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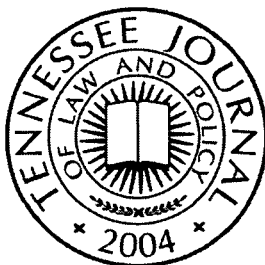
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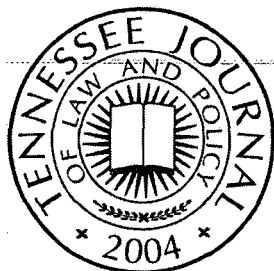
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ARTICLE

**THE ROLE OF THE ATTORNEY AND THE ATTORNEY  
CLIENT RELATIONSHIP: THE KEYS TO IMPROVED PUBLIC  
PERCEPTION OF ATTORNEYS AND THE LEXUS<sup>1</sup>**

*Jeanne Marie Zokovitch Paben*<sup>\*+</sup>

It is a pivotal time for the legal profession. Economic challenges are making it harder and harder for the historical law firm to survive. According to the National Law Journal's annual survey, "the 250 biggest firms . . . shed more than 9,500 lawyers in 2009 and 2010, nearly 8% of the total [lawyers at those firms]."<sup>2</sup> This

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+ I would like to thank Barry graduates Jennifer Collins ('12) and Margaret Reidy ('12) for their research assistance with this article. I would also like to thank Brett Paben, Gerard Glynn, Kate Aschenbrenner and Karen Greene for their support, timely review and edits. Finally, I thank Richard Goldsmith ('12) for his endless research, citation work and support for this article.

<sup>1</sup> I would like to note that as an avid environmentalist I of course refer to the hybrid version of the Lexus.

<sup>2</sup> *The NLJ 250 Regional Report*, NAT'L L. J., <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202489565842&slreturn=1>. For further reading about the plight of law firms dealing with the recession, see also Mathew Bishop, *A Less Gilded Future*, *ECONOMIST*, May 7, 2011, at 14, available at <http://www.economist.com/node/18651114>; Nathan Koppel, *Recession Batters Law Firms, Triggering Layoffs, Closings*, *WALL ST. J.*, Jan. 26, 2009, [http://online.wsj.com/article/SB123292954232713979.html?mod=rss\\_whats\\_news\\_us](http://online.wsj.com/article/SB123292954232713979.html?mod=rss_whats_news_us); Gus Lubin, *10 Huge Law Firm Collapses of the Decade*, *BUS. INSIDER L. REV.*, Dec. 8, 2009, available at <http://www.businessinsider.com/decades-biggest-law-firm-collapses-2009-12>; Carlo D' Angelo, *Overseas Legal Outsourcing and the*

represents the largest multiyear decline in the thirty-four years the National Law Journal has conducted this survey.<sup>3</sup>

These same challenges are making it harder for law graduates to get “typical” law jobs.<sup>4</sup> The job statistics for recent law school graduates have not been good.

According to the National Association for Legal Career Professionals (NALP), of 41,156 Class of 2010 graduates whose law schools reported their job status to NALP nine months after graduation, 36,043 (87.6%) obtained jobs of some type.<sup>5</sup> A lower percentage of law school graduates reported having a job for which bar passage was required than ever before (68.4% for the Class of 2010 compared to 74.7% for the Class of 2008).<sup>6</sup> Further, only seventy-one percent of the 2010 jobs reported were both full-time and permanent.<sup>7</sup> “Overall, nearly 27% of all jobs taken by

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*American Legal Profession: Friend or “Flattener”?*, 14 TEX. WESLEYAN L. REV. 167, 187-91 (2008) (discussing the outsourcing of American legal jobs).

<sup>3</sup> *The NLJ* 250, NAT’L L. J., <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202489565842&slreturn=1>.

<sup>4</sup> David Segal, *Is Law School a Losing Game?*, N.Y. TIMES, Jan. 9, 2011, at BU1, available at [http://www.nytimes.com/2011/01/09/business/09law.html?\\_r=1](http://www.nytimes.com/2011/01/09/business/09law.html?_r=1) (last modified on Jan. 16, 2011); see also Molly McDonough, *Company’s “ Craigslist” Model Seeks to Keep Outsourced Work On-Shore*, A.B.A. J., Mar. 30, 2009, [http://www.abajournal.com/news/article/companys\\_craigslist\\_model\\_seeks\\_to\\_keep\\_outsourced\\_legal\\_work\\_on-shore/](http://www.abajournal.com/news/article/companys_craigslist_model_seeks_to_keep_outsourced_legal_work_on-shore/) (describing system for piece-work assignment of legal tasks).

<sup>5</sup> *Employment for the Class of 2010 – Selected Findings*, NALP.COM, <http://www.nalp.org/uploads/Classof2010SelectedFindings.pdf>.

<sup>6</sup> *Id.*; see also Menachem Wecker, *In Tough Job Market, Law Grads Use J.D.s for Nonlegal Work*, U.S. NEWS & WORLD REPORT, Sept. 30, 2011, <http://news.yahoo.com/tough-job-market-law-grads-j-d-nonlegal-150049287.html>.

<sup>7</sup> *Employment for the Class of 2010 – Selected Findings*, NALP.COM, <http://www.nalp.org/uploads/Classof2010SelectedFindings.pdf>.



members of [the Class of 2010] were classified as temporary.”<sup>8</sup>

Additionally, the downward turn in the economy is marginalizing the role of the attorney by allowing others to perform some work historically performed by attorneys.<sup>9</sup> Legal services are now being offered through untraditional media, such as newspaper columns, radio or television programs, or internet sites.<sup>10</sup> And, with increased reliance on electronic media in all parts of life, legal services have also been affected. Further, specific areas of practice such as environmental law, while a “fast track career” in the late 1980s and into the 1990s, began to wane during the end of the Twentieth Century when environmental regulation began to taper off and during times of economic turmoil; duties once asked of an environmental attorney are now handled by other environmental professionals.<sup>11</sup> With this in mind, it is clear that we must rethink the role of the attorney and what it takes to have a successful legal practice.

Further, the public perception of the bar, and the legal process in general, is not positive. Most recently, a December 2010 Gallup poll on the public’s rating of the honesty and ethical standards of various “professionals” placed lawyers sixteenth out of twenty-two, ahead of “car salesman,” “members of Congress,” “lobbyists” and “business executives.”<sup>12</sup>

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<sup>8</sup> *Id.*

<sup>9</sup> See RICHARD SUSSKIND, *THE END OF LAWYERS: RETHINKING THE NATURE OF LEGAL SERVICES* (Oxford University Press, 2008).

<sup>10</sup> See Catherine J. Lanctot, *Attorney-Client Relationships in Cyberspace: The Peril and the Promise*, 49 DUKE L.J. 147, 218-45 (1999).

<sup>11</sup> Michael B. Gerrard, *Trends in the Supply and Demand for Environmental Lawyers*, 25 COLUM. J. ENVTL. L. 1 (2000).

<sup>12</sup> Jeffery M. Jones, *Nurses Top List in Honest and Ethics List for 11<sup>th</sup> Year*, GALLUP POLL NEWS SERVICE, Dec. 3, 2010, available at

Due in part to these changes, the chasm between the average citizen and attorneys continues. For all of these reasons, access to legal services continues to be a challenge for low income and other disadvantaged people. According to Legal Services Corporation “LSC,”<sup>13</sup> “[e]ven before the 2008 recession, studies in several states found that about eighty percent of the legal needs of low-income families go unmet.”<sup>14</sup> LSC’s internal monitoring revealed that for every client served by a LSC funded program, at least one client will be turned away due to a lack of resources even though the client meets the eligibility criteria for service.<sup>15</sup>

This article seeks to examine how the role of the attorney can shift some of these dynamics, make better lawyers, and improve relationships between lawyers and the general public. Further, in focusing on this issue, I assert that we can pave the way for more successful and rewarding legal practices. In Part I of this article I will explore the history of the role of the attorney in the United States legal system generally. In Part II, I will look through the lens of the three dominant historical attorney-client models – authoritarian, client-centered and collaborative – to observe the attorney-client relationship and the trends associated with each model. In Part III, the article looks at

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<http://www.gallup.com/poll/145043/Nurses-Top-Honesty-Ethics-List-11-Year.aspx>.

<sup>13</sup> LSC is a congressionally established entity and “is the single largest provider of civil legal aid for low-income Americans in the nation.”

*About*, LEGAL SERVICES CORPORATION, *available at* <http://www.lsc.gov/about/lsc.php>; *see also About, LSC Act and Other Laws*, LEGAL SERVICES CORPORATION, *available at* <http://www.lsc.gov/laws/act.php>.

<sup>14</sup> LEGAL SERVICES CORPORATION, 2010 Annual Report p.1, Jul. 21, 2011, <http://www.lsc.gov/media/press-releases/lsc-annual-report-highlights-importance-access-justice>.

<sup>15</sup> *See Documenting the Justice Gap in America*, LEGAL SERVICES CORPORATION, *available at* [http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting\\_the\\_justice\\_gap\\_in\\_america\\_2009..pdf](http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009..pdf), p. 4.

community lawyering models and the attorney-client relationship. In Part IV, I advocate for a broader role for attorneys today and identify impediments to this role. In Part V, I utilize professional rules of conduct to support this broader role and draw into question whether doing otherwise complies with these rules. Lastly, in Part VI, the article returns to advocating for a broader role for attorneys and sets the stage for discussion as to how achieve this in legal education and practice.

## Part I. History of the U.S. Legal System

### A. Colonial Times

To fully appreciate the role of attorneys in the United States legal system, it is important to look at the differences throughout time.<sup>16</sup> Attorneys at the inception of the United States legal system were quite often the politicians and thinkers of the time.<sup>17</sup> The Drafters of the Declaration of Independence and the Framers of the United States Constitution were mostly lawyers.<sup>18</sup> “Courts were increasingly manned by lawyers, who listened to the

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<sup>16</sup> LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 13-25 (Simon & Schuster 1973). Professor Friedman's book remains the outstanding comprehensive treatment of the history of American law and the legal profession from its English origins to its state in the late Twentieth Century. For further discussion on the history of the American legal profession, *see generally* JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAWMAKERS (Little, Brown and Company 1950); MAXWELL BLOOMFIELD, AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876 (Harvard University Press 1976); MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (Oxford University Press 1992).

<sup>17</sup> *See* FRIEDMAN, *supra* note 16, at 93-137, 265-66.

<sup>18</sup> “Almost half of the signers of the Declaration of Independence, and more than half of the members of the Federal Constitutional Convention were lawyers and thirty-two out of the fifty-four Framers of the Constitution were lawyers.” FRIEDMAN, *supra* note 16, at 265.

arguments of other lawyers” but rarely to those of the commoner.<sup>19</sup> Wherever one looked in political life – in town, city, county, state and national government – the lawyers were there.<sup>20</sup>

The early lawyers in the United States were learned men; men that were learned not only about the law, but in all fields of knowledge.<sup>21</sup>

While a great many of the leaders of the Republic were attorneys, many commoners were distrustful of lawyers for the same reasons they despised the British rule.<sup>22</sup> Lawyers had often been denounced in earlier history by powerless people for trucking the will of the powerful minority (i.e., land owners, merchants and the general wealthy) and their allegiance in the young Republic was occasionally questioned by the common public.<sup>23</sup> For that reason, conspiracy theories formerly reserved for those that still supported British rule during the revolution, were refurbished and adapted to the activities of attorneys after the formation of the republic.<sup>24</sup> “Critics [of attorneys] read sinister implications into the very idea of the lawyer-politician, charging that an inevitable conflict of interest must exist when the same men both made the laws and profited from their ambiguities in private legal practice.”<sup>25</sup> These exaggerated fears – which flowed from visions of an

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<sup>19</sup> FRIEDMAN, *supra* note 16, at 95.

<sup>20</sup> Hurst, *supra* note 16, at 249-52.

<sup>21</sup> *Id.*

<sup>22</sup> For further discussion on anti-lawyer sentiment in the early United States, see generally BLOOMFIELD, *supra* note 16, at 32-58.

<sup>23</sup> See BLOOMFIELD, *supra* note 16, at 32-58; see also Jason J. Kilborn, *Who's in Charge Here?: Putting Clients in Their Place*, 37 GA. L. REV. 1, 7 (2002).

<sup>24</sup> Of concern to the public at the time was that “lawyers seemed a counterrevolutionary force, blocking the emergence of a truly free republic by their adherence to prewar forms.” Of additional concern was “their rapid rise to positions of power within state and national government.” BLOOMFIELD, *supra* note 16, at 40-41.

<sup>25</sup> BLOOMFIELD, *supra* note 16 at 43.

unholy alliance between lawyers, judges and legislators – had some foundation in objective conditions.”<sup>26</sup> “Attorneys were profiting from the distress of the times through their heavy involvement in contract cases, debt collections, and land transactions, which made up the lion’s share of their practices.”<sup>27</sup> “Small wonder then that [the common public] felt trapped at times in a vast web of legal chicanery and denounced those that constructed it.”<sup>28</sup> Lawyers were the advocates for the new Republic, yet they were still distrusted based on their perceived dominance of the public when they needed representation and consultation. How could the general public embrace such dominance when just a few years back they were fighting a war for ideas of self-determination and respect for individual values against the English absolute monarchy?

## B. The Nineteenth Century

Lawyers of the mid-1800s were largely mentored and self-taught, worked in small firms or solo practice settings, and handled a wide range of business.<sup>29</sup> “[T]hey would ride circuits representing clients with disputes about stolen livestock in the morning and perform transactional work for the railroads, among the largest corporate clients of the time, in the afternoon.”<sup>30</sup> At the time, the system of

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 43-44.

<sup>29</sup> See JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 15 (1976) (“Practicing alone in a small town, [the country lawyer] prepared for his profession by reading Blackstone and Kent and by apprenticing himself to an established practitioner for whom he opened and cleaned the office, copied documents, and delivered papers.”).

<sup>30</sup> See *id.* (“An independent generalist, he served all comers, with no large fees to turn his head toward a favored few.”); William Hornsby, *Challenging the Academy to a Dual (Perspective): The Need to*

legal representation accepted, and even encouraged, legal representatives' control of the decisions of the parties they represented.<sup>31</sup> Written and unwritten norms of lawyer-client interaction at best ignored the client's interest in controlling her legal matters; at worst, they encouraged lawyers to substitute their moral or legal judgments for those of clients.<sup>32</sup> Most clients had little choice but to submit to the total guidance of their advocates.<sup>33</sup> Those who sought legal representation were in most instances relegated to handing over complete control to the legal expert and praying that the result obtained would suit them. At that time, lawyers did not have the ethical rules to follow or disciplinary procedures to face what lawyers of today have become so accustomed to.<sup>34</sup> The Nineteenth Century's influential voices on the subject of legal professional ethics advocated for authority and discretion in the lawyer's handling of a case.<sup>35</sup> For example, David

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*Embrace Lawyering for Personal Legal Services*, 70 MD. L. REV. 420, 421 (2011)

<sup>31</sup> Hornsby, *supra* note 36, at 421. *See also* FRIEDMAN, *supra* note 16, at 96-99; Kilborn, *supra* note 29, at 14-15.

<sup>32</sup> Kilborn, *supra* note 29, at 14-15 (discussion of how much of the legal system from English rule carried over to the United States as did the approach to legal practice totally detached from the client and focused instead on professional hierarchy and scientific discovery of a priori rules of law).

<sup>33</sup> *See* 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 30, available at [http://avalon.law.yale.edu/subject\\_menus/blackstone.asp](http://avalon.law.yale.edu/subject_menus/blackstone.asp). Blackstone's view was consistent with the developing professional ideology of the client's reliance on his counselor's independent judgment. EDWARD P. WEEKS, A TREATISE ON ATTORNEYS AND COUNSELLORS AT LAW 50 (1878) (it was clear that lawyers were not liable for failing to follow the client's instructions, as "[t]he conduct and control of the cause are left to him.")

<sup>34</sup> Hornsby, *supra* note 36, at 421; Kilborn, *supra* note 29, at 17.

<sup>35</sup> Kilborn, *supra* note 29, at 17-22. *See* DAVID HOFFMAN, A COURSE OF LEGAL STUDY, ADDRESSED TO STUDENTS AND THE PROFESSION

Hoffman, a lecturer at the University of Maryland who drafted a proposed list of fifty “Resolutions” for “professional deportment,” encouraged lawyers to act as a gatekeeper, controlling access to the legal system by standing as the sole judge of appropriate claims and defenses.<sup>36</sup> Similarly, George Sharswood, then a Dean and Professor at the University of Pennsylvania, a state court judge, and later a Chief Justice of the Pennsylvania Supreme Court, described attorneys as “the keeper of the conscience of the client” and the role of attorneys as one of guardians over clients.”<sup>37</sup> Edward Weeks, author of a work that “purported to be the first American treatise exhaustively treating ‘the law governing the attorney as an officer of the court and as the representative of his client,’”<sup>38</sup> claimed, “[T]he attorney has a very extensive authority, which springs mainly from his general retainer. He has the free and full control of a case, in its ordinary incidents, and as to those incidents is under no obligation to consult with his client.”<sup>39</sup> Weeks went so far as to advocate for the attorney to proceed in opposition to the client’s wishes because “the client has no right to control the attorney in the due and orderly conduct of a suit.”<sup>40</sup>

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GENERALLY 720, 752-75 (1836), *reprinted in* 31 A.B.A. REP. 717-35 (1907).

<sup>36</sup>Kilborn, *supra* note 29, at 17-18. *See* A.B.A. REP. at 720 (Resolution XIII).

<sup>37</sup> Kilborn, *supra* note 29, at 18-19; *see* GEORGE SHARSWOOD, COMPEND OF LECTURES ON THE AIMS AND DUTIES OF THE PROFESSION OF THE LAW DELIVERED BEFORE THE LAW CLASS OF THE UNIVERSITY OF PENNSYLVANIA (1854), *reprinted in* *An Essay on Professional Ethics*, 32 A.B.A. REP. 1 at 110-11 (1907). *See, e.g.,* WILLIAM ALLEN BUTLER, LAWYER AND CLIENT: THEIR RELATION, RIGHTS, AND DUTIES 15-16, 18 (1871); SAMUEL HABER, THE QUEST FOR AUTHORITY AND HONOR IN THE AMERICAN PROFESSIONS 1750-1900 85 (1991).

<sup>38</sup> Kilborn, *supra* note 29, at 19. *See* WEEKS, *supra* note 39, at 50.

<sup>39</sup> Kilborn, *supra* note 29, at 19 (citing WEEKS at 385).

<sup>40</sup> *Id.* at 20 (citing WEEKS at 387).

### C. The Twentieth Century

The Twentieth Century was a period of rapid social, economic, and political change. World population doubled between 1900 and 1970.<sup>41</sup> Greater connectivity, through automobile and airplane travel as well as the spread of technologies like the telephone (invented in the late 1800s)<sup>42</sup> and television (invented in the 1920s),<sup>43</sup> combined with widespread political upheaval (two World Wars) and economic changes (the Great Depression of the 1930s and the increased presence of women in the workplace during the World Wars) culminated in widespread social changes. Just as important, if not more influential, was the decreased divide between social classes, which brought more people into the mainstream.<sup>44</sup> Now, many of the new lawyers who

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<sup>41</sup> THE WORLD AT SIX BILLION, <https://www.un.org/esa/population/publications/sixbillion/sixbillion.htm>.

<sup>42</sup> See Stephen H. Cutcliffe & Terry S. Reynolds, *Technology in American Context*, in TECHNOLOGY AND AMERICAN HISTORY: A HISTORICAL ANTHOLOGY FROM TECHNOLOGY AND CULTURE 18 (Stephen H. Cutcliffe & Terry S. Reynolds, eds., 1997) (noting that a quarter million phones were in service within fifteen years of Alexander Graham Bell's 1876 patent for the telephone, but that the number grew exponentially when his patents expired so that by 1929, forty-two percent of American homes had phone service).

<sup>43</sup> ALEXANDER B. MAGOUN, TELEVISION: THE LIFE OF A TECHNOLOGY 15-37 (2007) (telling the stories of the invention of four different television systems). Like the telephone, it took another two decades of infrastructure and programming development before television was widely adopted by the American public. *Id.* at 39-76. It was not until 1941 that the Federal Communications Commission adopted a commercial standard for television. *Id.* at 40. However, America's entrance into World War II caused significant disruption in the availability of commercial television service. *Id.* at 76. Production of televisions resumed in 1946 after the War, and within a generation, ninety-five percent of Americans had a television receiver. *Id.* at 77-78.

<sup>44</sup> Kilborn, *supra* note 29, at 23. World War II brought a huge economic boon to the country and allowed more people to become middle/upper class. Women and African Americans also started to slowly lay the



were starting to experience the changes in the first half of the Twentieth Century were better able and more willing to empathize with their clients and respect their individuality. The seeds of social change that were planted in the first half of the Twentieth Century forced the practice of law and the standards governing client and lawyer interaction to recognize and embrace the individual as well as their choices.

If any specific year can be said to embody all these changes, that year is 1968. 1968 was such a remarkable year that multiple bibliographies have been written about it.<sup>45</sup> It was a year of revolution – “a spontaneous combustion of rebellious spirits around the world.”<sup>46</sup> “What was unique about 1968 was that people were rebelling over disparate issues and had in common only that desire to rebel, ideas about how to do it, a sense of alienation from the established order, and a profound distaste for authoritarianism in any form. . . . It was not planned and it was not organized.”<sup>47</sup> 1968 was the result of four historic factors – the civil rights movement, a generation that felt different and alienated, the near-universally hated Vietnam War, and television’s coming of age.<sup>48</sup> The year started with the Tet Offensive in Vietnam.<sup>49</sup> The year ended with the safe return to Earth of

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groundwork for the civil rights movement and stand for the belief that they were individuals and not to be ignored. People were starting to move from rural areas of the country into cities. For further discussion on the impact of the first half of the Twentieth Century. see Jason J. Kilborn, *Who's in Charge Here?: Putting Clients in Their Place*, 37 GA. L. REV. 1, 23 (2002).

<sup>45</sup> MARK KURLANSKY, *1968: THE YEAR THAT ROCKED THE WORLD* (2005); CHARLES KAISER, *1968 IN AMERICA: MUSIC, POLITICS, CHAOS, COUNTERCULTURE, AND THE SHAPING OF A GENERATION* (1997); MICHAEL KAUFMAN, *1968* (2009).

<sup>46</sup> KURLANSKY, *supra* note 51, at xvii.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at xviii.

<sup>49</sup> *Id.* at 1.

the Apollo 8 mission – the first American-manned mission to orbit the moon.<sup>50</sup> In between, Martin Luther King, Junior and Bobby Kennedy were assassinated, protestors rioted at the Democratic National Convention in Chicago, the Black Power movement gained momentum – visually illustrated when two black American athletes gave the Black Panther salute on the medal podium at the Olympics, and Richard Nixon was elected as the President of the United States.<sup>51</sup> The events of 1968 made it abundantly clear that we were living in a new world, a world in which the old models must be carefully examined – or perhaps just discarded outright as suspect – and new models, more reflective of the new realities, developed.

By the end of the 1960s, it was clear the world as we knew it was a changed place, and that the role of the lawyer had to be considered in light of these changes. It was in that context that in 1969 the ABA issued the first Model Code of Professional Responsibility that opens with the following lines:

The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and his capacity through reason for enlightened self-government. Law so grounded makes justice possible; for only through

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<sup>50</sup> THE APOLLO PROGRAM (1963 - 1972), <http://nssdc.gsfc.nasa.gov/planetary/lunar/apollo.html> (earlier missions orbited the Earth or were unmanned) (last visited April 15, 2012).

<sup>51</sup> KURLANSKY, *supra* note 51.

such law does the dignity of the individual attain respect and protection. Without it, individual rights become subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible.<sup>52</sup>

This recognition of the power, rights, and dignity of an individual's self-determination is a clear departure from the past role of the lawyer as the all-powerful gatekeeper and guardian, proceeding as the lawyer sees fit without regard to the client's wishes. This new belief can most certainly be attributable to the civil rights revolutions of the 1950s and 1960s, as the Bar recognized that lawyers no longer should maintain control of the individual.<sup>53</sup> This new belief of legal theory could be achieved only through an attorney-client relationship that respected individual dignity and each individual's capacity for autonomy.

## Part II. Attorney Client Models

Beginning in the 1970s after the new Model Code,<sup>54</sup> legal writers began analyzing various attorney-client relationship models. There has been a wide variety of nomenclature used to define these different attorney styles

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<sup>52</sup> REPORT OF THE SPECIAL COMMITTEE ON EVALUATION OF ETHICAL STANDARDS, 94 A.B.A. REP. 729, 731 (1969).

<sup>53</sup> See generally Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501, 513 (1990) (the civil rights movement of the 1950s and 1960s is a salient representative example of the rise of individual rights in the American social consciousness and "[r]ecognizing a person's autonomy is essential to according respect to that person; respect for autonomy is a cornerstone of liberal legal theory and of the American political system").

<sup>54</sup> Kilborn, *supra* note 29, at 36-37.

or types.<sup>55</sup> Further, there has been an array of models applied to different aspects of legal practice.<sup>56</sup> However, over the last several decades there seems to be three general types of attorneys that have been defined, discussed and compared, regardless of what labeling is used.<sup>57</sup> For the

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<sup>55</sup> Several books and articles have explored the place of lawyer/client relationship. See THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* 2 (1994); MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS' ETHICS* 60-62 (2d ed. 2002); DAVID A. BINDER, PAUL BERGMAN & SUSAN C. PRICE, *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 282-84 (1991); ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, *INTERVIEWING, COUNSELING, AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION* 334-38 (1990); Robert F. Cochran, Jr., John M.A. DiPippa, Martha M. Peters, "The Counselor-at-Law: A Collaborative Approach to Client Interviewing and Counseling" (2d ed. Matthew Bender & Co., Inc., of LexisNexis Group 2006); Robert F. Cochran, Jr., *Crime, Confession, and the Counselor-at-Law: Lessons From Dostoyevsky*, 35 HOUS. L. REV. 327 (1998); Jack L. Sammons, *Rank Strangers to Me: Shaffer and Cochran's Friendship Model of Moral Counseling in the Law Office*, 18 U. ARK. LITTLE ROCK L.J. 1 (1995); Thomas L. Shaffer & Robert F. Cochran, Jr., *Lawyers as Strangers and Friends: A Reply to Professor Sammons*, 18 U. ARK. LITTLE ROCK L.J. 69 (1995); Kimberly E. O'Leary, *When Context Matters: How to Choose an Appropriate Client Counseling Model*, 4 T.M. COOLEY J. PRAC. & CLINICAL L. 103 (2001).

<sup>56</sup> See generally Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 VA. L. REV. 1103, 1104 (1992) (focusing on the public interest); Rodney J. Uphoff & Peter B. Wood, *The Allocation of Decisionmaking Between Defense Counsel and Criminal Defendant: An Empirical Study of Attorney-Client Decisionmaking*, 47 U. KAN. L. REV. 1, 4 (1998) (focusing on criminal law); David Dana, *Environmental Lawyers and the Public Service Model of Lawyering*, 74 OR. L. REV. 57, 70 (1995) (focusing on environmental justice/environmental law); Kimberly E. O'Leary, *When Context Matters: How to Choose an Appropriate Client Counseling Model*, 4 T.M. COOLEY J. PRAC. & CLINICAL L. 103 (2001) (discussing different models for different areas of practice).

<sup>57</sup> Robert F. Cochran, Jr. et. al., *Symposium: Client Counseling and Moral Responsibility*, 30 PEPP. L. REV. 591, 593-602 (2003).

purposes of this section, I will focus on the broad but easily distinguishable attorney-client models most commonly referenced: the Authoritarian/Directive Model, the Collaborative Model and the Client-Centered Model.<sup>58</sup> For the most part these models have been applied to client interviewing and counseling skills,<sup>59</sup> but the same traits that guide an attorney's interviewing and counseling practice can also be applied to most aspects of client representation, including litigation. In this article I do not seek to duplicate the analyses of these models that have been done by many accomplished scholars. In fact, this article is not looking at these models so much for the purpose of framing the strategies used by different attorneys in individual client representation, but instead to use them for context in discussing the role of the attorney and the overall approach attorneys take in their entire practice.

#### A. Authoritarian Model

The Authoritarian or Directive Model is often also called the traditional model, as it is commonly-accepted as the model most ascribed to during the greater part of the American legal system.<sup>60</sup> Analyses of this approach can be found as early as the 1830s.<sup>61</sup> While clearly there were

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<sup>58</sup> See generally Robert F. Cochran, Jr., John M.A. DiPippa, Martha M. Peters, "The Counselor-at-Law: A Collaborative Approach to Client Interviewing and Counseling, Second Edition" (Matthew Bender & Co., Inc., of LexisNexis Group 2006).

<sup>59</sup> See generally DAVID A. BINDER, PAUL BERGMAN & SUSAN C. PRICE, LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH 282-84 (1991); Cochran, Jr. et al., "The Counselor-at-Law: A Collaborative Approach to Client Interviewing and Counseling."

<sup>60</sup> See Binder, *supra* note 59; Cochran, Jr., *supra* note 59, at 595.

<sup>61</sup> Cochran, Jr., *supra* note 59, at 595 (quoting David Hoffman, who in the 1830s drafted the first guidelines for American lawyers, said, "[the client] shall never make me a partner in his knavery." Judge George Sharswood said, "[i]t is in some measure the duty of counsel to be the keeper of the conscience of the client; not to suffer him, through the

nuances to employment of such a model specific to individual attorneys and/or their individual relationships with each client, the Authoritarian Model was the norm for a long time. In the Authoritarian Model the attorney is the central figure in the attorney-client relationship.<sup>62</sup> Quite simply and bluntly stated, the Authoritarian Model puts the lawyer fully in charge of the relationship between attorney and client. Under this model it is the clients' understanding that they should trust their lawyer(s) to act in their best interest.<sup>63</sup> As such the clients are expected to be docile and passive.<sup>64</sup> Further, clients are expected to be hands-off and lawyers are expected to be aggressive, decisive, and commanding.<sup>65</sup> In the often referenced and cited study of lawyers and clients, Douglas Rosenthal calls this the "traditional approach," in which he concludes "the traditional idea is that both parties are best served by the professionals assuming broad control over solutions to the problem brought by the client."<sup>66</sup> This old-fashioned

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influence of his feelings or interest, to do or say anything wrong . . . ." (HON. GEORGE SHARWOOD, AN ESSAY ON PROFESSIONAL ETHICS 110 (T & J.W. JOHNSON AND CO., 1876); Judge Clement Haynsworth put it, in a law school commencement address: "[T]he lawyer must never forget that he is the master. He is not there to do the client's bidding. It is for the lawyer to decide what is morally and legally right.

<sup>62</sup> Binder, *supra* note 59, at 17; Cochran, Jr. et al., "The Counselor-at-Law: A Collaborative Approach to Client Interviewing and Counseling" at 2.

<sup>63</sup> Binder, *supra* note 59, at 17; Cochran, Jr. et al. "The Counselor-at-Law: A Collaborative Approach to Client Interviewing and Counseling" at 2.

<sup>64</sup> Binder, *supra* note 59, at 17; Cochran, Jr. et al., "The Counselor-at-Law: A Collaborative Approach to Client Interviewing and Counseling" at 2-4.

<sup>65</sup> Binder, *supra* note 59, at 17; Cochran, Jr. et al., "The Counselor-at-Law: A Collaborative Approach to Client Interviewing and Counseling" at 2-4.

<sup>66</sup> DOUGLAS E. ROSENTHAL, "WHO'S IN CHARGE?" 7 (1974).

approach, even with the criticism it engenders, is alive and well in many areas of law.<sup>67</sup>

The motives for the Authoritarian Model are not difficult to recognize – clients are often vulnerable, troubled persons, they frequently lack a general understanding of the law, and they do not understand the procedure of the courts. Why would the client not put all his trust into his lawyer? This reality is further exacerbated by societal circles in which lawyers see themselves as members of the elite and better than the clients they are hired to serve.<sup>68</sup>

When these factors are present, it becomes easy for a lawyer to act paternalistically towards a client and deal with her not as an adult, but as a child, or perhaps a broken object to be fixed.<sup>69</sup> The lawyer through her actions treats the client “as though the client were an individual who needed to be looked after and controlled, and to have decisions made for him or her by the lawyer, with as little interference from the client as possible.”<sup>70</sup>

Critics of the Authoritarian Model indicate that this model assumes that “[l]awyers give adequate and effective service; [l]awyers are able to be disinterested and make objective decisions; [t]he solutions to legal problems are primarily technical; [o]rdinarily, there is a correct solution to a legal problem; and [l]awyers are experts in the technical information that is needed to arrive at the correct conclusion.”<sup>71</sup> Noted critical scholars of the Authoritarian

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<sup>67</sup> For additional discussion on the authoritarian model see David Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454 (1981); William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29 (1978).

<sup>68</sup> Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 18 (1975); Cochran, Jr., *supra* note 64, at 595..

<sup>69</sup> Wasserstrom, *supra* note 75, at 21..

<sup>70</sup> *Id.* at 22.

<sup>71</sup> Cochran, Jr. et al., “The Counselor-at-Law: A Collaborative Approach to Client Interviewing and Counseling” at 2-3 (citing

Model Robert Cochran, John DiPippa and Martha Peters identify four problems with the authoritarian approach.<sup>72</sup> First, it disregards the client's dignity.<sup>73</sup> The client should be in charge of the important decisions about her life, not a lawyer. Second, it is likely to be less satisfying for a client "because clients, in general, are likely to be the best judges of their own interests."<sup>74</sup> Only the client knows her values, goals and willingness to take risks.<sup>75</sup> Third, client control is likely to achieve better monetary results than the authoritarian model.<sup>76</sup> In their book, Cochran, DiPippa, and Peters note that Rosenthal's study found that "plaintiffs who are actively involved in their cases obtain higher settlements and higher verdicts than plaintiffs who allow their lawyers to control the representation."<sup>77</sup> Fourth and most importantly, the Authoritarian Model is contrary to the purpose of the Model Rules of Professional Conduct, which give the client the ultimate authority to decide the objectives of the representation.<sup>78</sup>

There are even bigger problems with the authoritarian approach. Under the Authoritarian Model,

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Douglas E. Rosenthal, *Lawyer and Client: Who's in Charge?* 169 (1974)).

<sup>72</sup>*Id.* at 3-4; see GERALD DWOMUN, *THE THEORY AND PRACTICE OF AUTONOMY* 110 (1988); IMMANUEL KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* 59, 67-68, 73. <--which edition of Kant?

<sup>73</sup> Cochran, Jr. et al., "The Counselor-at-Law: A Collaborative Approach to Client Interviewing and Counseling" at 3.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*; see Gary Bellow & Beatrice A. Moulton, *The Lawyering Process* 1055 (1978) and Geoffrey C. Hazard, *Ethics in the Practice of Law* 136-37 (1978).

<sup>76</sup> Cochran, Jr. et al., "The Counselor-at-Law: A Collaborative Approach to Client Interviewing and Counseling" at 4.

<sup>77</sup> *Id.* (citing Douglas E. Rosenthal, *Lawyer and Client: Who's in Charge?* 36-46 (1974)).

<sup>78</sup> MODEL RULES OF PROF'L CONDUCT R. 1.2 (2011); Cochran, Jr. et al., "The Counselor-at-Law: A Collaborative Approach to Client Interviewing and Counseling" at 2-3.



client problems are viewed as legal problems for which the lawyer provides legal solutions.<sup>79</sup> The lawyer pigeonholes clients' claims and concerns into legal elements without regard to clients' personal thoughts.<sup>80</sup> As a result, it is unlikely that an attorney and client will engage in a sufficient and thorough discussion of the professional and moral issues involved with the representation.<sup>81</sup> Feelings, emotions, morals, religious considerations, and concern for third-parties are all irrelevant.<sup>82</sup> There is little reason to raise moral issues if the lawyer views the client as a child, rather than an adult.<sup>83</sup> The client may feel as if their own thoughts, ideas or concerns cannot be voiced, and the lawyer may bracket their own moral and professional values.<sup>84</sup> As a result the authoritarian model for the attorney-client relationship is inconsistent with client dignity.

#### B. Client-Centered Model

After centuries of domination of the Authoritarian Model in legal representation throughout the world, including close to two centuries in the United States, in the mid-Twentieth Century the backlash against the legal profession resulted in the emergence of the Client-Centered Model.<sup>85</sup> The Client-Centered Model seeks to rectify the power imbalance inherent in and perpetuated by the Authoritarian Model by attempting to make the attorney subservient to the client.<sup>86</sup> At its extreme, the Client-

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<sup>79</sup> Binder, *supra* note 60, at 5, 17.

<sup>80</sup> *Id.* at 5, 17.

<sup>81</sup> *Id.* at 8, 17.

<sup>82</sup> *Id.* at 17.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> Cochran, Jr. et al., "The Counselor-at-Law: A Collaborative Approach to Client Interviewing and Counseling" at 4.

<sup>86</sup> *Id.*

Centered Model severely limits, or in fact completely removes, any input from the attorney's perspective.<sup>87</sup> Proponents of the Client-Centered Model assert that such a drastic shift is necessary to overcome the natural inclinations of the attorney to control the relationship and the goals of the representation and is the only way to achieve even a semblance of balance in the power between the attorney and the client.<sup>88</sup> In the Client-Centered Model the attorney is almost a mere facilitator in the problem-solving of the client. The job of the attorney is to make the client comfortable and aid the deepening of the client's involvement in identifying the problem, conceiving of and weighing solutions, and ultimately selecting strategies and tactics to achieve his or her own identified goal.<sup>89</sup>

As its name suggests, in the Client-Centered Model the client is indeed in the center of the relationship. An attorney who truly subscribes to the Client-Centered Model will utilize lawyering skills to help the client probe the issue and its desired outcome through lenses other than just the legal realm.<sup>90</sup> Other lenses can include looking at

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<sup>87</sup> See Donald G. Gifford, *The Synthesis of Legal Counseling and Negotiation Models: Preserving Client-Centered Advocacy in the Negotiation Context*, 34 UCLA L. REV. 811, 820-22 (1987) (describing how Binder and Price, the initial proponents of a client-centered approach, suggest the attorney go to great lengths to avoid stating an opinion, including carefully controlling demeanor when discussing options with a client and refraining from stating an opinion, even when directly asked to do so by the client).

<sup>88</sup> *Id.* at 817 (describing how early proponents of a client-centered model came from a legal services background and realized that lawyers representing indigent clients "frequently imposed their own values on their clients and dominated the clients during the counseling process."); Cochran, Jr. et al., "The Counselor-at-Law: A Collaborative Approach to Client Interviewing and Counseling" at 11-26 (discussing ways lawyers subconsciously dominate clients and control cases).

<sup>89</sup> Binder, *supra* note 60, at 5, 17.

<sup>90</sup> For example, see the extensive decision making process described in Cochran, Jr. et al., "The Counselor-at-Law: A Collaborative Approach to Client Interviewing and Counseling" at 135-66.

solutions that do not include traditional legal services and identifying all pros and cons of various solutions as they affect the client.<sup>91</sup> Critics of the Client-Centered Model significantly address two issues. One critique is the fear that the attorney will contort herself to such a degree, in an effort to escape even minute influence over the client's processing, that she may fail to provide to the client with the one thing that the client seeks an attorney: learned and experienced counsel.<sup>92</sup> The other dominant critique is that the Client-Centered Model, when employed at the extreme, may ignore not only the attorney's perspective, but also the perspective and consequences of any other person beyond the client.<sup>93</sup> For instance, the Client-Centered Model, when truthfully followed, prevents the attorney from playing the devil's advocate. The devil's advocate is less about the attorney's perspective and goals and more about posing perspectives and goals alternate to the initial inclinations of the client. Many attorneys believe that such role is necessary to in fact help the client reach true conclusions on his own goals, strategy, and tactics.<sup>94</sup> At first blush, the failure to include perspectives and consequences other than the client's may seem to fully embrace the bedrock principle of zealous representation of your client. However, as many notable critics have asserted, rare is the client who truly has no impact, as can be seen in the consequences of their decisions on others.<sup>95</sup>

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 6.

<sup>93</sup> *Id.* at 5.

<sup>94</sup> *Id.*

<sup>95</sup> Cochran, Jr. et al., "The Counselor-at-Law: A Collaborative Approach to Client Interviewing and Counseling" at 5.

### C. Collaborative Model

With the other client-attorney relationship models, one party dominates decisions, raising moral and professional concerns. Under the authoritarian approach, the lawyer controls such decisions; under the client-centered approach, the client controls such decisions. Under the Collaborative Model, “the client would control decisions, but the lawyer would structure the process and provide advice in a manner that is likely to yield wise decisions.”<sup>96</sup> “The Counselor-at-Law: A Collaborative Approach to Client Interviewing and Counseling,” an exceptional exploration of the Collaborative Model, quotes David Rosenthal, urging lawyers and clients to work towards “mutual participation in a cooperative relationship in which the cooperating parties have relatively equal status, are equally dependent, and are engaged in activity ‘that will be in some ways satisfying to both [parties].’”<sup>97</sup>

Critics like Cochran and his co-authors argue that the collaborative approach avoids the problems of the Authoritarian and Client-Centered Models.<sup>98</sup> As compared to the Authoritarian Model, the Collaborative Model upholds client dignity and yields better results.<sup>99</sup> The Collaborative Model is superior to the Client-Centered Model as well, because it encourages the client to consider not only her own self-interest, but also the interests of

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<sup>96</sup> *Id.* at 6.. For further discussion on the Collaborative Model see Cochran Jr., *supra* 64, at 598; Ascanio Piomelli, *The Democratic Roots of Collaborative Lawyering*, 12 CLINICAL L. REV. 541, 548 (2006).

