The Ethics and Practice of Litigating Lawyers Engaging With the Media[1]

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I. Introduction

For most attorneys, high-profile cases happen rarely, if at all, during their career, and managing cases with media coverage remains well outside traditional legal education and the typical practice skillset. Indeed, some of our colleagues have long eschewed speaking to the media at all, insisting that it is unseemly to "try their cases in the press" and that our opponents have long complained about it. However, the recent explosion of social media-driven social movements, such as Black Lives Matter[2] and #MeToo,[3] has changed the landscape for many lawyers, drawing unprecedented focus to legal disputes that would have likely flown under the media's radar just a few years ago. As heavy media coverage brings attention to these issues, victims who would otherwise have remained silent have been motivated to speak out and seek legal advice. The #MeToo movement, for example, has not only prompted the disclosure of past sexual harassment and abuse but has also brought forth new allegations and legal claims from victims who have been inspired to come forward as part of a broader protest against the status quo. This phenomenon has produced truly remarkable results. In the last three years, the #MeToo movement has held scores of serial abusers accountable for decades of harassment across a variety of industries[4] and prompted significant policy changes within leading organizations.[5]

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[2] Black Lives Matter (BLM) began as a hashtag phenomenon in 2013, following George Zimmerman's acquittal for the murder of Trayvon Martin. Jessica Guynn, *Meet the Woman Who Coined #BlackLivesMatter*, USA TODAY (Mar. 4, 2015), https://www.usatoday.com/story/tech/2015/03/04/alicia-garza-black-lives-matter/24341593/. It has since grown into an international social justice movement advocating for racial equality across a spectrum of issues. See BlackLivesMatter.com, *What We Believe: Guiding Principles*, https://blacklivesmatter.com/about/what-we-believe/.

[3] #MeToo began in October 2017 when, in the wake of reports of decades-long sexual harassment and assault by Harvey Weinstein, actress Alyssa Milano urged victims of sexual abuse to come forward using the hashtag "#MeToo" (originally coined by activist Tarana Burke). See Aisha Harris, *She Founded Me Too. Now She Wants to Move Past the Trauma*., NY TIMES (Oct. 15, 2018), https://www.nytimes.com/2018/10/15/arts/tarana-burke-metoo-anniversary.html.

[4] For discussions of various high-profile cases and their aftermath, see Ed Pilkington, *How Cuomo went from #MeToo Ally to a one-man battle to discredit women*, The Guardian (Aug. 7, 2021), available at https://www.theguardian.com/us-news/2021/aug/07/andrew-cuomo-self-defense-metoo-misconduct; Kat Tenbarge, *A New #MeToo Movement is Erupting Online as Allegations of Sexual Misconduct Hit Celebrities, Influencers, and Streamers*, Insider (Jun. 23, 2020), available at https://www.insider.com/me-too-allegations-movement-a-list-celebs-streamers-bieber-tiktokers-2020-6; *Post-Weinstein, These Are the Powerful Men Facing Sexual Harassment Allegations*, Glamour (May 18, 2019), available at https://www.glamour.com/gallery/post-weinstein-these-are-the-powerful-men-facing-sexual-harassment-allegations.

[5] Microsoft, Uber, and Lyft rescinded their mandatory arbitration agreements for sexual harassment complaints, for example, as #MeToo brought attention to corporate practices that help perpetuate abuse. See https://blogs.microsoft.com/on-the-issues/2017/12/19/microsoft-endorses-senate-bill-address-sexual-harassment/; Laharee Chatterjee, *Uber, Lyft Scrap Mandatory Arbitration for Sexual Assault Claims*, REUTERS (May 15, 2018); https://www.reuters.com/article/us-uber-sexual-harassment/uber-lyft-scrap-mandatory-arbitration-for-sexual-assault-claims-idUSKCN1IG1I2. A number of large law firms also responded to public pressure, rescinding mandatory arbitration clauses for their own employees. See Meghan Tribe, *Will Law Firms Bow to Pressure to End Mandatory Arbitration?*, AM. LAWYER (May 24, 2018), https://www.law.com/americanlawyer/2018/05/24/will-law-firms-bow-to-pressure-to- end-mandatory-arbitration/.

As social media-driven movements continue to focus public attention on racial and gender discrimination, abusive police practices, and other misconduct, attorneys are increasingly likely to encounter cases that draw the media spotlight. High-profile cases raise unique strategic, legal, and ethical considerations, and weighing the risks and benefits of taking on such cases draws on all aspects of legal practice. The benefits are perhaps most obvious: Media attention can essentially advertise an attorney's practice by increasing name recognition and bolstering his or her public image as an expert. There is also the natural excitement of participating in an issue that holds the public interest. In cases that are directly connected to national (or even international) movements, a high-profile case can also be a unique opportunity to connect to a cause that has real personal resonance and historical impact.

The risks of media coverage are less apparent but perhaps more significant to consider. The speed and reach of social media can amplify hostility in dramatic, sometimes dangerous, ways, and clients and attorneys can face online abuse, harassment, and bullying that limits their online lives and raises the potential for real life harm. When Christine Blasey Ford made public allegations of sexual assault against then-Supreme Court nominee Brett Kavanaugh, for example, she faced months of frightening online abuse and threats that drove her out of her home and transformed nearly every aspect of her personal life.[6] As Dr. Ford's attorneys, our law firm also faced threats credible enough to require extensive security services. Even in cases that do not generate abuse or threats of violence, publicity can bring more subtle harms that can impact an attorney's career. Association with a social movement or cause can alienate potential clients and perhaps narrow one's client base, for instance, limiting business for the short or long term. Coverage that paints an attorney's abilities in a negative light can also affirmatively impact a reputation, fairly or not. In more personal terms, being a public figure for the course of representation (and maybe afterward) might be outside an attorney's comfort zone.

In addition to weighing the general impact of publicity on one's practice, attorneys in high- profile cases must also be prepared to navigate the ethical aspects of managing media coverage in relation to legal strategy and their client's ultimate outcome. The "court of public opinion" is an immensely powerful forum with high stakes for all parties, whether or not formal litigation ever unfolds.[7] Despite this fact, ethics rules have been rather slow to adapt to the reality of 21st century media and the legal industry, leaving gaps in regulation and inconsistent enforcement. Lawyers must therefore exercise thoughtful judgment when engaging with the media, balancing their duty to advocate for clients with often ambiguous professional restrictions.

