements helped divert media attention from scrutiny of Odwalla to scrutiny of the entire fresh juice industry. Supermarket giant Safeway's refusal to accept unpasteurized juices from Odwalla's rivals in November 1996 is often cited as an example of the success of Odwalla's strategy.[24]

As neither the Tylenol and Odwalla cases involved public statements made directly by an attorney, Rule 3.6 would not appear to be applicable. However, an analysis of both Johnson and Johnson's and Odwalla's statements indicates that those companies consistently cited either public records or facts that were already public knowledge. Limiting

[22] *Id.* at 452.
[23] *Id.* at 455.
[24] *Id.* at 457.

public statements to such public records and knowledge, a safe harbor under Rule 3.6, could be indicative of the influence Johnson and Johnson's and Odwalla's attorneys on the had over the substance of the public statements made. In all, Tylenol and Odwalla Juice provide us with examples of how, with proper planning and practice, a company can be prepared to exert control over a situation in an effort to emerge from a crisis with its reputation intact and with minimal damage to public confidence.

c. Trying to Ensure Compliance with Rule 3.6

While members of the bar are often requested by clients to assist in crisis management and determine how best to frame statements to the public, Rule 3.6 offers minimal guidance on what attorneys may say. The ambiguous language of Rule 3.6 serves to complicate further an attorney's decision on how to represent her client properly while abiding by her ethical obligations. Initially, a lawyer must determine whether a case is "pending." While this issue is to be determined by the circumstances of the situation, and appears clear cut when actual litigation has been commenced, it is unclear whether Rule 3.6 would apply to statements made by an attorney shortly after a crisis or accident occurs when litigation may be anticipated. Rule 3.6 offers little guidance on how an attorney should conduct herself when there is little or no substantial likelihood of significantly influencing a judicial proceeding in the near future. An attorney is left to her own devices to determine whether a statement made far in advance of trial or even when no legal proceeding is in sight may have a substantial likelihood of significantly

affecting a judicial proceeding.[25] In addition, Rule 3.6 offers little guidance regarding when an attorney may exercise her right to reply to adverse statements about a client. As a result, an attorney faced with negative publicity against her client must evaluate how to respond without violating the provisions of Rule 3.6.

Given the lack of clear guidance in the Rules, an attorney must distinguish between factual commentary and inflammatory adversarial comment. An attorney must also continuously weigh how her early public statements may affect a judicial proceeding against the benefit such statements may provide to her client.

III. Cautionary Tales: The Impact of Public Advocacy in Some High Profile Cases.

a. O.J. Simpson Murder Trial and California Rule 5-120

The impact of the media coverage on the OJ Simpson murder trial has been dissected and discussed *ad nauseam* in legal circles and most of the public is well aware of the circus atmosphere that surrounded the trial. Some of the ethical concerns at the trial included potential witnesses selling their stories to the tabloids, infighting among the defense attorneys as to who should speak to the press, and a public comment by the prosecutor that he expected a guilty plea from O.J. Simpson. Perhaps due to the public backlash over the O.J. Simpson trial, or ethical concerns about the interaction of the involved attorneys with the media, the California Legislature enacted California Rule 5-120.[26] Prior to the California Supreme Court's adoption

[25] Gabriel G. Gregg, *ABA Rule 3.6 and California Rule 5-120: A Flawed Approach to the Problem of Trial Publicity*, 43 UCLA L. Rev. 1321 (1996) at 1364.
[26] *Id* at 1324.

of Rule 5-120 in 1995, California had been the only state that had not adopted some sort of trial publicity rule.

California Rule 5-120, entitled "Trial Publicity" provides:

(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.

(B) Notwithstanding paragraph (A), a member may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(a) the identity, residence, occupation, and family status of the accused;

(b) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(c) the fact, time, and place of arrest; and

(d) the identity of investigating and arresting officers or agencies and the length of the investigation.

(C) Notwithstanding paragraph (A), a member may make a statement that a reasonable member would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the member or the member's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

California Rule 5-120 is almost identical to Rule 3.6, containing both the “substantial likelihood” standard, as well as providing an attorney the right to reply in Rule 5-120(C). As with Rule 3.6, Rule 5-120 applies to attorneys who have participated in the investigation or litigation of a matter. One difference between Rule 3.6 and Rule 5-120 is that Rule 5-120 does not contain paragraph (d) of Rule 3.6, which extends the application of Rule 3.6 to all attorneys associated in a firm or governmental agency with an attorney subject to Rule 3.6.

