Strategies for the Media[1]

Weighest thy words before thou givest them breath
Othello, Act III, sc 2

Introduction

I am asked today to discuss with you strategies to be used by counsel in dealing with the media when involved in a high profile case. This is a topic I approach with trepidation, aware that anything I have happened to learn over 30 years of trial work has been accomplished mostly by trial and error. The errors, it goes without saying, have been many and sometimes embarrassing. I do not hold myself out as an authority on the subject, but as I embark upon it I am comforted somewhat by these words of Eric Hoffer: "It is to escape the responsibility for failure that the weak so eagerly throw themselves into grandiose undertakings".[2]

Ethical Considerations

Any discussion of strategy concerning the media must be informed and shaped by counsel's ethical duties to the court. The Law Society's Rules of Professional Conduct are an essential starting point. They are designed to reduce public complaints about the profession,[3] and to ensure that counsel's comments to the media do not infringe counsel's obligations to the client, the profession, the courts, or the administration of justice.[4]

Most of the rules governing media relations focus on counsel's conduct while the case in question is ongoing, although counsel's obligations do not end the moment the case is over or the

[1] Patrick J. Ducharme of Ducharme Fox L.L.P June 2007 Law Society of Upper Canada 7th Annual Six-Minute Criminal Defence Lawyer CLE Toronto, Canada
[2] Eric Hoffer, *The Ordeal of Change* (1964), 15.5
[3] The applicable *Rules of Professional Conduct*, Law Society of Upper Canada are attached as Appendix A
[4] *Rules of Professional Conduct*, Law Society of Upper Canada, Rule 6.06 (1)

last appeal period has run its course.[5] Referred to as the *sub judice* rule, statements by counsel during proceedings must not prejudice the proceedings. The most common transgressions of the *sub judice* rule relate to public expression by lawyers of their private or personal opinions, opinions on such matters as:

- the guilt or innocence of the accused;
- intended trial tactics;
- the outcome of the case;
- the conduct of a person involved in the case;
- the strength or weakness of the case for the Crown or the defence;
- the criminal record of a witness or an accused person;
- the existence or results of plea negotiations or resolution discussions;
- the correctness or significance of a ruling or judgment by the court; and
- the character, reputation or credibility of a witness.

Other dangerous areas of public comment for counsel are:

- providing information to the media prior to its presentation as evidence in court;
- engaging in unfair or misleading criticism or commentary about a case before the court;
- making public statements about the client, not for the client's benefit but for some other purpose such as self-promotion**;**
- referring negatively to a decision of a jury or a judge.

[5] *Stewart v. Canadian Broadcasting Corp.* (1997), 150 D.L.R. (4th) 24 (Ont. Gen. Div.)

This is not to suggest that all public comments by counsel in these areas necessarily constitute ethical infractions. Comments having the effect of violating counsel's obligations to the client, the profession, the courts, or the administration of justice may be viewed as ethical transgressions. Ethical breaches have a dangerous twofold potential; they may attract disciplinary penalties for the offending lawyer from the Law Society, or damages or both. Less likely, but still possible, are charges of contempt, or obstructing or attempting to obstruct justice.[6] LawPro, the insurer for lawyers in Ontario, has identified the area of "Lawyers Speaking to the Media" as a particularly fertile realm for malpractice claims.[7]

Absent these ethical duties, and the risk of being sued, our approach to the media might well be less restrained, as for example in the American model. But even the American model, wild and unrestrained as it is, imposes some ethical constraints upon lawyers. A case in point is that of Mike Nifong, the now embattled prosecutor once at the helm of the Duke Lacrosse rape case. Today, his professional career in ruins, he stands accused by the North Carolina Bar of all manner of abuses, including the making of inappropriate public statements about the case before the case was before the court.

One might legitimately ask: why suddenly, Mr. Nifong? Day after day in the United States prosecutors and lawyers "try" cases in the media, even while the cases are being adjudicated and all the evidence is not in. The more notorious or high profile the matter the greater the comment. Nifong's public statements, however, were of a different character. His alleged transgressions are

[6] See *R. v. Kopyto* [1987] 62 O.R. (2d) 449 (Ont. C.A.)