<sup>97</sup> Cochran, Jr. et al., “The Counselor-at-Law: A Collaborative Approach to Client Interviewing and Counseling” at 7.

<sup>98</sup> *Id.* at 5-6; Cochran, Jr., *supra* note 64 at 597-98.

<sup>99</sup> Cochran, Jr. et al., “The Counselor-at-Law: A Collaborative Approach to Client Interviewing and Counseling” at 7; Cochran, Jr., *supra* note 64, at 597 -98.

others who might be affected by her decisions.<sup>100</sup> Since the Collaborative Model allows both parties to bring their practical wisdom to bear upon problems, it is likely to lead to better, more-informed decisions.<sup>101</sup>

Perhaps most importantly, the Collaborative Model allows lawyers and clients to engage in a moral dialogue. The lawyer is not the client's boss, but neither is she the client's hired gun. Each party is empowered to raise moral concerns. Cochran and his co-authors suggest analogizing the relationship between a lawyer and client to the relationship between friends.<sup>102</sup> This does not mean, of course, that lawyers must become friends with each and every client, but that lawyers might discuss moral issues with a client in the way that they would discuss moral issues with a friend – not imposing their values on the client, but exploring their clients' moral values, and not being afraid to influence their clients.<sup>103</sup>

A collaborative relationship is also like a friendship in that each party maintains moral accountability for her own actions within a context of mutual accountability to and for the other.<sup>104</sup> Neither party is the rubber stamp of

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<sup>100</sup> Cochran, Jr. et al., "The Counselor-at-Law: A Collaborative Approach to Client Interviewing and Counseling" at 7.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 8; Cochran, Jr., *supra* note 64, at 598.

<sup>103</sup> See Cochran, Jr., *supra* note 64, at 598; see Piomelli, *supra* note 103, at 599.

<sup>104</sup> Thomas D. Morgan, *Thinking About Lawyers as Counselors*, 42 FLA. L. REV. 439, 455-59 (1990) (arguing that lawyers should deal with clients as they would a good friend). Professor Charles Fried uses the analogy of the lawyer-as-friend for a quite different purpose. Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1066-67 (1976) (arguing that the lawyer-as-friend analogy explains why lawyers may do things for clients that ordinary morality would condemn). For a sharp criticism of Fried, see Edward A. Dauer & Arthur A. Leff, *Correspondence: The Lawyer as Friend*, 86 YALE L.J. 573 (1976).

the other.<sup>105</sup> When we go to a friend, we expect advice on what to do. We do not want to be preached at, and we do not want to be manipulated. We would not consider ourselves well advised, however, if our friends failed to consider the moral, as well as any other dimensions of our problem.<sup>106</sup> Lawyers should be free to give “the kind of candid, tough advice” that a friend would give.<sup>107</sup>

Some scholars have worried that the collaborative models might be a cloak for subtle manipulation and domination by the lawyer.<sup>108</sup> In many lawyer-client relationships, the lawyer is in the dominant position. The lawyer has the knowledge of the law and the trappings of power.<sup>109</sup> The lawyer in either situation may have to work to attain a level of mutuality with the client. To raise and discuss moral problems thoughtfully with another requires wisdom, a quality that comes in part with age and experience.<sup>110</sup> Further, we live in an individualistic age where we do not collaborate very well. That may be why each of the other models of client counseling identifies one of the parties to the relationship as the party in charge. Moral counsel also requires time, a scarce commodity in the hourly billing-driven practice of the corporate lawyer or the heavy case-load practice of the legal aid lawyer.

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<sup>105</sup> Cochran, Jr., *supra* note 64, at 598.

<sup>106</sup> Morgan, *supra* note 105.

<sup>107</sup> *Id.* at 457.

<sup>108</sup> Professor Jack Sammons objects to the friendship model, doubting that lawyers and clients share sufficient common moral values. Schaffer and Cochran admit, “There is a danger that the lawyer will err either on the side of imposing her values or on the side of ignoring moral values. Developing the ability, the skill, to initiate and carry on such conversations without imposition is a challenge.” Thomas L. Shaffer & Robert F. Cochran, Jr. *supra* note 55 at 83.

<sup>109</sup> There are other ways that domination could occur – age, status, sex, etc.

<sup>110</sup> Cochran, *supra* note 64, at 598.

#### D. Analysis of the Three Models Throughout Time

One purpose to including these three models of attorney-client relationships is to evaluate their rise and fall in the context of history and public satisfaction levels of attorneys. As previously discussed, since the dawn of the legal system in the ancient Greek empire, the predominant model of legal representation has been the Authoritarian Model.<sup>111</sup> Similarly, even in the early United States, when the chief goal of the colonists was freedom from an oppressive elite, consisting in large part of those in the judicial system, the colonists still established a new legal system that was based on this elitism. Both with respect to the status in society of those who were part of the judicial system, and to the roles that they adopted in the way that they employed their profession – that the lawyer knows best, a commoner is not smart enough, the well-educated and affluent are inherently more moral and capable of making such judgments – this elitism is the dominant theme throughout the United States legal system.

Throughout the history of both the legal system in the world as well as that in the United States, we have seen significant times of dissatisfaction, distrust, and even hostility towards the elite. It is during these time periods that shifts in the role of the attorney in representing clients are made. In some instances, that shift manifests itself as reluctance to engage in such a relationship (i.e., people do not hire lawyers). In other times, the shift is actually the dynamic between the attorney and the client and in its extreme, results in the employment of one of the other two models. It should be of no shock to anyone that the Client-Centered Model found its first great acceptance during the mid-to-three quarters Twentieth Century, when the distrust of the legal system and the political system in general, by a public scarred by things like the Vietnam War, Watergate,

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<sup>111</sup> Cochran, *supra* note 59.

and even the economic recession of the 1970s, were at an all time high.

Not only is the time period indicative of the rise of the Client-Centered Model, but the location of its birth is also.. The Client-Centered Model was largely birthed from those in legal representation of the poor. It is fair to say that the harsh realities of the imbalance of power in the Authoritarian Model are likely felt no greater than by those in such circumstances. It is also worth noting that the client-centered mentality was likely to find a receptive audience in the legal services attorneys of this time, who were often elite white men troubled by disparate representation who wanted to use their privilege to serve those less fortunate. That desire was a natural outcome of the turmoil of the 1960s and 70s. As is often the case, when you have a problem of such significance that has been entrenched for so long, a dramatic about-face is necessary to achieve any change. The Client-Centered Model represented a dramatic change from the long history of authoritarianism and the systemic problems it brought.

After time and change occurs from the dramatic shift, the pendulum often swings back. How far it swings back is often dependent on the negative impacts of the original model and the negative and positive impacts of the first dramatic shift. And so the Collaborative Model was born. Most would characterize the Collaborative Model as envisioned by its original scholars as a move back toward the Authoritarian Model while remaining closer to the envisioned Client-Centered Model.

This article focuses its evaluation of the models at their extremes to fully capture the impacts. However, I acknowledge and would caution all readers to recognize that in fact, the proponents of each model tend to see the models in shades of grey, or, if you will, as a spectrum by which even individual attorneys identifying themselves strongly with one or another model in fact embrace and



utilize very different methods, principles, and strategies. However, interestingly enough, the critics of each of the models historically have almost without fail approached their criticisms on the other models as exemplified by the extreme. I myself have utilized this approach in the critiques espoused in the previous section but would be remiss to not acknowledge the tendency for analytical, learning or other purposes to draw generalizations about those employing each of the models.

For the most part, the analysis of the three models in this article is meant only as a backdrop to discuss that although we have spent significant time analyzing different attorney-client relationship models, that such analysis has largely focused on the interviewing and counseling aspect of that relationship. And yet, using this same language and framework we could further analyze other aspects of legal practice. It is with this in mind, that they are included here.

Further, although some have sought to evaluate or categorize other legal practice, including litigation, into these same or similar models, little has been done to evaluate the effect of the attorney-client relationship and an individual attorney's selected approach to this relationship on attorneys' overall practice and their ability to obtain and retain clients. The same is true for law schools' efforts to properly prepare new attorneys to adequately represent their clients.

This article asserts that there are lessons to be learned by viewing the deployment of all three attorney client counseling models throughout history and by utilizing the themes of both the proponents and the critics of all three models in evaluating the choices to be made regarding the role that an attorney, and the impacts and consequences of such a choice to the attorney, his or her practice, the client, the entire Bar, and society as a whole. To be clear, this article does not seek to solve all of these problems, but instead seeks to begin a new dialogue

regarding the attorney-client relationship. By focusing more on the role of the attorney, we may seek better ways to practice law, represent our clients, and train our students.

Regardless of with which model an individual attorney may identify, the utility of such identification is limited when applying it to one's practice as a whole. For purposes of teaching through the academy or even in professional trainings on interviewing and counseling techniques, the models continue to maintain significant benefit, but rarely do we see the effects of employing one model over another to one's practice as a whole. Often, different clients and different issues require different dynamics.

### Part III. Community Lawyering

To add information where the above models most commonly attributed to interviewing and counseling have not been widely considered - assessing the attorney-client relationship to one's practice as a whole - it may also be beneficial to look at efforts to categorize different approaches to serving a particular client-base. To bring that added dynamic, this article will look at some of the writings regarding models of community lawyering.

The term "community lawyering" has been used for years to define the practice of law in underrepresented communities.<sup>112</sup> In the last decade or so, the term has taken on significant definition and meaning in the context of law school clinics who often define themselves as community lawyering clinics.<sup>113</sup> This by no means is meant to say that only law school clinics are performing community lawyering. Community lawyering can also be found in

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<sup>112</sup> Juliet M. Brodie, *Little Cases on the Middle Ground: Teaching Social Justice Lawyering in Neighborhood-Based Community Lawyering Clinics*, 15 CLINICAL L. REV. 333, 339 (2009).

<sup>113</sup> *Id.* at 333-34.

legal services and other nonprofit legal entities. Like any other terminology, proponents of community lawyering each have their own nuances in the description of their practice, but consistently define the betterment of “the community” among their goals.<sup>114</sup> Historically, different models of community lawyering have included: the civil legal aid model, the impact litigation model, the social-rescue model, and the movement or political lawyering model.<sup>115</sup> Regardless of the model, all community lawyering seeks social justice.<sup>116</sup> The civil legal aid model is based on high volume work, essentially subscribing to the fact that 1. if there were enough lawyers, all individuals could be served and 2. that individual service can achieve social justice if all needs are met.<sup>117</sup>

In the impact-litigation model, lawyers focus on systemic changes, class actions and other representation that can affect the greatest number of people to the greatest possible degree.<sup>118</sup> In the social-rescue model, lawyers team with other professionals to cure the failure of social services including but not limited to legal services.<sup>119</sup> Through the movement or political lawyering model, attorneys focus on building the power of communities to challenge and remove societal inequities.<sup>120</sup> While all of the above community lawyering models are still employed today, most have embraced some aspect of the political or movement lawyering model, resulting in stronger

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<sup>114</sup> *Id.* at 342.

<sup>115</sup> Joseph Phelan, *Purvi & Chuck: Community Lawyering*, ORGANIZING UPGRADE (June 1, 2010).

<sup>116</sup> Brodie, *supra* note 119, at 343.

<sup>117</sup> See Phelan, *supra* note

122; <http://www.organizingupgrade.com/2010/06/social-justice-lawyering/http://www.organizingupgrade.com/2010/06/social-justice-lawyering/> Brodie, *supra* note 119, at 347-48.

<sup>118</sup> Phelan, *supra* note 122.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

connections with the community clients, greater collaborations with non-lawyers, and a focus on community empowerment. In a 2009 survey of law school clinics who self-describe themselves as community-lawyering clinics all agreed on three tenets: prioritizing social justice in their mission, defining their client as a community – “a member of some socially cognizable and systemically disadvantaged group,” and providing a broad range of services both substantively and tactically.<sup>121</sup> Some community lawyering advocates have defined these common themes as the answers to three questions: Who do you work with? What do you do for them? And how do you work together?<sup>122</sup>

Prior to the emergence of the community lawyering movement, public interest attorneys probed these same questions. In the context of environmental justice lawyering, the practice of representing clients dealing with disproportionate impacts of pollution and disease, no scholar was as prolific and as prophetic as Luke Cole.<sup>123</sup> Cole’s practice and writing involved the merging of civil rights, poverty, and environmental law.<sup>124</sup> In his article, *Macho Law Brains, Public Citizens, and Grassroots Activists: Three Models of Environmental Advocacy*, Cole

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<sup>121</sup> Brodie, *supra* note 119, at 342-45.

<sup>122</sup> Phelan, *supra* note 122.

<sup>123</sup> Luke Cole was killed in a car accident in 2009, while on vacation in Uganda. Michael Taylor, *Luke Cole – Environmental Justice Lawyer – Dies*, SFGATE, June 9, 2009, available at [http://articles.sfgate.com/2009-06-09/bay-area/17209219\\_1\\_environmental-law-environmental-justice-mr-cole](http://articles.sfgate.com/2009-06-09/bay-area/17209219_1_environmental-law-environmental-justice-mr-cole). The author cannot overstate the impact that Mr. Cole has had on her legal career.

<sup>124</sup> Mr. Cole co-founded both the Center for Race, Poverty and the Environment (a nonprofit law firm) and the journal *Race, Poverty, and the Environment*. *Our Founders*, CENTER ON RACE, POVERTY & THE ENVIRONMENT, [http://www.crpe-ej.org/crpe/index.php?option=com\\_content&view=article&id=153&Itemid=121](http://www.crpe-ej.org/crpe/index.php?option=com_content&view=article&id=153&Itemid=121) (last visited Apr. 14, 2012).

discusses a community environmental justice battle in three different approaches: the professional, the participatory, and the power model.<sup>125</sup> Through the lens of each of these models, he explores different options for clients, significantly different roles for the attorney, and vastly different relationships between the attorney and the client.<sup>126</sup> The professional model is most akin to the Authoritarian Model discussed previously. The lawyer is the center of the relationship. He is the one in control, who dominates the relationship and who makes the decisions. In the professional model, it is presumed that the clients come to the attorney for his skills, experience, and knowledge of the legal system, that the desired service is that of litigation, and that the attorney is well-situated to utilize the legal system to achieve the client's goals.<sup>127</sup> However, much like the Authoritarian Model, critics of the professional model, including Cole himself, believe that the domination by the attorney puts at risk the true desires of the client and acts to further divide lay people and the professional bar.<sup>128</sup>

In the participatory model, the clients play a more active role and, although they are less subservient to the attorney, they remain subservient to the legal process.<sup>129</sup> The participatory model, as its name indicates, is where the attorney educates the client on opportunities to participate in decision-making.<sup>130</sup> In some areas of law, like environmental justice, where decisions are made through judicial, legislative, quasi-judicial, and administrative processes, points of entry for potentially affected people

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<sup>125</sup> Luke W. Cole, *Macho Law Brains, Public Citizens, and Grassroots Activists: Three Models of Environmental Advocacy*, 14 VA. ENVTL. L.J. 687 (1995).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 693.

<sup>128</sup> *Id.* at 703-04.

<sup>129</sup> *Id.* at 705-07.

<sup>130</sup> *Id.* at 705.

(i.e., clients) to participate can be significant. In employing the participatory model, the attorney's primary function is to identify these opportunities and to assure participation by the clients, either directly or via the attorney herself.<sup>131</sup>

Much like other models we have looked at today, there is a spectrum of employing the participatory model, which in some instances results in comment, advocacy, testimony, and/or representation of the client's interests via the attorney and at the other end involves the attorney educating, training, and empowering the clients to comment, advocate, testify, and/or represent themselves.<sup>132</sup> In the participatory model, it may also be possible for the attorney to do both, resulting in direct participation by the clients but also participation by the attorney in a representative capacity.<sup>133</sup> Many areas of substantive law, like environmental administrative law, including but not limited to environmental law, are heavily reliant on these participatory processes. In fact, legal standing can be predicated upon such participation.<sup>134</sup> For instance, often in a land use context, lower level decision-making is done by local elected government bodies. Decisions of that body are often challengeable to Article III Courts, but failure to participate before the elected body can result in impediments, or in some instances in fact preclusion, from the ability to get Article III standing.<sup>135</sup> The critics of the participatory model are often steeped in areas of law that are heavily administrative in nature, hence the Catch-22: it is these administrative processes and administrative rights that provide the opportunity for such participation but which often, when they finally make it to the judicial

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<sup>131</sup> Cole, *supra* note 132, at 705..

<sup>132</sup> *Id.* at 705-06.

<sup>133</sup> *Id.* at 709.

<sup>134</sup> *Id.*

<sup>135</sup> For example, Florida's Administrative Procedure Act provides, "A party who is adversely affected by final agency action is entitled to judicial review." FLA. ST. ANN. § 120.68(1) (West 2011).

system, involve exceptionally high standards or burdens of proof, including things such as agency deferential standards.<sup>136</sup> Such standards often make victory in an Article III Court extremely difficult and offend the average person's sense of fairness and justice. Clients invest time, energy, and money in going through the motions of these participatory options and at the end of the day feel let down or like it was all for nothing.<sup>137</sup>

In essence, the greatest critique of the participatory model is that it disempowers communities and individuals because of the low likelihood of victory. It is the challenges identified above with the professional and the participatory models which led Cole and others to advocate for the power model.<sup>138</sup> In the power model, the attorneys and clients accept that the system is flawed or fixed, that the ability to succeed in court or through other legal or government decision-making tribunals is unlikely, and that when disenfranchised people spend energy pursuing either option that the failures do not serve to strengthen the resolve of the communities but instead to further disempower them.<sup>139</sup> In the power model, the key is power and the role of the attorney is to help the clients get that power.<sup>140</sup> Often this involves not advocating for or against a particular issue, but instead advocating for a change in the system and/or those making the decisions.<sup>141</sup>

Supporters of the power model believe that employing this model leads to empowerment of disenfranchised communities, and such empowerment leads to societal changes in a way that betters the quality of life

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<sup>136</sup> Cole, *supra* note 132, at 702-03.

<sup>137</sup> *Id.* at 707.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 697-98.

<sup>140</sup> *Id.* at 701-02. See David H. Harris, Jr., *Farm Land, Hog Operations and Environmental Justice*, RACE, POVERTY & ENV'T 31, 32-33 (Fall 1994-Winter 1995).

<sup>141</sup> Cole, *supra* note 132 at 698-99.

beyond a single issue.<sup>142</sup> Critics of the power model focus on the fact that failing to participate and avail themselves of legal representation, in whatever decision-making venues exist, guarantees that the communities will lose important battles. One example critics might give of the consequences of this model might be a community failing to testify on a zoning change, which could result in another polluting factory in your neighborhood, and will assure that that factory is built. Further, failing to challenge the air permit associated with the factory with an experienced, knowledgeable attorney in court will also assure that the factory is built and that it will be poorly regulated.<sup>143</sup>

Other critics of the power model assert that the goal is too lofty and that much like criticisms of the other two models, the systems and decision-makers in the power model are also fixed and may not result in improved societal changes.<sup>144</sup> For instance, you convince the local community leader to run for the seat on the local government body who makes the sitting decisions, only to find that the one vote does not preclude the sitting of yet another factory in your neighborhood, or due to campaign corruption, the once local community leader becomes a politician beholden to those who put and who will keep him in office.<sup>145</sup> Even in these early writings, Cole himself seems to imply that a combination of models is often necessary in environmental justice representation, although his disdain for the professional model is thinly veiled.<sup>146</sup>

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<sup>142</sup> *Id.* at 708; *See Harris, supra* note 147, at 32-33; Matthew Chachere, “*What’s Intent Got to Do With It?*”, *RACE, POVERTY & ENV’T* 42, 42-43 (Fall 1994-Winter 1995).

<sup>143</sup> *See Cole, supra* note 132, at 702-03.

<sup>144</sup> *Id.* at 701.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 708-09 (calling the professional model “a waste of time from the perspective of the community” and the participatory and power models “complementary”); *see* Richard Toshiyuki Drury & Flora Chu,



Part IV. The Legal System Today: Do We Value  
the Attorney-Client Relationship?

Two common themes of community lawyering analyses are the need for the attorney to provide problem-solving services and the need for equity and balance between the attorney and client, within the attorney-client relationship.<sup>147</sup> The question is: Are our current configurations of legal practice conducive to achieving those goals?

It is not very conducive to achieving either of these goals. In fact, our legal practice has become more and more specialized over the last several decades, resulting in artificial boxes being imposed on clients' problems. Essentially, when a client walks in the door the question posed to the attorney is: Can you take my case? More often than not, both the client and the attorney want the answer to be yes. Unfortunately, the question translates to the attorney as: Can I perform a legal service which might address your issue? The type of legal services the attorney offers is the artificial box into which the client's problem must then fit. Perhaps compounding the problem is that we all want to fit into the skinny jeans and we come up with extensive contortion and rationalization just to make it happen, when in fact we should just go buy a new pair. By relegating the client's problem immediately into whatever box defines one's practice at the outset, one often precludes potential solutions. Further, the limitations on solutions also lend to the imbalance of power between the attorney and the client.

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*From White Knight Lawyers to Community Organizers*, 5 RACE, POVERTY & ENV'T 52, (Fall 1994-Winter 1995).

<sup>147</sup> See Gifford, *supra* note 94, at 812-13; Dinerstein, *supra* note 59, at 600; see also R. FISHER & W. URY, GETTING TO YES: NEGOTIATING AGREEMENTS WITHOUT GIVING IN (Houghton Mifflin ed.1981); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 758 (1984).

To further the skinny jean analogy, if you find you do not fit into one pair and go back to the rack, you end up discovering that there is a disproportionate number of size 2s on the rack.<sup>148</sup> Essentially, impediments in the legal system result in attorneys focusing significantly on the same type of services. For instance, attorney's fees provisions and contingency fee arrangements, while intending to create more access to legal services, may be unintentionally pushing solutions towards litigation where such fee arrangements are permissible.

When the real answer is that we do not need another pair of jeans but maybe some cords, or that we just need to look through our closet for something else to wear, the problem is that we as attorneys often do not get paid if we point clients to those other choices. So, can we be trusted to fully evaluate those options? As discussed above, attorney's fees provisions and contingency fee arrangements may be leading attorneys to recommend and select litigation solutions. Is this consistent with what we want to promote? Much of the critique of attorneys and the legal system revolves around this perception of a "litigious society"; yet, we find ways to compensate attorneys only if they actually bring and win litigation. Additionally, in contingency fee arrangements, we actually allow the percentage of fees to increase at the point of litigation. To be clear, I do not assert that attorney's fees provisions or contingency fee arrangements should be done away with, as they have been shown to offer some greater access to those underrepresented, but we should be considering how we can incentivize attorneys to explore other options.

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<sup>148</sup> Yes, I know that I may have just lost the entire male portion of the legal profession with my chosen analogy, but let's be honest, attorneys are the most vain people on Earth. So, despite the initial protest, I am confident that most of you men are fully aware of what I am talking about.

The discussion above focused on service or tactical limitations in practice, but the trend towards greater specialization in substantive practice areas may also have unintended consequences. The goal of developing a substantive specialization is to demonstrate expertise, which will provoke confidence in clients who desire services on a particular issue. However, implicit in this is a predicate that the client knows what the substantive issue is when she comes to see the attorney. Does such specialization also result in predetermined limitations regarding solutions? For instance, if I am a public interest environmental law attorney working at a nonprofit, am I more likely to force the client's issue into an environmental law enforcement claim over a tort claim? I would assert that in most instances the answer is yes. Further, if there are claims under multiple environmental statutes and my client is a nonprofit or an indigent individual or a low income community, do claims with attorney's fees provisions climb to the top of the list, and if so, at what expense? Related to this, what if the alternative is to say no to the client, who may receive no legal assistance? If the nonprofit is dependent on private donations from individuals and foundations, as well as attorney's fees recovery, is an alternative choice to litigation more acceptable? The concepts I am proposing are not exactly radical. In fact, many would argue that these concepts are what we as attorneys, to some degree individually but even more so as a whole, are supposed to be following. One only needs to look to the rules of professional conduct to find that attorneys are not supposed to go down an assembly line and pick (1) litigation or transactional law, or (2) substantive specialization to define the types of cases we could take. In fact, the choices in one are only the tip of the iceberg when you look at the roles that the rules anticipate the attorney playing.

## Part V. Professional Regulation

In the Model Rules of Professional Conduct, Rule 2.0 addresses issues related to the attorney as Counselor and Rule Three issues related to the attorney as Advocate.<sup>149</sup> The roles of the attorney, however, are more expansively defined under both of these rules as well as others. Under Rule 2.0, the sub-rules envision attorneys functioning as an advisor to a client<sup>150</sup> or as a third party neutral.<sup>151</sup> Under Rule 3.0, the conduct of the attorney as an advocate, predominantly in the litigation context, is addressed. However, Rule 3.0 also talks directly about the attorney functioning as an advocate in a non-adjudicative proceeding, specifically citing to client representation before a legislative body or an administrative agency.<sup>152</sup> Also under Rule 3.0, and more specifically in Rule 3.5, the conduct of the attorney before a “tribunal” is regulated.<sup>153</sup> The language beneath is more expansive than just referring to a judge or jury, also including “other officials.”<sup>154</sup> In the definition section Rule 1.0, “tribunal” is defined as “a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity.”<sup>155</sup> Again, this definition makes clear that the Model Rules envision attorneys functioning in capacities other than just that of a courtroom litigator. Similarly, Rule 3.3, entitled “Candor Toward the Tribunal,” emphasizes duties on all attorneys representing clients before any of these tribunals.<sup>156</sup> And Rule 4.1

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<sup>149</sup> MODEL RULES OF PROF’L CONDUCT R. 2.1, 3.1 (2004).

<sup>150</sup> MODEL RULES OF PROF’L CONDUCT R. 2.1 (2004).

<sup>151</sup> MODEL RULES OF PROF’L CONDUCT R. 2.4 (2004).

<sup>152</sup> MODEL RULES OF PROF’L CONDUCT R. 3.9 (2004).

<sup>153</sup> MODEL RULES OF PROF’L CONDUCT R. 3.5 (2004).

<sup>154</sup> MODEL RULES OF PROF’L CONDUCT R. 3.5(a) (2004).

<sup>155</sup> MODEL RULES OF PROF’L CONDUCT R. 1.0(m) (2004).

<sup>156</sup> MODEL RULES OF PROF’L CONDUCT R. 3.3 (2004).

requires “truthfulness in statements to others” from attorneys regardless of what role they are serving.<sup>157</sup>

Likewise, in many state rules regulating attorneys, the same widely-defined roles are seen. In the Rules Regulating the Florida Bar, at least six roles are defined for attorneys: advocate,<sup>158</sup> third-party neutral,<sup>159</sup> adviser,<sup>160</sup> representative before a non-adjudicative tribunal,<sup>161</sup> person providing legally-related services,<sup>162</sup> and person providing non-legal services.<sup>163</sup> Additionally, other provisions in the Rules Regulating the Florida Bar demonstrate expectations of broader roles through the expansive language. In Rule 4-3.3, entitled “Candor Towards the Tribunal,” the rules do not say “candor towards the court,” clearly indicating that the attorney may be involved in a representative capacity in some other forum.<sup>164</sup> Even more telling is that the rules apply not to an attorney delivering legal services, but in fact to the attorney’s behavior regardless of whether the attorney is functioning in a legal capacity at that moment.<sup>165</sup> In looking at these rules, I am acutely aware of that cocktail party “fact,” which states that we only actually use about ten percent of our brain.<sup>166</sup> Is that what we are doing when we only offer clients one solution to their legal problems?

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<sup>157</sup> MODEL RULES OF PROF’L CONDUCT R. 4.1 (2004).

<sup>158</sup> FLA. RULES OF PROF’L CONDUCT R. 4-3 (2006).

<sup>159</sup> FLA. RULES OF PROF’L CONDUCT R. 4-2.4 (2006).

<sup>160</sup> FLA. RULES OF PROF’L CONDUCT R. 4-2.1 (2006).

<sup>161</sup> FLA. RULES OF PROF’L CONDUCT R. 4-3.9 (2006).

<sup>162</sup> FLA. RULES OF PROF’L CONDUCT R. 4-5.7(a) (2006).

<sup>163</sup> FLA. RULES OF PROF’L CONDUCT R. 4-5.7(b) (2006).

<sup>164</sup> FLA. RULES OF PROF’L CONDUCT R. 4-3.3 (2006).

<sup>165</sup> FLA. RULES OF PROF’L CONDUCT R. 4-5.7 (2006).

<sup>166</sup> This supposed fact is “so wrong it is laughable” according to neurologist Barry Gordon. Robynne Boyd, *Do People Only Use 10 Percent of Their Brains?*, SCI. AM., Feb. 7, 2008, available at <http://www.scientificamerican.com/article.cfm?id=people-only-use-10-percent-of-brain>.

Beyond these clear notions of expansive roles for the attorney, the ethical rules also speak to the way the attorney-client relationship should be conducted. As a professor, every semester when discussing the various models of attorney-client relationships, at least one of my students will ask how the Authoritarian Model complies with various ethical rules. Most notably, students question compliance with Rule 1.2(a), which requires the lawyer to “abide by a client’s decisions concerning the objectives of representation and . . . consult with the client as to the means by which they are to be pursued,” and Rule 1.4(a)(1), which requires the lawyer to “reasonably consult with the client about the means by which the client’s objectives are to be accomplished.”<sup>167</sup> Similarly, students question how an attorney employing the Client-Centered Model, at its extreme, allows a lawyer to zealously represent his or her client as required by the Model Rules if at the protection of client control a lawyer’s ability to pursue the best legal solution is undermined. Other students believe that the Collaborative Model’s insistence on making the client evaluate the impacts of their decisions on others may run afoul of the duty to zealously represent one’s client. Aren’t these the same allegations made by clients when they seek redress for what they perceive as poor legal representation? What should that be saying to us? And what should we do about it?

#### Part VI. Conclusion: Where do we go from here?

Part of this article is to try to help us figure out how we got here, and then to pose two questions: Do we like where we are? And if not, What do we intend to do about it? In researching this article, I have at least attempted to answer these questions for herself and to elicit greater

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<sup>167</sup> MODEL RULES OF PROF’L CONDUCT R. 1.2(a) (2004); MODEL RULES OF PROF’L CONDUCT R. 1.4(a)(2) (2004).

dialogue from others.<sup>168</sup> For me, the answer to the first question is no, but the second question is not for any one individual to answer. I do, however, posit that a place to start is in legal education. I further assert that the focus of this legal education should be more about the importance of the attorney-client relationship and defining the role the attorney can play. When looking at attorney satisfaction surveys, those clients most happy with their attorneys are the ones who win.<sup>169</sup> However, for those who are happy with their attorneys even when they do not win, the reasoning is often routed in a positive, respectful and sympathetic relationship with their attorney.<sup>170</sup> To be clear, by no means am I saying that as long as you are a nice guy your clients will never care if you win. I am saying that if clients feel ownership in the decisions made in their cases, feel like they truly understand the consequences and risks of their choices, and feel like they understand the potential outcomes of their choices – that in the end, they can own the outcome. I further posit that if we teach law students more about the importance and the impact of the attorney-client relationship, we will help them make more educated, value-laden choices in their practice.

To teach law students these things, coursework should draw from the lessons of the attorney interviewing and counseling models and the tactics employed to foster client participation, as well as from the lessons of the community lawyering movement and practice models, such as those defined by Cole. Additionally, skills classes which provide the opportunity for students to employ such lessons are a critical component.

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<sup>168</sup> And, as quite a few colleagues have pointed out, to set the stage for needed empirical research.

<sup>169</sup> Cochran, Jr., *supra* note 65, at 4. See Douglas E. Rosenthal, *Lawyer and Client: Who's in Charge* (1974).

<sup>170</sup> *Id.* See also DAVID A. BINDER, PAUL BERGMAN & SUSAN C. PRICE, *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 282-84 (1991).

However, in addition to giving them the opportunity to practice lawyering skills, we must give them the experience of observing and managing the attorney client relationship. In the last decade or so, medical schools have recognized that curriculum that addresses “the bedside manner” are critical to both success as a doctor and the reputation for the medical profession as a whole.<sup>171</sup> Patients treated respectfully are often less likely to sue for malpractice.<sup>172</sup> Isn’t this telling us something?

However, skills education is not the full picture of how to integrate these issues into legal education. In the doctrinal context we should consider ways to humanize the cases. Without identifying the human dynamics between clients and attorneys, the case study is limited in its ability to address these issues. One way to do this is to talk more about what took place before the appellate opinion. How often have we as professors teaching doctrine heard students brief a case by telling us the arguments of the plaintiffs and the defendants? Yet, what tools and information have we given them to determine what those arguments are? Do your students, like mine, not ask you questions about why the plaintiffs did not argue X or why the defense did not refute plaintiff’s Y argument? When you get these questions, does not it drive home the fact that we are limiting the students’ perspectives on what actually happened in the case? The appellate opinion in actuality tells us only what the court thinks the arguments are, but we seem to gloss over that fact too often. In a similar vein, how many times have you as a trial attorney read an

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<sup>171</sup> Pauline W. Chen, M.D., *The Hidden Curriculum of Medical School*, N.Y. TIMES, Jan. 29, 2009, available at <http://www.nytimes.com/2009/01/30/health/29chen.html>.

<sup>172</sup> Beth Huntington & Nettie Kuhn, *Communication Gaffes: A Root Cause of Malpractice Claims*, CBS INTERACTIVE BUSINESS NETWORK RESOURCE LIBRARY, available at [http://findarticles.com/p/articles/mi\\_6802/is\\_2\\_16/ai\\_n28172966/?tag=content;coll](http://findarticles.com/p/articles/mi_6802/is_2_16/ai_n28172966/?tag=content;coll).



opinion only to think either the court missed the boat on your argument or characterized it in a way so as to justify the end result? Is it not in our students' best interest to help them see the path from the complaint to the opinion or at least to acknowledge the limitation by not looking backward?

As indicated above, I do not pretend to have all of the answers, or even to assert that my answers within this article are the correct ones. What I do know is that we need to talk more about this. In retrospect, I found that when talking to others about this article, I kept saying that my "hypothesis" is that we as individual attorneys and as a collective profession need to shift the system to promote a more problem-solving role for attorneys with less predisposed solutions and which partners more with our clients. Essentially, I think the crux of the conversation is the role of the attorney and the combined role of attorneys – both in what we do as well as how we do it.

Stepping away from the substance of my "hypothesis," I think the nomenclature I use is also telling – several colleagues kept correcting me and calling it my "thesis" but it is in fact not a thesis but a hypothesis.<sup>173</sup> Though some will recognize them as synonyms – the definitions make it clear that the hypothesis is the younger naïve cousin – a thesis is an idea which one argues to support but a hypothesis is offered as unsupported or partially supported. Similarly, the one is more an art term and the latter a scientific term. In Composition or Lit 101, your paper should, in fact, support your thesis or you will not like your grade. In science, however, your hypothesis may be disproved without your grade suffering.

From my reality, this is a "hypothesis" because while I feel I can contribute to this conversation with support for preliminary contentions, I believe the real

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<sup>173</sup> WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (Unabridged) (1971).

answers to these questions are far beyond the capacity of my mind, or in fact, any one mind. Some may say I am being lazy or cowardly in such an assertion, but neither is a word that anyone who knows me would attribute to me. Regardless, my hope is that this article will create new discussions, but also borrow from old discussions to consider our lessons learned in a new light, and to then chart new territory.

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REMARKS

THE UNIVERSITY OF TENNESSEE COLLEGE OF LAW  
FRIDAY, NOVEMBER 18, 2011

**KEYNOTE ADDRESS:  
PROTECTING THE PILLARS OF OUR LEGAL SYSTEM**

*Bernard W. Nussbaum*

Thank you Dean Blaze for those kind words.

I would also like to express my appreciation to Wyc and Lynn Orr for sponsoring this lecture series and for all the good work they do. Additionally, I would also like to pay tribute to my friend, Todd Campbell, a distinguished graduate of this law school, who is now serving as Chief Judge of the Middle District of Tennessee. He could not be here today, but I know we share happy memories. Judge Campbell and I worked in the White House together in the early years of the Clinton Administration — he was counsel to the Vice President and I was counsel to the President. To put it mildly, there is sometimes internal competition in the White House between a President's staff and a Vice President's staff, but there was none between the two counsels' offices. And one of the great things President Clinton did in 1995 was to nominate Judge Campbell to the bench. He has had a most distinguished career.

Let me say that I am also honored to follow those other Lions of the Bar who have given this lecture — Jim Neal, Bobby Lee Cook, Fred Bartlit and James Brosnahan — all very distinguished lawyers. But I must tell you that compared to them I feel like a young lion, perhaps even a cub. But I am not really that young, and late in my career I have begun to appreciate a simple thing. It's not a specific case, nor a particular institution, nor [a particular] client. It is true, that some of the things I have been fortunate to do

have been quite exciting. It's hard to describe the feeling of walking into the West Wing as White House Counsel to work with the President on various issues.

There is a similar rush of energy every time you walk into a courtroom — after a lot of pretrial preparation — ready to fight for your client, when his life, his career, or the life of his company is on the line. And, of course, it's hard to capture in a few words the experience of working for a committee of the House of Representatives considering the impeachment of a President of the United States, which I was privileged to do in 1974.

But more than any one of these experiences, one of the things I now appreciate is the blessing of *perspective*. It comes with age.

I have seen the highs and lows of our legal system — and I continue to marvel at its importance and its value. It is easy to read about attacks on lawyers in the papers, or to see dramatic depictions (for better or worse) of the legal profession in movies or television, and to become, well, cynical. I'm sure there were times during law school when you wondered what you were getting yourselves into.

Well, I'm here to tell you that, from my perspective, you could not be entering a more noble field — and your work as new lawyers will be more important than ever to preserve the strengths of our legal system, to be the champion for those, rich and poor, white and black, who need the protection of the law. The legal profession today is more open and more vibrant than it has ever been. There are all sorts of opportunities to do good and to do well. So, in many ways, you are quite fortunate to soon be entering the world of law.

But I am concerned about certain disturbing trends I see, trends that will demand your attention as you enter the legal profession. In recent years, three pillars of our legal system have come under assault.

1. The independence of attorneys is in peril, as the attorney-client relationship is being steadily eroded by attacks on the attorney-client privilege;
2. The right to counsel, for those unable to afford counsel, is at risk;
3. And our judges — in our state *and* federal courts — have been treated poorly by other branches of government on the issue of adequate judicial compensation, demeaning and demoralizing the Judiciary.

I want to briefly discuss these trends.

I will tell you how I have tried to respond — and how important it is for you to join this cause to defend the profession you are about to enter.

#### I. Attorney Independence: Attacks on the Privilege

Criticism of lawyers in popular culture is nothing new. Shakespeare and Dickens reviled lawyers in their famous works. And lawyers have been the butt of jokes for as long as there have been lawyers.

What is new, however, and merits our concern, is the transformation of this anti-lawyer sentiment into a new brand of attack on lawyers and their legitimate practices in representing their clients — particularly when a client, or a cause, is unpopular, or subject to political attack.

At first blush, this problem might seem to be limited to my former line of work in the White House. And it is, indeed, a problem that any White House Counsel must face (as some of my successors have learned)-or for that matter, any other lawyer representing a public official. But the problem is not so confined. It has spilled over into the private arena. And it will continue to do so.

I am worried, in particular, about the attack on the attorney-client privilege. The oldest of the privileges, the

attorney-client privilege protects communications between lawyers and their clients from being divulged to others.

The purpose, of course, is to encourage full and frank discussions between lawyers and their clients — so a lawyer is in a position to adequately defend a client. But that purpose is undermined unless there is a guarantee of confidentiality. And in recent years, this guarantee has, in fact, been undermined for government attorneys and for private attorneys. To some extent, it is our courts that have failed to protect the role of the lawyer.

Several federal appeal courts have ruled, for example, that there is no attorney-client privilege protecting the advice a White House Counsel gives to the President, at least in connection with a possible criminal investigation. That legal advice must be disclosed. Why? Because White House lawyers, and other government lawyers, ultimately owe a so-called *duty to the public*.

This rationale — while rhetorically satisfying — is not sound. All lawyers, whether in the public or private sector, take an oath to uphold the Constitution of the United States. All attorneys must promise to follow the law as a requisite for admission to the Bar. All lawyers are officers of the court. And all clients, private or public, are expected to follow the law.

At least one federal appeals court, the Second Circuit, has wisely pushed back. It acknowledged that government lawyers are public servants and [that] there is a public interest in ensuring that grand juries collect all relevant information.<sup>1</sup> But, unlike its sister circuits, it found that objective outweighed by the public interest in having state officials receive and act upon the best available legal advice.

