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Wesley M. Oliver

*Duquesne University*, wesleymacneiloliver@gmail.com

Rebecca L. Silinski

rebecca.l.silinski@gmail.com

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# GEORGE ZIMMERMAN, JERRY SANDUSKY, AND THE ETHICS OF COUNSEL'S USE OF THE MEDIA

WESLEY M. OLIVER\* & REBECCA L. SILINSKI\*\*

## *Abstract*

*The media is both a tool and a temptress for the modern lawyer. With interest in trials increasing, particularly criminal trials, lawyers are frequently invited to become part of the media's coverage. The media provides lawyers an opportunity to tell their clients' stories, but it also brings a type of fame to the attorney, which may bias the lawyer's view of the wisdom of the coverage. The American Bar Association's (ABA) Model Rules of Professional Conduct (Model Rules) have long recognized that a lawyer's interest in the literary and media rights to the client's story potentially compromises the client's representation. This essay argues that the same concerns apply to immediate national media attention and proposes an extension of the Model Rule's conflict-of-interest provisions to an attorney's participation in high-profile coverage of a client's case.*

## *Introduction*

Current ethics rules view lawyers' contact with the media only through the lens of the fair administration of justice. An attorney's statements to the media raise concerns only if intended to influence the outcome of a case in favor of the client.<sup>1</sup> The Model Rules assume that a lawyer speaking to the media is doing so for the sole purpose of assisting the client's cause. This assumption, however, fails to appreciate the complexity of concerns that arise when lawyers communicate with the media—particularly in high-profile cases.

Often, statements to the press are made for the genuine purpose of furthering a client's interest. Sometimes, however, a lawyer's contact with the media is for the purpose of advancing the *lawyer's* agenda—either to attract clients or simply to relish being in the limelight. These two aims do not necessarily conflict: while a media appearance may be self-serving, a

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\* Professor of Law and Associate Dean of Faculty Research and Scholarship, Duquesne University. B.A., J.D., University of Virginia; LL.M., J.S.D., Yale University. The author served as NBC Legal Analyst for the trial of Jerry Sandusky.

\*\* Associate Attorney, Law Offices of Stephen S. Stallings, Esq., J.D. 2015, Duquesne University.

1. MODEL RULES OF PROF'L CONDUCT r. 3.6(a) (Am. Bar Ass'n 2015) [hereinafter MODEL RULES].

lawyer may, in fact, be intending to advance his client's agenda, and may actually achieve this goal. But there are times when the lawyer's moment in the spotlight undermines the client's interest in a fair trial. This is especially true where you combine a lawyer, with no particular media-relations expertise, and his desire for media attention. There is, in other words, a potential conflict of interest between the attorney and the client when the lawyer chooses to engage with the media.

As the media has increasingly given lawyers airtime in high-profile cases, the potential conflict has become more acute. In the not-so-distant past, lawyers who represented high-profile clients wrote books about their clients.<sup>2</sup> For some time, ethical rules have recognized that a lawyer's interest in the literary or media rights to a client's story may adversely affect his representation, and those rules have provided mechanisms to deal with this conflict.<sup>3</sup> While some lawyers still write books about their famous, or infamous, clients, far more find themselves talking about their clients on Anderson Cooper 360° or Nancy Grace.<sup>4</sup> The Model Rules, however, have not been updated to reflect this new reality.

This is problematic because while the potential conflict between an attorney's representation and subsequent media rights is great, it is dwarfed by the potential conflict between a lawyer's self-interest in national media coverage and her duty to the client. A lawyer who contemplates changing strategy to improve her chance of selling a book or screenplay is gambling on a product that may never be commercially viable. The public's interest in any case has a shelf life, and the lawyer, who has to spend considerable time writing the story, has little way of gauging what the public's interest will be when she completes the task. As such, many of these projects go unfinished, and the ones that are completed rarely result in fame or fortune.

National media appearances, by contrast, guarantee an immediate high level of attention. An appearance on the TODAY Show promises the lawyer a national audience of approximately five million people.<sup>5</sup> Moreover, this exposure occurs during the course of the representation.

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2. See, e.g., ROY BLACK, *BLACK'S LAW: A CRIMINAL DEFENSE LAWYER REVEALS HIS DEFENSE IN FOUR CLIFF-HANGER CASES* (1999); CLARENCE DARROW, *THE STORY OF MY LIFE* (1932); ALAN M. DERSHOWITZ, *REVERSAL OF FORTUNE: INSIDE THE VON BÜLOW CASE* (1986); MICHAEL E. TIGAR, *FIGHTING INJUSTICE* (2002).

3. MODEL RULES, *supra* note 1, at r. 1.8(d).

4. Brian Wice, *Are You Ready for Your Close-Up? A Criminal Practitioner's Primer on Dealing with the Electronic Media*, HOUS. LAW., Jan./Feb. 2014, at 34, 34.

5. Brian Steinberg, *'Today' vs. 'Good Morning America': Morning News Race Heats Up TV's Fiercest Duel*, VARIETY (Aug. 12, 2014), <http://variety.com/2014/tv/news/today-vs-good-morning-america-duel-1201280481>.

Unlike a subsequent book or movie right to a client's story, which may skew a lawyer's representation in the hopes of a better story to sell in the future, the media's distorting effects on the lawyer's representation are far from speculative. A lawyer does not have to wonder if there will be national interest in the story she is telling when there is a sound truck on her front lawn.

Additionally, the lawyer's media appearance itself may influence the jury against the client. Joseph Amendola, who represented former Penn State Assistant Football Coach Jerry Sandusky, provides perhaps the best example of an engagement with the media that hurt the client's interest. Quotes from Jerry Sandusky's interview with Bob Costas on NBC's *Rock Center* were introduced in the prosecution's case against Sandusky.<sup>6</sup> While Bob Costas won an Emmy Award for the interview<sup>7</sup> and Amendola received national attention, Sandusky received a thirty- to sixty-year prison sentence for child molestation.<sup>8</sup> No lawyer would regard Sandusky's appearance on *Rock Center* as a strategic victory for the defense. Yet, if the state's ethical rules had recommended ways to deal with the media and publicity, such as consulting a media expert before making such an appearance, it is possible this interview would never have occurred.

This is not to say that the risks of appearing on television always outweigh the benefits. In fact, the opposite may be true. The coverage of a high-profile case is rarely limited to the fact that charges have been brought against a particular person.<sup>9</sup> Very damaging pretrial publicity against a criminal defendant is becoming quite common, and jurors are not immune from the effects of this information. Even when there has been extensive pretrial publicity, jury selection can be quite perfunctory<sup>10</sup> and often

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6. NBC, *Jurors, Sandusky Hear Costas Interview*, NBC NIGHTLY NEWS (June 13, 2012), <http://www.nbcnews.com/video/nightly-news/47805591#47805591>.

7. Costas, *NBC Win Emmy for Sandusky Interview*, NAT'L SPORTSCASTERS & SPORTSWRITERS ASS'N (Oct. 2, 2012), <http://nssafame.com/2012/10/02/costas-nbc-win-emma-for-sandusky-interview/>.

8. Jenna Johnson, *Jerry Sandusky Sentenced to 30 to 60 Years in Prison*, WASH. POST (Oct. 9, 2012), [http://www.washingtonpost.com/local/education/jerry-sandusky-sentenced-to-30-to-60-years-in-prison/2012/10/09/6d5ed134-1184-11e2-ba83-a7a396e6b2a7\\_story.html](http://www.washingtonpost.com/local/education/jerry-sandusky-sentenced-to-30-to-60-years-in-prison/2012/10/09/6d5ed134-1184-11e2-ba83-a7a396e6b2a7_story.html).

9. Mark J. Geragos, *The Thirteenth Juror: Media Coverage of Supersized Trials*, 39 LOY. L.A. L. REV. 1167, 1168 (2006) ("In a time when reality television, myriad cable networks, and supermarket tabloids regularly captivate millions, a high-profile case involving '[m]urder and mystery, society, sex and suspense' easily becomes the subject of national engrossment.") (citation omitted).

10. See *Mu'Min v. Virginia*, 500 U.S. 415, 424-25 (1991).

requires potential jurors to self-assess their ability to fairly judge a case in spite of the publicity.<sup>11</sup> Effective assistance of counsel may require a defense lawyer to rebut false claims or characterizations of his client in the media, lest these unchallenged propositions find their way into the jury pool.

The prosecution of George Zimmerman provides an example of a necessary and effective use of pretrial media appearances to positively change the public's perception of a defendant who, it initially appeared, had already been convicted in the court of public opinion. The pretrial media coverage in Zimmerman's case was intense: it painted him as a racist who stalked and killed an unarmed black teenager without justification.<sup>12</sup> Mark O'Mara's ultimately successful representation of Zimmerman contained a very elaborate pretrial media strategy that involved hiring a media expert and was largely celebrated as rehabilitating Zimmerman's public image.<sup>13</sup>

The way the lawyers engaged the media in these two high-profile cases can teach us a lot. After all, there will be occasions when defense lawyers must engage with the media. But even when such an engagement is advisable, a media strategy is often outside a typical lawyer's wheelhouse. Thus, in a media-driven culture, it becomes easy to question which interest a lawyer is serving when given an opportunity to gain national or worldwide attention through her client's case. In these instances, state ethics rules should provide guidance to lawyers who find themselves with this opportunity or in this predicament.

Recommending a client seek the advice of a disinterested expert on media relations can overcome these concerns. An attorney's engagement with the media on behalf of his client is analogous to entering a business relationship with a client, and when a lawyer does so, he must advise a client of the desirability of consulting outside counsel. Lawyers, however, are not always in the best position to determine how potential jurors will view a communication to a media organization once it is packaged and

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11. See Christopher Robertson, David Yokum & Matt Palmer, *Can Jurors Self-Diagnose Bias? Two Randomized Controlled Trials* (Ariz. Legal Studies Discussion Paper No. 12-35, Feb. 14, 2013), <http://www.mslitigationreview.com/files/2013/05/Can-Jurors-self-diagnose-bias-2.pdf>.

12. See Margaret Tarkington, *Lost in the Compromise: Free Speech, Criminal Justice, and Attorney Pretrial Publicity*, 66 FLA. L. REV. 1873, 1938-39 (2014) (discussing Zimmerman team's response to pretrial publicity).

