

SHIFTING PUBLIC PERCEPTION AND ELIMINATING THE DREADED “NO COMMENT”

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I. INTRODUCTION

It happens every day in communities across the country—either the police arrest someone or one party sues another, and one of these two statements is issued by legal counsel: “No comment”¹ or “We are looking forward to our day in court.”² To a degree, this is understandable. Lawyers must protect their clients’ trial rights and follow the rules of professional responsibility;³ no one wants to tip their hand and reveal their trial strategy. This approach makes for sound legal judgment. However, the court of public opinion differs entirely from the court of law. A good strategy in the courtroom often creates damaging, brand-defining, and long-term ramifications in the public eye. The fallout of failing to define the pretrial narrative can be difficult, if not impossible, to surmount after any case.⁴

It is precisely in this type of situation that communications professionals and attorneys butt heads. By nature, communication individuals want to get information out into the open, define the narrative, and ensure their perspective is part of the conversation. For reasons discussed above, lawyers would prefer, and are sometimes obligated, to say as little as possible.⁵ Thus, conflict is inevitable. There is a middle road—a method that allows both defining context and solid legal strategy to exist in the same place.

¹ “No comment” is a frequent attorney catch-all phrase. For example, see Jessica Holdman, *Lawsuit Accuses SC Legislator of Misleading Former Client, Forging Legal Documents*, S.C. DAILY GAZETTE (Apr. 11, 2024, at 16:00 CT), <https://scdailygazette.com/2024/04/11/lawsuit-accuses-sc-legislator-of-misleading-former-client-forging-legal-documents/> [https://perma.cc/H38B-GFQ2].

² See Guy D. McCardle, *Air Force General Faces Court-Martial for Sexual Assault and Misconduct Charges*, SOFREP (May 24, 2024), <https://sofrep.com/news/air-force-general-faces-court-martial-for-sexual-assault-and-misconduct-charges/> [https://perma.cc/XHF3-DXG3].

³ MODEL RULES OF PRO. CONDUCT r. 1.6 (A.B.A. 2001).

⁴ Brian Gallagher, *Leadership Imperative: Understanding Why It’s So Difficult to Change Someone’s Mind*, FORBES (Nov. 17, 2020, at 07:00 ET), <https://www.forbes.com/councils/forbescommunicationscouncil/2020/11/17/leadership-imperative-understanding-why-its-so-difficult-to-change-someones-mind/> [https://perma.cc/N79E-W268].

⁵ See Douglas R. Richmond, *Lawyers’ Rare Privilege of Litigating in the Media*, 128 PENN. ST. L. REV. 701, 750 (2024) (cautioning lawyers “to litigate their cases in court rather than in the media” or risk being “sued for defamation or other tort [claims] arising out of” those communications with the media).

Elevating the story becomes a critical means of protecting legal and brand risks.

While there have been many articles covering the rules and obstacles lawyers face when speaking to the media prior to trial, very few explore how to elevate a client's story in the media while staying within the confines of the professional rules of conduct. Part II of this article will explore the Model Rules of Professional Responsibility when speaking to the media about a pending case and what an attorney can and cannot say about their client and the case pretrial. Similarly, Part III of this article will examine the idea of public perception—how we humans form our perceptions and how we can shift public perception to overcome the initial emotional resonance of a case. This article will suggest a three-step approach for crafting a statement to elevate the client's story and shift the narrative being told by the media. Lastly, Part IV will evaluate the communications strategies (or lack of them) in three different cases—*Depp v. Heard*,⁶ *United States v. Michael Avenatti*,⁷ and *United States v. R. Kelly*⁸—and demonstrate that some proper planning and statement preparation might have made a difference in the outcome of these cases and in the client's overall reputation. Crafting a statement that includes a statement of care, a statement of action, and a statement of perspective improves a client's chances of elevating his or her story and shifting public perception.

II. COMPLYING WITH ETHICAL OBLIGATIONS AND THE RULES OF PROFESSIONAL RESPONSIBILITY: WHAT AN ATTORNEY CAN AND CANNOT SAY ABOUT HIS CLIENT TO THE MEDIA BEFORE TRIAL

Before exploring how to elevate the story, provide necessary context, and mitigate a client's legal and brand risk, it is important to review the boundaries of what attorneys can and cannot say to the media prior to trial.

Lawyers, unlike the media or even any other party involved in a legal matter (client, investigator, witness, concerned third

⁶ *Depp v. Heard*, No. CL-2019-2911, 2022 WL 2342058 (Va. Cir. Ct. June 24, 2022).

⁷ *United States v. Avenatti*, 559 F. Supp. 3d 274 (S.D.N.Y. 2021).

⁸ *United States v. Kelly*, 609 F. Supp. 3d 85 (E.D.N.Y. 2022).

party, etc.), have ethical obligations to their clients and are subject to rules of professional responsibility.⁹ If a lawyer violates a rule or violates client confidentiality, they can be sanctioned by the local bar, be subject to contempt charges, or be sued civilly for defamation by their client or another aggrieved party.¹⁰

Some of the more basic ethical rules require attorneys to:

- (1) Be truthful in their statements to others while representing a client;¹¹ and
- (2) Keep client information confidential unless the attorney receives informed consent from the client.¹²

Even when an attorney complies with the basic ethical rules, obtains client consent, and makes only truthful statements, they must still exercise caution before publicly commenting on a legal matter involving a client—particularly when retained in connection with an ongoing investigation or litigation.¹³ Lawyers are held to this higher standard (though everyone, not just lawyers, would benefit from a think-before-you-speak rule)

⁹ MODEL RULES OF PRO. CONDUCT pmb. ¶ 9 (A.B.A. 2023).

¹⁰ Typical elements of defamation or slander include: (A) Defendant published a statement; (B) with knowledge that the statement is false and defaming to Plaintiff; or (C) with reckless disregard for the truth of the statement. *Sullivan v. Baptist Mem'l Hosp.*, 995 S.W.2d 569, 571 (Tenn. 1999).

¹¹ Attorneys shall not “make a false statement of material fact or law” or “fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.” MODEL RULES OF PRO. CONDUCT r. 4.1 (A.B.A. 2023). According to the commentary to the rule, “[a] misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements.” MODEL RULES OF PRO. CONDUCT r. 4.1 (A.B.A. 2023); MODEL RULES OF PRO. CONDUCT r. 4.1 cmt. 1 (A.B.A. 2023).

¹² “A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).” MODEL RULES OF PRO. CONDUCT r. 1.6(a) (A.B.A. 2023). Disclosures under section (b) include revealing information to prevent reasonably certain death or substantial bodily harm, to prevent the client from committing a crime or fraud, to detect and resolve conflicts of interests, to comply with other laws and court orders and to seek legal advice to ensure compliance with such rules. *See* MODEL RULES OF PRO. CONDUCT r. 1.6(b) (A.B.A. 2023).

¹³ MODEL RULES OF PRO. CONDUCT r. 3.6 cmt. 3 (A.B.A. 2023).

because “lawyers’ statements are likely to be received as especially authoritative” and because “lawyers have special access to information through discovery and client communications.”¹⁴ A lawyer involved in a case who speaks to the press often carries greater credibility than a typical court blogger, whose commentary may rely on limited publicly available information and speculation.¹⁵ The lawyer associated with the actual client involved in the case has inside information and as far as the public knows, speaks the truth (at least from the perspective of the client). In other words, the lawyer’s words carry weight.

Understanding why lawyers are held to a higher standard helps explain why Rule 3.6, restricting what an attorney can say to the public, of the Model Rules of Professional Responsibility was created.¹⁶ The first thing to remember is that ethical rules, evidentiary rules, and court-made rules are designed with fundamental fairness in mind.¹⁷ According to the Sixth Amendment and the Due Process Clause, the defendant is entitled to a fair trial.¹⁸ The prosecution and defense (or plaintiff and defendant in a civil trial) are supposed to “fight” fairly, follow the rules, and exchange evidence and information that the rules say the other side is entitled to (according to discovery obligations).¹⁹ Our adversarial system operates under the premise that if two adversaries “fight” fairly and share their side of the story with the

¹⁴ *Gentile v. State Bar of Nev.*, 501 U.S. 1053, 1078 (1991).

¹⁵ Model Rule 3.6 “applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.” MODEL RULES OF PRO. CONDUCT r. 3.6 cmt. 3 (A.B.A. 2023).

¹⁶ This article focuses on the Model Rules of Professional Responsibility. Every state has their own rules but most states, for the most part, follow the provisions found in the model rules. *See generally* MODEL RULES PRO. CONDUCT r. 3.6 (A.B.A. 2023).

¹⁷ Ethical rules, evidentiary rules, and court-made rules are fundamentally designed to ensure fairness in the legal process. The Federal Rules of Evidence, for example, state that proceedings should be administered “fairly.” FED. R. EVID. 102. Ethical rules require fairness, integrity, and respect for the justice system. MODEL RULES OF PRO. CONDUCT pmbl. ¶¶ 1, 9 (A.B.A. 2023). Likewise, court-made rules and doctrines are developed to promote the fair and efficient administration of justice. 4 WRIGHT & MILLER’S FEDERAL PRACTICE & PROCEDURE § 1029 (4th ed. 2025).

¹⁸ U.S. CONST. amends. VI, XVI.

¹⁹ *See* FED. R. CRIM. P. 16; *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

jury, then the truth will be revealed and the fact-finder (jurors or judge) will identify the truth and make the appropriate decision.²⁰

A. Rule 3.6(c) – When an Attorney Goes on the Defensive and Responds to Negative Publicity

Keeping in spirit with this idea of fundamental fairness, an attorney is entitled to respond before trial to unfair and adverse recent publicity. Model Rule 3.6(c) states that the lawyer can “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.”²¹ This tit-for-tat provision provides a significant amount of leeway as to what a reasonable lawyer would deem necessary to protect a client from the prejudicial effect of recent publicity.²²

The commentary to the rule attempts to clarify that the “responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.”²³ This rule, in effect, gives a green light to defense attorneys who are responding to negative comments made about their client regardless of the messenger.²⁴

For example, following the 2008 death of Staff Sergeant Ryan D. Maseth—an active duty Army Ranger and Green Beret serving with the 5th Special Forces Group at the Special Operations Task Force-Central in the Radwanayah Palace Complex in Baghdad, Iraq—the executor of his estate filed a lawsuit against Kellogg, Brown and Root Services (“KBR”), a defense contractor providing engineering and technology services.²⁵ Maseth was electrocuted while showering in his quarters at the RPC.²⁶ Equipment and

²⁰ See Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 8-9 (1996).

²¹ MODEL RULES OF PRO. CONDUCT r. 3.6(c) (A.B.A. 2023).

²² See *id.*

²³ MODEL RULES OF PRO. CONDUCT r. 3.6 cmt. 7 (A.B.A. 2023). The more narrowly tailored the response to address the attack, the more likely there is no violation of Rule 3.6.

²⁴ See *id.*

²⁵ *Harris v. Kellogg, Brown & Root Servs.*, No. 08-563, 2009, U.S. Dist. LEXIS 18348 (W.D. Pa. Mar. 11, 2009).

