

The Advocate and the Media: The Courthouse Basement

The coffee shop at the bottom of the well-worn stairs was not its usual flurry of jibes and clinking dishes. The frantic faces of young attorneys and the sly smiles of experienced advocates that normally graced the dingy tables were gone for the day. All that remained was a waitress brewing one last pot of coffee for the five criminal defense attorneys who somewhat anxiously, somewhat objectively were awaiting the verdict on their five co-defendants. The trial had lasted two tense and turbulent weeks, and now it was 6:30 p.m. The media had covered the case from day one, and I had noticed that each of the lawyers had handled the onslaught of reporters and interviewers a little differently. What did I, a lowly and often abused law clerk, have to lose by trying to figure out how and why they treated the media as they did?

In law school we were taught to use a "client-based" decision model,¹ and to consider more than just the immediate legal ramifications of decisions that the client faces. Our professors told us to consider the status of the client in the community and in the work place, as well as the impact of the client's legal dilemma on family and friends. It occurred to me that in a high publicity criminal trial, an attorney faces not only the challenges of a courtroom duel, but also the responsibility of assisting his client in returning to society without undue stigma if (or when) an acquittal is achieved. It had always seemed to me that using the proper approach to deal with the media was essential to achieving this end, but my quest for guidance through this maze of pitfalls seemed limited in the available literature. Perhaps it was something that one could truly learn only by experience.² These attorneys may have, if not answers, at least some guiding principles to consider.

1. See generally D. BINDER & S. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1977).

2. This Article is an attempt to shortcut that process by having experienced attorneys discuss their various (and at times contradictory) approaches in dealing with a hypothetical situation. The attorneys who graciously gave their time and insight (with the most sincere appreciation of the author) by participating in this Article are: Robert C. Folgelnest, New York, New York; Drew Findling, Atlanta, Georgia; Alexander L. Zipperer, Savannah, Georgia; Wellborn Jack Jr., Shreveport, Louisiana; and William B. Moffit, Alexandria, Virginia. The author would like to acknowledge these persons for not only providing the substance of this Article but also for their guidance, patience, and enthusiasm.

I waited on a lull in the conversation, explained my confusion, and told them that I wished to pose a hypothetical in an attempt to alleviate my ignorance.³

I began, "The defense attorney and the reporter have both been misunderstood by the other for as long as newsmen have covered the courthouse. Both professions have been called 'the lowest form of life.'⁴ I believe attorneys must learn to deal with the press, for today the trend seems to be for the court to allow the media greater access to the courtroom and I don't think that this is necessarily all bad. It seems that if attorneys are doing their job properly, enhanced coverage will only assist the public in gaining a greater understanding of our legal system and the principles of its operation."

"I also believe that the courtroom is not a vacuum. If our legal system is to continue to have the respect of those it is designed to serve, the public must have a basic understanding of the system and the procedures it uses. So, I was wondering, what have you learned about dealing with the media over the years," I asked.

Joe answered first, "Attorneys may take for granted that the public-at-large understands basic terms. I read an article the other day that said when '[r]eaders were asked to define the following terms: arraignment, change of venue, preliminary hearing, concurrent sentence, probable cause, felony, misdemeanor and own recognizance, for every right answer, there were two wrong ones. 'Probable cause is when the judge feels a person is justified in committing a crime,' one person thought . . .⁵ I think this illustrates the first principle an attorney should keep in mind when dealing with the media. The media's audience is like a jury. It is a cross-section of society and the attorney can use this to his advantage."⁶ Joe was the kind of guy who would remember verbatim an article he had read a month ago. He reminded me of Columbo—he seemed slow and asked a

3. The hypothetical was loosely based on the recent investigation and subsequent downfall of Washington D.C.'s Mayor Marion Barry. The interviews were conducted by telephone in October of 1990, and the results are organized into a conversation to aid readability and to highlight the differences in the attorneys' various approaches. Interspersed with the actual comments of the interviewees are snippets of material uncovered through traditional library research. Because each interview was conducted independent of the others, and the participants did not have the opportunity to respond directly to their colleagues, I did not feel that it would be fair to the attorneys involved to attribute personally the responses.