In fact, the Second Circuit noted, the rationale for the attorney-client privilege applies with "special force" in government, because officials must be encouraged to seek

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<sup>1</sup> *In re Grand Jury Investigation*, 399 F.3d 527, 534 (2d Cir. 2005).

out and receive fully informed legal advice while conducting the public's business.<sup>2</sup> But this issue remains unresolved as there is a split among our federal courts — and it is a dangerous one.

The decisions eviscerating the attorney-client privilege rest, I think, ultimately on the fundamental misunderstanding of the appropriate role and value of lawyers. And this threat is not limited to government attorneys. Just as courts limiting the privilege in government have focused on duties to the public, it's not difficult to see courts applying this rationale about a "duty to the public" to the private commercial contest.

After all, business entities, like government ones, have many constituencies, including public ones. The Supreme Court has hailed the "public watchdog" function of *accountants* in limiting protections of the confidentiality of their work product.<sup>3</sup>

So lawyers in the private bar face this threat, too. Take the recent tobacco wars, for example. As part of the battle being waged against the unpopular tobacco industry, tobacco companies and their lawyers have been forced to divulge thousands of privileged documents.

Apart from the tobacco wars, prosecutors have regularly required business entities to waive the attorney-client privilege if they sought leniency from the government. A "culture of waiver" took hold where prosecutors insisted on companies waiving their privilege as a matter of course, or they were threatened with indictment. Believe me, an indictment alone — much less a criminal conviction — can destroy a business enterprise.

One commentator has observed these trends could lead to "the complete elimination of the attorney-client

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<sup>2</sup> *Id.*

<sup>3</sup> *United States v. Arthur Young & Co.*, 465 U.S. 805, 818 (1984).



privilege in the corporate context.”<sup>4</sup> If that happens — if attorney-client privilege in the private context is eroded by a so-called “public” duty — it will have a serious negative effect on the quality of legal services provided to individuals and corporations in this country.

By chilling candor and openness between a lawyer and a client, erosion of the attorney-client privilege will undermine nothing less than the independence of our lawyers in the public and private sectors. It will undermine the rule of law.

For — and this is my basic point — make no mistake about it, compliance with law in a country of 300 million is *not*, in the first instance, dependent on prosecutors, on courts, on judges — it is dependent upon honest lawyers giving candid, knowledgeable advice to clients. And that cannot be achieved without a level of trust and confidence between lawyer and client.

To interfere with that relationship — to break down the bond between lawyers and clients — to tear away the veil of confidentiality, which is necessary to induce candor and openness — undermines law enforcement. It undermines the rule of law. And that is why it must be resisted.

Let me turn to another issue.

## II. Judicial Pay

I am also concerned about the terrible and growing disparity between judicial salaries and the compensation of lawyers in private practice. I have a particular interest in this matter, because for the last four years I have been representing the New York State Judiciary on this issue. Despite heroic efforts by our former Chief Judge in New York, Judith Kaye, and her successor Jonathan Lippman, to

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<sup>4</sup> Paul R. Rice, *How the Tobacco Company Industry Lost Its Attorney-Client Privilege*, LEGAL TIMES, May 4, 1998.

have judicial pay raised to an adequate level, the dispute resulted in litigation.

We, on behalf of the judges, were forced to sue the Governor and the Legislature.<sup>5</sup> You see, judicial salaries in New York have been frozen for over a decade — twelve years in fact — resulting in the diminution of their compensation by about forty percent, in real terms, because of inflation — while the salaries of virtually all other state employees were raised by that amount to keep them even with inflation.

As a result, New York judges, who were once among the highest paid in the country, went to being the lowest paid in the country, taking into account the cost of living. They went from number one to number fifty.

This growing disparity between judicial compensation and the private sector is nothing less than an assault on the legal profession and on our system of justice. And ultimately it will have an impact on the quality of the bench and the rule of law. And it was not always this way.

In New York, for example, in 1909, a State Trial Judge was paid \$17,000 a year. In 1935, in the middle of the depression, that Judge earned \$25,000 a year. Both these amounts are equivalent to well more than \$400,000 a year in today's dollars. In 1935, a senior partner at a successful New York law firm made about \$25,000 a year. A few made more, some made less. But parity is the point — judges had parity with senior partners.

Today we know that judges, state and federal, not only do not have parity with senior partners — they do not have parity with first year associates. They do not have parity with their own law clerks, who leave to become associates in law firms in metropolitan areas.

To tie judicial salaries to executive or legislative salaries, as is normally done today in federal and state

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<sup>5</sup> *Maron v. Silver*, 925 N.E.2d 899 (N.Y. 2010); *Chief Judge of N.Y. v. Governor of N.Y.*, 887 N.Y.S.2d 772 (Sup. 2009).

governments, is sheer folly. As we all know, executive branch officials — especially White House counsels — do not have lifetime jobs. Individuals in those positions have the option and ability, which they often exercise, to step into the more lucrative private world. Also, legislators can and do earn outside income while in office.

None of this, of course, is true for judges. A federal judge is appointed for life; a state judge is elected for a term of many years, and they are expected to serve out those terms. That is their sole job. That is, with minor exceptions, their sole income. That tenure gives them strength and independence. In the long run, that strength, that independence, will be eaten away if judges are not fairly compensated.

What's more, this practice of linking judicial salaries to other issues is not only folly; it is unconstitutional. Indeed, this is one of the major arguments we made on behalf of the Chief Judge and our State Judiciary. And, after hearings in the trial and intermediate appellate courts, the New York Court of Appeals last year vindicated our position. We won.

For the first time anywhere in the country, our state's highest court declared that holding judicial pay hostage to unrelated political priorities, like legislative salary raises, or whatever, is unconstitutional. It violates the separation of powers in our State Constitution.

The Court also declared, for the first time, that the separation of powers in our Constitution requires that judicial compensation must be adequate. Otherwise the independence of the judiciary as a co-equal branch of government is undermined.

Our Court of Appeals then left it to the other branches of government to remedy this situation — saying, that if they did not do so, we could return to court. This was a significant victory for the judiciary in the State of New York and, indeed, for all our state courts. That decision led

our State Legislature, last December, to pass, and the Governor to sign, a law creating an independent Judicial Pay Commission to determine, on an objective, non-partisan basis, what the salaries of judges shall be in the future.

And that is what the Commission did a few months ago — it raised state judicial salaries in New York to the federal level, from \$136,700 to \$174,000, to go into effect over a period of two and one-half years starting next April. But this battle is not over. The issue remains front and center in many states across the country and in our federal courts. The demeaning of our courts in this manner has had, and will continue to have, a negative impact on our system of justice until it is corrected.

And that situation is in no one's interest — lawyers, judges, or the public.

### III. The Right to Counsel

My final concern — again part of the attack on our legal system — is the refusal of government to provide those who cannot afford it with a meaningful right to counsel.

My friend Evan Davis, when he was president of the New York City Bar Association years ago, wrote a column addressed to the then-Governor of New York. The title of the column was *George Pataki: Raise Assigned Counsel Rates Now*. The column began with the following words:

“What would the visitor from Mars say about a society where 1) top business lawyers have billing rates well in excess of \$500 per hour, 2) billing rates for normal individual work range well in excess of \$200 per hour, yet 3) lawyers assigned to represent indigent clients who have a right to counsel under the law are fixed by the State at \$25 per hour for out-of-court time and \$40 for in-court time?

The visitor from Mars would say that in that society the right to counsel is a cruel joke that exists on paper only. With respect to the State of New York, the visitor from Mars would be absolutely right.”<sup>6</sup>

That is what Evan wrote. He was right then — and he is right now. After litigation — yes, again it took *litigation* — the reimbursement figures for assigned counsel were raised somewhat. But they are still inadequate. They are still way below typical billing rates in private practice. The gap in fact has grown larger.

That is why it is so important [that] as lawyers, we not only contribute to causes that help raise funds for meaningful representation — but also that we help to provide it, and we fight for it. I need not tell you that it is an essential principle of our society that *all* are entitled to adequate legal representation.

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<sup>6</sup> Evan A. Davis, Governor Pataki: Raise Assigned Counsel Rates Now, 44th Street Notes (ABCNY), Jan. 2001.

*All* are entitled to equal justice under law — as is emblazoned on the façade of the U.S. Supreme Court — and equal opportunity for justice is only possible with real, meaningful legal representation, with lawyers, fairly compensated, doing their duty.

#### IV. Conclusion

Each of the battles I have mentioned is not easy. I've tried to give you a sense of these issues, but they are far from simple when you are in the trenches.

Take, for example, the attorney-client privilege that I discussed at the beginning of these remarks. Going back to my own experience in Washington, it became fashionable for a time to assert that the "Counsel to the President" is really "Counsel to the Presidency" — that I should have dedicated myself to the office, to the institution, to the White House, rather than to the person.

In part, I understand that view. My role did include defending the institutional interests of all Presidents — even Republicans. And I agree that there are some purely personal matters that should be handled by a private attorney.

But I also know that the Counsel's responsibility to the institution of the Presidency begins with advising the particular individual in that office. You do not give advice to a building or an office. You can only advise its current occupant, who is a human being.

That human being — in his or her official capacity — *is the client* to whom you are bound by an ethical duty. And that duty includes the duty to preserve his confidences, to represent him zealously, and to help him achieve his legitimate objectives.

These are duties that a lawyer has in representing any client. They cannot be compromised because the client happens to be President of the United States or some other

government official. If a Counsel to the President is forced to diverge too far from the role of a lawyer generally, we will have weakened both the Office of Counsel and the Office of President.

And let me be clear, I am not saying presidential power or judicial power must reign supreme over the Legislature. I was very much on the other side of the line from both of those institutions in 1974, as a member of the staff of the House Judiciary Committee, conducting the impeachment inquiry involving President Nixon.

My views are not based on defending one branch of government over another. My views arise from where I started this morning — from my perspective on our legal system and its importance in our society. And the vital role that lawyers play. To me, it is all of a piece — these attacks on the independence of lawyers, on judges, and on those who provide legal help for those who cannot afford it.

None of these are simple issues, but they represent threats to our legal system. As such, they represent a threat to the Rule of Law. That is why we as lawyers have to respond; that is why we have to resist; that is why we have to fight back.

We can never rest.

Enough. Enough talk about battles on this wonderful day. You have before you many exciting days in courts, in boardrooms, in the halls of government.

Regardless of what area of the law you choose to enter, you will have the privilege of using your skills to fight for others, to fight for things you believe in.

And I do hope, as you become lawyers, you will remember it remains a noble profession — and you will work to defend it, at every turn, during the great careers I know you all have ahead of you.

I wish you the best.

Thank you.

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STUDENT POLICY NOTE

**FLORIDA'S LEGISLATION MANDATING SUSPICIONLESS  
DRUG TESTING OF TANF BENEFICIARIES: THE  
CONSTITUTIONALITY AND EFFICACY OF IMPLEMENTING  
DRUG TESTING REQUIREMENTS ON THE WELFARE  
POPULATION.**

*Lindsey Lyle*<sup>7</sup>

I. Introduction

Luis Lebron is a thirty-five year old<sup>8</sup> who balances his duties as sole caretaker of his four year-old son with pursuing a degree at the University of Central Florida.<sup>9</sup> To help support himself and his child while in school, Lebron applied to the Florida Department of Children and Families for Temporary Assistance for Needy Families (TANF) benefits in July 2011.<sup>10</sup> However, Lebron refused to take the drug test<sup>11</sup> required by a recently passed Florida statute, requiring prospective TANF beneficiaries to undergo drug testing prior to receiving benefits.<sup>12</sup> Lebron insists that he has never used illegal drugs, but refuses to take the test claiming that requiring him to pay for drug testing when there is no reason to suspect him of drug use is

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<sup>7</sup> Lindsey Lyle is a second-year law student at The University of Tennessee College of Law.

<sup>8</sup> Rebecca Catalanello, *Florida's Welfare Drug Testing Halted by Federal Judge*, TAMPA BAY TIMES, Oct. 25, 2011, [www.tampabay.com/news/florida-judge-blocks-drug-testing-of-welfare-applicants/1198389](http://www.tampabay.com/news/florida-judge-blocks-drug-testing-of-welfare-applicants/1198389) (“[A] 35-year-old Navy veteran and single father from Orlando who is finishing his degree.”).

<sup>9</sup> *Lebron v. Wilkins*, 820 F. Supp. 2d 1273 (M.D. Fla. 2011) (order granting preliminary injunction).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> FLA. STAT. § 414.0652 (2011).

unreasonable and a violation of his Fourth Amendment right.<sup>13</sup>

Because Lebron refused the drug test, the State denied Lebron benefits pursuant to the statute.<sup>14</sup> However, Lebron is bringing a class action lawsuit against the state of Florida, relying on the premise that the required drug testing violates his Fourth Amendment right and the right of others similarly situated.<sup>15</sup> Also concerned with the constitutionality of the law, Judge Mary Scriven issued an order granting a preliminary injunction against the state until the proceedings are fully decided.<sup>16</sup>

The controversy derives from HB 353<sup>17</sup> that was signed into law on May 21, 2011 by Governor Rick Scott of Florida.<sup>18</sup> The bill mandates suspicionless drug testing of all TANF applicants.<sup>19</sup> Furthermore, the law requires that the individual applying bear the initial cost of the test.<sup>20</sup> Individuals that test clean are refunded the testing cost; but, individuals that test positive for controlled substances are not refunded the testing cost, are denied benefits, and are not allowed to reapply for one year (or six months if they successfully complete a substance abuse program at their own expense).<sup>21</sup> Governor Rick Scott claims that by requiring drug testing of applicants, TANF beneficiaries

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<sup>13</sup> Lebron, 820 F. Supp. 2d 1273.

<sup>14</sup> § 414.0652 (requiring beneficiaries to pass a drug test before receiving benefits).

<sup>15</sup> Lebron v. Wilkins, 227 F.R.D. 664 (M.D. Fla. 2011) (order granting class action certification).

<sup>16</sup> Lebron, 820 F. Supp. 2d 1273 (demanding the state to refrain from requiring drug testing in order to issue TANF benefits for the plaintiff until motion fully decided on the merits).

<sup>17</sup> H.B. 353, 113th Reg. Sess. (Fla. 2011).

<sup>18</sup> Catalanello, *supra* note 1.

<sup>19</sup> FLA. STAT. § 414.0652 (2011).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

will focus less on using illegal drugs.<sup>22</sup> Gov. Scott also contends that the measure ensures that taxpayer money is not spent funding drug habits.<sup>23</sup> Furthermore, Scott has also touted that by implementing drug testing, the state will save \$77,000,000 in taxpayer dollars.<sup>24</sup>

Critics of the legislation are less enthusiastic about the program's ultimate cost efficiency. Those disfavoring the legislation argue that testing and administrative costs will contribute to the expense of running and maintaining the program.<sup>25</sup> Furthermore, TANF applicants who pass the drug test are refunded the cost of the test.<sup>26</sup> Since only about two percent of applicants have tested positive for drug use since Florida implemented the drug testing requirement,<sup>27</sup> Florida is currently bearing most of the costs of testing. This low percentage of positives is less surprising after considering the plethora of research indicating that, contrary to popular belief, drug use is no more prevalent in people on welfare than in the working population.<sup>28</sup> In fact, one Florida study found that TANF

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<sup>22</sup> Catalanello, *supra* note 1 ("Hopefully more people will focus on not using illegal drugs.").

<sup>23</sup> *Id.*

<sup>24</sup> Aaron Sharockman, *Bill Amended to Expand Drug Testing Requirement*, POLITIFACT (Apr. 14, 2011), [www.politifact.com/florida/promises/scott-o-meter/promise/600/require-drug-screening-for-welfare-recipients](http://www.politifact.com/florida/promises/scott-o-meter/promise/600/require-drug-screening-for-welfare-recipients) (discussing Governor Scott's seven-step plan to create 700,000 private-sector jobs and save taxpayers \$77 million by adding drug testing requirements for welfare recipients).

<sup>25</sup> *Stereotyping the Welfare Recipient*, LANCASTER NEW ERA (Oct. 10, 2011), [http://lancasteronline.com/article/local/476019\\_Stereotyping-the-welfare-recipient.html](http://lancasteronline.com/article/local/476019_Stereotyping-the-welfare-recipient.html).

<sup>26</sup> FLA. STAT. § 414.0652 (2011).

<sup>27</sup> *Stereotyping the Welfare Recipient*, *supra* note 18.

<sup>28</sup> See News Release, NIAAA Researchers Estimate Alcohol and Drug Use, Abuse, and Dependence Among Welfare Recipients, Nat'l Inst. of Health Press Release (Oct. 24, 1996), *available at* [www.nih.gov/news/pr/oct96/niaaa-23.htm](http://www.nih.gov/news/pr/oct96/niaaa-23.htm) (finding that the prevalence of alcohol and drug use was comparable among welfare recipients and

beneficiaries that tested positive for drug use had employment levels and salaries comparable with TANF beneficiaries that tested negative for drug use.<sup>29</sup>

In light of these recent developments and the controversy regarding mandatory drug testing of welfare recipients, this paper will explore the history leading up to Florida's decision to implement a mandatory drug testing scheme. Furthermore, this paper will discuss the various issues surrounding mandatory drug testing of welfare recipients and will argue that if *Lebron v. Wilkins* is heard by the Supreme Court, the Supreme Court will most likely rule mandatory drug testing, as proposed in the relevant Florida statute, unconstitutional.

## II. History and Development of Mandatory Drug Testing for Welfare Recipients

The United States has, for a long time, sought to restrict or regulate the use of various drugs and chemical substances. The Nixon Administration first used the term "war on drugs,"<sup>30</sup> and presidents have used that term, as

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the general population); *Mandatory Drug Testing and Treatment of Welfare Recipients Position Statement*, CENTRE FOR ADDICTION AND MENTAL HEALTH (Nov. 8, 2006, 4:15 PM), [www.camh.net/Public\\_policy/Public\\_policy\\_papers/manddrugtesting.html](http://www.camh.net/Public_policy/Public_policy_papers/manddrugtesting.html) (explaining that substance abuse is no more prevalent among welfare recipients than the working population and recommending a shift in focus from mandatory drug testing to providing welfare recipients suspected of abusing drugs with the necessary support to help them leave the welfare system).

<sup>29</sup> Matt Lewis & Elizabeth Kenefick, *Random Drug Testing of TANF Recipients is Costly, Ineffective and Hurts Families*, CLASP (Feb. 3, 2011), <http://www.clasp.org/admin/site/publications/files/0520.pdf> ("This is also true of the general population, as most drug users have full time employment.").

<sup>30</sup> Corinne A. Carey, Comment, *Crafting a Challenge to the Practice of Drug Testing Welfare Recipients: Federal Welfare Reform and State*

well as other strong anti-drug rhetoric, repeatedly ever since.<sup>31</sup> In an effort to combat drug usage, various anti-drug acts have been passed in the past three decades. In 1988, the Anti-Drug Abuse Act provided harsh sanctions that included denying contracts, loans, and licenses to convicted drug possessors and traffickers, imposing the death penalty for certain drug-related killings, and allowing for the eviction of persons involved with drug-related criminal activity from public housing.<sup>32</sup> Proposed in 1987, the Family Welfare Reform Act attempted to deny benefits to welfare beneficiaries who withdrew from drug treatment programs before completion until the beneficiary either completed the program or was medically determined to be drug free, but these provisions were ultimately dropped.<sup>33</sup>

Finally, in 1996 Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act.<sup>34</sup> This Act replaced several previous welfare programs with the Temporary Assistance for Needy Families (TANF) program.<sup>35</sup> TANF provides funding to states to cover benefits, administrative expenses, and services targeted toward needy families.<sup>36</sup> The goals of the TANF program

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*Response as the Most Recent Chapter in the War on Drugs*, 46 BUFF. L. REV. 281, 285 (1998).

<sup>31</sup> *Id.* at 285-303 (discussing the rhetoric of the Reagan and Bush Administrations, Congress, and the Office of National Drug Control Policy up until 1997).

<sup>32</sup> *Id.* at 290.

<sup>33</sup> Carey, *supra* note 23 (“[P]rovided for the denial of benefits to any welfare recipient who had withdrawn from a treatment program before its completion.”).

<sup>34</sup> Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105.

<sup>35</sup> *About TANF*, U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES (Dec. 7, 2011), [www.acf.hhs.gov/programs/ofa/tanf/about.html](http://www.acf.hhs.gov/programs/ofa/tanf/about.html).

<sup>36</sup> *Id.* See generally Walker Newell, *Tax Dollars Earmarked for Drugs? The Policy and Constitutionality of Drug Testing Welfare Recipients*, 43 COLUM. HUM. RTS. L. REV. 215, 215-18 (2011) (explaining history of TANF program and program eligibility requirements).

include helping needy families to achieve self-sufficiency, promoting job preparation and employment, and encouraging two-parent families.<sup>37</sup> Complimenting TANF, 21 U.S.C. § 862b expressly allows states to administer mandatory drug testing programs and sanction beneficiaries who test positive for controlled substances.”<sup>38</sup>

In accordance with the Personal Responsibility and Work Opportunity Reconciliation Act, Florida commenced TANF disbursement in 1996.<sup>39</sup> In 1998, Florida solicited a “Demonstration Project” in order to study the costs and benefits of implementing mandatory drug testing among TANF recipients.<sup>40</sup> The results contradicted the researchers’ expectations, demonstrating lower rates of drug use among TANF beneficiaries than among the general Florida population.<sup>41</sup> Although researchers speculated that after news spread of the drug testing requirements applicants would abstain from using illegal substances prior to applying, results after actual implementation of the Florida statute demonstrated an even lower percentage of drug use than the initial study.<sup>42</sup> The Demonstration Project also found little difference between the employment and income levels of TANF beneficiaries who tested positive for drug use from those who tested

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<sup>37</sup> *About TANF*, *supra* note 28. See also 42 U.S.C. § 601(a) (2006).

<sup>38</sup> 21 U.S.C. § 862b (2006) (“Notwithstanding any other provision of law, States shall not be prohibited by the Federal Government from testing welfare recipients for use of controlled substances nor from sanctioning welfare recipients who test positive for the use of controlled substances.”).

<sup>39</sup> *Lebron v. Wilkins*, 820 F. Supp. 2d 1273 (M.D. Fla. 2011).

<sup>40</sup> *Id.*

<sup>41</sup> See *id.* (discussing structure of research and results).

<sup>42</sup> See *Stereotyping the Welfare Recipient*, *supra* note 18 (“Since drug testing began in Florida in July, only about 2 percent of welfare recipients have tested positive. This compares to the 8.7 percent of the U.S. population over the age of 12 (6.3 percent for those ages 26 and up), according to a 2009 survey by the U.S. Substance Abuse and Mental Health Services.”).

negative.<sup>43</sup> Despite the fact that the Demonstration Project's Evaluation Report did not recommend that welfare testing be expanded statewide, due to the high costs associated and the minimal benefits derived therefrom,<sup>44</sup> Florida enacted legislation implementing mandatory drug testing for TANF applicants, which became effective July 1, 2011.<sup>45</sup>

### III. Policy Issues Regarding Mandatory Drug Testing for Welfare Beneficiaries

#### A. Cost and Actual Efficacy

Florida is not the only state that has recently shown interest in implementing mandatory drug testing for welfare recipients. In 2011, the state of Idaho solicited a study to determine how to test welfare recipients for illegal drugs in order to save money.<sup>46</sup> The study estimated total government savings to be below \$100,000 annually.<sup>47</sup> The study also pointed to one of the risks of drug testing: The risk of parents not applying for aid if drug screens are involved, effectively denying their children the benefits from TANF assistance.<sup>48</sup>

Many critics argue against implementing drug testing requirements for welfare benefits.<sup>49</sup> First, drug

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<sup>43</sup> Lebron, 820 F. Supp. 2d 1273.

<sup>44</sup> *Id.*

<sup>45</sup> FLA. STAT. § 414.0652 (2011).

<sup>46</sup> Dustin Hurst, *DHW Study Says Welfare Recipient Drug Testing Would Cost State More Money Than It's Worth*, IDAHO REPORTER (Feb. 9, 2011), [www.idahoreporter.com/2011/dhw-study-says-welfare-recipient-drug-testing-would-cost-state-more-money-than-its-worth](http://www.idahoreporter.com/2011/dhw-study-says-welfare-recipient-drug-testing-would-cost-state-more-money-than-its-worth) (discussing study of various drug testing schemes for welfare applicants and the prospective savings of each).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

testing is expensive.<sup>50</sup> Furthermore, denying drug users financial assistance may actually help to perpetuate the drug use cycle instead of cure it, and this impoverishment may actually increase drug-related activity in an effort to generate income.<sup>51</sup> Furthermore, drug testing is not an entirely accurate means of identifying drug abuse.<sup>52</sup> The Center for Addiction and Mental Health suggests that funds would be better spent educating government workers to identify substance abuse problems more accurately and offering treatment to those who need the assistance in an attempt to help people better their position and leave the welfare system.<sup>53</sup>

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<sup>50</sup> See *id.* (“According to estimates, testing is pricy”); Rebecca Catalanello, *Florida Judge Blocks Drug Testing of Welfare Applicants*, TAMPA BAY TIMES (Oct. 25, 2011), [www.tampabay.com/news/florida-judge-blocks-drug-testing-of-welfare-applicants/1198389](http://www.tampabay.com/news/florida-judge-blocks-drug-testing-of-welfare-applicants/1198389) (“Applicants must pay \$25 to \$45 for the test...”); *Stereotyping the Welfare Recipient*, *supra* note 18 (“[S]avings could evaporate, considering the cost of staff hours and other resources the state has had to spend on implementing the program”); *Our Take on: Welfare Drug Tests*, ORLANDO SENTINEL (Oct. 30, 2010), [http://articles.orlandosentinel.com/2010-10-30/news/os-ed-mandatory-drug-testing-103010-20101029\\_1\\_welfare-recipients-drug-screening-cash-assistance](http://articles.orlandosentinel.com/2010-10-30/news/os-ed-mandatory-drug-testing-103010-20101029_1_welfare-recipients-drug-screening-cash-assistance) (“In the pilot program it cost almost \$90 per test, which resulted in a \$2.7 million expense.”); Newell, *supra* note 29, at 250 (“A study by the Center for Law and Social Policy reached similar conclusions, noting that the real cost of identifying a single drug user could range from \$ 29,000 to \$ 77,000, since tests do not accurately identify drug users.”).

<sup>51</sup> Carey, *supra* note 23, at 330-31 (“Guthrie argues that denying welfare to drug users will only eliminate that class of substance abusers from welfare rolls; it will not eliminate drug use and crime among the destitute. It seems senseless to make poor drug addicts suddenly poorer and, therefore, more desperate to commit income-generating crimes.”).

<sup>52</sup> *Drug Testing of Public Assistance Recipients as a Condition of Eligibility*, ACLU (Apr. 8, 2008), [www.aclu.org/drug-law-reform/drug-testing-public-assistance-recipients-condition-eligibility](http://www.aclu.org/drug-law-reform/drug-testing-public-assistance-recipients-condition-eligibility).

<sup>53</sup> *Mandatory Drug Testing and Treatment of Welfare Recipients Position Statement*, *supra* note 21.



Despite these issues with mandatory drug testing, states have continued to consider varying drug testing programs. At least ten states have introduced legislation to enforce drug testing on welfare recipients.<sup>54</sup> Kentucky is even considering implementing random drug testing on Kentucky residents who receive food stamps, Medicaid, and other assistance, denying further assistance to any recipients who test positive.<sup>55</sup>

### B. Constitutionality

The greatest challenge to these efforts to implement mandatory drug testing on welfare recipients is the fact that drug testing in such a context may be unconstitutional. Although the issue has not yet made its way to the Supreme Court, a similar law in Michigan was granted a preliminary injunction by the United States District Court for the Eastern District of Michigan,<sup>56</sup> the court ruling that the testing program was unconstitutional<sup>57</sup> because suspicionless testing was an infringement upon the individual's Fourth Amendment right.<sup>58</sup>

Those that have challenged the mandatory drug testing laws look to the Fourth Amendment for grounds of unconstitutionality.<sup>59</sup> Historically, the Supreme Court has always considered the collecting and testing of urinary

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<sup>54</sup> *Stereotyping the Welfare Recipient*, *supra* note 18.

<sup>55</sup> Jack Brammer, *Kentucky Lawmaker Wants Random Drug Testing For Welfare Recipients*, KENTUCKY.COM (Feb. 17, 2011, 4:30 PM), [www.kentucky.com/2011/01/17/1600950/kentucky-lawmaker-wants-random.html](http://www.kentucky.com/2011/01/17/1600950/kentucky-lawmaker-wants-random.html).

<sup>56</sup> *Marchwinski v. Howard*, 113 F. Supp. 2d 1134, 1144 (E.D. Mich. 2000).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause.").

samples to be a “search” under the meaning of the Fourth Amendment. In *Skinner v. Railway Labor Executives’ Ass’n*, the Supreme Court discussed the fact that chemical analysis of urine can reveal a wealth of information about a person and that the act of collecting urine itself invades on privacy interests.<sup>60</sup>

However, the Fourth Amendment does not protect against all searches, just “unreasonable” searches.<sup>61</sup> In deciding what is “reasonable,” the circumstances surrounding the search and the nature of the search is considered,<sup>62</sup> judging the permissibility of a search by “balancing its intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate government interests.”<sup>63</sup> Typically, there is a presumption of reasonableness in favor of the procedures described in the Warrant Clause of the Fourth Amendment,<sup>64</sup> but an exception to this presumption is recognized when “special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.”<sup>65</sup>

*Skinner* applied this balancing test to the drug testing of railroad employees after major train accidents and found that the “governmental interest in ensuring the

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<sup>60</sup> *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 617 (1989) (“Because it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable, the Federal Courts of Appeals have concluded unanimously, and we agree, that these intrusions must be deemed searches under the Fourth Amendment.”).

<sup>61</sup> U.S. CONST. amend. IV; *United States v. Sharpe*, 470 U.S. 675, 682 (1985).

<sup>62</sup> *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985).

<sup>63</sup> *Delaware v. Prouse*, 440 U.S. 648, 654 (1979).

<sup>64</sup> U.S. CONST. amend. IV (“[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).

<sup>65</sup> *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985).

safety of the traveling public and of the employees”<sup>66</sup> justified implementing policies to deter drug use, and that suspicionless testing was necessary in order to best protect the public’s safety.<sup>67</sup> The Court in *Skinner* further qualified suspicionless drug testing by stating that the railway’s employees have a diminished expectation of privacy because they are involved in an industry highly regulated to ensure the safety of the public.<sup>68</sup>

Similarly, the Supreme Court in *National Treasury Employees Union v. Von Raab* held that the government’s interest in safety outweighed the individual employee’s privacy interests; thus, the Court held that suspicionless drug testing of federal employees applying for positions involving illegal drugs or positions that require the carrying of a firearm is reasonable.<sup>69</sup> *Von Raab* also addressed and dismissed the warrant issue by claiming that the applicant knows that he or she must take a drug test in order to apply for the position<sup>70</sup> and thus the process is not discriminatory because it is required of all applicants.<sup>71</sup> Consequently, a warrant would provide little protection of personal privacy.<sup>72</sup>

In a similar vein, *Veronia School District 47J v. Acton* held that suspicionless drug testing of school athletes

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<sup>66</sup> *Skinner*, 489 U.S. at 621.

<sup>67</sup> *See id.* at 628-33 (“We conclude that the compelling Government interests served by the FRA’s regulations would be significantly hindered if railroads were required to point to specific facts giving rise to a reasonable suspicion of impairment before testing a given employee.”).

<sup>68</sup> *Skinner*, 489 U.S. at 627.

<sup>69</sup> *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 679 (1989) (“We hold that the suspicionless testing of employees who apply for promotion to positions directly involving the interdiction of illegal drugs, or to positions that require the incumbent to carry a firearm, is reasonable.”).

<sup>70</sup> *Id.* at 667.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

and extra-curricular program participants is reasonable<sup>73</sup> after the school demonstrated that there was a problem with illegal drug use among the student population.<sup>74</sup> The Court also alleged that students have a decreased expectation of privacy due to the fact that they are under the control of their parents and guardians<sup>75</sup> and because student athletes “voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally.”<sup>76</sup> Because the government has a significant interest in maintaining order and protecting students in a school environment, the drug tests were held to be reasonable.<sup>77</sup>

#### IV. Analysis of the Constitutionality and Efficacy of Mandatory Drug Testing of Welfare Recipients.

Despite the line of Supreme Court cases that seem to favor suspicionless drug testing within “reasonable” circumstances, *Chandler v. Miller* held that suspicionless drug testing of candidates for state office in Georgia was not reasonable and thus unconstitutional.<sup>78</sup> One reason the Court cited for ruling the law unconstitutional was the fact that the state of Georgia did not provide any evidence that there was a current or past drug problem with candidates for state office,<sup>79</sup> unlike in *Veronia*.<sup>80</sup> The Court also held that the drug testing was implemented purely to protect the

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<sup>73</sup> *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 665 (1995).

<sup>74</sup> *Id.* at 648-50.

<sup>75</sup> *Id.* at 654.

<sup>76</sup> *Id.* at 657 (discussing requirements of student athletes in *Veronia*’s public school system).

<sup>77</sup> *Id.* at 646-47.

<sup>78</sup> *Chandler v. Miller*, 520 U.S. 305 (1997).

<sup>79</sup> *Id.* at 321. *See id.* at 319.

<sup>80</sup> *See Acton*, 515 U.S. at 665.

State's anti-drug image,<sup>81</sup> and that the Fourth Amendment protects society against policies that diminish "personal privacy for a symbol's sake."<sup>82</sup>

Likewise, an argument can be made that the Florida law implementing mandatory suspicionless drug testing on welfare applicants is purely symbolic, as Governor Rick Scott ran for office promising such a requirement.<sup>83</sup> So far, evidence is lacking to support any proposition that TANF beneficiaries use drugs more frequently than the general population.<sup>84</sup> According to the data from the first month requiring mandatory drug testing of TANF applicants, approximately only 2-5.1% of TANF applicants use drugs.<sup>85</sup> Despite these low numbers, Florida urges that all refusals to test should be considered "drug related denials."<sup>86</sup> However, the court in *Lebron* found it difficult to conclude that an applicant refusing to take a drug test does so for purely drug-related purposes and cited other reasons why an applicant may refuse, such as: "[I]nability

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<sup>81</sup> See Chandler, 520 U.S. at 321 ("By requiring candidates for public office to submit to drug testing, Georgia displays its commitment to the struggle against drug abuse.").

<sup>82</sup> *Id.* at 322.

<sup>83</sup> *Rick Scott Says Welfare Recipients are More Likely to Use Illicit Drugs*, POLITIFACT (Jun. 5, 2011), [www.politifact.com/florida/statements/2011/jun/09/rick-scott/rick-scott-says-welfare-recipients-are-more-likely/](http://www.politifact.com/florida/statements/2011/jun/09/rick-scott/rick-scott-says-welfare-recipients-are-more-likely/).

<sup>84</sup> See *Stereotyping the Welfare Recipient*, *supra* note 18 ("Since drug testing began in Florida in July, only about 2 percent of welfare recipients have tested positive. This compares to the 8.7 percent of the U.S. population over the age of 12 (6.3 percent for those ages 26 and up), according to a 2009 survey by the U.S. Substance Abuse and Mental Health Services."); News Release, *supra* note 21 (finding that the prevalence of alcohol and drug use was comparable among welfare recipients and the general population); *Mandatory Drug Testing and Treatment of Welfare Recipients Position Statement*, *supra* note 21 (explaining that substance abuse is no more prevalent among welfare recipients than the working population).

<sup>85</sup> *Lebron*, 820 F. Supp. 2d 1273.

<sup>86</sup> *Id.*

to pay for testing, a lack of laboratories near the residence of the applicant, inability to secure transportation to a laboratory or . . . a refusal to accede to what an applicant considers to be an unreasonable condition for receiving benefits.”<sup>87</sup>

Furthermore, *Skinner* and *Von Raab* focused on imminent safety concerns.<sup>88</sup> In *Skinner*, the FRA provided the Court with evidence that alcohol and drug use had significantly contributed to railroad accidents, resulting in multiple fatalities, injuries, and millions of dollars in property damage.<sup>89</sup> *Von Raab* likewise focused on the dangerous aspects of the job, and the fact that employees deal directly with dealers and seized contraband,<sup>90</sup> in rationalizing the government’s drug testing requirements to be “reasonable.”<sup>91</sup> Although Gov. Rick Scott claims that there is a prevalence of drug use among welfare beneficiaries,<sup>92</sup> the evidence simply does not hold up.<sup>93</sup> Unlike in *Veronia*, where the school district was able to provide evidence of a substantial contemporary drug problem in the school that mandated the implementation of

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<sup>87</sup> *Id.*

<sup>88</sup> *See Skinner*, 489 U.S. 602; *Von Raab*, 489 U.S. 656.

<sup>89</sup> *Von Raab*, 489 U.S. at 669 (“The FRA also found, after a review of accident investigation reports, that from 1972 to 1983 ‘the nation’s railroads experienced at least 21 significant train accidents involving alcohol or drug use as a probable cause or contributing factor.’”).

<sup>90</sup> *Skinner*, 489 U.S. at 607 (“Many of the Service’s employees are often exposed to this criminal element and to the controlled substances it seeks to smuggle into the country.”).

<sup>91</sup> *Von Raab*, 489 U.S. at 670 (“It is readily apparent that the Government has a compelling interest in ensuring that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment.”).

<sup>92</sup> *Rick Scott Says Welfare Recipients are More Likely to Use Illicit Drugs*, *supra* note 74.

<sup>93</sup> *Our Take on: Welfare Drug Tests*, ORLANDO SENTINEL (Oct. 30, 2010), [http://articles.orlandosentinel.com/2010-10-30/news/os-ed-mandatory-drug-testing-103010-20101029\\_1\\_welfare-recipients-drug-screening-cash-assistance](http://articles.orlandosentinel.com/2010-10-30/news/os-ed-mandatory-drug-testing-103010-20101029_1_welfare-recipients-drug-screening-cash-assistance).

suspicionless drug testing.<sup>94</sup> Florida has not been able to demonstrate any such prevalent drug problem in the TANF beneficiary population.<sup>95</sup> Thus, Florida is unlikely to prevail on a claim that a current drug problem in the welfare population exists that necessitates mandatory drug testing.

However, the case of *Wyman v. James* is noteworthy in examining the constitutionality of a mandatory drug testing provision for welfare recipients. In *Wyman*, the Court held that a New York statute that required home visits as a requirement of assistance did not violate the Fourth Amendment because, by applying for benefits, welfare applicants consented to the searches; and consensual searches are not a violation of the Fourth Amendment.<sup>96</sup> Florida relied on the holding in *Wyman* to bolster its case; but, the Judge who ordered the Preliminary Injunction in *Lebron*, Mary Scriven, differentiated *Wyman*'s holding by arguing that urinary drug testing was more invasive than house searches.<sup>97</sup> Scriven argues that, although TANF beneficiaries give consent to be tested, requiring drug tests to receive benefits violates the Fourth Amendment.<sup>98</sup> Scriven further remarked that the State did not demonstrate a strong enough special need to overcome the presumption that "a search ordinarily must be based on individualized suspicion of wrongdoing"<sup>99</sup> in order to be "reasonable" under the Fourth Amendment.<sup>100</sup> Because

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<sup>94</sup> Acton, 515 U.S. at 648-50 (discussing drug problem in Veronia schools).

<sup>95</sup> *Lebron*, 820 F. Supp. 2d 1273.

<sup>96</sup> See *Wyman v. James*, 400 U.S. 309, 326 (1971).

<sup>97</sup> *Lebron*, 820 F. Supp. 2d 1273 ("The principal and dispositive difference between this case and *Wyman* is the nature of the intrusion demanded.").

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* (quoting *Chandler*, 520 U.S. at 313).

<sup>100</sup> *Lebron*, 820 F. Supp. 2d 1273 ("[T]he court finds the State has not demonstrated a substantial special need to justify the wholesale,

*Wyman* has never been reaffirmed, and because drug testing has since been repeatedly deemed a search under the Fourth Amendment,<sup>101</sup> the Supreme Court hearing the *Lebron* case will most likely agree with Scriven's reasoning regarding the applicability of the *Wyman* holding to the mandatory drug testing of welfare applicants.

Even if the Supreme Court did rule the Florida law constitutional, implementing mandatory drug testing of welfare applicants is simply bad policy. Although one can be sympathetic to the argument that drug testing is common place during the job application process in the private sector, and that TANF applicants should have to undergo a similar process as job applicants,<sup>102</sup> the fact is that most private sector employers do not require the applicant to pay for the drug test.<sup>103</sup> Conversely, the Florida law requires TANF applicants to pay for the test upfront, which is a substantial cost for a person who is already struggling to cover daily living expenses.

Another popular argument is that "it is unfair for Florida's taxpayers to subsidize addiction."<sup>104</sup> However, as previously discussed, the rate of drug use among the employed population is comparable to the rate of drug use among the unemployed.<sup>105</sup> Furthermore, drug testing

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suspicionless drug testing of all applicants for TANF benefits."). *See id.* (discussing rationale behind holding that State has not demonstrated a substantial need).