²⁶ OFF. OF THE INSPECTOR GEN., DEP’T OF DEF., IE-2009-006, REVIEW OF ELECTROCUTION DEATHS IN IRAQ: PART I - ELECTROCUTION OF STAFF SERGEANT RYAN D. MASETH, U.S. ARMY 1 (2009).

building maintenance at the time was performed under a Logistics Civil Augmentation Program contract with KBR.²⁷

At the time, the media had published a variety of articles that claimed: “(1) KBR’s maintenance work has been ‘linked’ to 18 electrocutions; (2) 18 electrocution deaths were caused by KBR’s ‘shoddy’ electrical work; and, (3) 18 electrocutions occurred in similar circumstances at facilities maintained by KBR.”²⁸ KBR believed these articles to be false and misleading, and in response, issued two press releases to local media outlets, “Facts About Electrocutions in Iraq” and “Summary of Confirmed and Suspected Deaths by Electrocution in Iraq (2003-2009).”²⁹

The plaintiffs later argued that such disclosures by KBR violated local rule 83.1(G) and requested sanctions.³⁰ While reviewing the plaintiffs’ allegations, the district judge pointed out that “any limitation on the attorney’s speech must be narrow and

²⁷ *Id.* at i.

²⁸ *Harris*, 2009 U.S. Dist. LEXIS 18348, at *3.

²⁹ *Id.*

³⁰ Local Rule 83.1(A)—formerly Local Rule 83.1(G)—states:

A lawyer or law firm associated with a civil action shall not during its investigation or litigation make or participate in making an extrajudicial statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication if there is a substantial likelihood that such extrajudicial statement would materially prejudice such civil action and relates to:

1. evidence regarding the occurrence or transaction involved;
2. the character, credibility, or criminal record of a party, witness, or prospective witness;
3. the performance or results of any examinations or tests or the refusal or failure of a party to submit to such;
4. his or her opinion as to the merits of the claims or defenses of a party except as required by law or administrative rule; or
5. any other matter substantially likely to materially prejudice such civil action.

necessary, carefully aimed at comments likely to influence the trial or judicial determination.”³¹ The district judge also quoted *Gentile*, stating that “limitations on attorney speech ‘are aimed at two principal evils: (1) comments that are likely to influence the actual outcome of the trial, and (2) comments that are likely to prejudice the jury venire, even if an untainted panel can ultimately be found.’”³²

Upon review of the statements, the court found “that the statements in the press releases d[id] not have a ‘substantial likelihood of materially prejudicing’ th[e] proceeding or a ‘reasonable likelihood’ that their dissemination ‘w[ould] interfere with a fair trial.’”³³

Since KBR had been the subject of recent negative publicity by third persons, including members of Congress and the media, regarding its services provided to the Army as a government contractor, and the publicity was not initiated by KBR or its counsel—KBR, with the assistance of counsel, was entitled to make an extrajudicial statement to mitigate the damage done to its reputation.³⁴

³¹ *Harris*, 2009 U.S. Dist. LEXIS 18348, at *19 (citing *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1075 (1991)).

³² *Id.*; accord *United States v. Wecht*, 484 F.3d 194, 205 (3d Cir. 2007) (quoting *Gentile*, 501 U.S. at 1075).

³³ *Harris*, 2009 U.S. Dist. LEXIS 18348, at *19-20; accord *Wecht*, 484 F.3d at 205-06.

³⁴ See *Harris*, 2009 U.S. Dist. LEXIS 18348, at *22-24.

This case shows that lawyers, and their clients, can respond to prejudicial statements publicly made by others in order to mitigate the prejudice created by such statements.³⁵

B. Rule 3.6(b) – What an Attorney Is Entitled to Say to the Media

1. General Topics

If an attorney wants to proactively define the narrative pretrial, they can always speak about the following matters:

- (1) [T]he claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
- (2) 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; [or]
- (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 interest³⁶

³⁵ See MODEL RULES OF PRO. CONDUCT r. 3.6 cmt. 7 (A.B.A. 2023) (“Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party’s lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer’s client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.”); see also *Doe v. Johnson City*, No. 2:23-cv-71, 2024 U.S. Dist. LEXIS 194739, at *4 (E.D. Tenn. Oct. 22, 2024) (reviewing Rule 3.6(c) and granting plaintiffs’ request to respond to public statements made by Johnson City’s former city manager Cathy Ball (one of the defendants) concerning a possible real estate deal between Ball and Sean Williams) (“[A]ny public statements shall be strictly limited to the real estate deal outlined in Plaintiffs’ motion.”); *United States v. McGregor*, 838 F. Supp. 2d 1256, 1267 (M.D. Ala. 2012) (finding that defendants’ attorneys inappropriately made prejudicial statements outside of court during the first trial and requesting that counsel adhere to Rule 3.6 rather than grant government’s proposed gag order).

³⁶ MODEL RULES OF PRO. CONDUCT r. 3.6(b) (A.B.A. 2023).

Similar to the language in Rule 3.6(c), some of these topics seem relatively broad. For example, to what extent can an attorney speak to their client's defense? Most defense attorneys will want to craft a narrative to fit their defense, and the vagueness of this language would seem to support such pretrial advocacy.³⁷ Most defense attorneys would not highlight that an investigation is ongoing as to their client nor would they spend time warning the public of danger concerning persons involved. A prosecutor would be much more likely to discuss an ongoing investigation or potential dangers to the community.³⁸ Moreover, depending on the level of detail in pretrial pleadings, the fact that attorneys can refer to facts and arguments already filed and in the public record casts a wide net over what can be communicated to the media.

For the most part, the prosecutors tend to shape the case narrative before trial, particularly if the prosecutor chooses to call a press conference once charges are filed. If defense counsel limits their comments to "No comment" and "We are looking forward to our day in court," the public is only exposed to the prosecution's case theory before trial.³⁹

Prosecutors must resist making inflammatory remarks at these press conferences because they risk going outside the parameters of Rule 3.6(c).

³⁷ See MODEL RULES OF PRO. CONDUCT r. 3.6(b)(2) (A.B.A. 2023).

³⁸ MONROE H. FREEDOM & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS § 6.02 (4th ed. 2010).

³⁹ Richmond, *supra* note 5, at 709-10.

It is best to stick to the four corners of the indictment and only mention information contained in pretrial pleadings to avoid making extrajudicial, prejudicial statements.⁴⁰

2. Criminal Cases

While not specifically referring to prosecutors, Rule 3.6(b) provides additional guidance as to what attorneys can say in a criminal case:

- (i) [T]he identity, residence, occupation and family status of the accused;
- (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
- (iii) the fact, time and place of arrest; and
- (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.⁴¹

Most prosecutorial press releases attempt to stick to the charges, the facts leading to the charges, the identity and arrest of the defendants, and the name of the agencies associated with the investigation.⁴² If an accused is considered a danger to the community, the public should be made aware of the threat and assist in the apprehension of that person. However, this type of information is not what attorneys want to use to craft their client narrative.

Prosecutors do have additional obligations in connection with making extrajudicial statements about defendants and criminal proceedings. According to Model Rule 3.8(f), prosecutors should stick to making “statements that are necessary to inform the

⁴⁰ Most people only heard about cases from the point of view of law enforcement and the state. In one study, researchers found that “heavy reliance on law enforcement and prosecution sources, numerous instances of sensationalized descriptions of the crime and criminal defendant, and the inclusion [in public communications] of legally excludable material” led to disastrous consequences for defendants facing the death penalty. Researchers found such negative pretrial publicity impacts “a capital defendant’s right to an impartial jury, due process protections, and the adequacy and availability of effective legal remedies.” Shirin Bakhshay & Craig Haney, *The Media’s Impact on the Right to a Fair Trial: A Content Analysis of Pretrial Publicity in Capital Cases*, 24 PSYCH. PUB. POL’Y & L. 326, 326 (2018).

⁴¹ MODEL RULES OF PRO. CONDUCT r. 3.6(b)(7) (A.B.A. 2023).

⁴² See *id.*

public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose," such as the arrest and capture of a fleeing individual.⁴³ Similar to Rule 3.6, prosecutors should refrain from, and encourage law enforcement and others working on the prosecution to refrain from, making comments "that have a substantial likelihood of heightening public condemnation of the accused."⁴⁴ For example, the prosecutor who indicted Samuel Little for the murder of two women (one unidentified) held a press conference and asked the public for any information that would lead to the identity of a Jane Doe that Little was said to have killed.⁴⁵ The prosecutor stated:

Look, this is the fifth serial killer that I've dealt personally with since I've been prosecutor . . . They all have proclivities that people don't understand, but the reality is, they have a compulsion to kill people. They're not insane. They're nothing but evil, period. And that is what we're dealing with. . . He specifically looked for girls with a certain neck type that he liked. And that's why he did it. That's how twisted this guy is.⁴⁶

Such comments are evaluated from both sides to determine when the line has been crossed.

3. Comments about Judges

It should also come as no surprise that there is a separate rule prohibiting attorneys (prosecutors, defense counsel, civil litigators, etc.) from making false statements about judges.⁴⁷ In

⁴³ MODEL RULES OF PRO. CONDUCT r. 3.8(f) (A.B.A. 2023).

⁴⁴ *Id.*; see generally KRISTINE HAMANN & KC STECKELBERG, PROSECUTORS AND THE PRESS — ETHICAL AND PRACTICAL GUIDANCE (2022) (discussing the ethical considerations prosecutors have to consider when talking to the media and how they should develop communication strategies).

⁴⁵ *Serial Killer Suspect of 93 Murders Indicted on Two Murder Charges in Cincinnati*, WPTV (June 8, 2019, at 09:13 CT), <https://www.wptv.com/news/national/serial-killer-suspect-of-93-murders-indicted-on-two-murder-charges-in-cincinnati> [<https://perma.cc/G5MK-ED3S>].

⁴⁶ *Id.*

⁴⁷ "A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or

fact, the commentary to Rule 8.3 encourages lawyers to “defend judges and courts unjustly criticized.”⁴⁸ The guiding principle is to avoid publicly discussing the judge in the case or commenting negatively on the judge’s rulings altogether.⁴⁹

That said, judges have been heavily criticized in the last few years in several high-profile cases without penalty. After the judge in President Trump’s hush money case denied his request to throw out his conviction on thirty-four felony counts of falsifying business records, Trump called him “the most conflicted judge in New York state history” and suggested that the judge be disbarred on *Truth Social*.⁵⁰ “Trump also denounced New York’s justice system as ‘corrupt,’ saying the state’s ‘corrupt’ courts are ‘why people, and companies, are fleeing’ the state.”⁵¹ Additionally, President Trump wrote that “‘corrupt judges’ are ‘so blinded by their hatred of me and my political ideology’ [that they] have made a ‘mockery of the United States judicial system.’”⁵² Moreover, Trump “called the judge overseeing the Jan. 6-related federal criminal case against him ‘the most evil person’” and called special counsel Jack Smith, who was prosecuting the case, “a sick puppy.”⁵³ In Trump’s civil fraud case, one of his attorneys, in a statement to the press, called Judge Engoron “unhinged.”⁵⁴ The

appointment to judicial or legal office.” MODEL RULES OF PRO. CONDUCT r. 8.2(a) (A.B.A. 2023).

⁴⁸ MODEL RULES OF PRO. CONDUCT r. 8.2 cmt. 3 (A.B.A. 2023).

⁴⁹ *See id.*

⁵⁰ Ty Roush, *Trump Says He Was ‘Evilly and Illegally Treated’ After Judge Upholds Hush Money Conviction*, FORBES (Jan. 4, 2025, at 12:37 ET), <https://www.forbes.com/sites/tylerroush/2025/01/04/trump-says-he-was-evilily-and-illegally-treated-after-judge-upholds-hush-money-conviction> [https://perma.cc/U4TK-PKHG]; Sophia Cai & Erin Doherty, “*Losing All Credibility*”: Judge Admonishes Trump’s Lawyer at Gag Order Hearing, AXIOS (Apr. 23, 2024), <https://www.axios.com/2024/04/23/trump-new-york-criminal-trial-gag-order-contempt> [https://perma.cc/W7WN-G9SU]; Danny Cevallos, *Why Trump’s Lawyers Don’t Seem to Care if They Antagonize Judge Engoron*, MSNBC (Nov. 13, 2023, at 05:00 CT), <https://www.msnbc.com/opinion/msnbc-opinion/trump-lawyer-defense-new-york-trial-judge-rcna124708> [https://perma.cc/S2N8-H7SB].