13. Jerriann Sullivan, *Key Player in George Zimmerman Murder Trial: Social Media*, ORLANDO SENTINEL (July 19, 2013), [http://articles.orlandosentinel.com/2013-07-19/news/os-trayvon-zimmerman-social-media-20130719\\_1\\_trayvon-martin-george-zimmerman-social-media](http://articles.orlandosentinel.com/2013-07-19/news/os-trayvon-zimmerman-social-media-20130719_1_trayvon-martin-george-zimmerman-social-media).

transmitted to a community that will place another spin on the story. It seems that clients in high-profile cases should be advised of the desirability of consulting with outside counsel and a public relations expert before the lawyer begins making public comments about the client's case.

### *I. Modern Media as a Temptation*

Modern media has blurred the lines between news and entertainment. Within the criminal justice system, this world of entertainment news has made immediate celebrities out of lawyers involved in high-profile cases. For some, their celebrity status has survived well beyond the actual trials. Roy Black, for instance, emerged from the William Kennedy Smith trial as one of this country's most respected criminal defense lawyers and went on to host a reality television program, which featured lawyers competing for a position with his firm.<sup>14</sup> In some cases, fame has followed those merely associated with high profile cases. Television viewers keep up with the Kardashians<sup>15</sup> for no apparent reason other than the fact that their father, Robert Kardashian, was one of the lawyers who represented O.J. Simpson.<sup>16</sup>

Certainly, the American criminal justice system has always served the dual roles of adjudication and public entertainment. Long before O.J. Simpson and daily television news broadcasts, Richard Bruno Hauptmann's trial for the kidnapping and killing of the Lindbergh baby riveted the American public from coast to coast.<sup>17</sup> The pretrial publicity surrounding Aaron Burr's trial for treason raised substantial concern for Chief Justice John Marshall (who sat as the trial judge in the case) that Burr might not be able to obtain a fair trial.<sup>18</sup> Despite long-standing interest in criminal cases,

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14. *The Law Firm* (NBC television broadcast Jul. 28, 2005-Aug. 4, 2005).

15. *Keeping Up with the Kardashians* (E! television broadcast Oct 14, 2007–May 31, 2015).

16. *Robert Kardashian, a Lawyer For O.J. Simpson, Dies at 59*, N.Y. TIMES (Oct. 3, 2003), <http://www.nytimes.com/2003/10/03/us/robert-kardashian-a-lawyer-for-o-j-simpson-dies-at-59.html>. Mr. Kardashian and Mr. Simpson were longtime friends; however, after the case, the two had a falling out regarding book and media rights to the case. Simpson alleged that "Mr. Kardashian had betrayed attorney-client privilege by telling details of the case." *Id.*

17. LLOYD C. GARNER, *THE CASE THAT NEVER DIES: THE LINDBERGH KIDNAPPING* (2012).

18. 3 ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 342 (1919) ("[T]he popular voice demanded the life of Aaron Burr. No mere trial in court, no adherence to the rules of evidence, no such insignificant fact as the American Constitution, must be permitted to stand between the people's aroused loyalty and the miscreant whom the Chief Executive of the

though, new forms of media have disproportionately increased the public's interest in criminal cases and made famous, or infamous, those involved in them.

High-profile lawyers are certainly not a new phenomenon, but there is something relatively new about the ability of a single case to immediately transform a regionally respected attorney into a national figure. It was Clarence Darrow's reputation as a trial lawyer that attracted the public's attention to the Scopes Monkey Trial, not the Scopes Monkey Trial that first made the public aware of Darrow.<sup>19</sup> Johnnie Cochran, to the contrary, had a very solid reputation as a trial lawyer, but the O.J. Simpson case alone made him a household name—so much so that a character spoofing him had a recurring role on *Seinfeld* and appeared in a number of national car commercials.<sup>20</sup>

Modern media presents lawyers with the temptation of worldwide fame. Cameras in the courtroom and twenty-four-hour cable news channels have allowed actual trials to replace, or at least supplement, scripted courtroom dramas. While the O.J. Simpson case correctly holds the claim to being the “trial of the century”<sup>21</sup> and occurred as media coverage of trials dramatically increased, it was not solely responsible for the new culture of trial coverage.<sup>22</sup> *Court TV*, a cable network focused primarily on covering

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Nation had pronounced guilty of treason.”); R. KENT NEWMYER, *THE TREASON TRIAL OF AARON BURR: LAW, POLITICS, AND THE CHARACTER WARS OF THE NEW NATION* (2012).

19. *People & Events: Clarence Darrow (1857-1938)*, PBS AM. EXPERIENCE: MONKEY TRIAL, [http://www.pbs.org/wgbh/amex/monkeytrial/peopleevents/p\\_darrow.html](http://www.pbs.org/wgbh/amex/monkeytrial/peopleevents/p_darrow.html) (last visited Oct 20, 2015).

20. Jake Coyle, ‘*Seinfeld*’ Character Jackie Chiles Reborn on *Funny or Die*, USA TODAY (Dec. 1, 2010), [http://usatoday30.usatoday.com/life/television/news/2010-12-01-jackie-chiles\\_N.htm](http://usatoday30.usatoday.com/life/television/news/2010-12-01-jackie-chiles_N.htm); Gail Shister, ‘*Seinfeld*’ May Be Gone but Jackie Chiles Lives, CHI. TRIB. (July 24, 1999), [http://articles.chicagotribune.com/1999-07-24/news/9907240147\\_1\\_elaine-and-george-spinoff-final-episode](http://articles.chicagotribune.com/1999-07-24/news/9907240147_1_elaine-and-george-spinoff-final-episode).

21. *Flashback, 20 Years Ago: Key Moments from the O.J. Simpson Trial*, CBS 6 (Jan. 13, 2015, 7:22 PM), <http://wtvr.com/2015/01/13/flashback-20-years-ago-key-moments-from-the-o-j-simpson-trial/>.

22. See Michael O’Connell, *TV Ratings: Cable Viewership Swells Past 10 Million with George Zimmerman Verdict*, HOLLYWOOD REP. (July 15, 2013), <http://www.hollywoodreporter.com/live-feed/tv-ratings-cable-viewership-swells-585498> (stating that 10.5 million people tuned in to hear the jury verdict in the George Zimmerman case); Brian Stelter, *Casey Anthony Verdict Brings HLN Record Ratings*, N.Y. TIMES (July 6, 2011, 4:18 PM), <http://mediadecoder.blogs.nytimes.com/2011/07/06/casey-anthony-verdict-brings-hln-record-ratings/> (stating that 5.2 million people tuned in to hear the jury verdict in the Casey Anthony trial).

salacious criminal cases, launched on July 1, 1991.<sup>23</sup> Its coverage of the Menendez-brothers prosecution brought the new network to national prominence.<sup>24</sup> And before the Simpson trial unfolded in the spotlight, there was William Kennedy Smith's 1992 rape trial; every moment of which was covered live on CNN, transforming defense attorney Roy Black into something of a household name.<sup>25</sup>

O.J. Simpson's trial took this emerging form of coverage to a whole new level.<sup>26</sup> The public's interest in William Kennedy Smith's case was entirely driven by Dr. Smith's middle name, as he was all but entirely unknown to the public before the trial. In contrast, O.J. Simpson was, at the time of his arrest, a beloved former football star, sports commentator, and actor. He was accused of murdering his ex-wife at a time when cable news only meant CNN—a network that had recently become prominent because of its constant coverage of the first Gulf War.<sup>27</sup> CNN emerged as a sort of on-the-scene version of C-SPAN, providing unedited, live coverage of developing stories.<sup>28</sup> Complete coverage of the William Kennedy Smith

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23. Lee Winfrey, *Courtroom Network Banks on Real-Life Drama*, PITTSBURGH PRESS (July 6, 1991), at C10, <https://news.google.com/newspapers?id=u-khAAAAIABAJ&sjid=7GMEAAAAIABAJ&pg=6980,1261106&hl=en>; Lee Winfrey, *News Cable Network to Telecast Trials Live Court Tv, to Premiere Tomorrow, Could Focus on 45 States*, PHILLY.COM (June 30, 1991), [http://articles.philly.com/1991-06-30/entertainment/25788854\\_1\\_court-tv-american-lawyer-media-courtroom-television-network](http://articles.philly.com/1991-06-30/entertainment/25788854_1_court-tv-american-lawyer-media-courtroom-television-network).

24. John Hughes, *The Courtship of the American Viewer: Court Tv Has Live Coverage of Big Trials, Including Some Too Bizarre to Have Been Produced as Fiction*, SUN SENTINEL (Oct. 20, 1993), [http://articles.sun-sentinel.com/1993-10-20/lifestyle/9310190366\\_1\\_menendez-brothers-court-tv-kitty-menendez](http://articles.sun-sentinel.com/1993-10-20/lifestyle/9310190366_1_menendez-brothers-court-tv-kitty-menendez); Lauren Schutte & Chris Godley, *10 TV Trials That Shook The World: Casey Anthony, OJ Simpson, Rodney King*, HOLLYWOOD REP. (July 5, 2011), <http://www.hollywoodreporter.com/gallery/10-tv-trials-shook-world-208094#2-menendez-brothers>.

25. NBC's *The Law Firm* featured attorney Roy Black, managing partner of The Law Firm, who determined the fate of twelve real-life lawyers competing for a \$250,000 prize—a show reminiscent of the much more successful *Apprentice*. *The Law Firm*, TV.COM, <http://www.tv.com/shows/the-law-firm/> (last visited Sept. 27, 2015).

26. Collen Curry, *10 Classic Images that Explain the O.J. Simpson Trial*, ABC NEWS (June 12, 2014), <http://abcnews.go.com/US/10-images-explain-0j-simpson-trial/story?id=24058030> (stating that 150 million people tuned in to hear the jury verdict in the O.J. Simpson case).

27. Daniel Foster, *This Isn't CNN*, NAT'L REV. ONLINE (July 30, 2012), <https://www.nationalreview.com/nrd/articles/309263/isnt-cnn> (stating that Tom Brokaw called CNN “the little network that could” during the first Gulf War).

