

ADVOCACY IN THE MEDIA: THE BLAGOJEVICH DEFENSE AND A REFORMULATION OF RULE 3.6

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ABSTRACT

The current ethical rule governing lawyers' interactions with the media applies equally to defense attorneys and prosecutors despite their different roles and responsibilities in the justice system. With a focus on the Blagojevich trial as an example of modern lawyers' interactions with the press, this Note argues for a separate rule governing defense lawyers' extrajudicial speech. Such a rule would recognize an interest in protecting the legitimacy of the justice system and would provide clear standards to guide defense lawyers' advocacy outside of the courtroom. This Note provides an overview of the development of the trial-publicity rules, a glimpse of the media coverage of the Blagojevich trial, and a proposed rule to guide defense lawyers' extrajudicial advocacy.

INTRODUCTION

In the midst of a press conference announcing former Illinois Governor Rod Blagojevich's indictment on conspiracy and bribery charges, U.S. Attorney for the Northern District of Illinois Patrick Fitzgerald accused Blagojevich of engaging in conduct that "would make Lincoln roll over in his grave."¹ This press conference was the first drop in a sea of media coverage that would surround the events

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1. MICHAEL L. SEIGEL & JAMES L. KELLEY, *LAWYERS CROSSING LINES: TEN STORIES* 48 (2d ed. 2010).

leading up to and during the former governor's trial.² After Fitzgerald's public announcement, the Blagojevich defense team became a common presence on the evening news in Chicago, and the lawyers made no attempt to hide their defense strategy from the public and potential jurors.³ Although lawyers' advocacy in the media is nothing new, the Blagojevich defense team brought a new level of flamboyance to the court of public opinion.⁴

For more than forty years, committees of lawyers and judges have worked to develop sensible, modern guidelines for lawyers' interactions with the media, struggling to balance the right to a fair trial with the right of free expression.⁵ These rules have been designed to keep a jury focused on what occurs in the courtroom when rendering a verdict by reducing the potential for outside influences on the jurors.⁶ The modern rule on trial publicity has gone through at least three major revisions⁷ and, even in its current form, has received plenty of criticism from commentators.⁸

The current rule,⁹ which applies to prosecutors and defense lawyers alike, does not explicitly address defense lawyers'

2. A number of Chicago news outlets created blogs and webpages specific to the Blagojevich trial as a part of their coverage. *See, e.g.*, CHI. SUN-TIMES BLAGO BLOG, <http://blogs.suntimes.com/blago> (last visited Sept. 5, 2011); CHI. TRIB. BLAGOJEVICH ON TRIAL BLOG, <http://newsblogs.chicagotribune.com/blagojevich-on-trial> (last visited Sept. 5, 2011); *Blagojevich Trial*, WGN.TV.COM, <http://www.wgntv.com/news/blagojevich> (last visited Sept. 5, 2011); *Blagojevich Trial Coverage*, ABC7 NEWS, <http://abclocal.go.com/wls/channel?section=news/politics&id=7159461> (last visited Sept. 5, 2011); *Rod Blagojevich Coverage*, FOX CHI. NEWS, <http://www.myfoxchicago.com/generic/news/rod-blagojevich> (last visited Sept. 5, 2011).

3. *See infra* text accompanying notes 95–100.

4. *See* Bryan Smith, *Mighty Mouth*, CHICAGO, June 2010, at 70, 73 (“Adam Jr. has been the public face of the defense. And, true to form, his over-the-top appearances have been eclipsed only by the bombast and unrestrained theatricality of Blagojevich himself.”).

5. *See* MODEL RULES OF PROF'L CONDUCT R. 3.6 cmt. 1 (2010) (“It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression.”); *see also* Paul C. Reardon, *The Fair Trial-Free Press Standards*, 54 A.B.A. J. 343, 345 (1968) (“The report of the advisory committee was, in essence, an attempt to establish reasonable guides for professional conduct with no interference with constitutional guarantees of press freedoms.”).

6. John C. Watson, *Litigation Public Relations: The Lawyers' Duty To Balance News Coverage of Their Clients*, 7 COMM. L. & POL'Y 77, 91 (2002).

7. STEPHEN GILLERS, ROY D. SIMON & ANDREW M. PERLMAN, *REGULATION OF LAWYERS: STATUTES AND STANDARDS 271–76* (concise ed. 2010); *see also infra* Part I.

8. *See e.g., infra* notes 73–74 and accompanying text.

9. MODEL RULES OF PROF'L CONDUCT R. 3.6.

extrajudicial advocacy.¹⁰ This lack of clearly defined restrictions on extrajudicial speech allows lawyers like the Blagojevich defense team to push the limits of the rule through their statements to the media without any serious repercussions.¹¹ Other lawyers, concerned with violating the rules, have responded to the lack of guidance by remaining silent.¹² To address this problem, the focus of the rule should be reevaluated to account for the different interests in restricting prosecutors' and defense lawyers' speech, and the structure of the rule and its limitations should reflect those interests. Such a reform would provide more guidance for attorneys in determining when it is appropriate to talk to the media and would allow disciplinary authorities to enforce the rule when lawyers cross the line.

This Note proposes that the American Bar Association (ABA) develop a separate rule for defense lawyers in the realm of trial publicity that accounts for the different purposes for restricting their speech and that takes into account the proper allowances or limitations on extrajudicial advocacy.¹³ Part I provides an overview of the history and development of trial-publicity rules. Part II looks to the Blagojevich case as an example of lawyers' current interactions with the media in high-profile cases and discusses the rule's shortcomings. Part III addresses the importance of having a workable rule and explains the rationale behind the separation of rules for prosecutors and defense lawyers. It then proposes potential guidelines that would allow defense lawyers to advocate in the court of public opinion, but that would also limit this advocacy in a way that would ensure the effective representation of clients and the legitimacy of the legal profession as a whole.

10. *See id.* R. 3.6 cmt. 1 (listing several "vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves" but omitting any reference to a lawyer's advocacy for his client).

11. *See infra* text accompanying notes 164–166.

12. *See infra* text accompanying notes 167–171.

13. Although this Note will address the current trial-publicity rule as it applies to both prosecutors and defense attorneys, the suggested changes in the rule will focus on defense attorneys' extrajudicial advocacy. Because the current rule seems to be geared more toward prosecutor speech, a new, separate rule should be developed to provide clear guidelines for defense attorneys. The current Rule 3.6 would remain a rule that applies to prosecutors only.

I. DEVELOPMENT OF THE TRIAL-PUBLICITY RULES

A. *History of the Regulation of Trial Publicity*

The ABA's first attempt at restricting extrajudicial speech came long before the influx of modern media. In 1908, the ABA issued Canon 20 of the Canons of Professional Ethics, which significantly limited a lawyer's interactions with the press.¹⁴ The Canon expressed the ABA's view that lawyers should generally refrain from making extrajudicial public statements,¹⁵ even in extreme cases.¹⁶ If a lawyer found it absolutely necessary to comment publicly, the Canon declared that the lawyer "should not go beyond quotation from the records and papers on file in the Court."¹⁷ Despite its strict language, the standard was not actually mandatory.¹⁸ The lack of enforceability was likely due in part to a concern that such a rule would risk infringing on lawyers' First Amendment rights.¹⁹

1. *Sheppard v. Maxwell*. Nearly sixty years after the creation of Canon 20, the Supreme Court acknowledged in dicta the potential for a constitutional rule restricting lawyer speech.²⁰ A jury found Dr. Sam

14. Canon 20 provided that:

Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the Court; but even in extreme cases it is better to avoid any *ex parte* statement.

CANONS OF PROF'L ETHICS Canon 20 (1908).

15. Like the trial-publicity rules, this Note frequently references lawyers' extrajudicial statements. The concern, however, is not with all statements made outside the courtroom. Instead, the references to extrajudicial statements are in regard to statements made outside the courtroom that the lawyer knows or should know will be transmitted to the public through some form of media.

16. See CANONS OF PROF'L ETHICS Canon 20 ("[E]ven in extreme cases it is better to avoid any *ex parte* statement.").

17. *Id.*

18. See Gabriel G. Gregg, *ABA Rule 3.6 and California Rule 5-120: A Flawed Approach to the Problem of Trial Publicity*, 43 UCLA L. REV. 1321, 1331-32 (1996) (explaining that Canon 20 "was simply a guideline and not punishable by state bars"); Reardon, *supra* note 5, at 344 ("In our judgment, the canon was not sufficiently explicit and lacked muscle.").

19. Lonnie T. Brown, Jr., "May It Please the Camera, . . . I Mean the Court"—An Intrajudicial Solution to an Extrajudicial Problem, 39 GA. L. REV. 83, 95-96 (2004).

20. See *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966) ("Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures."); see also Watson,

Sheppard guilty for the murder of his wife in 1954, and Sheppard's habeas corpus petition reached the Supreme Court in 1965.²¹ Sheppard argued that he had not received a fair trial because of the "massive, pervasive and prejudicial publicity" that surrounded the litigation.²² Overturning Sheppard's conviction, the Court noted the increasing prevalence of "unfair and prejudicial news comment on pending trials" and emphasized the need for further regulation in the realm of trial publicity.²³ Although the Court in *Sheppard v. Maxwell*²⁴ focused on the "carnival atmosphere at trial" rather than statements made only by the attorneys in the case, it nevertheless emphasized that the need for regulation came from a concern about the accused's right to a fair trial.²⁵

2. *The ABA Model Code of Professional Responsibility: DR 7-107.* The Court's dicta in *Sheppard*, together with the Warren Commission Report²⁶ and a general sense among the press and judges that the profession needed more guidance in trial publicity, led to the formation of a new rule to replace Canon 20.²⁷ The Advisory

supra note 6, at 93 (explaining that during the years between the creation of Canon 20 and the *Sheppard* case, "sensational and intrusive coverage of controversial trials was blamed for contributing to public hysteria and, in turn, producing unfair trials").

21. *Sheppard*, 384 U.S. at 335 & n.1.

22. *Id.* at 335.

23. *Id.* at 362–63. The Court noted that it was the trial courts' responsibility to ensure a defendant's right to a fair trial through the creation of rules and regulations. *Id.* Although the Model Rules of Professional Conduct now provide guidelines for lawyers' comments to the media, the Model Rules are not binding on their own. GILLERS ET AL., *supra* note 7, at 3. Courts still adopt their own rules, and states have their own disciplinary systems. *Sheppard*, 384 U.S. at 363. The Model Rules simply provide a comprehensive set of guidelines, which most states follow closely. GILLERS ET AL., *supra* note 7, at 3. For a selection of state variations on the current trial-publicity rule, see *id.* at 276–78.

24. *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

25. *Id.* at 358, 362. The Court made clear that the trial judge should have instated rules to control both the press and "the release of leads, information, and gossip to the press by police officers, witnesses, and the counsel for both sides." *Id.* at 358–59. It did, however, note that if there was a continued likelihood that publicity could threaten the defendant's right to a fair trial, the judge could have transferred the case or sequestered the jury. *Id.* at 363.

26. The Warren Commission's purpose was to investigate the assassination of President Kennedy. ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 61:1008 (2011). As a part of its report, the commission encouraged representatives of the bar to work with law enforcement and news media to develop "ethical standards concerning the collection and presentation of information to the public so that there will be no interference with pending criminal investigations, court proceedings, or the right of individuals to a fair trial." *Id.* In response, the ABA established the Advisory Committee on Fair Trial and Free Press in 1964, chaired by Paul Reardon. Reardon, *supra* note 5, at 343.

27. Reardon, *supra* note 5, at 343–44.

Committee on Fair Trial and Free Press released a final draft in 1968.²⁸ In its report, the committee focused on creating a set of narrowly tailored guidelines and limitations to protect a criminal defendant's right to a fair trial without upsetting the First Amendment.²⁹ The committee's recommendations were incorporated into the ABA Model Code of Professional Responsibility as DR 7-107.³⁰ These guidelines alleviated some of the concerns about the lack of specificity and enforceability present in Canon 20, but the overall restrictive nature of the standard remained.³¹

3. *Chicago Council of Lawyers v. Bauer*. The Seventh Circuit reviewed Illinois's version of DR 7-107 in *Chicago Council of Lawyers v. Bauer*.³² Just as *Sheppard* questioned the continued effectiveness of Canon 20 and prompted a new trial-publicity standard, the decision in *Bauer* questioned the continued validity of DR 7-107.³³ In determining that the reasonable-likelihood-of-prejudice standard in DR 7-107 was overbroad, the court emphasized that all First Amendment restrictions must be narrowly tailored to the state's legitimate interest.³⁴ The court held that the rule swept too broadly and could lead to the prohibition of harmless statements.³⁵ Suggesting the inclusion of a serious-and-imminent-threat standard, the court added that "[l]awyers must be aware of exactly what areas

28. ADVISORY COMM. ON FAIR TRIAL & FREE PRESS, ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS (1968). The committee's report is often referred to as the Reardon Report after the committee's chairman.

29. See Reardon, *supra* note 5, at 344 ("In short, we have recommended new language that states the duty of a lawyer to refrain from disseminating information or opinion reasonably likely to interfere with a pending or imminent criminal trial with which he is associated or with a grand jury or other pending investigation."). The committee also reiterated that the focus of the conflict in extrajudicial speech is the tension between a defendant's Sixth Amendment right to a fair trial and the First Amendment right to free speech, both of which have been considered independently to be the most fundamental of all constitutional rights. Robert A. Ainsworth, Jr., *Fair Trial-Free Press*, 45 F.R.D. 417, 418 (1968).

30. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-107 note 85 (1980); see also Brown, *supra* note 19, at 98 (noting that the committee's report includes the "reasonable likelihood" of preventing a fair trial standard, which the *Sheppard* Court suggested would be the appropriate standard).

31. Brown, *supra* note 19, at 98-100.

32. *Chi. Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975).

33. See *id.* at 251 (finding that DR 7-107, among other rules, was "constitutionally infirm" because it "fail[ed] to specifically incorporate within each provision the serious and imminent threat standard").

34. *Id.* at 249.

35. *Id.* at 251.

of speech might pose a serious and imminent threat of interference with a fair trial.”³⁶

B. Development of the ABA Model Rules of Professional Conduct

Shortly after the *Bauer* decision, the ABA established the Commission on Evaluation of Professional Standards to comprehensively rethink the existing Model Code of Professional Responsibility.³⁷ Instead of revising the existing Model Code, the commission proposed the Model Rules of Professional Conduct as a replacement, including Rule 3.6, which addressed trial publicity.³⁸ As adopted in 1983, Rule 3.6 disallowed the making of any statements that a reasonable lawyer knows or should know would “have a substantial likelihood of materially prejudicing an adjudicative proceeding.”³⁹ The rule also listed the types of statements likely to prejudice a proceeding and those that a lawyer could usually make without fear of violating the rule.⁴⁰ In a comment accompanying the final draft of the proposed Rule 3.6, the commission noted the difficulty in striking a balance between a defendant’s right to a fair trial and an attorney’s right of free expression, and it acknowledged that no set of rules would be able to satisfy the multiple competing interests.⁴¹

36. *Id.*

37. Robert J. Kutak, *Chairman’s Introduction to MODEL RULES OF PROF’L CONDUCT*, at i, i (Proposed Final Draft 1981); *see also* ABA COMM’N ON EVALUATION OF PROF’L STANDARDS, REPORT TO THE HOUSE OF DELEGATES 1 (1982) (“The objective of the project was to produce rules of professional conduct that preserve fundamental values while providing realistic, useful guidance for lawyer conduct in an environment that finds the profession and the practice of law, like American society itself, undergoing significant change.”).

38. ABA COMM’N ON EVALUATION OF PROF’L STANDARDS, *supra* note 37, at 72–73.

39. *Id.* at 72.

40. *Id.* at 72–73. For example, the rule specified that a statement is likely to lead to material prejudice when, *inter alia*, it refers to a criminal matter and relates to “the 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,” or “information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial.” *Id.* The rule also included as subsection (b) a provision allowing “[a] lawyer involved in the investigation or litigation of a matter [to] state without elaboration . . . the general nature of the claim or defense,” public information, and other basic facts. *Id.*

41. *See id.* at 73 (“No body of rules can simultaneously satisfy all interests of fair trial and all those of free expression.”). As a part of the 1994 amendments to the rule, the committee removed this comment. ABA STANDING COMM. ON ETHICS & PROF’L RESPONSIBILITY & ABA CRIMINAL JUSTICE SECTION, REPORT TO THE HOUSE OF DELEGATES 3 (1994).

The commission determined that the rule should apply equally to prosecutors and defense attorneys, without any explicit differentiation between the two.⁴² Although the drafters of Rule 3.6 did not clarify why they chose not to enumerate separate guidelines, they defended the application of the general rule to both prosecutors and defense lawyers⁴³ after courts and commentators argued that the limitations on extrajudicial speech should apply only to the prosecution.⁴⁴ These arguments focused on the idea that the restrictions on pretrial publicity are meant to safeguard a defendant's Sixth Amendment right to a fair trial, a right that is not jeopardized by the defense counsel's interactions with the media.⁴⁵ Responding to this argument, the drafters explained that the state's interest in the limitations could be construed as a more general concern about the fair administration of justice, rather than protecting the specific right of a defendant.⁴⁶

42. See ABA COMM'N ON EVALUATION OF PROF'L STANDARDS, *supra* note 37, at 72 ("A lawyer shall not make an extrajudicial statement that the lawyer knows or reasonably should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding." (emphasis added)). The rule also applies to lawyers involved in a civil case, but this Note focuses solely on the rule as it applies to defense attorneys and prosecutors. Much as this Note will argue that the rule should provide separate guidelines for defense attorneys and prosecutors, it would also be wise to reevaluate the guidelines for lawyers involved in civil litigation. See WILLIAM H. FORTUNE, RICHARD H. UNDERWOOD & EDWARD J. IMWINKELRIED, *MODERN LITIGATION AND PROFESSIONAL RESPONSIBILITY HANDBOOK: THE LIMITS OF ZEALOUS ADVOCACY* § 7.2.4, at 312 (2d ed. 2001) ("While Model Rule 3.6 applies to all 'adjudicative proceedings,' the courts' primary concern has been with extrajudicial statements in criminal cases. Civil cases take longer to reach trial, are usually less highly charged, and do not implicate the right to an impartial jury under the sixth amendment.").

43. See MODEL RULES OF PROF'L CONDUCT R. 3.6 notes at 148 (Proposed Final Draft 1981) (explaining the application of the rule to both prosecutors and defense counsel, rather than to prosecutors alone).

44. *Id.*

45. *Id.*; CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 635 n.5 (1986); see also *Chi. Council of Lawyers v. Bauer*, 522 F.2d 242, 253 (7th Cir. 1975) ("The possibility of prejudice to the Government's case, which has not even been presented by indictment or information, is too remote in view of the countervailing interests to justify these restrictions on nonprosecution attorneys."); Monroe H. Freedman & Janet Starwood, *Prior Restraints on Freedom of Expression by Defendants and Defense Attorneys: Ratio Decidendi v. Obiter Dictum*, 29 STAN. L. REV. 607, 607-08 (1977) (arguing that concerns about publicity generated by the defense are misguided because the Constitution guarantees "protecting the individual from the state, not the reverse").

46. MODEL RULES OF PROF'L CONDUCT R. 3.6 notes at 148 (Proposed Final Draft 1981). It is not clear what the drafters meant by a general concern about the "fair administration of justice." Although the committee stated that it intended to protect more than the defendant's Sixth Amendment right to a fair trial, it did not explain the explicit nature of those interests. *Id.* For more on the state interest in the rule, see *infra* Part II.C.2.

C. *Challenging the Validity of the Rule: Gentile v. State Bar of Nevada*

The new ABA standard loosened the restrictions on lawyer speech but did not eliminate doubts about the rule's constitutional validity.⁴⁷ The new rule faced its first major revision in 1994 following the Supreme Court's ruling in *Gentile v. State Bar of Nevada*.⁴⁸ In *Gentile*, a criminal-defense attorney challenged the constitutionality of Nevada's trial-publicity rule, which was almost identical to Rule 3.6.⁴⁹ The Southern Nevada Disciplinary Board of the State Bar had recommended that Gentile face private reprimand for statements he had made during a press conference six months before his client's trial, in which he argued that the police, rather than his client, had been responsible for the theft of \$300,000 worth of drugs from a storage facility.⁵⁰ Gentile appealed the decision to the Nevada Supreme Court, which affirmed the board's judgment.⁵¹ In a decision with two majority opinions, the Supreme Court held that Nevada's rule was unconstitutional.⁵² Justice O'Connor joined parts III and VI of Justice Kennedy's opinion, giving those parts five votes.⁵³ There, the Court held that the rule was unconstitutionally vague.⁵⁴ Specifically, the Kennedy majority recognized that the rule's safe-harbor provision⁵⁵ "misled [Gentile] into thinking that he could give his press conference without fear of discipline."⁵⁶

47. See Scott M. Matheson, Jr., *The Prosecutor, the Press, and Free Speech*, 58 *FORDHAM L. REV.* 865, 931 (1990) (suggesting that "provisions remain in Model Rule 3.6 that are open to vagueness and overbreadth questions").

48. *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991).

49. *Id.* at 1033 (opinion of Kennedy, J.).

50. *Id.*

51. *Id.*

52. *Id.* at 1033–34.

53. *Id.* at 1082 (O'Connor, J., concurring). Justices Thurgood Marshall, Harry A. Blackmun, and John Paul Stevens joined with Justices Kennedy and O'Connor to form the majority for parts III and VI of Justice Kennedy's opinion.

54. *Id.* at 1048 (majority opinion of Kennedy, J.).

55. This provision aligned with subsection (b) of Rule 3.6, which provided a number of things a lawyer could state "without elaboration." *Id.*; ABA COMM'N ON EVALUATION OF PROF'L STANDARDS, *supra* note 37, at 72–73.

56. *Gentile*, 501 U.S. at 1048 (majority opinion of Kennedy, J.). The Court seemed particularly concerned with the language of the rule that allowed lawyers to state the "general nature of the . . . defense." *Id.* (alteration in original) (quoting ABA COMM'N ON EVALUATION OF PROF'L STANDARDS, *supra* note 37, at 72). This language provides insufficient guidance to lawyers hoping to discuss a client's defense: "The lawyer has no principle for determining when

Justice O'Connor also joined parts I and II of Chief Justice Rehnquist's opinion, giving a fifth vote to those parts.⁵⁷ The Rehnquist majority held the rule's "substantial likelihood of material prejudice" standard to be constitutional.⁵⁸ The Court determined that lawyers' speech could be restricted in this way in part because lawyers are "key participants in the criminal justice system" and have additional responsibilities to protect the fairness and integrity of the judiciary.⁵⁹ Rehnquist held that the standard was sufficiently narrow and only limited lawyers' speech to the extent necessary to protect the state's interest.⁶⁰

Alternatively, in the portion of his opinion that received only four votes, Justice Kennedy argued that lawyers have a duty to their clients outside the courtroom, which sometimes necessitates making statements to the media to defend a client's reputation or responding to comments from the prosecution.⁶¹ Although Kennedy argued that the rule imposed a greater-than-necessary limitation on a lawyer's First Amendment freedoms, he also noted that the case was "a poor vehicle for defining with precision the outer limits under the

his remarks pass from the safe harbor of the general to the forbidden sea of the elaborated." *Id.* at 1049.

57. *Id.* at 1082 (O'Connor, J., concurring). Justices Byron R. White, Antonin Scalia, and David H. Souter joined with Chief Justice Rehnquist and Justice O'Connor to form the majority of the court for parts I and II of Rehnquist's opinion.

58. *Id.* at 1075 (majority opinion of Rehnquist, C.J.).

59. *See id.* at 1074-75 ("Because lawyers have special access to information through discovery and client communications, their extrajudicial statements pose a threat to the fairness of a pending proceeding since lawyers' statements are likely to be received as especially authoritative.").

60. *Id.* at 1075. Both Chief Justice Rehnquist and Justice O'Connor justified their positions by recognizing that lawyers are "officers of the court." *Id.*; *id.* at 1081-82 (O'Connor, J., concurring). Rehnquist noted that the state's interest in protecting the integrity and fairness of the judicial system requires a less demanding standard. *Id.* at 1075 (majority opinion of Rehnquist, C.J.). Rehnquist did not make clear whether he was referring to the defendant's Sixth Amendment right to a fair trial or a more general interest in the overall integrity of the system but did note that "[f]ew, if any, interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors, and an outcome affected by extrajudicial statements would violate that fundamental right." *Id.*

61. *Id.* at 1043 (opinion of Kennedy, J.) ("An attorney's duties do not begin inside the courtroom door. He or she cannot ignore the practical implications of a legal proceeding for the client. . . . [A]n attorney may take reasonable steps to defend a client's reputation and reduce the adverse consequences of indictment, especially in the face of a prosecution deemed unjust or commenced with improper motives.").

Constitution of a court's ability to regulate an attorney's statements about ongoing adjudicative proceedings."⁶²

In response to the Supreme Court's ruling, the Standing Committee on Ethics and Professional Responsibility reviewed the continued validity and effectiveness of Rule 3.6 and suggested three substantial changes.⁶³ First, responding to the *Gentile* Court's concern about the vagueness of the rule, the committee proposed minor changes to the wording of several of the safe-harbor statements in subsection (c) and proposed moving the rule's provisions outlining specific statements that were likely to cause prejudice to the commentary.⁶⁴ Next, the committee proposed the addition of a right-of-reply provision.⁶⁵ This provision, now included as Rule 3.6(c), allows "a lawyer to respond where adverse publicity has been initiated by an opposing party or third persons, in order to avoid substantial undue prejudice to the lawyer's client."⁶⁶ Finally, the committee suggested that a new subsection be added to the current Rule 3.8, which includes special rules for prosecutors.⁶⁷ This provision would prohibit unnecessary comments likely to increase public criticism of the accused.⁶⁸ The ABA House of Delegates approved the recommendations of the committee in August of 1994.⁶⁹

62. *Id.* at 1057–58. One of the reasons Justice Kennedy thought this case did not provide a good occasion for defining an appropriate standard of scrutiny for extrajudicial speech was that it involved a criminal defense lawyer and not a prosecutor. *Id.* at 1055. Whereas Chief Justice Rehnquist stated that the rule applies equally to all lawyers, *id.* at 1076 (majority opinion of Rehnquist, C.J.), Kennedy argued that "[t]he various bar association and advisory commission reports which resulted in promulgation of ABA Model Rule of Professional Conduct 3.6, and other regulations of attorney speech, and sources they cite, present no convincing case for restrictions upon the speech of defense attorneys," *id.* at 1055 (opinion of Kennedy, J.) (citation omitted).