⁵¹ Roush, *supra* note 50.

⁵² *Id.*

⁵³ Ryan J. Reilly et al., *Trump Calls Judge Overseeing His Jan. 6 Case ‘The Most Evil Person’*, NBC NEWS (Oct. 18, 2024, at 13:32 CT), <https://www.nbcnews.com/politics/justice-department/trump-calls-judge-overseeing-jan-6-case-evil-person-rcna176112> [https://perma.cc/Y8T2-N8LN].

⁵⁴ Cevallos, *supra* note 50.

attorney stated that she would not “tolerate” what the judge was doing and that what she was seeing at this trial was “a demise of American judicial system and democracy.”⁵⁵

C. Rule 3.6(a) – When an Attorney Chooses to Be Proactive and Crafts the Media Narrative, What Is the Line That Cannot Be Crossed?

Having focused on what a lawyer can say and when a lawyer can respond to negative publicity, it is now important to discuss what a lawyer cannot say when crafting their client’s narrative. According to Rule 3.6(a), a lawyer “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.*”⁵⁶

The difficulty in following this rule is determining what words said to the media might be considered materially prejudicing a future trial, or any adjudicative proceeding. The primary purpose of engaging with the media is to safeguard the client’s reputation and minimize the potential damage arising from ongoing legal proceedings. Even a simple “no comment” can create negative inferences in the public’s perception—suggesting, for example, that the client has something to hide or implicitly admitted guilt by remaining silent.⁵⁷ So what type of comment protects the client’s reputation but is not later considered materially prejudicial?

If the case is of a criminal nature, rather than civil, there is a greater likelihood that the comments to the media will be given greater scrutiny to determine if they prejudiced the jury.⁵⁸ The arbitrators, whether it be the trial judge or bar panel, review the inflammatory comments to determine whether the jury heard

⁵⁵ *Id.*

⁵⁶ MODEL RULES OF PRO. CONDUCT r. 3.6(a) (A.B.A. 2023) (emphasis added).

⁵⁷ See JAMES F. HAGGERTY, IN THE COURT OF PUBLIC OPINION: WINNING YOUR CASE WITH PUBLIC RELATIONS 85 (2003).

⁵⁸ MODEL RULES OF PRO. CONDUCT r. 3.6(a) cmt. 6 (A.B.A. 2023).

them or whether the statements referred to inadmissible evidence.⁵⁹

The commentary to Rule 3.6 provides little guidance to attorneys who want to speak and are weighing whether their comments can be perceived as being materially prejudicial. The commentary does provide sample subjects that “more likely than not” would be considered materially prejudicial if discussed with the media:

- (1) [T]he character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;
- (2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person’s refusal or failure to make a statement;
- (3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;
- (4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;
- (5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or
- (6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.⁶⁰

In other words, do not slander a witness or the suspect; do not talk about plea negotiations or a defendant’s confession (or lack thereof); do not talk about submitting or failing to submit to a

⁵⁹ *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1039, 1047 (1991) (noting that when evaluating pretrial attorney statements, courts examine whether the jury heard the comments and whether the publicity “included . . . numerous items of prejudicial information inadmissible at trial”).

⁶⁰ MODEL RULES OF PRO. CONDUCT r. 3.6 cmt. 5 (A.B.A. 2023).

polygraph, or to DNA, blood, breath, or urine tests (or any test for that matter); do not opine on the guilt or innocence of the defendant; do not mention anything that might be inadmissible in court; and when in doubt, do not mention the defendant was charged with a crime.⁶¹

Again, while some criminal defense attorneys may want to broach these subjects while talking to the press, such as arguing that their client is innocent, many of these subjects are more likely discussed by a prosecutor who wants to try the case in the media and crosses the line. How strict the judge may be in enforcing these rules is left up to his or her discretion (and that of future appellate judges reviewing the pretrial publicity surrounding the case), and much later, disciplinary boards may opine if a bar complaint is ever filed.

1. Do Not Misconstrue the Evidence: The Prosecution Is Lying, and My Client Is a Saint

Disclosing evidence publicly that is likely inadmissible in a trial is certainly something that has gotten defense attorneys sanctioned by their local bar. In *United States v. Cutler*, John Gotti's defense attorney, Bruce Cutler, spoke repeatedly to the media about the government's case against his client and was later found guilty of criminal contempt for failing to comply with a local criminal rule that prohibits lawyers from saying things publicly before trial that would "interfere with a fair trial or otherwise prejudice the due administration of justice."⁶²

The U.S. Attorney in the case announced the indictment at a press conference and said that Gotti was a "murderer, not a folk hero" and that the evidence in the case, including wiretap evidence, was much stronger than in previous trials.⁶³ In response, Cutler called "the prosecutors 'publicity-hungry' and on a vendetta to frame his client."⁶⁴

At one point, Cutler held a press conference outside the courthouse and "declaimed that the government had 'thrown the

⁶¹ *Id.* No wonder many attorneys choose the "no comment" route.

⁶² *United States v. Cutler*, 58 F.3d 825, 828-29 (2d Cir. 1995).

⁶³ *Id.* at 828.

⁶⁴ *Id.*

Constitution out the window,’ mocked the government’s witnesses as ‘bums,’ and erroneously described the government’s tape recordings of wire-tapped conversations as the same ones used in earlier prosecutions.”⁶⁵

During a live television interview, Cutler made several inflammatory comments:

[W]herever Gotti lives, there is no problem with drugs and crime in the neighborhood; Gotti is not a danger to any community other than federal prosecutors; Gotti has “admirable qualities[,]” including being courageous, loyal, sincere, selfless and devoted to his family; Gotti is a “good man” and an “honorable man”; Gotti is not a “ruthless man”; Gotti is one of “the most compassionate men” Cutler knows; Gotti is “deadly against drugs”[,] . . . the prosecutors “are doing everything they can to destroy John Gotti” and are “dealing in vendettas[,]” “on a witch hunt[,]” and “framing people”; the Government “threw the Constitution out the window” and is on a “vendetta” against Gotti; the prosecution is an “example of McCarthyism”; Gotti was being “persecuted” because of his “lifestyle” and “friends”; the prosecutors want to “destroy” Gotti “because of his popularity” and because “he’s deadly against drugs”; the “evidence is phony”; the “tapes are phony”[,] . . . the Government is “creating cases against individuals they target” by “giving freedom to drug dealers and murderers if they will sing the government’s tune against the likes of John Gotti”; and . . . jurors realize that “the witnesses lie” and that “even the federal investigators lie” and that is why they vote “not guilty unabashedly.”⁶⁶

The trial judge had repeatedly warned Cutler not to make such comments and requested he comply with the local rule.⁶⁷ After Cutler ignored the judge’s admonitions, he was found in criminal contempt of court for his comments.⁶⁸ Cutler later argued the local rule was unconstitutional.⁶⁹ The Second Circuit agreed that Cutler’s comments were reasonably likely to prejudice the

⁶⁵ *Id.* at 829.

⁶⁶ *Id.* at 831 (alterations in original) (citing the district court’s opinion in *United States v. Cutler*, 815 F. Supp. 599, 606 (E.D.N.Y. 1993)).

⁶⁷ *Id.* at 834.

⁶⁸ *Id.* at 828.

⁶⁹ *Id.*

Gotti proceedings and that attorneys should be held to a higher standard of conduct than lay persons, writing:⁷⁰

[W]e sympathize with the plight of a defense lawyer torn between his duties to act as an officer of the court and to zealously defend his client. Nonetheless, a lawyer, of all people, should know that in the face of a perceived injustice, one may not take the law into his own hands. Defendant did, and now he must pay the price.

In some quarters, doubtless, this affirmance will elicit thunderbolts that we are chilling effective advocacy. Obviously, that is neither our intention nor our result. The advocate is still entitled—indeed encouraged—to strike hard blows, but not unfair blows. Trial practice, whether criminal or civil, is not a contact sport. And, its tactics do not include eye-gouging or shin-kicking.

In this case, a conscientious trial judge tried mightily to limit the lawyers to press statements that were accurate and fair. The defendant's statements were dipped in venom and were deliberately couched to poison the well from which the jury would be selected. Such conduct goes beyond the pale, by any reasonable standard, and cannot be condoned under the rubric of "effective advocacy."⁷¹

2. Stick to What Can Be Proven at Trial: My Client Is Innocent, the Cops Are Crooked

The Supreme Court in *Gentile v. State Bar of Nevada* upheld the defense counsel's right to make comments to the media but also affirmed that ethical restrictions, such as Model Rule 3.6, can limit an attorney's speech in the event that the attorney knew or should have known that the statements would materially prejudice the subsequent trial.⁷² However, few comments by counsels seem to rise to the level of being materially prejudicial, especially if the comments pertain to evidence that will most likely be admissible at trial.⁷³

⁷⁰ *Id.* at 837.

⁷¹ *Id.* at 840.

⁷² *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1056-58 (1991).

⁷³ *Id.* at 1047-48.

In *Gentile*, the defendant, Grady Sanders, was charged with racketeering, larceny, and drug trafficking.⁷⁴ Sanders owned a business that offered its customers safe deposit boxes. Metro undercover officers rented a safe deposit box from Sanders' business and used it to store travelers' checks and kilos of cocaine used for undercover drug sting operations.⁷⁵ The checks and drugs were found missing from the box, and seven other customers (four of whom Sanders' defense counsel believed to be drug dealers or money launderers themselves) had jewelry, coins, silver, gold, and cash go missing from their safety deposit boxes within the past three years.⁷⁶ Sanders was subsequently charged with stealing it all.⁷⁷

Grady's defense counsel, Dominic Gentile, held a press conference after his client was indicted on the narcotics and larceny charges. The lawyer stated that it was the police and not his client that actually committed the crimes for which his client was indicted:

MR. GENTILE: I want to start this off by saying in clear terms that I think that this indictment is a significant event in the history of the evolution of the sophistication of the City of Las Vegas, because things of this nature, of exactly this nature have happened in New York with the French connection case and in Miami with cases—at least two cases there—have happened in Chicago as well, but all three of those cities have been honest enough to indict the people who did it; the police department, crooked cops.

When this case goes to trial, and as it develops, you're going to see that the evidence will prove not only that Grady Sanders is an innocent person and had nothing to do with any of the charges that are being leveled against him, but that the person that was in the most direct position to have stolen the drugs and money, the American Express Travelers' checks, is Detective Steve Scholl.

⁷⁴ Brief of Petitioner, *Gentile*, 501 U.S. 1030 (No. 89-1836), 1991 WL 521171, at *6.

⁷⁵ Pauline Bell & Harold Hyman, *Metro Missing \$1.3 Million in Drugs, Checks*, L.V. SUN, Feb. 6, 1988, at 1A.

⁷⁶ *Id.*

⁷⁷ *Id.*

There is far more evidence that will establish that Detective Scholl took these drugs and took these American Express Travelers' checks than any other living human being.

And I have to say that I feel that Grady Sanders is being used as a scapegoat to try to cover up for what has to be obvious to people at the Las Vegas Metropolitan Police Department and at the District Attorney's office.

Now, with respect to these other charges that are contained in this indictment, the so-called other victims, as I sit here today I can tell you that one, two—four of them are known drug dealers and convicted money launderers and drug dealers; three of whom didn't say a word about anything until after they were approached by Metro and after they were already in trouble and are trying to work themselves out of something.