[7] See: http://www.practice pro.ca/information/speakingtomedia.asp

not related to speaking to the media *per se*. Rather, they have to do with casting suspicion upon the accused parties by making false statements about them and withholding material exculpatory DNA evidence all the while that the prosecutor unabashedly promoted his own re-election. Absent the false statements, the withholding of evidence and the re-election motive, Nifong was free within the American model to discuss the entire case for the prosecution publicly with impunity.

The case of Jose Padilla is an example of the American model of trial by media. On May 8, 2002 Jose Padilla was arrested by FBI agents at Chicago's O'Hare International Airport and held as a witness in connection with the September 11, 2001 attacks at the World Trade Centre in New York. Speaking at a news conference a month later US Attorney General John Ashcroft accused Padilla in unequivocal fashion of being a terrorist bomber. He said, "We have captured a known terrorist who was exploring a plan to build and explode a radiological dispersion device, or 'dirty bomb' in the United States."[8]

Ashcroft said the arrest of Padilla "disrupted an unfolding terrorist plot" one that could have caused "mass death and injury". President George W. Bush accused Padilla of "acts of international terrorism" and declared him an "enemy combatant".[9] Using the U.S.A. Patriot Act Padilla was denied access to an attorney. So the president and the top prosecutor of the United States condemned Padilla as a terrorist. Who but a lawyer representing Padilla could challenge these damning statements? Who but a lawyer could challenge the truth of the accusations? Yet the U.S. government argued forcefully that he was not entitled to a lawyer. Ashcroft's comments

[8] See "Dirty Bomber? Dirty Justice" by Lewis Z. Koch Bulletin of the Atomic Scientists 2004 Vol 60
[9] *I.b.i.d.*

represented conviction by government announcement. Some atomic scientists believe that Padilla does not possess the intellectual sophistication in nuclear engineering or the organizational skills to successfully obtain enough radioactive material, fuse it with explosives and detonate a dirty bomb.[10] Without a lawyer able to confront and challenge the information provided by the government to media, only one side of the story was presented to the public.

Alan Dershowitz, notable Harvard law professor and occasional defence counsel, discussed with me recently his view of the role of a defence attorney in making public statements on behalf of a client. He said, "I will defend my client wherever and whenever he is attacked. If it is on the courtroom steps, I will be there, if it is on *Larry King Live*, I will be there. I view my role for the defence as reactive in that way. The prosecutor sets the rules of engagement. If the prosecutor makes comments that are adverse to my client, I have a duty to respond."

In Ontario, however, the situation is far different. In our jurisdiction, the Law Society sets the rules of engagement, not the prosecutor. And prosecutors must follow the same ethical rules as defence counsel. It is not a valid response in our jurisdiction to a claim of unethical conduct that the prosecutor did it first. We are directed by the Law Society to refrain from expressing personal opinions on the merits of a client's case.[11] This admonition does not contain the words, "unless the prosecutor first says something adverse to or about my client". So, my first suggestion on developing strategies for the media is to remember that this is not the U.S.A.[12]

[10] *I.b.i.d*
[11] *Rules of Professional Conduct*, Law Society of Upper Canada, Rule 4.01 (1) Commentary
[12] *Rules of Professional Conduct*, Law Society of Upper Canada, Rule 2, Rule 4, Rule 6

Why Media Strategies are Necessary

Although the Law Society sets the rules of engagement, it provides no training to deal with the onslaught of an intrusive media. When covering high-profile cases the media do not generally arrive unarmed. Reporters get information from the public relations departments of the police. These are not the police your grandparents knew. In their day, an investigating officer declined to comment on the evidence, expressing a preference to await the decision of a court. Today's police departments are acutely conscious of their public image. They appoint spokespersons to liaise with members of the media. They hold press conferences before, during and after arrests. Have you ever wondered how the media are present to photograph and video so many arrests?

Media spokespersons are now eager to share information with the public about their successful investigation and detection of crime. They make public statements sympathetic to and supportive of "the victims" of the crime. They often speak of the crime as though the laying of the charge is also the end of the matter. Attendance at court for trial, if referred to at all, is made to seem as though it were merely a technical step toward a known and certain result. They pose ebulliently before caches of drugs, guns or money. They stand glumly, reverentially, sadly, beside members of the family of the deceased or before a photograph of the deceased. The impact can be forceful and lasting, and can have pernicious consequences.