28. *From O.J. to 'Serial': We're All Armchair Jurors Now*, DAILY BEAST (Jan. 23, 2015), <http://www.thedailybeast.com/articles/2015/01/23/from-o-j-to-serial-we-re-all-armchair-jurors->

and O.J. Simpson trials perfectly fit the model CNN had then staked out for itself—uninterrupted and complete coverage of developing news stories.<sup>29</sup> A modern paradigm of news coverage was emerging and minting a new type of celebrity: lawyers, specifically defense lawyers, in criminal cases.

Of course, with this new path to stardom came a new challenge: how could an attorney capitalize on his time in the spotlight without jeopardizing the client's case. Joseph Amendola, whose media antics led bloggers to dub him “Lawyerin’ Joe,”<sup>30</sup> no doubt faced a difficult task in representing a client charged with sexually molesting ten adolescent boys. Amendola's efforts to court media attention included hosting a party at his home for the correspondents covering the case,<sup>31</sup> comparing the case to the soap opera “All My Children,”<sup>32</sup> putting Sandusky on television,<sup>33</sup> subjecting his client to a New York Times interview,<sup>34</sup> and staging an hour-long news conference on the courthouse steps on the day scheduled for the preliminary hearing.<sup>35</sup> Beyond this glaring interest in getting as much exposure as possible, Amendola's media “strategy” simply lacked competence.

Though it can certainly be disputed whether this coverage advanced his client's interest, Amendola's strategy did succeed in keeping *him* in the spotlight consistent with his reputation for “jerk[ing] the media around like

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now.html (“Court TV and CNN [provided] coverage that could track every mundane detail of the proceedings.”).

29. *From Chase to Trial: How O.J. Simpson Changed TV*, FOX NEWS (June 12, 2014), <http://www.foxnews.com/entertainment/2014/06/12/how-oj-simpson-trial-changed-tv/>.

30. *See, e.g., 2012 Deadspin Hall of Fame Nominee: Lawyerin’ Joe Amendola*, DEADSPIN (Jan. 3, 2013), <http://deadspin.com/5972946/2012-deadspin-hall-of-fame-nominee-lawyerin-joe-amendola>.

31. Kyle Scott, *NBC Reporter Arrested After Leaving Party at Joe Amendola's House*, CROSSING BOARD (Dec. 20, 2011), <http://www.crossingboard.com/2011/12/nbc-reporter-arrested-after-leaving-party-at-joe-amendolas-house.html>.

32. Paul Thomasch & Doina Chiacu, *Sandusky Lawyer Likens Sex Abuse Trial to Soap Opera*, FOX NEWS (June 19, 2012), <http://www.foxnews.com/sports/2012/06/19/sandusky-lawyer-likens-sex-abuse-trial-to-soap-opera/>.

33. Jessica Hopper, *Jerry Sandusky to Bob Costas in Exclusive ‘Rock Center’ Interview: ‘I Shouldn’t Have Showered with Those Kids,’* ROCK CENTER (Nov. 14, 2011), [http://rockcenter.nbcnews.com/\\_news/2011/11/14/8804779-jerry-sandusky-to-bob-costas-in-exclusive-rock-center-interview-i-shouldnt-have-showered-with-those-kids](http://rockcenter.nbcnews.com/_news/2011/11/14/8804779-jerry-sandusky-to-bob-costas-in-exclusive-rock-center-interview-i-shouldnt-have-showered-with-those-kids).

34. Jo Becker, *Center of Penn State Scandal, Sandusky Tells His Own Story*, N.Y. TIMES (Dec. 3, 2011), <http://www.nytimes.com/2011/12/03/sports/ncaafootball/at-center-of-penn-state-scandal-sandusky-tells-his-own-story.html>.

35. Jeré Longman & Nate Schweber, *Sandusky Changes Course and Waives Preliminary Hearing*, N.Y. TIMES: THE QUAD (Dec. 13, 2011, 8:02 PM), [http://thequad.blogs.nytimes.com/2011/12/13/live-updates-sandusky-to-face-accusers-in-preliminary-hearing/?\\_r=2](http://thequad.blogs.nytimes.com/2011/12/13/live-updates-sandusky-to-face-accusers-in-preliminary-hearing/?_r=2).

a Jim Henson puppeteer.”<sup>36</sup> Likely the most memorable moment was the impromptu, November 14, 2011, Bob Costas interview on *Rock Center*, which simultaneously had defense attorneys cringing and prosecutors reveling at the opportunity to hammer the nail into the coffin.<sup>37</sup> What was originally slated as an interview with Sandusky’s attorney turned into an interview with the alleged child molester himself—an almost unheard of decision by a defense lawyer.<sup>38</sup> Even attorneys who knew Amendola were shocked.<sup>39</sup> James Bryant, an attorney who practiced in the same Centre County bar said, “To put a client on TV under those circumstances would ‘take a gun to my head.’”<sup>40</sup> But it was not until the following day that Costas explained how he managed to nab an interview with Sandusky: it was all Amendola.<sup>41</sup> Around ten to fifteen minutes before going on air, Amendola suggested getting his client on the phone for an interview.<sup>42</sup> While Costas questioned Amendola’s decision, wondering whether it was the “smartest thing to do,” he readily agreed to an interview<sup>43</sup> with someone he described as either a guilty man or “the unluckiest and most persecuted man that any of us has ever heard about.”<sup>44</sup>

One would think that Amendola would be by his client’s side, possibly even preparing a statement for his client; yet, Amendola was in the New York studio with Bob Costas, hundreds of miles from his client at the time of the interview.<sup>45</sup> Quite possibly, a bad connection accounted for the awkward pauses and seemingly shifty responses Sandusky gave. Or maybe it was simply as it appeared: a defendant with unbridled freedom to respond as he desired with little preparation or guidance from his attorney.

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36. Mike Dawson, *Jerry Sandusky’s Lawyer Joe Amendola in Spotlight as Trial Nears*, CENTRE DAILY TIMES (June 4, 2012), <http://www.mcclatchydc.com/news/crime/article/24730396.html>.

37. Hopper, *supra* note 33.

38. Jacob Bernstein & Jessica Bennett, *Lawyers: Costas Interview ‘Killed’ Sandusky’s Case*, DAILY BEAST (Nov. 16, 2011, 2:04 AM), <http://www.thedailybeast.com/articles/2011/11/16/lawyers-costas-interview-killed-sandusky-s-case.html>.

39. *Id.*

40. *Id.*

41. *Bob Costas on Jerry Sandusky Interview: ‘Very Strange’ (VIDEO)*, HUFFINGTON POST (Nov. 15, 2011), [http://www.huffingtonpost.com/2011/11/15/bob-costas-jerry-sandusky-strange\\_n\\_1094800.html](http://www.huffingtonpost.com/2011/11/15/bob-costas-jerry-sandusky-strange_n_1094800.html) [hereinafter *Bob Costas on Jerry Sandusky Interview*].

42. *Id.*

43. *Id.*

44. Hopper, *supra* note 33 (quote from the video).

45. Bernstein & Bennett, *supra* note 38.

As the minutes ticked by, pictures of Sandusky lingered on the screen and the cameras flashed back to Costas.<sup>46</sup> With each question, Sandusky tried to affirm his innocence; yet, his answers were a few words too long, and he was neither clear nor direct.<sup>47</sup> For instance, Sandusky essentially admitted to the crimes for which he had been accused when he replied:

Well I could say that, you know, I have done some of those things. I have horsed around with kids. I have showered after workouts. I have hugged them and I have touched their leg. Without intent of sexual contact. But--so if you look at it that way- there are things that . . . would be accurate.<sup>48</sup>

Costas retorted, "Are you denying that you had any inappropriate sexual contact with any of these underage boys?" to which Sandusky replied, "[Y]es I am."<sup>49</sup>

But it was not until the nineteen-minute mark that Sandusky's guilt was undeniable in the court of public opinion. Costas asked him, "Are you sexually attracted to young boys . . . ?"<sup>50</sup> After a sixteen second pause and what should have been a quick and unequivocal "no," Sandusky spouted, "Am I sexually attracted to underage boys? . . . Sexually attracted, you know, I enjoy young people. I love to be around them. But no I'm not sexually attracted to young boys."<sup>51</sup> The next morning, Costas remarked, "[Sandusky] hesitated and then repeated the question. You know, I will let the viewer infer what they will from that. But it was somewhat odd."<sup>52</sup> While the viewers that night would certainly draw their own inferences, it was the twelve individuals who made up the jury that needed to hear it. Not surprisingly, the prosecution acted quickly to get the full transcript of the interview and recording and played it in court so that the jury could hear from the defendant himself. Thus, Sandusky's admission found its way into the courtroom.<sup>53</sup>

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46. Hopper, *supra* note 33 (quote from the video).

47. *Id.*

48. *Transcript: Jerry Sandusky Interview*, NBC 10 PHILADELPHIA (Nov. 15, 2011, 9:47 AM), <http://www.nbcphiladelphia.com/news/local/Jerry-Sandusky-Full-Interview-Transcript-133872303.html>; Hopper, *supra* note 33 (quote from the video).

49. *Id.*

50. *Id.*

51. *Id.*

52. *Bob Costas on Jerry Sandusky Interview*, *supra* note 41 (quote from video).

53. Michael Isikoff, *Prosecutors May Present Unaired Portions of NBC News' Sandusky Interview*, NBC NEWS (June 18, 2012, 5:47 AM), [http://usnews.nbcnews.com/\\_news/](http://usnews.nbcnews.com/_news/)

While Amendola later appeared during the broadcast proclaiming his client's innocence and went so far as to say that he would allow his children to spend time with Sandusky,<sup>54</sup> by then, the damage had been done. In a panel afterwards, Tom Harvey, a New York defense attorney, joined other criminal defense lawyers who found it hard to understand why Amendola allowed his client to appear on national television.<sup>55</sup> Harvey believed Sandusky's admissions would be costly—and they were.<sup>56</sup> “If he were my client, [said] defense attorney Phil Masorti, I would hope I would be able to distinguish that while these interviews may be good for me as his lawyer, they may not be good for him as my client . . . I watched that interview. It killed [Sandusky].”<sup>57</sup> These attorneys were not alone. Most people were “absolutely baffled as to why any licensed attorney would allow Sandusky to go on national TV and admit that he was naked in the shower with little boys on at least two occasions, and that he touched little boys all the time.”<sup>58</sup> By all accounts, the most disparaging thing was that Amendola had just encouraged his client to give up his Fifth Amendment right not to incriminate himself—something Phil Masorti called “unforgivable.”<sup>59</sup> After all, in a matter of four minutes on air with Bob Costas, Sandusky had offered the prosecution a key piece of evidence.<sup>60</sup>

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2012/06/18/12279408-prosecutors-may-present-unaired-portions-of-nbc-news-sandusky-interview.