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[6] Dr. Ford recounted the impact of coming forward in her testimony to the Senate Judiciary Committee in September 2018. *Kavanaugh Hearing: Transcript*, WASH. POST (Sept. 27, 2018), https://www.washingtonpost.com/news/national/wp/2018/09/27/kavanaugh-hearing-transcript/?utm_term=.cc5e4fc84dc5.

[7] "[T]he court of public opinion not only affects the administration of justice in a court of law, but also often acts like the administrator of justice itself. The court of public opinion issues verdicts that have as much, if not more, weight than a court of law." Michele DeStefano Beardslee, *Advocacy in the Court of Public Opinion, Installment Two: How Far Should Corporate Attorneys Go?*, 23 GEO. J. L. ETHICS 1119, 1148 (2010) (hereinafter DeStefano Beardslee, *Part II*).

II. Media Strategy in High-Profile Cases

Most high-profile cases draw media attention because they present marketable narratives and a compelling blend of public interest and human drama. In criminal cases, the severity or brutality of the alleged crime is often the "hook;" in civil cases, the media may take notice because one or both of the parties is already well-known, the remedy sought is exceptionally high, or the claims align with other trends unfolding in popular culture or politics. While legal conflicts have always been a mainstay of news, the 1995 O.J. Simpson trial, and its saturation of tabloid-style coverage, arguably marks the start of modern legal media culture.[8] In the 27 years that have followed, the 24-hour news cycle has only intensified the spotlight on attorneys in high-profile cases,[9] and the advent of social media in the last decade has exponentially multiplied the glare. Millions of individual and institutional voices now have unprecedented opportunities for sharing, amplifying, and leveraging information. Taken together, the overlapping timelines of traditional and social media outlets can create exceptionally intense, even relentless attention on a particular case or issue.

Determining a media strategy for a high-profile case depends on the direction and personality of the client, the goal of representation, and the parties' tolerance for risk. Some clients may want or approve a very aggressive approach to publicity because their goals are to expose mistreatment/misconduct and demand accountability. This is also likely in cases involving high profile clients who are already public figures and accustomed to managing the press.[10] For most clients, however, press attention is stressful and disruptive of normal life, and a more conservative approach best serves their interests.

A. Advantages to Engaging the Press

Once a particular case is in the spotlight, engaging with the media is inevitable and *any* statement – even "no comment" – shapes public perception. Media coverage can play such an

[8] While legal public relations (PR) had been growing as an aspect of high-profile cases prior to the OJ Simpson case, the scale of saturation in that case was extraordinary. See John C. Watson, *Litigation Public Relations: The Lawyers' Duty to Balance News Coverage of Their Clients*, 7 COMM. L. & POL'Y 77, 91 (2002) ("[T]he practice of litigation public relations had become [widespread] in the 1990s with cottage industries that taught it, public relations consultants who specialized in it and lawyers who practiced it in civil suits and criminal cases."); Arthur Gross-Schaefer et. al., *Are Media Interference and Technical Complexities Crippling the Ability of Juries to Deliver Fair Verdicts?*, 20 J.L. BUS. & ETHICS 1, 9-12 (2014) (noting that Simpson's proceedings were "the first fully televised celebrity trial").

[9] For instance, Michael Avenatti, former attorney for Stephanie Clifford, also known as "Stormy Daniels", appeared on CNN and MSNBC a total of 108 times during a two-month period in 2018 to discuss her claims against former President Donald Trump. Joe Concha, *Michael Avenatti has appeared on CNN and MSNBC 108 times since March 7, says Free Beacon*, The Hill (May 18, 2018), available at https://thehill.com/homenews/media/387325-michael-avenatti-has-appeared-on-cnn-and-msnbc-108-times-since-march-7-says.

[10] Notably large-scale legal PR campaigns include efforts during the Enron scandal on behalf of accounting firm Arthur Andersen, and executives Jeffrey Skilling and Kenneth Lay, and Martha Stewart's $1 million plus publicity blitz related to her insider trading trial. See Kathleen F. Brickey, *From Boardroom to Courtroom to Newsroom: The Media and Corporate Governance Scandals*, 33 J. CORP. L. 625, 636-43 (2008).

important role in shaping client outcomes that some legal commentators argue attorneys have an affirmative responsibility to develop media strategy as a component of meeting the professional duty of zealous representation.[11] Whether or not there is a duty to engage the press as a matter of course, constructive engagement with the press can deliver meaningful advantages throughout representation.

In the most concrete terms, adept media strategy can help secure efficient, fair remedies for clients without the immense costs of litigation. While the strength of a client's legal claims is always at the heart of any negotiation, media coverage can provide crucial leverage to reach settlement, particularly with opposing parties that are highly sensitive to their public image. Corporate counsel are keenly aware that legal conflicts shape public perception of their organizations and recognize that the "court of public opinion" delivers verdicts that can be just as meaningful to the bottom line as the outcome of formal litigation.[12] Being aware of this calculus is not entirely cynical, on either side. As the #MeToo Movement has shown, publicly exposing unlawful practices can create accountability that results in meaningful positive change. Particularly in cases that involve toxic corporate culture, media coverage is an important tool in not just making the individual client whole, but in pressuring organizations to improve the workplace for everyone.[13]

Engaging with the media also gives the client the opportunity to frame her own narrative, which has practical and psychological benefits. In the typical high-profile case for a plaintiff-side attorney, the opposing party is a powerful organization or individual who is media-savvy, experienced, and well-resourced. These actors almost always have a well-developed, well- supported media strategy of their own, and taking a proactive approach to publicity is crucial to equalizing the playing field and protecting the reputation and well-being of the client.[14] Setting the terms of media coverage can also act as its own kind of restorative justice in some cases. Clients who have been silenced, intimidated, or belittled by unlawful behavior can often find a sense of agency and control in telling their stories openly, and this experience can be an important part of remediation. An effective media strategy may also convince law enforcement or other government actors to take action where the issues may otherwise have remained ignored.[15]

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[11] See, e.g., John C. Watson, *Litigation Public Relations: The Lawyers' Duty to Balance News Coverage of Their Clients*, 7 COMM. L. & POL'Y 77 (2002); Michele DeStefano Beardslee, *Advocacy in the Court of Public Opinion, Installment One: Broadening the Role of Corporate Attorneys*, 22 GEO. J. L. ETHICS 1259, 1297 (2009) (hereinafter DeStefano Beardslee, *Part I*); Nisha Chandran, *The Privilege of PR*, 2015 U. ILL. L. REV. 1287, 1297 (2015).

