

Representing High-Profile Clients the Ethical Way

By Jack B. Zimmermann

This article discusses some basic principles and practice pointers that apply to the representation of any client in a high-profile media case at all stages of representation, concentrating on the ethical duties at various stages of the representation.

Basic Principles and Practice Pointers That Apply at All Stages of Representation

- Be truthful. Tell it like it is, and be fair to the other side.
- Remember you represent a client, not a cause.
- You are a representative of the bar. Act like someone your fellow attorneys will be proud of when their neighbors discuss your case after the nightly newscast.
- Be aware of ethical constraints. Make it clear that you follow the rules all lawyers are obliged to follow, specifically Rule 3.6 of the American Bar Association Model Rules of Professional Conduct or the Texas adaptation of that rule regarding extrajudicial statements and trial publicity, Texas Disciplinary Rule of Professional Conduct 3.07.
- How to deal with reporters:
 1. Don't play favorites. Media representatives compete with one another.
 2. Remember the media representative has a job to do and help meet his or her deadline.
 3. Learn the reporters you can trust, who is accurate, who is sloppy, and who has a private agenda.
- How to conduct an interview:
 1. Answer the question.
 2. Be brief.

3. Avoid profanity.
4. Look like a lawyer. Think about your clothes, grooming, and jewelry. Be conscious of perspiration, shaving, makeup, hair, or the knot in your tie.
5. When you are interviewed via satellite, look at the camera.
6. Think about your message and what will help get across your point (e.g., a photo or letter).
7. Be physically fit. When you are tired, you make mistakes.

The Lawyer's Role Pre-Trial

Pre-trial publicity can either hurt your client or be favorable to your client, but ordinarily it is adverse.

- In a criminal case, there is usually a presumption of guilt that permeates the newscasts, film clips, and printed stories.
 1. If an indictment occurs, your potential jurors will equate that with guilt and a conviction.
 2. The only story that is released and consumed is the police version of the facts or the report from the medical examiner.
 3. The most damning type of publicity is the story that proclaims "the case was solved today by the arrest of John Q. Client."
 4. Often, this type of case will deal with a very sympathetic victim, such as a popular person being killed or a young child being badly mistreated.
- In a prominent civil case, there will usually be an emphasis on "frivolous lawsuits" and the most recent large award of damages will be discussed.





► In political cases, pre-trial publicity can sometimes be favorable to your client.

1. If the stories portray your client in a fight with the power structure, the "underdog" reaction can occur.
2. Sometimes the client will appear as a scapegoat because "someone had to be arrested" or "this case just had to be prosecuted."
3. This particular factor is dependent on your client's background.

Influencing Pre-Trial Publicity Through Your Own Actions

- The first rule is to make it *your* actions. There should be no comment or interview by the client. This is especially difficult with an influential client, a political officeholder, or someone used to controlling the environment. It is imperative in these situations because invariably the client will say or do something to shoot him or herself in the foot. Watch what the client wears.
- The trial of any case is an exercise in psychology. Begin early using words like "the tragedy," not the killing; "the widow," not the defendant; "the home," not the compound.
- Respond to every press inquiry, being especially cognizant of the need to return phone calls. If the question is out-of-bounds, be forthright and tell the reporter that professional ethics prevent you from answering that question. You will be respected if you answer proper questions directly, and decline to answer if you should not do so, rather than being evasive or dancing around the question.

► Remember the ethical constraints on making extrajudicial statements. (See Texas Disciplinary Rule of Professional Conduct 3.07 regarding extrajudicial statements on p. 757.)

How to Counter Adverse Pre-Trial Publicity at Trial

- Try to determine its impact ahead of time.
 1. You can use surveys if the funds are available.
 2. Your investigator can conduct random or sample interviews.
 3. In small towns especially, watch the letters-to-the-editor section of the newspaper.
- If necessary, move for a change of venue. Document it with newspaper clippings and video clips from TV newscasts. Use transcripts of radio newscasts if tapes are not available.
 1. If denied at pre-trial, renew the motion at trial.
 2. If denied again, renew the motion during or after voir dire.
- If change of venue is denied at pre-trial, move for a continuance to lessen the impact of the adverse publicity.
- Use a juror questionnaire. Confer with opposing counsel and get an agreement on the particular questions.
- If no transfer or change of venue is granted, and the motion for continuance is denied, question the jurors carefully to challenge for cause. Make your record. If challenges for cause are close but denied, move the court to allow extra peremptory challenges.
- If that motion is denied, move for a mistrial because you had to take an objectionable juror. Name the juror, and state on the record why that juror is objectionable.