54. Teri Thompson, Michael O’Keeffe & Kevin Armstrong, *Jerry Sandusky’s Lawyer, Joe Amendola, Got a 16-Year-Old Client Pregnant and Later Married Her*, N.Y. DAILY NEWS (Nov. 15, 2011, 1:59 PM), <http://www.nydailynews.com/sports/college/jerry-sandusky-lawyer-joe-amendola-16-year-old-client-pregnant-married-article-1.977873>. Amendola’s estranged wife, Mary Amendola, did not seem to agree with her husband’s outspoken confidence in his client’s innocence. She posted on Facebook shortly after her husband’s statement: “OMG, did Joe just say that he would allow my kids to be alone with Jerry Sandusky?” *Id.*

55. Teri Thompson, *Jerry Sandusky: ‘I Didn’t Go Around Seeking Out Every Young Person for Sexual Needs that I’ve Helped,’* N.Y. DAILY NEWS (Nov. 15, 2011, 10:06 AM), <http://www.nydailynews.com/sports/college/jerry-sandusky-didn-seeking-young-person-sexual-helped-article-1.977730>.

56. *Id.*

57. Bernstein & Bennett, *supra* note 38.

58. Thompson, *supra* note 55.

59. Matt Assad, *Will Amendola’s Comments to Media Be Grounds for Appeal for Jerry Sandusky?*, MORNING CALL (Allentown, Pa.) (June 24, 2012), [http://articles.mcall.com/2012-06-24/news/mc-sandusky-amendola-attorney-appeal-20120624\\_1\\_state-college-attorney-philip-masorti-jerry-sandusky](http://articles.mcall.com/2012-06-24/news/mc-sandusky-amendola-attorney-appeal-20120624_1_state-college-attorney-philip-masorti-jerry-sandusky).

60. *Id.*; Thompson, *supra* note 55.

Attorney Tom Harvey added that

”[Amendola] seems more focused on getting himself on as many national news shows as he can . . . [t]he only person in the United States legally obligated to vigilantly defend Sandusky has taken it upon himself to encourage his client to waive the most basic constitutional right . . . the right to remain silent.”<sup>61</sup>

This move added to what legal analysts were already describing as a “highly unusual media strategy”<sup>62</sup> of “wreaking havoc.”<sup>63</sup> The Allentown, Pennsylvania newspaper, *Morning Call*, reported that based on their prior experiences with him, colleagues observed that Amendola “relish[ed] the limelight, betraying an inclination for theatrics” rather than a determination to adhere to longstanding traditions within the profession—protecting a client and shying away from an abundance of media attention.<sup>64</sup>

## II. Modern Media as a Necessity

Modern media culture creates not only a *temptation* for lawyers to speak to the media, which may run contrary to the best possible defense, but also situations which *require* a zealous advocate to address negative publicity. Furthermore, in a day and age where most people get their news from social media outlets, it would seem that attorneys representing high-profile clients must learn to address these outlets in order to best defend their clients. Yet, in 2012, when George Zimmerman’s defense team did just that, ethical questions mounted.

Certainly not all interactions with the media are contrary to a client’s interest, even when the lawyer benefits personally from the media exposure. Mark O’Mara’s representation of Zimmerman and use of social media made him a household name and a CNN legal analyst.<sup>65</sup> But more

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61. Thompson, *supra* note 55.

62. Sam Kennedy & Andrew McGill, *Sandusky’s Lawyer Under Spotlight*, MORNING CALL (Allentown, Pa.) (Nov. 16, 2011), [http://articles.mcall.com/2011-11-16/news/mc-penn-state-lawyer-20111116\\_1\\_jerry-sandusky-lawyer-top-notch-attorney](http://articles.mcall.com/2011-11-16/news/mc-penn-state-lawyer-20111116_1_jerry-sandusky-lawyer-top-notch-attorney).

63. Abby Rogers, *Here’s Why Joe Amendola Might Be the Worst Lawyer to Represent Jerry Sandusky*, BUSINESS INSIDER (June 20, 2012, 1:14 PM), <http://www.businessinsider.com/heres-why-joe-amendola-might-be-the-worst-lawyer-to-represent-jerry-sandusky-2012-6#ixzz3KD0WILAH>.

64. Kennedy & McGill, *supra* note 62.

65. Mark O’Mara, *George Zimmerman Lawyer, Joins CNN as Legal Analyst*, HUFFINGTON POST (Nov. 6, 2013, 3:45 PM), [http://www.huffingtonpost.com/2013/09/06/mark-omara-cnn-george-zimmerman\\_n\\_3882207.html](http://www.huffingtonpost.com/2013/09/06/mark-omara-cnn-george-zimmerman_n_3882207.html).

importantly, his engagement with the media reshaped much of the public's perception of what happened one February night in Sanford, Florida, when Zimmerman unquestionably shot and killed Trayvon Martin.

After Zimmerman's original two lawyers resigned from the case, O'Mara agreed to represent Zimmerman.<sup>66</sup> At the time, O'Mara was widely recognized "in central Florida as a low-key legal analyst on television who frequently commented on the trial . . . of Casey Anthony."<sup>67</sup> He took the case after being recommended by another prominent attorney, Mark NeJame, who had provided the Zimmermans with a list of attorneys to consider.<sup>68</sup> NeJame had recommended O'Mara because he was known for having "strong attributes like being compassionate, extremely smart, media savvy and very professional," as well as a "measured approach . . . [that] would help keep unbridled passions contained."<sup>69</sup>

Keeping unbridled passions contained may very well have been the motto of the O'Mara defense team. It was no secret that the racial tensions surrounding this case were especially high.<sup>70</sup> It began with the State's affidavit of probable cause, which alleged "Zimmerman profiled and confronted Martin and shot him to death while Martin was committing no crimes" and affirmed what many had already conjectured: a racist shooter killed an innocent young black child.<sup>71</sup> To compound this, images were plastered across television screens, the Internet, and newspapers of a twelve-year-old Trayvon Martin in a red Hollister shirt contrasted with the scruffy-looking twenty-eight-year-old George Zimmerman. To make matters worse, on the TODAY Show, NBC aired a segment in which they played an *edited* version of the 911 calls surrounding the Trayvon Martin case.<sup>72</sup> In the edited version, "Zimmerman sounds like he thinks Martin is up to no good *because* Martin is black."<sup>73</sup> The unedited version, however,

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66. Serge Kovalski & Lizette Alvarez, *A Day in Court and a New Lawyer for Defendant in Martin Case*, N.Y. TIMES (Apr. 12, 2012), [http://www.nytimes.com/2012/04/13/us/george-zimmerman-to-appear-in-court.html?\\_r=0](http://www.nytimes.com/2012/04/13/us/george-zimmerman-to-appear-in-court.html?_r=0).

67. *Id.*

68. *Id.*

69. *Id.*

70. *State of Florida v. George Zimmerman*, N.Y. TIMES (Apr. 12, 2012), <http://www.nytimes.com/interactive/2012/04/12/us/13shooter-document.html>.

71. *Id.* (showing affidavit of probable cause).

72. Michael Brendan Dougherty, *NBC Edited the 911 Tape Audio and Made George Zimmerman Sound Racist*, BUSINESS INSIDER (Apr. 2, 2012, 8:01 PM), <http://www.businessinsider.com/nbc-is-investigating-how-its-news-edited-the-audio-to-make-george-zimmerman-look-really-racist-2012-4>.

73. *Id.*

reveals that “Zimmerman says he ‘looks black’” when he is asked to describe Martin’s race, not when he is trying to justify why he thinks Martin is ‘up to no good.’”<sup>74</sup> Despite NBC apologizing to Zimmerman for this error, the damage had been done.<sup>75</sup>

The damage could be seen across Facebook, Twitter, YouTube, and other media outlets. “Among the first to publicize the story was nationally syndicated radio host, Michael Baisden who sent a message to his 65,000 Twitter followers and 585,000 Facebook fans [stating,] ‘Unarmed 17-year-old boy shot by neighborhood watch captain in Sanford, FL outside of Orlando.’”<sup>76</sup> Michael Skolnik, current president and former editor-in-chief of GlobalGrind.com, “credits social media with making Trayvon Martin a household name. ‘Young people using social media forced traditional media to pay attention,’ Skolnik said.”<sup>77</sup> According to an analysis from social-media software Topsy Pro, Skolnik’s hashtag #JusticeForTrayvon was used 906,000 times over the course of the year following the shooting.<sup>78</sup> In that same year, #TrayvonMartin and #Trayvon were tweeted roughly eighteen million times and #GeorgeZimmerman and #Zimmerman were tweeted roughly fifteen million times.<sup>79</sup> Quickly, the movement gained momentum with celebrities, athletes, and TV and radio personalities donning their red hoodies, “blacking out” their social media avatars, and tweeting or posting about Trayvon Martin.<sup>80</sup>

Recognizing the growing hostility towards his client, O’Mara turned to the media. He stated, “While it can be safely argued that it is largely the question of civil rights issues that has made the George Zimmerman case a national—and international—story, there is nothing to support the

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74. *Id.*

75. *Id.*

76. Mike Schneider, *George Zimmerman Trial: Social Media Infiltrates Trial*, HUFFINGTON POST (July 7, 2013, 11:12 AM), [http://www.huffingtonpost.com/2013/07/07/george-zimmerman-trial-social-media-infiltrates-trial\\_n\\_3557734.html](http://www.huffingtonpost.com/2013/07/07/george-zimmerman-trial-social-media-infiltrates-trial_n_3557734.html).