[12] A 2009 survey of corporate counsel found nearly universal agreement that the court of public opinion is equal to, and sometimes more powerful than, formal legal forums. See DeStefano Beardslee, *Part I*, *supra* note 11, at 1276-73. In the words of one General Counsel, "for a major company that's subject to a lot of public criticism, winning in court, two or three years down the road isn't the most important thing, it's a necessary thing, but it's also a very important thing to be able to deal with the media and reputation issue." Id. at 1291.

[13] See note 5, *supra*.

[14] Corporate PR and legal teams work closely as standard practice, and opposing parties should expect to face a strategic media plan. See DeStefano Beardslee, *Part I*, *supra* note 11, at 1279-80; 1285-86; 1293; 1295; DeStefano Beardslee, *Part II*, *supra* note 7 at 1124.

[15] Lindsey Boylan, Charlotte Bennett, and other women coming forward about then-Governor Andrew Cuomo's

For cases that seriously approach or enter litigation, a proactive media strategy has even more potential benefits. Positive media depictions of a client and her claims can create goodwill that shapes the opinions of judges, juries, and the public as a whole, and this reality shapes not just the outcome of litigation, but whether litigation unfolds at all.[16]

B. Publicity Pitfalls

The benefits of an active media strategy are powerful and will almost always justify some engagement with the press, but publicity also holds real, sometimes life-altering, risks for clients and attorneys. Even with diligent planning and preparation, a client's story may not "play" the way an attorney intends and a negative impression can create backlash against her position. Criticism and hostility against clients can be exceptionally intense on social media, where the pile-on effect and culture of vitriolic abuse can be harrowing. Bullying, threats to the client and her loved ones, revelation of personal information, and other forms of harassment can take a toll that undermines any benefit from resolving the legal claim. We have seen this is recent high-profile cases such as the impeachment of former President Trump, where Colonel Alexander Vindman was accused on Fox News of espionage after testifying to the House of Representatives, and then received threats that made him consider moving his family onto a military base for safety. The anonymous whistleblower whose complaint led to the impeachment inquiry was not safe from online attacks, as President Trump stated publicly that he wanted to identify the whistleblower and handle that person the way "we used to do in the old days when we were smart."[17] Later, during the Senate trial, Senator Rand Paul tweeted the name of the person he suspected to be the whistleblower, leading to concerns about whistleblower safety.[18] President Trump and top administration officials told the national media that our client Dr. Rick Bright, the former Director of BARDA who blew the whistle about the Administration's reckless response to the COVID-19 pandemic, is a "creep" and unfit

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sexual harassment prompted the New York Attorney General, Leticia James, to investigate their allegations and ultimately issue a 163-page report finding their allegations to be credible. Report of Investigation into Allegations of Sexual Harassment by Governor Andrew M. Cuomo, State of New York Office of the Attorney General (Aug. 3, 2021), available at https://ag.ny.gov/sites/default/files/2021.08.03_nyag_-_investigative_report.pdf. In the wake of this report and his impending impeachment, Governor Cuomo resigned effective August 21, 2021. Jaclyn Diaz et al., Andrew Cuomo to Resign After Investigation Finds He Sexually Harassed Multiple Women, NPR (Aug. 10, 2021), https://www.npr.org/2021/08/10/972725388/new-york-governor-andrew-cuomo-resigns-amid-sexual-harassment-claims,

[16] See DeStefano Beardslee, *Part I*, *supra* note 11, at 1273-76 (describing the impact of media coverage once litigation is underway); DeStefano Beardslee, *Part II*, *supra* note 7, at 1154 ("[T]he way the court of opinion is negotiated wags the tail of the dog—it determines whether litigation will ensue, and if it will be civil or criminal. It also impacts how the controversy might be decided."). In addition, positive media about a case or a cause often encourages other witnesses to come forward.

[17] Letter from Andrew P. Bakaj to Acting Dir. Of Nat'l Intelligence Joseph Maguire (Sept. 28, 2019), available at https://compassrosepllc.com/wp-content/uploads/2019/09/2019_0928_-Correspondence-to-DNI.pdf.

[18] Emilie Mutert, Trump Whistleblower's Anonymity Resurfaces as Issue in Senate Impeachment Trial, NBC (Jan. 30, 2020) https://www.nbcwashington.com/news/politics/trump-whistleblower-right-to-stay-anonymous/2206694/.

for government service.[19]

The internet has also made a new phenomenon known as "doxing" possible. Doxing involves posting an individual's personal information, such as home address and other contact information, on social media or other publicly available internet spaces. After Christine Blasey Ford publicly alleged then-Judge Kavanaugh had sexually assaulted her as a teenager and testified as such to the Senate, she was doxed and received death threats and other harassment over phone and email.[20] Her home address was publicized, and she had to relocate her family multiple times for their safety.[21] She needed crowd-sourced financial assistance to pay for a personal security detail, home security system, and the constant moving expenses.[22]

The law has not caught up to reality on this issue yet, often leaving individuals who are doxed and subjected to online smear campaigns with little recourse.[23] The Interstate Stalking Statute makes it a crime to use the internet to put someone in fear of death or serious bodily injury, or to cause substantial emotional distress, when done with intent to kill, injure, harass, intimidate, or stalk that person or a family member.[24] The Interstate Communications Statute prohibits online threats to kidnap or injure someone.[25] The Communications Decency Act allows internet providers to restrict access to harassing materials and is primarily designed to protect children.[26] These laws leave gaps, since doxing – while providing others the opportunity to harass an individual – typically occurs without a clear accompanying threat, and are rarely enforced.[27] Congresswoman Katherine Clark introduced the Interstate Doxxing Prevention Act in 2016 to fill in those gaps, but the law was only referred to a subcommittee and never

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[19] Timothy Bella, *Trump, in Response to '60 Minutes' Interview, Claims Whistleblowers Like Rick Bright are 'Causing Great Injustice and Harm*,' Wash. Post (May 18, 2020), available at https://www.washingtonpost.com/nation/2020/05/18/trump-rick-bright-coronavirus-60-minutes/

[20] Tim Mak, *Kavanaugh Accuser Christine Blasey Ford Continues Receiving Threats, Lawyers Say*, NPR (Nov. 2, 2018), available at https://www.npr.org/2018/11/08/665407589/kavanaugh-accuser-christine-blasey-ford-continues-receiving-threats-lawyers-say.