Only the naïve believe that negative media coverage, coverage adverse to the interests of the accused, does not impact judges and jurors exposed to the media coverage surrounding a high profile case. And it is foolhardy to believe that opinions formed by media coverage do not seep through to or affect our decision-makers, including judges and juries. This is why counsel must

develop workable strategies to deal with the media: to protect the interests of those we represent. Failure to do so is not an option because those interests are jeopardized by negative media coverage.

The Law Society rules may, in some instances, limit the ability of counsel to counteract media-based information even if the information is false, because efforts to counteract information may run afoul of counsel's obligation not to endeavour, directly or indirectly, to influence the decision or action of a tribunal or court in any case by any means other than open persuasion as an advocate.[13] Do the Rules of Professional Conduct permit counsel acting on behalf of an accused to correct unfair allegations or false impressions created by inaccurate or incomplete information published by the media?

Rule 6.06 of the Rules of Professional Conduct[14] provides this limitation only: when speaking to the media the lawyer must not infringe his obligation to the client, the profession, the courts, or the administration of justice. The commentary to the Rule insists that the lawyer's duty to the client demands that, before making a public statement concerning the client's affairs, the lawyer must first be satisfied that any communication is in the best interests of the client and within the scope of the retainer. Consequently, every retainer agreement should include an authorization by the client specifically permitting public statements by the lawyer concerning the client's case, provided the lawyer deems the statements to be appropriate and in the best interests of the client.[15]

[13] *Rules of Professional Conduct*, Law Society of Upper Canada, Rule 4.01 (2) (d)
[14] *Rules of Professional Conduct*, Law Society of Upper Canada, Rule 6.06 (1) Commentary.
[15] See Appendix B Sample Retainer Agreement.

Not surprisingly lawyers fear transgressing a complex range of professional and legal statutes, precedents, codes and guidelines. They fear their ability to calculate what to say and when, and the impact it will have on the outcome of proceedings. Their fear translates into a reluctance to speak to the media at all. But failure to address the media may compromise the interests of the client and compromise the outcome of the proceedings, the very result that the rules seek to avoid.

Justice Learned Hand long ago said, "The hand that rules the press, the radio, the screen and a far-spread magazine, rules the country."[16] Communicating well with the media is a separate and particular skill. In high-profile cases it is an essential skill.

Every suggested strategy has as its foundation the concept of the lawyer's duty to be fair and honourable. Every strategy must encompass the requirement of a fair trial. But every strategy also seeks to quell the fear that lawyers have when facing the media on behalf of a client who is without any protection except for that afforded by counsel hired to protect the client's interests.

The Power of the Media

The media is protected by the constitutional right to freedom of expression allowing it to report and broadcast with all the freedoms of a constitutionally protected right. But clients have equally important constitutional rights of procedural fairness and the presumption of innocence. Clients are entitled to private lives free from media harassment and to fair trials in open courts free from the prejudice sometimes created by sensational media coverage. And, clients are entitled to have

[16] Memorial Address for Justice Brandeis, December 21, 1942

false accusations corrected swiftly and with the same prominence as the false accusations were published.

Trial by media is as much a reality in Canada as in the U.S.A. The seminal difference is that the information made available to the media in high-profile cases in Canada is generally provided by the police, not the prosecutor. Because Canadian prosecutors are considered ministers of justice they have responsibilities to relate to the media differently from other lawyers.[17] Their quasi-judicial role places an even greater burden upon them to avoid any possibility of interfering with a fair trial. But the fact that Canadian prosecutors play a more limited role in providing information to the media than prosecutors in the United States does not mean that our trials by media are much different. Information provided by the police perhaps has even greater impact than information provided by a prosecutor, viewed by members of the public as just another lawyer. For many citizens, the police have exalted status and stature. And they are viewed as disinterested evidence-gatherers. Lawyers, by contrast, have a different public persona. Even prosecutors are merely lawyers being paid to present arguments and to advocate for a particular side.