63. ABA STANDING COMM. ON ETHICS & PROF'L RESPONSIBILITY & ABA CRIMINAL JUSTICE SECTION, *supra* note 41, at 7.

64. *Id.*

65. *Id.* at 8.

66. *Id.*

67. *Id.*

68. *Id.* This new subsection now appears in MODEL RULES OF PROF'L CONDUCT R. 3.8(f) (2010). Although it is not clear from the committee report, this addition may have been in response to Justice Kennedy's argument in *Gentile*, in which he distinguished criminal defense lawyers from prosecutors. See *supra* note 62.

69. GILLERS ET AL., *supra* note 7, at 274.

* * *

Throughout the course of the development of the ABA's ethical rules, commentators have criticized them as an ineffective approach to dealing with the trial-publicity problem.⁷⁰ This sentiment has also been reflected in the courts.⁷¹ The added "right of reply" in Rule 3.6(c)⁷² and the continued ambiguity in the rule's language and purpose following the 1994 amendments⁷³ have left lawyers with little guidance in determining how much they can or should say to the media.⁷⁴ Without the necessary level of clarity and a proper focus, the rule provides little force for effectively restricting lawyers' speech.

70. See, e.g., Erwin Chemerinsky, *Silence Is Not Golden: Protecting Lawyer Speech Under the First Amendment*, 47 EMORY L.J. 859, 884-85 (1998) ("The [Model Rules'] inherent vagueness and uncertainty is virtually certain to chill speech."); Gregg, *supra* note 18, at 1361 ("In essence, broadly applicable disciplinary rules such as these create more problems than their limited value as a control on lawyers' speech warrants.").

71. See Gregg, *supra* note 18, at 1323 ("Indeed, every major trial publicity rule introduced before 1994 has been invalidated by some court as overly restrictive of lawyers' First Amendment rights.").

72. Rule 3.6(c) provides:

Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

MODEL RULES OF PROF'L CONDUCT R. 3.6(c). The addition of Rule 3.6(c) may have signified the rule writers' recognition that talking to the media at times plays a role in lawyers' zealous representation of their clients. See *id.* R. 3.6 cmt. 7 ("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."). It is not clear, however, what may be viewed as "necessary" to mitigate the effects of adverse publicity and at what point a lawyer's responsive statements would become unnecessary. It may be the case that, in practice, Rule 3.6(c) provides no meaningful limitation on lawyers' extrajudicial speech so long as it is responding to recent adverse publicity. See Brown, *supra* note 19, at 111 ("[O]ne might reasonably question whether . . . the door for responsive extrajudicial statements is ever truly closed in [high-profile] cases."). For more on the limitations on the scope of the right of reply, see *infra* Part II.C.1.

73. Brown, *supra* note 19, at 90-91 ("Rule 3.6 is rife with qualifiers and ambiguities that render it difficult, if not impossible, to enforce meaningfully."). Professor Brown also asserts that limitations on prosecutors' extrajudicial speech in Rule 3.8(f) are "equally as vague and difficult to enforce as Rule 3.6." *Id.* at 91.

74. See James R. Devine, *The Duke Lacrosse Matter as a Case Study of the Right To Reply to Prejudicial Pretrial Extrajudicial Publicity Under Rule 3.6(c)*, 15 VILL. SPORTS & ENT. L.J. 175, 210, 223 (2008) (questioning the limits of Rule 3.6(c) but noting that there must be some limitation).

II. THE WEAKNESSES OF THE CURRENT RULE

The added right of reply in Rule 3.6(c) is perhaps an indication that the ABA is prepared to recognize that advocacy may properly reach beyond courtroom doors.⁷⁵ But the rule's remaining ambiguity is more likely to lead to confusion than successful advocacy. This Part begins with a discussion of the Blagojevich trial as an example of defense lawyers' representation of a client in the media and illustrates the different motivations for prosecution and defense attorneys to engage in extrajudicial speech. Finally, this Part uses the press coverage of the Blagojevich case to illuminate the rule's lack of clarity and misguided purpose and to attempt to discover the ultimate source of confusion.

A. *Blagojevich Trial: Advocacy in the Media*

1. *Pretrial Statements.* On December 9, 2008, Patrick Fitzgerald, the U.S. Attorney for the Northern District of Illinois, addressed the press on what he called "a very sad day for Illinois government."⁷⁶ Fitzgerald's press conference was the first official announcement of the complaint accusing then-Illinois Governor Rod Blagojevich of conspiracy and bribery.⁷⁷ Fitzgerald said Blagojevich had been arrested in an attempt to stop "a political corruption crime spree."⁷⁸ The "most appalling" allegation in the complaint was that Blagojevich had attempted to sell the Senate seat vacated by Barack Obama after his election to the White House.⁷⁹ Fitzgerald told the media that the Federal Bureau of Investigation (FBI) had placed a wiretap on Blagojevich's home phone and that the tapes from that interception would expose Blagojevich's attempt to sell the seat.⁸⁰ He then quoted the governor as saying that the Senate seat is "a bleeping valuable thing You just don't give it away for nothing. . . . I've got this thing, and it's bleeping golden. And I'm just not giving it up

75. See Watson, *supra* note 6, at 98 (arguing that the right-of-reply revision indicates that the ABA is "recognizing the outside forum as a proper arena where the attorneys' duty to zealously defend their clients remains paramount").

76. Patrick Fitzgerald, U.S. Att'y for the N. Dist. of Ill., & Robert Grant, Special Agent, Fed. Bureau of Investigation, Justice Department Briefing on Blagojevich Investigation (Dec. 9, 2008) (transcript available at <http://www.nytimes.com/2008/12/09/us/politics/09text-illinois.html>).

77. *Id.*

78. *Id.*

79. *Id.*

80. SEIGEL & KELLEY, *supra* note 1, at 48.

for bleeping nothing.”⁸¹ Fitzgerald described the governor’s actions as taking the state of Illinois “to a truly new low,” and remarked that Blagojevich’s conduct “would make Lincoln roll over in his grave.”⁸² The latter statement made for a sensational headline, but commentators quickly questioned whether Fitzgerald had gone too far.⁸³

The defense team first appeared in front of cameras and reporters on Blagojevich’s behalf on December 19, 2008.⁸⁴ After Blagojevich denied the accusations against him, attorneys Sam Adam

81. Fitzgerald & Grant, *supra* note 76. Fitzgerald specified that “the bleeps are not really bleeps” and that the quotes were “his words, not our characterization, other than with regard to the bleep.” *Id.*

82. *Id.*

83. See Helen Gunnarsson, *Did Pat Fitzgerald Say Too Much?*, 97 ILL. B.J. 116, 116 (2009) (“Fitzgerald’s statements garnered considerable criticism after viewers in the legal world had the chance to catch their breath.”); Kelly Selesnick, Current Development, *Innocent Until Proven Guilty: Will Patrick Fitzgerald’s Public Statements Prejudice Rod Blagojevich’s Trial?*, 23 GEO. J. LEGAL ETHICS 827, 828 (2010) (assessing whether Fitzgerald’s statements violated Illinois’s version of Model Rules 3.6 and 3.8). Some lawyers felt that Fitzgerald’s statements could upset Blagojevich’s right to a fair trial while others felt “that the prosecutor’s comments were not only appropriate but necessary to explain the federal authorities’ actions to an understandably curious public.” Gunnarsson, *supra*, at 117. In her assessment of whether Fitzgerald’s statements had violated Illinois Rules of Professional Conduct 3.6 and 3.8(e), which are fairly similar to Model Rules 3.6 and 3.8(f), Kelly Selesnick points out that the Illinois Rules use a “serious and imminent threat” standard as opposed to the Model Rules’ “substantial likelihood” standard. Selesnick, *supra*, at 832–33. She opined that for this reason, it is unlikely Fitzgerald will be prosecuted for violating the Illinois Rules, even though he likely violated Model Rules 3.6 and 3.8. *Id.* at 842.

This criticism of Fitzgerald’s statements is reminiscent of the commentary surrounding former District Attorney Mike Nifong’s disbarment following the Duke lacrosse case in 2007. It was in part Nifong’s personal characterization of the case that led to this sanction. One scholar noted that “among Nifong’s more outlandish public comments were his characterization of the rape as ‘totally abhorrent’ and ‘reprehensible’ [and] his analogizing the case to a ‘cross burning.’” R. Michael Cassidy, *The Prosecutor and the Press: Lessons (Not) Learned from the Mike Nifong Debacle*, 71 LAW & CONTEMP. PROBS. 67, 67 (Autumn 2008). Because Nifong did not challenge his disbarment on First Amendment grounds, the Supreme Court of North Carolina had no opportunity “to clarify the precise contours” of the state’s version of Rule 3.6 as it “pertain[s] to public comments by elected prosecutors.” *Id.* at 69. The main difference between Nifong and Fitzgerald in their positions as prosecutors is that Nifong’s position is an elected one. It is perhaps the case that Rule 3.6, as it applies to prosecutors, is also in need of clarification. This Note, however, engages primarily with the trial-publicity rule as it applies to defense attorneys.

84. Susan Saulny & Monica Davey, *‘I Will Fight,’ Blagojevich Vows*, N.Y. TIMES, Dec. 20, 2008, at A11.

Jr.⁸⁵ and Sheldon Sorosky took questions from the reporters.⁸⁶ These two members of what would later become Blagojevich's seven-lawyer defense team accused the prosecutors of taking a limited number of Blagojevich's statements out of context to create a negative image.⁸⁷ Adam Jr. said that "[w]hen those tapes come out—and they're not just 15-second snippets that an agent who sits down in an office somewhere pulls out what he thinks is bad—you're going to find out the truth on these conversations."⁸⁸ These statements directly rebutted the prosecutor's allegations, but they were only a taste of what the defense lawyers would offer the media.

On February 4, 2010, the government reindicted Blagojevich on what Sorosky described as the "same false charges realleged under different legal theories."⁸⁹ In response to the new indictment, Adam Jr. held a press conference to defend his client. Addressing the now-infamous FBI tapes, Adam Jr. raised his voice and again insisted that the tapes, if played in their entirety, would reveal his client's innocence.⁹⁰ "You guys are good, hard-working journalists," he said.⁹¹ "Why aren't *you* demanding that these tapes get played? We shouldn't have a system here in which the government comes in and tapes *and you don't get to the truth!* That's what *we* want here. The truth!"⁹² One journalist called Adam Jr.'s press conference "a

85. Sam Adam Jr. is the son of "legendary" Chicago criminal defense attorney Sam Adam Sr., who was also a part of Blagojevich's defense team. *R. Kelly Lawyers Hint They May Take Blagojevich's Case*, ST. J.-REG. (Springfield, Ill.) (May 11, 2009, 01:06 PM), <http://www.sj-r.com/breaking/x1194166165/R-Kelly-lawyers-hint-may-take-Blagos-case>. Having practiced law for only eleven years, Adam Jr. has already developed a reputation for his performances inside and outside of the courtroom. In 2008 Adam Jr. successfully obtained an acquittal for his client, R&B singer R. Kelly, and during his closing argument in that case, he "yelled, whispered, laughed and pounded on the jury box." *Id.* In representing a man accused of murder whose wife had been missing for twenty years, Adam Jr. came to the Chicago Criminal Courts Building with a stack of "missing" posters he had designed specifically for news reporters and TV cameras. Jeff Coen & Bob Sector, *A Little Swagger in the Court*, CHI. TRIB., June 2, 2010, § 1, at 1. The posters had a picture of the alleged victim; they were a prop that Adams Jr. made to illustrate the fact that no one knew whether the woman had actually died. *Id.*

86. Saulny & Davey, *supra* note 84.

87. *Id.*

88. *Id.*

89. Jeff Coen & Jeremy Gerner, *Blagojevich Re-Indicted, but Accusations the Same*, CHI. BREAKING NEWS CTR. (Feb. 4, 2010, 9:34 PM), <http://www.chicagobreakingnews.com/2010/02/blagojevich-re-indicted-on-corruption-charges.html>.

90. Smith, *supra* note 4, at 73.

91. *Id.*

92. *Id.*

calculated performance, one aimed directly at getting a six o'clock sound bite."⁹³

The defense team's pretrial approach remained the same for the remaining months before trial: the defendant went on a "coast-to-coast publicity blitz"⁹⁴ while his lawyers talked strategy to the press. Two days before the trial began, Aaron Goldstein, another member of the Blagojevich defense team, engaged in a TV-broadcast roundtable discussion on WTTW's *Chicago Tonight*.⁹⁵ When asked about the defense strategy, Goldstein responded that the team would show that Blagojevich was an innocent man and a good governor.⁹⁶ "What you will see is that every allegation was an innocent thing that happened. Not only was it innocent and not criminal, he did nothing wrong. He provided good for the state," he said.⁹⁷ Then, when the discussion moved to the content of the tapes, Goldstein delved further into the team's strategy: "They are introducing around 100 tapes, most of them heavily redacted. . . . It is us that have constantly asked, 'Play all the tapes, play all the tapes.' The government is not going to. . . . We want to put in tapes that directly show his innocence."⁹⁸ Goldstein said, however, that he was barred from discussing the details of the content of the missing tapes.⁹⁹ Finally, Goldstein said Blagojevich would "absolutely" testify so that he could explain everything on the tapes and fill in any gaps.¹⁰⁰

93. *Id.*; see also *id.* ("[T]rue to form, [Adam's] over-the-top appearances have been eclipsed only by the bombast and unrestrained theatricality of Blagojevich himself. . . . Adam strode into the bright lights and the bouquet of microphones, turning what in the hands of another lawyer might have been a predictable bout of no-comment rope-a-dope into a freewheeling 20 minutes of rhetorical haymakers that would have put starch in Don King's fright wig.").

