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SPINNING AND WINNING IN THE COURT OF PUBLIC OPINION

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INTRODUCTION

The American public has long held a fascination for courtroom drama since before the days of Perry Mason. However, these days, actual judges, lawyers, parties, and witnesses have become the celebrities. These new "reality" stars later write books, give interviews and sell movie rights. The trial may be broadcast live or sensationalized on cable news magazines. The spectacle that surrounds a highly publicized case presents difficult ethical problems for attorneys who must wage their battle in both the courtroom and in the court of public opinion.

The prosecution usually controls the initial narrative while the defense absorbs the first public relations blows. Through press conferences, leaks, and the indictment the government attempts to establish in the public's mind a presumption of guilt with tailored information released with the authority of the Government at its back. If left unanswered, that presumption may become settled in the public consciousness, affecting the willingness and ability of the prosecutors to deal; the economic, medical, and mental state of the client; and forever mark the client's reputation regardless of the eventual outcome.

THE RULE

The ethical rule that guides an attorney presented with a situation where the opposition's narrative is stealing the air from the room is *American Bar Association Model Rule of Professional Conduct* (Rule) 3.6:

> "(a) A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding."

Section (b) provides a list of statements that ordinarily are likely to violate section (a), and are primarily directed at criminal prosecutors. Section (c) provides safe harbors, those statements that would not violate the rule. The purpose of this rule is to prevent an attorney, through the use of the media, prejudicing the impartial jury before it can be seated.[i] Several factors weigh at whether a statement will material prejudice the proceeding. First, is the question of timing.[ii] Statements made six months away from trial or on the eve of a verdict (where the jurors are not following the news), are less likely to be prejudicial than statements made on the cusp of jury selection.[iii] Courts have noted that it is reasonable to assume that a seated jury would follow the admonitions of the court to avoid news accounts relating to the matter before them, therefore statements made once the jury has be seated are unlikely to reach their ears and corrupt their minds.[iv]

The amount of publicity surrounding a trail is another factor in determining whether the statements could be prejudicial.[v] A statement that is just a "mere drop in the ocean of publicity" is unlikely to be prejudicial because it is unlikely to be so "qualitative" as to affect public knowledge or mood in a saturated environment.[vi]

THE SPIN

As media as evolved into the 24-hour cable news cycle and the internet revolution has changed the way people get information, so too has the public relations response to legal troubles become more sophisticated and the ethical questions more complex.

Coordinated efforts by public relations experts and attorneys are being utilized by individuals and corporate citizens alike. For those that can afford it, like former HealthSouth CEO Richard Scrushy, the public relations campaign can have many fronts. Scrushy, a white Alabama native, began attending a predominately black church (which has televised broadcasts) just before he was indicted for securities fraud.[vii] Scrushy purchased an hour block on local cable to host his own television talk show on religion, law and politics.[viii] On the show, Scrushy interviewed his own attorney, Donald V. Watkins, several times.[ix] At the same time, Scrushy lead an aggressive legal counterattack that included complaints against the United States Attorney prosecuting the case, an FBI agent, and the Deputy Chief of the DOJ Fraud division.[x] Scrushy also employed the device that is proving to be universal in the pretrial legal public relations front, his own website.[xi]

THE WEBSITE

The website has emerged has the number one tool for creating, managing and responding to publicity surrounding legal proceedings. Unlike interviews and other forums, the website can be tailored specifically to convey the exact message and content that the creator wants, without the interference of journalists. While seeking interviews is still part of the public relations toolbox, the ploy can be risky if the softball interview becomes a game of hardball. The damage that can be done can produce another wave of bad press.

Websites can serve a variety of purposes. They can feature the good deeds of a person, as the website for Ken Lay—the former Enron CEO—did by touting his charitable work.[xii] Martha Stuart used her website to start the rehabilitation of her image—the image of her billion dollar company—before she even entered prison for crimes associated with securities fraud.[xiii] Scrushy used his website to counter negative press, to post legal documents, to tell his personal story of rags to riches, and to issue press releases relating to his prosecution.[xiv]

Chevron has very successfully used the internet to combat bad press and apparent judicial corruption regarding a civil case over environmental damages in Ecuador. Chevron has an entire website dedicated exclusively to the lawsuit alleging that Texaco—which was acquired by Chevron in 2001—poisoned the rainforest. Chevron has used YouTube.com in addition to its own website to post journalistic videos to combat negative press from a "60 Minutes" report. Chevron used its website to publish footage it says shows millions in bribes being solicited for contracts related to case. Chevron then turned over the footage to U.S. and Ecuadorean officials. The Chevron media response is closely coordinated between media advisors, litigation attorneys, in-house counsel, and company executives. The consultants and in-house attorneys remain in contact with each other daily and even hourly, and so are able to react to happenings with a timely legally informed media response in the battle over the trial narrative.

CONCLUSION

In both *Scrushy* and the *Chevron* case, the information released through the website was not just a media strategy to protect a brand name, but a legal strategy aimed at winning the battle of public opinion. The Rules prohibit publicity meant to prejudice jurors, yet the Supreme Court of the United States recognizes that the lawyers must be allowed to act as advocates to fight the

public opinion battle as well.[xv] Courts have been reluctant to gag the corporate and individual media machines of defendants.[xvi]

As the information age pushes more people to get their news and general information online, a legal strategy for high profile cases will inevitably require a professionally tailored website from which to publish "the other side of the story." The pretrial public relations blitz comes with inherent risks, and if poorly conceptualized and executed it can cause a backlash of negative press. The defense attorney always begins the public relations battle fighting the authoritative narrative of the prosecution. Both sides are ruled by professional rules regulating their speech. Winning the battle for public opinion may help deliver a more favorable result in the case; begin the restoration of image; and protect the client's economic, mental and physical health.

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[i] *Matter of Sullivan,* 185 A.D.2d 440; 586 N.Y.S.2d 322 (1992)(Per Curiam)(noting that jurors tend to follow the courts' instructions to avoid media coverage of the case during trial).
[ii] *Id.*
[iii] *Id.*
[iv] *Id.*
[v] *Id.*
[vi] *Id.*
[vii] Brian Grow, *All Scrushy, All The Time*, Business Week, April 12, 2004, http://www.businessweek.com/magazine/content/04_15/b3878100.htm.
[viii] *Id.*
[ix] *Id.*
[x] Scrushy World, http://www.scrushy-report.com/ss_names.html (last visited Aug. 30, 2010).
[xi] Krysten Crawford, CNN Money.com, *Extreme Makeover: CEO edition*, January 7, 2005, http://money.cnn.com/2005/01/07/news/newsmakers/execs_pr/?cnn=yes
[xii] *Id.*
[xiii] *Id.*
[xiv] Brian Grow, *All Scrushy, All The Time*, Business Week, April 12, 2004, http://www.businessweek.com/magazine/content/04_15/b3878100.htm
[xv] *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991)
[xvi] *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), *Matter of Sullivan*, 185 A.D.2d 440; 586 N.Y.S.2d 322 (1992)(Per Curiam); *But, U.S. v. Northrop Corp.*, DC Ca, No. CR 89-303-PAR, 2/15/90, 58 U.S.L.W. 2513.