As with Rule 3.6, the determination of whether an out-of-court statement will materially prejudice a proceeding under Rule 5-120(A) will necessarily be determined on a case-by-case basis. The notes to Rule 5-120, however, set out some factors which may be relevant to deciding whether an extrajudicial statement would violate the rule, including (1) whether the statement contains information based on clearly inadmissible evidence; (2) whether the lawyer knows the statement is false, deceptive, or in violation of Business and Professions Code section 6068(d), which describes the lawyer's "duty to employ only such means as are consistent with the truth and never to seek to mislead the judge or any judicial officer by an artifice or false statement"; (3) whether the statement violates a lawful gag order, protective order, statute, rule of court, or other requirement of confidentiality (such as in domestic, mental disability, and some criminal and juvenile proceedings); and (4) the timing of the statement.

b. The Michael Jackson Civil Case

On September 14, 1993, a lawsuit was filed against Michael Jackson on behalf of a thirteen year old alleged molestation victim. Although it was a civil action, Michael Jackson's civil attorney, Betram Fields, hired Howard Weitzman, an experienced criminal lawyer, to assist in the defense. At a press conference scheduled by the defense team shortly after the lawsuit was filed, defense team spokesperson Anthony Pellicano, a well-known "private investigator to the stars", claimed that before going public with the molestation charges, the father of the child had demanded a twenty million ($20,000,000) dollar film deal, which was rejected by Michael Jackson.[27] The choice of Anthony Pellicano as the initial spokesperson for the defense team, in place of Howard Weitzman, was a questionable decision. Without even considering his recent indictment on 110 separate criminal charges, at the time of his involvement in the Michael Jackson matter, many in the press considered Pellicano brash and abrasive. Further, with a reputation as being the "Hollywood Fixer" or "P.I. to the Stars", the choice of a private-eye as the spokesperson left an impression that the defense strategy would focus more on attacking the accuser then putting on a defense. Although Mr. Pellicano only remained as spokesperson for approximately two months, his abrupt manner and attitude with the press may have caused long term damage.[28]

Over the next few months, Michael Jackson did not appear in public to address the molestation claims in any manner. In the numerous press conferences conducted by the defense team in the weeks following the filing of the lawsuit, questions often focused on Michael

---

[27] Robert S. Weider, *Don't Stop Till You Get Enough: How Michael Jackson's Handlers Came Up Short on Good Press*, California Lawyer (1994).
[28] *Id.* at 65.

Jackson's lack of a public response and denial of the claims. In response to these questions, Bertram Fields on occasion provided response which may have adversely affected Michael Jackson's reputation. For example, in November 1993, after it was announced that Michael Jackson was cancelling his tour and going into drug rehabilitation, Fields announced that Michael Jackson was too incompetent to aid in his own defense.[29] At a later conference, after refusing to divulge Michael Jackson's whereabouts, and in response to a question from a reporter of whether Jackson was "Somewhere on this earth?" Fields responded "I don't concede that."[30] Though meant in jest, this comment, as well as his earlier reference to Michael Jackson being incompetent, may have served only to reinforce the public's negative perception of Michael Jackson.

On December 21, 1993, both Bertram Fields and Anthony Pellicano resigned, leaving Harold Weitzman in charge of the defense. The following day, Michael Jackson delivered a televised denial of the molestation charges against him. Weitzman then retained Johnnie Cochran Jr. to help in the defense. The new defense strategy shifted to possible settlement and the civil action was settled on January 25, 1994. Had this strategy been adopted at the outset, the ultimate adverse impact the allegations had on Michael Jackson's reputation might have been diminished.

---

[29] *Id.* at 65.
[30] *Id.* at 65.

c. Duke University Lacrosse Team

The recent Duke University lacrosse team matter offers an example of the benefits and dangers of an attorney attempting to litigate her case in the media. When the incident was first reported, intense media coverage led many to form strong opinions on the case. The facts that the players were white men and students at an elite university and the alleged victim was an African-American woman were emphasized in early media coverage helping to create strong racial and social class undertones to the case. Early in the case, the Durham County District Attorney, Michael Nifong, held numerous press conferences in which he discussed specific aspects of the case, including the defendants' refusal to cooperate with the investigation, provided commentary on the evidence he intended to produce at trial and offered his opinion as to the guilt of the defendants. Initially, it appeared that the possibility of a fair and impartial trial was remote.