Now, up until the moment, of course, that they started going along with what detectives from Metro wanted them to say, these people were being held out as being incredible and liars by the very same people who are going to say now that you can believe them.⁷⁸

The Nevada bar was concerned with several of Gentile's comments—primarily that he asserted multiple times that he knew he represented an innocent man, that the likely thief was a police detective, and that the other victims were known drug dealers, money launderers, and liars who had an ulterior motive, such as insurance fraud, for blaming Sanders.⁷⁹

In evaluating whether Gentile had violated the local bar rule governing pretrial publicity, which is almost identical to Model Rule 3.6, the Supreme Court pointed out that most of the things Gentile mentioned “had been published in one form or another, obviating any potential for prejudice.”⁸⁰ Additionally, all the information mentioned at the press conference was “admitted in evidence before the jury.”⁸¹ Moreover, the trial judge asked each potential juror about the press conference, and no jurors

⁷⁸ *Gentile*, 501 U.S. app. A at 1059-60.

⁷⁹ *Id.*

⁸⁰ *Id.* at 1046.

⁸¹ *Id.* at 1047.

remembered Gentile or his press conference.⁸² The jury acquitted Grady Sanders, and upon review of Gentile's pretrial comments, the Supreme Court found such statements did not create a likelihood of material prejudice.⁸³ None of the empaneled jurors recalled Gentile's remarks, and all those comments referenced evidence that actually went to the jury; thus, there was no harm, no foul.

What distinguishes Cutler from Gentile? Both called the government and witnesses liars, and both claimed their clients were victims or scapegoats. Cutler seemed to be over-the-top in his overly broad statements and name-calling (bums, phony, etc.), and he mischaracterized evidence he knew to be false.⁸⁴ Different

⁸² *Id.*

⁸³ *Id.* at 1048.

⁸⁴ Cutler was clear that he wanted to influence the venire based upon his extrajudicial comments. Specifically, Cutler stated "that I want the prospective veniremen out there to feel that I mean what I say and I say what I mean, and if that can spill over and help my client, then I feel it's important for me to do that." Gov't Exhibits 61, 61A at 4-5, *United States v. Cutler*, 840 F. Supp. 959 (E.D.N.Y. 1994) (No. 91-CR-1189) (Bruce Cutler, Remarks at the Brooklyn Law School Symposium (Apr. 25, 1991)). "Cutler was quoted by the *New York Newsday* as saying, 'They tell everyone and anyone that the key to open their cell door is giving false information against Mr. Gotti.'" *Cutler*, 840 F. Supp. at 969 n.13; Gov't Exhibit 54, *Cutler*, 840 F. Supp. 959 (No. 91-CR-1189) (*Gotti Son's Killer Was Paid Back*, N.Y. NEWSDAY, Feb. 7, 1991, at 45). Cutler was also quoted saying, "The tapes do not say what Mr. Gleeson says they say, and the conversations that he put forth are totally and deliberately taken out of context by the government." Gov't Exhibit 56, *Cutler*, 840 F. Supp. 959 (No. 91-CR-1189) (*Feds: Gotti Paid Lawyers 600G on '36G Salary'*, N.Y. POST, Feb. 28, 1991). Cutler said, "The Government . . . deliberately and intentionally injected John Gotti's name into conversations to try and put him in a case that he had nothing to do with. This shows the ends that the Government will go to in their continuing vendetta to create cases against John Gotti." Gov't Exhibit 57, *Cutler*, 840 F. Supp. 959 (No. 91-CR-1189) (Arnold H. Lubasch, *Defense Accuses U.S. of Trying to Ensnare Gotti*, N.Y. TIMES, Mar. 7, 1991, at B3). Cutler appeared on *60 Minutes* "and stated that he admired Gotti for his 'loyalty, honesty, integrity' and that 'the tapes don't say what the prosecutors say they say. They weave a little bit and they put a spin on it they [sic] way they want to put a spin on it.'" *Cutler*, 840 F. Supp. at 969 n.19; Gov't Exhibit 59, 59A, *Cutler*, 840 F. Supp. 959 (No. 91-CR-1189) (60 MINUTES: *Brucification* (CBS television broadcast, aired Apr. 7, 1991)). "Cutler stated in this interview that the Government goes to jails around the country 'and say[s], 'Tell us what you know or what you want to tell us about John Gotti. You can tell us this, you can tell us that. You're facing a hundred years for drugs, you're facing a thousand years for this, you're facing a million years for that. But if you sing our song about John Gotti, you'll be on a beach someplace, not in jail.'" In addition, he stated, 'Millions and millions of dollars have been spent since 1977 in the government's endless attempt to frame John Gotti.'" *Cutler*, 840 F. Supp. at

courts and jurisdictions will have differences of opinion as to when the line is crossed. The courts' discretion is why an attorney representing a mob boss was found to have crossed the line to a much greater extent than an attorney representing a business owner targeted by the government. The nature of the alleged crime, whether murder or a white-collar offense, may also influence how many extrajudicial pretrial comments are tolerated.

D. What Pretrial Comments Go Too Far and Violate a Defendant's Sixth Amendment Right to a Fair Trial by an Impartial Jury?

While it is important for attorneys to insulate themselves from future bar complaints or criminal contempt charges, it is just as important to consider the impact of pretrial comments on their client's outcome at trial.

Trial judges are constantly screening pretrial comments from both sides to evaluate whether such comments are tainting the jury pool. The judge is focused on whether the defendant has been prejudiced by pretrial publicity. If the judge determines that the defendant has been prejudiced by too much negative publicity, the judge can order a change of venue or, during the trial, close the courtroom to the press, caution the witnesses and/or jurors not to look at press coverage, sequester the jury, or order a continuance, hoping the press frenzy might die down.⁸⁵

Before trial, judges have also been known to issue gag orders to prevent attorneys from speaking to the media. It is not wise to ignore such an order, as this was one of the reasons the court in *Cutler* held the attorney who violated the gag order in criminal contempt.

969 n.21; Gov't Exhibit 65, *Cutler*, 840 F. Supp. 959 (No. 91-CR-1189) (INTERVIEW MAG., Aug. 1991).

"Cutler commented on tapes to be played at trial, stating, 'The government takes these innocuous conversations, takes them out of context and puts a negative interpretation on them. These conversations are not evidence of any crimes, and they are meaningless.'" *Cutler*, 840 F. Supp. at 970 n.24; Gov't Exhibit 71, *Cutler*, 840 F. Supp. 959 (No. 91-CR-1189) (Pete Bowles, *On Tape, Gotti Gripes About 'Rats'*, N.Y. NEWSDAY, Aug. 2, 1991, at 3).

⁸⁵ See Joseph F. Flynn, Note, *Prejudicial Publicity in Criminal Trials: Bringing Sheppard v. Maxwell into the Nineties*, 27 NEW ENG. L. REV. 857, 867-68 (1993).

That said, there is a great deal of tension between the right to impartial jurors and the desire to influence the potential jury pool to support one side of the story. Of course, attorneys want to influence the jury pool—that’s the whole point of speaking out and elevating the narrative! The Supreme Court clarified the idea of an “impartial juror” back in 1961 in *Irvin v. Dowd*:

It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. . . . It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.⁸⁶

The Court then reversed the conviction because the trial court did not conduct a proper voir dire to determine whether the potential jurors could be impartial.⁸⁷ Two-thirds of the jurors admitted, before hearing any testimony, to possessing a belief in the defendant’s guilt, and one juror said, “You can’t forget what you hear and see.”⁸⁸ The Court made clear that a miscarriage of justice exists when there is an “anticipatory trial by newspapers instead of trial in court before a jury.”⁸⁹

However, the Court has limited such decisions to extreme cases.⁹⁰ Very rarely are such Sixth Amendment challenges successful.⁹¹ Many times, the judge will review the facts of the

⁸⁶ *Irvin v. Dowd*, 366 U.S. 717, 722-23 (1961).

⁸⁷ *Id.* at 727-29.

⁸⁸ *Id.* at 728.

⁸⁹ *Irvin*, 366 U.S. at 729 (Frankfurter, J., concurring).

⁹⁰ See *Morgan v. Illinois*, 504 U.S. 719, 719 (1992) (holding that “[t]he trial court’s refusal to inquire whether potential jurors would automatically impose the death penalty” after conviction is inconsistent with due process); *Mu’Min v. Virginia*, 500 U.S. 415, 417 (1991) (finding that “[t]he trial judge’s refusal to question prospective jurors about the specific . . . news reports to which they had been exposed did not violate [the defendant’s] Sixth Amendment right to an impartial jury”); *Ross v. Oklahoma*, 487 U.S. 81, 81 (1988) (determining that the fact that the defendant had to use a peremptory challenge because the trial court erred in failing to remove a prospective juror for cause did not mean that the Sixth Amendment was violated).

⁹¹ See *Skilling v. United States*, 561 U.S. 358, 380-81 (2010).

case and determine that the public comments were not substantially prejudicial to either side or that the comments were made months ago and their potential prejudice diminished over time. Other times, the judge will find that the pretrial public comments discussed evidence that will most likely be admissible at trial or that such comments did not contain blatantly prejudicial and/or false information. Moreover, the judge can eliminate any potential bias by conducting a thorough jury selection process to ensure biased prospective jurors are excused for cause.⁹²

Judges have a constitutional duty to protect a defendant from prejudicial publicity, but this duty focuses on protecting the defendant from negative publicity derived from police officers, witnesses, the prosecutor, angry citizens, and the press. The defense counsel's extrajudicial comments will have the opposite effect. Therefore, it is unlikely the judge will be worried about the defense counsel's comments negatively damaging the defendant's interests as much as other interested parties at trial. That said, understanding that the Sixth Amendment only protects a defendant's right to a fair trial, the courts still maintain an overall concern with the fairness of the proceedings for both sides.⁹³ The defense counsel must choose their words carefully so the judge is satisfied that at the start of the trial, both sides have played "fair."

⁹² See *id.* at 463.

⁹³ For examples of cases where the defense counsel was accused of making over-the-top comments that the judge determined impacted the fairness of the trial, see *United States v. Mosby*, 626 F. Supp. 3d 847 (D. Md. 2022); *Mercier v. City of La Crosse*, No. 02-C-376-C, 2004 U.S. Dist. LEXIS 11106 (W.D. Wis. June 11, 2004); *Smartmatic USA Corp. v. Newsmax Media, Inc.*, No. N21C-11-028EMD, 2024 Del. Super. LEXIS 628 (Del. Super. Ct. Sep. 12, 2024).

Prosecutors concerned with opposing counsel's pretrial comments that might unfairly taint the jury pool and damage their prospects at trial should move for a change of venue, request a continuance, or ask for a gag order to be put in place.

III. ELEVATING THE STORY

A. *How Humans Form Perceptions*

Recognizing that lawyers must adhere to the rules of professional conduct and avoid actions that could materially prejudice ongoing legal proceedings, the question then becomes: What strategies can a lawyer ethically employ to counter or reshape negative media coverage of their client?

The first concept to keep in mind is that perception is everything when trying to shift, or at least manage, the client's narrative. Words and facts are always filtered through perception.⁹⁴ Perception is the basis upon which one builds their understanding of the world and makes decisions about their interactions with the world. Each lived moment creates new experiences, which, when viewed through the lens of confirmation bias,⁹⁵ harden one's perceptions. These perceptions are created quickly, sometimes in a matter of seconds. It is a survival mechanism that has survived through millennia of evolution. This process is as instinctive as breathing and represents the first and most significant hurdle any lawyer must overcome.