<sup>101</sup> Carey, *supra* note 23, at 316.

<sup>102</sup> Aaron Sharockman, *Bill Filed Would Require Only Recently Convicted Drug Felons Be Tested*, POLITIFACT (Feb. 22, 2011), [www.politifact.com/florida/promises/scott-o-meter/promise/600/require-drug-screening-for-welfare-recipients](http://www.politifact.com/florida/promises/scott-o-meter/promise/600/require-drug-screening-for-welfare-recipients).

<sup>103</sup> Department of Health and Human Services, *Drug Testing*, COMP DRUG, INC. (last visited May 1, 2012, 11:51 AM), <http://www.compdrug.org/tipsheet9.htm>.

<sup>104</sup> Brammer, *supra* note 46 ("Most employers require it for their workers. . ."). *See Stereotyping the Welfare Recipient*, *supra* note 18.

<sup>105</sup> *Mandatory Drug Testing and Treatment of Welfare Recipients Position Statement*, *supra* note 21 (explaining that substance abuse is



regimes are expensive to implement, administer, and maintain, and ultimately do not save the State any significant expense.<sup>106</sup> And despite the good intentions of the legislature, sanctioning welfare recipients who test positive for drug use may actually help to perpetuate the drug cycle in Florida instead of helping to give the applicant the resources they need to defeat any drug reliance they have and to ultimately leave the welfare system.<sup>107</sup>

## V. Conclusion

Ultimately, the *Lebron* case may make its way before the Supreme Court of the United States; and there, the Florida law requiring suspicionless mandatory drug testing of welfare recipients will likely be struck down as unconstitutional. However, whether other legislative attempts to institute drug testing programs will succeed as constitutional is uncertain. Kentucky State Representative Lonnie Napier claims that by making drug testing random, his bill, which proposes a drug testing scheme similar to the Florida law, would be constitutional.<sup>108</sup> However, this is likely an unfounded claim, as random testing is not the same as suspicionless testing and the law would likely have to pass through the same rigorous analysis of

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no more prevalent among welfare recipients than the working population).

<sup>106</sup> *Stereotyping the Welfare Recipient*, *supra* note 18 (“[S]avings could evaporate, considering the cost of staff hours and other resources the state has had to spend on implementing the program.”).

<sup>107</sup> Carey, *supra* note 23, at 330-31 (“Guthrie argues that denying welfare to drug users will only eliminate that class of substance abusers from welfare rolls; it will not eliminate drug use and crime among the destitute. It seems senseless to make poor drug addicts suddenly poorer and, therefore, more desperate to commit income-generating crimes.”).

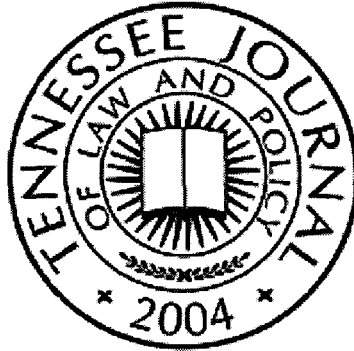
<sup>108</sup> Brammer, *supra* note 46 (“Making the testing random would ensure the bill constitutional, Napier said.”).

“reasonableness” established throughout *Wyman*, *Chandler*, *Veronia*, *Von Raab*, and *Skinner*.

Regardless of the constitutionality of various drug testing schemes, states are most likely better off not implementing any wide scale mandatory suspicionless drug testing schemes for welfare beneficiaries, due to the costs and questionable efficacy of such schemes. Instead, states would better accomplish the goal of eliminating drug use in the welfare population by offering better access to drug rehabilitation programs, education, and resources in an effort to improve marketable job skills. Doing so will help individuals increase financial stability so that they can support themselves and their family without needing to rely on the welfare system for assistance, which is better off for everyone in the long run.



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**SUMMERS-WYATT SYMPOSIUM**

**“CRISIS, COVERAGE, AND COMMUNICATION:  
ADVOCACY IN A 24/7 NEWS WORLD”**

**FRIDAY, MARCH 9, 2012**

**THE UNIVERSITY OF TENNESSEE  
COLLEGE OF LAW**

**PANEL DISCUSSION 1:  
TO COMMENT OR NOT TO COMMENT: WHAT THE MEDIA  
WANTS, WHAT THE CLIENT NEEDS, AND WHAT THE  
RULES REQUIRE**

*Joseph B. Cheshire V*

*Mark Curriden*

*Kim Helper*

*Pamela Mackey*

*Al Tompkins*

AMY MOHAN: We're happy to introduce our first panel of the symposium: "What the Media Wants, What Your Client Needs, and What the Rules Require."

Joe Cheshire has a client list that includes Bon Jovi, Mötley Crüe, death row inmates, members of the Duke Lacrosse team, and state governors, in no particular order of course. Mr. Cheshire started the firm Cheshire, Parker, Schneider & Bryan in 1978, which specializes in criminal defense. Mr. Cheshire will also serve as one of our keynote speakers later this afternoon.

Having worked as a reporter for the Dallas Morning News and the Atlanta Journal-Constitution before law school, the next panelist understands well the intersection between law and media. Mark Curriden's investigative journalism about tobacco litigation led to the indictment and conviction of Texas Attorney General Dan Morales. He is also the author of Contempt of Court, A Turn-Of-The-Century Lynching That Launched A Hundred Years of Federalism. Mr. Curriden is currently the legal affairs writer for the American Bar Association.

A few years ago, while reporting on a local television story involving an animal raid in Williamson County, I first met General Kim Helper, the District Attorney General for the 21<sup>st</sup> Judicial District of Tennessee. At that meeting she told me, "you can get your B roll over

there.” At the time, this struck me as odd for a DA to say, but learning about General Helper’s background changed that. Kim Helper was also a journalist before going to law school, and she began her journalism career as a reporter and news director at WBUF FM 93. After graduating from law school, General Helper worked at a State’s Attorney’s Office in Tampa, Florida and the Tennessee Attorney General’s Office. General Helper was appointed as district attorney general in 2008.

Our final panelist has served as an inspiration to reporters, producers, and news directors throughout the country. For the last 30 years, Al Tompkins has worked as a photojournalist, reporter, producer, anchor, assistant news director, and news director. Mr. Tompkins has spent the last decade at the prestigious Poynter Institute in St. Petersburg where he is the senior faculty for broadcast and online media. He is also the co-author of four editions of the Radio and Television News Directors Foundation’s “Newsroom Ethics” workbook.

Our moderator this morning is UT College of Law Professor Paula Schaefer. Professor Schaefer specializes in the area of professional ethics, and she frequently lectures and writes in this area. In particular, Professor Schaefer concentrates on the area of attorney ethical obligations in the representation of business clients.

We are honored to have all of these esteemed panelists with us today.

**PAULA SCHAEFER:** Thank you all. We will give each member of this panel an opportunity to make some comments and then we’ll have some questions for all of them; I hope the audience will too. We are going to start with Kim Helper, who is going to use PowerPoint.

**KIM HELPER:** Good morning. I feel like the nerd here because I did bring a little bit of a PowerPoint, so I

apologize if it's boring. I appreciate the opportunity to be here. I have two teenage daughters and I was talking to one of them the other night and explaining a little bit about what I was doing and who else was on the panel. After listening to the accomplishments of the other panelists, my daughter finally looked at me and said, "well, Mom, you had one big case." The irony is my daughter's "big case" from her perspective is a case that I handled that in the grand scheme of things probably wasn't all that big. It became big because it was just sexy enough to be covered by "48 Hours" and "Dateline", so from her perspective what made my case big was the media attention that went toward that case. Hopefully, this morning, I can share a little bit of the perspective that prosecutors bring.

In listening to Ms. Mackey, I was a little disappointed. I certainly do not know enough about the prosecutor's handling of the Kobe Bryant case. Being based in Williamson County, just outside of Nashville, we get our share of celebrities who run into trouble because of the country music industry and also because of Albert Haynesworth who, fortunately from my perspective, moved out of Williamson County and took his problems elsewhere.

I'm going to start with a case that came out of the Tennessee Supreme Court involving one of my fellow colleagues and prosecutors, John Zimmerman, in Nashville, who was disciplined with a private sanction. In the litigation John argued that he did not need to be disciplined at all, and that some of the rules involving what can be said infringed on his right of free speech. The Board of Professional Responsibility, felt that the private disciplinary sanction was not strong enough. But the remarks at issue were said when coming out of a preliminary hearing in a murder case and being confronted by reporters. John made the comment that the medical examiner said Campbell was strangled, stabbed in the chest

multiple times, and had his throat slashed all the way across. I don't know whether or not there was any gesturing that went along with that [statement]. John then commented that the photographs of the body were pretty bad, and that they were considering asking for the death penalty. He also made some other comments that had to do with statements that the defendant made in the form of a confession or admissions. The Supreme Court found that that was acceptable for him to say from the perspective that those were statements or comments that came out during the preliminary hearing so they were public record. And that is one of the guidelines that I really encourage folks in my office to follow. Thankfully they do not get approached by the press all that much, but when they do, if it has been said in court or comes out during a court proceeding, that it is generally okay for me to repeat back. I make it very clear to say, "during the court proceeding the detective testified to." I make it clear that they are not my comments but I'm just repeating what happened during the hearing. It is my interpretation of the rules that that would be acceptable.

One of the interesting things that the Supreme Court recognized during the discussion, particularly as it related to prosecutors and whether their free speech is impinged on, was that the speech at issue is "that which would reasonably likely interfere or affect a fair trial"-I think you see that still in Model Rule 3.8, which specifically talks about prosecutors and what our special role is in the requirement that it is okay to speak to the journalists or the media about facts that are necessary to explain the actions, but there should not be any extrajudicial comments that would heighten the public condemnation of the accused.<sup>109</sup>

Within our office we bear that in mind and are extremely careful about any statements made and how they could ultimately affect a fair trial. However, sometimes we

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<sup>109</sup> MODEL RULES OF PROF'L CONDUCT R.3.8 (2004).



get overzealous law enforcement officers who like to be on TV, and who like to comment and talk about the work they're doing. Generally, I really try to discourage that sort of discussion by the agencies in our jurisdiction. I understand that they feel an obligation to tell the public what they have done and what arrests they have made, but I really try to discourage law enforcement from making comments about the evidence and the facts. Generally, I've gotten pretty good results within our jurisdiction as it relates to that.

[referring to PowerPoint] I have done a little bit here about what a prosecutor can say, and I relied on Rule 3.6 of the Rules of Professional Conduct.<sup>110</sup> We can talk about the offense that's charged and any information that is in the public record. But the reality is that for many reasons, I really do not want to try our cases in the press. Although oftentimes we come across as the good guys or the people in white hats just because we're prosecutors, it can cause problems when you ultimately come down to jury selection. I'm looking for the same fair jury that defense counsel is.

I'm also cognizant that my responsibility is not to get a conviction, but to make sure that justice is served and that the best interest of the state goes forward. It is not all about getting a conviction. With that in mind, I encourage the folks in our office not to talk to the media about issues that are not public. Oftentimes we just say the investigation is ongoing and cut off the discussion at that point. We can talk about the schedule of court hearings. If there is a warning that the behavior of an individual involved who may still be out in the public could cause harm, the Rule suggests that we can discuss that.<sup>111</sup> We can also identify the accused in a criminal case. What we should not say, and this falls under the comments, is any statement about the

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<sup>110</sup> MODEL RULES OF PROF'L CONDUCT R. 3.6 (2004).

<sup>111</sup> MODEL RULES OF PROF'L CONDUCT R. 3.6 (2004).

character, credibility, reputation or criminal record of a party, a suspect, or witness; the identification of a witness; any kind of plea negotiations; or the contents of a confession or statement. As I said, the exception to this rule happens if the information came out during a public hearing. My better practice is not to say anything and hope that the reporter was present so they can just document what occurred during the hearing. Stay away from any kind of discussion about a refusal to take a test or the results of a test. For instance, if someone failed a polygraph, we do not go there at all.

My practice is not to give an opinion on the guilt of a defendant. Let a jury decide the guilt of the defendant. Certainly, I think the impression would be that I believe the defendant is guilty if I am going forward with the prosecution, but I am not going to articulate that. And stay away from any information that is inadmissible and would prejudice an impartial trial. I think from a prosecution perspective, we are very careful to not say or do anything that would come back to haunt us as the case proceeds and goes forward to trial.

As I said, because of our jurisdiction, we have had our fair share of high-profile defendants; one of them being Mindy McCready. Depending on where you come from, maybe she's not all that high-profile. I think she had one big song. But she repeatedly ran into trouble. Nancy Grace from CNN latched onto her case and did several shows on her. The next two slides are some excerpts from that. Mindy McCready was placed on probation, typical within the State of Tennessee for first-time offenders, violated that probation, and had continuing issues. Nancy Grace was doing a show on that and I got the call at 5:00, the show was supposed to be at 7:00, to come down to the studio and go on the air. I do not have a PR person, but my husband does PR for a living, so he is my unpaid PR advisor. He

basically said “No, don't do it. Don't go down there. Don't get on TV. No, no, no.”

However, they pestered me enough, and with my background in journalism, I finally agreed to speak over the telephone, I was not going to be on camera. I agreed to speak in part because-and this goes to part of Rule 3.6, which talks about the ability of an attorney to rebut or to speak if there is misinformation out there-<sup>112</sup> I was concerned about the suggestion that Mindy McCready was getting special treatment, that we were being unduly kind to her. That was not the case.

The law presumes that a first-time offender should get probation because he or she is entitled to alternative sentencing. Nancy Grace starts out by asking me why was it taking so long for there to be jail time. She also wanted to know exactly what I expected to be coming. I knew she was going to hammer us because she felt like Mindy McCready needed to be in prison. After discussing things with my husband, I went into this with some talking points, and I was going to get them out there. I told her there actually has been jail time in this case. And, for once, Nancy was kind of speechless. Then I went on to explain that she originally was ordered to serve three years' probation, which is, by statute, the preferred sentence when someone is involved in prescription drug fraud.

So, despite all of the commentators and everyone else who has never practiced criminal law in Tennessee, such as Nancy Grace, telling everyone what should have been the sentence, I tried to explain that the sentence Mindy McCready got is exactly what the law required, that there was no special treatment. One of my other objectives was to indicate that the problem that I felt Mindy McCready had was that she had an addiction, but she was not willing to get the treatment or the help that she needed.

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<sup>112</sup> MODEL RULES OF PROF'L CONDUCT R. 3.6 (2004).

During the interview, someone did ask about drug court and I clarified that we do have a drug court program in Tennessee, but if someone does not want to be a part of it, the program is not going to be successful. Nancy Grace simply responded, “you are absolutely right, Kim.”

From my perspective my goal going forward with the interview was to straighten the record out. I wanted to show that we were not being light on Mindy McCready; we were doing what the law required. I was very concerned about the misinformation that kept coming out on this program, that our district was light on crime, because that is just not the case.

I am going to quickly restate my rules. If it is public record, we will talk about it. If it happened in court and/or on the record, I can repeat what was said or what occurred. But that is it. Generally, I will sit down with the reporter and explain what the law is, but not the facts of the case until after the completion of the proceedings. Reporters sometimes want me to comment on a pending case or some arrest that has just been made, but I will not do that. I am happy to sit down and discuss the consequences of charges. For instance, if someone is convicted of a DUI 10th offense, I will tell the reporter what penalty the accused may be eligible for, but I do not discuss any of the facts or anything that has occurred with the case.

Generally, I will never say, “no comment.” But I will say “I cannot comment.” It might be a minute distinction, but to me “no comment” suggests that I am trying to hide something. However, “I cannot comment” suggests that my ethical obligations will not allow me to comment because the investigation and/or litigation is continuing. I think the latter makes more sense, and people better understand why I am refusing to say anything. They understand that I am not trying to be obstinate, I just ethically cannot comment. I will always return a call from the media because I want reporters to know and understand

what is happening from our perspective. That may not mean I can give anyone a sound bite or an interview, but I will at least always call back and just say, “Hey, I’m sorry, I can’t talk to you, the investigation is continuing,” or otherwise explain whatever the issue may be. With that policy, I have managed to build a pretty good rapport with reporters. So, if I do say, “I can’t talk to you,” generally they understand and I believe that we get a fair shake.

PAULA SCHAEFER: You spoke to the issue of talking to law enforcement, about why they should not talk to the media. We know that there are professional conduct rules that require prosecutors to take reasonable care to make sure that law enforcement, and other people who are assisting in the investigation, do not make statements that are prejudicial about the case to the media. What would you tell other prosecutors about how to have those conversations and how you’ve been successful in conveying that to law enforcement?

KIM HELPER: What I usually try to do within our office, when we have a case that I know will generate media attention, is touch base with the lead detective and say, “Hey, you need to be careful about what you’re saying.” Hopefully, most prosecutors have that kind of ongoing dialogue with their local law enforcement. If they do, then they can make that call and warn the law enforcement officers that if they talk about the case, they are going to be in trouble down the line, because it could come back to haunt them at trial, and that it is going to be an issue for them in trying to select a jury.

For example, we had a case which involved a defendant who was finally apprehended after being a suspect in raping women across Davidson and Williamson County for several years. The media was camped outside our office when we had grand jury, so I had told all of our

officers to not speak to the media. I talked to the officers in Davidson County to make sure no one was talking to the media. However, the next day a verbatim story came on TV about the grand jury testimony. The officers were furious with me. They wanted to know why I had talked to the media after telling them not to. I think they realize it is a give and take situation. If I ask them to not do something, and I do not do it either, then we are all okay.

**PAULA SCHAEFER:** We will have time for questions from the audience at the end, but we are going to move on now and give Mr. Curriden a chance to make some comments.

**MARK CURRIDEN:** First, I am very honored to be here. Thanks to Justice White for inviting me. Second, spend as much time as you can with this man right here, Joe Cheshire. Not only are you going to be amazed by what he says this morning, but he is also truly one of the great lawyers in America.

I was a history major at the University of Kentucky. I had no interest in being a lawyer. I got to the end of my junior year and started looking around at newspaper jobs. I wanted to be a writer. I had no newspaper experience, so I was going to have to go work at the Uharley Daily Bugle down in Georgia. That didn't seem like a positive. The American Bar Foundation offered a scholarship for journalists who wanted to go to law school, and I thought that sounded pretty cool. I could go to law school, stay out of the real world for three more years, and milk my parents out of tens of thousands of dollars. That seemed like the right thing to do, so I applied. It was a long shot, but about two months later I got a letter from the American Bar Foundation saying, "congratulations, you've been awarded the scholarship." I thought, "I am the man," but when I talked to them a week later I found out that in 1985 I was

the only applicant for the scholarship. I was accepted at Vanderbilt and I spent my first two years of law school in Nashville. Then the Atlanta Journal-Constitution, through Billy Kovach and Sonny Rawls, offered me a writing position and paid for my third year down in Atlanta.

I have never covered a high-profile case, as far as celebrity. I covered the Manuel Noriega trial, he was somewhat of a celebrity. My first big trial was actually right here. It involved one of my law professors from Vandy, Ellen Clayton. She teaches reproductivity law. I had just started at the Atlanta paper when she called and said "I've got this great case, it's a divorce case." I didn't think that the Atlanta Journal-Constitution would be interested in a divorce case, but she said she was going to send me some of the information anyway. It was a case called *Davis v. Davis*,<sup>113</sup> and no one had written about it. Junior was suing Mary Sue, and it was counter-sued. They were from Maryville, Tennessee, and as I arrived there I was told it was pronounced "Murrville," so I got that down right.

It was a great case. Everything was amicable in the divorce, but they had been trying to have children. They had gone through an in vitro fertilization program and they were battling over seven frozen embryos. The wife wanted to have them as part of the divorce because she wanted to have them implanted so she could have children. One morning, the husband realized that if the wife has the children, he will have to pay for them all because they were his children. He decided that was not a good idea. And thus began the battle over the legal status of these seven little frozen embryos, which were truly smaller than the period at the end of any sentence in your materials. It was a great case. I came and spent two weeks here.

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<sup>113</sup> *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992).

I covered the Exxon Valdez <sup>114</sup> trial from beginning to end, spending much time in Alaska. It was so much fun. It was beautiful. But the flight from Atlanta up to Anchorage, through Dallas, is a long flight. I would stay in Anchorage for two weeks and then come back.

I also covered all the tobacco litigation. I got into the tobacco litigation because of someone else in Knoxville. I got a tip one day in 1993 from a guy named J.D. Lee. J.D. Lee was trying tobacco cases before trying tobacco cases was cool. He tried them and was losing them, but then he heard about this one case, and he got me interested. J.D. was a pilot, so he flew down to Atlanta, picked me up, and we flew to Louisville, Kentucky. For the next six years all I did was cover tobacco litigation. It was fun.

Why did I cover all this? I loved it. I loved covering law and dealing with lawyers because lawyers love to talk. All my sources are lawyers and judges. I have to be honest, most are not prosecutors. I get very little information from prosecutors. That may be because the articles that I write in the criminal side are more pro-defense oriented. This may be because I usually come to a case after everyone has written all the stuff about how bad the defendant is and how horrible the crime is. I come in and show that there was something wrong in the case. For example, I will point out if there are false confessions. I have a piece on the role of false confessions coming out in a couple of weeks. I did a piece on paid informants. I like digging in. I interviewed many judges and went around the country talking about the role of paid snitches and how there are so many flawed cases out there. This is because I found out that many co-defendants turned snitch and got offered great deals.

A couple of comments. The prosecutor [Kim Helper] talked about Rule 3.6. One of the keys of Rule 3.6 is it came from a case that I also wrote about when it was

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<sup>114</sup> In Re.: The Exxon Valdez, 239 F.3d. 985 (9th Cir. 2001).



argued in 1991, the Gentile case.<sup>115</sup> A guy named Dominic Gentile was a criminal defense lawyer in Vegas. The police and district attorney had issued what they call a speaking indictment, with details, and very strong language in the indictment itself. Then they arrested the defendant and they did the “perp walk.” Then the district attorney and the police both made statements.

Mr. Gentile, hired as the defense lawyer, went public, and had his own press conference. He said, “I’m going to show you at trial that not only did my client not do this, but it was the police officers.” Mr. Gentile’s client was accused of stealing cash, money orders, and some drugs from a police safety deposit box. Mr. Gentile said that he was going to show that the police officers were actually the ones who were more likely to have stolen the money and the drugs from the safety deposit box.

The case went to trial and, indeed, that is exactly what Mr. Gentile argued and the jury came back and found his client not guilty. The next day the State Bar of Nevada moved against Mr. Gentile, charging him with violating Rule 3.6. Mr. Gentile waived his confidentiality under the Nevada Rules, and asked for a public trial before the Nevada Supreme Court. He was found guilty. Before the trial, the state offered him a slap on the wrist. They did not even call for a suspension. They just asked him to take a reprimand, but Mr. Gentile wanted a trial.

Then Mr. Gentile hired a guy named Mike Tiger. Tiger was a great lawyer from the University of Texas, and now he is a great law professor at Duke. Tiger argued two issues before the United States Supreme Court. First, Tiger argued that lawyers have First Amendment rights and Rule 3.6 violates them. Second, Tiger argued that, assuming the State Bar Rules are constitutional, there needs to be safe harbor clauses in the rules to allow lawyers to go in and fight back, especially criminal defense lawyers.

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<sup>115</sup> Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991).

The Supreme Court decided the First Amendment issue in a five to four vote, with Chief Justice Rehnquist writing that, as lawyers, you have First Amendment rights, but as an officer of the court, you forfeit some of those rights.<sup>116</sup> The Supreme Court ruled that the State Bar and the State Supreme Court can promulgate rules to limit your speech as lawyers.

But, with the second issue Justice O'Connor jumped ship. She said that there does need to be broad rules. Rule 3.8 says you can't talk, but Rule 3.6(b) and (c) give examples of what you can say; Rule 3.6(c) says you actually have an obligation to speak out to defend your client when you feel that the other side has unfairly tainted the case against your client.<sup>117</sup> This applies in civil or criminal cases.

There are also a couple of other things in the rules. Beyond just doing battle, almost all the State Rules of Professional Conduct have in their preamble or in their competence rule that it is the duty of a lawyer to educate the public as to the administration of justice. In the ABA's Model Rules it talks about the fact that the entire public confidence in the justice system relies on lawyers actually communicating and educating the public.<sup>118</sup> The number one way to do that is through the media.

Each of us cannot go door to door and say, "I need to talk to you about the rule of law." So, what do you do? You write up ads, you go on TV shows, you go on the radio, you answer when the reporter calls and says explain this to me. I'm a journalist, so I want everyone to talk as much as possible. I want everyone to tell their side of the story. I really dislike gag orders.

When I was covering the Valdez trial, the Exxon people were under instructions to not talk to the reporters.

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<sup>116</sup> Id.

<sup>117</sup> MODEL RULES OF PROF'L CONDUCT R. 3.6(b)-(c), 3.8 (2004).

<sup>118</sup> MODEL RULES OF PROF'L CONDUCT PREAMBLE (2004).

The chairman of Exxon once told me, “we’re not going to talk to you so how’s that for killing your story.” But Jim Neal, one of the truly great lawyers in America, was on the case. He would privately come to me and say “here’s what this means, off the record.” He explained things to me. Exxon always thought that if they didn’t talk to me, then I wouldn’t be able to write a story. I did write a story; it just didn’t have their side in it.

After I was hired by the Atlanta newspaper, I was offered a clerkship by Judge Frank Johnson. Judge Johnson was one of the great judges in America. In the early 1950s he was appointed by President Eisenhower to be a U.S. District Court judge in Montgomery, Alabama. By the time I clerked for him, he was actually on senior status as he had been appointed by President Carter to the 11th Circuit. Judge Johnson was the U.S. District Court judge who integrated Alabama. He, his wife, and his children had to have U.S. Marshal protection 24 hours a day, seven days a week, for 17 years. They could not go to church. They could not go to the grocery store. Judge Johnson used to love playing golf and the only place the marshals would allow him to play golf was Maxwell Air Force Base because it was the only place they could keep him safe.

When he interviewed me for the clerkship, he said, “I want you to know that I had one real good experience with the media.” He said they were coming to the end of the 17 years the marshals were providing the service. He said the marshals told him, “it’s been a year and a half, we haven’t gotten any real substantive threats, maybe we should back off.” Judge Johnson had been trying to get them to back off and to have a little more freedom anyway, so he agreed. Well, the local newspaper found out and wrote a front-page story, “U.S. Marshals Withdraw Protection from Judge Johnson.” Immediately, the marshals came back and stayed with him, his wife, and children for several more days. I thought at that moment, “my interview is over, I’ve

lost this clerkship.” Then Judge Johnson told me, “you know what I realize now? The day that Frank Johnson no longer needed U.S. Marshals’ protection in Montgomery, Alabama was a major day in the history of the state of Alabama. That was a front-page story.”

Then I got the clerkship. Thank you very much.

**PAULA SCHAEFER:** What advice would you give to a new reporter about how to be a good legal reporter and how to cultivate relationships with lawyers to help her reporting?

**MARK CURRIDEN:** There are more and more lawyer/journalists. When I got out of law school there were only a few. There are so many who are very well educated, even those who didn’t go to law school. For journalists, I think getting to know the lawyers personally is key. Because of cutbacks in newspapers and TV stations, there are fewer reporters to do just as many stories. The bottom line is that reporters do not have the time. The lawyers and the journalists both have a responsibility here. The reporter’s responsibility is to know the story, to get it right. Make sure not only that it is right but also that it is holistically accurate, that it is wholly true, that the whole premise of the story is going in the right direction.

But the burden also lies on you, as lawyers. You have clients and you have those responsibilities. I was with a big firm in a litigation group, 780 lawyers, and lawyers would come to me all the time complaining that a reporter screwed up a story, missed the whole point, missed his or her side of the story. I would ask, “oh, did the reporter call you?” They would say yes. I would then say “And you told him your side of the story?” They would respond “No, I’m not talking to him.” I would then tell them they deserved what they got because they did not communicate. You, as the lawyer, need to take the time and sit down with the

reporter and say here is what the law is, here is what this case is about. So, there is a lot of burden on you as lawyers to educate the public.

PAULA SCHAEFER: We are going to go now to Joe Cheshire. Like me, Joe is also losing his voice today, and he's our next speaker in the next session too. So you can limit your comments to keep your voice for the next session. But if you want to make a few comments now, we would appreciate it.

JOE CHESHIRE: Thank you, Paula. It is a great pleasure for me to be here today. I probably would not be here if it was not for the state of Tennessee. My momma was a Russian immigrant, and back in the Second World War my daddy was head of security in Oak Ridge. They fell in love and got married in Nashville, Tennessee without anybody attending but the two of them. A couple years later, I came along. So I am always happy to come to Tennessee. I tried one of my favorite cases in front of Judge Nixon, a federal judge in Nashville, Tennessee, for seven weeks some years ago and really enjoyed being there. I have really enjoyed being here. We have been treated so wonderfully.

First, before I forget, in the materials I have put briefs and orders from two particular cases, one of them the Duke Lacrosse case, and another one a very high-profile government fraud case in which the prosecutors tried to gag me. The briefs and the discussions of those two particular cases are written by my partner, Brad Bannon, who is the gentleman who discovered the DNA in the Duke case, and who I think is one of the most brilliant lawyers in America. Those briefs will tell you every single solitary thing you need to know about your ethical obligations, both from a prosecutorial standpoint and from a defense standpoint, in talking to the media. They cover Rule 3.6. They cover all the Supreme Court cases. They cover local cases. They are

definitive briefs because they had to be in both of those cases. I did not write them, although I signed them. I commend them to you all anytime you have a problem, a worry, or a wonder about what your ethical obligations are. For example, if you are a criminal defense lawyer, you will find that the field is actually wide open to you, if you just know how to use it and if you are not afraid to use it. I'll give you the story of my use of it during the Duke Lacrosse case after we finish here.

Let me give you a brief history of mine as it relates to my career and the media. I am one of these really lucky lawyers who, from the very beginning of my career, has had cases that seemed to have media following. The first jury trial I ever tried in 1973 was a very high-publicity first-degree murder case, so I got to know the media on a local basis. I also got to learn to deal with the media, and I got to learn how important it was. Five or six years in to my practice, I was appointed by the governor to prosecute the longest sitting sheriff in North Carolina, one of the most powerful politicians. I was 29 years old. Why he chose me, I have absolutely no earthly idea, because I do not think I was competent to do it. I learned a lot of lessons. That case had a number of trials with it, including the sheriff himself. Twelve law enforcement officers went to prison. It was a very high-profile media case that was a very difficult case for me because half the media wanted the sheriff acquitted and half the media wanted him convicted. I had to learn to deal with those things.

Shortly after that, I was appointed to do maybe one of the worst murders ever in North Carolina. Three people in a robbery were murdered and the defendants, while they escaped, took a 16 and 17-year-old couple hostage. They raped the girl while the boy was tied to a tree, blew his head off, took the girl up to New York, and sold her into the white slave trade. The publicity of that case was bad enough, but then my client took me hostage for a whole day

in the visiting room in the Cumberland County Jail. So, it blew up into an even bigger situation.

Subsequent to that, there was a fellow named Phil Harvey in Chapel Hill, North Carolina who had the biggest x-rated movie business in America, and he put all of his profits into birth control for third-world countries. He hired me and two other North Carolina lawyers and for two and a half years we traveled around the United States. We even tried a case in Nashville, Tennessee, fighting the U.S. Justice Department's Obscenity Task Force, along with nine different obscenity cases.

Shortly after that, the most fun thing happened to me-I got hired to represent Roy Black. Roy Black's office referred him to me from Florida. He turned out to be the fellow who discovered, created, funded, and managed Mötley Crüe and then Bon Jovi, Cinderella, and various other bands. He was charged with possessing a 50,000 pound load in North Carolina and then subsequent to that 286,000 pounds in a barge that came up the Mississippi River. The Mississippi load was unloaded by the Hells Angels while there was a DEA agent on the barge and was then taken all the way to Detroit, Michigan where every single solitary ounce of it got sold. It was interesting, Mark, because that was the organization that laundered its money through Noriega.

MARK CURRIDEN: Right.

JOE CHESHIRE: This was pre-guidelines, so I worked out a deal where my client got a probationary sentence for almost 300,000 pounds of marijuana in both jurisdictions. We set up a nonprofit foundation that traveled around the world putting on concerts to fund the nonprofit foundation for drug abuse. So for about three years, while I was still practicing law in Raleigh, I was traveling with Bon Jovi, Mötley Crüe, Doc McGhee and various other people all

over the world. This culminated in the largest rock and roll concert in the history of Europe in Moscow in Lenin Stadium in 1989. That show was trumpeted by the press in Germany as being the final straw in communism, which of course it was not, but it was a lot of fun.

Then I came back from that and got very deeply involved in death penalty cases. I tried 24 death penalty cases in a reasonably short period of time, and never had a death verdict, thank God. But, earlier on, I did represent a client in the biggest media explosion I've ever been in, including Duke Lacrosse. Although the world was different then, I represented the first man executed in North Carolina when the death penalty became law again. What made it a great legal story was that Texas was determined to kill the first person in America first, and North Carolina was determined that they would not. So, there was this enormous battle between the two states in which the defense lawyers and the defendants got caught up. I think Texas won by three-and-a-half minutes. But that was the biggest press conference that I have ever been in, including Duke.

In the course of the death penalty work, we uncovered enormous prosecutorial misconduct throughout the State of North Carolina, and the press was instrumental in uncovering it. One of the saddest things in America today is that the print press is decreasing in its ability to do its job, because in the state of North Carolina there are two entities that have allowed our state to be a free and progressive state. One of them is the University of North Carolina, and the other one is The Raleigh News & Observer. The press in The Raleigh News & Observer uncovered this prosecutorial misconduct, and I was blessed enough to be involved in three retrials of three men that had been on death row, one for 22 years, one for 16 years, and one for 18 years. They were all acquitted or had their case



dismissed, and were all innocent. Each one of those carried a tremendous amount of press.

Then I got into the Duke case, and I will talk about that in a minute. Then I represented the last two governors in the State of North Carolina. My whole legal career has been involved in cases in which the media has been incredibly instrumental. From 1973 to 2012 I have seen the amazing change in America and the amazing change in the media.

It is my belief that a trial lawyer who is not engaged with the media on an intimate basis will never be a great lawyer today. It does not matter whether it is during his or her case, whether it is a case where he or she has media coverage, or whether he or she is not in a case in which there is media coverage. That lawyer will never be a great lawyer today, not three years ago, not five years ago, but today, because instantaneous communication has made the media. The media includes things that never existed before, like comments to TV articles, blogs, and speaking indictments, which are the prosecutor's way of prejudicing a case. Federal prosecutors are the worst at it in the world. Of course, the federal criminal judicial system is a jury away from a totalitarian country anyway, and that is the truth, in my opinion. Speaking indictments have created an enormous disadvantage to defendants.

The media itself, and private comments and blogs, have made every single solitary juror that comes into a jury box predetermined about the case you are going to try, even if they do not know the facts of that particular case. So, if you do have a case that is a high-publicity case, such as the Duke case, you have to have lived your career building up good faith with media members. That means not just trying to get them to report what you want them to report, but helping them on background in other cases that you are not even in, explaining things to them, giving both sides to them so that they can write good articles. Most print

journalists are intellectually honest people who want to write good material. So if you spend your life helping them, they cannot help but try to help you a little bit when you need help.

The other thing is that you can learn more from the media about your case than your investigators can learn about it because the media has more sources than you do. If you develop that kind of relationship with them, they will be off the record with you just like you are off the record with them.

Some people have the talent to do it, and some people do not. Some people are afraid of it. Some people cannot be criminal lawyers, and most of my experience is in the context of criminal lawyers. I have had some civil experience and civil lawyers seem to be terrified of the media, which is something I just don't understand. But criminal lawyers, we have to deal with it.

When you do deal with it, you need to understand the ethics of it. We have what is called the arsenal of devices to deal with pretrial publicity: gag orders, voir dire, special jury instructions, prior restraints on media, sequestration, postponement of cases, change of venue; none of those things work. And if you try a high-profile case and a juror that tells you that he or she has not read the media or has not been influenced in any way by the media, they get to sit as a juror and his or her number one qualification for getting to sit is that he or she is a liar.

My firm just tried a retrial in a murder case in which, during the voir dire, it was found out that four different jurors were blogging or putting things on Facebook. The case was tried for seven weeks. The verdict was reached, and the next day the judge ordered an investigation because two of the jurors were putting their deliberations out on a Web site. So, you have to understand that there is going to be prejudice, even when the jurors say there is not prejudice. If you do not prepare yourself, then

you are an idiot. For example, if you do not have somebody reading the comments and articles in the news media, and you don't have a team that is answering those comments, you are an idiot. If you do not read every blog that is written or have somebody read every blog that is written on the case, particularly if it is a high-profile case, and engage the bloggers, you are making a terrible mistake. This is because those jurors go home or these people who may be your jurors a year after the charge are blogging on it every day, they are reading about it every single solitary day.

So, we are in this world, and the media is in competition with each other now. It is not just about writing articles: it is about the most outrageous articles, so you have to be very careful about those things. The media can also be enormously intoxicating. And all of us who drink have done a lot of stupid things when we are intoxicated. So, do not ever forget that either. Thank you.

PAULA SCHAEFER: I use a video clip in my legal profession class in which your client talked to the media and you are standing by him. What influences your thinking on whether your client should talk to the media and how you prepare them to talk to the media?

JOE CHESHIRE: The first thing that influences me is my client. Some people can do it and some people cannot. My experience when I took David Evans, the captain of the Duke Lacrosse team, in front of the national media, after being told it was the stupidest thing in the whole world to do, after he gave his statement, there was not a mother in America that thought he raped that lady. But, part of it depends on your faith in your client, and the vast majority of it depends on the facts of your case. That is really the determination. It is a tough determination to make, and if you make it wrong, you can lose the case. It is always a

risk, and the vast majority of the time I will not let my client talk.

PAULA SCHAEFER: Thanks. We are going to move now to Al Tompkins. Al, do you have a few prepared remarks you want to make?

AL TOMPKINS: Here I am sitting between these two, Joe Chesire and Pamela Mackey; one saying do not talk to the press; one saying yes talk to the press. My wife is a United Methodist minister and a shrink, which is another whole seminar I will not burden you with, but I will borrow from John Wesley and give you this advice: leak as much as you can to as many as you can as often as you can.

As a journalist, we are out there trying to get information. We are trying to scour for information. I understand if you have a really guilty, awful, low-life client that you would not want him on TV, but the fact of the matter is he is going to be a low-life, guilty client whether he is on TV or whether he is in the newspaper. So, the more you can help to educate the journalistic process, probably the better.

My great-grandfather was a judge and hated journalists, I later came to understand. His big problem was that he did not like to work very much, and passed that down in his family quite well. One of the things he would do is knock off court at noontime and go out and train horses. The journalists hated him. So, one of the things that I came to understand is that relationships are everything.

One of Kim Helper's predecessors, Joe Baugh in Williamson County, was involved in a case I covered. It was a trial involving an heir to the Coca-Cola fortune, John Candler. Candler had a bad personal habit of writing cold checks that were so large that it actually bankrupted the bank of Hole InThe Wall, Tennessee. The problem was that I had never covered an international banking fraud case,

because it involved offshore bank accounts. Joe Baugh, the district attorney, was so generous in teaching me about things like that, so it made the trial coverage so much better for a young reporter.

... I left a handout on your desk. I will walk through it. I am going to offer the big five guidelines for what I think make for better press relations. Number one follows along this line: teach them well. Some of the great mentors that I have had as a reporter have been really, really good attorneys. People like Aubrey Harwell and Jim Neal; people who were willing to take me aside and tell me how things were going to go, tell me how things work in the court, tell me about things that I probably would not have known. Were they spinning me? Yeah. But I am old enough to understand that. I just want to know all I can know about how this is likely to go and what it is I am likely to learn.

John M.L. Brown, an attorney in Nashville, was one of my favorite lawyers there. He usually represented cops that were accused of awful things, and he was so tired of watching us report badly about guns, firearms, shootings, and things, that he called me one time and said “You guys are idiots and I'd like to make you a little less idiotic, let me teach you about guns.” So we paid for this training. We went out to his gun range and he and a couple of guys on the S.W.A.T. team taught our staff, our reporters and managers, about firearms. For many of the people, it was the first time they had ever shot a pistol; they had never shot a gun of any sort. I thought that was a really interesting idea, an attorney who helped us to get our literacy up when it came to firearms.

And is this your duty? No, it is not your duty, but you are going to get better coverage if we know more. So, one thing I would say is help to school the journalists. Do not be afraid to pitch stories to reporters, even stories that you are not involved with. Some of the great cases,

including the Firestone and Ford Explorer case,<sup>119</sup> those stories did not just fall into the reporters' laps. David Rasika, an investigative reporter at KHOU, was talking with a civil attorney in Houston, and asked the attorney about what was going on in his life. The attorney said, "I'm getting all these cases in these rollovers of these Ford Explorers and I think there's something going on here but we don't really know exactly what it is." They ended up mapping all those cases and they found out that all of the rollovers were in southern states in the middle of the summer. They thought it might be heat related, so they started looking at heat-related things. They found out it was a tread separation coming from the Firestone tires.