The "No Comment" Technique

Let’s start with the obvious: saying nothing is definitely better than saying something detrimental to the client's interests. But the "no comment" approach is, in most instances, only marginally better than a detrimental comment. Having absolutely no comment for the media while representing someone who has attracted intense media interest based on criminal allegations is

[17] Province of Ontario Ministry of Attorney General: Crown Policy Manual: Media Contact by Crown Counsel , March 21, 2005

tantamount to submission. This kind of apparent passivity is unwise. It suggests that the lawyer is uninformed, unprepared or defeated. And worse, it could be viewed as counsel climbing into an underground bunker to avoid the onslaught of police-generated information, information that to the public seems or sounds compelling, and for which the lawyer apparently has no answer.

As a rule, simply saying "no comment" effectively abandons counsel's responsibility to represent and protect the client to the full extent permitted by law.[18] If counsel actually has no comment to make when questions are posed by the media, counsel should at least offer valid reasons for not having a comment, such as, for example, 'the prosecution has not yet provided us with the materials upon which the charge is based', or 'we have not had an opportunity to meet with Mr. Smith to discuss the allegations' (we never refer to an accused person as 'the accused' because that term depersonalizes him), or 'the question you ask requires that I decline to answer right now based on ethical rules I am required to follow because that very issue will have to be decided by the court'.

It is also wrong to categorically assert the innocence of the accused. Comments asserting the innocence of the accused through counsel, even authorized by the client, may be seen as an aggravating feature in the event of a conviction. Falsely proclaiming innocence may be considered an aggravating feature toward victims already victimized by the acts of an accused. The defending lawyer is rarely in possession of sufficient information prior to trial to categorically proclaim innocence. Proclamations of innocence smack of false bravado and are remembered long after other comments about the case are forgotten. Jurors remembering the proclamation of innocence may be shocked and disappointed when the accused fails to testify at

[18] See Commentary *Rules of Professional Conduct*, Law Society of Upper Canada, Rule 4.01 (1) Commentary

trial. Offering no comment or boldly proclaiming innocence are at opposite ends of the spectrum, and each is wrong. Somewhere at or near the middle of the spectrum is the place to be.

A Case Example

The powerful impact of the media sometimes requires a public response from the defence. It typically happens that the police provide information to the media that casts the circumstances of the alleged crime in a particular light. The stage is then set to view all the circumstances from the victim's position. This directly or indirectly damns the defence. Should the defence remain silent? Should the defence patiently wait to select jurors from the community who already have a favourable impression of the victim and either know nothing about the accused or, worse, have a pre-determined negative impression of the accused? Waiting silently, helplessly, is likely not a good tactic. The following case example is apt.

In a second-degree murder case involving the death of a prominent public figure a police appointed spokesperson referred to the deceased as "the victim," a "well-known member of the community," "a person known for his charitable works," and "a person who may have died because of his generosity." Some of that information was true. The deceased was indeed well known in his community and was a person who appeared to be quite generous, offering his home to young homeless boys who, but for his generosity, would likely have been forced to live on the street. The deceased acted as a sponsor of immigration applications by young boys, including the accused, seeking refugee status in Canada. He provided financial support while the claims were being processed. The deceased also sponsored the accused's older brother a year earlier.

The accused did not speak English. Through an interpreter the accused provided information about his life in Peru prior to arriving in Canada. He and his brother had escaped separately from the clutches of the Shining Path of Peru, one of two main leftist rebel groups operating in Peru.[19] He was sponsored into Canada by the deceased, and re-united with his only surviving brother[20] who was living with the deceased for a year prior to his death.

At the time the deceased was killed the accused had not yet learned what was intended for him. But late one night he was awakened by the sounds of his brother groaning. The sounds emanated from the deceased's bedroom. He opened the door to see his brother held facedown on the bed by 2 adult males while the deceased was penetrating his brother anally. All three adults were naked. The accused grabbed a nearby knife. The deceased died naked, running from his bedroom, stabbed multiple times both front and back. The other two males, apparently Americans, were never seen again. Apparently the deceased's "generosity" toward young males was fueled by a different motivation. Nevertheless, his public image was as favourable as it was false.

Defence counsel responded to the media coverage about the victim with this comment: "Members of the community should keep an open mind until the evidence is presented at trial. It may be that the deceased was not so honourable." Then defence counsel commented on the accused hoping to be re-united as soon as possible with the only "remaining" living member of his family, his older brother.