94. Coen & Sexter, *supra* note 85. This was a part of what one journalist described as Blagojevich's "blather defense." Smith, *supra* note 4, at 139. Adam Jr. thought that if the public could see how Blagojevich spoke his mind, then the defense could argue that what he had said on tape was "little more than his typical claptrap and attempts to impress people." *Id.*

95. *Chicago Tonight* (WTTW television broadcast June 1, 2010), available at <http://chicagotonight.wttw.com/2010/06/01/news-analysis-bлагоjevich-trial> (previewing the Blagojevich defense with host and news analyst Elizabeth Brackett).

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* Near the end of the discussion, the host noted that it was unusual for a defendant's attorney to be willing to talk to the media on the eve of trial. *Id.*

2. *Sound Bites During the Trial.* Once the trial began, the defense team often let Blagojevich or his wife, Patti, do the talking.¹⁰¹ At two notable points during the trial, however, the lawyers returned to the cameras. The first appearance came after the completion of prosecution witness and Blagojevich's former chief of staff Alonzo Monk's testimony against the former governor.¹⁰² Following the final day of Monk's cross-examination, Adam Jr. stepped in front of the cameras to address the media.¹⁰³ Adam Jr. accused Monk of lying on the stand in an attempt to get a deal from the government.¹⁰⁴

In my opinion, . . . it came out and anybody who was sitting in the courtroom was able to see that this was . . . a man that was saying what he needed to say to get a deal. . . . [H]e would tell a story and then change that story, and then after he told the second story change it back to another one. . . .

[At the e]nd of the day, when it comes to it, he couldn't tell you one deal that they had done that was illegal¹⁰⁵

These statements, along with Blagojevich's own comments to the press that same day, were widely broadcast and published in the Chicago area.¹⁰⁶ In response to Adam Jr.'s comments to the media, the prosecution filed a motion the next day, requesting the court to issue a gag order to limit the extrajudicial statements of the parties and attorneys in the case.¹⁰⁷ In its motion, the government referenced the statements both Blagojevich and his attorneys had made before the trial began, as well as those that were made during the trial.¹⁰⁸ The

101. The Model Rule addressing trial publicity restricts only the speech of attorneys. MODEL RULES OF PROF'L CONDUCT R. 3.6 (2010). The rule does not restrict the speech of the defendant or his wife. *Id.*

102. Government's Motion To Limit Extrajudicial Comments at 10–11, *United States v. Blagojevich*, 743 F. Supp. 2d 794 (N.D. Ill. 2010) (No. 08 CR 888).

103. *Id.*

104. *Id.*

105. *Id.* at 10; *Blagojevich Attorney: Monk "Couldn't Name One Deal . . . Nothing!"*, NBC CHI. WARD ROOM (June 16, 2010), http://www.nbcchicago.com/blogs/ward-room/Blagojevich_Atorney_Monk_Couldn_t_Name_One_Deal__Nothing__Chicago.html.

106. See Government's Motion To Limit Extrajudicial Comments, *supra* note 102, at 11 ("The above statements, opinions, and viewpoints regarding Lon Monk's testimony, credibility, and family members, as well as the day's courtroom proceedings, were widely broadcast by the media in the Chicago area. Television channels 2 and 9 aired the statements of both Rod Blagojevich and his counsel; channel 5 currently has videos of both statements on its website.").

107. *Id.* at 1.

108. *Id.* at 6–11.

government argued that “[t]he defense’s constant media barrage has reached the point where it poses a substantial likelihood of materially prejudicing the trial in this case. . . . [T]he more intense the media attention becomes, the greater the likelihood that a juror will inadvertently be exposed to prejudicial external influences.”¹⁰⁹ Judge James Zagel denied the prosecution’s request to put an end to the extrajudicial statements, calling the issuance of a gag order a last resort, but he warned that everyone should use discretion when making comments to the media.¹¹⁰

Another significant interaction between Blagojevich’s counsel and the media came just before the end of the trial. From the start, the defense had said that Blagojevich would take the stand to explain the gaps in the government’s tapes.¹¹¹ But as the end of trial neared, Adam Jr. and his father and fellow member of the defense team, Sam Adam Sr., made it clear to the press that they were at odds about whether to follow through with that promise.¹¹² Adam Jr. wanted Blagojevich to testify, and Adam Sr. did not.¹¹³ Following the announcement of the defense’s decision to rest its case without calling a single witness, the father and son duo justified their position in time for the evening news. Adam Jr. went first: “We think by putting him up there to answer anything makes it seem as if the government was right”¹¹⁴ His father followed those same sentiments. “The law is clear. The burden of proof is on the government. They did not meet their burden of proof and I think the jury will say that.”¹¹⁵ But after the debrief on the decision, Adam Jr. felt as though he still had some

109. *Id.* at 13–14.

110. Paul Meincke, *Blago Judge: Gag Order Is Last Resort*, ABC 7 NEWS (June 17, 2010), <http://abclocal.go.com/wls/story?section=news/local&id=7501331>. Following Blagojevich’s second trial, the *Chicago Tribune* reported, citing a “source familiar with the decision,” that Judge Zagel “barred Blagojevich’s legal team from speaking to the news media during jury deliberations.” *Blagojevich Team Under Gag Order, Source Says*, CHI. TRIB., June 24, 2011, § 1, at 11. The following day, however, the newspaper reported that the court had sealed the documents gagging the attorneys, and thus, “[i]t was unclear why [the judge] issued the order.” *Tribune Challenges Sealing of Documents in Blagojevich Retrial*, CHI. TRIB. (June 24, 2011, 7:17 PM CDT), <http://www.chicagotribune.com/news/local/breaking/chi-tribune-challenges-documents-in-bлагоjevich-retrial-20110624,0,6097347.story>.

111. *See supra* text accompanying note 100.

112. *Ex-Gov. Blagojevich: ‘I Talk Too Much,’* ABC 7 NEWS (July 21, 2010), <http://abclocal.go.com/wls/story?section=news/local&id=7566578>.

113. *Id.*

114. *Id.*

115. *ABC 7 News* (WLS-TV television broadcast July 21, 2010), available at <http://abclocal.go.com/wls/story?section=news/local&id=7566578>.

explaining to do. Surrounded by a swarm of media, he made the following statement:

Is there a harm when I go back and look at them on Monday and say, “Look, I promised you; he wasn’t there”? Certainly! We’re adults. We know it. But is that harm greater than . . . putting him on the stand and saying . . . “We think they proved you guilty here; you need to answer”? And right now, my father has said, and the governor has said, we don’t need to answer that.¹¹⁶

When asked by a reporter what he would say to the jury, Adam Jr. responded with a laugh and said, “I pretty much just gave you part of my closing.”¹¹⁷

3. *Post-Trial Statements.* Blagojevich’s first trial ended with a single conviction on one count of lying to federal agents; the jury could not reach a consensus on the twenty-three remaining counts.¹¹⁸ After the prosecution announced it would retry the case, the defense attorneys slammed the government’s decision in the media, leading to the defense’s most questionable extrajudicial statement regarding the trial.¹¹⁹ When speaking to the press after the announcement, Adam Jr. posed a question: “Why are we spending \$20 million to \$30 million on a retrial when you couldn’t prove it the first time?”¹²⁰ Referencing his post-trial statements, Adam Jr. made it clear that he was “talking to the next jury.”¹²¹ In its response to Blagojevich’s motion of acquittal, the government noted that the defense had simply made up the cost of a retrial and that they had clearly been making those and other

116. *Chicago Tonight* (WTTW television broadcast July 21, 2010), available at http://www.wttw.com/main.taf?p=42,8,80,32,1&rel=4AKkZa1helDCwaN69MR_hbjRpxr1smDq.

117. *Id.*

118. Bob Sexter, Jeff Coen & John Chase, *Guilty on 1 Count, and Retrial Looms*, CHI. TRIB., Aug. 18, 2010, § 1, at 1.

119. See Stacy St. Clair & David Heinzmann, *2 Sides Look Ahead to Blagojevich Retrial*, CHI. TRIB., Aug. 18, 2010, § 1, at 3 (“Sam Adam and his son Sam Adam Jr. launched into a diatribe against the city’s longest-serving U.S. attorney after hearing the jury’s verdict, calling him ‘nuts’ and accusing him of running a ‘banana republic.’”). On retrial, a federal jury convicted Blagojevich of seventeen counts, including eleven counts related to the Senate seat. Bob Sexter & Jeff Coen, *Feds Vindicated as Jury Returns 17 Convictions*, CHI. TRIB., June 28, 2011, § 1, at 1. At the time of publication, the former governor was awaiting sentencing.

120. St. Clair & Heinzmann, *supra* note 119.

121. *Selecting Second Blago Jury Offers Challenge*, ABC 7 NEWS (Aug. 20, 2010), <http://abc.local.go.com/wls/story?section=news/local&id=7618335>.

statements “to improperly influence the jury that will hear this case on retrial.”¹²²

* * *

The manner in which Blagojevich’s defense team interacted with the media before and during the trial may have been risky,¹²³ but it is less evident that any of the lawyers’ comments violated the current version of Rule 3.6.¹²⁴ Some of the lawyers’ statements were made directly in response to the accusations Fitzgerald had made during his initial press conference, and although one could argue that some of the later statements would also qualify as a response under Rule 3.6(c), it is not clear from the rule or the commentary what is sufficient to constitute “recent adverse publicity,” or what type of a response would be considered “necessary.”¹²⁵ This type of confusion highlights the need for a revised rule that provides more guidance to lawyers.

B. Explanations for Lawyers’ Interactions with the Media

Because defense lawyers and prosecutors have different roles in the justice system,¹²⁶ they also have different reasons for talking to the media. Lawyers, in speaking to reporters, are generally concerned about both providing the public with important information and advancing the interests of their clients.¹²⁷ When Fitzgerald spoke to the press on the day of Blagojevich’s indictment, his intentions were

122. Government’s Response in Opposition to Defendant Rod Blagojevich’s Motion for Judgment of Acquittal, Arrest of Judgment or New Trial at 28–29, *United States v. Blagojevich*, 743 F. Supp. 2d 794 (N.D. Ill. 2010) (No. 08 CR 888).

123. *See supra* text accompanying note 100.

124. If the lawyers involved in the case were actually to face disciplinary charges, those would be brought based on a violation of the Illinois Rules, which contain a different standard than Model Rule 3.6. Instead of assessing whether the lawyer knew or should have known that his statements were “substantially likely to materially prejudice” a jury, Illinois applies a “serious and imminent threat” standard. Selesnick, *supra* note 83, at 832–33. Because of this difference, a lawyer would be more likely to violate Rule 3.6 than its Illinois counterpart. *Id.* at 842.

125. MODEL RULES OF PROF’L CONDUCT R. 3.6(c) & cmt. 7 (2010); *see also infra* Part II.C.1.

126. *See infra* Part III.B.

127. *See* Chemerinsky, *supra* note 70, at 871 (“The point is that attorney speech often serves to advance the interests of the client and the interests of society. The former explains why attorney speech, at times, is part of the duty of zealous representation. The latter helps to explain why attorney speech is protected by the First Amendment.”).

likely much different from those of the defense team when they participated in later press conferences. Fitzgerald was acting in his capacity as an officer of the court,¹²⁸ and the defense attorneys were attempting to further their client's interests, both in terms of the upcoming trial and in terms of protecting his public reputation.¹²⁹

One important reason prosecutors talk to reporters is to provide the public with information.¹³⁰ In talking to the media, a prosecutor can inform the community about how public resources are being utilized to serve law-enforcement goals.¹³¹ A prosecutor's comments can also serve as a warning about any ongoing dangers.¹³² In addition to informing the public, a prosecutor's statements might also encourage witnesses or other victims to come forward with assistance or might serve to deter other would-be criminals.¹³³

After an indictment, "the scales of justice in the eyes of the public are weighed extraordinarily heavy against [the] accused."¹³⁴ Because of this effect, the defense counsel's motives for talking to the media are different from the prosecutor's. When Fitzgerald announced on national television that tape recordings would show that Blagojevich had attempted to sell Illinois's vacant Senate seat,¹³⁵ the defense took an immediate hit. It would have been difficult for the Blagojevich attorneys to sit back and watch the public turn against their client with no response. In fact, a criminal defendant would likely find it difficult to believe that his lawyer is fully committed to his representation if the attorney simply allowed the prosecutor to spin the media entirely in one direction.¹³⁶ Thus, immediately after an indictment, a defense lawyer often speaks out to the media to restore the presumption of innocence and to level the playing field before a trial.¹³⁷ Aside from defense lawyers' role as zealous representatives of their clients, they also have an interest in

128. *See infra* notes 199–206 and accompanying text.

129. *See infra* notes 203–207 and accompanying text.

130. *See* Cassidy, *supra* note 83, at 73 (defining the public interests served by prosecutors' extrajudicial statements).