Faced with intense media attention, as well as an extremely zealous prosecutor, the attorneys for the defendants decided to conduct their own press conferences to discuss their clients' defenses.[31] During these press conferences, the defense attorneys addressed what they believed were key inconsistencies in the accuser's story as evidenced in several police reports prepared concerning the alleged incident. They also referenced media reports that disclosed that the accuser had failed to consistently identify the three defendants in lineups. At later conferences, when additional evidence came to light, the defense attorneys noted that, based on the accused's December 2006 interview, her account of the timing of the events conflicted with one defendant's well-documented alibi evidence which placed him away from the house where

[31] Gary Blankenship, *Duke Lacrosse Lawyers Overcome a Rush to Judgment*, Florida Bar News, July 15, 2007, quoting defense counsel Joe Cheshire, who represented one of the charged players.

the alleged rape occurred.[32] Over the course of several months, it was discovered that District Attorney Nifong withheld potential exculpatory evidence from the defense.[33] Ultimately, in April 2007, North Carolina Attorney General Roy Cooper dismissed all charges against the defendants and also took the unusual step of declaring the defendants innocent.[34] It is interesting to consider whether the defendants would have achieved both the dismissal of all charges and a public declaration of innocence if their attorneys had decided to forego litigating their case in the court of public opinion.

In addition, the case provides us with a glaring example of the dangers faced by an attorney when his interaction with the press results in possible ethical violations. In December 2006, the North Carolina State Bar filed disciplinary charges against District Attorney Nifong, accusing him of: (1) telling reporters that the Duke players were refusing to cooperate with the investigation and that the players were refusing to make statements to local law enforcement authorities; (2) improperly commenting on tests involved in the investigation; (3) improperly commenting on evidence and testimony he expected would be presented in trial; (4) improperly giving his opinion about the guilt of the players; (5) improperly trying to explain the absence of incriminating evidence; and (6) improperly commenting on the character, credibility and reputation of the accused.[35] Given his role as District Attorney, Mr. Nifong's public comments had carried with them a substantial likelihood of materially prejudicing the trial. The State Bar concluded that, in his zeal to prosecute the case successfully, District Attorney Nifong

---

[32] *Id.* at page 3.
[33] The North Carolina State Bar v. Michael B. Nifong, 06 DHC 35, Excerpt Transcript, Findings of Fact and Conclusions of Law, June 16, 2007 at 6.
[34] Roy Cooper, *Summary of Conclusions*, Office of the Attorney General of North Carolina, Durham County Superior Court case file Nos. 06 CRS 4332-4336, 5582-5583,
[35] The North Carolina State Bar v. Michael B. Nifong, 06 DHC 35, Amended Complaint filed January 24, 2007.

failed to properly consider his ethical obligations as an attorney. As a result, he was disbarred in June 2007.

IV. Unintended Waiver of Privilege

a. Potential waiver of attorney/client privilege when using litigation communication specialists

As publicity surrounding business crises become more intense, many clients are creating crisis management teams and requesting that their attorneys assist the team in preparing public statements. Attorneys are often required to attend numerous crisis management team meetings and provide and/or receive written reports or documents concerning the crisis. While communications between an attorney and her client are privileged, and therefore, not discoverable, there is no definitive rule as to whether the attorney-client privilege extends to outside communications specialists who assist the attorney in providing legal services. As a result, an attorney may be required to provide her adversary with copies of any such documents exchanged with other members of the crisis management team.

One case in favor of the extension of attorney-client privilege to communications specialist is *In re: Grand Jury Subpoenas*[36]. In *In re: Grand Jury Subpoenas*, the plaintiff was the target of a high-profile grand jury investigation and its counsel hired litigation communications consultants to assist in addressing inaccurate press reports about the client. Defense counsel cited attorney-client privilege in response to demands for documents exchanged between counsel and the communications consultants. In his decision in *In re: Grand Jury Subpoenas*, Judge Kaplan of the United States District Court, Southern District of New York,

[36] 265 F.Supp. 2d 321 (S.D.N.Y. 2003)

extended the attorney-client privilege to outside litigation communications specialists who assist attorneys in providing legal services holding that "attorney efforts to influence public opinion in order to advance the client's legal position" are legal services because it can be important to a defendant's "ability to achieve a fair and just result". Judge Kaplan further noted that courts have long recognized public relations efforts as a legitimate legal function and have reimbursed court appointed counsel in a number of instances for time spent hosting press conferences and performing other public relations tasks in connection with their representation.