[19] The Maoist Shining Path (known in Spanish as *Sendero Luminoso*)

[20] The remaining members of the accused's family, including his mother and father, his grandparents and one sibling were killed by the Shining Path. Only the accused and his brother were kept alive and conscripted into the Shining Path. Later and separately they escaped. The accused's older brother made his way to Canada and was sponsored by the deceased just before the accused arrived himself and entered Canada in the same way.

What followed is quite remarkable and can only be explained by the power of the media. These comments caused two boys in the community to come forward with evidence that the deceased had attempted, on separate occasions, to sexually assault them. They provided valuable information about the deceased, his habits, his haunts and his friends. Slowly the *modus operandi* of the deceased began to emerge. He was a predator. And his program was to groom and entice young vulnerable males to his home, then offer them to his male friends for sex. The vulnerable targets were often young males seeking refugee status or homeless or otherwise displaced. The boys, after grabbing the lifeline offered by the deceased, were reminded often about what would happen to them if they broke their silence or otherwise challenged their benevolent saviour. They sold their silence for a roof, free meals, or a sponsorship of residency in Canada.

The pattern, number and nature of the stab wounds made the defence of self-defence problematic. Perhaps the jury believed that the deceased was running from his bedroom to attack the accused. But the blood spatter evidence suggested otherwise. They heard the accused through an interpreter. They heard similar fact evidence from another young victim of the deceased who had come forward after hearing or seeing the comment that the deceased may not have been so honourable.

Provocation could only reduce the murder charge to manslaughter. Both defences were left to the jury. The jury acquitted the accused. They deliberated less than 2 hours. The jury apparently did not view the victim as honourable. The number of times he was stabbed or where he was stabbed did not seem to matter much to them. Short but poignant comments from counsel to the

media eventually led to the "outing" of the deceased as a sexual abuser of the worst kind. The tide turned in favour of the real victim.

Understanding the Media: Parasitic Sensationalists or Protectors of the Public?

Developing successful strategies for the media requires an understanding of the members of the media. Some cynics view members of the media as akin to leeches and bloodsuckers, oblivious to personal privacy and to the potential for the harm they cause to people without fault or blame. They view the media as operating under a thinly veiled guise-- that of protecting the public's right to know the truth-- but actually scavenging for lurid titillating information about anyone, but especially those with even a modicum of celebrity. Sensational stories about celebrities make the best "news."

Others, less inclined to misanthropy, view media as the custodians of the public faith, guardians of a fair and open system of justice, watchdogs of a system operated by the privileged and prone to excesses if not held in check by full public scrutiny. Advocates of the role of the media in the judicial system tend to align themselves with the words of English philosopher and jurist Jeremy Bentham: “In the darkness of secrecy, sinister interest and evil in every shape, has full swing. Only in proportion as publicity has place can any of the checks, applicable to judicial injustice, operate. Where there is no publicity there is no justice."[21]

Overall, most dispassionate, impartial observers would, at minimum, credit the media for occasionally playing a pivotal role in exposing corruption at society's highest levels or forcing

[21] 'Constitutional Code, Book II, ch. XII, sect. XIV.' *The Works of Jeremy Bentham, published under the superintendence of John Bowring*, 11 vols, (Edinburgh: Tait, 1843) vol. ix, p. 493.

our judicial system to remain accountable to the people it serves. The Watergate scandal of the early 70s stands as an obvious example of a tenacious press holding an entire government and its leader accountable for its misdeeds. Watergate ushered in a new era of investigative reporting; more importantly, it highlighted the benefits of a vigilant, effective media. Were it not for the media, Richard Nixon's denial of personal involvement in the scandal would likely never have been uncovered. Nixon denied any personal involvement, but the courts eventually forced him to yield tape recordings, which indicated that he had, in fact, tried to divert and obstruct justice. Many believe the relentless media coverage forced the hand of the judges, despite the allegiance they may have felt to the person who appointed them, to order the disclosure.