131. *Id.*

132. *Id.*

133. *Id.*

134. *Chi. Council of Lawyers v. Bauer*, 522 F.2d 242, 250 (7th Cir. 1975).

135. *See supra* notes 80–81 and accompanying text.

136. Kevin Cole & Fred C. Zacharias, *The Agony of Victory and the Ethics of Lawyer Speech*, 69 S. CAL. L. REV. 1627, 1651 (1996).

137. *Id.* at 1647–49.

exposing corruption among the police, prosecution, and the judiciary,¹³⁸ and in increasing the public's understanding of flaws in the trial process.¹³⁹ These public functions justify the constitutional protection of their extrajudicial speech.¹⁴⁰

Although these rationales explain some of the statements the Blagojevich defense team made to the media, particularly those that came prior to the start of the trial, the lawyers in that case continued to talk to the press during the trial and after the verdict. Similarly, even though Fitzgerald made fewer media appearances, he still included extra information in his initial press conference that did not seem to further any of these objectives.¹⁴¹ Thus, it is clear that there must be another reason lawyers are motivated to talk to the press in the course of ongoing litigation, one that applies to both sides: they want to win their cases.¹⁴² Before representing O.J. Simpson, defense attorney Robert Shapiro spoke to the importance of using the media to one's advantage in a high-profile case, explaining, "There is no question that media coverage can and does affect the ultimate outcome of widely publicized cases. Just as it is important to cultivate relationships with judges and prosecutors, it is equally important to establish and maintain such relationships with the press."¹⁴³

When used in this way, lawyers' statements are not directed generally at the public. Instead, lawyers are talking to potential jurors, actual jurors, or even the other side in the case.¹⁴⁴ Sam Adam Jr. made this point clear in his post-trial statements to the press:

138. See *Bauer*, 522 F.2d at 250 ("We can note that lawyers involved in investigations or trials often are in a position to act as a check on government by exposing abuses or urging action."); Cole & Zacharias, *supra* note 136, at 1663 ("Sometimes, lawyers' public statements are justifiable as furthering society's 'right to know.'").

139. See *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1070 (1991) (majority opinion of Rehnquist, C.J.) ("[T]he criminal justice system exists in a larger context of a government ultimately of the people, who wish to be informed about happenings in the criminal justice system, and, if sufficiently informed about those happenings, might wish to make changes in the system. The way most of them acquire information is from the media.").

140. See Chemerinsky, *supra* note 70, at 871 (arguing for broader protection of defense lawyers' extrajudicial speech).

141. See *supra* text accompanying note 82.

142. See Stephen N. Zack, *Foreword to ROGER J. DODD & CLAUDIA N. OLTEAN, MEDIA SKILLS: THE LAWYER AS SPOKESPERSON*, at v (2009) ("Lawyers who ignore the media . . . risk ceding the court of public opinion to their opponents.").

143. Robert L. Shapiro, *Using the Media to Your Advantage*, CHAMPION, Jan./Feb. 1993, at 7, 11-12.

144. See Chemerinsky, *supra* note 70, at 870 (noting that in civil cases lawyers may be speaking to the media as part of a strategy to encourage a settlement). Although this rationale

I said from the very beginning that this government could not prove Rod Blagojevich guilty of a single offense when it comes to any kind of corruption or anything like that, and we were right. . . . I'm looking at every single camera. I'm talking to the people of Illinois; I'm talking and they are going to say I am talking to the next jury. Yes, I'm talking to the next jury! . . . And when it comes to the next time, I guarantee you, we'll do everything we can like we did this time to make sure.¹⁴⁵

If Adam Jr. was willing to admit to the public that his intention was to reach the new jury in the case, many of his previous statements may very well have been made with the same intention. It is unlikely that Adam Jr.'s strategy is unique among lawyers who discuss their cases in the media. Lawyers use the media as a forum for advancing their cases, knowing, and perhaps hoping, that potential jurors are listening.¹⁴⁶

Despite the likelihood that advocacy is one of the primary motivations behind extrajudicial speech, the drafters made no mention of such a purpose in any of the commentary surrounding the development of the trial-publicity rules prior to 1994.¹⁴⁷ Even if this omission could be construed as a sign of the drafters' initial disapproval of lawyers' advocacy in the media, the 1994 amendments to the rule suggest a possible evolution in the drafters' understanding of the role of extrajudicial speech.¹⁴⁸ In *Gentile*, Justice Kennedy addressed a defense lawyer's role in the court of public opinion, arguing that "[a]n attorney's duties do not begin inside the courtroom

only applies to the civil context, the same concept may extend to plea negotiations in criminal cases.

145. *Blago Attorney: Blame Me for One Guilty Count*, WARD ROOM (Aug. 17, 2010), http://www.nbcchicago.com/blogs/ward-room/Blago_Atorney__Blame_Me_for_One_Guilty_Count_Chicago.html. Although post-trial statements would generally have much less of a potential to affect the outcome of a case, Adam Jr. knew of the government's intention to retry the case at the time he made the statements.

146. See DODD & OLTEAN, *supra* note 142, § 1.4, at 8 ("Media exposure, whether promulgated through TV or radio stations, newspapers, or the web, affect[s] how opposing counsel, prosecutors and *juries* view a . . . client's . . . guilt/innocence." (emphasis added)).

147. See Brown, *supra* note 19, at 103 ("[O]ne might reasonably surmise that the drafters were principally concerned about the public educative function and not the adversarial benefit that extrajudicial speech could generate for a client."); Jonathan M. Moses, Note, *Legal Spin Control: Ethics and Advocacy in the Court of Public Opinion*, 95 COLUM. L. REV. 1811, 1825 (1995) ("[Rule 3.6] discount[s] the importance of advocacy in the court of public opinion for a client.").

148. See Brown, *supra* note 19, at 103 ("Rule 3.6 represented a 'warming-up' to the concept of lawyer commentary in the media.").

door.”¹⁴⁹ Kennedy noted that lawyers “may take reasonable steps to defend a client’s reputation and reduce the adverse consequences of indictment, especially in the face of a prosecution deemed unjust or commenced with improper motives.”¹⁵⁰ Kennedy also suggested that defense attorneys might attempt to secure a dismissal of a client’s case through persuasion in the court of public opinion.¹⁵¹ In response to the Court’s *Gentile* opinion, the ABA altered Rule 3.6 to incorporate a right-of-reply provision.¹⁵² Although this reply provision only permits lawyers to respond to recent adverse publicity and does not allow lawyers to advocate for their clients in the court of public opinion if it is likely to lead to material prejudice, it is nevertheless a sign that the rule writers are now willing to acknowledge a lawyer’s role as an advocate outside the courtroom.

C. *The Misleading Structure of Rule 3.6*

Despite the addition of the right-of-reply provision, Rule 3.6 is still framed primarily in terms of protecting the right to a fair trial and preventing prejudice,¹⁵³ acknowledging the need for advocacy only in response to adverse publicity.¹⁵⁴ There are two main weaknesses in the rule that should be addressed. First, the limits on the response provision in subsection (c) are unclear and lead to confusion about exactly how much extrajudicial advocacy is allowed. This lack of clarity in the rule’s limitations forces lawyers to guess how their conduct will be viewed¹⁵⁵ and leaves disciplinary authorities unable to enforce the rule in a principled way.¹⁵⁶ Second, the state’s interest in restricting lawyer speech is misguided as it applies to defense lawyers. Prosecutors and defense attorneys must look to the same rule to try to decipher how their unique interests should be properly balanced.

149. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1043 (1991) (opinion of Kennedy, J.).

150. *Id.*

151. *Id.*

152. *See supra* text accompanying notes 65–66.

153. *See* MODEL RULES OF PROF’L CONDUCT R. 3.6 cmt. 1 (2010) (“Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved.”).

154. *Id.* R. 3.6(c).

155. Chemerinsky, *supra* note 70, at 884–85.

156. *See* Brown, *supra* note 19, at 137 (“[G]iven the lack of meaningful ethical or procedural oversight or constraints with regard to the limits of such conduct, there is legitimate concern that extrajudicial advocacy is being, and will continue to be, utilized in an increasingly unprofessional and deleterious fashion.”).

1. *Lack of Clarity on the Right of Reply.* Rule 3.6(c) allows lawyers to make extrajudicial statements in response to recent adverse publicity about their clients.¹⁵⁷ The commentary to the rule provides that “responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.”¹⁵⁸ Considering the more general limitation on lawyers’ extrajudicial speech in subsection (a), it is difficult for lawyers to determine when statements to the media are necessary and when they might exceed the rule’s limitations.¹⁵⁹ Although Rule 3.6(c) seemingly applies without distinction to both prosecutors and defense attorneys, the standard for when responsive statements are warranted is likely to vary for each side.¹⁶⁰ The rule’s language suggests only that some sort of attack is necessary before lawyers can respond with public comment, but neither the rule nor the comments provide any guidance about exactly what is enough to constitute an attack.¹⁶¹ Thus, a defense lawyer might argue that an indictment always qualifies as an attack on a defendant’s character, and that because of that, any filing of criminal charges triggers a defense lawyer’s right of reply under Rule 3.6(c).¹⁶² It is also possible, however, that the rule writers expected that some sort of public statement attacking one side or the other, like an initial press conference announcing an indictment, would be required before an attorney could respond. Under either evaluation, the defense would be much more likely than the prosecution to face an attack allowing extrajudicial comments under Rule 3.6(c).

If the committee indeed intended to allow defense attorneys more of an opportunity to speak out in the media, knowing that an

157. MODEL RULES OF PROF’L CONDUCT R. 3.6(c).

158. *Id.* R. 3.6 cmt. 7.

159. See Devine, *supra* note 74, at 210 (observing that the Rule 3.6(c) commentary provides lawyers with only a partial standard for determining what type of response is appropriate); see also Brown, *supra* note 19, at 110–11 (“Given the widespread media coverage of high-profile cases, ranging from general news reports to in-depth television talk shows to the unbridled commentary now provided via the Internet, one might reasonably question whether, as a result of the right of reply exception, the door for responsive extrajudicial statements is ever truly closed in such cases.” (footnotes omitted)).

160. See MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. 5 (“Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).”).

161. See *id.* R. 3.6(c) & cmt. 7 (“[R]esponsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.”).

162. See *supra* note 72 and accompanying text.

indictment would automatically constitute an attack allowing a response, the prosecution, while ostensibly retaining a right of reply, would have fewer opportunities to take advantage of the provision. This discrepancy would have the effect of expanding defense lawyers' right to speak while essentially maintaining the rule as it applies to prosecutors. This interpretation could have been a step in the right direction toward an appropriate division in the rule, reflecting lawyers' individual roles and responsibilities.¹⁶³ Such an intention, however, was not clear from the committee's notes, and it is certainly not clear in the text of the rule.

Without meaningful guidance or enforceability, Rule 3.6 allows "hyper-zealous" lawyers to "press[] the boundaries of proper extrajudicial comment."¹⁶⁴ Defense lawyers with more resources are able to spend more time discovering the rule's weaknesses and loopholes, and therefore, they are unlikely to fear the repercussions of defending their clients in the media.¹⁶⁵ Although there is nothing inherently wrong with this type of advocacy, lawyers who feel comfortable pushing the limits may go too far, risking damage to their clients' cases or to the legal profession as a whole.¹⁶⁶ Conversely, there is likely an inequitable chilling effect for those lawyers who will not go nearly as far without some sense of comfort that their comments are within the bounds of the rule.¹⁶⁷ If lawyers do not have the funds to develop a media strategy, it is unlikely that they will find ways to manipulate the rules to favor their clients.¹⁶⁸ These lawyers with fewer resources are more likely to provide a default "no comment" response to media inquiries for fear that they will unintentionally

163. See *infra* Part III.B.

164. Brown, *supra* note 19, at 111–12.

165. See Gregg, *supra* note 18, at 1362 & n.161 (explaining that "sophisticated lawyers" are the ones who are "most capable of evading the constraints of these Rules").

166. See Brown, *supra* note 19, at 137 ("[T]here is legitimate concern that extrajudicial advocacy is being, and will continue to be, utilized in an increasingly unprofessional and deleterious fashion.").

167. See Gregg, *supra* note 18, at 1361–62 ("This creates a genuine risk that overly cautious lawyers in lower profile trials will unnecessarily limit or forego contact with the media for fear of discipline."). The authors of a book guiding lawyers on their interactions with the media suggest that "[t]oo often, lawyers read Rule 3.6, in its variations, as being restrictive of what a lawyer may say when, in fact, it is informative in saying that a lawyer may make many statements . . ." DODD & OLTEAN, *supra* note 142, § 3.8, at 52. This highlights one of the primary concerns about the rule—even though the authors claim that the rule is "informative" in its language allowing lawyer speech, if lawyers are unable to discern that from the text, they will remain silent.

168. Gregg, *supra* note 18, at 1362.

violate Rule 3.6.¹⁶⁹ This inequity is troubling because it means public-interest lawyers and lawyers representing indigent criminal defendants often will be unwilling to talk to the media, even though their clients may need that form of advocacy more than a defendant like Blagojevich.¹⁷⁰ The development of a rule that provides clearer guidelines for defense lawyers' ability to speak to the media could allow these lawyers to feel more comfortable advocating for their clients outside of the courtroom.¹⁷¹

2. *Misguided Purpose.* Past committee reports justify restricting extrajudicial lawyer speech by suggesting that the state's interest is in protecting an overall concept of fairness in adjudicative proceedings.¹⁷² In the comments to the current rule, however, the rule writers noted only the state's interest in "protecting the *right* to a fair trial."¹⁷³ Although it is possible that certain statements by a defense lawyer could prejudice the prosecution's case, it is the defendant, and

169. *Id.* For example, in *Gentile*, the lawyer did not intentionally push the limits of the rule; he decided to make the statements only after studying the language of the Nevada rule. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1044 (1991) (opinion of Kennedy, J.); *see also* Chemerinsky, *supra* note 70, at 884–85 (warning that "lawyers must speculate as to how, after the fact, their speech will be assessed" and that "[t]he inherent vagueness and uncertainty is virtually certain to chill speech").

