

**ADVANCED STRATEGIES FOR HANDLING AND MANAGING
HIGH PROFILE CASES**

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SCOPE NOTE:

There are monsters lurking in the woods. And all the walls have ears. High profile cases bring the monsters out in droves. As the monsters emerge from their woodland haunts, the walls in all the buildings in the village sprout ears, which rotate strangely and intercept lawyer murmurings.

Edward Bennett Williams, the great Washington trial lawyer, once said: "Nothing is frequently a very good thing to do and always a brilliant thing to say." This is an excellent way to begin a discussion of how to deal with the most important element of a high profile case, the media. The presence of intense media attention in a case substantially elevates the difficulty level. Media attention distracts and alarms the client who cannot help but read the newspaper and watch television. When one is at the middle of a fire storm of media coverage it is easy to assume that every person in a community is as focused on the facts as are the actual players. Of course, this is not true. People have their own problems and issues and are not nearly as concerned or focused as are we and our clients. I recall one instance in which the Raleigh News & Observer was hounding me daily about some position I had taken. There were numerous editorials. I was deeply embarrassed and felt that each of my neighbors was as intensely interested in every sentence in the news reports as was I. On my way in to work one morning when I was feeling so vulnerable and visible, a friend hailed me from across the street and said: "I read about you in the paper this morning. Can't remember what it was, but keep up the good work."

Even in the most intensely covered cases the public is not as keenly focused on the facts as are the key players. However, this is a difficult fact to convey to a client who feels he is being bludgeoned to death each day in the media and who wants to start talking before it is too late. Usually this same client also wants his lawyer to start talking. It is the purpose of this paper to advance the idea that in high profile cases one can't "just start talking." There are monsters in the woods and these monsters are waiting to pounce on an unwary trial lawyer or litigant.

Two stories illustrate this point. In the mid 1990's there was a dramatic case in Wake County. A woman died after a fall from a high bridge. Her husband was with her at the time. Many theories emerged as to how she could have fallen from the bridge and why it took her husband so long to call 911. His lawyer was a fine and seasoned lawyer. He felt it would be advantageous to his client to get immediate media coverage. He quoted his client as saying that as he descended to the canyon below he slipped and struck his head and was unconscious. This quote was widely published. As the facts emerged during the ensuing weeks this theory made less and less sense. It developed into an enormous problem for the client.

The lawyer was forced to withdraw and turn the case over to other counsel. Worst of all,

he was subpoenaed to testify on behalf of the state. Having sought to help his client in the media, he suffered the humiliation of having to be a witness against his client.

The second story is equally timely. In a high profile case when there is great media interest there are not only monsters in the woods, the very walls have ears. Roger Smith and I were representing a prominent public official. This official was being urged to resign and step down. The public official's administrative assistant was also being heavily investigated. As the intensity increased hourly, the administrative assistant called our office from his office in the state government compound. The administrative assistant informed us that he planned to resign and enter a plea of guilty. We were meeting with our client in our conference room five blocks away. When the administrative assistant told us of his decision to resign, I told him we wished him well and that our client would resign the following morning. The press had ardently hoped for this resignation.

Within five minutes our telephone rang and a reporter said: "I understand that (your client) will resign tomorrow." I was stunned. How could the reporter know this? When I inquired, he replied: "We just heard you say it." I began thinking wire taps. However, we later learned that the administrative assistant was on speaker phone and my words could be heard through his closed door and out in the hallway where the reporter sat. I telephoned the reporter's editor and insisted that they not run the story because of the unfair manner in which it was discovered. He was courteous but he insisted that it was an important story and that they would go with it. As a result we called a press conference for that night and announced our client's resignation.

The reporters and camera people are not there to hassle us. They are simply doing their jobs. On numerous occasions reporters have told me that they regret having to camp out to get a statement. They are there to complete an assignment. In one instance a television reporter called to say that my out of town client had been photographed coming from her house and returning by every other media outlet and he had been told he must remain near her house until he got a photograph of her. He asked if I could help. I called the client, told her the problem, and asked her to walk to her mail box and back into the house so the reporter could photograph her and leave. She walked to her mail box and he got the shot and returned to Raleigh.