So, do not be afraid to pitch stories to reporters, especially stories that have to do with money, family, safety, health, or community. If you can tie a story to one of those, you are almost certain to be successful in getting coverage. Injustice is one of the hardest things to get people interested in, because it's too hard to prove. So if you can pitch it as a money, family, safety, health, community story, it is almost always going to be more successful.

I would say that journalists love proof. You do not have to hand over specific proof, but sometimes pointing us in the right direction is very useful. Sometimes teaching us where to go to look for documents that will help the case can be very useful. People that they might know, who are expert witnesses, could be very useful. You do not have to do the work, but if you can point journalists in the right direction, it sure does help our coverage be better.

Number two, keep your promises. One of the ways to really ruin your reputation in the press is to make a promise and break it, to say, "I'm going to be available, I'm going to talk to you, I'm going to supply this," and then back out. The problem is that journalists are so strapped for

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<sup>119</sup> *In re Bridgestone/Firestone, Inc. Tires Products Liab. Litig.*, 155 F. Supp. 2d 1069, 1078-79 (S.D. Ind. 2001).

time now. There are so few of them, that when they make a promise to an editor that something is going to happen, it better happen or they are going to look like idiots and they are not going to get the time to do that kind of story again. So if you make a promise, make sure you fulfill it and do the best you can.

Number three, demand accuracy. Do not be reluctant to call a reporter and tell him or her that what he or she reported was not accurate. I do not think you have a lot of right to complain about tone or spin. You are not going to win those because they are all subjective. But I believe that you have the right to expect that a story is going to be accurate.

There is a difference between accuracy and truth. Accuracy is getting the facts right, but truth is getting the right facts. You can help with truth by providing context. I do not mind people saying “I just don’t agree with that fact,” or “I don’t think that study is the right study.” To challenge that is a completely legitimate thing to do. I remember one time Aubrey Harwell called me and said “You need to apologize to the public defender.” I said “What are you talking about?” He said “One of your reporters really did a job on the public defender and you need to apologize to him on the air.” I was the news director at Channel 4 then. We had a reporter who was covering a death penalty case, the Baskin and Robbins murder case. A guy would go around to Baskin-Robbins and kill people. One of my reporters, in a desperate move, wrote a letter to the accused Baskin and Robbins murderer telling him that the public defender was overwhelmed with cases, had never tried a death penalty case, and the only hope he had of staying out of the electric chair was talking to him on Channel 4.

It was not a very good move, and it also was not true. Moreover, in my eyes, he had more or less made a contract with the defendant that we would pay for all his

defense, which concerned my corporate owners quite a lot. So that night I actually had to go on television and apologize to the public defender's office for tarnishing their good name. That was not the highlight of my career. But we did it because it was the right thing. Aubrey had nothing to do with the case. He was calling because he had seen an injustice and expected more of us. I always respected him for that. He was a friend and a mentor in many ways, but he would hold you accountable. I think that when you hold people accountable, even when you are friends, that that is one way that you raise your status with people.

Number four, this is what I call know the rules. I see this as a big mistake that attorneys make. There is a difference between off the record, on background, not for attribution, and on the record. This morning Ms. Mackey said "I'm going to say something, there's no recording going on, right?" Ms. Mackey, what did you expect when you asked that?

PAMELA MACKEY: That there was no recording going on.

AL TOMPKINS: And were you expecting that we were on the record, that it was okay for us all to blog and Facebook this?

PAMELA MACKEY: Well, sure.

AL TOMPKINS: Well, usually when somebody is saying there is no recording going on, what they mean is you are not ever going to report this. I live my life thinking that we are always on the record. There are settings obviously where you have an expectation of privacy, but a great number of you are fairly public people. I am certainly a public person, and if I say something that is going to be newsworthy, or if you say something that is going to be



newsworthy, you have expectations it is going to be recorded somewhere. You ought to live your life that way. Just live your life on the record and you will not be too disappointed.

When you say “not for attribution”, what you are saying is what I am saying is on the record, you just cannot pin it to me directly, which I think is a slimy way to live life. It is like saying “I’m going to say something I probably shouldn’t say but I want you to know it.” If you are not going to be attributive, do not say it. Unless I really need it; then you can say it. That is right, is it not John?

JOHN SEIGENTHALER: Absolutely.

AL TOMPKINS: “Off the record” means you cannot ever report this. It is a contract. We tell reporters all the time that this is an enforceable contract, and you can’t repeat this, you can’t report this. I urge journalists to not take information off the record if there is any possibility that they can get it somewhere else, and/or if it is information the public needs to know. You ought to know the difference between these things. If you say not for attribution, if you say off the record, this is what they generally mean. However, they do not always mean these things. So be sure you clarify with the journalist what it is you mean. I have been around lawyers, and cops too, who will say things off the record knowing that what they are doing is handcuffing the journalist from ever reporting it. That is a way to never get it reported. If you give it to me off the record, I cannot do anything with it. So know the rules.

Number five, never lie. If you cannot comment, if you cannot report, then do not. But do not lie and do not mislead. It will come back. Everything is recorded now. Everything is recorded now, and if you lie, it is going to be

in the public, you can just count on it. You are generally better off just saying nothing.

I hate to be so shallow, but we are in a visual world, so I will give you a few tips on how to make better video, how to make better television, and what to wear. The setting can make a client look guilty or good. Nobody ever looked dumb when they were sitting in front of a bunch of law books. But people can look really stupid and awful if you put them in a bad setting. This is really big. I want you to think about the video that you saw of Kobe Bryant. What was he wearing?

UNIDENTIFIED SPEAKERS: A white shirt.

AL TOMPKINS: A white shirt. He looked innocent, he looked athletic, and he looked like we were interfering with his busy life. Who was sitting next to him?

UNIDENTIFIED SPEAKERS: His wife.

AL TOMPKINS: What was she doing?

UNIDENTIFIED SPEAKERS: Holding his hand.

AL TOMPKINS: And stroking his arm. And here is this high-powered woman attorney, which is not a small thing in a sex case. This women attorney is saying her client is innocent. My journalist mind is going "He might not be guilty but I don't think he's innocent, he's already lied to the cops, he's already admitted he had a girl on the side that he did exactly the same sexual act with and held her by the throat." He already told the cops this.

PAMELA MACKEY: He never lied to the cops.

AL TOMPKINS: He did lie to the cops. I have what he said on my computer. He said, "I did not have sex with this woman." He sounded just like Clinton. That is what he said. There was a recording. The recording was released.

PAMELA MACKEY: So the prosecutors who mailed it to the press --

MR. TOMPKINS: It does not matter. He still said it. First thing out of his mouth, lie, boom, he said I invited her up to the room so we could talk about the bears who come to the window, I like to see the bears. So, her client lied to the cops. It is in the affidavit; you can see it. It was a lie. And the officers said "Well, the problem is that you had sex with her." Bryant's response was "Oh, yeah, I guess I did." The police officers then said "The problem is you said you held her by the neck, bent her over a chair." Bryant responded "Well, yeah, I guess I did that too now that I think about it." The cops asked "Have you ever had another girl?" Bryant responded that he did have another girl and he did exactly the same thing with her. Bryant said "Don't tell my wife and don't tell the people who endorse me." He was worried about his wife, he was worried about his endorsements, and he asked the officers to not tell the press. That was what was coming out in his affidavit.

I do not know if he was innocent. I doubt it. I think he was probably not guilty, but back to the press conference. Here they are using the word innocent over and over again. Then, here comes weepy Kobe who has been in front of the press since he was 17, saying I'm innocent. You know it makes great TV. I would say be really thoughtful about where you do this. I do not think that the wife stroking the arm thing works very much anymore. We have seen this a few times. We keep seeing politicians, Tiger, and half of Joe Chesire's clients. Be very careful with the weeping wife, because they are going to end up suing the

cheating husband and then leaving them and getting three houses. Is that not what Kobe Bryant's wife got, three houses?

PAMELA MACKEY: Ten years later.

MR. TOMPKINS: Ten years later. Sound bites. She did a perfect job on her sound bites. Sound bites are best when they are subjective, not factual. Thoughts, opinions, feelings, emotions and observations, those are sound bites. Just like in print, the quotes are best when they are subjective. So, what the journalists are going to use from you is not all the facts; they are going to write that in copy. They are going to use the subjective sound bites you give. A thought, opinion, a feeling, emotion and observation. If you go more than 15 seconds, you are usually not going to make it. Kobe got a longer sound bite because he was crying. But most of the time you do not get that. What was that, about 20 seconds?

PAMELA MACKEY: Yes.

MR. TOMPKINS: So, I want you to be really thoughtful about the sound bites. The last thing is clothing. Keep it simple. Do not wear stripes. Do not wear leopard print. Do not wear anything that is going to buzz on the TV. Insist on great lighting, because if you look awful, your client is going to look guilty. If you look bad, if the lighting is awful, your client is going to look guilty. You have to insist on the right setting or do not do the interview. Do not ever use natural light. Make sure you light the scene. If they are not going to light it, you pay for the lighting. Do not wear anything that is going to make you look ridiculous. If anybody remembers what you are wearing, then you wore the wrong thing.

Sitting in our audience is one of my great heroes, John Seigenthaler. We largely have cameras in the courtroom because of the work of this man. For many years he traveled across this state, met with judges, and campaigned for open cameras in the courtroom. I am a big supporter of that. In a few weeks we are going to have the longest hearing in front of the U.S. Supreme Court that we have had in decades on the national health care plan. But, you are not going to get to see it, which I think is just crazy.

In my hometown, Caldwell County, Kentucky, the two biggest rooms in the county were the basketball court and the circuit court. The two most important things that happened in my hometown were basketball games and criminal trials. I think the public's business ought to be done in the public. Our courtrooms are not big enough to support that kind of an audience any more. So what we know about the law comes from Matlock, Perry Mason, and Law & Order, instead of being able to see with our own eyes the impressive work of courts. I seldom go into a courtroom without coming out impressed with how professional you are, how thoughtful you are, how good our judges are, and how in the end we seem to come up with good answers.

I'll leave you with this thought when it comes to cameras in the courtroom. We just got out of Iraq, but when they built a courtroom for Saddam Hussein's trial, did you notice what they did? The American government designed this courtroom and had a camera in the courtroom to watch Saddam Hussein's trial. Why? Because the government wanted the people of Iraq to understand that Saddam Hussein would get a fair hearing, that there would be evidence, and he would be able to cross-examine. Think about the irony of that. When we help rebuild another country, what do we do? Put cameras in the courtroom. Yet we do not have them in our own. I think that is a bad deal. It is not good for justice. It is not good for the courts. It is

not good for the people. We ought to be able to witness, first-hand, what goes on in the courtroom. So I just want to thank John Siegenthaler for all the work he has done to open our courtrooms. We had really good experience in Tennessee and it would not have happened without his work.

**PAULA SCHAEFER:** In a recent case or relatively recent history, which lawyer in the media has done a pretty good job or a pretty bad job interacting with the media in a high-profile case?

**AL TOMPKINS:** Well, that Casey Anthony case was ridiculous. The judge I thought did an admirable job of controlling that circus in the courtroom. But outside, it was crazy. Largely, I blame people like Nancy Grace for that—people who should know better but do not seem to care that much. I think that a feeding frenzy started there and the lawyers did not know how to stop it. As a result, so much information leaked. It was just an awful case. I would say that what happened in that case was largely fed by attorneys. Attorneys made sweetheart deals with networks; networks paid for information. They did this deal where they leased the photographs from the Anthony family and that money ended up paying for lawyer fees. They said “We didn’t pay for testimony, we just paid for the leasing of the photographs.” Give me a break. You paid for them. That is a problem. I just think that whole case was handled awfully on most sides, including the media.

I work for The Poynter Institute, and we own the St. Petersburg Times. The Times, a Pulitzer Prize-winning newspaper, sued to get the jurors’ names released. We did not want the names and we never published them, but we sued for the principle that was involved. We are one of the few media companies that still sues on principals like that. So, we won and they released the jurors’ names. St. Pete

Times never used the names; most media did not use the names. But a media outlet in Orlando released the names of all the jurors, their marital status, how many kids they had, and in three cases actually named the juror's employer. Then the bloggers ended up taking that information and looked up their property information so you could see exactly where the jurors lived. Many of these people were neighbors of mine, they lived in St. Petersburg. Two of them were congregants at the church where my wife is a pastor. So, you have to have enough sense not to use information when it is public. In the Casey Anthony case the press did not have enough sense to leave it alone.

PAULA SCHAEFER: Let us open it up to the audience.

UNIDENTIFIED SPEAKER: This is not directed at any one particular person, but would anyone care to comment on the recent issues with Judge Baumgartner in Knoxville and part of the TBI files being released, through there is still some discussion about whether or not the whole TBI file will be released?

AL TOMPKINS: I only know about a little bit of the case, so somebody can fill us in on some details. As far as I know, this was a judge who was thought to be inattentive during trial or something, maybe for a lot of years, and nobody seemed to notice, or if they did notice they did not seem to talk about it. So, my question is, "Why did this go on for so many years?" Maybe one of you could illuminate me as to why it took so many years for these problems to arise when many of you or your colleagues probably appeared before him. Why did it take so long?

UNIDENTIFIED SPEAKER: I think a lot of people knew that the judge had problems in the past, but most members

of the Bar had no idea that he was taking drugs. They knew he had other problems in the past.

AL TOMPKINS: If I were looking for a sound bite, that would be it.

UNIDENTIFIED SPEAKER: Until about 90 days before this hit the paper, I was in that court every day and nothing was ever manifest that he had any difficulty. And as soon as it became obvious that there was a problem, news coverage followed within just a matter of days. Everyone in the system checked to see if someone had reported him, and found out that someone on high had. There was nothing else we could do.

AL TOMPKINS: Someone on high had reported him, you said?

UNIDENTIFIED SPEAKER: I was told that one of the public-elected officials made the report.

UNIDENTIFIED SPEAKER: Additionally, I think there had been a good deal of support because most of Judge Baumgartner's cases had actually gotten a lot of publicity. I watched the live stream of the Christian-Newsom trials, all of them, and in each case he had a federal clerk there with him advising him on all of the evidence, every decision, and all the testimony. He was very well assisted. I did not think he made any missteps during those trials. I do not think he ruled incorrectly on any of them. He had great support from that clerk that was working with him.

UNIDENTIFIED SPEAKER: What about the media? There was a reporter there every day, all day, more than one sometimes, but nothing was ever in the media that pointed toward Judge Baumgartner indicating that he was



acting inefficiently or inappropriately. The only negative comments were that the rulings were not always the way the prosecutor wanted them. The prosecutor lost a few. Also, everybody did talk about it. I was there many times throughout the years when people were saying that he seemed sick. That was the word everybody used. He had cancer, and he was recovering, so that is what everybody hung their hats on.

PAMELA MACKEY: I think this discussion illustrates beautifully one of the problems that I have. My esteemed colleague to my right is talking about sound bites, and you all are talking about a very nuanced, long-standing issue with very different perspectives. The gentleman back here is defending the judge. We are hearing different things. What often happens in the press is that we get the sound bite, and that is why I have a problem with journalists.

AL TOMPKINS: The problem is a few things. One, how do we prove what was going on here? Two, do you have the guts to go up and ask the judge? You have to be able to have a conversation and ask the Judge how he is doing and what is going on. I do not know that many journalists who know judges well enough to be able to have that conversation. These days they are going to know a lot less because there are fewer and fewer journalists covering courts and the legal process on an hourly or daily basis. That is a real problem. You have to have the courage to go ask.

UNIDENTIFIED SPEAKER: You have to have more courage if you are a lawyer.

AL TOMPKINS: Yeah. As a lawyer, you have a lot more to risk.

UNIDENTIFIED SPEAKER: Because you have a lot more to lose.

AL TOMPKINS: Yes, you do.

UNIDENTIFIED SPEAKER: There were lawyers who asked him if he was okay, and what was going on. The answer was that he had a little bit too much wine to drink with dinner, or something else. So, he had an answer when it was asked and it was a reasonable answer.

UNIDENTIFIED SPEAKER: Plus, he is a very likable person, he is intelligent, and he had done a great job for years.

PAULA SCHAEFER: We are going to take the next question.

JERRY SUMMERS: Well, I am against cameras in the courtrooms. I probably sound like a hypocrite because I have been the beneficiary of a lot of publicity over the years in high-profile cases, but I believe that there are two things that have led to the bad images of lawyers, one was lifting the ban on lawyer advertising, and two was the cameras in the courtroom. I know that when the cameras come on, lawyers react differently.

AL TOMPKINS: Let me just play this game with you. Think about this sentence for a second. I'm going to say it with no inflection. "I didn't say he stole the money." With every inflection of each word you will change the understanding. "*I* didn't say he stole the money. *I didn't* say he stole the money. I didn't *say* he stole the money. I didn't say he *stole* the money. I didn't say he stole the *money*." Each one of them has a different inflection, and

when you read it in the paper, you do not know which one is right.

JERRY SUMMERS: That is an interesting observation.

AL TOMPKINS: That is the truth in my opinion.

JERRY SUMMERS: I think there is always this difficult balance and contest between the Sixth Amendment right to a fair trial and the First Amendment right for the public to know. I have debated this with the late Leroy Phillips, Mr. Curriden's co-author in his book, *Contempt of Court*,<sup>120</sup> which won an ABA award, and I took the side against cameras in the courtroom. We had the Honorable Frank Wilson, the most highly-revered judge of the Sixth Circuit, in the public forum. After listening to the pros and cons, they decided against cameras in the courtroom. The situation has changed since then. We do not have just three television stations anymore, we have texting, we have the internet and those sorts of things. But I will tell you as that one lone horse braying in the wilderness, I know that we have to deal with it. I do still respectfully say that I do not believe it has helped the administration of justice and an individual having an opportunity to have a fair trial.

AL TOMPKINS: I can point to a fair number of cases that have gotten extensive press coverage by cameras that ended up in not guilty verdicts.

JERRY SUMMERS: That is true.

AL TOMPKINS: Like the Casey Anthony case and the O.J. case where they were found not guilty. Also, I am

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<sup>120</sup> MARK CURRIDEN, CONTEMPT OF COURT: THE TURN-OF-THE-CENTURY LYNCHING THAT LAUNCHED A HUNDRED YEARS OF FEDERALISM (2001).

convinced that one reason we ended up with riots after the police officers were acquitted in the Rodney King beating case was because the public didn't hear the evidence.

JERRY SUMMERS: Was the Rodney King case a camera in the courtroom issue?

PAMELA MACKEY: There were no cameras.

AL TOMPKINS: There were no cameras. That was followed by riots when the police officers were acquitted. We never heard that evidence, we only heard the press coverage of the evidence, and I think that contributed to the heated response.

JERRY SUMMERS: Thank you.

MARK CURRIDEN: Let me add something. Number one is that I think that not all lawyers are as great as Jerry Summers or Leroy Phillips or Conrad Finnell or Jim Logan. You have some great lawyers here. I think that the cameras in the courtroom are becoming a secondary issue. If you're a lawyer and you know how to use the cameras, it can be effective. You, Jerry, say you are against them, but I think you do use them and you use them very effectively.

JERRY SUMMERS: I still do not like them.

MARK CURRIDEN: I think you left out the third thing, about lawyers not looking good. The main issue is that they are bad lawyers, or lawyers that do a very bad job. I wrote a story last year on a very good lawyer who did a very bad job out of Nashville. This was a guy who had a great reputation. The Tennessee Criminal Defense Lawyers named an award after him. He won death penalty cases. But in this particular death penalty case case, he did not

interview his own client until five days before trial. He did not interview a single witness. He did not even look at the public file. He did not know that his own client had been in and out of mental institutions. He did not talk to a member of his client's family. He did not do any work on the case. Cameras in the courtroom have a role.

UNIDENTIFIED SPEAKER: Following up on some of the comments again about cameras. As a professional photographer's daughter and a current candidate for a local judgeship in Chattanooga in which a clandestine nontransparent interim appointment has been made behind closed doors, I am a great supporter of transparency. However, I would like to ask: how do you prevent what I would characterize as the Hollywood effect, when cameras are in the courtroom and people are mugging for the cameras? How does that get controlled? Because I do know, whether the person is a bad lawyer or is just coming off as bad, cameras can change how people act.

PAMELA MACKEY: Let me take that question first. Two years ago I tried a cold case down in Albuquerque, New Mexico. It was a triple homicide. It had been 10 years from the day when we started the case since the three boys had been gun downed by an AK47 at an intersection in the East Mountains. They were found sitting in their car, dead. My client was accused and ultimately charged with the homicide. There was massive local press, and had been for the intervening 10 years. We went through all of the media, even all the way up to the bloggers. We did not respond to the bloggers, and we still got a not guilty verdict. So I am going to take issue with Joe [Cheshire] saying that you are an idiot if you do not respond to bloggers because my job is to win cases, and we did that. But, there were cameras in the courtroom, over our objection, and it changed the way I viewed them because we had an absolutely first-rate crew.

Dennis Lynch, the guy that did the Saddam Hussein trial, is the one who came in and did this trial in Albuquerque. He was unobtrusive. His equipment was unobtrusive. He did a fabulous job. So, the way you control mugging for the cameras is just do not do it. Every day I would walk out and hear “Comment, Ms. Mackey?” I always said “No, going back to work, see ya,” and kept walking.

AL TOMPKINS: One of the things that irritates me, and one of the things that we hoped would end when we went out and talked to judges early on, is this stuff on the sidewalks. We hoped that if we could get in the courtrooms, then the stuff on the sidewalk chasing people down the street would stop. That has always been my hope, and it still is my hope. I wish that we could stop doing that chasing people down the sidewalk business, because that is where the bad stuff usually starts happening. It is awful and it is unnecessary. If you get unfettered access to the court, you ought to be able to tell your story without chasing people.

PAMELA MACKEY: We agree on something.

JOE CHESHIRE: If I could say one thing to that, my experience is it is not the lawyers that have the tendency to mug in the courtroom but it is the Court itself.

AL TOMPKINS: Yeah, that is true.

JOE CHESHIRE: In my experience in watching other cases and in cases I have been in, after a day or so, the lawyers are just trying their case, they are into doing their job. The judge is the person that gets enamored of the cameras quite frequently and prances around, makes demonstrative rulings, and falls in love with the camera.

MARK CURRIDEN: I think we have both looked at this before. After hour one the lawyers do not even think about the camera anymore, it is just gone.

JOE CHESHIRE: Right.

KIM HELPER: I think part of that is because, generally, the cameras are to our backs so we don't even realize they are there. The Court is looking at them the entire time. So there is that tendency to play to the cameras because the judges are looking at them the whole time.

PAULA SCHAEFER: We have time for one more question.

UNIDENTIFIED SPEAKER: One question that I have always wondered about is the use of anonymous sources in the stories in the newspaper and on TV, especially government anonymous sources. That really frosts me. We are getting manipulated by the government, and I do not like that. I just wondered what anybody thinks about that.

AL TOMPKINS: Amen. I would say that it is a mistake to never use anonymous sources. But I would put a five-part guideline on this. One, is there any other way to get the information? Two, are you willing to say why you have granted anonymity? Three, can you prove the information to be true even if the source remains anonymous? Four, how hard have you tried and what are your motivations; are you willing to state your motivations for using the source? Five, which I would make a rule, never allow anonymous persons to make personal attacks on another. If you can live by that five-part rule, then I think you can find ways to use anonymous sources. Anonymous sources sometimes provide such overwhelming information that the harm that comes from anonymity is overwhelmed by the public good

that comes from the information. For example, The Pentagon Papers, or Watergate, the cases that are big and very important. I had a reporter in one of my classes one time who came to me and said that a source said that it was raining that day. Gee, you think we could nail that one down. It was just laziness. I've done so many public encounter groups where the public tells us what they think of news coverage. All around the country, the public increasingly does not believe what they hear from anonymous sources. But they also think that reporters use anonymous sources to make their story look more important.

MARK CURRIDEN: I think for anonymous sources you look at the credibility of the person. Is he or she really the person in the room, is he or she the person who has the information, and can I get it any other way? Also look to whether it falls under the state's shield law. The keys are: can I get it anywhere else, can I get it confirmed, who is the source, and what is the credibility of the source, is it somebody inside the attorney general's office, someone who was a witness who does not want to come out but who can tell you what was said. That is why you use an anonymous source.



**MORNING KEYNOTE ADDRESS:  
SURVIVING THE MEDIA ONSLAUGHT**

*Joseph B. Cheshire V*

KATIE DORAN: Mr. Cheshire has already thoroughly introduced himself on the panel but I'd like to reiterate a few things. He is a very prominent defense attorney in North Carolina. He has his own criminal defense firm and has also done civil defense. He just told me that his greatest accomplishment is starting an indigent defense service in North Carolina and thinks it's one of the best in the country. Mr. Cheshire is very passionate about criminal defense work and thinks that what he does is a calling for him.

When he was 15 or 16, Mr. Cheshire got to sit down and have a private one-on-one conversation with Dr. Martin Luther King, Jr. at which point Dr. King inspired him to want to do something to help people as much as he could, which I think he has done admirably in his work as a lawyer. Also, Mr. Cheshire is a proud graduate of UNC and so we'd like to especially thank him for coming here today despite UNC playing in the basketball tournament.

JOE CHESHIRE: Thank you. I hope you all can hear me again. My voice is kind of going on me. I am, as I said earlier, really pleased to be here.

When she referred to the Indigent Defense Commission, just to tell you all a little bit about it, our indigent defense used to be controlled by judges in North Carolina, which means there wasn't much indigent defense, with all due respect to my friends on the bench. We changed it in North Carolina to where criminal lawyers run indigent defense and the legislature funds the Indigent Defense Services Commission, they fund the lawyers, and the quality of indigent defense in our state has gone up probably 1,000 percent since that happened. That, and the

assistance of one of the first states to have open file discovery.

I'll tell you this story real quick just because everybody seemed to have found it so interesting about Dr. King. When I was 12 years old my parents sent me up to Boston to a school called Groton School which at that time was a very elite northern school where the Roosevelts and other people went, and I was one of only three people from the south. For you older people, you will remember this; for any of you that are below 50, you won't know this, but to get the same cultural experience today, you'd have to send your child to Bangladesh, because the north and the south were two entirely different places back then and we didn't have television to bring them together. The headmaster of our school was very active in the civil rights movement and he had asked Dr. King to come and visit. Dr. King was a young man then. And the headmaster chose me, a little 15-almost 16-year-old southern boy, to show him around the school. I got to spend about an hour alone with him. We walked down to the river and back, which took about 45 minutes.

We talked a lot about the civil rights movement-my family had been very deeply involved in it in North Carolina-and he said, well, what's it like being a southern boy up here in the north? And I said, well, Dr. King, it's really hard. Every time I open my mouth, people laugh at me. Every time I talk, people think I'm stupid. Everyone thinks I'm a racist, and they don't understand anything about my culture. And he said, well, you're getting a really interesting lesson in prejudice then, aren't you? And I said I am. And he said, well, I'll tell you something, I much prefer southern prejudice and bigotry to northern prejudice and bigotry. He said southerners love us as individuals and people and hate us as a race; northerners love us as a race and hate us as individuals and people. He said, I think I can do something about that first thing; I'm not sure anybody

can do anything about the second. It made me feel really good.

I'm actually the fifth straight first-born male of the same name to continually hold a law license in North Carolina from 1836 until today, so it was pre-ordained that I would be a lawyer, although my son, Joseph Blount Cheshire VI, was a professional surfer; now he's in videography. We finally had a smart one after 180 years. But I decided then that I wanted to be a criminal lawyer because I wanted to be able to fight against the power of government.

And that's really what criminal lawyers do. They're the most misunderstood people in our democracy. But, in my view, they're the most important, because they fight against government, taking the top off the worst people in saying they don't need representation, and before long you erode down to you. Like Martin Niemöller said in his famous lengthy quote, when they came for the Jews, I didn't say anything. When they came for the Catholics, I didn't say anything. When they came for the intellectuals, I didn't say anything. And then they came for me and there wasn't anybody else to say anything.<sup>121</sup>

I do have this enormous passion for the practice of criminal law. It's like a narcotic. My daddy made me be a civil lawyer for five years because he said criminal law was like heroin, if you did it once, you wanted to do it the rest of your life, but it would cause you all kinds of heartache. I found out being a civil lawyer wasn't so much for me, so I built my own criminal practice. I am passionate about it.

I was talking to Jerry Summers a minute ago and telling him about a case I tried when I was 30 with Bobby Lee Cook, which was one of the highlights of my life because I was a little kid and he was a legend. The Duke Lacrosse case was also one of the highlights of my life.

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<sup>121</sup> MILTON MAYER, THEY THOUGHT THEY WERE FREE (1955).

Commentators have said that the Duke Lacrosse case is one of the most important criminal cases to have been heard in the last 20 years in America because it brought together the perfect storm of factors for the nation to examine. It had race, sex, class, politics, media, town and gown, and criminal law. The only thing it didn't have was religion. The American people got to see our system of justice in this enormous media frenzy that we've been talking to you all about, and they got to see it from investigation to exoneration. Unlike just seeing the trial, they got to see it all in our modern sensationalist press machine. They got to see our increasingly strident and dangerous sport of political correctness and class warfare.

But the most important thing they got to see was defendants who looked like the majority of them, because most of the time what we see in the news media are black people or Mexican people or really poor white people charged with crimes because they're easy targets and that's where our police go and that's what we see. They got to see defendants who looked like their son and looked like their brother or looked like their younger sister's husband. They got to see middle class and upper middle class white males being the subject of the criminal justice system, and they didn't like what they saw.

They had seen it a million times before. They had seen people be abused every day by the criminal justice system. But when they saw those nice-looking young white boys, they didn't like what they saw. And in many ways, it changed a lot of the culture of the way the American public looked at our criminal justice system and it changed it, I'm told by lawyers all over the United States, for the better.

The Duke Lacrosse case spawned the most amazing rush to judgment in any criminal case I think that there's been that's been publicized in our time. These boys were judged by almost every single media outlet in the world as guilty rapists. There were articles written about them

internationally, there were shows about them internationally, and every one of them said that they were guilty. The prosecutor went out and branded them rapists, lied to the public, said things that simply weren't true, pandered to race, because he was running for re-election, and because he was a prosecutor, people believed him.

One of the reasons that this case was so awful for prosecutors-I've tried cases in 16 states and 85 of the 100 counties in North Carolina, I know a lot of prosecutors, and 99.9 percent of them that I know are wonderful, good, honest people-but what Mr. Nifong did was take advantage of the fact that the American people want to believe the State, they want to have faith in police, they want to have faith in their prosecutors. He went out there and took advantage of the American people's faith. And at the time he did it, none of these boys had lawyers, there was no one to respond, so he was just inundating the press. And much of the press --with all due respect to my friends that were on here this morning with me who I dearly love; I didn't know Al before, but, man, he's an impressive guy-and I do know Mark, and if you all haven't read his book, you should read it, it's one of the best books ever on the criminal justice system in America-but much of the press has a world view, and what happened in this case was that the prosecutor's story fit perfectly in their world view. In other words, a black woman who was poor and had children was raped by elitist white athletes at an expensive privileged school while she was trying to make a living for her children stripping. And the defendants were northerners living in a racially-divided southern city. How can it get better for that political-correct view?

I was hired by the captain, David Evans, and his family before there were any charges by anybody. I reached out to the prosecutor, who wouldn't speak to me. I reached out to news media. I met with David Evans. My son was an all-conference college lacrosse player. I raised only boys.

I'm an only child. I went to an all-boy school. I met my wife the summer of my freshman year at Carolina. I don't know anything about women. But I know everything there is to know about boys. I coached every one of my kids' teams until they went off to school. And I knew Dave Evans. And when I talked to him for an hour and a half, I knew he wasn't guilty. I knew none of his teammates were guilty. I knew they were guilty of bad judgment, they shouldn't have had strippers in a house party, they shouldn't have been drunk, they shouldn't have done all those things, they weren't perfect kids, but I knew-because I knew this boy, he was me, this boy, I knew he didn't do it, and he was there the entire time.

The district attorney's statements led to marches [with people] holding banners that said "castrate them, kill them, lynch them". It was a terrifying atmosphere and it was fed by the media. So I tried as best I could to sit down with reporters from The New York Times, sit down with other people in the case and explain to them and try to turn them around, and I couldn't do it. I had a lot of contacts in the media at that point in time from my prior life. And I got upset because, for example, Houston Baker, who was a respected professor of English who moved to Vanderbilt, said about these boys before they were ever charged that there's a culture of silence that seeks to protect white male athletic violence. Lacrosse players at Duke are white, violent and drunken men who have been given license to rape and maraud and deploy hate speech. The proof was the only person that ever deployed any hate speech was the alleged victim one time, but that didn't make any difference. They are the embodiments of abhorrent sexual assault, verbal racial violence, and drunken male privilege loosed among us. The dean at Duke, William Chafe, compared the players to the men who lynched Emmett Till. Players were actually pointed to by professors at Duke, in

small classes, and said 'he's one of the rapists'. It was out of control.

The DA said "I want to be part of the healing process." "One would wonder why an innocent person would need a lawyer", he said. "I will not let the image of Durham in the eyes of the world be a black girl being raped by a bunch of Duke athletes." There were lies and distortions of defense witnesses. I got angry. And when I get angry, sometimes I'm not always as sensitive or thoughtful as I should be. And I called a press conference-nobody had been indicted yet-and in that press conference there were maybe this many people there with cameras from all over everywhere. I've never seen quite anything like it except when James Hutchins was executed. And I looked out at them and I said, you people are lying to the American public, you're pandering to them, you're not doing your job, you're not trying to find the truth, you don't care what the truth is because it fits within your world view, but let me tell you something, it's going to be proven that you're lying to them, it's going to be proven it's not true, and you're going to be embarrassed, and it's time for you to open up your ears. It was the quietest room I think I've ever been in in my life.

I said two things to myself; the first one was, Lord, please let those boys really be innocent, and the second thing I said was, Joe, the last time you saw somebody wagging their finger at the public and lecturing was when Bill Clinton said "I did not have sex with that woman." So we put together a marvelous defense team. We've got several absolutely glorious criminal defense lawyers in North Carolina and I managed to bring them on. And I will also say to you all that do trial work or you law students who want to do trial work, whenever you have a co-defendant case or a multi-defendant case, the most important thing in the case is who's going to be your co-counsel, your other defendants or other plaintiff's counsel,

because you've got to have somebody that's going to have your back, you've got to have somebody you trust, you've got to have somebody you can split up responsibilities to, and, more important, you've got to have people whose egos aren't going to step on the team and who don't mind if one person is getting the publicity when the other people might be doing more important work.

We put together that team, and it was a great team. It was basically, with one addition, the team we took on the road to defend obscenity against the National Obscenity Enforcement Unit. I can tell you a great story about that too but I'd have to use a word that... I won't tell you. It was the case in Nashville, Tennessee in which the jury didn't convict our sadomasochistic films, one which included a bodily function in the course of the sex, and the reason was that we had seven good ole boys from Tennessee on the jury and I told them in my closing argument, I don't know about you ladies, because I don't know anything about women, but when something appeals to sex in a man, there's a little bell that goes off, he knows it, so you guys know it. The judge is going to tell you this has to appeal to a prurient interest in sex, and I said that word prurient just means an ugly-based interest in sex but it still means an interest in sex. So if any of you guys found any of that interesting at all, you go back and tell the rest of the jurors and convict my client. If you didn't, it can't have appealed to a prurient interest in sex. Well, six of those boys just weren't going to go back and tell those women, so they hung the jury. We pled to a tax count. Then my co-counsel had a t-shirt made up that said the NOEU, the National Obscenity Enforcement Unit, can't convict S-H-T, which I thought was a little aggressive.

They used to say about me that the most dangerous place to be was between Cheshire and a camera. I never thought that was fair to me or the camera, but I had had a lot of experience with the media so it was my job to be the



person that interfaced with the media. And for the next 16 months my partner, Brad Bannon, prepared this case for the most part, did what Pam did with Kobe Bryant, and I dealt with the media. I probably talked to the media during that period of time an average of five or six hours a day, and what I did was I reached out to reporters that I had identified that were fair, that I thought had open minds, and I reached out to reporters that I thought weren't, and I would sit down with them and I would talk to them.

I started with the local media because everything is always local, and then I moved to the national media. And we developed a message and we spent a lot of time reaching out to the reporters. We didn't use professional people to tell us what to do. In fact, one of our defendants hired a professional PR person and every time I was going to give a press conference she told me not to. And every time she'd say it, I'd say watch me, and we'd do it. In my experience if you're going to use a PR person, they'd better be somebody who knows something about trial practice and criminal law, because most PR people don't know much about much, except how to bill and how to tell you not to do things, and how to tell you when you do things. That's just my experience.

But things started turning for us. As we were doing our investigation, we would share our investigation with media people. And even before my client got indicted, the prosecutor had poisoned the well so badly that I started having press conferences every time he did and going after him and going after his facts and calling him out in every single way I possibly could. It became really effective. The reporters who trusted me, who had known me for years, particularly the local reporters-which is a reason why you try to build up the trust-said Joe would never be saying these things publicly if he didn't believe them. So they began to re-examine.

As they began to re-examine, we helped them by giving them documents and information we had which proved that things could not have happened the way that the victim said that they happened, which proved that the prosecutors were not telling the truth. We got into the line-up procedures-this was the greatest line-up ever. There were 34 boys at the party. They took the team pictures of all 34 boys and put them on one piece of paper and handed it to the alleged victim and said you said three boys assaulted you, right? And she said right. Well, these are the boys that were at the house that night; tell us which three did it. So there was not a wrong answer. She made a horrible mistake in the people she picked out, by the way. There were a couple maybe she could have picked out that wouldn't have been as nice and good as the ones [she picked]. But we started doing that and we used open-minded reporters to begin to turn the media around.

It was incremental. It was really a bizarre situation because Fox News was our biggest supporter. Rush Limbaugh was our biggest supporter. I play in a member golf tournament with him every year-I played with him once in a foursome, I don't play with him-and he came up to me after the Duke case and said I just want to tell you that that job you did was just one of the greatest American things anyone has ever done. And I said, well, Rush, that's the only thing in the world that you and I could ever agree on.

So we did have these weird people out there that were supporting us that we used. I don't mind saying that we did use them, and they were helpful to us. As things were kicking up, the media started to turn. One of the media outlets that never turned was The New York Times, and there's an interesting reason in my view. I've always been a big fan of The New York Times, I still look at it every day, but they have a world view. They had reported their world view and they didn't want to differ from their

world view. One day I was actually taking a few days off at the beach and the phone rang and it was Duff Wilson, who was the reporter. He said to me we're running a three-page article in The New York Times tomorrow morning on your case and wanted to know if you have any comment. I said, how long have you been working on it? He said, months. I said, you're calling me right now? So I stopped everything I was doing in my office and sent him about 150 pages that disproved everything he wrote. He never used a word of it.

As things started to get out, the media started to turn. Let me tell you something about the media-I don't know if Mark and Al will agree with this, but you've heard the old expression about a woman scorned? Well, there's nothing like a pissed off media person who's been lied to and believed it and reported it. And these people who had gone out and said all these horrible things and then began to be doubted and were called out on it were so mad that by that time they didn't really care what the facts were because the facts were our clients were innocent now. They turned on the prosecution and turned on them hard. But we still weren't making a lot of progress because there was a lot of judicial compliance with what the prosecutor was doing. They tried to gag me, for example, and you can see our response in the papers I gave you. We began to use the press conferences, and each investigative step that was analyzed that was put out, we would have a press conference and talk about it. They came out with the DNA and we had a big press conference. I didn't know much of anything about DNA, but we had a big press conference. It happened to be at Christmas vacation, and I started talking about the report and I allegedly have the Guinness Book of World Records now for having said the words vagina and penis on national television more than any human being that ever lived, so badly that they began to scroll on the bottom of all the national TV that this press conference is not suitable for young children. Not one of my finer

moments, but I was in a moment myself so I didn't know what to do other than that.

We made a decision within the team that we were going to go to “60 Minutes.” Now, that was an enormous decision because “60 Minutes” is a pretty credible place, but we wanted to reach millions of people with the story. Before that, I also made what at the time was the same decision Pamela made and that is to take my boy out and let him make a statement. And, just as with her, it was the most controversial thing in the world when people found out that I was going to do it. The day he was arrested, he went in and was booked and I told everybody he's going to give a statement when he comes out and then I'm going to answer all the questions you want. So the whole media was out there in front of the jail. That was our backdrop, Al, the jail. An innocent man being arrested for a crime he didn't commit. When that boy walked out of there he was scared to death. And all I said to him was David, you're a smart boy, I don't want to tell you what to say, I don't want you to be scripted, I want you to say you're innocent, but other than that, you go back and search your heart and find four talking points and you just go out there and say it.

He went out there and he stood in front of that bank of cameras and his legs were shaking so hard that I didn't know that he'd be able to stand up, and he gave that statement that was so criticized before he gave it, and when he finished giving that statement, I promise you there wasn't a mother in America that thought he raped that woman.

I took questions about the case for an hour. I didn't let him take the questions about the case, of course. But we decided to go to “60 Minutes.” I would say within the course of our work with them we probably had 1,000 hours working with them for that show. My client's momma actually called me up and said we're not going to do the

show, after we had done all this work. I said, then find yourself another lawyer.