170. Gregg, *supra* note 18, at 1362.

171. One might argue that a rule allowing more expansive public comment from defense lawyers could actually have the effect of furthering the inequity because some lawyers would still feel uncomfortable handling the publicity side of their clients' cases. Although a rule that clearly allows defense lawyers to advocate for their clients outside of the courtroom could expand defense lawyers' overall interactions with the media, lawyers representing defendants with fewer resources may still be unable to spend time developing a media strategy. The rule already has this general effect, and it is important to at least afford all lawyers the opportunity to speak on behalf of their clients in the media without the fear of violating an ethical rule.

172. *See supra* note 46 and accompanying text. "When a state regulation implicates First Amendment rights, the Court must balance those interests against the State's legitimate interest in regulating the activity in question." *Gentile*, 501 U.S. at 1075 (majority opinion of Rehnquist, C.J.).

173. MODEL RULES OF PROF'L CONDUCT R. 3.6 cmt. 1 (2010) (emphasis added). Even if the rule writers intended this statement to refer to the more generalized protection they referenced in their draft, such a concern explains only why the rule applies to both prosecutors and defense lawyers, and not why the "Rule draws no distinction between [the two]." MODEL RULES OF PROF'L CONDUCT R. 3.6 notes at 148 (Proposed Final Draft 1981). The commentary to the ABA Standards for Criminal Justice 8-1.1, which focuses on attorneys' extrajudicial statements and parallels an earlier version of the Model Rule, suggests that one reason for a lack of any distinction in the trial-publicity rules is that there "is a general presumption in the adversarial system of rules applying equally to both sides." ABA STANDARDS FOR CRIMINAL JUSTICE: FAIR TRIAL AND FREE PRESS standard 8-1.1 cmt. at 7 (1992).

not the state, who is guaranteed Sixth Amendment protection.¹⁷⁴ Therefore, the current rule, focused on protecting the right to a fair trial and limiting the potential for prejudice, is more appropriately directed toward prosecutors.

In the concurring portion of his opinion in *Gentile*, Justice Kennedy argued that “[t]he various bar association and advisory commission reports which resulted in promulgation of ABA Model Rule of Professional Conduct 3.6 (1981), and other regulations of attorney speech, and sources they cite, present no convincing case for restrictions upon the speech of defense attorneys.”¹⁷⁵ Perhaps the lack of any satisfying explanation about the state’s interest in restricting defense attorneys’ speech is the result of the rule writers’ attempt to produce one rule which applies equally to defense lawyers and prosecutors. Such a rule, however, will result in confusion unless the same interests are at stake.

Cases involving challenges to extrajudicial statements made by defense attorneys seem to discuss restrictions on defense lawyers’ speech as a means of protecting the overall integrity of the judicial system. For example, in *Sheppard*, the Supreme Court expressed a concern about the “orderly administration of justice” and the lack of “protective procedures” in the media.¹⁷⁶ Justice Clark argued that freedom of discussion “must not be allowed to divert the trial from the ‘very purpose of a court system . . . to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom according to legal procedures.’”¹⁷⁷ Similarly, in *Gentile*, Justice Kennedy argued that “[a] profession which takes just pride in the[] traditions [of the judicial system] may consider them disserved if lawyers use their skills and insight to make untested allegations in the press instead of in the courtroom.”¹⁷⁸ In his portion of the *Gentile* opinion, Chief Justice Rehnquist focused more on the “threat to the fairness of a pending proceeding” that lawyers’ extrajudicial statements may pose, but he still noted that the rule is designed to

174. See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .”).

175. *Gentile*, 501 U.S. at 1055 (opinion of Kennedy, J.).

176. *Sheppard v. Maxwell*, 384 U.S. 333, 350–51 (1966) (quoting *Pennekamp v. Florida*, 328 U.S. 331, 347 (1946); *Marshall v. United States*, 360 U.S. 310, 313 (1959)) (internal quotation marks omitted).

177. *Id.* (omission in original) (quoting *Cox v. Louisiana*, 379 U.S. 559, 583 (1965) (Black, J., dissenting)).

178. *Gentile*, 501 U.S. at 1058 (opinion of Kennedy, J.).

protect both the fairness *and the integrity* of the judicial system.¹⁷⁹ Although protecting the fairness of a trial is certainly a concern that justifies restricting prosecutors' speech, protecting the dignity and legitimacy of the adjudicative process provides a much better argument for restricting defense lawyers' extrajudicial statements.¹⁸⁰ Therefore, restrictions on prosecutors' extrajudicial speech are justified by the current rationale underlying Rule 3.6, but any restrictions on defense lawyers' extrajudicial speech must be justified by concerns about the legitimacy of the adjudicative process.

III. REWORKING THE GUIDELINES FOR EXTRAJUDICIAL ADVOCACY

A. *Importance of a Workable Rule*

The effect of lawyers' extrajudicial statements on the outcome of a criminal jury trial "is, at best, inconclusive."¹⁸¹ But even if there is no clear link between lawyers' statements to the media and the outcome of a trial, that does not mean that there is no reason for concern about lawyers' extrajudicial speech. By definition, high-profile trials command substantial media coverage.¹⁸² To the extent that the media is involved, there is likely to be an influence on public opinion,¹⁸³ and defense lawyers will be concerned about the way their clients are perceived by the public and, ultimately, the jury.¹⁸⁴ Defense lawyers'

179. *Id.* at 1074–75 (majority opinion of Rehnquist, C.J.).

180. This is not to say that the state interest in protecting the integrity of the judicial system does not apply to prosecutor speech. Instead, the argument is that the most reasonable explanation for restricting defense lawyers is to protect the integrity of the system. Restrictions on prosecutorial speech may be founded in both the concern about protecting the defendant's right to a fair trial *and* protecting the overall legitimacy of the process.

181. Alberto Bernabe-Riefkohl, *Silence Is Golden: The New Illinois Rules on Attorney Extrajudicial Speech*, 33 LOY. U. CHI. L.J. 323, 360 (2002); *see also* *Gentile*, 501 U.S. at 1054–55 (opinion of Kennedy, J.) ("Empirical research suggests that in the few instances when jurors have been exposed to extensive and prejudicial publicity, they are able to disregard it and base their verdict upon the evidence presented in court."); Gregg, *supra* note 18, at 1366 ("[D]espite careful and thorough tests, there is no hard evidence that statements ever do prejudice juries.").

182. Beth A. Wilkinson & Steven H. Schulman, Essay, *When Talk Is Not Cheap: Communications with the Media, the Government and Other Parties in High Profile White Collar Criminal Cases*, 39 AM. CRIM. L. REV. 203, 203–05 (2002).

183. *See* Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397, 404 (2006) ("[W]orrisome evidence suggests that [the news media] is playing a significant role in shaping—or distorting—public opinion.").

184. *See supra* text accompanying notes 144–146.

interactions with the media throughout the litigation process can be seen as attempts to mitigate baseline prejudice against their clients. An indictment, together with extensive media coverage based on information from the police and prosecution, will place a defendant at a disadvantage from the start.¹⁸⁵ Although a defense lawyer may not be responding to specific instances of adverse publicity during the course of ongoing litigation, the lawyer may be concerned about the general unevenness of the playing field. Often a lawyer advocates for a client in the media not simply to ensure a favorable jury verdict, but also to protect the defendant's public reputation from undue harm.¹⁸⁶ Some scholars go as far as to say that speaking to the press on behalf of a client is an essential element of zealous representation.¹⁸⁷

In addition to the need for a rule to allow for effective representation in the media, additional guidance is necessary to protect the dignity of the legal profession. Press coverage of a trial inevitably leads the public to adopt certain perceptions about the parties and the lawyers involved in the trial.¹⁸⁸ This media coverage can cause lawyers to act differently than they otherwise would. For example, one of the main concerns after the televised O.J. Simpson trial was that television cameras had caused trial participants to act

185. See Matheson, *supra* note 47, at 890 n.143 (“It is well-established that reporters get most of their crime news from law enforcement sources.”); Judith L. Maute, “*In Pursuit of Justice*” in *High Profile Criminal Matters*, 70 *FORDHAM L. REV.* 1745, 1751 (2002) (“Our adversarial system of justice is theoretically weighted against the prosecution, in favor of protecting the innocent. Wide disparities in available resources for the opposing sides practically tip the scales the other way.”); see also David A. Strauss, *Why It's Not Free Speech Versus Fair Trial*, 1998 *U. CHI. LEGAL F.* 109, 117–18 (“[I]t might be argued that out-of-court advocacy by a defense lawyer is valuable even if—indeed just because—it is directed to potential jurors. The value is not that it contributes to society or democratic government generally, but precisely that it enhances the chances that the trial will be fair.”).

186. See Gregg, *supra* note 18, at 1327 (“Evidence shows that the preponderance of trial publicity is negative to criminal defendants.”).

187. See Chemerinsky, *supra* note 70, at 861 (“[A] lawyer's duty to zealously represent a client often is best served by the attorney speaking to the press. Indeed, what generally has been overlooked is how attorney speech about pending cases can advance the interests of the client and the justice system.”). *But see* Maute, *supra* note 185, at 1756 (“Criminal cases should be tried in court, not in the media. Period.”); Hal Haddon, *Representing a Celebrity Criminal Defendant*, *GPSOLO*, Mar. 2008, at 26, 26 (“However flattering requests for interviews may be, it is almost always a mistake for a criminal defense lawyer to grant one while the case is pending, especially on the front end of a case before the facts are fully known.”).

188. See DODD & OLTEAN, *supra* note 142, § 2.7.2.3, at 36 (“The image you project directly impacts how you are perceived—as a lawyer and potential media spokesperson. Image is a measure of your professionalism and credibility, even your character.”).

differently than they would have without the media's presence.¹⁸⁹ Though this concern was in reference to having media inside, rather than outside, of the courtroom, the concerns still apply here. When a lawyer makes statements to the media about ongoing litigation, the presence of a camera will likely influence what the lawyer says and how he says it.¹⁹⁰ The worry is that lawyers' statements could lead the public to develop a negative impression of the judicial system and thus lower public opinion of and trust in lawyers.¹⁹¹ To prevent this result, "trial publicity rules can act as a shield against an undignified public spectacle."¹⁹² But to serve as a shield, the rules must be clear about the extent to which advocacy is allowed.

Despite its desirability, a "complete separation of a court of law from the court of public opinion is unattainable, and we should readily admit that it cannot be achieved."¹⁹³ Media coverage of a case will have an effect on the public, and therefore, many defense lawyers will feel a need to advocate for their clients beyond the courtroom doors. Although many view this advocacy as an important element of representation,¹⁹⁴ it is not clear that it is allowed under the current Rule 3.6, and even if it is, lawyers are left in the dark about its appropriate boundaries.¹⁹⁵ What is important is that we give lawyers

189. See Diane Furno-Lamude, *The Media Spectacle and the O.J. Simpson Case*, in THE O.J. SIMPSON TRIALS: RHETORIC, MEDIA, AND THE LAW 19, 34 (Janice Schuetz & Lin S. Lilley eds., 1999) (explaining that Judge Hiroshi Fujisaki's decision to ban television cameras from entering the courtroom during O.J. Simpson's civil trial was in part because the "electronic coverage of the [criminal] trial significantly diverted and distracted the participants therein[and] it appear[ed] that the conduct of witnesses and counsel were unduly influenced by the presence of the electronic media" (quoting *Rufo v. Simpson*, 24 Media L. Rep. (BNA) 2213, 2215 (Cal. Super. Ct. 1996))).

190. In responding to a survey about the effect the media has on court participants, Judge Nauman Scott of the U.S. District Court for the Western District of Louisiana explained what he sees as the "inevitable" effect of media presence: "One has only to see a televised football game. All the fans come to see the game but the game is forgotten immediately and their attention is captured by the camera, as soon as they find that they are on television." Laralyn M. Sasaki, *Electronic Media Access to Federal Courtrooms: A Judicial Response*, 23 U. MICH. J.L. REFORM 769, 788-89 (1990).

191. See Cole & Zacharias, *supra* note 136, at 1667 (arguing that the more lawyers engage with the media, the less clients and the public will trust them and view them in a professional light); see also Gregg, *supra* note 18, at 1330 (explaining that one interest furthered by the trial-publicity rules is the restraint of "flamboyant, media-savvy lawyers who regularly appear in the media").

192. Gregg, *supra* note 18, at 1330.

193. Gerald F. Uelman, *Leaks, Gags and Shields: Taking Responsibility*, 37 SANTA CLARA L. REV. 943, 946 (1997).

194. See *infra* notes 247-251 and accompanying text.

195. See *supra* Part II.C.1.

an equal opportunity to speak¹⁹⁶ and provide them with reasonable limitations and guidelines to ensure that they are representing their clients effectively.