A high profile case makes it necessary to be more vigilant about statements which we believe are well conceived, but in truth are not wise. Edward Bennett Williams was right. "Nothing is always a brilliant thing to say."

THE LURE OF FAME

Edgar Lee Masters wrote *Selection From Spoon River Anthology*. It contains useful words for lawyers. Masters went to the cemetery of a New England community and talked with the people in their graves. From his grave, the lawyer said:

"HOW does it happen, tell me
That I who was the most erudite of lawyers,

Who knew Blackstone and Coke
Almost by heart, who made the greatest speech
The court-house ever heard, and wrote
A brief that won the praise of Justice Breese—
How does it happen, tell me.
That I lie here unmarked, forgotten,
While Chase Henry, the town drunkard,
Has a marble block, topped by an urn,
Wherein Nature, in a mood ironical,
Has sown a flowering seed?”

Fame is fleeting and seeking to be famous is a useless endeavor. Nevertheless, fame is a powerful elixir. Cameras and reporters are hard to resist. Some people find it impossible to “shut up” when there are cameras nearby. There is an intoxicating and dangerous drug associated with notoriety and fame. Television has the power to introduce a lawyer to the entire world in a few minutes. Sixty Minutes reaches twenty-five million people. A sea of cameras makes walking with a client to the courthouse a serious undertaking. Lawyers have to deal with the question of whether to make a statement to the press, knowing, of course, that a statement will be urgently sought. These issues must be considered in advance. Should we make a statement? What should the statement be? Who will make the statement?

Some people cover their faces or pull their coats over their heads when cameras are near. These are terrible gestures. Potential jurors may be watching.

High profile cases can disturb lawyer teams when egos emerge and people jockey for position on the way to court. Judges are not immune from this strange appeal of the cameras.

In a case in which there is great public interest and cameras and reporters are everywhere, lawyers must exercise great care when they are in public places. The walls have ears.

High media interest requires that lawyers pay attention to what a client is wearing for court hearings or during other public appearances. Appropriate clothing is essential. Nothing outrageous should be worn. One client came to court wearing a t-shirt that read: “Everybody should believe in something. I believe I’ll have another drink.”

Decide in advance whether you will speak to the media and what you will say. The client should understand that when the statement is completed, he must stop and not talk further.

If there are cameras in the courtroom, remember that your microphone is on and that the world will hear what you whisper to co-counsel. Worse, the world will hear what your client whispers to you.

NORTH CAROLINA RULE OF PROFESSIONAL CONDUCT 3.6

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

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

(2) the information contained in a public record;

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

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

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

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

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

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

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

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

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

Rule 3.6 contains a savings provision which was employed in the recent Lacrosse case in Durham. Efforts have been made to eliminate this provision or to change it significantly. Recently a committee of the State Bar considered proposed changes. The changes would have required a lawyer to request a Superior Court Judge to approve responses to publicity generated by his opponent. The changes were not approved by the subcommittee.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue

prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is reasonably necessary to mitigate the recent adverse publicity.

The prosecutor in the Duke Lacrosse case is the first lawyer in North Carolina to be disbarred for violation of North Carolina's rule on pre-trial publicity. However, it seems clear to me that the State Bar is not lurking, hoping to punish lawyers for little lapses or unintentional violations of the rule. The prosecutor in the Lacrosse case ventured far over the line, holding dozens of press conferences with the national media and describing the defendants as hooligans and making it clear that he personally believed they were guilty. He demonstrated on national television the manner in which the assault took place and stated that for sure they were guilty. There was little doubt that he triggered the savings clause in Rule 3.6.

One of the most important roles for a lawyer in a high profile case is to monitor his statements and make them fit the North Carolina rule. This introduces a tension and a nagging concern in high profile cases which is absent in other kinds of cases.