[21] Id.

[22] Help Christine Blasey Ford, GOFUNDME (NOV. 21, 2018), https://www.gofundme.com/f/help-christine-blasey-ford.

[23] See generally Alexander J. Lindvall, *Political Hacktivism: Doxing and the First Amendment*, 53 CREIGHTON L. REV. 1 (2019) (proposing a new anti-doxing law and discussing First Amendment arguments); Lisa Bei Li, *Data Privacy in the Cyber Age: Recommendations for Regulating Doxing and Swatting*, 70 FED. COMMC'N L.J. 317 (2018); Julia M. MacAllister, *The Doxing Dilemma: Seeking a Remedy for the Malicious Publication of Personal Information*, 85 FORDHAM L. REV. 2451 (2017).

[24] 18 U.S.C. § 2261A(2).

[25] 18 U.S.C. § 875(c).

[26] 47 U.S.C. § 230 (c)(2). *See also* Li, *supra* note 23, at 324 (discussing the Communications Decency Act, Computer Fraud and Abuse Act, and Stored Communications Act as inadequate protection from doxing).

[27] Lindvall, *supra* note 23, at 8-10.

seriously considered.[28]

In addition to these personal risks, publicity can also have a negative impact on legal outcomes. While the conventional wisdom that companies will settle to avoid embarrassing press normally holds, in some cases opposing parties are *less* likely to settle high-profile cases if doing so is seen as an admission of wrongdoing. Some decision-makers have a higher tolerance for risk than normal, or a more combative personality, and become aggressive and dug-in when faced with public scrutiny. In rare cases, opposing parties may even take the extreme step of taking legal action against the client to save face or retaliate for bad press. For most clients, the threat of legal action is extremely stressful, whether or not a claim is actually filed.

Publicity can also potentially harm the client's own legal claims if they proceed to litigation. Even positive coverage can impact change of venue issues, for example, and negative coverage creates obvious problems if it prejudices the judge or jury against the client. Attorneys must also consider the fact that public statements made in the course of a media campaign may be admissible during litigation as party admissions.[29] As discussed below in Part IV, discussions with PR experts may be discoverable in some cases, as well. Weighing the legal and personal costs of an active media strategy is crucial to serving the client's overall interests, and requires on-going evaluation throughout representation.

III. Ethical Considerations for Attorneys Engaging with the Media

Once an attorney has determined that he or she has the professional capacity to take on a high-profile case and has determined whether the client's interests will be served by an aggressive or conservative approach to publicity, the final consideration for any media strategy is understanding what is permitted, or perhaps required, by the rules of professional ethics. Under the ABA Model Rules of Professional Conduct (MRPC), which form the basis for most state and local ethics rules nationwide,[30] a lawyer's primary ethical responsibility is to act zealously in her client's interest, within the bounds of duties also owed to the court and society. Despite the fact that media issues can be central to, and even determinative of, the fate of legal claims, ethical rules have been slow to reflect this reality, leaving some important gaps in guidance. To minimize risks to clients and to their own professional standing, attorneys in high-profile cases should take special care in making ethical judgment calls about publicity and the media. The following ethical rules are likely to apply in most high-profile cases and give a sense of the competing interests at play when attorneys join public discussion on behalf of their clients.

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[28] Interstate Doxxing Prevention Act, H.R. 6478, 114th Cong. (2016).

[29] See DeStefano Beardslee, *Part I*, *supra* note 11, at n. 11 (citing scholarship on "risks of legal PR spin"); Fed. R. Evid. 801(d)(2) (hearsay exception for opposing party statements).

[30] The MRPC have no inherent legal authority, and attorneys must consult state, local, and/or court ethics rules for all applicable rules. Local jurisdictions may interpret identical language in ethical rules in widely different ways.

A. Applicable Rules

1. Client Authority and Confidentiality

Under Rule 1.2 and Rule 1.4, attorneys have a duty to "abide by a client's decisions concerning the objectives of representation," and "reasonably consult with the client about the means by which the client's objectives are to be accomplished." Because media strategy in high-profile cases can potentially impact the client's legal objectives (as well as their personal life), attorneys have an ethical obligation to discuss the risks and benefits of engaging the press throughout representation. The effects of publicity can sometimes be more pervasive and life-changing for a client than a formal legal outcome, and lawyers must take care that media strategy does not inflict costs on a client that will, in the long run, outweigh the remedies it may bring.

In addition to the ethical duty to consult with clients regarding media strategy, attorneys engaging with the press are subject to Rule 1.6's prohibition on disclosing client information without informed consent or implied authority.[31] Consultation over media strategy must therefore include detailed, clear discussions about what information the client is authorizing for disclosure or leaving to the attorney's discretion. With the stakes for exposure even higher than normal in a high-profile case, attorneys must be exceptionally vigilant about maintaining client trust when statements will have a wide reach.

2. Trial Publicity

Rule 3.6, as adopted by state and local jurisdictions, sets the most specific ethical standards for making public statements related to litigation. It provides that:

> (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.[32]

In addition to allowing for the release of certain specific facts,[33] the rule also permits attorneys to make limited statements that serve as a response to harmful publicity about the client:

> (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

[31] See ABA Comm. On Ethics & Prof'l Responsibility, Formal Op. 480 (2018), available at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_opinion_480.pdf (discussing confidentiality rules as applied to media and online communications).