Determining the Degree that Pre-Trial Publicity Has Penetrated Your Jury Panel

► Lawyer Voir Dire

1. Get an agreement that the judge will ask: "Has anyone heard, read, or seen anything about this case?" to the whole panel. All who respond will be questioned individually. A short review of the undisputed facts, enough to identify the case for certain, sometimes is advisable.
2. If you cannot get that, you ask the question and request questioning alone or at least at the bench.
3. Determine what newspapers, magazines, and radio and TV stations the panel members read, listen to, or watch.
4. Ask specifically what it is they heard, read, or saw.
5. Ask: "What did you think when you received your jury summons?"
6. Ask: "Is there anything at all about what you knew of this case before you got here that (the client) must overcome by producing any evidence for you?"
7. Always include questions about any pre-trial publicity

about the lawyer. Do not ask: "Do you 'know' any of the lawyers?" Ask: "Have you 'heard' of any of the lawyers?"

8. Inquire if they have followed other cases of the lawyers', and whether they agree or disagree with the verdicts.
9. Ask if they have ever heard it said: "He must be guilty if he hired that lawyer," and then compare the choice of counsel to the choice of a doctor for medical care.

► Judge Voir Dire

1. Always submit your questions in writing. Attach a proposed questionnaire to be filled out by the prospective jurors.
2. Request that publicity questioning be done in chambers.
3. If the judge will not do it in chambers, ask that it be done in the courtroom, alone, and outside the hearing of the rest of the jurors.
4. Ask to supplement questions asked by the judge, based on prospective jurors' answers. Some judges will permit the lawyers to ask limited follow-up questions.

KNOWING THE RULES OF ATTRIBUTION

The various rules of attribution are an important element of the media game. But what are these rules of attribution and how can they be used? It is best if you and the reporter agree on the rules beforehand to help limit misunderstanding. Generally speaking, the rules are as follows:

Off-the-Record

This means that the reporter cannot use the information you have given at all. This causes confusion, because many people think the information can be used as long as it's not attributed to the interviewee (that's not-for-attribution, see below). Another point: Although he can't use the information you have given him, that doesn't stop the reporter from going to some other party and getting the same information from them in a manner that can be used in the story. For example, if you tell a reporter: "Off-the-record, the real problem with this case is that the judge is a drunk, and that's why he's ruling for the other side," the reporter cannot, under any circumstances, include this in his or her story. But, the reporter can go to the lawyers from the other side and say, "So ... Why does your side keep winning on these motions?" and get confirmation that way. It's still not attributable to you, but it's in the article.

which will not be a good thing for your side, since it's likely to anger the judge (particularly if he reads it after an all-night bender). He'll naturally think it came from your side, even if a lawyer for the other side is quoted. Lesson to be learned: If you don't want to see it in print, don't say it.

Not-for-Attribution

This is a statement that can appear in the article, but cannot be attributed to you. It can be attributed, however, and generally reporters will choose something innocuous, such as "someone close to the situation said" or "a source close to the plaintiff said" or perhaps even "someone with knowledge of the settlement negotiations said." Sometimes, the reporter and the interview subject will agree beforehand how the information will be attributed, as in "a source from the defendant's legal team." But again, although your name will not be attached to the comment, interview subjects play a dangerous game if the quote is something they otherwise wouldn't want to see in print — such as something that can be damaging to the case by annoying the judge, emboldening the other side, or harming the litigant's overall reputation. This is particularly true in the context of a lawsuit or other legal dispute

where there are only two sides: if it hurts the plaintiff and helps the defendant, it's probably the defendant's side who said it; if it helps the plaintiff and hurts the defendant, it's probably the plaintiff's side. This is in contrast to, say, politics — the Mecca of background conversations — where there are usually numerous sides with varying agendas all spouting off a mouth about this issue or that. It's a lot harder in this arena to tell who said what.