A DESCRIPTION OF A MEDIA STORM

My first media storm cases were tried in the 1970's. The Jeffrey MacDonald case arose in 1970 and was tried in 1979. The case came on the heels of the Manson murders in California. The MacDonald case involved bloody words inscribed on a bed: "Acid is groovy, kill the pigs." A family died in their home. The father and husband was eventually indicted. There was a woman with a floppy hat and a wig. The trial lasted eight weeks, after which the jury found the defendant guilty. This was my first opportunity to see large numbers of media people creating a tent city at the courthouse. In the MacDonald case, there was no way to walk quietly to the courthouse and get on an elevator and get off at the courtroom. The elevator was packed with cameras, wires, lines, and people, all hoping for a statement for the morning news, all with microphones turned on. The more wild and outrageous the statement, the better for the news people.

There were other cases which created media storms after that. The most recent, of course, is the Duke Lacrosse case. That case would make a semester long seminar on dealing with the media and the problems intense media creates for lawyers.

THE DUKE LACROSSE LESSONS

The Duke case was a perfect storm of remarkable issues, all of which attracted media from across America and from many foreign countries. It was a case about elite athletes, the contrast of wealth and poverty in America, town and gown tension, sex and violence. Added to that already volatile mix was the issue of race. Two comparable cases in recent years are Michael Jackson and O. J. Simpson. In the Duke Lacrosse case and in others like it, the media firestorm is constant because all media outlets, including newspapers, have news cycles which are continuous, twenty-four hours a day, every day.

The Lacrosse case offers an excellent opportunity to see how the North Carolina Rules of Professional Conduct worked. The prosecutor in that case held dozens of news conferences. As counsel for the defendants we looked at the Rules of Professional Conduct in an effort to understand Rule 3.6(c). We concluded that we had to speak to the media or the case would be lost well in advance of trial.

Immediately after the first DNA results became public, we held our first press conference. The DNA report revealed that there was not a scintilla of evidence connecting members of the lacrosse team to the accuser. This news conference took place on the steps of the Durham Courthouse. There were hundreds of reporters and cameras. The conference was instantly made public, in airports, on news monitors, in sports bars, and millions of homes. As we have evaluated the turn around of public opinion, we believe this press conference was one of the keys. It had to be done. All the lawyers who were working on the case, including attorneys who had only served as advisors, stood together for that press conference. It was one of several press conferences, which I believe, made a difference in turning the tide of public opinion away from the prosecutor's theories.

One of the most dramatic media decisions I have ever witnessed was made by Joe Cheshire on behalf of his client, David Evans. Evans was the last of the defendants to be indicted, and he was indicted as he was graduating from Duke. After Evans made bond, he stepped out to the front of the courthouse. With his parents at his side and in front of a massive media group, he spoke from his heart to the world, saying he was not guilty, that neither were his co-defendants, and that he would be found innocent. It was a stirring and powerful statement of innocence made possible only by Rule 3.6(c).

My philosophy with respect to speaking to the media prior to this moment in my career had been extremely conservative. I almost never made a statement to the press because of my sense that it was so dangerous. However, we conducted polling in Durham County where this case would be tried. It was alarming what the prosecutor's rants had done to our ability to receive a fair trial. There was no way we could win the case in Durham. A hung jury was the best we felt we could hope for. We knew we had to speak out on behalf of our clients. We decided to cooperate fully with the television program, 60 Minutes.

Cooperating with 60 Minutes meant making our clients and their families available to speak on camera. We devoted many hours to preparing our clients to speak. We worked with the families to assure that they made no statements which would damage the case.

I employed an excellent public relations person to work with my client's family to help them choose the right words and to express themselves.

The 60 Minutes effort was Ed Bradley's farewell. He was dying and would not live to do another 60 Minutes assignment. The fact that he devoted his final professional effort to the Lacrosse case was extraordinarily helpful to the defense.

I learned that my conservative views about speaking to the media would not always work. Without the media it is likely we would have tried this case. The media opened the windows and let the sunshine in. The world could see a hoax. We had no power to make this happen. It took the power of the media to get it done.