77. Sullivan, *supra* note 13.

78. *Id.*

79. *Id.*

80. Crystal Bell, *Trayvon Martin Celebrity Reactions: Spike Lee, Sherri Shepherd React to Florida Teen’s Death*, HUFFINGTON POST (Mar. 23, 2012), [http://www.huffingtonpost.com/2012/03/23/trayvon-martin-celebrity-reactions-shooting\\_n\\_1376065.html](http://www.huffingtonpost.com/2012/03/23/trayvon-martin-celebrity-reactions-shooting_n_1376065.html); *Celebrities Wear Hoodies in Support of Trayvon Martin*, BET, <http://www.bet.com/celebrities/photos/2012/03/celebrities-wear-hoodies-in-support-of-trayvon-martin.html#!032612-sports-trayvon-martin-jeezy-plies>; Sam Schlinkert & Brian Rises, *Trayvon Martin Killing Inspires 13 Tweets from Celebrities*, DAILY BEAST (Mar. 21, 2012, 5:52 PM), <http://www.thedailybeast.com/articles/2012/03/21/trayvon-martin-killing-inspires-13-tweets-from-celebrities.html>.

contention of racism in the Zimmerman case.”<sup>81</sup> Even so, O’Mara’s opinion did little to ease racial tensions, thereby requiring the defense team to rethink their strategy and focus their efforts not only on defending Zimmerman at trial but in the court of social media as well. Jose Baez, the defense attorney who successfully defended Casey Anthony, noted, “[A]s much as the lawyers don’t want this to be about race, it is. I don’t think it should be avoided in any of the discussion. It should be tackled head on. I think that’s what makes this case unique.”<sup>82</sup> Tackling it head on was the only option left.

With every Facebook post, comment, retweet, and hash tag, O’Mara realized that any hope of acquittal for his client was dwindling.<sup>83</sup> Accordingly, O’Mara along with his communications director, Shawn Vincent, crafted a plan to respond to the information and misinformation circulating in both traditional and social media.<sup>84</sup> Their first priority was to shut down all of Zimmerman’s personal social media sites, explaining in a statement that

[i]t is not in Mr. Zimmerman’s best interests to speak publicly about this case, and as he has hired us to represent him, we feel part of our responsibility to our client is to provide a voice for Mr. Zimmerman, but only when it is appropriate to do so. Please understand that, with pending criminal charges, he cannot speak freely concerning these issues.<sup>85</sup>

Following the removal of Zimmerman’s personal social media accounts, in an unprecedented move, O’Mara’s team created their own social media outlets, which included an official website, Twitter handle, Facebook account, and blog. The same outlets that were used to attack Zimmerman

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81. Trymaine Lee, *Mark O’Mara, George Zimmerman Attorney: Race Is Not the ‘Elephant In The Room’ in Trayvon Martin Case*, HUFFINGTON POST (Oct. 11, 2012), [http://www.huffingtonpost.com/2012/10/11/mark-omara-george-zimmerman-lawyer-trayvon-martin\\_n\\_1958874.html](http://www.huffingtonpost.com/2012/10/11/mark-omara-george-zimmerman-lawyer-trayvon-martin_n_1958874.html).

82. David Ovalle, *Jury Selection to Begin in Trayvon Martin Killing*, MIAMI HERALD (June 9, 2013), <http://www.miamiherald.com/news/state/florida/trayvon-martin/article1952344.html>.

83. Sullivan, *supra* note 13.

84. Rebecca Silinski, *Conversations with George Zimmerman’s Lawyer: Race, the Media, and the Trayvon Martin Case*, DUQUESNE LAW., Fall/Winter 2014, <http://law.duq.edu/news/conversations-george-zimmermans-lawyer-race-media-and-trayvon-martin-case>.

85. Edward B. Colby, *George Zimmerman’s Legal Team Rolls Out New Social Media Sites*, NBC MIAMI (Apr. 30, 2012, 8:02 PM), <http://www.nbcmiami.com/news/local/George-Zimmerman-Legal-Team-Rolls-Out-New-Social-Media-Sites-149569335.html>.

became the outlets by which O'Mara tried his case in the court of social media, and people noticed. Scott Greenfield, a New York attorney and blogger, responded to their strategy by stating, "They just broke through a major wall by saying the way to defend is to start a website and put out news . . . ." <sup>86</sup>

First, in late April 2012, O'Mara's team created a website, [gzlegalcase.com](http://gzlegalcase.com), in response to the revelation that three other websites, all in Zimmerman's name, existed when only one was actually owned by Zimmerman.<sup>87</sup> The new website had two main purposes: (1) to post media releases about the case and (2) to provide a secure website to raise funds.<sup>88</sup>

Second, the Twitter handle, [@gzlegalcase](https://twitter.com/gzlegalcase), was created on April 24, 2012.<sup>89</sup> Within hours of launching, the Twitter handle garnered 785 followers and, by late 2014, amassed a total of 8,485 followers. The Twitter account's purpose was to supplement the defense website since it was another means to connect followers to the main website. Occasionally, Twitter was used to send out short public notifications that otherwise did not require a media release. For instance, on April 29, 2012, [@gzlegalcase](https://twitter.com/gzlegalcase) tweeted, "Post answering questions regarding discovery deadline in George #Zimmerman case: [ow.ly/aAFJn](http://ow.ly/aAFJn)."<sup>90</sup> On April 26, 2013, the defense team tweeted, "Defense documents in regards to motions for sanctions in #Zimmerman case. <http://ow.ly/ks3SX>."<sup>91</sup> And on July 12, 2013, they tweeted, "#zimmerman is in the hands of the jury. The defense team will comment after the jury has rendered a verdict."<sup>92</sup>

Lastly, rounding out the trifecta of social-media outlets, the defense team created a Facebook page in late April 2012. On [gzlegalcase.com](http://gzlegalcase.com), the defense team explained that Facebook initially served to: (1) "discredit[] and eliminate[e] fraudulent websites and social profiles"; (2) "provid[e] a

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86. Adam Hochberg, *George Zimmerman's Lawyers Hope to Win Trial by Social Media in Trayvon Martin Case*, POYNTER (May 7, 2012), <http://www.poynter.org/news/mediawire/172840/george-zimmermans-lawyers-hope-to-win-trial-by-social-media-in-trayvon-martin-case/>.

87. *Statement from Mark O'Mara Regarding the Funds Raised by George Zimmerman's Website*, GZLEGALCASE (Apr. 26, 2012), <http://gzlegalcase.com/index.php/press-releases/6-example-press-release>.

88. *Id.*

89. [@GZlegalCase](https://twitter.com/gzlegalcase), TWITTER, <https://twitter.com/gzlegalcase>.

90. [@GZlegalcase](https://twitter.com/GZlegalCase/status/196717219571437570), TWITTER (Apr. 29, 2012, 4:46 PM), <https://twitter.com/GZlegalCase/status/196717219571437570>.

91. [@GZlegalcase](https://twitter.com/GZlegalCase/status/327771057266233345), TWITTER, (Apr. 26, 2013, 8:08 AM), <https://twitter.com/GZlegalCase/status/327771057266233345>.

92. [@GZlegalcase](https://twitter.com/GZlegalCase/status/355755736858505216), TWITTER, (July 12, 2013, 1:29 PM), <https://twitter.com/GZlegalCase/status/355755736858505216>.

forum for communication with the law firm”; (3) “acknowledge[e] the larger significance of the case.”<sup>93</sup> However, after only four months of activity, the defense team shut down the Facebook page because of “diminishing returns” and increasing concerns.<sup>94</sup> A press release posted on [gzlegalcase.com](http://gzlegalcase.com) explained that, despite its initial purpose, the defense team shut down the Facebook profile because it was not helping them reach one of their “published goals” of “[d]iscouraging [s]peculation.”<sup>95</sup> The biggest challenge the Zimmerman Defense Team faced in operating a Facebook page was that they were unable to post information without allowing comments:

With comments active, each thread becomes a discussion forum. While we are not responsible for the comments people leave on our page, because we have the ability to delete comments, what we choose not to delete reflects on the defense team. Since we can ban users from posting on the page, who we choose not to ban reflects on the defense team. Admittedly, it does not always reflect well, and that is a concern for the defense.<sup>96</sup>

In addition to the social media outlets, the O’Mara team also traversed into treacherous territory when Zimmerman made a television appearance, pretrial, on the *Sean Hannity Show*—a risky decision according to most criminal defense lawyers.<sup>97</sup> The day after the interview, O’Mara spoke to reporters regarding his decision to allow Zimmerman to appear on Hannity.<sup>98</sup> While ordinarily, he explained, you never have a client do an interview, in this case it was out of necessity.<sup>99</sup> O’Mara also explained that they wanted to tell people not to rush to judgment—their mantra from day one.<sup>100</sup> Yet, O’Mara candidly admitted that having his client appear on national television opened him up to a myriad of criticism and could have

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93. *Defense Closing the George Zimmerman Legal Case Page on Facebook*, GEORGE ZIMMERMAN LEGAL CASE (Aug. 22, 2012), <http://gzlegalcase.com/index.php/press-releases/45-zimmerman-defense-closes-the-george-zimmerman-legal-case-page-on-facebook>.

94. *Id.*

95. *Id.*

96. *Id.*

97. *George Zimmerman’s Exclusive Full Interview with Sean Hannity*, FOX NEWS (July 18, 2012), <https://www.youtube.com/watch?v=kaua8aAUpOs>.

98. *Mark O’Mara Speaks About Zimmerman’s Television Interview: Part 1*, WESH ORLANDO (July 19, 2012, 3:53 PM), <http://www.wesh.com/trayvon-martin-extended-coverage/Mark-O-Mara-speaks-about-Zimmerman-s-television-interview-Part-1/15608980#!bSI3Zs>.