[32] MRPC Rule 3.6(a); NY ST RPC Rule 3.6(a) (tracking MRPC Rule 3.6(a)).

[33] MRPC Rule 3.6(b); NY ST RPC Rule 3.6(c) (tracking MRPC Rule 3.6(b)).

> 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.[34]

It is important to note that Rule 3.6 is limited on its face to statements that are likely to prejudice "an adjudicative proceeding." For high-profile "cases" that involve claims raised, contested, and resolved prior to litigation, Rule 3.6 arguably has no application at all.

The Supreme Court upheld a First Amendment challenge to Rule 3.6 in Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991), with a highly divided opinion that reflects the tension between free speech principles and protecting fairness in the legal system. Reviewing the application of Nevada Supreme Court Rule 177, which mirrors MRPC Rule 3.6, the Court held that the rule's "substantial likelihood of material [prejudice]" standard was consistent with the First Amendment because it is "designed to protect the integrity and fairness of a State's judicial system, and it imposes only narrow and necessary limitations on lawyers' speech.[35] The Rule was invalidated, however, because its safe harbor provision permitting statements about the "general nature of the defense" did not provide adequate notice about the kinds of statements that were prohibited.[36] While non-controlling dicta in the minority portion of Justice Rehnquist's opinion endorsed robust restraints on lawyers' speech, Justice Kennedy's minority dicta gave short shrift to the notion that pretrial statements warranted panic, stating, "Only the occasional case presents a danger of prejudice from pretrial publicity."[37] Current MRPC commentary acknowledges that application of Rule 3.6 should reflect the context of the proceeding, noting that "criminal trials are most sensitive to extrajudicial speech," civil trials are "less sensitive," and non-jury hearings and arbitration proceedings "even less affected."[38]

Despite the fact that Rule 3.6 expressly sets out a "substantial likelihood" standard, some jurisdictions continue to propagate and enforce highly restrictive rules for trial publicity that are clearly beyond constitutional limits set out in Gentile (or, at best, at their very farthest edge). The Fifth Circuit recently struck down the application of a district court rule that

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[34] MRPC Rule 3.6(c); NY ST RPC Rule 3.6(d) (tracking MRPC Rule 3.6(c)).

[35] Gentile, 501 U.S. at 1075. Gentile was a Nevada attorney who had been sanctioned for statements made at a press conference six months prior to the start of his client's trial, which included his assertions that his client was innocent, a police officer was guilty of the alleged theft, and the government's witnesses were not credible.

[36] Id. at 1048-51.

[37] Id. at 1054. Gentile was decided in 1991, well before the explosion of legal media coverage in the 1995 O.J. Simpson case and the internet revolution that followed. It is likely that today's Court would have different ideas about the potential reach and impact of public statements, whether or not they ultimately decided that they are protected under the First Amendment.

[38] MRPC Rule 3.6 Comment [6]; NY ST RPC Rule 3.6 Comment [6]. The ABA's and New York's position that criminal proceedings require more protection from extrajudicial statements is arguably in tension with the premise of Justice Kennedy's minority reasoning in Gentile that commentary on the criminal justice system is political speech, deserving robust protection under the First Amendment. Gentile, 501 U.S. at 1034-35. The Comment's list of statements that are "more likely than not to have a material prejudicial effect on a proceeding," particularly in criminal cases, include examples quite similar to the statements the Court protected in Gentile itself.

prohibited *any* pretrial statements by prosecutors or defense counsel other than recitations from the public record, for example, holding that the court failed to meet the standard for prior restraint set out in Gentile.[39] The attorney in the case had been sanctioned for giving an interview in anticipation of a mistrial, with a six month suspension of practice in the district court. Attorneys facing prior restraint and/or discipline under rules that are obviously overbroad under Gentile must consider whether the potential for parallel litigation is worth the benefit of the statements in question. Even where an attorney may prevail on the merits, the costs of making a challenge can be significant.

3. Truthfulness

Public statements by attorneys are also subject to ethical rules prohibiting misrepresentations and misconduct generally. Rule 4.1 prohibits knowingly making a false statement of material fact or law to a third person in the course of representation, for example, and Rule 8.2(a) specifically bars statements that are knowingly false or made with reckless disregard for the truth concerning the qualifications or integrity of judges and other legal officers. The catch-all misconduct provision, Rule 8.4, reiterates that "engage[ment] in conduct involving dishonesty, fraud, deceit or misrepresentation" and conduct "prejudicial to the administration of justice" comprise "professional misconduct," as well. These ethical obligations are not limited to acts carried out by an attorney directly. Rule 8.4 also prohibits attorneys from evading ethical restrictions by violating or attempting to violate the rules "through the acts of another."

B. Enforcement of Ethical Rules: Gag Orders and Sanctions

1. Gag Orders

In addition to the general restrictions on public statements during litigation under ethical rules, courts may impose so-called "gag orders" to limit disclosures more specifically. These orders comprise prior restraint of speech and, under Gentile's First Amendment doctrine, must be narrowly tailored to reach only those statements that have a significantly likelihood of creating material prejudice to the trial process. The narrow tailoring standard generally prohibits gag orders from silencing media campaigns that are merely aggressive, annoying to opponents, or in poor taste, and it requires a showing that there is a real risk to the actual jury in the case at hand. In high-profile litigation between Stephanie Clifford, also known as "Stormy Daniels," and Donald Trump and his former attorney Michael Cohen, for instance, a California trial judge denied a request for a gag order against Clifford's attorney, Michael Avenatti.[40] The court acknowledged that Avenatti had engaged in "incessant commentary" about issues related to

[39] In re Goode, 821 F.3d 553, 559-62 (5th Cir. 2016). See also WXIA-TV v. State, 811 S.E.2d 378 (Ga. 2018), reconsideration denied (Mar. 29, 2018) (broad gag order barring parties, investigators, court staff, and anyone with knowledge of investigation from making statements on enumerated topics comprised unconstitutional prior restraint of free speech); Ex parte Wright, 166 So. 3d 618, 632 (Ala. 2014) (vacating gag order prohibiting plaintiffs from making any extrajudicial statements about case, including mentioning the case on law firm's website and social media accounts, as overbroad under, *inter alia*, Gentile).