THE ELEVEN RULES FOR DEALING WITH THE MEDIA

1. Do not respond to a reporter's question by saying: "No comment." This is an unnecessarily blunt and even a rude response. It is much easier to be friendly and to say that you can't speak today, but that you look forward, perhaps, to a moment when you can talk about the case. If you can give the reporter something to take back, it is very helpful to the reporter and it does not hurt your case. "Thanks for the question. I wish I could comment. I can't comment about that now, but I hope that at some point in the future I will be able to speak about it."

2. Use care in making "off the record" comments. Make sure the reporter understands what you mean when you say: "Can we go off the record?" When you say these words to a reporter you are negotiating a contract or an agreement to the effect that you will not be quoted. Almost all reporters will respect this condition as a matter of journalistic ethics. But, it is important to be clear about it. No one knows for sure what is meant by "off the record." If you can't speak to a reporter and be quoted, you can ask if you could speak on background. This means "not for attribution." The reporter can then say: "Sources close to the investigation have said, etc." If you feel that you could give the reporter context, but you don't want to be quoted, even without attribution, you can say: "I can give you this on deep background." This means that the reporter should not quote you even without attribution. The reporter can use this information only to help them understand the context. They must go elsewhere to get a quote.

3. During an interview with a reporter it is dangerous to make "off the cuff" remarks. Whatever you say is fair game. No matter what it is. You can't say something outrageous and then expect the reporter to sort through the things you said and select only the parts that you would be happy that you said.

4. Keep your answers short and concise. This is especially true in the age of the ten second sound bite.

5. Develop a relationship with the reporters. Become known as a resource for them. If they need to understand a legal concept they will call you. You will then have insight into the reporters' personalities and they will understand you when the moment comes for you to speak about a client.

6. Always respect deadlines. If you promised to get back to a reporter before the deadline, keep the promise even if there is nothing you can say that is useful.

7. Never quote your client. If you are about to begin a sentence: "My client says," stop and reconsider. Nothing good can come of this statement unless you are absolutely positive you know that the statement is true. Joe Cheshire admits that his heart was in his throat when his

client spoke at the Durham Courthouse steps, even though he knew for certain his client was innocent. He remembered, at that moment, President Clinton shaking his finger at the camera and speaking those eight words that nearly ended his Presidency.

8. Take care of your credibility as you work with the press. Don't get the reputation for running to get to a camera or a reporter every time there is an opportunity. Let an interview with you be considered something valuable.

9. Speak plainly. Don't use legal jargon. The reporters are hoping to get you on the next news segment. If you can't be understood or if you use words that are not acceptable for the general public, your statements will not be used.

10. Praise good work. Reporters appreciate feed back. A "thank you" to a reporter is much appreciated. If the story is accurate and well presented, a telephone call is very valuable to a reporter.

11. This may be the most important rule of all. Return all media phone calls. Even if you can't make a statement. Be known by the media as a person who will return a call promptly.

WORDS FROM THE REPORTERS AND PRODUCERS

I asked several reporters to help us with this topic by answering three questions:

1. What are the most common mistakes lawyers make in working with you during a high profile case?

2. What are the most helpful things lawyers can do for you when working on a high profile case?

3. If you had to choose one piece of advice for lawyers in working with the media, what would it be?

AARON BEARD, an excellent reporter for the Associated Press responded:

1. What are the most common mistakes lawyers make in working with you during a high profile case?

I think it would help for lawyers to learn the difference between "the media" and professional journalists. Nancy Grace, for example, is part of the media, but not a journalist. Professional reporters are committed to getting a story correct. These are the people from your local newspapers and radio and television stations. Lawyers make the mistake of not observing this difference.

Lawyers working on high profile cases should share as much information as possible, as early as possible. In the Duke case, had the lawyers been able to come forward more quickly, the

case would have unraveled much faster.

If you have big news, it is a mistake to hold on to it because it will leak out. Don't make a decision on Friday and hope that you can get the story out on Monday. It will get out.