99. *Id.*

100. *Id.*

easily blown up in their faces.<sup>101</sup> It would further be revealed, long after the case was over, that Zimmerman was insistent on the Hannity interview over O'Mara's advice to the contrary.<sup>102</sup>

While concerns stemming from *The Sean Hannity Show* appearance were valid—remember the *Rock Center* interview Amendola had his client give—they proved unmerited. On July 13, 2013, after deliberating for fifteen hours over the course of two days, the six-person Florida jury returned a verdict in favor of Zimmerman.<sup>103</sup> Despite the prosecution's attempt to silence O'Mara on three separate occasions, the judge overruled them each time and seemingly sanctioned his strategy.<sup>104</sup> The Social Media Defense had worked: O'Mara had mastered the “monster that will devour you if you screw up.”<sup>105</sup>

Notwithstanding its success, the Florida Bar Association initiated an investigation into the strategy used by the defense team.<sup>106</sup> Before employing the social media defense, O'Mara had contacted the Florida Bar Association to seek its approval after explaining the situation, or problem, and the tentative plan for handling the case.<sup>107</sup> At that time, however, the Florida Bar Association had neither encountered nor addressed this issue and offered little more than cautionary instructions to tread carefully.<sup>108</sup> Thus, O'Mara was left to determine how to balance ethical concerns and an

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101. *Id.*

102. Mark O'Mara, Remarks at Duquesne University School of Law, at Conversations with George Zimmerman's Lawyer: Race, the Media, and the Trayvon Martin Case (Oct. 27, 2014) [hereinafter O'Mara, Remarks at Duquesne] (remarks at program held by Duquesne University School of Law featuring two panels discussing the case and surrounding issues).

103. Yamiche Alcindor, *George Zimmerman Found Not Guilty*, USA TODAY (July 14, 2013), <http://www.usatoday.com/story/news/nation/2013/07/13/george-zimmerman-found-not-guilty/2514163/>.

104. Graham Winch, *Trial 2.0: Is FL v. Zimmerman the Future of Justice?*, HLN (June 23, 2013), <http://www.hlntv.com/article/2013/06/10/george-zimmerman-trayvon-martin-internet-fundraising-future-justice-0>.

105. Hochberg, *supra* note 86.

106. *Investigation into O'Mara's Handling of Zimmerman Case Still Open with Florida Bar*, WFTV 9 (Dec. 17, 2013), <http://www.wftv.com/news/news/local/investigation-omaras-handling-zimmerman-case-still/ncNN5/>.

107. Tom Winter & Tracy Connor, *Zimmerman Lawyer Says He Did “Nothing Wrong” Amid Probe*, NBC BAY AREA (Dec. 18, 2013, 12:48 AM), <http://www.nbcbayarea.com/news-national-international/George-Zimmerman-lawyer-Mark-OMara-Investigation-236332311.html>.

108. Mark O'Mara, *A Response to Reports of an Ethics Complaint Regarding My Handling of the Zimmerman Case*, O'MARA LAW BLOG (Dec. 17, 2013), <http://omaralawblog.com/index.php/8-blog/52-a-response-to-reports-of-an-ethics-complaint-regarding-my-handling-of-the-zimmerman-case>.

acquittal for his client—something Joseph Flood, a civil attorney, said O'Mara could do well. In a statement, Mr. Flood commented, "I think he'll be able to manage both the criminal prosecution side, which is going to be a big task, but also just as importantly he'll be able to manage the media side of it. He will come up with the best defense that Mr. Zimmerman is entitled to get."<sup>109</sup>

While making clear that he normally avoids speaking to the media because it rarely yields positive results, the Zimmerman case was, in his words, "utterly unique."<sup>110</sup> This uniqueness is what O'Mara maintains qualified his actions under Model Rule 3.6(c), the exception to the general rule which provides that an attorney may make a statement to rebut the "substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client."<sup>111</sup>

Even with ethical concerns raised, there was and is still an overwhelming amount of support for O'Mara—even from those who adamantly disagreed with the outcome of the case—when it comes to lawyering in the age of social media. Amy Singer, a Gainesville-based trial consultant who worked for the Casey Anthony defense team, heralded O'Mara saying, "This is a brilliant move on his part. . . . By engaging the public online, you get a lot of comments, a lot of perspectives, a lot of discussion."<sup>112</sup> Even New York University law professor, Stephen Gillers, an authority on ethics, supported O'Mara when he stated, "There's no problem with the vehicle . . . the site appears to recognize the limits imposed by rules forbidding certain public comments by lawyers associated with a case. I did not see anything untoward on it . . . it seems he knows the boundaries."<sup>113</sup> Whether he knew what his boundaries were or whether he was willing to set new boundaries to protect his client, in a statement on the O'Mara Law Blog website, O'Mara made clear, "Not only have I done nothing wrong in regards to how we managed the defense fund and the online presence for the Zimmerman

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109. *Zimmerman's New Attorney: Who Is Mark O'Mara?*, NBC NEWS (Apr. 12, 2012, 10:15 AM), [http://usnews.nbcnews.com/\\_news/2012/04/12/1163332-zimmermans-new-attorney-who-is-mark-omara?lite](http://usnews.nbcnews.com/_news/2012/04/12/1163332-zimmermans-new-attorney-who-is-mark-omara?lite).

110. O'Mara, Remarks at Duquesne, *supra* note 102.

111. *Id.*

112. Jeff Weiner, *George Zimmerman: Defense Enters Twitter, Facebook Conversation*, ORLANDO SENTINEL (Mar. 1, 2012, 12:07 AM), [http://articles.orlandosentinel.com/2012-04-30/news/os-george-zimmerman-defense-website-20120430\\_1\\_social-media-new-website-twitter-accounts](http://articles.orlandosentinel.com/2012-04-30/news/os-george-zimmerman-defense-website-20120430_1_social-media-new-website-twitter-accounts) (internal quotations omitted).

113. Emily Bazelon, *The Sarah Palin Defense Strategy*, SLATE (May 4, 2012, 1:22 PM), [http://www.slate.com/articles/news\\_and\\_politics/crime/2012/05/george\\_zimmerman\\_s\\_social\\_media\\_strategy\\_.html](http://www.slate.com/articles/news_and_politics/crime/2012/05/george_zimmerman_s_social_media_strategy_.html).

case, but I think we also set the standard for how these matters should be handled in future high-profile cases that warrant such measures.”<sup>114</sup>

As trial by media becomes increasingly common and as neither law nor psychology has provided a way to overcome the biasing effects of pretrial coverage,<sup>115</sup> a defense strategy that includes public commentary will be more standard. In response, ethical rules need to be adapted to recognize a lawyer’s limits and obligations in this new reality.

### *III. Modern Media as a Conflict of Interest*

Clients undeniably have the right to prevent their attorneys from speaking to the media (or anyone) about their cases, but ethical rules do not adequately recognize that the advice clients receive from their lawyers on the wisdom of a media strategy is potentially tainted by the lawyer’s self-interest. So long as a lawyer does not attempt to influence the outcome of a case by speaking to the media or speak without the client’s permission, the Model Rules have not been violated. Yet, there is a fear that a lawyer’s interaction with the media will harm the client’s case either directly, as in Jerry Sandusky’s case, or indirectly, by undermining the attorney-client relationship. As commentators have observed, “Arguably, the more lawyers play to the press, the less clients will trust their motives.”<sup>116</sup>

Notwithstanding the potential pitfalls of talking to the media, ethical guidelines must speak in terms of caution, not prohibition. While it may be per se ineffective assistance of counsel to *ever* appear on Nancy Grace, even an advisory comment preferring a “no comment” policy for all media outlets would fail to recognize the occasional necessity of engaging the media. Lawyers must have the flexibility to use the media when it is necessary. At the same time, there must be some method of curbing the lawyer’s self-interest in publicity when it does not coincide with the client’s interest.

Furthermore, not all media outlets are created equal. The lawyer’s self-serving interest in coverage is less acute when interviewed by a local newspaper reporter or asked to do a background interview for a national outlet. Rules that seem necessary or appropriate when a lawyer is offered time in an international spotlight would be onerous, unnecessary, or even silly when he is considering an interview with a hometown newspaper. As

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114. O’Mara, *supra* note 108.

115. See Robertson et al., *supra* note 11.

116. Kevin Cole & Fred C. Zacharias, *The Agony of Victory and the Ethics of Lawyer Speech*, 69 S. CAL. L. REV. 1627, 1667 (1996).

such, rules for handling media must be flexible enough to account for these differences.

The present rules, however, are inadequate. The Model Rules do nothing to prompt a lawyer to consider or address the tension between his interest in his own media profile and the most effective representation of his client. Model Rule 3.6, the only ethics rule to address counsel's statements to the press, places no meaningful limit on attorney comments to the media; it merely forbids lawyers from using coverage to prejudice a case in their client's favor, while simultaneously permitting a lawyer to respond to prejudicial publicity. In a world in which media has become entertainment, prejudicial pretrial publicity is the norm. A lawyer, in a case of any degree of profile, could defend media comments as nothing more than a reaction to unfair negative press. Practically speaking, the present version of Rule 3.6 imposes very few limits on the ability of lawyers to try their case in the media.

The larger concern, however, goes entirely unmentioned. While weak rules attempt to prevent a lawyer from using the media to get an unfair advantage over an opponent, nothing other than the client's insightful fortitude prevents a lawyer from using the media to advance his own agenda at the expense of the client. Model Rule 1.8 identifies a number of conflicts that threaten the attorney-client relationship. The rule does not, however, recognize many lawyers' desires to become high-profile lawyers by appearing on national television and being quoted in internationally-read publications. Interestingly, Rule 1.8 does recognize that a lawyer's interest in the literary rights to a client's story may adversely affect the representation, but the rules raise no concern whatsoever about how the possibility of international media attention may skew the lawyer's view of the best interest of his client.

In spite of its limitations, the scheme of Rule 1.8 provides a nice model for addressing the appropriateness of the lawyer becoming a part of the media's coverage of a high-profile case. When lawyers find they have potentially different goals than their clients, they are to inform their clients of the prudence of seeking the advice of a lawyer who is not interested in the matter. In this context, however, media consultants may be better equipped than lawyers to determine whether an appearance by a lawyer or the client would further the goals of the representation. An advisory rule that required lawyers to advise their clients of the wisdom of involving media consultants in cases involving high-profile coverage would develop a culture of lawyers seeking advice before they comment. In seeking this advice, lawyers would also insulate themselves from criticisms that their

actions are self-serving and have a ready answer for challenges made in ineffective-assistance-of-counsel proceedings.