We did “60 Minutes.” Those two shows on the Duke Lacrosse case came at the end of NFL playoff games, they had their biggest audience that they can possibly have, and when those shows were over, that case was still going on but it was done. I also learned a lot about the power of the media because I was up there in Annapolis preparing my client for his interview and I was staying in a hotel; I rode down to the bottom floor and the door opened-and at 60 Minutes, you don't deal with Ed Bradley and Lesley Stahl and those people, they do the interviews but you don't ever see them, you deal with producers-the doors to the elevator opened and there was Ed Bradley standing there, that I've been watching since I was a little boy. I looked at him and I said Ed Bradley, and he looked at me and he said Joe Cheshire. And I said how do you know who I am? And he said I've been watching you every day for 15 months.

Shortly after that, the DNA was discovered. I'll tell you this briefly for you law students and you lawyers too, let me tell you how the DNA was discovered. I can't give enough praise to my partner, Brad Bannon. He didn't know anything about DNA, and we knew we were going to get the discovery, and so he ordered on Amazon the three best textbooks on DNA before we got the discovery and he read them. And then we got the discovery and it was DNA. You know how DNA discovery is, it's huge, it's all the graphs, it's everything. I walked into the office at 7:30 on Monday morning; Brad was in the conference room. I walked in there and asked him what he was doing. He said he was looking through this discovery. I left at six o'clock that night; he was still in there. I came in the next morning; he was still there. I came in the next morning and the next morning; he was still there.

Then Friday afternoon he walked into my office and he said you're not going to believe what I found. There was

DNA from nine men in and on this woman and none of them were Duke Lacrosse players. When when we hired the former FBI head of the DNA section to review Brad's work, the first question he said to me was where did this Brad Bannon get his Ph.D.? I said he's an English major from South Carolina and, as you know, that means he can't even really speak English. But he blew that case open. And the media helped us blow that case open.

The blogs were enormously helpful to us in the Duke lacrosse case. If you ever want to see a great blog and what the ABA awards for blogs, look at Durham-In-Wonderland by KC Johnson who is a law professor in New York. We learned more from that blog about our case than we learned about it any other way. LieStoppers was another one. But we read anti-blogs too. And we were able to understand our case using blogs, strangely enough, stepping outside the cocoon of our work, because preparation becomes a cocoon where you're with a certain number of people and you have a certain view and you're not really getting another view. You get another view on the blogs. And in the comments section, you realize how the crazies feel about the case. And we did try to also influence the crazies.

I have to tell you we enlisted our own crazies, so they told our story on the comments. And then we also were able to control the end story. It's a great story in and of itself how we got the attorney general to use the word "innocent." Once Mike Nifong was kicked off the case and disbarred, the attorney general took it all, and it was an amazing fight to get the word "innocent" used. And then we had to control the end gate and control the books that were written, and go so far as to control HBO who wrote this unbelievable movie they were going to put out that had a world view that was different than the truth. So we continue today to work on those details.

The lesson from the Duke Lacrosse case is that the culture of winning in American criminal courts has got to be stopped. It's got to be a culture of justice and not winning. Open file discovery must be expanded and protected. We would have never known about the DNA if we hadn't had open file discovery.

One of the other lessons is that there are two justices in America—one for people with money and one for poor people. We need grand jury reform, we need to stand up to the cheaters without fear, because there's a great cost that comes when you try to take on the king, but when the king needs taking on, it's our duty to stand up and take him on, and we need more transparency in the criminal justice system.

It's been a great pleasure for me. I've enjoyed it a tremendous amount. I want to say to you that I've never been treated with the warmth that we were treated here, never been taken out to dinner and had a chance to sit with law students and talk with them and understand them and have a genuine personal professional experience with them and the other speakers, so that I get to make more friends, more colleagues. I thank you all very much for having me.

**LUNCH KEYNOTE ADDRESS:  
A HISTORICAL PERSPECTIVE ON JUSTICE AND  
JOURNALISM**

*John Seigenthaler*

AMY MOHAN: As a former journalist, there is no greater honor than introducing someone who continues to be a shining example of the importance and the integrity of journalism and is truly a living legend. We can spend this entire symposium on Mr. Seigenthaler's accomplishments, but in the interest of time, I would just like to name a few.

John Seigenthaler started his career as a newspaper reporter in Nashville, Tennessee. He then worked with Attorney General Robert Kennedy and the committee investigating organized crime, and then served as special assistant to Kennedy. Mr. Seigenthaler served as an intermediary between the federal government, the Freedom Riders and white segregation and state officials. His goal was to convince the Freedom Riders to cease their direct action and accept a cooling off period. As he stated in a PBS documentary, "I go in, my Southern accent dripping sorghum and molasses, and warm them up." Mr. Seigenthaler successfully arranged for the original core Freedom Riders to depart from Birmingham by plane after a lack of willing bus drivers threatened to hamper their mission.

Mr. Seigenthaler later returned to journalism and retired from the Tennessean as the editor, publisher and CEO. He also served as the founding editorial director of USA Today. In 1961, Mr. Seigenthaler founded the First Amendment Center at Vanderbilt University. The Center's mission is to create national discussion about First Amendment rights and values. Mr. Seigenthaler has been on the forefront of numerous causes involving journalism and justice, including advocating for Gaile Owens, recently



released from prison after more than twenty-five years on death row.

We are excited and honored to have Mr. Seigenthaler here with us today at the UT College of Law to talk about his perspective on journalism and justice.

JOHN SEIGENTHALER: Thank you very much. And she's right, I am a legend in my own mind.

I have a fourteen year old grandson, and I talked with him last night. He checks on my conduct periodically. He asked last night, "What are you going to be doing tomorrow?" I told him I was going to be here with you. Then he asked me what the first thing I was going to say to you would be. I said, "Well, Jack, I suppose I'm just going to tell them how happy I am to be with them." He said, "Gran, you're eighty-four years old, you're happy to be anywhere." And you know, he's right.

But I'm particularly happy to be here today to talk with all of you about a subject that has continuing importance, largely because of the challenges that changing technology imposes on journalists and because of the legal and ethical questions that are raised because of the transformation that technology has brought about.

Several years ago, Howard Baker and I were on a program together here at the University and we were talking about those changes. Howard asked me what the difference was in covering politics today than when he was a candidate. And I said, well, Howard, the best way I can describe it to you is tell you that I recently saw Condoleezza Rice, now a professor of law, in a classroom. She was being cross examined after class by one of her students who was challenging her on the legality of torture. It was a hot issue and the exchange was quite tense. And I said, Howard, the difference with journalists today is that, unknown to Secretary Rice, a young man who was a fellow student of the one cross examining her had his cell phone

open and was recording the entire exchange. And the next day it was on YouTube.

I came back to my Nashville office the next day, and the point was made poignant to me when my colleague, Jean Policinski, walked into my office and said “you and Howard Baker are on YouTube.” And sure enough, there was some person in that audience that opened their phone and there we were. I had not watched my words very carefully, but the grammar seemed adequate and the point was made.

I listen to so many able and distinguished journalists talk about this culture of which I have been a part all those years as a journalist. I was part of a culture different from the culture of the lawyer or other professions. But I listened to what they said here today. I listened to Al [Tompkins] on the difference between “off the record” and “not for attribution.” The definitions of those terms are part of that culture, and they’re understood by journalists. And often, as you heard from Joe Cheshire, they’re understood as well and sometimes used by lawyers. But I think about that culture and then wonder what will happen with this new technology which makes virtually every person with access to the internet a potential journalist. That’s where we are.

I’d like to focus for a few minutes on an experience that makes the point. Some of you may know about my encounter with Wikipedia. Five years ago I was sitting at a computer at home. An old friend called me and told me to Google myself on Wikipedia and then sue. So I Googled and I hit the Wikipedia link and there I was. There was a six sentence biography of me, which said that I had been administrative assistant to Robert Kennedy in the early 1960s, and that after the deaths of President and Attorney General Kennedy, I was a principal suspect in their assassinations, following which I had defected to the Soviet Union for twelve years.

If you start a First Amendment Center, you're hardly going to sue somebody because they said something bad about you, so I didn't think for a moment about suing. And I'll come back to that in a little bit. But I laughed, as you did.

Later in the day, I heard from a young woman, a graduate student at the University of Alaska, who had interned with us at the First Amendment Center in Vanderbilt the year before. She was in tears. She said "Have you seen what they have said about you on Wikipedia?" I said that I had, and that she should not pay any attention to it. She said "I'm with foreign students here and many of them believe it, please do something about it."

That night, my son called. And I was still chuckling a bit about it. But he said, "Dad, please, you're not the only John Seigenthaler, there's me, there's your grandson, get that stuff down." And then he told me that there are twenty-four mirror sites of Wikipedia. So that libel had been repeated now twenty-four times, and I began to take it seriously.

I had seen Jimmy Wells, the founder of Wikipedia, in a C-Span interview with Brian Lamb, my friend. So the next day I called Brian, and he put me in touch with Jimmy Wells, who answered his own phone and went with me [on the website] to my biography. And I said, "I don't know whether you know it or not, but I was not a suspect and I didn't defect, and I want to know what you're going to do about it." He asked me if I was watching my screen; I said I was. And it vanished. He told me it was now in his archives and only twelve hundred of his editors can see it.

I said that was not adequate, because I did not want that anywhere anybody can read it. My son's worried about it, and it may reflect on my grandson. He said he had rules, he called his website a demonstration of online democracy, and he had done the best he could do.

I said tell me just one thing, who did it? He said he did not have the slightest idea, that it was an anonymous posting, and that he did not have any way to find out. He said the only way to find out was to bring a Jane or John Doe lawsuit against the information service provider, and if I did that, then the Court may tell them to disclose the name. Otherwise, he said he did not know how I could find out.

I said, well, I'm not going to do that. Maybe I have enough investigative reporting skills to find out on my own. And I told Mr. Wells that I hoped I'd be able to call him one day and tell him who it was.

In the weeks that followed, I tried, and I was frustrated again and again. It went on for five months. Finally, frustrated, disgusted, a little bit angry, no longer laughing, I wrote an opinion column in USA Today, in which I said Wikipedia was an unreliable research resource. The article pretty well condemned Wikipedia. And in the next three weeks I was inundated by e-mails, telephone calls, and letters from people who had similarly been wronged and libeled by Wikipedia. That first reaction astounded me, but it made me think that I had done the right thing by writing that column. And again and again and again, the original posting reappeared.

Now I am on television and radio debating the credibility of Wikipedia with Jimmy Wales. I got nowhere, except that a number of people across the country were brought in on it, including members of the media. Kit Seelye from the New York Times stands out in my mind. A couple of AP reporters were interested, and they began to track what I was doing. One person who wrote me lived in San Antonio, Texas, and was a media guru. [He said] the same thing had happened to him, and he had launched a new website, Wikipedia Watch. He asked me for many of the complaints that had been filed with me, and I passed them on to him. He put them up, and he put mine up. The

result was that more and more people responded again, saying it happened to them as well.

I didn't know at the time that if I had wanted to sue Wikipedia, Section 230 of the Communications Decency Act says that content service providers are immune. The law says they are not to be treated in matters of defamation as either publishers or speakers. In other words, if I can track the person who originated the posting, that person is vulnerable to a lawsuit. But Wikipedia and other sites that are content service providers are immune, and there is now a body of law [to that effect].

The first case I found out about involved not Wikipedia, but a dating board in Los Angeles. The company was called Metro Splash. The actress was Christianne Carafano, whose stage name is Chase Masterson. And one day Chase Masterson began to get telephone calls from people who wanted dates. She didn't know her real name, her stage name, her telephone number, her e-mail address, her physical dimensions, and her interest in a strong, hard man for a one night stand, was on this website until these calls began to inundate her. It was an anonymous posting.

She was able to find out that someone somewhere in Germany had posted this information anonymously about her, and she sued Metro Splash. I won't go into any detail about the case except to say that the judge, in ruling against her, found that the language in Section 230 said Congress did not mean for these information content providers to be sued. There is a whole body of law that has now developed that follows what the judge said in that case, as reprehensible as it is – Section 230 exempts Metro Splash. There are an awful lot of people in journalism and law, I have found, who aren't aware of that provision or what it means to this new world of communications.

As I said, I had no interest in bringing a lawsuit, but let me just deal with a couple of other instances. There is a

comedian named Sinbad. His true name is David Adkins. David Adkins has died again and again, a hundred times and more, on Wikipedia. He's alive, he's well. His professional success depends upon national recognition that he's viable. But let's say you're a journalism student, and [your] professor says she would like to have a profile on a comedian. Sinbad's a natural. So where will you go? You'll go to Wikipedia, [and you will see that] Sinbad has died from an overdose of drugs, from a sexual assault in a public bathroom, from suicide. Quite often he dies simply because whoever it is who is trying to destroy his career simply enters under the date of his birth the date of his death.

Some of you may be interested in golf, and the name Fuzzy Zoeller is one you'll recognize. He had a big controversy one year. Fuzzy made some comments that weren't funny. He ultimately apologized to Tiger Woods for it, and that's there in his [Wikipedia] biography. But also in his [Wikipedia] biography is that Fuzzy Zoeller is an alcoholic, a drug addict, a wife beater and a child molester. Fuzzy Zoeller did sue Wikipedia, and then found Section 230 was there, and went beyond that and filed suit with AOL to find out the name of the customer.

If you're online, you have an internet protocol number. And very probably if you work in an office, you have the same IP number as your colleagues. This customer was the owner of a company in Miami and had forty-two employees. Fuzzy sued them. And the owner called his lawyer and said they didn't do it, that they were offended by what happened, and that they wanted to help find out who did it. They interviewed every single employee, and got total denial. There was no way to nail it down, and Fuzzy finally dropped the suit.

It's not just Wikipedia. You can go to Wikipedia and it is loaded with valuable, solid, and credible information, but that may not be where you go. And if that's the case, you're relying on that website for research

that may be flawed. I think as a result of the controversy that emerged after I and others had problems, Wikipedia has made an effort to change its rules, but not enough to clean it up. Periodically someone will take a shot at me, much of the same stuff, sometimes much worse.

Finally, as a result of all the heat that was put on and the help from the [media] guru in San Antonio, I finally tracked the company. And then the media began to call the company. It was a company in Nashville called Rush Delivery. One morning I was on public radio debating Jimmy Wales, and when I came back to the office there was a letter. And the author said he apologized, he did it as a joke, his employer is getting all these calls from the New York Times and USA Today, and this morning they let him go. It started in May, and this was Christmas. It was just before Christmas, and he had been fired.

I started talking to him while at my office, but by the time the conversation ended, I was home talking to him on my cell phone. And I mentioned the fact that he had been fired, and my wife burst into tears, telling me I couldn't let that man be fired before Christmas. I wanted to say to hell with that man. But she got me to call his employer and tell them that I was angry at him and didn't understand it, and I still don't believe he did it as a joke, and I don't know what his motive is, but I did ask them to not to let him go. And I hope he stayed there until the company went defunct, and the company is defunct.

I dwell on this subject because, as I said, communications now involves several different cultures. And many of them are alien to the culture that Al [Tompkins] and Mark [Curriden] and I generally, and most often specifically, embrace. The question in my mind, as we look to the future, is who are going to be these professional journalists with whom these lawyers interact?

About five years ago, just about the time I was having that first encounter with Jimmy Wales, Vartan

Gregorian who heads the Carnegie Foundation, and Alberto Ibarguen who heads the Knight Foundation, entered into a joint effort to look at the future of journalism education. A series of studies have flown from that. And while there are four salient points, the one that's most relevant and pertinent here is that given the shortages in newsrooms as a result of a down economy, older and more experienced journalists ingrained in that culture are being laid off, bought out, or furloughed and are being replaced by young, inexperienced ones. I'm happy I'm not part of that culture today.

I know that every editor I know seeks to do more with less. But when you think about the relationship between the lawyer and the media on behalf of a client, the ground rules may change because the journalist is so inexperienced.

Jim Duff is here. He's the head of the Freedom Forum. Twelve years ago the Freedom Forum, largely as a result of an initiative by Gene Policinski and myself at the First Amendment Center, launched an initiative with federal judges and journalists. When we had that first session, with the help of the Committee of the Judicial Conference, we sought to try, as best we could, to break down the barriers that existed between the journalists and the judicial officers. And over about five years, we were successful. The judges became amenable to the idea that journalists could help by telling the court's story, by building support. And they also acknowledged that the judiciary is a human institution and that press monitoring was a healthy thing.

After five years, we began to hear from the judges that these young people we were sending to them knew nothing. They said they had to educate them, and it was becoming a bit of a burden. And a year ago, it was a different concern on their part – they started to say they hadn't seen a journalist in their courtrooms throughout the



last term. That's the result of the slashing of those staffs. We're doing more with less, but not nearly enough to provide the basis for maintaining that culture. And so we must confront the reality that this relationship will be dramatically different in the future.

I'll give you one response as a result of that Carnegie/Knight study. The Cronkite School, the journalism school at Arizona State University, now covers the state legislature for the newspaper. Journalism students are covering the legislature as working reporters. Their value as professionals will be immeasurably enhanced as a result of the experience. The question is whether that idea has viability and will catch on elsewhere. I think about my own youth as a journalist, the days I covered the courts. I think back on that time, and I know that there always has been tension between the institution of the news media and the institution of government. It's a natural tension and it should exist. I guess I'd even say it must exist. It should not be a hostile relationship, but the tension, I think, is healthy and serves democracy.

When I first began to talk about the press and the role of the press, I used to love to quote Thomas Jefferson, who said "Were it left for me to choose government without newspapers or newspapers without government, I would not hesitate to choose the latter."<sup>122</sup> And there's so many people today who would say, Mr. President, there's not going to be any newspapers, the culture's going to change.

Thank you all very much.

AMY MOHAN: We have time for one or two questions for Mr. Seigenthaler.

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<sup>122</sup> THE PAPERS OF THOMAS JEFFERSON (Julian P. Boyd et al., eds., 1950).

**UNKNOWN SPEAKER:** If we're losing concentration of journalism, what reporting model do you see rising in the future?

**JOHN SEIGENTHALER:** There is not a news organization that doesn't have an online website. No newspaper, no television station, no radio station. And the theory is that if you can make your website as interesting, as informative, and as entertaining as the bloggers make theirs, then readers will be drawn like a magnet to that content. If readers are drawn there, if readers chase the content, advertisers will then chase the readers. The profit margins will never come back where they were when I was a publisher and editor. Part of it is the economy, and part of it is just the fractionalization of readership, or in television and radio audiences. And while I don't believe there is a daily newspaper in this country that's not making a profit, it is significantly less profit and might even be compared with that percentage of loss of staff members. It has been dramatic, and it won't come back.

I think you have to supplement coverage in a variety of new ways. And I like this idea about using journalism education as a place to fill some of that gap, but that's also going to mean journalism education has to be willing to take more professionals to train these journalists who are going to perform before their time as reporters.

There are other possibilities. Citizen journalists can also be trained. The only thing I'm sure of, in answer to your question, is that there are going to have to be journalists, citizen journalists, sometimes volunteer journalists, who fill what is a tragic gap in where journalism was and where it is and, beyond that, where it's going.

**PANEL DISCUSSION 2:**  
**CROSS TRAINING: JOURNALISM FOR LAWYERS, LAW FOR**  
**JOURNALISTS**

*Joie Chen*  
*James Duff*  
*Kim Helper*  
*Cynthia Moxley*

AMY WILLIAMS: This panel will perhaps demystify the world of journalism for the attorneys in the room, as well as the legal world for the journalists in the room.

Many of you will recognize Joie Chen as one of the main anchors on CNN's "The World Today", as well as anchor on CNN International. She was also the creator of the network's first interactive news program, "News Site with Joie Chen". Chen then moved onto CBS, working as a White House and Capitol Hill correspondent and contributor for "CBS Sunday Morning." She's received numerous awards in her journalism career, including two national Emmy awards and the Gerald Loeb Award in financial journalism. Chen left the field of journalism just three years ago and is now the executive vice-president for Branded News Worldwide, a company that combines journalism and public relations by creating branding concepts for online applications for corporations. Chen has worked with in-house and outside counsel to create responsive journalism to negative reports about companies' products, as well as working proactively to promote a company's brand and to create news stories specially related to an organization's platform.

James Duff is the president and CEO of the Freedom Forum, an organization which champions First Amendment and media issues, operates a museum in Washington, D.C., and helps fund the First Amendment Center in Nashville. Mr. Duff is an attorney who worked in

Chief Justice Warren Burger's chambers for four years while he attended Georgetown Law School. He served as counselor and administrative assistant to Justice Rehnquist and was his liaison with Congress, the Executive Branch and various state and federal organizations. He also served as counsel to the Chief Justice in his role as presiding officer of the Presidential impeachment trial in 1999. Mr. Duff also spent several years in private practice at Clifford, Warnke, Howrey, Simon, and Baker, Donelson, Bearman, Caldwell, and Berkowitz. At Baker, Mr. Duff was managing partner of the Washington office, represented the University of Kentucky's federal interest, served as counsel to the Freedom Forum and was appointed by the NCAA to review its procedures and provide recommendations.

Next we have Cynthia Moxley. Ms. Moxley is the face of public relations in East Tennessee as the founder and CEO of Moxley Carmichael. She offers services in public relations, media relations, crisis management, image campaigns and more. Her clients include major corporations, smaller businesses and government officials. Ms. Moxley has her own blog, The Blue Streak, which has earned her the title as best blogger from the Knoxville News Sentinel. She's also won numerous public relations awards, including several from the Public Relations Society of America. Ms. Moxley also has experience in the field of journalism. She spent more than a decade at newspapers in East Tennessee, including the Gatlinburg Press, the Sevier County News Record and the Knoxville Journal.

You have already met Kim Helper from earlier this morning.

Our moderator is Dr. Sam Swan. He is professor and director of the Internationalization and Outreach Program for the College of Communications and Information here at UT. In this position, he provides leadership for college-wide, international and outreach programs. His prior professional experience includes

serving as a news director, news reporter, anchor, producer and manager for various television and radio stations in Missouri. He has served since 1995 as executive producer for a weekly public affairs program, UT Today, airing on WBIR locally. Dr. Swan has conducted broadcast journalism and management workshops for media professionals around the world, working for the Voice of America, the US State Department, IREX and other agencies. Additionally, he is the recipient of the Ed Bliss Distinguished Journalism Educator Award presented by the Association of Education in Journalism and Mass Communications.

SAM SWAN: Thank you. I'm happy to be here to represent the College of Communication and Information. We're going to focus today on some of the conflicts and collaborations in communication between journalists and lawyers.

First, I want to mention John Seigenthaler and the great work he's done over the years in journalism education. He served for many years on our Board of Visitors. And right now we, as are all journalism schools around the country, are looking at how to do a better job of preparing journalists for this new world we're living in. Everything is changing very quickly, and it's a challenge to prepare students today for the challenges they will face tomorrow.

With that, I'm honored to serve as the moderator for today's panel. We have four distinguished panelists. We will hear from each of them first, and then there will be a few questions.

We are all aware of the adversarial relationships that can develop in court cases between the prosecution and defense teams on both sides, but beyond that, there are other potentially adversarial relationships that can occur. Journalists are assigned to cover a court case. They have a

job to do. They're trained to cover that case, but may be blocked at every turn by judges, by lawyers, by everyone who, it seems, are hell-bent on keeping us from getting the story. But we have editors, we have news directors who are telling us we'd better bring them a story by deadline today or we're fired. And that's happened more than once. Journalists are assigned to cover court cases, but it's not easy.

Some firms hire public relations firms to assist in helping journalists do their job, in helping law firms put the best spin on their clients. And so that adds another dimension to this entire interaction. In addition to that, we'll discuss the challenges faced by lawyers who are charged with the responsibility of prosecuting or defending their clients while, at the same time, having journalists constantly at their heels trying to get all the information that they can in order to meet their deadlines.

We have asked the journalists on today's panel to discuss the challenges they've faced covering these legal issues, how news cycles work, how stories are pitched, what goes into reporting a story on a daily basis for that deadline, and the twenty-four hour news cycle. We've asked attorneys on the panel to discuss what they expect from the media and what journalists can do to facilitate a better relationship. We believe we have all of those points of view covered with these four distinguished panelists. So with that, I would like to ask Joie Chen to begin.

JOIE CHEN: Thank you all, particularly to the University, to my friend, Amy Mohan, and to all the team here for inviting us here to speak to you. It's always a difficult situation to be a reporter who gets called to speak to lawyers, because usually when that happens, either we've done something wrong or you've done something wrong. And there's never anything good to the start of that relationship. So I'm quite relieved to be here today to try to

smooth some of that adversarial stuff the professor was talking about.

I think it is absolutely true that the nature of our industry has changed so much and so rapidly that we are really looking at a different breed of young reporter. What we have, in particular, are younger, less monitored reporters. I left the business of television news after twenty-five years, and I don't have any regrets about doing that. I'm not concerned that you take away some old reporters, but I do worry when you start taking away senior editors, because I think what happens is you have fewer people who are able to monitor, to edit. That is the point of having an editor, someone who understands the complexities of the issues.

We have an environment in which we have fewer specialized reporters, fewer legal reporters. When I went to CBS, I started going to Capitol Hill as a correspondent in the 108th session. And about six weeks into it, somebody asked me where I was from. I said CBS. And they said they had not seen a CBS correspondent. Turns out the CBS Evening News did not have a correspondent covering Capitol Hill for two years. So what's happened is you lose the specialization and the ability and the understanding and the context of reporters. I was obviously a fairly young reporter, but there were people coming along behind me who were younger and less experienced and less knowledgeable than I was going into an environment that the network either didn't think was important enough or couldn't finance. I'm not going to make a judgment about what they did or didn't do, but the reality was CBS News did not have a correspondent on Capitol Hill, which is just astonishing.

We live in an environment where there are younger reporters, less edited reporters, reporters who, through their journalism education, don't have the opportunity to study ethics or legal issues as much as prior generations have. We

could all talk about the weaknesses of that. I'm only here to tell you that that is a reality and will probably continue to be reality.

The problem for you, as counsel to clients in a multitude of situations, whether it's criminal clients or corporate clients, is that you're talking to a younger group of reporters who don't have the experience and aren't going to be edited and do not understand what you're talking about.

I was talking to Mr. [Jerry] Summers earlier today about the notion of whether there should be more cameras in the courtroom. I'll make the argument that I don't want to see cameras in state courts, but I would like to see cameras in the Supreme Court. Because I think the way television uses those cameras is not particularly a good service to the public. The idea is that we should have transparency in the courtroom by putting cameras in the courtroom. Well, what actually ends up happening is that you have a Casey Anthony trial that gets disseminated and watched by people, but they're not really getting the whole context. And a reporter who's covering a local news issue is going to take a twelve second sound bite and put it on the air without that kind of context. So you're making my job easier as a reporter because I'll have a sound bite to use, but you aren't necessarily serving the public as meaningfully.

Nevertheless, I think that it would be important to have transparency at the Supreme Court level where I really do, as a citizen of this nation, want to understand the complexities of that environment and those kinds of cases. That's where it's really important. That's where it's transformative to our understanding of the nation and our laws.

But I digress, and I do that a lot. Remember that I was on cable television for ten years, and we can pretty much talk for four hours at a time without having any factual information.



We have younger reporters, we have fewer opportunities, but we have greater obligations for those reporters. We tell a young television reporter that you've got to file for the 7:00 a.m. and the 8:00 a.m. and the 9:00 a.m. and the noon show and the 4:00 show and the 5:00 show and the 10:00 news and the 11:00 news. And, also in between, we want you to file for the online news service. And some young reporter who isn't being that well monitored to begin with has got to keep generating that stuff. You're going to go into a complex legal situation and I'm going to get a ten second sound bite of you. That sounded like a sound bite, so I go with it. I need to get that out there because I only have this many opportunities to get my news on the air.

It is a real risk, covering legal issues. It's really quite problematic, and I worry about that a good deal. Maybe you get sound bites that are right, but not stories that are complete. And this leads me to what I've been doing for the last four years now, working in an area of digital and online communications. What we found comes down to this: In the digital age, every corporation, individual, government agency and nonprofit has the opportunity to be their own media company, to tell their own side of a story. Sometimes that's problematic. But what if you use that platform to advance understanding of a story or issue or point of view?

[referring to a PowerPoint presentation] This is an example of a case that I worked on. This is a product manufacturer -- Remington Rifles, the oldest firearms manufacturer in the United States and the oldest in the world continuing producing. They faced a really difficult communications issue. They knew that a major network, CNBC, was planning a harsh story about one of their products, the Remington 700. It's a bolt action rifle. There have been lawsuits by people who claim that it had accidentally discharged. The company maintains that this is

not a flawed product. It has settled some suits. But now here comes CNBC, a very powerful news organization, that's going to tell a story. And the story is almost guaranteed to be quite negative. How could it not be?

So Remington is asking, what can they do? Do they submit to an interview with CNBC where they know the story's going to be negative? As legal counsel, can you tell your client, sure, sit down with the news media because they're going to present a fair story, when you know they're already coming out with a negative story?

What's another way? Tell your own story. Remington did not actually sit for this interview. They released a paper statement through their legal counsel. And they chose to create an online presence in which we told their side of the story, and waited till after the CNBC report aired. It was an hour long program, and we responded with what I would call responsive reporting. I'm not sure I call this journalism, but I would say this is responsive reporting to what they saw on CNBC.

Our mission in this was to tell a story that we did not think could be told by talking to the news media. I'm just going to play it for you.

(Video recording:) "In fact, a review of the program uncovered numerous inaccuracies, misstatements and mischaracterizations all in support of a false conclusion that a design flaw in the model 700 makes it prone to accidental discharge. Since the first model 700s were introduced almost fifty years ago, more than five million have been sold to generations of satisfied shooters. Billions of rounds have been fired. Although a small portion of those millions of users have told the company a model 700 rifle went off when they didn't intend for it to, both Remington and experts hired by the plaintiffs' attorneys have tested accident guns which were alleged to have fired without a trigger pull. And neither has ever been able to duplicate such an event on guns which have been properly

maintained and which had not been altered after a sale. No scientific test has ever supported the accidental discharge theory of plaintiffs' lawyers and their experts. That's true, even with the gun at the center of the CNBC report. The reporter tells the compelling story of the Barber family who lost their son in a hunting accident a decade ago. But the show never reveals the condition of the gun, which experts found was heavily rusted with the trigger engagement screw, safety lever and fire control mechanism all adjusted or removed and reinstalled. A statement made shortly after the incident concluded that a number of abnormal conditions existed in the Barber's firearm. Even so, experts for both Remington and the family found the Barber's gun worked properly when it was tested. The supposed flaw could not be repeated. The gun fired only when the safety was in the fire position and the trigger was pulled, exactly as it was designed to do."

(End of video recording.)

JOIE CHEN: This is another way to deal with the media in an environment when you know that you might not get full reporting. Maybe not inaccurate reporting, but you might get only part of the story. What is the option that allows the client's side of the story to be told? There were some legitimate arguments they made. We actually watched this program with the company's lawyers. It's an hour long program. There were a hundred facts that the company disputes and the history of the litigation disputes. And they were all over the place. There were police reports in which a certain set of facts were laid out, but they were completely --I don't want to say misrepresented, but represented in a way that was different than the words in the police report. Is that misrepresentation? Talk to a lawyer. But this was their best shot at speaking directly to the audience they wanted most to understand their view of the story. This is a side of the story that they understood

would not be told in the CNBC report no matter what they did. No matter how many interviews they would submit their client to, they didn't think that a full story would be told.

Because reporters, by our nature, we're working very fast, we're entering into something quickly, we're studying something quickly, we're analyzing it very quickly, and then we're telling other people about it. So our tendency is going to be to reach out and try to deliver information in a sound bite. It's going to happen very quickly. And we are going to go for drama. We're going to go for the best characters and the best storyline. And an easy storyline is a woman is out hunting with her ten old son and accidentally shoots and kills him because she says the product was flawed. But the emotional part of the story that the reporter's going to go for is the woman held her ten year old son in her arms as he died. And you are never going to get a story that's going to refute that on television. No matter how many facts you present, you're not going to get that. You're not going to be able to reach that emotional field.

I'm just asking you to consider that there are new ways to leverage the relationship with the media, whether that means developing relationships with reporters directly, by lawyers to reporters that they know will be covering their stories to try to develop that arena of trust, an opportunity to be able to give them off-the-record comments and know what's off the record and what isn't, or whether it involves hiring a communications expert who does litigation communications and can actually help you tell your side of the story to reporters.

There is also another opportunity, which is to find ways for your client to be able to tell his or her own side of the issue. I have another example. I'm not going to make you watch it, but we also worked with branding for clients. I was contacted by general counsel of an

organization/corporation led by the man who started TD AmeriTrade, a big online brokerage with the largest volume in the world. This gentleman is now in seven other lines of business. And as his counsel, the lawyer told me that they were also in the business of reputation manager, of trying to help his image. He's not facing any litigation problems, but how does the lawyer help her client establish his brand digitally and tell his story online? This is equally a way you can use relationships with people who have journalism training to reach out and talk directly to audiences.

What it goes back to is that we should not be frightened by the idea that there are new kinds of journalism and information going out there. We should take advantage of those opportunities and use that to build the relationship between lawyers and people who tell stories. Whether we call them journalists or not, they are people who are in the business of storytelling to uphold your interest in your cases and those of your clients and their reputations.

SAM SWAN: Thanks, Joie. And next we're going to turn to Jim Duff.

JIM DUFF: Thank you, Sam. It's great to be with you here in Knoxville. My roots are in Kentucky, not too far from here. I actually was a walk-on on the basketball team at the University of Kentucky, so we used to like to come down to Knoxville every once in a while. Our football team does not like to come down here to Knoxville, and sometimes our basketball team doesn't like to either. But it's great to be back.

First of all, I just want to pay tribute to John Seigenthaler and all he's meant to us --he's a national treasure. I got to spend yesterday at lunch with another national treasure, and that's Senator Howard Baker, with

whom I worked for many years. And I love the fact that we're in the Baker-Donelson classroom here. That's a nice bit of a homecoming for me too. I did get to be his managing partner in the Washington office of that firm for a number of years.

If you ever spend any time with Senator Baker, you know you're going to have some stories to tell. We traded stories yesterday. I'll share one with you out of a court experience that I had recently from a judge. We were talking about moonshining. His grandmother was a sheriff and my grandfather was a sheriff, so we had a lot of moonshining stories to tell. But my favorite was this judge down in Florida. There was an old moonshiner down there and the revenuers were after him. He got tipped off to it. And they pulled his truck over on the side of the road one day. He had some jugs in the back. And they went back and they said, Buford, you're under arrest. He said what for? And they said, moonshining. He said, well, that's not moonshine - go taste it, it's water. So they went back there, and they opened it up and took a swig. And, sure enough, it was water. So the feds got a little irritated and they charged him with fraud. So they go to trial and the first question from the prosecution is, what do you do for a living? And he said, I sell water to the federal government. So sometimes your clients have a better story to tell than even the lawyers could come up with.

I thought today I would give you a little bit of a different wrinkle in the panel discussion so far, and that's something from the Court's perspective. And then I want to dovetail with what John Seigenthaler had to say about our judges and justice and journalism projects at the Freedom Forum, which are really crucial to the future of our country because of the nature and necessity of the interaction between the courts and the media.

My experience in the government has been with the court system. As was mentioned earlier, I started in Chief

Justice Burger's office back in the mid-70s. And in those days, a relationship with the media was one of great distrust, almost hostility. But if you put yourself back in that time frame, we were really fresh off of what was the greatest journalistic achievement in investigative journalism -certainly in my lifetime, and I would say also in the history of the country-and that was Watergate.

What journalists did and Bob Woodward and Bernstein did in particular with the investigation of Watergate and exposing governmental abuse was an enormous benefit to the country in exposing government wrongdoing. That was certainly the plus side of what's happened within journalism and the good that it can do. After writing a couple of books, Bob Woodward turned his sights onto the Supreme Court and was going to do a book about them. And, naturally, there was a lot of nervousness at the Supreme Court at the time, because he was great at uncovering scandal and was an accomplished journalist and well respected just shortly in the aftermath of Watergate.

He wrote the book, called Brethren.<sup>123</sup> As it turned out, there really wasn't any scandal in the Supreme Court at the time. It was an interesting perspective that he had on the interactions of the Justices at the time. But there really was no particular scandal there to uncover. It didn't foster or improve press relations with the Court.

And then during that time frame, Chief Justice Burger also attempted to reach out to improve relations with the media. I would have to say in retrospect, there wasn't really the attitude there to do so in a very aggressive way. You've made great improvements since then. But in the context of reaching out to the media, Chief Justice Burger invited some of those who covered the court on a regular basis at that time to come to the conference room at the Supreme Court and he would show them around and

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<sup>123</sup> BOB WOODWARD AND SCOTT ARMSTRONG, THE BRETHREN (1979).

give them a little background off the record on the workings of the court.

In the course of that visit from the media, an ABC reporter named O'Brien got out of eyesight and picked up a crumpled piece of paper, in the fireplace in the conference room, that had information on it that he later used to disclose the outcome of a case at the Supreme Court before the Supreme Court announced the decision. Well, that was not very well received at the Supreme Court, as you might imagine. So press relations remained somewhat sour in those years.

Years later, after going back into the private sector in law practice, I became counselor to Chief Justice Rehnquist. And we made some real efforts to improve relations with the media. And those were, in a very great way, improved by John Seigenthaler and others who reached out to the courts to try to make improvements to the relationships. We've made some good strides there.

Fast forward a few years hence, and Chief Justice Roberts asked me to become director of the federal courts. I served in that position for five years. And it was during that period of time where it really came home to me how much the courts need the media. The courts are still suffering from underfunding. The number of vacancies on the courts is quite high. Salaries are a real problem in the judiciary. In major urban areas judges are vastly underpaid. It's a little harder to make that argument in Booneville, Kentucky where my family's from, but nationwide it's a major problem. And what's the solution for the courts? Obviously, we do go to Congress for help. But the media plays a very important role in exposing and advocating for the judiciary when our judges don't really get out and lobby for themselves in that regard. So the media is important to the functioning of the judiciary, the independence of the courts.

Today you have a presidential candidate who is advocating bringing judges in front of investigative bodies



for the opinions that they issue. And what's the recourse to that for the courts? Who advocates on their behalf? To a very large degree, it's the media. So there's obviously a need to cultivate better relationships between the judiciary and the media.

Conversely, now I'm at the Newseum. I had a friend who was visiting recently that I bumped into over Thanksgiving, and he told me the story of one of his acquaintances who's from Russia. He was taking him through the museum, and his acquaintance said that in Russia they had a free press also, but the difference in Russia and America is in America you're free after you publish. It was a very profound observation. Why is that? The reason is very simple-the First Amendment to the Constitution of the United States. There are five freedoms in the First Amendment. But what's the difference between Russia and the United States? There are many countries around the world that have a Bill of Rights. Many countries have a more elaborate Bill of Rights than we do in the United States, but they're unenforceable because they don't have an independent judiciary. The difference in the United States is if Congress does pass a law abridging freedom of the press, you have an independent judiciary that could step in through litigation and do something about that, declare the law unconstitutional.

The brilliance of our founders is that they devised a system which is so intricately involved in checks and balances, and so very important in that system of checks and balances is an independent and free press-and an independent and free judiciary to make it work. I've been very fortunate in my career to get to work with some real national treasures and leaders -recently getting to work with John Seigenthaler on his Justice in Journalism programs is really a capstone of a very lucky career on my part. A big part of that program is going to be bringing judges and journalists together to communicate with each other about

their needs and to help them recognize how much they do need each other.

They are very different kinds of organizations. As Joie was describing the media and its need to act and respond quickly, I was sitting here thinking that's exactly the opposite of the judicial branch. They act very slowly. They deliberate. They try to get out of the heat of the moment and deliberate in a calmer atmosphere and environment. And they give opinions on their own clock. There's not a deadline. There isn't a twenty-four hour news cycle that they really worry about. Through communications between the judges and the journalists, they can recognize their cultural differences.

During one of the meetings with Chief Justice Rehnquist with the press, they were after him because all the difficult decisions that the Supreme Court issued came out the same time, at the end of June, because they're so difficult. The hardest cases, which take the longest to deliberate over, to draft, to build your majority, usually come out at the end of the term. And the journalists cannot stand this because they've got a deadline the next day. You've got five cases that come out the same day, and they're all equally high profile or important, sometimes. And so they've asked the Chief Justice, can't you dribble out these decisions little by little, give us a little advance so we can do a better job of reporting on the important decisions of the court? I think that's a reasonable request on the part of the journalists. It is completely foreign to the thinking of a judge or justice on the Supreme Court. But it's putting them in the same room together to talk about this, because what the media wants is access and transparency, and what the courts want is accuracy and getting it right.

The things that I think irritate judges the most is when the reporting isn't quite accurate. There's another element, as both John [Siegenthaler] and Joie [Chen] mentioned, and that is the decline in the beat coverage of

the judiciary. Mark [Curriden], you alluded to this earlier when we were talking about Fred Graham. When I first started working at the Supreme Court in 1975, there were beat journalists who covered it regularly, and they did a pretty good job of getting it right. Even under the deadlines that they had, they did a pretty good job of getting the stories accurate. It really hit me that this has changed, and it's because of what John said in that the funding is drying up. There isn't enough money to devote to coverage of the courts. Not only the Supreme Court, but the local court level and local reporters, they don't have beat coverage anymore.