[40] Clifford v. Trump, No. CV 1802217 (SJO) (FFMx), 2018 WL 5273913 (C.D. Cal. July 31, 2018).

litigation in both California and New York but found that Cohen had not shown the statements were "substantially likely to have a materially prejudicial effect" on the potential trial ahead, as required under Gentile.[41]

In In re Dan Farr Productions, 874 F.3d 590 (9th Cir. 2017), the Ninth Circuit struck down overly broad orders that imposed wide-ranging restrictions on how defendants in a trademark action could publicly discuss the case, including prohibitions on making public statements on a wide range of issues related to the litigation, requirements on the nature of documents they could provide online, and the imposition of a mandatory "disclaimer" disclosing the limitations.[42] The court found that the suppression and disclaimer orders constituted unconstitutional prior restraint on free speech, as the restrictions went far beyond what was necessary to protect the integrity of the jury pool.[43]

In United States v. Khan, 538 F. Supp. 2d 929 (E.D.N.Y. 2007), the court imposed a gag order on defense counsel for violating EDNY Local Criminal Rule 23.1 which, similarly to Rule 3.6, prohibits the dissemination of "nonpublic information or opinion . . . if there is a substantial likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice."[44] In particular, at a press conference in Guyana, the country from which the defendant allegedly ran a drug organization, defense counsel openly named those he believed to be government witnesses or cooperators, commented on the credibility of these witnesses, and made numerous other comments regarding the case's merits, evidence, his client's innocence, and alleged political motivations behind the prosecution.[45] The court found that news of this Guyanese press conference would likely make its way to New York City given that New York City is home to the largest Guyanese ex-patriate population and is an established hub for many other immigrant populations whose home countries would also have news coverage of this press conference.[46] In response, the court imposed a prohibition on

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[41] Id. at *3-5. See also Underwood v. BSNF Ry. Co., 359 F.3d. 953, 959 (D. Mont. 2018) (denying motion for gag order on grounds that prior restraint was inappropriate under Gentile "when the [already] publicized statements do not specifically refer to the litigation or the parties involved"); Dippolito v. State, 225 So. 3d 233 (Fla. Dist. Ct. App. 2017), cert. denied sub nom. Dippolito v. Fla., 138 S. Ct. 698 (2018) (upholding a gag order issued after a criminal defendant issued a press release, on grounds that jury pool was likely to be affected by additional publicity and order was narrowly tailored); Laugier v. City of New York, 2014 WL6655283 (S.D.N.Y. Nov. 24, 2014) (while denying motion for a protective order for a deposition, imposing "prophylactic" order prohibiting extrajudicial statements impermissible under Rule 3.6 in light of "the publicity surrounding the case – and counsels' potential involvement in that publicity.").

[42] In re Dan Farr Productions, 874 F.3d at 592-93.

[43] Echoing the sliding scale of prejudicial risk set out in MRPC Rule 3.6(6), the court cited the routine nature of the civil proceeding as factor against prior restraint. Id. at 596 ("Unlike other cases involving attorneys or the press, grisly crimes or national security, the district court's orders silence one side of a vigorously litigated, run-of-the-mill civil trademark proceeding.").

[44] Khan, 538 F. Supp. 2d at 929-31.

[45] Id. at 932-33.

[46] Id. at 934-35.

any statement which would violate Local Criminal Rule 23.1, noting that the danger to witnesses posed by this publicity justified this limited constraint in accordance with Gentile.[47]

More recently, Donna Rotunno, lead counsel for Harvey Weinstein, wrote an op-ed in Newsweek, days before jury deliberations were set to begin, imploring jurors "to do what they know is right."[48] This op-ed came just weeks after Ms. Rotunno had already participated in a mid-trial interview with The New York Times' "The Daily" podcast, where she called Weinstein's accusers liars seeking fame, causing prosecutors to complain that she had violated the judge's order prohibiting publicly discussing the case during trial and prompting a warning from the judge about talking about witnesses.[49] In response to this op-ed, the judge ordered defense counsel "to refrain from communicating with the press until there is a verdict in the case," elaborating further, "I would caution you about the tentacles of your public relations juggernaut."[50]

As a pragmatic matter, attorneys who push the boundaries of ethical behavior with the media during litigation can harm their clients' interests, regardless of whether a gag order is imposed and upheld or not. Trial judges exercise discretion in countless rulings throughout litigation, and a media strategy that antagonizes a judge may create more problems on balance than it is worth.[51]

2. Sanctions

Attorneys who violate ethics rules, whether within litigation or otherwise, may face sanctions and/or disciplinary action by state bar authorities. For statements coming within MRPC Rule 3.6, courts apply the Gentile standard and are more likely to sanction attorneys for public statements made while a gag order is already in effect. In United States v. Hill, 420 F. App'x 407 (5th Cir. 2011), the Fifth Circuit upheld criminal contempt convictions for a defendant and his attorney who had given a television interview about a trial, in violation of a

[47] Id. at 935 (quoting Gentile, 501 U.S. at 1038).

[48] Donna Rotunno, Jurors in My Client Harvey Weinstein's Case Must Look Past the Headlines, Newsweek (Feb. 16, 2020), https://www.newsweek.com/jurors-my-client-harvey-weinsteins-case-must-look-past-headlines-opinion-1487564.

[49] Megan Twohey, A Question That Almost Went Unasked, The New York Times (Feb. 14, 2020), https://www.nytimes.com/2020/02/14/podcasts/daily-newsletter-weinstein-trial-coronavirus.html; Jan Ransom, Weinstein's Lawyer Wrote an Article Addressing Jurors. The Judge is Unhappy, The New York Times (Feb. 21, 2020), https://www.nytimes.com/2020/02/18/nyregion/harvey-weinstein-trial-donna-rotunno.html#:~:text=Article%20Addressing%20Jurors.-,The%20Judge%20Is%20Unhappy.,to%20complain%20of%20jury%20tampering.

[50] Id.