*A. Model Rules Consideration of Comments to the Media*

At one point, ethical rules imposed considerably greater restrictions on comments to media than they do in their present form. Model Rule 3.6 has always provided the only limitation on lawyers' comments to the media and prohibits comments that have a "substantial likelihood of prejudicing an adjudicative proceeding."<sup>117</sup> Prior to 1995, the Model Rules limited a lawyer's public comments to describing the "general" nature of the client's defense and prohibited "elaboration" on the nature of the defense.<sup>118</sup> A modification in the rules following the landmark case of *Gentile v. State Bar of Nevada* permitted lawyers to respond to prejudicial publicity with no proscription on "elaboration," opening the door for lawyers to spend more time in front of network cameras.<sup>119</sup> Like the pre-1995 version of Rule 3.6, the present version raises concerns only about a lawyer's comments harming an opponent's case. With this modification requiring less circumspection by lawyers, the opportunity for self-promotion increased and, with it, the potential for conflict between the interests of the client and lawyer grew. Yet, Rule 3.6 remains the only rule regulating lawyers' comments to the media.<sup>120</sup>

In *Gentile*, the Nevada Bar Association concluded that an attorney had violated the state's version of Model Rule 3.6 when he held a press conference following his client's arrest. During this press conference, Dominic Gentile stated that his client was innocent and that dishonest police officers were scapegoating him rather than arresting the truly guilty parties.<sup>121</sup> The Nevada Bar Association held that there was a "substantial likelihood" that these statements would "materially prejudice an adjudicative proceeding" and sanctioned Gentile.<sup>122</sup>

However, the Supreme Court concluded that interpreting Gentile's speech to run afoul of Model Rule 3.6 was contrary to the First Amendment

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117. Martin H. Samson, *What Lawyers Can and Cannot Say in and About Litigations*, N.Y. ST. B. ASS'N J., July/Aug. 2010, at 10, 12 (citing Rule 3.6, and its state-adopted counterpart, as the ethical rule which provides the limitations imposed on an attorney's speech for trial publicity).

118. Christopher A. Brown, *The Worsening Problem of Trial Publicity: Is "New" Model Rule 3.6 Solution or Surrender?*, 29 IND. L. REV. 379, 386 (1995).

119. *Id.*

120. Samson, *supra* note 117, at 12.

121. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1033 (1991).

122. *Id.*

because there was an insufficient basis for believing that Gentile's statements would actually prejudice the state's prosecution.<sup>123</sup> Before this decision, attorneys were only permitted to provide a "general" description of the defense their clients planned to offer and were not permitted to "elaborate" further. Obviously, *Gentile* found that the First Amendment permitted a much more robust statement by an attorney representing a criminal defendant. Model Rule 3.6 was therefore modified to remove these limitations and to expressly permit a lawyer to respond to prejudicial statements.

After 1995, however, Model Rule 3.6 still remained the only provision governing statements to the press and still only concerned itself only with the unfair impact a lawyer's statement might have on the fair consideration of the matter before an adjudicative body. In other words, Model Rule 3.6 contemplates now, as it did before 1995, only the concern that lawyers could run afoul of the rules of ethics by attempting to advance their client's interests. With the modern media's interest in giving lawyers airtime and with the modification of Rule 3.6 giving lawyers greater latitude to be part of the coverage of a case, a new concern arose for which the rules have yet to account: a conflict between the lawyer's media profile and the lawyer's undivided representation of his client.

#### *B. Conflicts of Interest, Literary, and Media Rights*

The Model Rules recognize both the generic problem of conflicts of interest and the specific conflict that exists when a lawyer seeks literary or media rights to a client's case. The conflict of interest that exists when a lawyer is offered national press coverage poses a far greater risk to a client's case than the possibility that a lawyer might write a novel or screenplay, yet the rules fail to regulate a lawyer's media appearances during the representation.

There are explicit provisions restricting a lawyer's conduct during the course of representation—beginning with the first interaction between the client and attorney, continuing throughout the trial, and in many cases, extending indefinitely.<sup>124</sup> When an attorney violates one of these important

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123. *Id.* at 1057.

124. The Model Rules' prohibition on conflicts of interest finds its roots in the early Biblical principle that a man cannot serve two masters. *People v. Corona*, 145 Cal. Rptr. 894, 915 (Cal. Ct. App. 1978) ("[B]y entering into a literary rights contract trial counsel created a situation which prevented him from devoting the requisite undivided loyalty and service to his client. From that moment on, trial counsel was devoted to two masters with conflicting interests—he was forced to choose between his own pocketbook and the best

ethical obligations, a battery of explicit sanctions awaits the attorney, whose role is that of a “fiduciar[y] in the highest sense.”<sup>125</sup>

The general rule governing conflicts of interest, Model Rule 1.7, sets forth a two-prong test for evaluating conflicts.<sup>126</sup> “First, the attorney must reasonably believe that the potential conflict will not jeopardize the client’s representation. . . . Second, even if he believes it does not, the attorney must advise the client of the potential conflict and seek informed consent.”<sup>127</sup>

Rule 1.8 governs specific actions by lawyers that may give rise to a conflict of interest.<sup>128</sup> If a lawyer is anticipating engaging in a business transaction with a client, the lawyer must offer terms that are fair and reasonable, and more importantly, the attorney must advise the client that he or she should seek an independent lawyer’s advice about the transaction.<sup>129</sup> Finally, the client must sign the terms of the agreement, and that document must indicate whether the client sought the advice of independent counsel as advised.<sup>130</sup>

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interests of his client, the accused.”); CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 313 (1986) (“Conflict of interest problems are probably the most pervasively felt of all the problems of professional responsibility that might haunt lawyers.”); Patrick E. Donovan, *Serving Multiple Masters: Confronting the Conflicting Interests That Arise in Superfund Disputes*, 17 B.C. ENVTL. AFF. L. REV. 371, 372 (1990) (“The continuing growth and diversification of today’s law firms aggravate this problem and have made conflicts checks a necessity, rather than a superfluous precaution.”); Kevin McMunigal, *Rethinking Attorney Conflict of Interest Doctrine*, 5 GEO. J. LEGAL ETHICS 823 (1992) (“[M]uch of attorney conflict of interest doctrine is ‘arcane, a subspecialty whose interpretation can seem as abstruse as explicating the Dead Sea Scrolls.’”) (internal citation omitted).

125. Note, *Sanctions for Attorney’s Representation of Conflicting Interests*, 57 COLUM. L. REV. 994, 994 (1957).

126. Martha McConnell Bush, *Letting Go of the Tiger’s Tail: Recognizing Conflicts of Interest*, 19 ARIZ. ST. L.J. 51, 53 (1987) (explaining this two-prong test); MODEL RULES, *supra* note 1, at r. 1.7(b)(1), (4) (“Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client . . . and (4) each affected client gives informed consent, confirmed in writing.”)

127. Bush, *supra* note 126, at 53; *see also* MODEL RULES, *supra* note 1, at r. 1.7(b); Lee E. Hejmanowski, *An Ethical Treatment of Attorneys’ Personal Conflicts of Interest*, 66 S. CAL. L. REV. 881, 907 (1993) (“For a client’s consent to be valid, an attorney must overtly and completely disclose the situation to the client, though exactly what information the attorney must disclose for courts to consider the consent adequate is not entirely clear.”) (internal citation omitted).

128. MODEL RULES, *supra* note 1, at r. 1.8.

129. *Id.* at r. 1.8(a)(1)-(2).

130. *See id.* at r. 1.8(a)(3).

Rule 1.8 further recognizes the unique situation of a business deal between lawyers and their clients for the media rights to the facts of their client's cases. In section 1.8(d), a lawyer is prohibited from "prior to the conclusion of representation . . . [making] or negotiat[ing] an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation."<sup>131</sup>

Courts have not limited this requirement in any way, recognizing that lawyers are prohibited from entering into such media and literary contracts during the course of the representation, as such a contract may skew the representation.<sup>132</sup> The more attention the case draws, the greater the value of the literary and media rights. It is certainly possible that the worse the client appears, the more interesting his story. As one court observed: "[A] lawyer-author's interest in the commercial viability of the client's story may conflict with the client-defendant's interest in, for example, plea bargaining or acquittal" and a "lawyer-authored publication[] may cause the evidentiary attorney-client privilege to be waived, resulting in adverse legal consequences for the client in subsequent criminal or civil proceedings."<sup>133</sup> However, once a case has been resolved, thereby terminating the client-lawyer relationship, it is not uncommon for a lawyer to publish a book and, in doing so, use their clients as a springboard to fame.<sup>134</sup> In fact, "[t]here is no shortage of criminal defense lawyers seeking book and movie deals to capitalize on the insider details of sensational crimes."<sup>135</sup>

Courts rarely find that these literary and media deals with clients create a conflict undermining the attorney's ability to effectively represent the client, but they invariably condemn such deals as unethical.<sup>136</sup> For instance,

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131. *Id.* at r. 1.8(d).

132. Ría A. Tabacco, *Defense Ethics: A Proposal to Revise the ABA Model Rule for Criminal Defense Lawyer-Authors*, 83 N.Y.U. L. REV. 568, 574 (2008).

133. *Id.* at 569.

134. *See* sources cited *supra* note 2.

135. Tabacco, *supra* note 132, at 574, 603 n.4 (arguing that while the Model Rules acknowledge, through 1.8(d), the serious problems stemming from a lawyer getting literary rights before the conclusion of the trial, the author does not believe the rules go far enough to minimize lawyers' incentives to promote their own interests above the interests of their clients and listing nine cases where criminal defense lawyers secured literary and movie rights).