But when it really hit me was in *Bush v. Gore*,<sup>124</sup> because if you remember watching the aftermath, as soon as that case was announced, the reporters came running out from the Supreme Court with decisions in their hands to report on what the Court had decided. And only one reporter got it right. It was Pete Williams, because --

UNKNOWN SPEAKER: No, Dan Abrams got it right. Dan Abrams was really good.

JAMES DUFF: Well, all right. Maybe I missed it. But most of the reporters were unfamiliar with the opinion. They were flipping through, trying to figure out what the vote was. And Pete Williams, who covered it regularly-and maybe Dan, I didn't see the report from Dan-got it right. My point is that it was because he covered the court regularly.

To improve the accuracy, I think you have to have more regular coverage. One of the brilliant things John Seigenthaler is coming up with is the notion of getting journalism students to, in the last year of school, cover courts as sort of an internship. It gives them an opportunity to learn the trade. It gives the courts more accurate

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<sup>124</sup> *Bush v. Gore*, 531 U.S. 98 (2000).

coverage. The longer you're on a beat, the better you're going to get at it. So it's a win/win in that scenario. And it's something I think journalism should really embrace.

We've been trying to get that done within the legal profession for a number of years-that is, converting the third year of law school to an internship. This dates back to the Burger years that in medical schools, you would never graduate from medical school without an internship. You would never go to a doctor that didn't have an internship, and yet we send lawyers out to practice law with no real practical experience. They're getting the experience at the expense of their clients in their first years on the job. This why I think John's idea was so brilliant, is that if you make internships available to journalism students in their last year of journalism school, they would get good, practical experience and that would benefit the judiciary also in getting more accurate coverage.

Those are my observations, and as we go through the panel discussion, I'm happy to respond and answer any questions you may have.

**SAM SWAN:** I'm glad to hear you make the comment about internships, something we strongly believe in and we require for all of our journalism students here at UT. I would like to invite Kim to go next.

**KIM HELPER:** Good afternoon. I may try to take a little bit more of a practical approach based on some situations that I've encountered. I did tell you I was going to come back to Nancy Grace. I've never met the woman. I don't have any bias one way or the other, but I'm going to read to you something that happened a couple of months ago that really made my job very difficult. When we talk about accuracy in doing the right thing this is where, from my perspective, I run into problems with reporters-when it becomes sensationalism as opposed to being accurate, or it becomes

“this is what my story is going to be about and what you say doesn't really matter.”

“Bombshell Tonight” is how it starts. “In a stunning twist, Rodney Atkins walks free on low bond after allegations he tries to murder his own wife. A country superstar divorce explodes in claims of attempted murder, but the star takes to the stage on national TV, even in sold out concerts.”<sup>125</sup> It wasn't an attempted murder. No one ever said it was an attempted murder. Even the victim didn't say it was an attempted murder, but Nancy Grace did. This was a domestic assault case very similar to any kind of domestic assault case that we handle. Those are very difficult cases for a prosecutor to handle, in part because you often have a victim who has relied very heavily on the alleged abuser for support. There are a lot of emotions involved.

In this case, there was a ten year old son who was present. In the course of this program, they suggested that no one even interviewed the son, which was totally inaccurate. But, ultimately, what ended up happening was the case was basically put on hold for a year. He was given some conditions to follow. As long as he followed the conditions, the case would be dismissed at the end of the year.

I knew that because of the attempted murder allegations, it was going to be a very difficult story to convey to the media. And because it was Rodney Atkins, a country superstar, we had three cameras in the courtroom that morning when he was coming to court. The plus of it, as I talked about a little bit earlier, is I really do try to foster a good relationship with the media that's in our area. And I turned around that morning and one of the reporters there was someone I had worked with before. It was an excellent opportunity for me to say that what's happening is not anything different than what happens to any other domestic

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<sup>125</sup> *Nancy Grace* (CNN television broadcast Dec. 22, 2011).

case after we talk to the victim and go through all of the evidence that we have in front of us. We talked a little bit, and one of my concerns was that Nancy Grace said that he would get special treatment and it would all go away. So I said to the reporter, it's not special treatment.

Then we announced the deal in court, and we walked outside. The cameras were there, and that reporter asked if she could talk to me. I said yes. And the first question she asked me, knowing what my answer would be, was did he get special treatment? And it gave me an excellent opportunity to say no, this is what we normally do in the course of these kinds of cases. We've spoken to the victim, and the victim understands. These are all the other conditions, et cetera.

That was the end of the story, thank goodness. I think it aired at noon that day and I don't think it aired ever again. And I attribute that to a couple of things. As I mentioned earlier, my husband, the night before, went through the talking points with me, which I very much appreciated. And having that relationship with the only reporter there was very helpful. She knew what I was sensitive about and was willing to go there and ask that and to understand what happened.

So what I would stress in terms of what I look for [from the media] is accuracy, but the willingness to ask questions about what's going on and not to jump to conclusions. Because at first glance, particularly from a prosecution standpoint, things aren't always as they appear. Sometimes we have victims who just aren't going to show up in court. We have victims who change their stories. We have witnesses that change their stories. So what starts out as a big drama, oftentimes by the time it works its way through the system has kind of piddled down to nothing. To try to explain that to the media is not always the easiest thing, but if I've built up that rapport with a reporter I can explain, within the realm of my ethical duties, that this is

the best outcome possible based on the evidence that we have in front of us.

There was a series by a reporter within the Nashville area called Policing for Profit. I know it found its way over here to Knoxville, because I got calls from people in Knoxville yelling at me and furious, even though it wasn't me. I was in the piece, but my actions had nothing to do with what happened. The reporter latched onto this idea that our drug task forces across the state are stopping innocent motorists and stealing their money. I jokingly, after the report aired, wanted to put out a press release-and don't worry, I didn't do it-that said the 21st Drug Task Force stopped a school bus today and took the kids' lunch money.

That's not what's happening, but if you watched the story, you probably thought that was happening. And the frustration that I have with that report and with the reporter, I really debated whether it was even worth my time talking to him when he made the phone call. Because I knew, based on what was going on, what he was looking for, what the focus of his story was going to be, that our drug task force are nothing more than law enforcement ripping off innocent citizens driving down the highways of this state with hundreds of thousands of dollars stashed into wheel wells, and we're taking it for no reason. That's not the case, but I knew that that's what his tenor was and that's what his goal was going to be. But I had never dealt with him before. And I thought, okay, I'm going to give him an opportunity. I'm going to sit down with him and I'm going to tell him everything, how it works, what the law is, why we do what we do.

He was focusing on a case that came out of our district. And although I still really can't talk about it, I told him there is more to that story and that case than meets the eye, but I can't discuss it right now. And, lo and behold, when I watched the piece, that guy who was interviewed

had a hundred and sixty thousand dollars stashed somewhere, and it came across, from my perspective, that we had just picked on this little man and taken all his money. Despite my efforts to say it's not what it appears, I can't talk about it because they're still being investigated in an ongoing investigation, none of that came across. It came across as if we had just stolen money from this innocent man. That was very frustrating to me.

What was even more frustrating was the characterization, through some careful editing, that he had asked me a question and they showed a picture of me smiling. I smiled because he had asked me the question ten times already and ten times I kept saying, that's not true, that's not the case. And I think by the tenth time, I was just like are you kidding me? You're asking me this again? I've already told you that that's not the case. So that was very frustrating to me, but from my perspective it was a lesson learned.

I gave this reporter the opportunity to be fair and straightforward about it. I didn't like his editing. I was a reporter in an earlier life, and that's why I got all the phone calls. He ran it in conjunction with the actions of another agency, and everyone who watched it assumed that I was in charge of them. And I got calls from across the country yelling at me. If I get a call from that reporter again, the reality is I'm not going to talk to him because I just was not comfortable with the treatment I received nor the spin on the story, despite our efforts to give him all of the information. And let me assure you, we gave him stacks and stacks of documents, information showing how to test the money to show that it has drug residue on it, that we're not just stealing money from innocent folks.

I will also say that going into it, I put a tape recorder on the table during the interview, and he was a little surprised and shocked by that. But knowing his reputation coming in, I thought, I'm going to have my own



record so that if there's something that's terribly taken out of context, I've got it. So that's my bad story.

On the plus side, after that series ran, another reporter called and said he thought we got a raw deal, and asked if he could do anything, if there were any stories out there that we wanted him to look into. And that ultimately led to, not me speaking to him because it was pending litigation, but him going out with one of our police agencies as they rounded up drug suspects and showing the process. So there was a positive that ultimately came out of it, and our agencies were very happy with that.

I'm almost ashamed to say it, Mr. Seigenthaler, but when I was first a journalist coming out, as a general assignment reporter for a radio station in Buffalo, they sent me to cover something in court, and I didn't have a clue, so I reported it as a trial. I got the stuff right, but it wasn't a trial. It was just a preliminary hearing, which was really embarrassing to me when I figured it out. I think I was twenty or twenty-one at the time when I really figured out what I had done. So I recognize that so many reporters now are covering everything. There's not that specialization. And they're thrown out to get a story in an hour.

So I really try to get that back and forth. If they've got it, that's great. If they don't, then you have the opportunity to discuss it and straighten it out, make sure that we're all on the same page, that no one is reporting on something that's just not quite right.

I do want to touch on one other thing that I really try to be cognizant of, and it's because of my background. Shortly after I was appointed as the District Attorney, we had a puppy mill in Hickman County, which is one of our more rural counties. They don't have an animal control agency. And this woman had six to seven hundred dogs on her property.

JAMES DUFF: Any moonshine?

**KIM HELPER:** You know, ironically, I have a moonshine case pending right now. But the Humane Society generously offered to come in and help us out, and we needed that help. There is absolutely no way that the police agencies in that jurisdiction could have handled seven hundred puppies. They had no place to take them. They didn't have the training or the experience. We welcomed the Humane Society, and the ASPCA came in too. The downside to that, of course, is that they're in it to generate publicity and to make money for themselves. I mean, they do an excellent job. We never had any evidentiary issues. But as we executed a search warrant, I came around the corner and there were reporters walking all over the site of my puppy mill, and I had a search warrant that was going on. That doesn't look so good when you go to court that you have had reporters there.

The puppies were taken to a holding area where they were all examined. And I looked up at that area, and the gentleman from the Humane Society was running reporters all through the area. And bells went off because, again, I just thought if that goes to court, that's going to be a real problem for me in terms of my evidence. But I certainly understood that the reporters that were out there had a story and needed to do a story. And without the visuals, it's nothing-especially when you're talking about puppies, because everyone loves puppies. That's what you want to put on the news, look at these little poor puppies in the cages. I get that.

What I tried to do is reach that point where my evidence would be okay and secure and not tampered with, but to recognize that reporters are out there doing a job as well and that they need to have that access. So we set up a little area where the news crews could shoot into the area where the puppies were. They could stand right on the edge and get what they needed, without interfering with the work

and getting involved in what was happening. And I think that was a good compromise..

From my standpoint as a prosecutor, any time you have a question or don't understand a proceeding, I'm happy to explain it. I was there, I was a journalist. I was the dumb one that said it was a trial when it really wasn't, so I get it. Ask questions and don't be afraid to ask. If I can't tell you, I will say so. I don't try to hide anything. I've had to dismiss cases because ultimately they've not worked out, and I'm not afraid to explain why I've done that. I would hope that my colleagues across the country feel the same way. I know Mr. Cheshire ran into one that didn't have that same viewpoint, but I really believe he's in a very, very small minority. And the rest of us are there, willing to provide what we can to assist journalists in doing their job. The folks in my district are my bosses. And if the message is not getting out to them about what I'm doing or why I'm doing it, then I'm failing in my job. That's why I've always felt it's very important for me to be available and to provide what information I can.

SAM SWAN: Thank you, Kim. And our final speaker is Cynthia Moxley.

CYNTHIA MOXLEY: Thank you very much. Justice White, thank you for inviting me.

You asked about news cycles and how they've changed. I'm not going to dwell on that. But, basically, when I started in journalism in Knoxville in 1980, there were two newspapers in town; a morning and evening newspaper. And the deadline for the morning newspaper was about 10:00 at night. You could push it a little bit. The deadline for the evening newspaper was about 10:00 or 11:00 in the morning. So there were those two big deadlines. There were three TV news channels. They had 6:00pm and 11:00pm news. And there was one main radio

station in town, WIVK, and they had mostly just drive time news. That was it. So you always knew when people's deadlines were. And once you got them the information you needed or somehow avoided getting them the information they wanted-and I was on the other side of that, I was a reporter-you could relax.

But today there aren't really specific news cycles. As Mr. Seigenthaler said, everybody has a website, and it's a rush to the web. I used to think it's crazy to put all this stuff on the web, they're just giving it to TV, but they do it. It's web first, and everybody's doing it. So you're constantly being forced to feed that beast, whether you're a reporter or a source. The TV news in Knoxville starts at 4:30 in the morning, and it goes until 11:30 at night, so the only time you can really relax is between midnight and 4:00am.

We represented the board of the Knoxville Tourism and Sports Corporation for a month in January or February when the executive director was forced to retire after it was revealed that not only was she making a \$400,000 salary that her own board didn't know about, but that there had been some manipulation of board meetings and minutes and that sort of thing. So we were helping the board get their information out. We worked with lawyers-I've worked with lawyers my entire career. When I was a reporter, I covered lawyers. Now that I'm in public relations, we sometimes have law firms as our client, but most of the time we partner with lawyers because we have the same client. And that's good for me because my fees always look good when they're up against the lawyer's fees.

But that was the case when we handled the Tourism and Sports Corporation. When I would walk into a board meeting, there would be seven cameras there, two for each TV station because one of the cameras was for live streaming, and one was for the TV or web for the newspaper because they were live streaming too. At the

same time, everybody's Facebooking and Twittering, including me.

One of the questions you asked was how stories are pitched. They are pitched two different ways. It just depends on what you're trying to accomplish. In the case of the Tourism and Sports Corporation story, there was a crush of requests for interviews and information, and for documents. They filed Freedom of Information requests. So when we had something to release, we would either call a news conference or put out a news release because everybody wanted the same information. That was the most efficient way to get it out.

But sometimes you're going to want to place a story with a certain reporter or a certain news organization. In that case, you do have to have a relationship with them, and you contact them and just tell them about the story. So it really depends on what you're trying to accomplish.

What do reporters want? They want information and they want it right now. TV needs video, radio needs sound-and even the newspaper now needs video. Here's a key tenet of public relations, especially in a crisis. You want your client to be the best first source. If you can establish yourself or your client as the best first source, the media will keep coming back to you for information. If you do not do that, somebody else is going to do it, and then you're going to be behind the story. You're going to be always trying to catch up. This is where PR people and lawyers sometimes come to cross purposes. I've always said that lawyers are the natural enemies of PR people, and that's because lawyers are trying to win a case in court, while PR people are trying to win in the court of public opinion. It's not always the same process and it's not always the same priorities.

I told this to a friend of mine who works for the City of Knoxville. He said that at the city, lawyers are trying to keep us from getting sued while the rest of us are

scrambling to get out of the way of the runaway freight train that is bearing down on us. I have really good friends who are lawyers and we've dealt with some great lawyers in town, but it always seems to be me trying to get them to release the information or respond to the request, and it's the lawyers saying no, we're not ready.

What do journalists expect from lawyers? What they expect from everybody-access, information. In a crisis, they want to know what's happened and what you are going to do about it or what you are going to do next. If you can't give them every bit of information, tell them what's happened and what's going to happen next.

I'll give you an example. One of our clients is KUB. That's the utilities company here. One day there was a terrible power outage. Half the city was out. Channel 6 had a generator, so they went live. They had their anchor, Lori Tucker, in the middle of Church Avenue, and they were interviewing an engineer, the second worst person for a PR person to deal with. The engineer said, this circuit did that and we're rerouting to this and kilowatts and megawatts and all this. And Lori took the microphone back and she said, what I think he said is that the power is out downtown and KUB is trying to get it back on.

So boil it down and tell them what they need to know. Avoid jargon. Lawyers, you all get so used to talking to each other in jargon. That's really not helpful when you're trying to talk to the public or through the media.

Let's talk about journalist ethics. As Mr. Seigenthaler said, reporters are not licensed. They are not like lawyers. They cannot be disbarred, they cannot lose their license. Most reporters that you all will deal with in a market this size have gone to journalism school, they've taken at least one ethics course, and they generally are doing a good job. They're trying to get the story right. They are trustworthy. They do have ethics. But the problem is, as many people have said today, everybody's a journalist

today and they haven't gone to journalism school. They don't give a darn about ethics. They're driving their own agenda. So if you're dealing with a reporter from a recognized news organization, you can probably depend on them being ethical and fair, but otherwise the bets are off. And it's not just bloggers and commentators. This has always been the case. In rural journalism or community journalism out in the small areas-I started at the Mountain Press in Sevier County, the reporters hadn't gone to journalism school-they were housewives. They were retired people. They had not the first bit of training in journalism. They were just writing for the paper. So you cannot always assume that everybody's well trained.

Earlier today, we heard somebody talk about saying "no comment. " I always say why I can't comment. We tell our clients to do that too. Look in the mirror and try to say "no comment" and not look guilty. No matter what you do, you might as well say put on the cuffs. There's no way you can say it that it doesn't look bad. So we always tell our clients, if you can't comment, explain why you can't comment. And we normally blame the lawyers. We normally say, I would love to comment on that, but the lawyers will not let us because it's a matter under litigation. Or if you can't blame the lawyers, blame the HR department. They won't let you talk either.

Some people talked about "off the record". We always ask our clients what they think off the record is. Some of them will say it means you can't use the information. Some of them will say it means you can use the information, but you can't say who gave it to you. Some of them say you can use the information only if you get it verified by somebody else. The bottom line is, nobody knows what it is anymore because they didn't go to journalism school. So do not go off the record, we recommend, unless you really, really know the reporter and hopefully have something on them. I rarely go off the

record, and I know the reporters. I've known them for thirty years, and I still rarely go off the record. And every time I do, I wake up at 2:00 in the morning going, Oh, God, why did I do that, what if they use this information?

Some final points. Say you have to give an interview. The most important thing you're going to do when you give an interview is going to happen before the reporter gets there. And that's when you think to yourself, or you ask your colleague, what are the three most important things I can say about this subject, this case, this situation, and you write them down. That's called your must-air points. You've got to know your must-air points. You have to remember what your job is, and your job is to communicate your message. The reporter knows what their job is-their job is to have the lead story. That's not your job. Your job is to deliver your message. So if you have your three must-air points in mind, bridge back to those no matter what.

I'll stop there, because I know you all have questions, and I'll turn it over to Dr. Swan.

**SAM SWAN:** I want to ask a follow-up question to the four panelists, and then we'll open it up to questions from any of you who may have them.

I'm thinking about the revolving door in the world of journalism, which involves young reporters. You made reference to young reporters, but one of the things that happens in a medium market like this is this is not necessarily the end destination for many reporters. This is the second or third stop on their way. And if you've noticed at the television stations here, there are always new faces, new names. They come in, they stay two or three years, and they're trying to get out of here to go to Nashville or Atlanta or to a larger market, because those places pay a lot better than we pay here in Knoxville. So it's a constant



challenge for people like Cynthia and others to keep those reporters informed about the way things work here.

The question that I was thinking about as I was listening to all of you here, about this problem of new journalists, inexperienced journalists and our challenge in journalism education, is what can the legal profession and the journalism profession do working together to help facilitate this process to educate each other?

JAMES DUFF: I think [having] more programs that pull the groups together is vitally important. And I don't think it stops with journalists. One of the things we're going to be doing at the Freedom Forum is embarking on a very aggressive civic education campaign, because if you look at the statistics around the country, they're alarming. Twelve percent of high school seniors are proficient in US History.<sup>126</sup> We can't sustain our freedoms with that sort of level of education in the population.

You point out a particular problem with journalists going elsewhere. You can't stop that. You hope they go elsewhere with at least a fundamental understanding of basic civic education. It's a broader societal problem. I don't think it's isolated to this business or this industry. We really need to address this as a nation. And one of the things we're going to be doing at the Freedom Forum is civic education in a much broader way. That helps somewhat. It doesn't solve exactly the problem you have posed. But I think even with new people coming in, if they're educated in the basics, that's about the best you can hope for. Because you're not going to stop the turnover.

CYNTHIA MOXLEY: Here's what you all need to do and what we tell our clients to do. Assume that when a reporter

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<sup>126</sup> Michael Murray, *Are You Smarter Than a 12<sup>th</sup> Grader?*, ABC NEWS (June 14, 2011), [http://abcnews.go.com/US/12-percent-high-school-seniors-proficient-history/story?id=13840331#.T\\_yxt\\_U0uS](http://abcnews.go.com/US/12-percent-high-school-seniors-proficient-history/story?id=13840331#.T_yxt_U0uS).

is coming to interview you, they are going to learn everything about the subject matter in the car between when they leave the TV station or the newspaper and when they get to you. So assume that and prepare accordingly.

SAM SWAN: In larger markets, and in this market for awhile, there were beat reporters, those who were specialized in covering the courts. The newspaper still does that. But television has moved away from that, especially in medium and small market stations, simply because they don't have the staff. In larger markets, they may have hired an attorney who then decides to become a journalist or is a journalist who then becomes an attorney. But in smaller markets that's not the case, so it's a constant challenge.

JOIE CHEN: I think it's true to the network level at some point. I got sent to the Supreme Court during a term that had a University of Michigan case in it, and I sat in there and I thought, please give me enough time to find somebody to call afterwards to explain to me what this ruling means, because I do not know. And I'm not going to know. I'm not a lawyer. It's the Supreme Court, for gosh sakes. And it was scary to me that you left it up to me to figure this out and tell the nation about it. But I want to give credit to Kim for establishing those relationships with reporters in which reporters feel that they can come to you and ask you what happened. Because it's the only way you're going to do it. And I think a lot of times reporters are intimidated by lawyers. I think there's always the sense that the lawyer's not going to like me coming to cover their story. So rather than deal with that, I'm not going to ask, I'm just going to try to figure it out on my own in the limited amount of time I have. It is a scary process. And it's scary to think that there are fewer and fewer beat reporters that truly understand that.

SAM SWAN: Let me open it up for questions. We have several in the back.

UNIDENTIFIED SPEAKER: We, as lawyers, have special ethical duties. As we get into journalists who are also lawyers, when we get into cases with sensational journalism where facts are either misrepresented or taken in such a way that doesn't portray the real story, considering the lawyer's ethical duty to educate the public properly about the law, has the Board of Professional Responsibility acted upon this? Have they brought anyone up for practicing law without properly being admitted to the Bar?

JOIE CHEN: I don't know. Some people have been phenomenally successful. We can look at Nancy Grace, and at Greta Van Susteren, who is a personal friend of mine, who is a lawyer and made that transition to television. If you look across the airwaves, there are a tremendous number of lawyerists. Whatever a journalist and a lawyer mashed together is, there are a number of those people. And they might come with the ethical understanding of a lawyer, but they're not going to be monitored as journalists or as performers and speakers on those.

KIM HELPER: I'm not aware of any complaints, at least within Tennessee, but that doesn't mean that there haven't been [any]. But it is a continuing frustration for myself and probably lawyers on both the prosecution and defense side when you're talking criminal cases, where you get all the talking heads opining about what's going on when they've never practiced in your state and don't understand the law of the state. That's why I think the Rodney Atkins thing really got under my skin, because it was not even close to being an attempted murder from the victim's standpoint. But that was not communicated and it really made our jurisdiction look bad, like we let some attempted murderer

out on a twenty-five hundred dollar bond, which was appropriate under the circumstances. But I'm not aware that there's been that sort of pursuing of anyone with a law license.

UNIDENTIFIED SPEAKER: This question's for the panel, as well as Mr. Tompkins. It seems that when I started practicing law, the objective, investigative journalist was just that. That was the single hat that that person wore. Today, it seems that the field gets muddled—I'm the objective, investigative journalist, yet, later tonight I'm appearing on this program and I'm going to be opinionated using some of the very information I'm supposed to be investigating and reporting on. So I'm wondering within the field, is that inhibiting relationships with attorneys? In trying to find information, do you feel that the audience doesn't know which role you're playing in this twenty-four hour news cycle?

AL TOMPKINS: I don't think it's possible to be objective. I don't think objectivity is the goal of journalism. I think truth, fairness, accuracy and thoroughness are goals. But to say that we're going to be objective is to say I have no opinion on anything. And you know me enough now, today, to know I've got an opinion on damn near everything. So I don't think it's possible to pretend you're objective. In fact, there are some in the blog world who say that what we ought to do is come out and state our opinions or our biases before we do any stories. I don't agree with that, but that is one new idea that's going on, that we ought to just say what all of our biases are and let you filter that through your own experiences. So for what that's worth, I don't think it's possible.

If you really care about this, it just so happens that I'm taking constitutional law night classes, and I just finished a big project online. If you're interested, go to

www.objectivenews.net. It's a website that I just built for the class that I'm working on right now, so it's got all kinds of resources. But if you go back to Edward R. Murrow and many others, the penny presses of a hundred and fifty years ago were owned mostly by political parties. So when we start pining for the old days of Madison and Jefferson and others, we have to remember many of those were subsidized media. So we're asking for a day that never existed, and they still don't largely.

I would like to ask a quick question, while I've got the floor, for Joie. Your client Remington, the great gun maker that's making safe guns-[there are ] two dozen deaths and one hundred injuries, and a number of out of court settlements, which are still sealed. Would you like to see your client unseal those settlements so we could see whether or not those guns were, in fact, unsafe?

JOIE CHEN: You've talked to CNBC, haven't you?

AL TOMPKINS: And what about that 1947 memo in which the inventor of that trigger said that it was unsafe and ought to be corrected?

JOIE CHEN: That, in fact, is not what he said. I have interviewed him and talked to him about that. And CNBC, by the way, sent their camera crew to interview a ninety-eight year old man. He let them in and said some other things about it as well. There are more than five million of those rifles in circulation. There were a hundred --as I recall, a hundred and eleven claims. Eleven of them resulted in trials, three of them went against the company.

AL TOMPKINS: How many were settled out of court?

JOIE CHEN: Less than a hundred.

SAM SWAN: Do we have other questions?

UNKNOWN SPEAKER: I am a journalism major right now in my junior year, but I want to go to law school. How do you merge the two together? And what kind of internship should I be looking for?

JOIE CHEN: What is it that you want to be?

UNKNOWN SPEAKER: I want to be a public interest lawyer.

JOIE CHEN: I think that's a lawyer question, not a journalism question.

PENNY WHITE: If you want to be a public interest lawyer, just come to UT College of Law. We'll give you every opportunity you need to be a great public interest lawyer.

KIM HELPER: But if I understood you, you're looking for an opportunity that merges both your journalism interest as well as your interest in being a public interest lawyer?

UNKNOWN SPEAKER: Yes.

KIM HELPER: Some of the journalism folks may have a better idea. Instinctively, I would suggest that you look at an organization that involves the kind of law you're interested in and maybe intern, if you can, in a PR, marketing, selling forum, but take the opportunity to look at other areas. I was working for the Environmental Protection Agency doing public affairs when I started law school. That was a great opportunity, because part of my job was to work with our enforcement division who handled all the legal actions, Clean Water Act, Clean Air Act. So I had that background of law, which is, in part, why

I did go to law school. So maybe look for an opportunity like that.

JAMES DUFF: Do you live here in Knoxville? Will you be here in the summer?

UNKNOWN SPEAKER: Yes, I'm planning to be.

JAMES DUFF: Do you want a paid internship or unpaid internship?

UNKNOWN SPEAKER: Either or.

JAMES DUFF: If you'll take an unpaid internship, I would go to the local paper and volunteer, and say, I would like to cover the courts for you, I would like to go to the courts and report on anything that I find of interest that you might want to use as a story. And then you get exposed to the courts, you get your journalism background and you can blend them both.

SAM SWAN: You can't do an unpaid internship. I coordinate the internship program through the school, and we cannot place a student any longer at the Knoxville News Sentinel unless it's a paid internship-

JOIE CHEN: Or unless they're getting credit.

SAM SWAN: Most companies are saying pay or credit or both. But now the News Sentinel and Scripps Howard in general-not Scripps Networks, but Scripps Howard-has said they will only take paid internships to avoid litigation down the line.

Thank you very much.

**PANEL DISCUSSION 3:  
LAWYERS AS CRISIS COMMUNICATORS**

*Adam Goldberg*  
*Tom Griscom*  
*Josh Galper*

KATIE DORAN: Good afternoon, everyone. I would like to go ahead and start with the third panel for today. First, we have Judge Harry Mattice, who will be a panelist as well as moderator for today. Judge Mattice is a graduate of the University of Tennessee College of Law and is actually considered the brain child of this entire symposium because he has previously taught a seminar about this topic of crisis management and the media for lawyers at Georgetown with the other panelists. He will be teaching a seminar similar to that this fall at the College of Law. He is currently a presiding federal judge for the Eastern District of Tennessee.

Josh Galper is a professor at Georgetown Law and is currently serving as the policy officer and general counsel for Personal, which is a new firm that allows individuals to own and have control over their own data. He has previously worked as a policy and speech advisor for multiple campaigns, including President Obama's and Senator John Kerry's.

Adam Goldberg is an adjunct professor at Georgetown Law as well, and is the founder of Trident Advisors, PLLC, which is a private firm that advises public interest nonprofit corporations on how to manage and prevent crisis situations. He has also worked as the counsel for the President from 1996 to 1999 and worked on the Monica Lewinsky scandal.

Finally we have Tom Griscom, who was the editor and publisher of the Chattanooga Times Free Press until about 2010. Mr. Griscom is now a communications director



and consultant. He has previously worked as a speech writer and advisor for President Reagan and Senator Howard Baker. Of note is his help in writing President Reagan's famous "tear down that wall" speech.

JUDGE MATTICE: Thank you, Katie. And I would be remiss unless I added my voice to everyone else who's been here today. I know he's getting tired of it because among his many character traits is humility, but I have to say something. And I'm particularly saying this to the students here in the room. If you don't remember anything else that happened here today, you will remember being here when John Seigenthaler spoke to this conference.

Who knows who Ray Donovan is? He was the Secretary of Labor for President Reagan from 1981 to 1985. He and a few other people were indicted in 1987 in Bronx County, New York for larceny and fraud in connection with a project to construct a new line for the New York City subway system. On May 25, 1987, Donovan and all the other defendants were acquitted, after which Donovan was famously quoted as asking, well, what office do I go to to get my reputation back? Doesn't that say it all about what we're talking about? If the only tool in your chest is a hammer, then every problem look likes a nail. So we lawyers are trained to approach every crisis as a legal problem.

We forget, however, that there are other players in this system to whom it is also probably a business problem, a personal problem, a PR problem. And what the client would always like is to have someone who can advise him or her about the problem generally. If that happens to be a lawyer, certainly, the lawyer's hired for legal advice, but as advisors, lawyers have a tendency to forget that there are other aspects of this problem. To me, that's what this whole conference is about and that's why I think it is so important that lawyers gain the skills necessary to recognize that

crises are not only legal crises, but they're business and PR crises-all that has to be addressed, in addition to doing the best legal job for your client that you can.

Who remembers a very respected accounting firm called Arthur Anderson and Company? Who was Arthur Anderson the auditor for? A company named Enron who came to an ignominious end. Arthur Anderson ultimately won its legal case in the Supreme Court, a few years after they were indicted by the federal government for their work as auditors of Enron. And who was there to cheer when Arthur Anderson was finally vindicated in the Supreme Court? No one, because Arthur Anderson had ceased to exist. One of the most respected professional firms in the world, who lived and died on its reputation for integrity and good work, died before it was finally vindicated in the courts. This is a great example of the need to focus not only on legal outcomes, but business and reputational outcomes. On the other side of the coin, some would say, Martha Stewart didn't exactly curl up and die after being a convicted federal felon and doing her stint in prison. I don't think anybody would advise becoming a federal felon as a career move, but it goes to show that that actually can be survived.

My interest [in this topic] was piqued about fifteen years ago when I worked for [Senator] Fred Thompson in a campaign finance investigation arising out of the 1996 federal election campaigns. There were a huge number of scandals that were spawned by fundraising efforts. A political advisor who's now on television all the time, Dick Morris, convinced Bill Clinton that the only possible way he could win re-election in '96 was to raise the astronomical sum of forty million dollars for his re-election campaign. Now that's not even a drop in the bucket for a presidential campaign. But upon hearing that, President Clinton and his administration went into overdrive in

efforts to try to raise that kind of money. Those efforts spawned all sorts of scandals.

During that period of about year and a half working on Capitol Hill, a couple of things dawned on me. One is that Capitol Hill is a very unusual place in the sense that there are way too many reporters chasing way too little news. This spawned an environment where we were trying to actually make stuff up that might be newsworthy. Because of that environment, it was necessary to have people on the ground. One of the spin doctors for the Clinton administration that I observed at very close range was a guy named Lanny Davis, who was a lawyer. His job was to try to spin the events that were coming out of our investigation on behalf of the White House. Once that investigation was over, Lanny went back into private practice. And he started a cottage industry, so to speak, in the Washington area for lawyers who also billed themselves as being public relations experts. I observed Lanny's career and watched it develop. He originally tried doing the context of a traditional law firm. That's how I came to meet Adam Goldberg and Josh Galper, who worked with Lanny first at law firms, I believe. Those three wrote together about crisis communications and how it could be handled. And I would commend that to you for your reading.

Years later, I made contact with Adam [Goldberg] and Josh [Galper]. They were kind enough to invite me to be a guest lecturer at a course they taught on crisis management at Georgetown Law Center. They were leaders among lawyers to try to professionalize this whole interdisciplinary working between lawyers and PR people.

I view it as a model of modern messaging when I, along with the rest of the country and the world, watched President Clinton stand at the podium, and before he walked away, he came back and addressed the press, pointed his finger at the world and said, I'm going to say

this once, but not again, I did not have sex with that woman, Ms. Lewinsky. And then he walked off. We all know how that turned out. Years later, I was told, Adam was in the general counsel at the White House during the Clinton administration. And years later, one of our mutual friends, Mike Madigan told me that everybody thinks Clinton came up with that himself, but he didn't. Adam Goldberg was the messaging genius who came up with the famous disclaimer by the President in the Monica Lewinsky affair.

So with that, Adam, I'll turn it over to you.

**ADAM GOLDBERG:** Two things occur to me. First, that that story shows that even Republicans have a sense of humor. And second, I actually advised the President, take the word "not" out.

Josh and I have spent a good part of our career being the bridge between the press folks and the lawyers, and more often than not, fighting with the lawyers to actually get the facts out. The Judge asked me to begin by explaining, from my perspective, how I came to this. Josh and I have this philosophy that to be a really exceptional lawyer who's going to handle clients on a litigation or transactional side, where you have clients who have matters that get to the public realm, you really need to have a fluency in how to deal with the press and what to say to them and when. If you're going to help to manage a crisis, it really helps to have the three legs of the stool; law, media and politics. Even if your specialty is law, it helps to at least have some fluency in the others.

I think I've worked at four different law firms -- well, now with my own, it's five different law firms and ten different jobs since I graduated law school. When I first got out, I lobbied for a law firm in Washington, D.C. on behalf of companies. The first hundred days for beginners in Congress was like a candy shop for companies. That's how

I first learned the chops in Washington politics. And it's also where I first learned that the old aphorism that Washington, D.C. is Hollywood for ugly people is a hundred percent true.

From there, I worked on the 1996 Clinton campaign in rapid response on investigations issues-things like Whitewater, Travel Office and the like. And from there, I went into the White House counsel's office. It was there where the nature of the practice I do was born. I worked with Lanny Davis there, but it really started before we got there. And it was the brain-child of Harold Ickes, who you may know as a big Hillary Clinton supporter, but he was deputy chief of staff for a long time in the Clinton campaign, had been a labor lawyer, long time Democratic operative. His father was the Secretary of Interior under Franklin Roosevelt.

Once Whitewater really exploded, and independent counsel was appointed, Michael McCurry was the press officer for the White House at the time. He was spending all his daily briefings on Senator D'Amato's hearings and Whitewater hearings, and this had to stop. The positive communications people in the White House were spending way too much time on talking about scandal, not about good, positive messages and what the administration was trying to do on behalf of the American people. So we're going to set up this team of lawyers inside the White House Counsel's office focused on press, politics and certainly the legal side of responding to congressional and independent counsel subpoenas. We're going to do it inside the Counsel's office to maximize our use of privilege and be able to defend, so our deliberations will be as protected as possible.

So during the Whitewater hearings they had two folks who focused on press, they had two lawyers who focused on Congress, and they had folks who handled the subpoena response in litigation. We continued that on, first

the campaign finance investigations, which were an incredibly partisan affair, and then on into the Monica Lewinsky matter.

Just a side note on the Lewinsky impeachment matter. The day the trial in the Senate began, we all walked in and there's this huge basket of cookies and pastries. And we're all wondering what perverse person would send this to us. We opened up the card and it was from Senator Rick Santorum, who wished us the best of luck. Which I thought was actually a very nice, earnest gesture.

The other thing is, I figured impeachment was the beginning of the time of the twenty-four hour news cycle. You had deadlines, and that was true for my first year in the White House. I knew at 5:00 I had to get the broadcast, I knew I had until 7:00 or 9:00, depending on the story, to get to the print journalist. Well, once impeachment hit, it was 24/7, just rolling. And it was the first time where outlets like the Wall Street Journal were posting stories online at night to try to beat the wires and the broadcasts and the others. It was insane. And it was very bad because it was coupled with the fact that the President's private counsel wouldn't let the White House talk about any facts about what happened.

We spent a year dealing with the press swapping rumor and trying to learn more about what we were doing from the actual lawyers handling the case two doors down from us. We had a lot of reporters getting things wrong and we were correcting it after the fact. We were only telling reporters the facts after they got them wrong, which wasn't a good thing for them and it wasn't a good thing for the White House.

From the White House, I started with Lanny really building this kind of private practice, because we realized there was this need out there in the private sector to have lawyers who could manage a crisis, who had these skills and could really quarterback folks and allow the normal PR

and the normal operational folks of the company get on with their daily jobs of their business and have outside folks come in and manage every aspect of their crisis. So that's how I came to this.

JUDGE MATTICE: Let me throw this over to Josh. You mentioned that part of the impetus for doing this in the White House Counsel's office was to have the lawyers doing it so you could maintain privilege to the fullest extent. Can you give a two or three minute primer on attorney/client privilege-how it works, in whose favor it attaches, who possesses it and historically who may not be able to possess it? The White House has a very extensive press office. They would normally be doing this, but because of the legal underpinnings of these problems, if I understand you correctly, Adam, it was thought that the lawyers need to take on this role, but historically the press office might be handling it. Is that accurate?

ADAM GOLDBERG: Yes.

JUDGE MATTICE: Josh, can you pick up on that and give a short primer of privilege?

JOSH GALPER: Absolutely. It might be helpful to hear some of how the White House operated, because it's going to be different than what we learned in law school. We all learn in law school that the client possesses the privilege, and that privilege extends to you when the client enters into that relationship with you as the lawyer. The attorney/client privilege is something that for all intents and purposes is a sacred relationship where you, as a lawyer, are able to learn the bad facts and the good facts in order to determine legal strategy going forward-strategies in other areas like the policy arena or even the media arena when they all come together to support the legal position of the client. In litigation, it's a fairly straightforward thing to understand.

You are in litigation and the investigation phase while the litigation is under way or maybe right before it, but you know something is happening. You conduct that investigation to learn the facts. Those facts are learned in this privileged environment in a privilege room, essentially where you can actually interview people, learn about the information and be able to preserve that privilege to the greatest extent possible so that you're not forced to divulge it in the course of litigation. Because it's something you're learning in order to support the case, to advance the case. It can attach through a different doctrine to attorney work product, if you are producing in support of whatever the effort is, and that's something that's viewed as protected.

What we have seen with the case law, mostly out of the Southern District of New York, but in recent years since we built and advanced this practice, is that it is extended to some other courts. There's a body of law that's developed that essentially demonstrates that lawyers looking to advance the case of a client in aspects that wouldn't traditionally be considered litigation, like PR in support of litigation, the protection would attach. Or it's really an inverse in that we've seen situations and decisions where PR strategists who were compelled to testify or turn over documents, the privilege did not extend to them.

The arguments made in some of these opinions clearly demonstrate to us that lawyers who are looking to advance their case through these issues that directly support the case, that come from the facts, have to do with our Rule 3.6, and that is something that would be protected under privilege.

That's the theory of the practice that we created and that we've seen flourish in other places. Other firms have created these sorts of groups now with slightly different emphases, sometimes more of a policy/government relations leading edge, but they all want to have some kind of communications ability. But we really came at it from



the PR perspective and government and legal perspective all in one, as Adam said, three legs of a stool. That's it in layman's terms.