B. Recognizing the Separate Roles of Prosecutors and Defense Attorneys

To provide clearer guidance, separate trial-publicity rules for prosecution and defense lawyers must be created that account for both the different purposes of each side's extrajudicial speech and the distinct values that such restrictions seek to protect.¹⁹⁷ Because these interests are different,¹⁹⁸ separate rules are required to account for the unique roles of lawyers on both sides and, ultimately, to provide clearer and more practical regulations.

Patrick Fitzgerald and the defense lawyers likely had different reasons for interacting with or choosing not to interact with the media in the midst of the Blagojevich trial.¹⁹⁹ These differences, in turn, reflect their distinct roles in the trial and the greater functions of prosecutors and defense attorneys in the adversarial system. Justice Sutherland's 1935 opinion in *Berger v. United States*²⁰⁰ stated what commentators view as the true position of a prosecutor:²⁰¹ "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose . . . interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."²⁰² Although *Berger* was not a case about prosecutors' ethical responsibilities, it properly construes a prosecutor's position as one much closer to that of a judicial officer than a client's advocate. In fact, a prosecutor is often described as having a dual role in the criminal justice system.²⁰³ In addition to obtaining convictions of the

196. For a discussion of the inequities under the current rule, see *supra* notes 164–171 and accompanying text.

197. There is also a need to provide lawyers involved in civil litigation with clear guidelines on extrajudicial advocacy, but this Note addresses only the rule as it applies to prosecutors and criminal-defense lawyers. See *supra* note 42.

198. See *supra* Part II.C.2.

199. See *supra* text accompanying notes 126–129.

200. *Berger v. United States*, 295 U.S. 78 (1935).

201. See Kevin C. McMunigal, *Are Prosecutorial Ethics Standards Different?*, 68 FORDHAM L. REV. 1453, 1454 (2000) (noting that Justice Sutherland's opinion is frequently cited by those discussing prosecutors' ethical obligations).

202. *Berger*, 295 U.S. at 88.

203. See WOLFRAM, *supra* note 45, § 13.10.1, at 759 (describing the prosecutor's dual role).

guilty, a prosecutor must ensure that justice is done.²⁰⁴ Because of these responsibilities, prosecutors are often seen as being much more constrained as advocates than defense attorneys²⁰⁵: “The prosecutor’s required objective . . . is to secure the result, whether conviction or acquittal, indicated by a good faith inspection of the facts and the law.”²⁰⁶

By contrast, a defense lawyer’s primary duty is to zealously represent his client.²⁰⁷ This function includes making strategic decisions about the trial²⁰⁸ as well as “defend[ing] a client’s reputation and reduc[ing] the adverse consequences of indictment.”²⁰⁹ Because the limits on a defense lawyer’s zeal are unclear, these lawyers must employ their best judgment and advocate in good faith.²¹⁰ This duty does not mean, however, that the defense lawyer’s sole responsibility is to the client. Defense lawyers also have an obligation to the court and to the opposing counsel.²¹¹

Thus, whereas the prosecutor’s role can be seen as largely one of cooperation,²¹² criminal defense attorneys have the responsibility to competently represent their clients and zealously advocate for the best possible results in their cases,²¹³ providing much more of an

204. *Donnelly v. DeChristoforo*, 416 U.S. 637, 648–49 (1974) (Douglas, J., dissenting). This opinion is also reflected elsewhere in the Model Rules. *See* MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. 1 (2010) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.”).

205. WOLFRAM, *supra* note 45, § 13.10.4, at 765.

206. *Id.*; *see also* Maute, *supra* note 185, at 1750 (“Prosecutors should be held to insure [*sic*] that one of the basic tenets of the adversary system is satisfied at trial: protect the public interest in fundamental fairness.”).

207. MODEL RULES OF PROF’L CONDUCT pmbll., para. 2 (2010); ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION standard 4-1.2 cmt. at 122 (1993).

208. WOLFRAM, *supra* note 45, § 10.5.3, at 590. The defense attorney has quite a bit of discretion in making decisions with regard to trial strategy. *Id.* For example, decisions about which witnesses to call are generally left to the lawyer’s determination. *Id.*

209. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1043 (1991) (opinion of Kennedy, J.).

210. WOLFRAM, *supra* note 45, § 10.5.3, at 589.

211. ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION standard 4-1.2 cmt. at 122. The defense lawyer’s primary obligation to the court may still come back to the client. *See id.* standard 4-1.2(b) (“The basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the accused’s counselor and advocate with courage and devotion and to render effective, quality representation.”).

212. McMunigal, *supra* note 201, at 1462.

213. ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION standard 4-1.2 cmt. at 122–23.

adversarial function.²¹⁴ On the spectrum between cooperative and adversarial, defense attorneys and prosecutors generally drift in opposite directions.²¹⁵ Thus, although any rule must ensure that the legitimacy of the adjudicative system is not compromised, the provisions that apply to prosecutors must focus on protecting the procedural safeguards of the system, whereas the provisions for defense attorneys must allow successful advocacy.

C. A New Standard for Defense Attorneys

As noted in Part II.C.2, the current version of Rule 3.6 is focused on protecting the fairness of a trial.²¹⁶ This rule is a fitting standard for prosecutors because the state's interest in restricting prosecutors' extrajudicial speech is appropriately aligned with the rule's stated purpose.²¹⁷ As applied to defense attorneys, however, the state interest justifying the rule is misguided.²¹⁸ As a result, defense attorneys are left with confusing guidelines and unclear limitations on their advocacy in the media. To address this problem, this Note suggests a new, separate standard to address defense attorneys' extrajudicial advocacy.

Any rule limiting defense lawyers' extrajudicial advocacy, like any restriction on speech protected by the First Amendment, must be no more extensive than necessary to fulfill the state's interest.²¹⁹ With that in mind, rule writers should shift their focus for defense lawyers from a rule aimed at protecting the overall fairness of a trial to specific guidelines for proper extrajudicial advocacy that will ensure the legitimacy of the judicial system.²²⁰ A rule structured in this way will provide disciplinary authorities with guidelines for sanctioning attorneys who go beyond the limits of extrajudicial advocacy²²¹ and will allow defense lawyers who otherwise do not have the resources to

214. *Id.*

215. *See* McMunigal, *supra* note 201, at 1462–63 (warning against an oversimplification of the cooperative and adversarial functions but noting “that the proportions of the cooperative and adversarial views that make up th[e] dual role are different for the criminal defense lawyer than they are for the prosecutor”).

216. *See supra* text accompanying notes 172–174.

217. *See supra* text accompanying notes 172–174.

218. *See supra* text accompanying note 180.

219. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1075 (1991) (majority opinion of Rehnquist, C.J.).

220. *See supra* notes 176–180 and accompanying text.

221. *See supra* notes 164–166 and accompanying text.

seek out the loopholes in the current rule to feel more comfortable speaking on behalf of their clients in the court of public opinion.²²²

In *Gentile*, Justice Kennedy noted that “[t]he vigorous advocacy we demand of the legal profession is accepted because it takes place under the neutral, dispassionate control of the judicial system.”²²³ It seems to follow, therefore, that any limitation placed on a defense lawyer’s advocacy outside of the courtroom should be no greater than the limitations placed on such advocacy during trial. But rule writers must also be realistic and must recognize that there are additional values implicated by allowing lawyers to make statements outside of the courtroom.²²⁴ A new rule should allow defense lawyers to advocate for their clients in the media at any time,²²⁵ but this new rule should also prohibit any discussion of evidence unless the lawyer has a good-faith belief that such evidence will be admitted at trial²²⁶ and should require that lawyers have a good-faith belief that any comments they make to the media are factually correct.²²⁷ These limitations would be substantial enough to satisfy any concerns about protecting the legitimacy of the system but would provide defense lawyers with clear guidelines for extrajudicial advocacy.

In 1994, following the Court’s decision in *Gentile*, the ABA revised Rule 3.6 in an attempt to address the Court’s concerns about the trial-publicity rule’s vagueness.²²⁸ As a part of those revisions, the committee moved to the comment section a provision that provided that statements relating to “information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a

222. See *supra* notes 167–171 and accompanying text.

223. *Gentile*, 501 U.S. at 1058 (opinion of Kennedy, J.).

224. See *supra* text accompanying notes 137–140.

225. This change would eliminate the confusion associated with the current right of reply in Rule 3.6(c). See *supra* Part II.C.1.

226. See *Gentile*, 501 U.S. at 1047 (opinion of Kennedy, J.) (“At trial, all material information disseminated during petitioner’s press conference was admitted in evidence before the jury, including information questioning the motives and credibility of supposed victims who testified against [petitioners’ client]”); see also *Sheppard v. Maxwell*, 384 U.S. 333, 360 (1966) (“The exclusion of [inadmissible] evidence in court is rendered meaningless when news media make it available to the public.”).

227. See *Chemerinsky, supra* note 70, at 887 (“A better approach would be to limit lawyers only from making statements about pending cases that they know to be false or that are made with reckless disregard for the truth.”). Dean Chemerinsky applies the standard for criticism of government officials in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) to the context of lawyer speech, which in part required that “the regulating authority must prove the falsity of the statements.” *Chemerinsky, supra* note 70, at 885–86.

228. See *supra* notes 63–69 and accompanying text.

trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial” are “more likely than not to have a material prejudicial effect on a proceeding.”²²⁹ The committee made this revision because it felt that, to avoid the vagueness problems identified by the Court, the text of the rule should only include clear standards.²³⁰ But the *Gentile* Court did not mention this portion of the rule in its opinion. Instead, it was concerned more with the rule’s safe-harbor provision, which previously had given lawyers the impression that they could safely discuss the entirety of their client’s defense.²³¹ In fact, a rule that prohibits statements relating to evidence that lawyers have a good-faith belief will not be admissible at trial seems to provide a clearer standard than one that requires lawyers to determine what may be considered prejudicial. Instead of contributing to the vagueness of the rule, such a limitation would provide a clear dividing line between proper and improper statements to the press.

The portion of the rule that would require defense lawyers to have a good-faith belief that the statements they make to the press are factually correct also reflects the type of advocacy that is allowed in court. Just as lawyers cannot knowingly offer false evidence or perjured testimony at trial, they could not do so to the media under this new rule.²³² This rule encourages fair competition and prevents lawyers from using improper tactics in zealously representing their clients.²³³ Lawyers should not be allowed to use the media as a back

229. MODEL RULES OF PROF’L CONDUCT R. 3.6 cmt. 5 (2010). Although this provision is different from the standard for defense lawyers suggested in this Note, it is still very similar in terms of the type of statements it would disallow.

230. ABA STANDING COMM. ON ETHICS & PROF’L RESPONSIBILITY & ABA CRIMINAL JUSTICE SECTION, *supra* note 41, at 7.

231. *See supra* notes 55–56 and accompanying text. It is also possible that the Court was concerned about the confusion that could arise from a rule containing categorical prohibitions on certain types of statements in addition to a safe-harbor provision. *See* Bernabe-Reifkohl, *supra* note 181, at 368–70 (arguing that the ABA moved the provision containing a list of statements more than likely to cause prejudice to a comment in Rule 3.6 because that provision and the safe-harbor provision “could not stand together”).

232. MODEL RULES OF PROF’L CONDUCT R. 3.4.

233. *See id.* R. 3.4 cmt. 1 (“The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.”).

door for making false statements that would otherwise be disallowed in court.²³⁴

Aside from the two suggested limitations, decisions about when and how to talk to the media should be left to the discretion of the defense attorneys. These decisions would be part of their trial strategy, giving lawyers wide latitude in making decisions related to extrajudicial advocacy.²³⁵ Any challenge to decisions regarding extrajudicial advocacy could be assessed in terms of the standard articulated in *Strickland v. Washington*²³⁶: “There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.”²³⁷ Under the *Strickland* standard, there is a strong presumption that a lawyer’s decisions are sound trial strategy.²³⁸ In making strategic decisions about how to interact with the media, defense lawyers would have to think carefully about the best approach for their particular clients.

Commentators disagree about what constitutes proper trial strategy with regard to interactions with the media.²³⁹ Some believe that it is not necessary for defense lawyers to speak to the media and that it can, at times, be detrimental to a client’s case.²⁴⁰ For example, defense attorney Hal Haddon²⁴¹ has argued that even though it might seem like a defense lawyer’s responsibility to respond when police or prosecutors leak false or detrimental information to the media, speaking out too soon can be dangerous because defense lawyers often do not have the same command of the facts on the front end of a case as the prosecution does.²⁴² Haddon also believes that it is good

234. See Moses, *supra* note 147, at 1852 (“Lawyers should not use this free-style form of advocacy to make unfounded allegations that they would not make in the courtroom for fear of sanctions.”).

235. See *Strickland v. Washington*, 466 U.S. 668, 689 (1984) (“Judicial scrutiny of counsel’s performance must be highly deferential.”).

236. *Strickland v. Washington*, 466 U.S. 668 (1984).

237. *Id.* at 689.

238. *Id.*

239. See *supra* note 187 and accompanying text.

240. See, e.g., Fred C. Zacharias, *Reconceptualizing Ethical Roles*, 65 GEO. WASH. L. REV. 169, 182 (1997) (“[W]hen speaking to the press, lawyers are putting their own integrity on the line; they need not say anything to the press to represent their clients effectively.”).