4. A. Green, *Dealing with the News Media: Guidelines for Popular Lawyers*, 4 PA. L.J.-REP., Sept. 21, 1981, at 2, col. 2.

5. Address by Justice S. Abramson, Media-Law Conference, Madison, Wis. (Oct. 1981), reprinted in 55 WIS. B. BULL. 34 (Jan. 1982) (quoting Hill, *Legalese Can Be Confusing*, OSHKOSH DAILY NORTHWESTERN (Feb 1980)).

6. Brimberpp, *How to . . . Handle the Media In and Out of Court*, 11 THE BRIEF 17, 18-19 (May 1982).

question two or three times, but he remembered every tidbit of information he had ever heard.

"I'm not sure I understand. Would you say for example, 'my client was released on his own recognizance' or something like, 'Mr. X has been in this community for twelve years and the judge recognized that he has never been in any trouble before, so he was released on his signature.'"

"Oh, I think the second way is much better," Joe replied. "You have to use the facts at hand to paint a picture just as you would for a jury. And you have to take the time to educate the reporter and test their knowledge. This will help to avoid inaccuracies and damage to your client."⁷

Bill added somewhat cynically, "Remember that everything you or your client says is on the record."⁸ Bill was slick, but not in a negative sort of way—slick in an expectedly competent way. He would give you a gut reaction answer to a question, and then be able to back it up as if he had thought about it for a week.

"I heard a PR man give a lecture one time and he said you should look straight into the camera's eye," Ted remarked. "It will portray sincerity and enhance your credibility. Another thing he stressed is to wear appropriate attire. Appearance is always important, but even more so on television."⁹ Ted didn't strike one as remarkable at first meeting, but he was tenacious, organized, and always kept his eye on his goal.

"You know what I hate?" asked David. "I hate how it always seems that some reporter will come up to you when you least expect it. So, I've found that you have to be prepared to meet the press at any time. I prepare for the press just like I prepare for the courtroom. The time you spend will pay off in both settings."¹⁰ David was a realist. He saw life as it was--no chaser, no rose colored glasses. He once said to me, "Take what life hands you, then make it work for you."

"From what I've seen, it's important to remain calm when dealing with the press. To the audience your reactions may be as important as your answers,"¹¹ remarked Susan. She always seemed like a warm person and always had a smile, but in the courtroom she had control. She never missed a beat and somehow managed to endear herself to everyone who watched her at work, including the jury.

"So let's say you're representing a mayor or city council member who has come to you because the federal grand jury is investigating some of his associates about drug use and distribution. The reporters are knock-

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

ing on his door wanting to know how he is involved. How do you advise him to deal with the press?" I asked.

Ted said, "First of all I would suggest that he not deal with the press at all, but refer them to me. And I'm not going to talk to them about anything that's not in the public record."

"Well, you have to consider several other factors," responded Susan. "If there is a possibility that your client may come under investigation himself, you must weigh the negative connotation that your client might seek immunity or use the fifth amendment to protect against any possible damage to his legal position. If this is the case, then you may want to avoid making statements to the press and keep focused on the courtroom."

"On the other hand," David interjected, "if a grand jury is investigating my client's associates, I would advise him to tell the press that the grand jury proceeding is secret and that he is cooperating in every way possible, but that at this point any further comment may jeopardize the grand jury's ability to do their job. Rule number one is that if I'm defending someone accused of a crime, I don't say anything to anyone because I don't believe a client can help himself by talking to the media. But try telling that to a politician!"

Bill agreed. "Tell them that you have the utmost respect for the grand jury process and that you would not want to do anything which might interfere with it. But, at this point my concern is whether or not my client may come under investigation himself. You don't want to have your client get caught in contradictions so keep your comments very general. But, if I'm representing a mayor, I'd try to work with his press people on it. It's their responsibility to handle his public relations not mine. Any client, not just a politician, has to be aware that any comment he makes could go to potential jurors."