[51] In In re Dan Farr Productions, for instance, long after the trial court's gag order against the defendants was struck down, the judge granted the prevailing plaintiff's motion for $4 million in legal fees, mentioning the defendants' publicity efforts within a litany of misconduct that warranted his ruling. In re Dan Farr Productions, 3:14-cv-01865-AJB-JMA, Order Granting in Part and Denying in Part Plaintiff's Motion for Attorneys' Fees and Costs (Aug. 23, 2018), https://pmcdeadline2.files.wordpress.com/2018/08/comic-con-ruling-wm.pdf.

gag order. The order tracked the language of Rule 3.6, prohibiting statements "that could interfere with a fair trial or otherwise prejudice Defendants, the Government, or the administration of justice," which the court found provided sufficient guidance under Gentile.[52] In the absence of a gag order, enforcement of ethical rules on trial publicity turns on context and timing. Discipline is less likely where statements are made far in advance of trial or are unlikely to draw particular attention.[53]

At its most extreme, engaging the press to advance legal arguments can threaten an attorney's ability to practice law altogether. In 2015, the Supreme Court of Louisiana upheld the sanction of disbarment for an attorney who carried out a social media and email campaign on behalf of a friend who was contesting custody of her children.[54] The court affirmed that the attorney's "social media blitz"[55] violated state ethics rules prohibiting attempts to influence a judge, *ex parte* communications with a judge, making false statements or misrepresentations, and engaging in conduct prejudicial to the administration of justice.[56] While media vendettas of this kind are rare, the case is an important reminder of the potential stakes involved. Attorneys who engage in professional misconduct in seeking publicity can seriously harm the legal and reputational interests of their clients and imperil their own practice.[57]

In criminal matters, prosecutors ought to note that extrajudicial statements about a pending indictment or ongoing criminal case could lead to a dismissal of the charges. In *United States v. Sheldon Silver*, 1:15-cr-00093-VEC, Order Denying Defendant's Motion to Dismiss the Indictment (S.D.N.Y. April 10, 2015), former Speaker of the New York State Assembly Sheldon Silver attempted to have the corruption charges against him dismissed on constitutional grounds due to improper public comments made by then-U.S. Attorney for the Southern District

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[52] Hill, 420 F. App'x at 410. See also U.S. v. Cutler, 58 F.3d 825 (2d Cir. 1995) (upholding contempt conviction of John Gotti's defense attorney for statements made to the press throughout his trial, on grounds that NY local rule tracking MRPC Rule 3.6 was lawfully applied).

[53] See, e.g., Joyce v. Town of Dennis, 736 F. Supp. 2d 321, 325 (D. Mass. 2010) ("[T]here is no reason to believe that press coverage will engender prejudice because the statements were made months before any trial, this case is not widely publicized and the Court can mitigate any potential prejudice through jury voir dire and jury instructions."); Seaman v. Wyckoff Hgts. Med Ctr., Inc., 8 Misc. 3d 628 (Nassau County Sup. Ct. 2005) (immediate release of defendant's deposition to tabloid press violated state ethics rules).

[54] In re McCool, 172 So. 3d 1058 (La. 2015).

[55] Id. at 1077.

[56] Id. at 1068-69, 1078.

[57] A New York court recently suspended Rudy Giuliani, former Mayor of New York City and former attorney for President Trump, from the practice of law for making "demonstrably false and misleading statements to courts, lawmakers and the public at large" in order to bolster President Trump's false allegations of voter fraud in the 2020 presidential election. Matter of Giuliani, 146 N.Y.S.3d 266, 268 (N.Y. App. Div. 2021). The bulk of the Giuliani's actions that led to this suspension constituted press conferences, television and other media appearances, legislative hearings, and one court appearance. Id. at 270. Giuliani is no stranger to abusing publicity to benefit his case, having been frequently criticized for his use of press conferences during his tenure as the U.S. Attorney for the Southern District of New York. Nancy Blodgett, *Press-sensitive: Prosecutors' Use of Media Hit*, 71 A.B.A. J. 17, 17 (1985), https://zh.booksc.eu/ireader/27822310.

of New York, Preet Bharara, at press conferences shortly after Mr. Silver's arrest on January 22, 2015, and in an accompanying press release and tweets, all before Mr. Silver's indictment on February 19, 2015.[58] These public comments included many statements about New York's culture of political corruption and which could be viewed as commentary about Mr. Silver's guilt, despite attempts to couch the commentary as "allegations" and to note the presumption of innocence.[59] While the court ultimately denied Mr. Silver's motion because he could not show that these comments "'substantial[ly] influenced' the grand jury's decision to indict,"[60] "the Court [was] troubled by remarks by the U.S. Attorney that appeared to bundle together unproven allegations regarding the Defendant with broader commentary on corruption and a lack of transparency in certain aspects of New York State politics" because the public could construe this "as a commentary on the character or guilt of the Defendant."[61] Not only can publicity subject an attorney to professional discipline if handled improperly, but, at least in the criminal context, improper commentary can also derail an entire prosecution.

IV. Strategic, Legal, and Ethical Issues Related to Public Relations Specialists

As media coverage plays an increasingly significant role in shaping legal outcomes, public relations (PR) specialists have become a more active component of legal representation. General Counsel at large corporations routinely coordinate and consult with PR teams as standard practice, recognizing that the public perception of a legal claim can have an equal or even greater impact on the company's well-being than its formal resolution.[62] Attorneys in high-profile cases facing corporate counsel, or counsel for any media-savvy party, should assume that there are PR professionals on the other side and should consider whether expert PR advice could serve their client's interest. In addition to taking on some of the labor of managing media strategy, PR experts can identify public image issues and communication tactics that an attorney's legal skillset may not reach.[63] In high-profile cases where traditional and social media news cycles can create a sense of relentless pressure, attorneys can also benefit from a second opinion and a fresh perspective on how a case is playing, helping to avoid media burnout.

While the strategic and practical advantages of engaging PR experts in high-profile cases are significant, attorneys must be mindful of unique legal and ethical issues their

[58] U.S. v. Silver, 1:15-cr-00093-VEC, Order… at 2-5. It is worth noting that the court did not consider the implications of the New York Rules of Professional Conduct as this was not a disciplinary matter.