On Background

This is where the information cannot be quoted at all, but can be used in the article to fill in the gaps for the reader. Sometimes in court-related stories, this can be information on the fine points of the law: "A Title VII discrimination claim only applies to those areas that are protected classifications under the Civil Rights Act, such as race, gender, religion, or natural origin." It can also be background information on the factual information of a case — "Storm water runoff is a major source of water pollution in Southern California" — or on the people involved in a case — "Texas Instruments has a history of aggressively defending its patents." Again, the key point here is that the information cannot be attributed to anyone, even anonymously.

Jack Zimmermann offers the following cases for further study and insight:

Media Relations During Trial

- You should be available. If it is a highly publicized trial and representatives of various media are covering it, be conscious of the need to conduct interviews where all reporters have access. For example, some courthouses will not permit TV cameras above the ground floor, so try to walk away from the courtroom to where you can answer all questions at the same time.
- Avoid antagonizing the judge. Do not answer questions inside or just outside the courtroom.
- Refuse to permit comment from the client.
- Do not refuse to permit photographs. One makes the worst impression possible by "ducking" a photographer or "shielding" a client from a camera. Instead, tell the client to stand or walk by your side, be as serious as the situation is, and then stride confidently through the crowd to the exit.
- Restrict your comments to the events of record — no predicting what the evidence will be tomorrow.
- Be judicious in your remarks. Often a 10-minute interview gets edited to 90 seconds, with the dumbest 15 seconds of your comments highlighted on tape or in print.

Media Relations After Trial

- Ensure the acquittal or other victory is reported. If the coverage is not satisfactory, most reporters will respond positively to a request to report the good result in a manner consistent with the reporting of the initial arrest or indictment (e.g., time spent, location in newspaper, size of photo).
- Remember when commenting that the client must return to the real world in business, politics, school, or his or her community. Give the client a good start back by posturing him or her in the best light possible. Do not infer that the result was favorable because of the brilliance of the lawyers.



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shooting case," was counsel for a leader of the Branch Davidian group, and served as co-counsel on a writ of habeas corpus for death-row inmate Gary Graham.

➤ **Wilson v. State**, 854 S.W.2d 270 (Tex. App. — Amarillo 1993, pet. ref'd). State Bar rules restricting trial publicity did not prohibit district attorneys or police officers from discussing background events surrounding arrests or commission of crimes.

➤ **Gentile v. Nevada State Bar**, 501 U.S. 1030 (1991). The U.S. Supreme Court upheld the constitutionality of the "substantial likelihood of material prejudice" standard. However, the court expressed concerns that ABA Model Rule of Professional Conduct 3.6 was unconstitutionally vague and failed to provide lawyers with fair notice as to what comments were acceptable. The rule was amended in 1994 to address the vagueness concerns of the *Gentile* court.

➤ **In re Sullivan**, 586 N.Y.S.2d 322 (App. Div. 1992). Dismissed disciplinary charges against a lawyer whose televised statements merely recapitulated testimony already before the jury.

➤ **In re Grand Jury**, 492 N.E.2d 459 (Ohio Ct. App. 1985). The prosecutor was not disciplined for comments made in open court.

➤ **United States v. Bingham**, 769 F. Supp. 1039 (N.D. Ill. 1991). Lawyers representing members of a Chicago street gang violated a local rule regarding public discussion of criminal litigation by making statements on the eve of jury selection criticizing the judge's decision to impanel an anonymous jury.

➤ **United States v. McVeigh**, 931 F. Supp. 756 (D. Colo. 1996). Due to the publicity surrounding the Oklahoma City bombing case and associated news leaks, prosecutors asked for a court order restricting extrajudicial statements made by all counsel "to protect all parties' right to a fair trial by an impartial jury." The court drafted an order to prevent counsel from making extrajudicial statements regarding discovery.

➤ **United States v. Cutler**, 58 F.3d 825 (2d Cir. 1995). A lawyer representing John Gotti who conducted an intensive media campaign in violation of the court's prohibition was held in contempt, fined, and sentenced to house arrest.