While I am not prepared to concede that there is no justice without the scrutiny of the media, it is fair to concede that the media, on occasion, perform the worthwhile function of exposing inappropriate conduct, even criminal conduct, in a way that others cannot. Does it really matter whether the true purpose of investigative reporting is to produce a lurid eye-catching story rather than to protect the public against governmental corruption as long as the latter is achieved? The motivation for the investigative reporting becomes inconsequential when the result ferrets out public corruption. Undeniably society benefits when our elected officials and our appointed judiciary remain accountable to their sworn duties by a diligent, informed media. Bentham also wrote "Publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial."[22] But the vast majority of media coverage is not aimed at holding public officials and judges to account. Its purpose is to entertain and thus to profit.

[22] 'Draught of a New Plan for the Organization of the Judicial Establishment in France.' *The Works of Jeremy Bentham, published under the superintendence of ... John Bowring*, 11 vols, (Edinburgh: Tait, 1843) vol. iv, p. 316.

Entertainment: The Media's Primary Function

W. H. Auden wrote that what the media offers "is not popular art, but entertainment which is intended to be consumed like food, forgotten, and replaced by a new dish."[23] Because this is so, the truth sometimes suffers. The truth may lack entertainment value. When the media publishes an untruth, it is usually because someone has lied to them or because they have taken a truthful statement and shaped or fashioned it to fit a storyline that is more interesting.

In the recently released film "The Hoax" Richard Gere played the role of novelist Clifford Irving who once falsely convinced the renowned publishing house McGraw-Hill that he was in fact communicating with wealthy recluse Howard Hughes and specifically authorized to write his autobiography. The film, in other words, is based on a true story. What made the story interesting as well as true is that it involved the mysterious, hermit-like billionaire Hughes. True stories with such compelling elements are relatively rare. When a client's "story" becomes the object of media attention, counsel must ensure that the truth of the story is not contaminated by falsehoods or by slants otherwise contributing to the story's entertainment value.

How do members of the media protect themselves from allegations of falsehood? They find members of the public (lawyers) to say the things that make up the substance of their story. Members of the media use lawyers regularly to provide information for their stories. Lawyers must therefore be on guard when providing information to the media. Lawyers who regularly have contact with the media should use the media more effectively than the media uses them. Lawyers need to prepare for the media to ensure that the result of counsel's commentary is in the

[23] W.H. Auden *The Poet and the City, The Dyer's Hand* (1962)

best interest of the client. The first and most fundamental rule of dealing with the media is preparation.

How to Prepare for the Media -- Anticipation

Counsel must anticipate media attention. Media attention is invariably linked to particular aspects of life's drama. Any culpable taking of human life will likely attract media attention. As the level of celebrity of the alleged culpable party or the deceased rises the media attention also rises. To properly anticipate the level of intensity of media attention it is useful to remember that almost anything relating to the private lives of celebrities will trump the goriest murder where the accused and the victim of the homicide are unknowns. Fascination is endless for anyone in a position of influence or authority apparently caught in breach of the law. The same goes for alleged transgressions by people least expected to breach the law: Imams, rabbis, bishops, priests, police officers, teachers, doctors, nuns, even lawyers.

The media takes particular interest in the marital or sexual strife of high-profile individuals particularly if infidelity or violence is involved. Sex is even more interesting than violence, but the two together make for sensational, riveting news. When wealth or fame is added to the mix the result is front-page, headline news. Stories of child abuse and most other matters of criminality relating to children are inevitably highly reportable, as are cases involving large organizations or numbers of people. The powerful bosses of wealthy corporations alleged to have committed improprieties will certainly attract intense coverage. Who is not endlessly fascinated by the public ordeal of Conrad Black? But if not him, then Paris Hilton and the now very dead Anna Nicole Smith may well suffice to satisfy our insatiable appetites. In short, media

attention is eminently predictable. It lusts for the lurid and for the mighty, and seems to relish especially the spectacle of the fall.

The Media as a Litigation Tool

Instead of viewing media as the enemy, it is more productive to view them as a litigation tool. They can help you find witnesses, as demonstrated by the accused from Peru. And, they will be attracted to and print or broadcast almost any story that is interesting. The threat of media exposure can cause a recalcitrant party to negotiate a better-negotiated plea agreement. Media coverage has the power to cause judges to alter sentences, lawyers to vary trial tactics, and witnesses to say and do things differently. Every defence counsel knows that one of the first concerns of every accused is whether or not his case (his name) is likely to surface in media coverage.