2. If you had to choose one piece of advice for lawyers in working with the media, what would it be?

Be available. An attorney handling a high profile case should always be accessible to reporters who are covering the case. Having an attorney who is willing to talk about a case, on or off the record, is a tremendous help for a reporter trying to sort through a complicated case. I can remember several times during the Duke case when reports surfaced that we were able to ultimately refute or find to be true simply by being able to reach one of the primary attorneys whether by cell phone, email or text message.

3. If you had to choose one piece of advice for a lawyer in working with the media, what would it be?

Silence is not golden. Try not to shut yourself off from reporters. If you can help us get the story correct in the first place, you will spend less time trying to refute errors later.

MICHAEL RADUTSKY, Senior Producer for 60 Minutes who worked with Ed Bradley on his most elegant stories, and producer of the Duke Lacrosse Story:

The most common mistakes lawyers make in working with reporters on high profile cases is to assume at the outset that nothing about a case can ever be discussed or reported while a case is pending and that a client should never go on camera until a case is settled or fully litigated.

Another mistake is to assume that reporters should either be given a "no comment" or a terse one or two line statement, or that reporters cannot be trusted to honor the sacred Journalist's credo that "off the record" or "background only" means just that.

The best advice I can give to lawyers is to be willing to engage in a personal, one-on-one dialogue with a reporter early on in the process once the immediate hoopla settles, in which trust can be built and intentions made clear and thoroughly vetted. As I experienced in the Duke case, mutual trust and open-mindedness between reporters, the attorney and the clients served the cause of justice in a way they never could have served it had there been no dialogue until after the proceedings wound their way through the courts. In certain circumstances, the media can be an extraordinarily effective weapon in challenging power when the legal system is broken.

A WORD ABOUT THE POWER OF THE MEDIA

When the Virginia Tech tragedy occurred, the family of the shooter, mother, father and sister, feared that their son and brother had been shot. They had no clue that he was the killer. They waited in dread at their home for news about the people who had died. Then their lives

were ended by a visit from the FBI informing them that their family member was the killer. They descended into a darkness which continues to this day. After a few weeks they felt a need to speak to a nation in mourning. They did not know how to reach out. They were in some danger. They couldn't just walk out on the street and speak.

I joined with several others to help them craft their statement. We worked with them and used their words to develop a statement for the world to read. When the statement was finished we looked for a way to make it as widely available as possible. We chose the Associated Press.

With the statement on a computer ready to send by email, we asked the AP how long it would take for the message to reach the maximum number of people. They responded that it would be fully available world wide in five minutes. We pressed the send button. In five minutes the message had been transmitted across the world. We began hearing from the Netherlands, from Belgium and many other countries, almost immediately. The switchboards were jammed. Emails continued to come for many weeks. These were statements of compassion for the Cho family which itself was innocent of wrong and whose lives were so terribly harmed because of the acts of a family member. Hundreds of people reached out to the Cho family. The messages were kind. People hurried to tell them it was not their fault and that they need not feel shame.

This was the most remarkable demonstration of the power of the media that I have ever seen. In only a few minutes the world had received the message of the Cho family. In five minutes the message had reached millions of people worldwide. In their statement the family expressed grief and sadness. They said they would live in darkness forever. They expressed their prayers for each of the slain and wounded students and teachers.

What does the speed and power of the media mean to us as lawyers? Can we fully comprehend this power? The availability of the media for dissemination of truth is astounding. The power to move millions of people to compassion and to kindness and forgiveness is a phenomenon that is nearly incomprehensible.

This is a reality we must acknowledge as lawyers. The world has changed significantly. We may not be able to contain a case to a small courtroom with a few benches and chairs and a musty old set of the North Carolina Reports. The world now has the power to crowd in.

For the moment, Rule 3.6 is the best we can do. We are a profession and we have a duty to make our rule work. It is imperfect, but most rules are imperfect.

In the meantime, we have the great statement of Edward Bennett Williams:

“NOTHING IS FREQUENTLY A VERY GOOD THING TO DO AND ALWAYS A BRILLIANT THING TO SAY.”