JUDGE MATTICE: Let's talk about who's involved in this. For instance, one person involved is obviously the client. And it may be a corporate client, in which case it becomes a little bit more complex as to who within the organization actually possesses the privilege. When I was in law school, we were taught that the attorney/client privilege is arguably the most precious commodity in the attorney's toolbox, and no one else in the world can have that privilege. As a matter of fact, the privilege can be destroyed if the confidential information conveyed by the client to the attorney for the purpose of seeking legal advice is divulged to anyone. So for that very reason, you do have the "privilege room" that nobody else can be in. But a third person involved on this team is the communications or PR person. Now, at the beginning of a crisis, the lawyer doesn't know, and arguably, the PR person doesn't know, what the facts are. So there's a need to find the facts, correct?

JOSH GALPER: Yes.

JUDGE MATTICE: Say you have an internal corporate investigation, which is fraught with peril in and of itself. The question of who can be in the room when these facts are found is crucial, right?

JOSH GALPER: Very true. Say the crisis has hit and Adam is hired. The first thing we have to do is figure out who should be in that room. Let's call it the war room, before you get to the privilege room-the war room of the crisis team. Who are the people who need to be there, the people who need to be able to make decisions on a dime, be able to authorize the investigation to make sure that people are

going to talk to you? Say it's a sprawling, global corporation-you need to get those kinds of clearances from way up high. You need people who can make decisions about messaging, politics, if there's going to be a regulator or a politician involved, and of course, speaking to the media. You need to have the right people involved.

JUDGE MATTICE: Lawyers are notorious for telling clients, in the first meeting, that the only way I can help you is for you to tell me everything, and you're covered by the privilege. Am I incorrect in saying that's also what communications and PR people tell their client, whether they're in-house or external, that they've got to know everything too in order to help them?

TOM GRISCOM: Correct.

JOSH GALPER: You pick the team and that's a "tell me everything moment", and anybody can hear about that. People should know who is on that team. When it comes to actually developing the facts, though, or investigating the facts first before you're developing them, you do need to be careful.

JUDGE MATTICE: Among Tom's many jobs was working as communications director for R.J. Reynolds during the tobacco litigation time.

TOM GRISCOM: Yes.

JUDGE MATTICE: When you're telling the CEO of R. J. Reynolds to tell everything he knows, and he starts to mention that one day one of his scientists came to him and said these cigarettes are probably not the greatest thing for your health that ever existed, do you want Tom Griscom, a nonlawyer, sitting there?

JOSH GALPER: Absolutely not. I come from a pretty cautious perspective on this. I want to be able to compartmentalize the information because him saying it doesn't necessarily make it true, but you've just heard it. And how do I know that the person sitting next to him, who I didn't view as being in the privilege room in the first place, is going to have the benefit of later facts that we develop that you may not know? Then you find yourself on the other side of a subpoena. I'm just trying to think ten steps down the road to try and pare down the number of people and make sure that once we have developed the facts, then we need Tom. We can't do this without Tom, because we need to develop the messages out of there and we need to actually communicate.

TOM GRISCOM: Let me add this piece to it. During the Waxman hearing, I'm sitting in this room in Winston-Salem, North Carolina. It's a room full of lawyers, inside and outside, and a few people like me, who were English majors. We know what's getting ready to happen. How do you work through this? What is it you're going to say? If you're going to make the positional statement, you've got to say it and you've got to stand up for it.

Let me give you another quick example. Sam Donaldson did a "20/20" piece on smoking and health. [He said to the companies,] it would be interesting if you would tell us about that. So they answered, we've got this research we found, we want a tobacco scientist on air. Nobody wanted to do it. It's almost like the no comment piece, where they're going to hit you with it, so you don't have any ability, in my mind, to come back after the piece airs if you didn't at least do one of three things. You could do a statement, you could refuse, or we could put somebody out there.

I was sitting in this room at Womble Carlyle. There were nineteen lawyers and me. The CEO wanted to go forward and put the scientist on. The scientist was in there too. We did it. Now, at the end of the day, this piece was pretty hard hitting. But at least there was that one piece of credibility—we were willing to put somebody up there to talk about the research and practice that scientists do. That, to me, is part of how you sit down to work through these kinds of issues.

JOSH GALPER: I want to be clear that investigation and fact finding is what I was responding to with the Judge's question. There's no question that in our line of work, we are the biggest supporters of the communications folks in the company and of the PR consultants outside the company, because of the nightmare scene of a room of twenty lawyers where you're the lone voice debating about the fact that a statement isn't good enough, or a no comment isn't good enough. You've got to put somebody on camera because you're looking for a fifty-one percent win, even if it's a hard hitting piece. So on that, we have to work together. It's the fact finding part where we want to be extra careful about making sure that we're not exposing people to the subpoenas and the kind of testimony that people shouldn't have to face.

TOM GRISCOM: Not only that, but what I want is to be able to sit down and have a conversation with you all sitting there saying, here's what we think that we would like to do.

JOSH GALPER: You need to be there.

TOM GRISCOM: You'll hope the lawyers can steer you whether to go down this road or another one. That, to me, is

how the pieces overlap and fit. I'm not equipped to do what you all do from that standpoint.

JUDGE MATTICE: But when you're trying to find the underlying facts, you just told me, Josh, that the attorney is the only one that holds the privilege. I have even kicked spouses out of meetings with a client, saying, I'm sorry that you love him more than anyone in the world, but he's going to have to tell this to me and me only. What do you think?

ADAM GOLDBERG: Let's be very clear. If you're a litigator, and you're trying to investigate facts and you have a public affairs person in the room before you know anything, when you're interviewing somebody for the first time, you're guilty of malpractice. If one of the parties has a PR firm, one of the things you should definitely look for in discovery is communication between the attorney and the client and that public relations person. Because the odds are, there's stuff going back and forth and it's incredibly unlikely that it will be fine if you capture without the attorney work product or the attorney/client privilege.

Here's a very quick primer in some basic attorney/client privilege. It's not true that it's solely confined between an attorney and their client. A famous case named *Kovel*<sup>127</sup> brought up that if an attorney retains an accountant to help the attorney render legal advice, that accountant is captured within the attorney/client privilege. The wording was that if the attorney needs another professional to help translate facts in order to help them render the facts, that is captured in the privilege. There is one case that we know of where it was held that a public affairs person is actually captured. Martha Stewart's

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<sup>127</sup> See generally *United States v. Kovel*, 296 F. 2d 918 (2d. Cir. 1961) (the Second Circuit Court of Appeals extended the attorney-client privilege to communications between a client and someone an attorney retains to provide accounting-related services).

attorney retained a public affairs firm and they did it because they wanted to relieve public pressure that they believed was on prosecutors to indict their client. And a judge held that, yes, her communications were captured. That was a legitimate purpose-the attorneys were actually using that PR firm to help render legal advice for their client about whether she should speak or not speak. And in a limited way, both work product and the attorney/client privilege were found to hold in that case. [But] very shortly after, another judge in the same Southern District cancelled out the validity of that case, and the value.

ADAM GOLDBERG: Martha was not actually indicted for having done insider trading, just for having lied about insider trading. But that's another story. So from a PR perspective, it can be brought in under circumstances. And this is why you often see the law firms being the ones to engage PR firms. From an initial investigation standpoint, if you're doing initial factual investigation, before you know the facts and you have a PR person, you're just sacrificing the privilege. And your PR advisor, in-house or out-of-house, is going to be disposed and you have to be prepared for that.

JUDGE MATTICE: How would you handle that, Tom Griscom? Say I was an outside lawyer for your company and I went to the CEO and said, okay, we need to find all the facts, and I can only help you if you tell me everything. You're the in-house communications guy for the company, Tom. And I look the CEO in the eye and say, Mr. Griscom is going to have to step out of the room because it can only be you and me. I presume that you might protest. And I say, Tom, don't worry about it, I'm going to tell you everything. And if the CEO acceded to my request and you did get kicked out, would you think to yourself, he's in there just trying to negotiate a higher fee for himself?

TOM GRISCOM: No. Because I work there, so I get to come behind you, so it doesn't really matter. I understand what you all have laid out, but here's what I've got to do if I'm there in a communication role. I'm being asked for the expertise that I've got. Because you've got the same opportunity and you all are going out and if it's a case that's to be tried in court, you know the other side's going to play it hard. So you've got to find out what is it we can say, wherever the facts take us. And you've got to decide whether you can go ahead and say, here's the strategy I'm asking you as the communicator, now will it hold up or not? And if it won't, I need to know, no, don't go out and start this because you get two-thirds down this path and guess what, the bottom's going to fall out. I need to know if the bottom's going to fall out. Because I'm being asked to help lay out a way to influence public opinion. Sometimes you work with the media and others when you're doing this, so I have to know the same thing.

And I know sometimes, in the White House, being a communications director is one thing. We had a little more insight into what's going on. The press secretary, I felt sorry for at times because there were reasons you didn't want them to know everything. And the biggest problems I ever saw in those roles, were the press secretary who'd try to demonstrate they knew more than they really did, and they would stumble. And if you know that there's a hole in what you've laid out, then you've got to come back and rework it. But the worst thing to do is say, let me go out and start down this path, and all of sudden you find out, oh, I just should have warned you not to go this way.

JUDGE MATTICE: In a court of law the coin of the realm is credibility. The lawyer has to have credibility with the judge and the jury. In the court of public opinion, credibility is also the coin of the realm, but it usually falls in the bailiwick of the client, and in the case of a

corporation, top management, in conjunction with its communication department. We've got players with different roles, different areas of expertise. The article that's in the materials seems to suggest that lawyers because of their possession of the privilege are in the best position to be the public spokesperson. To me, it seems like an almost impossible task. Because the lawyer's mind is running a thousand miles an hour, they're trying to think ten steps ahead. And then you're going to ask them, after they've done that, to be pushed out the door onto the steps of the courthouse with the client, put them in front of a bank of microphones and cameras and then expect them to deliver a cogent message with traps spread all around you. That's a good lawyer. I don't think I've met that lawyer that can pull that off yet. We'll pay them a thousand bucks an hour if they can do that.

JOSH GALPER: Yes. Because I don't think some are getting that. You don't want to put somebody out on the front steps who can't do it. But more broadly than that, it's about having the sensibility that the case is not won or lost just in the courtroom. There are so many other forces exercising themselves upon what's happening inside the courtroom. Even from the moment that the crime has been committed or the allegation is made against somebody, you need to do things to find the facts and lay out the facts to start the public defense. That's where the public affairs work meets the legal work, because that's where the defense starts.

ADAM GOLDBERG: I think a public spokesperson is not quite what we're trying to get at in the article. There's a big difference between speaking to a reporter and serving as the on-the-record spokesperson. It's extremely rare where we would allocate a lawyer to be the on-the-record spokesperson for the exact reason I said earlier today- if



lawyers are speaking for a client, people are going to think the client did something wrong, otherwise why would they need a lawyer speaking? That's on the record, but talking to a reporter for five hours a day, you don't have to be the on-the-record spokesperson to talk to reporters. Meet that reporter, explain to the reporter, you're in the midst of a crisis situation.

JUDGE MATTICE: You do it off the record?

ADAM GOLDBERG: Or on background. And then give an on-the-record comment from your CEO, your communications or your outside PR.

JUDGE MATTICE: You've got to have a high level of trust for the reporter and vice versa to do that, right? And to develop that level of trust, don't you have to deal with that reporter over a long period of time?

ADAM GOLDBERG: Yes. I've been burned only once from a reporter. That does not mean that I'm not extremely careful what I say so if they put it on the record it's not going to be doomsday, because everything I'm saying I want in the article. I wouldn't want it attributed to me except for the fact that from an appearance sake, I'd rather it come from my client's mouth so it doesn't look like my client's guilty. But if they burn me, they're dead to me. One, I'll go to their editor, and if this is an ongoing crisis or an ongoing story, that's the last thing they want. Because the next story, I'm going to go to their competitor and the story after that I'm going to a competitor and I'm going to make sure that they and their entire outlet are punished until they know they'll never burn me again.

You have to be much more careful. But there's a difference between that and then trusting somebody to go off the record. You want to build a relationship before you

can go fully off the record. Otherwise, even when you're talking off the record, you have to assume that what you're going to say could get out.

**TOM GRISCOM:** On that point, I think there are times where a lawyer ought to be that front face speaking, but you've got to change very quickly-if you're standing there in that courtroom going back and forth, you're working like a lawyer, thinking against that other side, and that is not how the public gathers information. They don't think and use the same kind of terms that you all use and some of the courtesies and things that you use in a courtroom. So you've got to sit down and really change it real quick and say, here's a quick set of talking points. You've got to run a mic real quick and go.

I can remember the picture of Ed Meese when he was in his situation running away from the camera and all you got was the back of his head. That right there sealed the whole deal. What you are trying to avoid is that image. It's taking that pause real quick, because you want to be able to assess what happened in the case, so when you go out, you're adding value to what's being said. But I do think there's times when a lawyer does serve the role to be that spokesperson for the company. Particularly if it's a really detailed legal matter, because you want somebody there that you feel knows what they're talking about. There are other times when I would hear them say, I would love to keep you all totally out of that. Because I think it changes the perception of how the public thinks of guilt or innocence.

**JUDGE MATTICE:** Tom, let me pretend that I've been the lawyer who's been in the courtroom all day and my brain's obviously fried. This is one of the times that we're going to have the lawyer go out on the courthouse steps. And I decide on the message that I'm going to send on behalf of

my client. Based on the evidence of the record that the government has presented to this point in the case, and drawing all reasonable inferences that could be drawn from that evidence in favor of the government, no reasonable jury could find my client guilty beyond a reasonable doubt at this point in time. Sounds like a perfect message, right?

TOM GRISCOM: No, I think you want to come out and say something straightforward. We put the facts out there and the facts take us where we think this is going to go. Our client hasn't done anything wrong. That's what we said, period. And that was my point. The other thing sounds so legalistic.

JUDGE MATTICE: I hope you don't think I was serious.

TOM GRISCOM: No, sir, I don't.

JUDGE MATTICE: No sane person would view that as denial of guilt. That's the way lawyers talk though.

TOM GRISCOM: I understand.

ADAM GOLDBERG: But there are a number of attorneys who I've heard say that exact statement and fought with over that. In fact, the first two criminal lawyers I've ever heard who were willing to go out in public and say my client is innocent are the two who are sitting here today. Can you say he's innocent? No, I'm not willing to say that. Usually it's because they think their client's guilty. And there's a huge difference between criminal cases and civil cases. Because if you're not willing to go all out for your client on the courthouse steps in a civil matter, then you shouldn't be out on courthouse steps.

**JUDGE MATTICE:** How many Americans really understand that in our system of criminal justice there is no such thing as innocence? It's either guilty or not guilty. It deals with the burden of proof the government has to meet. So no one's ever innocent. A lay person wants to hear that someone's innocent. But we as lawyers know that no one's ever innocent. They're either guilty or not guilty.

**ADAM GOLDBERG:** Well, if you're going to go buy a car from Toyota or another manufacturer, you want to know they were innocent of having cars that accelerate on their own. As lawyers and advocates, your advocacy extends much beyond the courtroom.

**JUDGE MATTICE:** I still don't quite get it about how the privilege can be divided up and who can know what when. And Tom made a valid point. An investigation followed by litigation is a long-term proposition. It's a little bit different than anything else we see in the public realm, including the political campaigns. It's going to go on for a long time. And therefore, they're going to be various players involved at various points in time that the proper public spokesperson may differ. Sometimes it can only be the CEO, sometimes it needs to be the PR person. Sometimes it may need to be the lawyer, depending on what you're talking about. Adam or Josh, talk about how those roles are established, how they may have evolved over time and how decisions are made as to who is going to be the public face of this particular statement.

**JOSH GALPER:** I think it starts with your assessment of the facts and how the facts have been developed into messages. Once you're at that point to figure out, what are the stories you want to have out there? What's the chess board look like? Where do you want to get? What's the goal? When you're at that point of what those stories are,

you're going to understand who should carry that message. It may take additional interviewing to understand who's associated with what issue. I think it's pretty obvious that when it comes to a CEO, you use that person sparingly, depending on what their own ambition is. Sometimes they want to be out there on the record all the time defending their company, because they are the CEO. And sometimes you have to tell them not to get out there.

JUDGE MATTICE: Let me use an example. For a little while in the BP oil spill, the CEO of BP was the only person who was out there. Some people would argue he got over exposed really quickly, and it ultimately destroyed his credibility.

TOM GRISCOM: The CEO is the ultimate voice of that company, period. He is the person at the top. When he or she speaks, there's no place else to go. So I agree that you've got to be really careful when you put them up there because you've put your whole company up there. I hate to say this, but there are people who will fall on the swords as you come on down.

JUDGE MATTICE: There are people who are more expendable than the CEO if it comes to that.

TOM GRISCOM: Yes. But there are also people who probably have more knowledge of what they're talking about than the CEO does. You need that for credibility, in my mind. If I've got a case going on here and it involves a widget, I'd like to have the person who knows about the widget and have them out there talking about it, because they've got the pedigree that brings credibility because of who they are and what they've done, and they know how this works.

ADAM GOLDBERG: I think it's important to make one point. When we're talking about investigating these documents, and when we bring in the PR person, once we see a document that's a terribly hot document and you know it's not privileged, it's going to fall within document request, it's going to be handed over in discovery, there's no reason not to hand it over as quickly as possible and get the input. From a crisis management perspective, the crisis manager's job is to make the crisis go away as quickly as possible. Litigation may last five or ten years. What you don't want is for information to drip down on the plaintiff's attorney's time line for ten years. You want to get that document and hand over all the bad stuff as quickly as possible that might come out, if you can't settle it without that information coming out.

JUDGE MATTICE: In the course of a year-long litigation, there may be several crisis points. The best case scenario for the client is the investigation is revealed and never comes back again. However, these things tend to ebb and flow, depending on the facts of the case, who discovers what, and when they discover it.

JOSH GALPER: Or the moment of the case.

JUDGE MATTICE: Who they have to disclose it to, right?

ADAM GOLDBERG: Right. Another distinction to make is, when you're dealing with a crisis, there are really two parts of any crisis story. There's what led up to it, and what it was and what caused it. And that's going to be very sensitive facts. And then there's the issue of what the company is doing now. For a company, we want to make sure the company assumes the responsible corporate actor. In that second half, you're arm in arm with the press person. Because you're trying to figure out what steps the company

can take, from a multiple stakeholder perspective, to reassure those stakeholders. And that's much less sensitive to privilege and litigation.

TOM GRISCOM: Let me throw the curve ball in here, because if you're outside trying to figure out how do I get shed of this and move on, I think it's fair to say that politically, the best thing to do is to acknowledge a mistake was made. The public many times is forgiving. When you all go in a litigation strategy, that's actually the worst thing to do because I'm out here acknowledging that, yeah, we blew it, but we want to move on. So I'm going to take it outside of your legal case you're dealing with, but what I would like to say publicly is acknowledge, we know a mistake happened. We know where the lines of responsibility are. We've looked at it, it's time to move on, and then see if you can put it behind you that way.

JOSH GALPER: I totally agree.

JUDGE MATTICE: You do?

JOSH GALPER: Not in the criminal context necessarily.  
JOSH GALPER: That's a special context, as Adam was alluding to. However, most times, and this is part of the narrative that Adam was drawing out about getting past the problem, you have to give up something. You have to do the apology at some point. But it's not some kind of blanket apology. It's based on the facts that have come to light. They're going to be in the case anyway, and they're public. And if you own them, you own them. I think that the most courageous thing we've seen clients do is to muster the strength to do that. And there are often lawyers in the room saying please don't do that, you're going to kill our case. I really can't think of a time when that has been the case, where we've hit the ground after figuring out what

happened. But giving up a little bit of that, showing a little bit of humility, based on the facts and trying to get past this to rehabilitate their credibility, has not been a good decision.

JUDGE MATTICE: To rehabilitate whose credibility?

JOSH GALPER: The person who's accused of wrongdoing. Once the crisis hits and his credibility's attacked because something bad has happened, you need to get your credibility back. It can't be done sometimes. But if somebody wants to try to get past this moment by getting the bad facts out, sometimes an apology is really helpful.

JUDGE MATTICE: Let's use the Toyota pedal sticking case. They say that nothing is wrong with our pedals, nobody's ever suffered because our pedals are sticking. But we think we'll voluntarily recall. In a court of law that probably would not be admissible as a subsequent remedial measure. But they did it. Did they have to make a conscious decision about what could be inadmissible evidence in litigation and what was best for their public image? If you're in the court of public opinion, if you come across as if you're just here to do the right thing, it seems to me you shoot yourself in the foot potentially when the trial comes.

ADAM GOLDBERG: What you're really talking about is a business decision. Whether Toyota made that recall or not, no doubt they did some testing to try to figure out how the public is going to respond if they do this versus not. Toyota was much more concerned about the next thirty years of business rather than whatever liability they might have to a handful that might be able to show there was something wrong with their car-plus their litigation costs for defending the thousand other people who just want to file.



For those securities litigators out there, there's a direct connection between your public relations and your legal liability under the Private Securities Litigation Reform Act. In 1994 they added a provision that says within thirty days of an event that causes the stock to go down, if you can bring the stock back up to a certain percentage, or a certain amount, your liability in any private securities lawsuit is going to be limited to the delta between what you brought it up to within-maybe it's ninety days-and where it was on the date of sale. So people are encouraged to advise people to hold onto the stock and not dump it. In order for companies to bring that stock back up, they have to communicate the facts.

Long before the mortgage crisis, we dealt with a home lender that was under short attack and some misinformation was put out. The Washington Journal did a front page story, and sent their stock dipping thirty percent. It was based on misinformation put out by short sellers. We had ninety days to get that stock back up to limit their liability in any securities lawsuit that would otherwise get dismissed on a motion. You had to know the facts and you had to use a whole variety of communication strategies through multiple sets of stakeholders to get that stock price back up.

**JOSH GALPER:** To go back to the Toyota example, do you remember what the biggest controversy probably surrounding all of that was? It was the reluctance of the leader of the company to acknowledge that there was an issue. That human aspect that people want to see people do the right thing is actually sometimes the right thing to do-to acknowledge if there's a problem, to say you're sorry, to say that you know that there are people who have been injured. I would argue that doesn't kill the legal case by expressing sympathy with people who have been hurt by your product.

You need to be careful about how you do it, but expressing sympathy isn't necessarily expressing guilt.

JUDGE MATTICE: Or liability.

JOSH GALPER: But the leader of the company wouldn't call anybody back, would not show any kind of human face. That hurt the company in a big way. And I would be at the side of that client saying, we really need a public statement from him.

ADAM GOLDBERG: I want to challenge you on what you're saying. If your client killed somebody, then I want to challenge your premise that you shouldn't acknowledge that your product has killed somebody. Because you're going to want to take remedial measures. Take Tylenol-they didn't do anything wrong. Somebody was poisoning their product. They did a massive product recall and then it was contrasted in recent years how Johnson and Johnson handled issues at some of their factories and hasn't done a responsible thing and hasn't acknowledged it. Johnson and Johnson for decades was the number one response in surveys of who was the most trusted company, and they're no longer on that list because of the last few years of trouble.

Can I cite some psychological studies? In the psychological academic literature, it has a lot to do with communications. There have been a lot of academic studies that show that if you don't comment, people perceive that as you are guilty. And then they've done studies to see how people perceive "no comment" to "I'm sorry, I did things wrong" versus denial. If you're in a crisis and it's been a question of trust and you say you're sorry and it's an issue of dishonesty, then that's worse than saying no comment. But if it's an issue of competence and you say you're sorry, that's much better, and then you acknowledge that you've

done something wrong. It's much better from a branding perspective-I'm not talking about from a liability perspective-than "no comment."

JUDGE MATTICE: How often does the client get put in the position of either losing a case or winning in the court of public opinion or vice versa? If you are ultimately going to be found guilty by a jury, for instance, there's often no way to win in the court of public opinion. Martha Stewart seems to have pulled it off.

JOSH GALPER: Look at it this way, in real time. If it's a public company that you're representing and the stock price is tanking, and yet you are winning the day in court, but the message is coming out of there that you're a terrible company, and the journalists don't care about your legal case, the merits of it and how it's going for you, you're going to be suffering. Your shareholders are suffering. And there are other avenues to go down besides just the court case to try and move past the problem. Try to show that you're a good company even though you know you're going to win in court.

Ray Donovan is a great example. Where is it that you go to get your reputation back? Well, for a company where they've got investors to make happy and a work force to keep enthused about the company and show that they're a trustworthy brand to be working for, there are other things I think you need to do than just think about the courtroom image.

TOM GRISCOM: You basically have what we'll call traditional media and social media. What would have happened if the Ray Donovan thing happened today? Because now everybody can be a publisher. And they can put something out there, and what we've lost are the gatekeepers that can separate truth and fiction. So a Ray

Donovan today might be able to go out on his own, hire somebody and say, I'm going to create a Facebook page. I'm going to go back and just fire this stuff out. Because the tools to allow you to do that now are so different than the time when this was happening.

JUDGE MATTICE: I want to address one more topic, and then I want to see if the folks who have been kind enough to stick around have topics they would like us to address or want to ask questions. We've talked about how lawyers gather facts, but we've talked about how, eventually in the court of public opinion, you need to get those facts into a message. We've already talked a little bit about how lawyers aren't necessarily trained to do that. Tom, you've involved in that sort of thing. Can you address the difference in fact gathering and messaging?

TOM GRISCOM: I want somebody to say here's what we've got. I've had to deal with the lawyers as they're working through their case, and say, all right, let's talk about where we are, what the overall message is, that landing point we want to keep going back to. And to me, the talkers are the ones you have to keep your eye on, because that's what's shifting. We just want to know what is going to work and what's not, what the key words are to use. It's the difference between talking about nuclear power and nuclear energy. There's a very different connotation when you use the energy word or the power word. But that, to me, is when you sit down and you take in all of the facts and you boil them down to here are the points that we're trying to push out to push our side. They've got to be factual. They've got to be truthful when you lay them out there. But you always want to go back to that key starting phrase.

JUDGE MATTICE: It's a process of boiling down into a message that can be stated in very few words, correct?

TOM GRISCOM: Thirty seconds or less.

JUDGE MATTICE: Let me go ahead and ask what people would like to hear us talk about.

UNKNOWN SPEAKER: I'd like to know if you all have ever been involved in a situation where you had some negative news that needed to come out, but you kind of timed it when there was some other news going on in the nation

TOM GRISCOM: If I've got something, I might decide to put it out right before Christmas. There are time elements too that you look at when you know people's attention may be someplace else. But you do it knowing you're going to come back to it. It's going to be out there, so it's not like it's forgotten. But it gives you a chance to roll this out, and then you can pick it back up and put another message on top of that.

ADAM GOLDBERG: Christmas Eve, then July 3rd, the night before Easter, and Friday nights. Any major holiday, the eve of, and then Friday evenings are historically the best.

TOM GRISCOM: Having been in newspapers, it's tough to watch what's going on right now as you see circulations decline. But if I could capture that Sunday edition, I worked hard to get it in there. I didn't want Monday. This is why all the watch and talk shows are great because they set the agenda for the start of the week by doing Sunday talk shows, because nobody else is out there on a Sunday

doing this. And Mondays are pretty slow news days. So there's also timing the other way.

UNKNOWN SPEAKER: How useful are, if at all, and how frequently do you use focus groups?

JOSH GALPER: They're typically very helpful and used. Focus groups are a form of survey research where you get maybe ten to twenty people into a room, and you have a moderator who is speaking with the group for maybe an hour or so. Often these folks are paid. And the research firm is trying to test messages with the group of people assembled to find out what is going to work. The moderator goes into the room after having spoken with Tom and folks like ourselves to figure out what we think might work. We would be behind a pane of glass where you could not see that we were sitting there. And we would watch how people interact with each other based on the messages with the moderator as well, to find out what works and what does not work. You get very surprised with those sorts of sessions. You find out that people don't really take to a certain message that you thought, ah, this is going to be a winner with this particular demographic the folks in the room represent. And it forces you to pivot in another direction and try something else.

There are certain jury focus groups who have jury consultants who do this and that's a real focused type of focus group. But then there's the mass communication kind where there's certain media or it's paid media, especially if you're going to invest a lot of money in some paid media campaign on television, you want to make sure that you get the message right, and that's what that is useful for.

JUDGE MATTICE: Tom, let me ask you about a specific example that you have given me permission to ask you about. Just a little bit over a year ago, you were advising

Governor Haslam about when to drop the news that he was to some extent going to cut back on the financial disclosure rules that applied to state employees, including himself, that had been developed under the previous administration. Most Tennesseans know or suspect that Governor Haslam has a little bit more disposable income than most people. Therefore, from what I recall from the press coverage, that was viewed pretty negatively. And the press did seem to pick up on it, but there were questions raised as to the timing of that disclosure of that revision of the governor's policy, right?

TOM GRISCOM: I was still the editor and publisher of the Times Free Press during the election, at least up to around the primary time. So I was watching this from that point of view. Governor Haslam had made a point early on and some of us will recall that both Zach Wamp and Ron Ramsey went after him because the Haslam family had all this money and he won't tell us where it's coming from. He made a clear decision of what he was going to disclose, and it was different than what Governor Bredesen had done. So I'm helping in the transition and then in the first hundred days of the administration, and as he's getting ready to be sworn into office, there's three or four executive orders that the Governor really needs to sign. We're trying to lay out the strategy of how to do this. One of them was going to be that he was going to go back to what disclosure had been prior to Phil Bredesen. But there was another one in there about nondiscrimination. There was another one about open government. And I threw that one in because I thought it was important. He was talking about how he was going to have an open government, dah, dah, dah. But we tucked this one in as well, so we could go ahead and say it.

JUDGE MATTICE: In the hopes that nobody would notice that?

TOM GRISCOM: No. We knew they were going to notice it because he gave his speech on a Saturday and the statement said, the first action that he took was signing these executive orders that Saturday after he took the oath. And they were out there and there was FOIA filed by the AP trying to look at all the documents. Having worked for the tobacco company, I'm pretty smart about what you don't put in writing. But they wanted to see what advice we had given. We tucked it in because, yes, you need to get it done. But Bill Haslam made it very clear during his campaign what he was going to do. The pressure was, now he's elected, will he change his mind? And the answer was, he wasn't. And I thought that message for a governor starting out was important enough for people to realize what he said in the campaign is what he believed. Rather than to sit here and let this thing string out for ten days or so-because if we had let it string out, then every day the pressure is going to mount more and more on the Governor, and the worst thing is you can have is this notion that this is what they said they were for, but now that they've won, they've sort of gone over here. So that's how that was put together, and we tucked it in there.

JUDGE MATTICE: Let me make one comment about timing of disclosing. Sometimes you can't control what's going to work in terms of timing, because you can't control the news cycle. You don't know whether it's going to be a slow or a fast news week. I'll give you an example from the campaign finance investigation I worked with Senator Thompson. I remember the day we were going to have the nationally televised hearings of the Buddhist nuns. They had on long saffron robes, females with shaved heads testifying before Congress under immunity. The Vice President was involved and we had been flacking this to the press for weeks. The weekend before the hearings began,



Princess Di was killed in the car wreck. We still got a lot of press, but Princess Di was the lead story.

ADAM GOLDBERG: Let me make one comment about that. From a White House perspective, we tried our best never to let them control the news cycle. We would always put out the worst stories before they had a chance to do so. So by the time that Sandy's hearings came around, almost everything that was in that hearing, we had already put out publicly. They had some amazing witnesses that said some horrifically bad things-that we couldn't control. But from a documentary perspective, we tried to control the timing as much as possible.

UNKNOWN SPEAKER: What do you think about Twitter and when your CEOs post regular tweets?

JOSH GALPER: Social media is a reality. Anybody who's in the communications profession or our line of work has to deal with it. As far as who is tweeting, companies have pretty sophisticated programs for having folks tweet, and they usually have social media people as part of the communications team or the marketing team managing that function, putting out tweets for a CEO. Some CEOs tweet on their own, and they want to do that. There's certain coaching that goes with it, especially if you're a public company. There is information you cannot put out into the market that isn't yet disclosed to the regulator, the SEC. So CEOs of public companies have to be very careful. There must be CEOs of public companies who are tweeting, but I can't name one off the top of my head.

JUDGE MATTICE: You mean personally as opposed to their staff?

**JOSH GALPER:** Personally, yes. There are people who do this. There are politicians who do it on their own because they love the medium. It's very immediate. And I'll tell you, that is how reporters are getting their news feed these days. That may be how you're getting your news feed. If you Tivo the Super Bowl and you're checking your Twitter feed before you watch the Super Bowl, that's a great way to ruin the game.[It's] the same with a political debate. I find this when I have these conversations with journalists who are living and dying by Twitter. That is how they're getting their news. You see the life cycle of an event pop up and go to a daily cycle through Twitter.

**TOM GRISCOM:** But as a lawyer, you created the document, so how do you sit there and tell that CEO, you put this out there, now this is reprisal. One of the concerns I have is that a lot of them pass it off to a staff person. I'm not sure that staff person understands what they really put out there at times. Because there are a lot of [people] with the notion that every time the pressure comes in to ask whomever, that it's that CEO or that governor [who] is the one who's answering it, when many times it's a PR person. So I would assume, from a legal standpoint, that that is opening up a whole new area that you've got to be concerned about if you're getting ready to go into litigation.

**ADAM GOLDBERG:** The sacred rule from our perspective is don't misrepresent who you are, whether it's a blog post comment or Twitter. You might recall a few years ago, the CEO of Whole Foods is a frequent tweeter and blogger. He was blogging and he was doing it anonymously about his company and saying things about his company. And he got into a host of legal inspection.

**UNKNOWN SPEAKER:** I was wondering, what advice do you have for young lawyers who represent high profile clients or corporations, especially in a high crisis situation?

ADAM GOLDBERG: Do you mean in terms of developing the skills and how to deal with the press?

UNKNOWN SPEAKER: Yes.

ADAM GOLDBERG: You don't want to wait till you have your high profile matter. I think the first thing is to get to know reporters. If you have a client that's a company and they have beat reporters that cover their company, you'd like to get to know those beat reporters before there's a crisis about that company and develop trust. Sit down and have coffee with them. Do all this within the auspices of the in-house communication people of the company, if there are any. But generally, develop relations with reporters so that they get to know you and build up trust, which is the greatest commodity you could have in a reporter. Then you could understand exactly what they're interested in, how their mind works and what they will be interested in later.

TOM GRISCOM: I got burnt one time too when I was working for Senator Baker. I bring that up because if I'm a journalist and you're trying to work with me to give me information, I'm maybe going to have time to check his sources. Otherwise, I hope that they would. But I'm going to take you as a credible source because you've built a relationship with me. And the last thing you want to do is to share anything and have it come back and blow up on you, because you'll never get it back. Your own credibility is more important. That can be a very important lesson. If you know it's not right, don't take that media person down that road with you, because that's their career. And they're looking to you as a source to help them develop a story, which is part of what they do for a living.

ADAM GOLDBERG: For those who are involved in politics, it may mean a little bit more. There's never credible deniability for your clients. Never do anything that you don't authorize first with your clients. I know folks who've done that and the situation always ends up horrendously bad. They always throw the lawyer overboard, and appropriately so.

UNKNOWN SPEAKER: Given the skepticism and cynicism of the American public today as to publicly traded companies and the amount of profitability that they are seeing, when we talk about these timed news dumps, isn't there some ethical responsibility on the part of the attorney who represents that corporation to make certain that the news dumps aren't done solely to improve profitability for the stockholders?

JUDGE MATTICE: Well, there are security laws, rules regarding timing of material information.

JOSH GALPER: But you can file with the regulator when you need to file with the regulator. The rule is two or three days, or the sixty day quiet period for an IPO. But I would say that the lawyer's ethical duty is to the client and to help the client however they can, within the bounds of their own ethical responsibilities to the Court. But I don't think that's one ethical canon that they would have to follow.

UNKNOWN SPEAKER: I was wondering about an ongoing fraud.

JOSH GALPER: Fraud is different. They should not be helping to perpetuate a fraud.

JUDGE MATTICE: Ma'am, I'm not sure that we really got to your question or issue. Because, what I heard you

saying, there are rules governing how corporations can disclose information. And they can never disclose misleading or fraudulent information, but it would seem to me that if the timing of a disclosure is favorable to the company's stock prices, as long as they're doing it within the SEC rules, then they're going to do it to their best advantage. If you have a quarrel with that, it would seem to me the quarrel would be with Congress or the SEC, not with the lawyer.

UNKNOWN SPEAKER: Hypothetically speaking, let's say we've got a corporation who knows they are going to have a very big lawsuit coming against them. Now, we're going to do our news dump, but we're only going to do so after stock dividends are paid. Then we'll start carefully handing out all of the little negative things that would follow once litigation actually does start. But most corporations, I think, have a pretty good idea that they're about to get sued well before it's filed.

ADAM GOLDBERG: You face this in the securities context all the time. And companies and securities lawyers take different approaches to this. Let's say the SEC opens up an informal inquiry into your company. Is that material information to an investor? That's really what it gets it down to. Would the material affect your decision whether to invest in the company? Some companies and some lawyers take the approach that an informal inquiry is not material, but a formal inquiry would be. So there's great disagreement on that. But ultimately, when you sit down as a lawyer with the accountants and everybody and you think it's going to be material to an investor, then that's something that you should disclose as soon as possible. If it's not material, then that's something that you have more leeway with, for a public company.

UNKNOWN SPEAKER: So there is no real conflict between our Rules of Evidence and the SEC rules when it comes to these types of information dumps?

JUDGE MATTICE: I would echo what's been said. The ethical rules are basically loyalty to the client. The lawyer has an ethical duty to act in his or her client's best interest as long as it is legal and ethical. I would take the position as a lawyer that that's a safe harbor for me. If you're telling me the SEC rules are not adequate, I would think there's a lot of Americans that would agree with you about that.

ADAM GOLDBERG: Where this has come into play a lot is when executives, before they disclose something, all of a sudden they have a stock option exercise. And then you have an allegation of insider trading and things like that. So when these issues come up, it's usually one of those kinds of situations where, did you disclose something, was it true or not, or did some insider act on that information before they disclosed it.

UNKNOWN SPEAKER: What goes into the decision making process of if you have a positive story that you want brought out, whether or not you go to television, newspaper, whether or not you hold a press conference or you go to an individual reporter that you might have a rapport with and let them have the exclusive?

TOM GRISCOM: I would add another one to your list today. And that is, do I take it and go viral with it? Let me give you an example. We're sitting down and looking at the things for Governor Haslam. And we talked about how anybody has an opportunity now to say, I can do the basic traditional way that you put out releases and information, or I can set it up on my own Facebook page or however else I want to push it out and do it that way as well. I think you

have to look at what the information is. There are times where if I've got a reporter that I really want to work with and cultivate, I'll give it to them exclusively. When you do that, keep in mind, you've got a whole range of people behind you ticked off. Because there's going to come a time when you want to come back and work with them. I would do a news conference if it's big enough and you want to draw more attention to it. I would go to an individual, and if I'm trying to get the story started, build it where I think I've got a chance to build on it. So I'm going to go and give it to you as an exclusive. But then, once I start it, I want to remember, there's another audience people tend to forget about. The best audience you have for any story, if you're a company, is the people that work for you. I have found many times that people forget that. Because that's the person you're going to see in church, at shopping some place, or on a soccer field, or whatever. And they're going to say, hey, I saw this story, what do you know about it? The worst thing is to have an employee say, I don't know, they didn't tell me.

And believe it or not, use talking points, three or four talking points that the company pushed out there in the employee. That is a good reinforcement to keep building the message. You've got to make sure there's multiple layers of this as you push it out. Because you're really trying to have this type of coverage, even though you started with a single individual. Does that help?

UNKNOWN SPEAKER: Yes.

UNKNOWN SPEAKER: Mr. Griscom, it seems that Governor Haslam responds to the media a lot himself more than relying on his press secretary or communications people. Why?

**TOM GRISCOM:** I think it's always important, whether it is a politician or a COA, to find where their comfort zone is. For Governor Haslam, he's what I call comfortable in his own skin. He wants people to see him for what he is, that he doesn't have to have a whole lot of handlers of people around him. One of the things I found interesting within the University of Tennessee is that we used to have presidents that had this entourage with them. And I think it's refreshing now that the president can show up by himself, or maybe with one person. You have to make sure that when you're out there messaging that it really does fit with the client that you're working for. The last thing you want to do is take them out of their natural environment and make them where they come across as stiff. Part of their credibility is that when you see and hear them, you feel like that's really coming from their heart. I know from Governor Haslam, that is how he is. I did not realize until I came in that he went a whole four years without a press person. In his last term as mayor of Knoxville, he didn't have anybody.

**JUDGE MATTICE:** There is a book that I read a long time ago by Roger Ailes, who's the head of Fox News, called You Are the Message.<sup>128</sup> It talks about the concept of messaging and message development. It makes the point that everybody thinks of message as being some sort of verbal or visual manifestation that's developed. But the point he makes is everything any individual does in their life, the message that they're sending, whether they intended or not, is the entire persona or aura that they have around them. It's like a reputation you've built over a long period of time and it can be changed but you need to be conscious of what sort of message you're sending.

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<sup>128</sup> ROGER AILES WITH JON KRAUSHAR, *YOU ARE THE MESSAGE* (1988).





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