Because the survival mechanism is so embedded in human DNA, the process of receiving stimuli taps into a primordial set of neurons, and it occurs in a part of the brain, the limbic system, that has no language mechanisms.⁹⁶ As neurons are stimulated, they generate powerful emotions. Those emotions lead to

⁹⁴ See Jessica Koehler, *Perceiving Is Believing*, PSYCH. TODAY (Jan. 23, 2021), <https://www.psychologytoday.com/us/blog/beyond-school-walls/202101/perceiving-is-believing> [<https://perma.cc/N4X2-3XUJ>].

⁹⁵ See Kendra Cherry, *What Is Confirmation Bias?*, VERYWELL MIND (May 19, 2024), <https://www.verywellmind.com/what-is-a-confirmation-bias-2795024> [<https://perma.cc/VV2H-3UC3>].

⁹⁶ See Jeffrey R. Binder et al., *Human Brain Language Areas Identified by Functional Magnetic Resonance Imaging*, 17 J. NEUROSCI. 353, 357-60 (1997); V. Rajmohan & E. Mohandas, *The Limbic System*, 49 INDIAN J. PSYCHIATRY 132, 135-37 (2007).

behaviors, often expressed as perceptions, decisions, and actions. The neocortex, complete with a language center, evolved as the human species evolved. However, the process of forming perceptions still takes place in the limbic system. It is only after the emotional process takes place that the neocortex begins to rationalize.⁹⁷ And because of the power of confirmation bias, the subsequent rationalization is often used to justify the initial emotional perception.⁹⁸

This process is quick—seconds quick. This means the first words heard by the listener will often be the ones upon which they create their perception of a case. To further complicate matters, a secondary process takes place with perception: value attribution. Emotions have an intrinsic value to people.⁹⁹ To shift perception, an individual must overcome the emotional value attribution they place on their emotional resonance with a case.¹⁰⁰ To put it simpler, if someone feels very strongly about something, they will need something equally as powerful to cause them to shift their perception.

To further draw this out, think about the process of a jury trial. There is a courtroom, often imposing in and of itself. A judge in black robes sits higher than anyone else in the room. Everyone rises when the judge enters. The jury is treated with deference. There is a rigid formality to court proceedings, a new type of language is used, and the exercise of law can feel intimidating to one not accustomed to daily court procedures. This entire process creates a powerful experience for the jury—often one that is powerful enough, and creates a strong enough emotional resonance, that the jury is able to set aside their preconceptions about the case.

⁹⁷ See generally JOSEPH E. LEDOUX, *THE EMOTIONAL BRAIN: THE MYSTERIOUS UNDERPINNINGS OF EMOTIONAL LIFE* (1996).

⁹⁸ Toby Shapshak, *Internet Heroine Brené Brown Wows SXSW*, FORBES (Mar. 14, 2016, at 18:16 ET), <https://www.forbes.com/sites/tobyshapshak/2016/03/12/internet-heroine-brene-brown-wows-sxsw/> [https://perma.cc/MK4N-KD4A]. The saying made famous by Brené Brown is true: “We are emotional, feeling beings; who, on rare occasions, think.” *Id.*

⁹⁹ See generally ANTONIO R. DAMASIO, *THE FEELING OF WHAT HAPPENS: BODY AND EMOTION IN THE MAKING OF CONSCIOUSNESS* (1999).

¹⁰⁰ See James Dennison, *Emotions: Functions and Significance for Attitudes, Behaviour, and Communication*, 12 *MIGRATION STUD.* 1, 13-14 (2024).

The average person, hearing about the case on the news or reading about it through some other medium, does not have the same experience to shift their perspective. Thus, they are left with whatever they take away from their initial experience of hearing about the case, often influenced by what an attorney says.¹⁰¹ When calculating a client's overall brand and reputation risk, this entire equation must be part of the calculation. Failing to do so and focusing only on the immediate outcome of the trial to come, will impact public perception.

B. Why “No Comment” Will Not Shift Perceptions

No comment is a comment. It says, “We don’t want to talk.” There might be excellent reasons not to talk. However, for the public, “We don’t want to talk” is no different from “We did the thing.” People learn this lesson very early in childhood. Media and television shows reinforce it, and it is something every parent who has ever had a child go silent, rather than admit wrongdoing, knows painfully well. These experiences are a part of the lived experience, seen in the seemingly 354 seasons of *Law & Order*; these perceptions are continuously reinforced in the collective psyche as true. When compounded with value attribution and the fact that “no comment” does nothing to shift value attribution, “no comment” becomes a statement of guilt.

This is not a matter of opinion. Studies have demonstrated the impact television shows have had, and continue to have, on court cases. There is perhaps no greater example than the CSI effect.¹⁰² Cases have been won or lost (depending on perspective) because of juries’ beliefs about forensic evidence. Juries’ assumptions that what is shown on television is real carries with them into trials, even after the value attribution shift that may take place, as discussed previously.¹⁰³ The impact of these shows

¹⁰¹ David L. Hudson Jr., *Watch Out for These Ethical Constraints and Pitfalls When Speaking with the Media*, A.B.A. J. (Oct. 1, 2022), <https://www.americanbar.org/groups/journal/articles/2022/watch-out-for-these-ethical-constraints-and-pitfalls-when-speaki/> [https://perma.cc/J58S-NRLR].

¹⁰² *CSI Effect*, CORN. L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/csi_effect [https://perma.cc/XR88-V2FP] (last visited Jan. 27, 2025).

¹⁰³ Donald E. Shelton, *The ‘CSI Effect’: Does it Really Exist?*, NIJ J., Mar. 16, 2008, at 1, 3-5.

is not limited to the CSI effect. A recent study found that people grieve the loss of beloved television characters and the end of television shows in the same way they grieve the loss of a loved one or friend.¹⁰⁴ To discount the impact that “no comment,” as seen on TV, has in the real world is to ignore the reality of how people think about defendants.

Equally as dangerous is, “We look forward to our day in court.” Really? Do you? Other than the attorney who enjoys the practice of law, does anyone look forward to a trial? No. No, they do not. A trial is the necessary prescriptive outcome in an arrest or tort action. People do not wake up and volunteer to go on trial. Few people look forward to court. This is so well understood that the California courts even have a self-help guide for people going to trial.¹⁰⁵ Lawyers immediately cast doubt in the listener’s mind by saying something so patently unbelievable. Even worse, the number of times that sentence is uttered only to be followed weeks or months later by a guilty verdict further cements the idea that someone who uses that phrase is, well, guilty.

The public will likely not follow along with the minutiae of a case. They may not even hear the conclusion or verdict. What they will be left with is the sense they had upon their first introduction to the story. A sense of guilt. This feeling that the defendant is guilty will stay with them each time they hear the client’s name in the future. Absent any motivating reason to shift their perception, the sense of guilt will be continuously reinforced in their echo chamber of bias confirmation.

Think for a moment about the following names: Enron, Lehman Brothers, and Goldman Sachs. There was likely a strong emotional reaction to each name. The Enron scandal is twenty-three years old,¹⁰⁶ and the scandal leading to the collapse of the economy involving Lehman Brothers and Goldman Sachs is

¹⁰⁴ See Cristel Antonia Russell & Hope Jensen Schau, *When Narrative Brands End: The Impact of Narrative Closure and Consumption Sociality on Loss Accommodation*, 40 J. CONSUMER RSCH. 1039, 1039-40 (2014).

¹⁰⁵ See generally *Tips for Your Day in Court*, JUD. BRANCH OF CAL., <https://selfhelp.courts.ca.gov/tips-your-day-court> [<https://perma.cc/S3ZT-EN95>] (last visited Jan. 27, 2025).

¹⁰⁶ See Troy Segal, *Enron Scandal and Accounting Fraud: What Happened?*, INVESTOPEDIA (Dec. 3, 2024), <https://www.investopedia.com/updates/enron-scandal-summary/> [<https://perma.cc/23PL-CVBV>].

seventeen years old.¹⁰⁷ Yet for those who lived during these periods in history, the emotional resonance and recall experienced today was likely as real and visceral as it was then. This is the true power of perception.

C. How to Craft a Message to Demonstrate Emotional Resonance

There is a way to elevate the story, provide necessary context, and mitigate legal and brand risk without attacking prosecutors or the other party, giving away vital information, creating exposure to liability, or damaging trial strategy. While this approach might not be at the top of attorneys' minds as a legal strategy, it should be at the top of their minds for the holistic protection of their clients. Crafting messaging to demonstrate emotional resonance with the case, detailing a set of actions that speak to the nature of the case, and creating context and perspective might not only be beneficial for the legal strategy but also highly beneficial for protecting the client's brand and image, which has to survive intact long after the trial is over, no matter the outcome.

1. Expression of Care

The process begins by demonstrating that the client cares about the matter at hand. This is where it gets tricky. As a defendant, the expression of care must not be one of self-interest. While the defendant may be facing jail time, the loss of money, or some other consequence—the public has no reason to care. Unless they know the defendant (think celebrity or personal connection), they have no emotionally vested interest in the defendant as an individual. Rather, the listener will care about the effect the perceived offense or injustice would have on them if they were the aggrieved party. Not only is this human nature, but it is also the logical process of the limbic system. Stimuli are introduced, and

¹⁰⁷ See Nick Lioudis, *The Collapse of Lehman Brothers: A Case Study*, INVESTOPEDIA (Dec. 9, 2024), <https://www.investopedia.com/articles/economics/09/lehman-brothers-collapse.asp> [https://perma.cc/4TGB-9HVX].

the brain immediately processes the impact said stimuli will have on the listener's life.¹⁰⁸

Thus, what type of statement might demonstrate that the defendant cares about the victim or even a victimless crime without admitting guilt?

When crafting such a statement, the care aspect needs to elevate the situation from the personal to the broad. The statement must create emotional resonance for the listener. As an example, in a vehicular manslaughter case,¹⁰⁹ it would be easy to say, "My client is devastated by this incident." To put it bluntly, no one cares. There is a person or persons who are dead. Families, friends, coworkers, and communities are grieving a profound loss. No one cares that the person who is accused of the crime feels bad. Expressing sympathy solely for the defendant can appear self-centered and tone-deaf. Critically, failing to acknowledge the broader impact of the incident reinforces the perception that the defendant is a bad person who deserves punishment. This, in turn, confirms the listener's preconceived notions of guilt—a cognitive effect known as confirmation bias, as discussed above.¹¹⁰

Rather, consider the following statement: "Mr./Ms. X is devastated by how terrible this situation is for all those who knew and loved the victim." This statement does not create culpability. Nothing in the statement puts the client in a position of responsibility for the incident. The statement does not even acknowledge that the defendant was on the scene of the accident. This is not an admission of guilt; it is a human statement. Of course, the defendant feels bad for the person who was killed and everyone else impacted by the loss of life. Any person, involved or not, would have that type of emotional response to hearing about a tragic loss of life. Saying the human thing is not the same as admitting guilt.

What makes the second statement more effective than the first is that it not only conveys a more accurate account but also

¹⁰⁸ See generally DAMASIO, *supra* note 99.

¹⁰⁹ The following is offered as a hypothetical example for a particular set of facts specific to this example and should not be construed to be actual statements that should be issued in any case.

¹¹⁰ See generally Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCH. 175 (1998).

shifts the focus from the personal to the broader impact of the incident. In doing so, the statement creates space for the public to see the defendant's humanity. This is the first and most important step in creating room to alter the perception that might form with a statement focused on the defendant rather than the victim.

2. The Action Statement

Now that care has entered the equation, it is important to tell people what is being done about the thing the defendant cares about. Unlike this care statement, which is elevated, the action statement must focus on the client. This is where people listening will need to know what the client is going to do about the situation. For reasons that were previously covered, litigating the case in the media is a non-starter. However, creating the sense of forward movement allows the listener to move (if even slightly) beyond the emotions of the case into a more logical headspace, activating the neocortex. Whatever the specific action item might be, it must be future-looking.