241. Haddon is a prominent defense attorney in Denver, Colorado, and has represented such high-profile clients as John Ramsey and Kobe Bryant. *This Defense Team Never Rests*, WASH. POST, July 27, 2003, at E3.

242. Harold A. Haddon, Remarks at the Duke University School of Law Conference on the Court of Public Opinion (Sept. 28, 2007), available at <http://www.law.duke.edu/copo/defense>.

practice for defense lawyers to avoid making substantive statements to the press when the facts of a case do not appear to be in favor of their clients.²⁴³ His default strategy in both high- and low-profile cases is to avoid making statements to the media.²⁴⁴ Other commentators argue that lawyers simply are not experts in public relations, and because of that, they should not play that role for their clients.²⁴⁵ They point out that law schools teach trial advocacy and not advocacy in the court of public opinion.²⁴⁶

At the opposite end of the spectrum, Dean Erwin Chemerinsky argues that “a lawyer who is zealously representing a client, at times, should be making statements to the media.”²⁴⁷ Chemerinsky suggests that it is unwise for defense lawyers to take the chance that adverse publicity will not affect their clients’ cases.²⁴⁸ Instead, according to Chemerinsky, lawyers should be prepared to counter any statements made against their clients.²⁴⁹ Commentators on this side of the debate note that defense lawyers may make statements to the media not simply to further their clients’ interests at trial, but also to protect their clients’ public reputations.²⁵⁰ In a book instructing lawyers on media strategy, Stephen Zack, former ABA president, suggests that

243. *Id.* Haddon noted that it may be important to make a statement if the prosecutors have a press conference or if police officers have been leaking information to the media.

But then shut up. And if you don’t have anything to say, because occasionally your client may be more guilty than not, either say nothing or . . . say . . . ladies and gentlemen, I’m really outraged at the leaks that the prosecutor and the police have been putting out in this case. I think it’s highly inappropriate. I think it’s an insult to the jury who is going to hear this case that these people think that they can try to manipulate them through the media. I will have a lot to say when I get to court and I’ll see you in court.

Id.

244. *See id.* (“[I]f I do [talk to the media], I do it in writing, because that can’t be misunderstood.”). He added, “If you have to seize the wolf by the ears, do it with care.” *Id.*

245. Laurie L. Levenson, Remarks at the Duke University School of Law Conference on the Court of Public Opinion (Sept. 28, 2007), available at <http://www.law.duke.edu/copo/defense> (relaying defense attorney Tom Mesereau’s views).

246. *Id.*

247. Chemerinsky, *supra* note 70, at 868.

248. *Id.*

249. *See id.* (“[An] attorney should always speak out and counter potentially harmful publicity unless the harm is clearly trivial.”). Chemerinsky suggests that in addition to speaking to the public and potential jurors, defense attorneys should at times “speak out to generate media interest in their cases with the hope that the public scrutiny will cause judges to be more careful and fair.” *Id.* at 871.

250. *See Uelmen, supra* note 193, at 951–52 (“A client who is never prosecuted, or who is prosecuted and acquitted, may have been ill-served by a lawyer who allowed public speculation about his guilt to go unchallenged.”).

“[l]awyers who ignore the media in the modern age do so at their own peril. They risk ceding the court of public opinion to their opponents.”²⁵¹

D. The Blagojevich Defense’s Extrajudicial Statements Under the Suggested Guidelines

1. *Explicit Limitations on Extrajudicial Advocacy.* During the months leading up to trial, the Blagojevich defense team continuously argued in front of cameras and reporters that the FBI tapes at issue should be played in their entirety.²⁵² Blagojevich’s lawyers suggested that the jury would obtain a complete understanding of the truth only if they were allowed to hear the full contents of all the tapes.²⁵³ At first glance, these statements may seem like a violation of the suggested guideline disallowing the discussion of any evidence that the defense lawyer does not have a good-faith belief will be admitted at trial.²⁵⁴ Nevertheless, the lawyers explicitly refrained from discussing the contents of the missing portions of the tapes.²⁵⁵ A rule disallowing the discussion of evidence that is unlikely to be admitted at trial should not cover comments urging the prosecution and the court to allow the jury to see evidence that is being withheld or suggestions that the truth will be exposed only if certain evidence is allowed at trial. A rule barring such statements could infringe on a lawyer’s ability to expose abuse among police, prosecutors, and courts, a goal that is one of the important reasons that defense lawyers speak to the media.²⁵⁶

Another extrajudicial statement in the Blagojevich case that could raise concerns under the suggested limitations occurred when Sam Adam Jr. addressed reporters following Alonzo Monk’s testimony.²⁵⁷ Adam Jr. stated that in his opinion, Monk portrayed himself on the stand as “a man that was saying what he needed to say to get a deal.”²⁵⁸ Under the limitation preventing the discussion of evidence that the lawyer does not have a good-faith belief would be

251. Zack, *supra* note 142, at v.

252. *See supra* text accompanying notes 90–99.

253. *See supra* text accompanying notes 92, 98.

254. *See supra* text accompanying note 226.

255. *See supra* text accompanying note 99.

256. *See supra* notes 138–139 and accompanying text.

257. *See supra* text accompanying notes 103–105.

258. *Blagojevich Attorney: Monk “Couldn’t Name One Deal . . . Nothing!”*, *supra* note 105.

admitted at trial, this statement would likely be allowed if, on cross-examination, the defense lawyers questioned Monk about any plea agreement that might have caused him to deliver biased testimony.²⁵⁹ During the cross-examination in the courtroom, Adam Jr. did confront Monk about his plea deal and at one point even said, “You’re making that up so you can get your two years.”²⁶⁰ Because of this questioning, Adam Jr.’s later statements to the press referred to evidence already in front of the jury and were therefore appropriate outside of the courtroom. The fact that Adam Jr. discussed his own opinion of Monk’s credibility, rather than simply stating that Monk was testifying as a part of a plea agreement, could raise additional concerns,²⁶¹ but it would not likely be enough to result in sanctions under this particular rule.

Although the suggested limitations on defense lawyers’ extrajudicial advocacy would probably not result in sanctions in either of these two situations, the statements made by the defense team following the close of the Blagojevich trial raise a much more serious concern. After the government announced its intention to retry the counts on which the jury was unable to reach a consensus,²⁶² Blagojevich’s lawyers publicly lashed out at the prosecution and told reporters that it would cost between \$20 and \$30 million to retry the case—an absurd amount, in their opinion, given that the government had not proven its case the first time.²⁶³ Making such an allegation in

259. See *United States v. Roberts*, 618 F.2d 530, 535 (9th Cir. 1980) (“Evidence that a witness is testifying pursuant to a plea agreement is usually admissible to show bias.”); see also *United States v. Abel*, 469 U.S. 45, 52 (1984) (“Bias may be induced by a witness’ like, dislike, or fear of a party, or by the witness’ self-interest.” (emphasis added)).

260. Bob Sector, *Monk’s Testimony Ends After Grilling from Adam*, CHI. TRIB. BLAGOJEVICH ON TRIAL BLOG (June 15, 2010, 12:42 PM), <http://newsblogs.chicagotribune.com/blagojevich-on-trial/2010/06/monks-testimoney-ends-after-grilling-from-adam.html>.

261. See *United States v. Young*, 470 U.S. 1, 8–9 (1985) (“Defense counsel, like the prosecutor, must refrain from interjecting personal beliefs into the presentation of his case.”); *United States v. Morris*, 568 F.2d 396, 401 (5th Cir. 1978) (“An attorney may not express his own opinion as to the credibility of witnesses.”); MODEL RULES OF PROF’L CONDUCT R. 3.4(e) (2010) (“A lawyer shall not . . . state a personal opinion as to . . . the credibility of a witness . . .”). A similar concern could arise if a defense attorney made “unfounded and inflammatory attacks on the opposing advocate” in the media. *Young*, 470 U.S. at 9. Although this Note does not suggest that defense lawyers’ extrajudicial advocacy should be limited to the type of statements that are allowed in court, it may be good strategy for defense lawyers to avoid framing their statements in terms of their own personal opinions.

262. After the first trial, the jury convicted Blagojevich of one count of lying to the FBI out of twenty-four total counts. Natasha Korecki, *\$30M? Feds Rip Blago Lawyers on Cost of Retrial*, CHI. SUN-TIMES, Oct. 15, 2010, at 4.

263. See *supra* notes 119–122.

the media is a likely violation of the suggested provision requiring defense lawyers to have a good-faith belief that the statements they make are factually correct.²⁶⁴ In a brief responding to a defense motion for a judgment of acquittal following the trial, the prosecution criticized the defense lawyers' comments regarding the cost of retrial, noting that the \$30 million calculation was false and was simply made up to improperly influence the next jury and the public.²⁶⁵ The prosecution argued that "[i]naccurate statements concerning the costs of retrial [are] part of a pattern in which the defense simply makes up numbers they think will support the particular point they want to make, regardless of whether those numbers are grounded in reality."²⁶⁶ If an assessment by a disciplinary commission were to reveal that the prosecution's arguments were accurate, sanctions would then be appropriate. Making blatantly false statements in the court of public opinion does nothing to further a client's interests or to ensure the legitimacy of the legal system.

2. *Trial Strategy.* The suggested guidelines for defense attorneys' extrajudicial speech leave room for lawyers to make their own case-by-case determinations about the type of out-of-court advocacy that would be most effective in their individual clients' cases.²⁶⁷ For example, Blagojevich's lawyers made an early decision to promise that their client would take the stand to fill any gaps in the FBI tapes and to explain the portions of the tapes played in court.²⁶⁸ During the time leading up to the trial, the defense team acted as if there were no question as to whether Blagojevich would testify.²⁶⁹ As the government's presentation of its case neared the end, however, the defense lawyers' promise became questionable, and ultimately the defense rested its case without calling a single witness.²⁷⁰ Although the lawyers' premature statements in the media could be termed misleading, they do not reach the point of being unethical. Instead,

264. See *supra* note 227 and accompanying text.

265. Government's Response in Opposition to Defendant Rod Blagojevich's Motion for Judgment of Acquittal, Arrest of Judgment or New Trial, *supra* note 122, at 28–29.

266. *Id.* at 29.

267. See *supra* notes 235–238 and accompanying text.

268. See *supra* text accompanying note 100.

269. See *supra* text accompanying note 100.

270. Mike Robinson & Michael Tarm, *Defense Rests in Blagojevich Trial: Rod Blagojevich Will NOT Testify*, HUFFINGTON POST (July 21, 2010, 6:50 PM), http://www.huffingtonpost.com/2010/07/21/defense-rests-in-blojev_n_654114.html.

under the proposed rules, decisions about whether to make statements of this nature are left to the discretion of defense lawyers and, ultimately, their clients.

Defense lawyers may disagree about whether making an early promise that a client will take the stand constitutes sound trial strategy. Blagojevich's lawyers were able to argue that the prosecution had not met its burden of proof, and because of that, that their client had nothing to refute.²⁷¹ But it is also likely that the lawyers viewed any testimony from Blagojevich as too big of a risk.²⁷² The jury convicted Blagojevich of just one out of twenty-four counts, but if the result had been different, commentators might have deemed the defense's promise bad strategy. They might have argued that the jurors came in with an expectation to hear directly from Blagojevich and left feeling unsatisfied with the defense. Judgments about strategy are made easily once a trial is over, but defense lawyers must be careful to assess the risks of their public statements in advance. With a standard including fewer restrictions on their statements in the media, defense attorneys would need to ensure that any extrajudicial statement is made in good faith and with a client's interests in mind.

CONCLUSION

Blagojevich's defense attorneys demonstrated to the public that zealous representation of their client did not begin and end with their presentation of his case in court. At points throughout the pretrial process and during the trial itself, the defense team risked sanctions to advocate on behalf of their client in the court of public opinion. Surely these lawyers are not alone in their view that advocacy in the media is an important part of representing a criminal defendant. Rule 3.6, however, provides insufficient guidance on the limitations on this type of advocacy. Without a revision to the rule, defense lawyers like those representing Blagojevich can use its lack of enforceability as an open door to make arguments in the media that undermine the legitimacy of the judicial process and risk damaging their own clients'

271. See *supra* text accompanying note 115.

272. See Jeff Coen & Stacy St. Clair, *Why Blagojevich Broke Vow To Testify at Trial*, CHI. BREAKING NEWS CTR. (July 22, 2010, 6:40 AM), <http://www.chicagobreakingnews.com/2010/07/why-bлагоjevich-broke-vow-to-testify-at-trial.html> (“[S]ources said the defense team was worried the former governor could be headed toward a beating on the stand that would only undermine his case and weaken his standing with the jury.”).

cases. Other lawyers will continue to see this lack of guidance as a barrier to advocacy outside the courtroom and will remain silent even when their clients need someone to speak on their behalf. The development of a separate ethical rule focused on defense lawyers' unique role in the justice system would provide lawyers with clear guidelines on extrajudicial advocacy and would provide all defense attorneys with an equal opportunity to speak to the media. Such a rule would also give disciplinary authorities the ability to impose sanctions in a principled way when lawyers use the media to undermine the dignity of the legal system. Although it may be difficult to strike the proper balance between lawyers' First Amendment rights and the need to preserve the legitimacy of the trial process in developing a trial-publicity rule,²⁷³ the rule writers must shift their focus to ensure that these appropriate interests are on the scale.

273. See MODEL RULES OF PROF'L CONDUCT R. 3.6 cmt. 1 (2010) ("It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression.").