Judge Kaplan's decision in *In re: Grand Jury Subpoenas*, however, was contrary to the earlier case *Calvin Klein Trademark Trust v. Wachner,*[37] in which the Court denied the extension of attorney-client privilege when a corporation sought the advice of communication professionals. Further, in subsequent decisions in *Haugh v. Schroder*[38] and *NXIVM Corporation v. O'Hara,*[39] the Courts have refused to extend attorney-client privilege to communications with public relations firms, with the *Haugh* court noting that *In re: Grand Jury Subpoena* was fact specific[40] and the *NXIVM* court refusing to extend the parameters of attorney-client privilege as far as Judge Kaplan without direction from the Circuit Court.[41]

Accordingly, an attorney involved in a high profile case in which public relations advisors and litigation communications specialists are also retained must be careful as to what documents are reviewed and who is present when communications with those advisors occur to avoid possible waiver of attorney-client privilege.

---

[37] 198 F.R.D. 53 (S.D.N.Y. 2000)
[38] 2003 U.S. Dist. Lexis 14586 (S.D.N.Y., 2003).
[39] 241 F.R.D. 109 (N.D.N.Y. 2007).
[40] 2003 U.S. Dist. Lexis 14586, *9.
[41] 241 F.R.D. at 141.

b. A Reporter Cannot Rely on her First Amendment Right to Refuse to Provide the Name of a Confidential Source

Yet another potential danger an attorney may face when speaking with the media is that, despite possible assurances by a reporter that what is said to him is privileged, no such clear-cut privilege exists. The recent imprisonment of New York Times reporter Judith Miller for contempt, and her ultimate decision to disclose the information she claimed was privileged after spending eighty five (85) days in prison, serves as an example of the lack of such privilege.

In the Judith Miller matter, a grand jury had been convened by Special Counsel Patrick Fitzgerald to investigate the disclosure of CIA operative Valerie Plame's identity, in violation of the 1982 Intelligence Identities Protection Act. The information was originally disclosed to syndicated columnist Robert Novak, who attributed it to "two senior Bush administration officials." Judith Miller investigated the leak after it occurred, but never published an article on the subject. It was believed, however, that during her investigation she came across information which was deemed valuable to the grand jury proceedings and a subpoena was issued to Miller in 2004. Judith Miller unsuccessfully moved to quash the subpoena and her case was appealed all the way to the Supreme Court, which declined review. At a hearing held on July 6, 2005, Judith Miller again argued that the inability of a journalist to guaranty confidentiality would result in a loss of the free press. Following the hearing, the federal judge sent Judith Miller to jail, holding her in contempt of court for refusing to testify in response to a grand jury subpoena.[42] Judith Miller remained in jail for eighty-five (85) days

[42] Adam Liptak and Maria Newman, *New York Times Reporter Jailed for Keeping Source Secret*, N.Y. Times, July 6, 2005.

before the source of her information, Lewis (Scooter) Libby, released her from her pledge of confidentiality.

As evidenced by the Judith Miller matter, an attorney speaking with a reporter cannot rely on the protection of any purported press privilege. A reporter may be forced to turn over any notes and tapes concerning conversations held with an attorney to discuss an ongoing or potential litigation. Accordingly, lawyers must be cautious as to what they say or reveal to a reporter, whether the information is provided on or off the record.

V. Conclusion

In today's environment, clients and their attorneys involved in high profile cases are under increasing pressure to address allegations and respond to media scrutiny in order to protect a client's reputation. While the traditional principle of avoiding litigating a case in public remains the preferred course of action under the ethical guidelines, the fact remains that "No Comment" is not always the most beneficial response for the client. When a client's reputation is at stake, an attorney must determine how much should be said in the immediate wake of a crisis. Despite the intense client and public pressure to respond, counsel assisting clients in meeting these challenges must also take into account both the applicable ethical requirements and the practical impact on attorney-client privilege.