"Would you hire a PR person to help you on a case?" I asked.

Bill responded, "I personally am a big believer in consulting with experts in any field in which I don't have an expertise."

"I do know," added Joe, "that you do not want to lock into a defensive position before your client has been charged and knows what defenses are viable. Where's the waitress? I need another cup," he said lifting his saucer. Then he walked over and got one for himself.

"Does your attitude change if your client does come under investigation himself?" I questioned.

"If allegations start to be made against my client, I believe that the best thing to do is deny them," Joe replied walking back to the table. "Then try to put the burden back on the media. Say, 'if the media has so little respect for the grand jury process as to question my client at this time, that is their problem. We have confidence in the legal system and we will do nothing to prevent the grand jury from doing their job.'"

David nodded in agreement adding, "If a client is being publicly investigated it is necessary to defend oneself publicly and answer allegations. The nature of the allegation is a major determining factor. It's not good for a politician to be accused of drug use in a public forum, but if evidence is available which would clearly exonerate your client, I would bring that evidence to light. You have to remember that the press is looking for the 'fight of the century.' They want to add up the punches thrown in each round, then add up the rounds and see who is winning the fight. The problem is that the legal system doesn't work that way. It's not that kind of addition and calculation. What the defense attorney wants is for the press to report only what went on in the courtroom and the significance of it from his point of view."

"Well," I asked, "what if your client is arrested or indicted, what then?"

Joe expanded on this theme, saying, "Remember that a television crew is looking at you as footage. Most of the time the editors or commentators have already decided on what they're going to say about the story. They need thirty seconds of film and one good sound bite. You're going to get treated as grist. The key is to take this defensive posture and turn it into something positive. I guess the usual 'party line' is to deny the allegations categorically. Say that you look forward to trial and that you're sure that your client will be found innocent of all charges. Now, when your client is first arrested or accused you are usually working in the dark, so you have to say 'nothing' in a positive way. Once you have some idea of what evidence is likely to come out at trial you can proceed more confidently, but when information is limited you have to maintain the ability to change the strategies or tactics of your defense."

Bill agreed by saying, "Keep your comments general and be sure that you don't narrow your options. I make sure, before I ever allow myself or my client to come into contact with the media, that we have an understanding of how we are going to handle them. You don't want your client making mistakes that could have been avoided. And you know how some people, politicians especially, think they can talk their way out of anything."

Susan voiced a little different opinion, "I think some of what my colleagues have said is true, but I've found a little different technique to be helpful. I go ahead and deny the allegations and say that I look forward to our day in court. This puts the reporter into a follow-up question situation. Since these questions are usually more specific they are easier to fend off. After five or six questions the reporter really starts to push for answers and makes himself look overly aggressive. Tell him, 'Look I've answered five of your questions and now you're really being rude. I don't want to talk to you anymore,'" said Susan. "Some of what you do depends on what the other side is doing, but don't let them put you in a

corner. If you really feel they're being overzealous in seeking media attention then file a motion asking the court to restrict the access to the media."

"Like Ted said earlier, I would prefer that I speak to the press rather than let my client," added David. "But at times I can see where clients have other interests to protect that forces them to speak for themselves. Like a politician or even any Tom, Dick, or Harry who has a reputation to protect; a defendant speaking for himself can be very effective. It really depends on what you perceive are the abilities of the client in coming off as being truthful and sincere. But, in general I want to have every word they are going to say scripted for them." added David.

"Well," I asked, "is it ever a good idea to reveal defense strategies to the press?"

Bill piped up, "The most important consideration is to be victorious at trial and I would not jeopardize at all the strategy of defense for any kind of post-trial social well-being. If you don't put the trial first, the client is constantly second guessing you. If the client is a politician, or has strong concerns about his post-trial life, you will constantly be in a debate with your client. The forum is a legal one and the client's other concerns won't mean anything if he is convicted. I won't work with a client otherwise. I don't have time for anything other than that approach."