Most members of the media will, upon the request of counsel, advise in advance the questions they wish to pose, thus permitting counsel time for reflection before answering. Even in circumstances where counsel is not entirely aware of the information in the possession of the media, most members of the media will share their information with counsel before they begin asking questions. Part of the preparation is thus to ask the media what they intend to ask before they ask it. Reporters are usually far more interested in succinct responses to their questions than they are in taking counsel by surprise. To this extent the media and counsel have something in common. They want some specific questions answered; we want to deliver a clear position in resonant sound bites. In fact, members of the media enjoy and rely upon sound bites. Lawyers exhibiting this skill are in demand by media all over.

The Language of the Media

A clear, cogent position spoken in simple, jargon-free language is more likely to be used by the media and repeated. One of the most effective ways to ensure that your side of the story is told accurately is to ensure that your cues, like flashing lights on a dark, dark night, are clear. Long, rambling answers are not merely tedious to listen to, they also blur the focus. They cause confusion; they blur the lights.

Review any story in any major newspaper and you will see instantly that most paragraphs are not longer than three sentences. Each paragraph contains only one idea or opinion. Counsel need to learn to speak the language of the media to effectively communicate the position they wish to advance**.** Short simple answers are key. Every answer to a reporter's question should contain one kernel, one idea, one striking notion. And, its meaning must be crystal clear. Avoid words and phrases that render an answer meaningless or inconsequential. Linguistic diffidence, hedging thoughts in thickets of words and phrases, can take many forms. One is the tendency to rely on words, even familiar words, devoid of concrete, specific meaning. Describing Mr. Black as a "good businessman" is meaningless. What does "good" mean? To whom? In relation to what? It is far more specific and therefore more meaningful to say, "Mr. Black worked 6 days a week, 12-14 hours a day to earn the position of trust he holds today."

Legal jargon is to be avoided at all costs. The words reveal more than we know, principally that we have been languishing in dry, unhappy spaces for too long. Learn to resist, and to despise, stilted words and phrases such as the following:

- It is suggested

- Notwithstanding
- Hereinafter
- Thereupon
- Cease and desist
- Forthwith.

Lawyers who continue to rely on words such as these are worse than boring. They are embarrassing. As lawyers we should pledge today to try to speak the language of the living. That means, alas, letting go of the Latin. I mean, *iter alia*, woe unto those who, notwithstanding this sage advice, nonetheless hereinafter forthwith proceed not to cease and desist, but to proceed according to their ways. To them, it is suggested that, at long last, they heed the words of Lord Balfour: talk English, not law.

Treatment of the Media

In conducting media relations it is important to remember generally that courtesy toward the members of the media will return courtesy. The courtesy that we expect in return is, at minimum, a balanced story. Fair and balanced coverage of the story by a reporter encourages counsel to trust that reporter in the future. To encourage such fairness I suggest the following:

- Attempt to identify and meet the reporter's deadline
- Be polite, friendly and professional
- Regard the demand by the media for information as justifiable
- Know who it is that you are talking to; do not be afraid to check the media person's credentials

- Keep the interview short and make only statements that you have considered in advance
- Listen carefully to the questions, including questions within questions
- Determine when and where the story will air or be printed and review it for accuracy
- Where it is found to be inaccurate, insist that the media correct the inaccuracies
- Be accurate yourself in whatever information you supply to the media
- Make public comments that are fair, dispassionate and moderate
- Have specific written authority to represent the client with the media on any issues arising from the client's case at any time even after completion of trial, sentencing and appeal.[24]

It is never an appropriate excuse for a member of the media to claim that a story was changed or altered by an editor and therefore "became" inaccurate through the process of editing. The reporter has a duty to ensure that the story that eventually reaches the public is accurate. Editing is often used as an excuse for inaccurate reporting. Media members exposed to editing that sacrifices accuracy must be avoided and their inaccuracies must be corrected.

Circumstances to be Avoided

Avoid television productions that are highly edited. Examples from U.S. television include programs such as 60 Minutes or 20/20, and from Canada, CBC's the Fifth Estate. Live programs are best because they capture what counsel says, not an edited version of what was said to fit a writer or narrator's pre-determined storyline.