There is a myriad of ways to demonstrate action in a case. It could be as simple as "Mr./Ms. X will cooperate fully with the investigation" to "Mr./Ms. X intends to prove that someone else is responsible for this horrific incident." Both examples, following on the heels of the care statement, are future-looking. They allow the listener to understand that the defendant intends to take some action.

In the O.J. Simpson case, after acquittal, Simpson said he would spend the rest of his life looking for the real killer(s).¹¹¹ Widely panned and often used as a punchline, the line stayed with people. When Simpson died, people took to social media, using the line to celebrate his death nearly thirty years after the statement was issued.¹¹² This is how powerful an action statement can be in a case.

¹¹¹ Linda Deutsch, *OJ: Media Made Me The Heavy*, CBS NEWS (June 5, 2004, at 11:21 ET), <https://www.cbsnews.com/news/oj-media-made-me-the-heavy/> [https://perma.cc/EG3X-5E8G].

¹¹² See Chuck Schilken, *From Anger to Appreciation, O.J. Simpson's Death Elicits Wide Range of Reactions*, L.A. TIMES (Apr. 12, 2024, at 06:38 PT), <https://www.latimes.com/sports/story/2024-04-11/oj-simpson-death-reactions-nicole-brown-usc-nfl> [https://perma.cc/D5D8-P79Z].

It is likely that, in most cases, the public will not remember the care statement verbatim. They will remember the sense of care. Unlike Simpson's statement, they will likely not remember the action statement. Rather, they will remember a sense of movement in the case. The care statement opened their mind to hear more, and the action statement moved them into receptivity for a different future outcome.

3. The Perspective Statement

This is where the perspective statement comes into play. The perspective statement is the final step in describing what the future could or should look like. It redirects the public's attention to the thing they should care about.¹¹³ The statement is designed to stay with the listener. It is at this moment that protecting the brand and reputation of the client truly takes form.

Similar to the care statement, the perspective statement must not focus on the client. Once again, the language shifts to elevate the situation and refocus the listener's mind on something equally as important. While this will be different for each and every case, using the vehicular manslaughter incident from above, a perspective statement might be: "Our sincere hope is that the person who is actually responsible for this situation has been held to account," or, "Nothing is more important than ensuring the family has the answers they deserve." Again, there is no admission of guilt or responsibility here, merely an acknowledgment that the family deserves answers—a statement that anyone can and should agree with.

Note the use of the past tense in the perspective statement. The intent is to describe a future that has already come to fruition. By using "has been held" rather than "will be held" or "has the answers" rather than "gets the answers," the feeling changes in the statement. The intentional tense shift brings a sense of closure to the incident. While the case may be far from over, the need for closure is strong. By creating a sense of closure, coupled with care and action, the formula for shifting value attribution and perspective is put into place.

¹¹³ See, e.g., GEORGE LAKOFF, DON'T THINK OF AN ELEPHANT!: KNOW YOUR VALUES AND FRAME THE DEBATE 3-4 (2004).

Taken together, the statement in this hypothetical case would be:

Mr./Ms. X is devastated by how terrible this situation is for all those who knew and loved the victim. We will cooperate fully with the investigation; nothing is more important than ensuring the family has the answers they deserve.

This is a full, complete statement encompassing the entirety of the perception-forming process, which did not require attacking anyone, litigating the case in the media, or demonstrating a selfish interest. No trial rights were waived, no professional misconduct took place, and the listener will feel the humanity of the defendant.

4. Issuing the Statement

There is one final component to this process: the issuing of the statement. A defendant's attorney has a vested interest in the case. The defendant is their client, and their reputation as an attorney is on the line. Both are well understood by the public. When a lawyer issues a statement on behalf of their client, it appears to be self-serving for both the attorney and the client. Moreover, because the attorney is assumed to have more inside information, as part of the attorney-client confidential relationship, the public will want that type of information as part of the statement. Therefore, many times it is better to avoid this predicament.

Having either the client or a third party release the statement creates distance from the idea that the defendant is hiding behind their attorney. This makes the statement more believable and less likely to feel like it is serving the particular interests of a vested party. While the attorney may want the publicity and name recognition for the case, their issuing the statement only complicates the intent of the statement and potentially does as much brand damage as a "no comment." That said, only a well-prepared and well-informed client should consider making a statement. The attorney should certainly provide support during the issuance of such statement to gain maximum effect and demonstrate sincerity on both the client's and lawyer's part. Even if the lawyer is not the spokesperson and

is not the one issuing the statement, the media and the public will identify and understand the role legal counsel plays.

This approach is good for current and for future clients. Every person watching the news, reading the newspaper, or seeing stories on social media is a potential future juror. While jurors are asked to set aside their personal feelings and rely only on the facts of a case, they are still human and absolutely bring their perspectives into the jury box.¹¹⁴ This is the very reason jury selection is such a meticulous process.¹¹⁵ Every time an attorney offers a “no comment” or similar utterance, they are educating a future jury that defendants want to hide from the truth, want to not be transparent, and are guilty—like a child with a marker in their hand who offers no comment about the drawing on the wall.

IV. COMMUNICATION MISSTEPS IN PAST CASES

In order to demonstrate how to apply these statement-crafting tools to actual cases, we have chosen a few cases to analyze why typical lawyer responses do not work in shifting perception and elevating the narrative in their client’s favor.

A. Case Study 1: Depp v. Heard (2022)¹¹⁶

1. The Challenge

In 2018, Amber Heard wrote an op-ed about her experience with domestic abuse in *The Washington Post*. She did not name Johnny Depp. Depp then sued Heard for defamation, claiming that what she wrote in the op-ed was false.¹¹⁷ Heard countersued Depp for \$100 million, claiming that she was only ever violent

¹¹⁴ *Facts Are Not What Wins Cases, Perceptions Do*, FINDLAW (July 27, 2017), <https://corporate.findlaw.com/litigation-disputes/facts-are-not-what-wins-cases-perceptions-do.html> [<https://perma.cc/B8N6-FE2V>].

¹¹⁵ Susan A. Hughes, *Want a Jury to Be Fair, Impartial, and Engaged in Higher-Quality Deliberations? Diversify the Jury Pool, Harvard Researchers Say.*, HARV. KENNEDY SCH. (Aug. 17, 2023), <https://www.hks.harvard.edu/faculty-research/policy-topics/fairness-justice/want-jury-be-fair-impartial-and-engaged-higher> [<https://perma.cc/D32C-488R>].

¹¹⁶ Depp v. Heard, No. CL-2019-2911, 2022 WL 2342058 (Va. Cir. Ct. June 24, 2022).

¹¹⁷ Memorandum in Support of Defendant & Counterclaim Plaintiff Amber Heard’s Post-Trial Motions at 1, Depp v. Heard, No. CL-2019-2911 (Va. Cir. Ct. June 24, 2022).

with Depp in self-defense or defense of her younger sister.¹¹⁸ Her countersuit centered around three statements made by Depp's former attorney in 2020 to the *Daily Mail*, where he described Heard's allegations of abuse as a "hoax."¹¹⁹

The defamation trial between Johnny Depp and Amber Heard captivated the nation and was the focus of intense media and social media coverage. For Depp, the stakes were clear: his career and reputation had been irreparably damaged by Heard's op-ed in *The Washington Post*. For Heard, the challenge was defending her credibility in the face of relentless public backlash and vicious social media attacks.

2. Approach Taken

Depp's legal team understood the power of perception and leaned into it. By allowing cameras in the courtroom, they invited the public to see their side of the story without relying on third-party media interpretations. This was an essential component in their ability to manage the narrative. The public, largely through social media activity (mainly on TikTok), had immediate access to curated soundbites taken directly from witnesses.¹²⁰ Importantly, the attorneys themselves became the subject of much of the social media attention.¹²¹ Everything from facial expressions to body

¹¹⁸ *Id.* at 6.

¹¹⁹ "Quite simply this was an ambush, a hoax. They set Mr. Depp up by calling the cops but the first attempt didn't do the trick,' Waldman told the Daily Mail, as quoted in the jury form. 'The officers came to the penthouses, thoroughly searched and interviewed, and left after seeing no damage to face or property. So Amber and her friends spilled a little wine and roughed the place up, got their stories straight under the direction of a lawyer and publicist, and then placed a second call to 911.'" Jacob Shamsian, *Why Johnny Depp Was Found Liable for Defamation for Something He Never Said*, BUS. INSIDER (June 1, 2022, at 16:40 CT), <https://www.businessinsider.com/johnny-depp-adam-waldman-statement-defame-amber-heard-2022-6> [<https://perma.cc/A2X7-QS6N>].

¹²⁰ Kathryn Vercruse, *Opinion: The Influence of Social Media on the Johnny Depp and Amber Heard Trial*, L.A. TIMES: HIGH SCH. INSIDER (Nov. 1, 2022), <https://highschool.latimes.com/opinion/opinionthe-influence-of-social-media-on-the-johnny-depp-and-amber-heard-trial/> [<https://perma.cc/JD5L-M9CV>].

¹²¹ Camille Vasquez, Depp's attorney, was quoted saying, "[A]ll anyone has is their name, so my goal was to give Johnny's back to him." Nate Luce, *Camille Vasquez Discusses Her Career and Representing Johnny Depp*, VAND. UNIV. L. SCH. (Mar. 13, 2024, at 08:58 CT), <https://law.vanderbilt.edu/camille-vasquez-discusses-her-career-and-representing-johnny-depp/> [<https://perma.cc/7T3H-QSHM>]. There was so much

language was scrutinized endlessly. The relaxed body language of Depp's team and the tense body language of Heard's team¹²² were used to bolster the perception that Depp was winning.

Depp's testimony, infused with emotion and personal anecdotes,¹²³ created a compelling narrative of resilience against unfair accusations.¹²⁴ Meanwhile, a clear public relations effort

speculation surrounding her and Depp and whether they were romantically involved. Vasquez firmly denied any dating claims, stating, "I would never. Let me just go on the record here: I never dated Johnny Depp. I never would date Johnny Depp. I think he's a lovely person. . . . He's not my type." *Johnny Depp's Lawyer Opens Up About Her Dating Status with the Actor: Who Is Camille Vasquez?*, ECON. TIMES (Nov. 2, 2024, at 20:58 IT), <https://economictimes.indiatimes.com/magazines/panache/johnny-depps-lawyer-opens-up-about-her-dating-status-with-the-actor-who-is-camille-vasquez/articleshow/114886955.cms> [<https://perma.cc/7P4A-AQZT>].

¹²² Several media articles discussed how Heard's legal team failed her, specifically because of Bredehoft's body language during trial: "When Johnny's lawyer, Camille Vasquez, interrupted Amber's lawyer, Elaine Bredehoft, with objections, she was visibly flustered. She didn't know how to handle the scenario—nor were they able to contain or manage their emotions very well. It was a tell-tale sign that they hadn't practiced or role-played. They appeared grossly unprepared." *Why Amber Heard's Team Failed Her*, NEGOTIATS. NINJA (June 27, 2022), <https://negotiations.ninja/blog/why-amber-heards-team-failed-her/> [<https://perma.cc/ERY2-HJN6>].