"No, I disagree," said David. "Decisions about whether to reveal defense plans are based on many factors—strength of the case, notions in the community, what kind of jury you are hoping to pick, and what kind of community you live in. All of the decisions should be designed to put the defense in a better position in both the community and the case. Innumerable factors go into these decisions. Many of these things are just instinctual calls based on experience."

"I say the main thing is to be cautious," added Joe. "Community size is one factor to weigh, but that goes mainly to assessing how much damage a misstatement can do."

"Well, there are situations when revealing defense plans may be a good idea," said Susan. "Especially if you feel that the prosecutor may be having some doubt whether to pursue the case. The decision has to be one made in reference to your overall defense plans."

"What if you are looking at plea bargaining?" I asked. "Would you ever release that to the press?"

Susan responded, "I would never discuss plea bargaining with the press. I don't see how it could be advantageous. You are negotiating and if negotiations fall through, your client looks like he has admitted some sort of guilt."

That seemed to be at least one comment upon which all the attorneys could agree. So I asked, "How do you handle the trial if it last two weeks,

like this one? What sort of things do you say to the press every afternoon?"

Ted finally got into the discussion by saying, "This is the time for the attorney to be a teacher. The attorney has, I believe, a professional responsibility to be sure that the media and consequently the public understand what is happening in the courtroom. If the attorney doesn't, the press relies on clerks or court staff members who don't have a legal education—or worse, they rely on the opposing counsel. If the attorney and the media work together properly, the attorney's name should not appear in the story. The attorney's role is best described as someone who explains the day's events from his own perspective. The real story is in the court record—not in what the attorney says on the courthouse steps. Nine out of ten reporters miss that, especially younger reporters."

Joe vehemently disagrees, "I never talk to the media during a trial. What's my purpose? The jury is sequestered, any statements I make should have no impact. My job is to worry about an acquittal. I'm not paid to concern myself about the client's post-trial life."

"I agree with Joe," chimes in Bill, "I may advocate our side to the press but my only real concern is what those twelve jurors believe."

"Well, I think if you look at what Weitzman did in the DeLorean trial, it was pure genius!" exclaimed Susan. "He held a press conference every day and explained exactly what had transpired and what the significance of the events were. That's what I try to do. For example, I might say to a reporter, 'Today the government put on their star witness, and it was obvious to me that under cross-examination he was shown to be less than credible.' That having been said, I think the attorney is in a difficult position. Face it, good press is good for business, so the attorney must first specifically identify how his comments are assisting the client's cause before speaking to the media. There is a distinction between legal advocacy and public relations. The latter is not what the lawyer is trained for and can be a very dangerous place to tread."

The waitress had reappeared, filling the now lukewarm cups when the bailiff came down the stairs and announced, "The jury is ready. The judge wants you upstairs."

As we were anxiously getting up from the table and taking our last sips of coffee too hot to drink, I thought to myself that beyond the social reasons for working with the media, there are practical ones.

It seemed like Susan had read my mind. "You have to remember the client is a member of his community and depends on it for livelihood, for emotional support, and all kinds of things. It seems to me that if I help the client receive a fair trial and get an acquittal, but don't protect his reputation, there is no way he can get on with his life," she said.

As we were walking back up the stairs Joe said to me, "An attorney in Atlanta once said to me that the hardest part of his job was that clients

come into his office with their life in shambles and expected him to be able to solve all their problems. I was just starting law school and at the time I didn't know how to answer to him. But today I would say: we can't work miracles--saints we're not, but we can seize opportunities to be an advocate for our client. When the press covers a trial you have a chance to help your client or hurt your client. I'd much rather know how to help him than inadvertently hurt him."

Once we were all seated in the courtroom and the jury had returned to their box, the judge asked those now familiar words, "Mr. Foreman, has the jury reached a verdict?"

I don't really know why, but at that moment, I looked down at the surface of the now cleared defense table. I noticed how dull and marred the finish had become. I guess years of heavy briefcases and thousands of shuffled files had worn down the gloss. I thought to myself how important it is not to forget what it is that can't be seen from the other side of the bar.

EDWARD S. McCALLUM, III