[24] See Appendix C Retainer Agreement. Also see *Stewart v. Canadian Broadcasting Corp.* (1997), 150 D.L.R. (4th) 24 (Ont. Gen. Div.) a good example of what can happen without such authorization. The court found that a lawyer has a continuing duty and obligation to his client and was in breach of that duty by favouring his own financial interests over the client's interests by putting his own self-promotion before the client's interests and by causing publicity damaging to the client. The lawyer was found liable in damages for emotional harm and for the profits derived from his participation in a television program based on the client's case.

- Do not comment on the transgressions of other lawyers. Transgressions of the law or ethics by lawyers are the business of the Law Society not individual lawyers. A lawyer speaking about another lawyer's difficulties may be viewed erroneously as speaking on behalf of the Law Society rather than in a personal capacity.
- Do not name a client at least without the client's specific and express consent. The consent should be in writing and should be part of the retainer agreement so that it encompasses the entirety of counsel's representation of the client. Even with the client's consent counsel should be careful that naming a client is not likely to prejudice that client's interests.
- Do not claim expertise that will not withstand scrutiny or challenge.
- Do not refer to your success rate. There is probably no need to remind counsel not to refer to counsel's failure rate; most are far too sensitive about public image to actually be self-effacing.
- Do not speak negatively about a jury's decision or a judge's decision. Jurors and judges have no ability to respond and therefore any negative commentary is unfair to them. Your avenue of redress is an appeal, not public commentary. In this regard it is bad form to, immediately after a trial that has been unsuccessful, suggest that you intend to appeal. Remember that judges also read and listen to and watch media coverage. Your words are heard as: 'I'm angry that I lost and I will get even by way of an appeal.'
- Do not say anything that seeks to enhance your own importance in the result. Winning a trial should not lead to gloating. The better approach is to convey the view that the accused prevailed because his defence had merit, that the evidence unfolded as it should and that counsel merely assisted the court in determining the evidence that was relevant

and admissible. No client should be exploited by the ego or ambitions of the lawyer in the media.

- Do not permit your staff to take media inquiries. Anyone who screens your calls from the media should be alerted to the fact that they must treat all members of the media, without fail, with courtesy, efficiency and professionalism. Remember that the experience of the media at the hands of your staff can alter the way you are treated by the media. It should not be necessary to say that the client's confidentiality should never be breached.
- Do not criticize a decision to prosecute. It involves an exercise of discretion and a consideration of public interest. Neither is the responsibility of defence counsel.
- Do not predict the outcome of a trial.
- Do not tell the media in advance about your client's defence.
- Do not lie. As soon as the lie is discovered, and it will be, you will be forever discredited.
- Do not speak to the media in anger. When passion calms, counsel is far more likely to be able to deliver information absent intemperate language.[25]
- Do not provide information or be interviewed or otherwise co-operate with those writing a book, producing a film, documentary or drama without specific written instructions from the client. Those instructions should only be received after the client receives independent legal advice. Independent counsel should be provided with all counsel's information concerning the media's or the film industry's intentions. An independent lawyer is better able to determine what is in the best interest of the client.[26]

[25] For an example of such intemperate language see *R. v. Kopyto* [1987] 62 O.R. (2d) 449 (Ont. C.A.)
[26] *Supra* notes 11 and 24.

Conclusion

High-profile cases generally involve well-known persons alleged to have committed foul deeds. The client's celebrity should not mean that he is afforded some lesser protection by law. Lawyers in their public appearances and public statements on behalf of a client must conduct themselves with the same professionalism that they are expected to exhibit in a court of law. Public statements concerning a client's case should never be used for the purpose of self-promotion or self-aggrandizement. But public statements delivered with the intention of advancing the best interests of the client are often necessary. A lawyer properly authorized to represent the client both publicly and in a court of law has a fiduciary duty to that client to face every issue fearlessly and to say and do that which will aid the client's case within the parameters of our law. As Melvin Belli once said, "There is never a deed so foul that something couldn't be said for the guy; that's why there are lawyers."[27]

[27] Los Angeles Times, December 18, 1981