[59] Id.

[60] Id. at 12 (citing Bank of Nova Scotia v. United States, 487 U.S. 250, 255-56 (1988)).

[61] Id. at 10-11.

[62] DeStefano Beardslee, *Part I*, *supra* note 11, at 1279 ("almost all [39] of the General Counsel Interviewees [at Fortune 500 companies] report having strong, daily relationships with internal PR professionals").

[63] Chandran, *supra* note 11, at 1320 ("[M]ost lawyers are unable to provide equally effective counsel to clients alone versus with a PR consultant."); DeStefano Beardslee, *Part I*, *supra* note 11, at 1282-84 (describing how consultation with PR teams shapes corporate counsel decision-making).

involvement raises.

A. Privilege for PR Communications

For cases in litigation, lawyers should be aware that communication with PR specialists is not always protected by attorney-client privilege and may be discoverable.[64] The purpose of attorney-client privilege "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."[65] Protections are generally waived when communications are shared with third parties, unless an exception applies.[66] The argument that an exception is appropriate under agency principles when an attorney engages a PR expert to help with legal representation reflects the reality of practice, particularly for high-profile cases, but has met with mixed success. While some courts take a hardline that PR services are not a necessary component of legal services,[67] most courts weigh a variety of factors that recognize the crucial role that media strategy can play in some cases. Attorney-client privilege is more often recognized when PR experts are engaged for a specific case near or during formal litigation, for instance, and their work is closely supervised or coordinated with the attorney.[68]

Work product privilege, which protects "tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial,"[69] may also provide some protection for PR-related communications, but its reach is limited.[70] Under federal rules, work product may still be discoverable if there is a "substantial need" for the materials and obtaining alternative sources would create "undue hardship," provided there is no disclosure of legal opinions or theories.[71] In addition, the privilege arguably has no application to materials that are produced

[64] See DeStefano Beardslee, *Part I*, *supra* note 11, at n.13 (summarizing scholarship on privilege issues for legal PR).

[65] Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

[66] The attorney-client privilege has been recognized where an attorney requires a third party to provide legal services, such as an interpreter or subject matter specialist. See United States v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961) ("What is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer.").

[67] Chandran, *supra* note 11, at 1299-1301.

[68] Chandran identifies six factors that courts use in determining PR waiver exceptions: (1) duration of PR firm relationship with client; (2) party enlisting PR firm; (3) nature of services provided by PR firm; (4) functional equivalence test for PR services; (5) common legal interest exception to waiver; and (6) enlisting a PR firm as a non-testifying expert. Id. at 1301-1314.

[69] Fed. R. Evid. 502(g)(2).

[70] See Cayce Myers, *E-Discovery and Public Relations Practice: How Digital Communication Affects Litigation*, 11 Pub. Rel. J. at 11-12 (June 2017), https://prjournal.instituteforpr.org/wp-content/uploads/CayceMyers-Ediscovery-IPR_Final.pdf.

[71] Fed. R. Civ. P. 26(b)(3)(A), (B). For discussion of cases discussing work-product privilege for PR-related materials, see Chandran, *supra* note 11, at 1314-17.

to avoid, rather than prepare, for litigation.[72] Given that PR efforts are often focused on trying to secure settlement or avoid criminal prosecution, this limitation is potentially significant.

The fact that privilege law for PR activities is unsettled and somewhat out of touch with the reality of 21st century legal practice is unsurprising – courts often lag behind rapid technological changes and media culture, and PR has not traditionally been seen as an integral part of legal representation. PR management is not simply window dressing for legal claims, however – media coverage is a powerful force that can shape the course of negotiations, litigation, and real-world outcomes for all parties. More expansive, consistently construed privileges for PR-related activities would better serve lawyers operating in today's media landscape, by reducing uncertainty and encouraging a holistic approach to managing cases.[73] While courts make their way to recognizing and protecting the important role that PR plays in legal representation, attorneys must be careful to determine privilege rules in their jurisdictions and avoid inadvertent exposure of client information.

B. Ethical Considerations

Ethical rules for litigation and legal practice generally apply to working with PR experts, as well. PR tactics for litigation must comply with the ethical rules discussed above concerning trial publicity, truthfulness, and misconduct, and attorneys may not evade the rules by having PR teams direct or carry out acts that are otherwise unethical.[74] Attempts to "clean up" the social media presence of a client or witness, for example, could result in spoliation of evidence and trigger sanctions against both the attorney and client.[75] In high-profile cases, attorneys should assume a particularly high level of scrutiny for every aspect of representation, including media strategy, and should be careful to vet all PR efforts for compliance with applicable ethics rules.

V. Conclusion

High-profile cases offer attorneys exceptional opportunities for professional and personal satisfaction, but practicing law under a media spotlight can also bring significant professional and personal risks. Publicity inevitably raises the stakes for everyone involved in a legal conflict, and never more so than now, when traditional and social media amplify more voices at once than ever before. The first and most important ethical duty an attorney owes a potential client in a high- profile case is making a deliberate, self-aware assessment about whether he or she has the resources, skill, and temperament to manage its unique challenges. Once representation is underway, the ethical duty of zealous advocacy requires the attorney to then develop an effective media strategy in close consultation with the client. Finally, attorneys

[72] Id. at 1321.

[73] See id. at 1322-26.

[74] See Part IIIA, *supra*.

[75] See Allied Concrete Co. v. Lester, 736 S.E.2d 699 (Va. 2013) (attorney directive to client to "clean up" Facebook page resulted in sanction of $520,000 against him and $180,000 against plaintiff).

in high-profile cases must ensure that, whether they take an aggressive or conservative approach to the media, their engagement with the press (including the involvement of PR experts) comports with all applicable ethical rules.

Throughout representation in a high-profile case, the guiding light must be the client's direction and well-being. Media attention can be extraordinarily stressful, changing the normal calculus of a legal claim in myriad ways, and attorneys must always remember that the goal of effective representation is resolution (by settlement, judgment, or otherwise). Reaching resolution ethically in a high-profile case means taking one's duty of zealous representation and truth equally seriously, even as the world watches (and comments and tweets).