136. *See, e.g.,* *Hearst v. United States*, 638 F.2d 1190, 1197-98 (9th Cir. 1980) ("Moreover, all courts before which the issue has been raised have disapproved the practice of attorneys arranging to benefit from the publication of their clients' stories."); *Wojtowicz v. United States*, 550 F.2d 786, 793 (2d Cir. 1977) ("While we do not regard the practice as worthy of emulation, we cannot say that it rendered counsel's representation constitutionally defective."); *cert. denied*, 431 U.S. 972 (1977); *Ray v. Rose*, 535 F.2d 966, 974 (6th Cir.

in *People v. Corona*, the California Court of Appeals ordered a retrial of a criminal defendant accused of murdering twenty-five migrant workers.<sup>137</sup> The court explained that counsel created a conflict by entering into a contract for literary rights requiring him to split his loyalties.<sup>138</sup> When this occurred, the attorney could not provide the “undivided loyalty and service to his client” due to him under the Model Rules.<sup>139</sup> Instead, the attorney, who was “devoted to two masters with conflicting interests . . . was forced to choose between his own pocketbook and the best interests of his client.”<sup>140</sup> In order to “strike[] a better balance between the client’s interest in effective representation, the lawyer’s interest in self-promotion, and the public’s interest in a transparent criminal justice system,”<sup>141</sup> the court opined, a rule should be adopted that would require a significant waiting period, two years for example, before publication.<sup>142</sup> This delay would ensure that the client and attorney focus on the immediate need of defending the case.<sup>143</sup>

Similarly, in *Beets v. Collins*, the Fifth Circuit reiterated that a contract granting counsel full literary and media rights to Beets’ story was “almost surely unethical.”<sup>144</sup> In keeping with other courts, scholars, and bar associations, the court denounced a fee arrangement based on receiving literary and media rights because “[v]irtually every court to consider a conflict of interest arising from a media rights contract executed in favor of trial counsel has unequivocally condemned the practice” even when the client signs off on it.<sup>145</sup>

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1976) (“Despite our disapproval of such a fee arrangement, however, its existence does not necessarily mean that Ray was denied effective assistance of counsel.”), *cert. denied*, 429 U.S. 1026 (1976); *Ray v. Rose*, 491 F.2d 285, 289 (6th Cir. 1974) (“We are not willing to sanction a rule that would permit an attorney to subordinate the rights of his client to receive fair and honest legal advice and related service to his own selfish interests.”), *cert. denied*, 417 U.S. 936 (1974); *Maxwell v. Superior Court*, 639 P.2d 248, 257 (Cal. 1982) (“We stress that our opinion connotes no moral or ethical approval of life-story fee contracts.”).

137. 145 Cal. Rptr. 894 (Cal. Ct. App. 1978).

138. *Id.* at 915.

139. *Id.*

140. *Id.*

141. *Tabacco*, *supra* note 132, at 570.

142. *Id.*

143. *Id.* at 571.

144. 986 F.2d 1478, 1488 (5th Cir. 1993).

145. *Id.*

*C. Extending the Principles of Rule 1.8 to Media Appearances*

The rationale for Rule 1.8 and its specific provision relating to literary and media rights should extend to a lawyer's media appearance in a high-profile case because clients are ill-equipped to regulate their lawyer's appearances in the media. Model Rule 1.6(a) prohibits an attorney from "reveal[ing] information relating to the representation of a client unless the client gives informed consent [or] the disclosure is impliedly authorized in order to carry out the representation."<sup>146</sup> In spite of this rule, however, a client may blindly trust the judgment of the attorney and tacitly agree to the attorney's proposed strategy for handling most or all aspects of a case.<sup>147</sup>

As other scholars have noted, "[t]he assumption that lawyers in criminal cases can, through rational deliberation, identify and resolve conflicts of interest . . . needs to be reassessed."<sup>148</sup> Conflicts are not always obvious. Robert Burt explained that "[p]rofessionally impermissible conflicts appear whenever an attorney prefers outcomes contrary to the client's wishes."<sup>149</sup> The client, whose lawyer wants to use the client's case to appear in the media, is often unaware of the potential pitfalls of such coverage or

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146. MODEL RULES, *supra* note 1, at r. 1.6(a).

147. Robert A. Burt, *Conflict and Trust Between Attorney and Client*, 69 GEO. L.J. 1015, 1015 (1981) ("Many attorneys and clients mistrust one another notwithstanding their initial hopes and the insistence of the profession's formal norms that a proper relationship requires mutual trust.").

148. Tigran W. Eldred, *The Psychology of Conflicts of Interest in Criminal Cases*, 58 U. KAN. L. REV. 43, 64 (2009) (arguing that "psychological research demonstrates that most lawyers—even those who are acting with the best intentions—are unable consciously to identify many conflicts that exist or to appreciate the corrosive effects that such conflicts may have on decision making," which necessitates reevaluation of the current conflicts rules to align with how lawyers actually behave when faced with a conflict); *see also* GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* 217 (2d ed. Supp. 1990) ("Some of the most difficult problems in the law of lawyering are problems of conflict of interest. These problems are not only pervasive, but intractable; many of them can at best be ameliorated not 'solved.'"); CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 313 (1986) ("Conflict of interest problems are probably the most pervasively felt of all the problems of professional responsibility that might haunt lawyers."); Kevin McMunigal, *Rethinking Attorney Conflict of Interest Doctrine*, 5 GEO. J. LEGAL ETHICS 823, 877 (1992) ("The hard questions which lie at the heart of the subject of attorney conflict of interest concern how to respond to these threats, how to distinguish risks which are acceptable from those which are unacceptable. If attorney conflict of interest doctrine is to provide guidance to lawyers in encountering such risk situations and to courts and disciplinary committees applying conflict of interest standards to lawyers, it must articulate and answer these essential questions.").

149. Burt, *supra* note 147, at 1016.

deferential to the lawyer's assessment of the wisdom of the media attention. The seductive limelight that high-profile press coverage offers to lawyers creates a potential conflict of interest.

Press coverage is sometimes, though clearly not always, in the client's best interest. The Zimmerman and Sandusky cases illustrate this point. A rule prohibiting a lawyer from ever being a part of high-profile coverage is therefore inappropriate—as is a rule that allows a lawyer to alone advise his client of the wisdom of obtaining such coverage. Rule 1.8's requirement that clients be advised of the wisdom of seeking a disinterested lawyer's advice when there is a conflict of interest provides a good model for ensuring that the client's interest is best served by the lawyer's participation in media coverage. The rigor and specific mechanism of Rule 1.8 is not, however, a perfect fit in the context of media coverage.

Media appearances potentially prejudice, or benefit, a client's case in ways that may not be immediately apparent to even a disinterested lawyer. While lawyers understand how facts can affect juries, judges, or prosecutors, they may not understand how a statement given to the press will be edited and interpreted by those delivering the news. Independent advice, therefore, may not necessarily come from another lawyer.

Modern media has produced a variety of professionals who specialize in understanding how messages will appear when filtered through the distorting lens of the press. They are often known as media consultants or public-relations specialists.<sup>150</sup> Whether lawyers have wisely suggested taking the client's story to the press is perhaps best assessed by such an expert rather than a lawyer. Recall Joe Amendola's decision to put Jerry Sandusky on *Rock Center*. Whether the interview was the product of a lawyer who chose his media profile over his client's best interest or of a lawyer inexperienced with the media, the advice of a media expert would have been beneficial to this decision.

Additionally, the degree of the potential conflict of interest varies widely when it is a lawyer's media appearance that creates the tension. A quote in the *Centre Daily Times* does not exactly thrust the lawyer into the intoxicating national limelight, even though most all newspapers are accessible online. Nor does an interview with a local television station serve as a trial run for a permanent position as a commentator for which a lawyer would be willing to leave practice. Such coverage, though, is not utterly free from potential conflicts of interest. Local press attention may generate business or be perceived to generate business. Seeking the

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150. See ALLAN BELL, *THE LANGUAGE OF NEWS MEDIA* (1991).

guidance of a media consultant on the advisability and substance of a quote to the *Sanford Herald* may be wise but is most often excessive and impractical. Few clients would have resources to spend on such advice, especially when the risk of a lawyer's divided loyalty is so low.

Somewhere between a small town newspaper and the TODAY Show, however, there is substantial concern that a lawyer's interest in the coverage will override strategic choices made purely for the sake of advancing the client's cause. A flexible approach is required to alert lawyers to their own, perhaps unrealized, conflict of interest with their clients without requiring them to suggest retaining a financially burdensome and unnecessary consultant when it is not necessary.

An advisory rule that instructs lawyers that high-profile media coverage creates a potential conflict of interest would provide such flexibility. The rule should instruct lawyers that in cases involving substantial press coverage, clients should be advised that it may be desirable to retain a media consultant to assist with the public relations aspect of the representation—specifically to assist in determining whether and how the lawyer should deal with the media. Lawyers should be instructed under this rule that, in cases involving a great deal of media attention, it is wise to instruct clients that lawyers in high-profile cases have benefitted from the publicity and that independent advice of a media expertise would be helpful in assessing the client's best interest.

This version of such a rule would provide lawyers substantial flexibility in determining when a case is considered "high profile" enough to recommend the client's retention of a media expert. The mere existence of such a rule may help lawyers avoid an internal conflict that they may not have otherwise even recognized. Finally, such an advisory rule would provide lawyers a ready mechanism to insulate themselves from criticism and ineffective-assistance-of-counsel claims.

### *Conclusion*

High profile lawyers existed before twenty-four-hour cable news, but the modern news culture has made temporary worldwide fame more accessible, increasing the temptation for lawyers to talk to the media. Just as the media began ramping up its coverage of criminal cases, the Supreme Court gave lawyers greater leeway to speak to the media, and a perfect storm was created. Individual cases now hold the potential to transform a lawyer into a celebrity.

The Model Rules have long recognized the potential for impairment posed by a lawyer who owns a media or literary interest in a client's case.

The risk that a lawyer would handle a case differently to make a book or screenplay more commercially viable seems considerably outweighed by the concern that an attorney would appear on a national television program when it was in the lawyer's, but not the client's, best interest. Model Rule 1.8 requires a lawyer to advise a client whenever there is a conflict of interest between the lawyer and the client and suggests that the client seek the advice of an independent lawyer. The logical extension of this rule to media coverage in high-profile cases should not be ignored, and lawyers should advise their clients in these cases to seek outside advice. Hard lines, however, are difficult to draw in such cases, and lawyers are not necessarily the best sources of advice on an appropriate media strategy. A flexible rule could leave it to lawyers to determine whether the case has attracted sufficient attention to warrant advising their clients of this type of conflict. Finally, independent lawyers may not be the best source of advice for clients. Media strategists may be in a better position than lawyers to determine whether the lawyer's appearance in the coverage is well-advised. Therefore, including such an advisory rule in state ethics codes highlights potential conflicts of interest for lawyers who may not have realized them and provides a ready defense for lawyers facing public criticism or ineffective-assistance-of-counsel claims.