¹²³ See Benjamin VanHoose, *Johnny Depp's Lawyers Were 'Concerned' He 'Might Lose His Temper' on the Stand in Amber Heard Trial*, PEOPLE (Dec. 26, 2024, at 23:00 ET), <https://people.com/johnny-depp-lawyers-concerned-he-would-lose-temper-amber-heard-trial-8766417> [<https://perma.cc/LAL7-J3SC>]. Benjamin Chew, part of Depp's legal team, is quoted saying, "Johnny's use of humor really undermined whatever serious point Amber's counsel was trying to make We wanted to humanize Johnny before the jury so they could understand why hitting the woman he loved was something that he's just not capable of." *Id.*

¹²⁴ On the witness stand, Depp portrayed himself as down to earth and "normal," and the media seemed to embrace his depiction:

supported the narrative, highlighting Depp's contributions to entertainment and framing him as a victim of injustice. Fueled by the speed of social media, it became an insurmountable obstacle for Heard's team.

Heard's team struggled to counter this narrative in the court of public opinion. Their statements often felt defensive rather than proactive, allowing social media and public sentiment to frame Heard as the villain.¹²⁵ They missed the opportunity to elevate the broader issue of domestic violence. Instead, they left Heard with

It was sort of a rapid-fire, sort of endless parade of insults and – you know, looking at me like I was a fool. And I just couldn't – I was having difficulty in my mind, of course, and in my heart dealing with that sort of barrage. . . . I was sort of not allowed to be right. Not allowed to have a voice. . . .

[Y]ou start to slowly realize that you are in a relationship with your mother, in a sense. . . . [B]ut the fact is that some people search for weaknesses in other people, and that is to say sensitivities, and when you've told that person your life and what you've lived through, what you've been through, just as happens in relationships, the more that became ammunition for Ms. Heard to either verbally decimate me or to send me into a kind of tailspin of confusion and depression . . .

There was – I had no interest in being the – the words that they use that I dislike very much, a celebrity, or an entertainer, or fame is a strange word because I could never equate it with myself. I pumped gas, I worked construction, I printed T-shirts, I dug, you know, I had many, many jobs before any of this happened to me. So, I've been able to live both sides of that life – of life.

Transcript of Jury Trial - Day 7 at 1703-04, 1710, Depp v. Heard, No. CL-2019-2911 (Va. Cir. Ct. June 24, 2022).

¹²⁵ Jamie Burton, *Amber Heard's Legal Team Spammed with Negative Online Reviews*, NEWSWEEK (May 17, 2022, at 12:18 ET), <https://www.newsweek.com/amber-heard-legal-team-spammed-negative-reviews-johnny-depp-trial-1707249> [<https://perma.cc/FPX7-RYXT>].

the salacious details of the courtroom testimony as the only picture of her character.

3. Outcome

While the legal outcome awarded damages to both parties, Depp emerged as the clear victor in the public eye.¹²⁶ His team's deliberate narrative strategy reshaped his image, while Heard's reactive approach left her reputation in tatters. Her team's post-trial media appearances, clearly intended to rehabilitate her public image, came across as defensive, detached, and tone-deaf to public perception.

4. Takeaway

Depp v. Heard shows why controlling the initial perception is critical. A proactive and emotionally resonant public narrative can significantly improve a client's reputation, but failure to address the audience's emotional resonance—particularly as Heard's team did—can reinforce biases against your client.

5. What If?

Amber Heard's attorneys faced two simultaneous, daunting challenges. They needed to do all they could to win their case and protect Heard's image. They failed to do either. The role of the attorney is different in every case. The attorneys themselves were subject to ridicule all over social media. Rightly or wrongly, they had no credibility with the public. Here, they would have been well served by having third-party advocates speak for Heard—anywhere they could get them booked. There was a tremendous opportunity to uplift the all-too-real issue of domestic abuse. There was a tremendous opportunity to put Heard at the heart of

¹²⁶ The trial took place in 2022 in Virginia, and the jury found that Heard acted with actual malice when writing her op-ed and awarded Depp \$10 million in compensatory damages and \$5 million in punitive damages. The jury also found that Depp, through his attorney, defamed Heard on one count, and she was awarded \$2 million in compensatory damages and \$0 in punitive damages. Kalhan Rosenblatt, *Johnny Depp and Amber Heard Defamation Trial: Summary and Timeline*, NBC NEWS (Dec. 19, 2022, at 09:55 CT), <https://www.nbcnews.com/pop-culture/pop-culture-news/johnny-depp-amber-heard-defamation-trial-summary-timeline-rcna26136#https://perma.cc/42LW-FJ67>.

a movement and build a base of support for her. In failing to think past the confines of the trial, Heard's reputation took a substantial hit that may take years to recover from.

*B. Case Study 2: United States v. Michael Avenatti (2020)*¹²⁷

1. The Challenge

In 2019, attorney Michael Avenatti was accused and later convicted of using threats of economic and reputational harm to try to extort Nike and, at the same time, defrauding his own client by promising to settle his client's potential claims against Nike if Nike agreed to make extortionate payments to Avenatti.¹²⁸ Specifically, "Avenatti threatened to hold a press conference on the eve of Nike's quarterly earnings call and the start of the annual National Collegiate Athletic Association ("NCAA") basketball tournament at which he would announce allegations of misconduct by employees of Nike."¹²⁹ Avenatti said that he would agree not to hold the press conference and reveal information about a high school and college basketball scandal involving Nike if Nike made a \$1.5 million payment to his client and further agreed to "retain" Avenatti to conduct an "internal investigation," where Avenatti demanded to be paid between \$15 million-\$25 million.¹³⁰ Alternatively, Avenatti demanded a total payment of \$22.5 million from Nike to resolve any claims from Avenatti's client and to buy Avenatti's silence.¹³¹ Avenatti never told his client what he planned and that he threatened Nike in this way.¹³² Avenatti was later sentenced to thirty months in prison.¹³³

¹²⁷ United States v. Avenatti, 559 F. Supp. 3d 274 (S.D.N.Y. 2021).

¹²⁸ *Michael Avenatti Sentenced to Over Two Years in Prison for Attempting to Extort Nike and for Defrauding His Client*, U.S. DEP'T OF JUST.: U.S. ATT'Y'S OFF. S. DIST. OF N.Y. (July 8, 2021) [hereinafter *Michael Avenatti Sentenced*], <https://www.justice.gov/usao-sdny/pr/michael-avenatti-sentenced-over-two-years-prison-attempting-extort-nike-and-defrauding> [https://perma.cc/U7J8-J3KD].

¹²⁹ *Id.* Avenatti claimed that Nike improperly made payments to families of high school basketball players. See Aaron Cooper & Nicole Chavez, *Michael Avenatti 'Saw Dollar Signs' When a Client Approached Him with Nike Allegations, Prosecutor Says*, CNN (Jan. 30, 2020, at 01:29 ET), <https://www.cnn.com/2020/01/30/us/michael-avenatti-trial-opening-statements> [https://perma.cc/539X-TNES].

¹³⁰ *Michael Avenatti Sentenced*, *supra* note 128.

¹³¹ *Id.*

¹³² *Id.*

Michael Avenatti's extortion attempt against Nike showcased the dangers of weaponizing public statements without considering their legal and reputational ramifications. By framing himself as a hero taking on corporate corruption, Avenatti gambled on public support to bolster his defense. Much as the fable of Icarus warns against hubris, Avenatti's attempt to claim the Hero story as a personal narrative left little room for error.¹³⁴

2. Approach Taken

Avenatti's public statements were aggressive, inflammatory, and designed to grab headlines.¹³⁵ Even though he was the one facing criminal charges, and Nike had no direct claim in his criminal trial, Avenatti attempted to pivot the public's attention away from him and onto Nike.¹³⁶ In doing so, he accused Nike of widespread corruption, but his rhetoric lacked substance and factual grounding, which quickly led to a loss of credibility. Any attempt to define the public narrative must be grounded in factual reality. Avenatti's failure to tie fact to rhetoric left him exposed.

¹³³ *Id.*

¹³⁴ "U.S. District Judge Paul G. Gardephe called Avenatti's conduct 'outrageous,' saying he 'hijacked his client's claims, and he used those claims to further his own agenda, which was to extort millions of dollars from Nike for himself.'" Associated Press, *Michael Avenatti Sentenced to 2.5 Years in Prison in Nike Extortion Case*, ESPN (July 8, 2021, at 15:12 ET), https://www.espn.com/mens-college-basketball/story/_/id/31784401/michael-avenatti-sentenced-25-years-prison-nike-extortion-case [<https://perma.cc/4WV2-T6GM>].

¹³⁵ "Avenatti told Nike's representatives that if his two demands were not promptly met, 'he was going to blow the lid on this scandal.'" *United States v. Avenatti*, 81 F.4th 171, 179 (2d Cir. 2023). "I'm not f—ing around with this, and I'm not continuing to play games," Avenatti told Nike reps, according to court papers. "You guys know enough now to know you've got a serious problem. And it's worth more in exposure to me to just blow the lid on this thing. A few million dollars doesn't move the needle for me." Elisha Fieldstadt, Tom Winter & Sarah Fitzpatrick, *Michael Avenatti Guilty on All Counts in Nike Extortion Case*, NBC NEWS (Feb. 14, 2020, at 19:36 CT), <https://www.nbcnews.com/news/us-news/michael-avenatti-guilty-all-counts-nike-extortion-case-n1137106> [<https://perma.cc/JY83-S8ZD>].

¹³⁶ See Associated Press, *Michael Avenatti, Stormy Daniels' Ex-Lawyer, Heads to Prison for Attempted Extortion*, NPR (July 8, 2021, at 16:59 ET), <https://www.npr.org/2021/07/08/1014357602/michael-avenatti-stormy-daniels-prison-nike> [<https://perma.cc/J8WH-K3H2>]. "[Nike's] lawyers said Avenatti threatened to do billions of dollars of damage to Nike and then falsely tweeted that criminal conduct at Nike reached the 'highest levels.'" *Id.*

Faced with potentially brand-damaging headlines, Nike's legal team took the high road. Their carefully crafted public statements emphasized transparency and accountability, steering the focus back to Avenatti's actions rather than their own.¹³⁷ This refocused the narrative factually, piercing the rhetoric and reinforcing an already solid public image. The approach reflected the response the public would expect from a trusted brand.

3. Outcome

Avenatti's strategy backfired spectacularly. He was convicted on all counts and sentenced to thirty months in prison. Meanwhile, Nike's measured and consistent messaging ensured their reputation emerged unscathed, perhaps even improved. Because they were transparent, unafraid to engage with the story, and factually correct, they not only emerged unscathed but also looked like they had been victimized, enhancing their image.

4. Takeaway

This case underscores that public statements, like trial strategies, must be rooted in truth and restraint. Avenatti's failure to align his narrative with credibility and professionalism cost him not only his case and his standing in the court of public opinion but also his freedom.

5. What If?

Sometimes, the best course of action is to let someone else do the talking. Avenatti's reputation as a pugnacious and, at times, controversial figure served him well in building a national reputation. As any communications professional will tell you,

¹³⁷ See Dennis Green, *Nike Responds to Michael Avenatti's Arrest: 'Nike Will Not Be Extorted'*, BUS. INSIDER (Mar. 25, 2019, at 15:37 CT), <https://www.businessinsider.com/nike-responds-to-michael-avenatti-arrest-and-extortion-charge-2019-3> [https://perma.cc/MZG4-H4MD]. "Nike will not be extorted or hide information that is relevant to a government investigation . . . Nike has been cooperating with the government's investigation into NCAA basketball for over a year . . . When Nike became aware of this matter, Nike immediately reported it to federal prosecutors . . . When Mr. Avenatti attempted to extort Nike over this matter, Nike with the assistance of outside counsel at Boies Schiller Flexner, aided the investigation . . ." *Id.*

what works to garner public attention under one set of circumstances rarely works in others. Avenatti would have been better served by letting his lawyers speak for him. This case was complicated, and it was difficult for the public to fully understand the minute details. Having a media-trained attorney break down the complexity into simple soundbites would have done wonders to allow the public to understand the facts more clearly. In providing this necessary clarification, Avenatti's attorneys would also have the opportunity to provide much-needed context within the bounds of what they could say. The result may have been the same, but the reputational damage would have been lessened.

*C. Case Study 3: United States v. Kelly (2022)*¹³⁸

1. The Challenge

For nearly three decades, R. Kelly was the leader of a criminal enterprise made up of a group of individuals who served as managers, bodyguards, accountants, drivers, personal assistants, and runners for Kelly.¹³⁹ Kelly “used his fame to recruit women and [underage] girls to engage in illegal sexual activity with him.”¹⁴⁰ He identified these girls at concerts and then directed others to escort them backstage.¹⁴¹ He would then exchange contact information with the girls and arrange travel and lodging with them to visit Kelly and engage in illegal sexual conduct.¹⁴² Kelly made the girls follow many rules, including calling him “daddy,” prohibiting them from leaving their rooms to eat or use the bathroom without getting permission first, requiring them to wear baggy clothing when not accompanying Kelly to an event, and directing them to keep their heads down and not look at or speak to other men.¹⁴³

¹³⁸ United States v. Kelly, 609 F. Supp. 3d 85 (E.D.N.Y. 2022).

¹³⁹ “R. Kelly” Sentenced to 30 Years in Prison, U.S. IMMIGR. & CUSTOMS ENF’T (Jan. 24, 2025), <https://www.ice.gov/news/releases/r-kelly-sentenced-30-years-prison> [https://perma.cc/AHX9-KZ9L].

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

R. Kelly's decades-long allegations of sexual abuse culminated in multiple federal convictions. As expected, the media and social media attention was fierce. In a case with horrific details exploding across headlines, Kelly's defense team's approach—characterized by minimal public engagement—left the narrative entirely to survivor advocates and prosecutors.¹⁴⁴ This allowed the victims and their advocates to rightly bring to light issues of sexual abuse without the fear of being victim-shamed.¹⁴⁵ The results were predictably devastating.

2. Approach Taken

Kelly's legal team relied heavily on a “no comment” strategy, issuing few public statements and failing to humanize their client or address the broader societal issues at play. In doing so, they allowed the dehumanization, the image of a soulless and merciless predator, to take hold. While the allegations supported this narrative in their own right, his defense team's lack of rebuttal concretized these narratives in the public mind. The continued silence throughout the process allowed survivor advocates a near-continuous opportunity to shape the narrative, emphasizing Kelly's systemic abuse and the importance of accountability. The prosecution's emotionally resonant presentation of survivor stories

¹⁴⁴ See Michael Tarm, *Federal Prosecutors Request 25 More Years in Prison for R. Kelly*, PBS NEWS (Feb. 17, 2023, at 10:42 ET), <https://www.pbs.org/newshour/arts/federal-prosecutors-request-25-more-years-in-prison-for-r-kelly> [<https://perma.cc/6QAZ-5KUG>]. “[P]rosecutors described Kelly's behavior as ‘sadistic,’ calling him ‘a serial sexual predator’ with no remorse and who ‘poses a serious danger to society.’” *Id.*

¹⁴⁵ See *id.*

deepened public outrage, and the defense team's silence destroyed any attempt at future rehabilitation.¹⁴⁶

3. Outcome

Kelly was sentenced to thirty-one years in federal prison, and his public persona was irreparably destroyed.¹⁴⁷ The absence of a counternarrative meant the public's perception of guilt solidified early and remained unchallenged throughout the legal proceedings.

4. Takeaway

R. Kelly's case demonstrated how silence in the face of public scrutiny can be as damaging as an ill-conceived statement. "No comment" does nothing to shift emotional resonance or challenge perceptions, leaving long-term reputational harm unchecked. Another key takeaway is the importance of properly preparing a client for a media interview.

On March 8, 2019, the nation watched as R. Kelly sat down with CBS's Gayle King for an in-depth interview.¹⁴⁸ The interview was a prime example of the dangers of having an unprepared, unrepentant, and woefully inept client sit down with a reporter.¹⁴⁹

¹⁴⁶ See Associated Press, *Attorney: Don't Accept Portrayal of R. Kelly as 'Monster'*, KXXV (Aug. 19, 2022, at 13:26 CT), https://www.kxxv.com/entertainment/attorney-dont-accept-portrayal-of-r-kelly-as-monster#google_vignette [<https://perma.cc/E9KN-8H24>]. Kelly's defense attorneys' attempt at character rehabilitation at trial was weak and ultimately unpersuasive. Jennifer Bonjean, one of his defense attorneys, said, "It is true that Mr. Kelly is imperfect. . . . On his journey from poverty to stardom, he stumbled along the way." She also said, "When the government wants to paint him as a monster . . . you remember we are talking about a human being." *Id.*

¹⁴⁷ Mark Savage, *R. Kelly Trial: A Look at the Key Moments After Star Found Guilty*, BBC (Sep. 28, 2021), <https://www.bbc.com/news/entertainment-arts-58306164> [<https://perma.cc/5H46-QR94>]. Jacquelyn M. Kasulis, U.S. District Attorney at the time, said, "Today's guilty verdict forever brands R. Kelly as a predator who used his fame and fortune to prey on the young, the vulnerable and the voiceless for his own sexual gratification." *Id.*

¹⁴⁸ See *Gayle King Questions R. Kelly on Abuse Allegations*, CBS NEWS (Mar. 8, 2019), <https://www.cbsnews.com/video/playlist/r-kelly-the-gayle-king-interview-cbs-this-morning/> [<https://perma.cc/WBK7-U6AR>].

¹⁴⁹ See *id.* R. Kelly's interview with Gayle King after being charged with 10 counts of aggravated criminal sexual abuse was called "histrionic." Mark Savage, *R. Kelly: The History of His Crimes and Allegations Against Him*, BBC (Feb. 24, 2023),

It was evident to all who watched that Kelly had no prepared remarks, was not ready for tough questions, and that ego, more than wisdom, was in the driver's seat.

Beyond the obvious foibles and missed messaging opportunities, the interview was far more devastating for Kelly than just having bad answers.¹⁵⁰ Kelly's behavior during the interview, including his physical aggression towards King, solidified the validity of the accusations against him in the mind of the viewers.¹⁵¹ Accused of sexual violence with women, his behavior with a King, verbally and physically, was emblematic of the very behavior he was charged with committing.¹⁵² People believe what they see before what they hear, and Kelly's actions were the proverbial straw that broke the camel's back in the viewers' minds. Any prep session conducted by a communications professional would have revealed this behavior, and no communications professional would have allowed this interview to occur. Moreover, it is difficult to reconcile any legal counsel allowing their client to participate in this type of interview without preparation. Either Kelly ignored the professionals and did the interview irrespective of the advice he was given, or there was significant professional malpractice across the board.

5. What If?

The more complex the case, the more horrifying the facts, and the more challenging the circumstances, the easier it is to try and hide behind a wall of silence. In Kelly's case, all three factors were against him. The allegations were horrific. The case was both

<https://www.bbc.com/news/entertainment-arts-40635526> [https://perma.cc/AEV7-ADS4].

¹⁵⁰ During the interview, Gayle King said, "But the past is relevant with you with underage girls." Kelly replied, "Absolutely no it's not. Because for one, I beat my case. You can't double jeopardy me like that. When you beat your case, you beat your case." Mark Savage, *R. Kelly Breaks Silence over Sex Abuse Accusations: 'This Is Not Me'*, BBC (Mar. 6, 2019), <https://www.bbc.com/news/entertainment-arts-47457866> [https://perma.cc/3VYV-KMQE].

¹⁵¹ See *id.* Becoming emotional, he asked King: "How stupid would it be for R. Kelly, with all I've been through to hold somebody? How stupid would I be to do that?" *Id.*

¹⁵² See *id.* In a subsequent interview with two of his victims, the victims said, "R. Kelly is a liar, manipulator and sociopath who must be brought to justice for his decades of sexual assaults on underage girls. All these victims and their parents cannot be lying." *Id.*

complex in law and challenging in the facts. While silence may be the better part of valor, compassion is sometimes the better path to take.¹⁵³ Very little would change the public perception of Kelly after his media interviews, public statements, and then silence. Still, this is the exact type of case where elevating the narrative to express compassion for any victim of sexual assault is so important. The facts of the case fade from public memory over time. What doesn't fade is how people feel in the moment. Those feelings can last decades. Even a little compassion can go a long way towards alleviating some of the anger. Absent any form of contrition, acknowledgment, or even a broad sense of compassion, the public is left only with a feeling of disgust.

V. CONCLUSION

Tension can exist between restraining from comment, which is encouraged under the Model Rules of Professional Conduct, and shaping the pretrial publicity surrounding your client (whether that be the government, plaintiff, or defendant). Both sides in a legal dispute are vying for the hearts and minds of potential jurors in any case. They are also preparing potential jurors watching at home for many more cases in the future. Like it or not, we live in a digital age where public perception is often shaped in seconds. The time to think critically, delve into nuance, and gather information to make informed decisions is increasingly rare in the public sphere. The speed with which people are now inclined to make judgments, often lasting judgments, is sadly dictated by the speed of their scrolling.

¹⁵³ HSI Acting Executive Associate Director Steve K. Francis stated:

Robert Kelly is a prolific serial predator who utilized his wealth and fame to prey on the young and vulnerable by dangling promises of fame, fortune, and stardom for his own sexual gratification. For nearly thirty years, Kelly and his accomplices silenced his victims through bribery, intimidation, blackmail, and physical violence, confident they were immune to justice. Today's sentence is a victory which belongs to the survivors of Kelly's abuse. These brave women and men came forward, despite threats to their own personal safety, and were forced to relive the pain of the most traumatic days of their lives to tell the truth and make their voices heard.

"R. Kelly" Sentenced to 30 Years in Prison, U.S. IMMIGR. & CUSTOMS ENFT (Jan. 24, 2025), <https://www.ice.gov/news/releases/r-kelly-sentenced-30-years-prison> [<https://perma.cc/62NG-ZXQX>].

As discussed, people do not leave their preconceptions at the door. They bring their whole selves into the jury box. Depending on which side of a case you are on, this can be extremely difficult to overcome for your client. More broadly, this behavior erodes the very foundation of justice. Each subsequent generation will become more dependent on social media, less reliant and less trusting of traditional media and institutions. This phenomenon is already playing out in real time.

Two things are clear: there is a pathway to stay within the confines of professional conduct and speak to an increasingly skeptical and distrustful public. Attorneys must use common sense and keep the professional rules of conduct, the Sixth Amendment right to a fair trial, and fundamental fairness protections in mind when making extrajudicial comments.¹⁵⁴ Finding the middle ground takes skill and intentionality to navigate well. It can be done. More importantly, it must be done. To continue to operate with a mindset that is a generation in the past puts your clients at risk, your clients' reputation at risk, your reputation at risk, and, in a world of thirty-second videos, our entire system of justice at risk.

¹⁵⁴ Plaintiff's attorneys in *Kroft v. Viper Trans, Inc.*, 263 N.E.3d 1245 (Ill. App. Ct. 2025), published a series of social media posts during trial titled, "What Jurors Should Know But Don't," that discussed several extraneous matters, including the details of plaintiff's medical condition that the judge had excluded at trial and that the first trial had resulted in a forty-three million dollar verdict. *Id.* at 1252. The appellate court found communicating such information on social media during the second trial to be highly prejudicial to the defendants' right to a fair trial. *Id.* at 1260. Attorneys must always remember to use common sense and sound judgment and refrain from comment once trial has begun.