Limiting extrajudicial speech in high-profile cases: The duty of the prosecutor and defense attorney in their pre-trial communications with the media

Hooker, Mawiyah

INTRODUCTION

The American Bar Association ("ABA") Model Rules of Professional Conduct ("Model Rules") guide an attorney in his relationship with the media.' The standards articulated in the Model Rules strive to maintain the delicate balance between the defendant's right to a fair trial, the public's right to safety and to knowledge of the trial, and the attorney's right to free speech.2 Failure to abide by the rules of the jurisdiction can result in criminal sanctions and even disbarment. Most trials fail to attract media attention; however, those few high-profile cases test the effectiveness of the standard.4

This note will consider whether, in a media-saturated society, it is possible to preserve a defendant's right to a fair trial in a high-profile case. It will specifically consider whether the prospective defendant in the Anthrax case and the defendants in the Sniper case could obtain a fair trial after all the media attention the cases have received.5 Part I will provide a background of the competing interests surrounding trial publicity and the history of Model Rule 3.6, including current standards governing lawyer communication with the media. Part II will lay out the differing expectations of the bar, as expressed in Rule 3.6, for prosecutors and defense attorneys when communicating with the press in light of the special duties and functions of each attorney. Part III will introduce two recent high-profile cases, consider the actions of each attorney involved in light of the duties enunciated in Model Rule 3.6, and pose the question and evaluate whether the defendant or defendants in each case may be able to obtain a fair trial. Finally, in addition to the limits on extrajudicial speech considered in the other sections of this note, Part IV will consider alternative remedies of ensuring a fair trial to defendants involved in high-profile cases.

I. BACKGROUND

A. COMPETING INTERESTS SURROUNDING TRIAL PUBLICITY

Many competing interests are involved in the debate about trial publicity. The most discussed interests are the lawyer's First Amendment right to free speech and the defendant's right to a fair trial.6 Other issues include the public's right to know,7 the prosecutor's right to enlist the aid of the public in performing his law enforcement function,8 the professionalism of the legal community,9 and the lawyer's right not to speak.10

The lawyer's first duty is to be an advocate for his client." This duty, in turn, implicates the right of the attorney to speak on the client's behalf.12 The attorney's right to free speech is not absolute, however.13 For example, where the lawyer's duty to advocate for his client or speak on his client's behalf conflicts with a court order not to speak, the attorney must abide by his duty as officer of the court - the lawyer is not above the law.14 Prosecutors, in particular, whose client is the public, are limited by conflicting duties to their client and to the justice system: prosecutors may not speak where such speech would prejudice a trial.15

Under American constitutional law, this result may seem counterintuitive, for the classic justification against censorship provides that the remedy for bad speech is not prior restraint of such speech but rather more speech.16 This presumes a faith in the public and its ability to weed out unsound speech from sound speech.17 Accordingly, the best speech, which makes the most sense, should win out in the marketplace of ideas.18

It is not clear whether a further restriction on attorney speech would withstand constitutional scrutiny. Technically, however, the First Amendment applies only to government restraint on speech,19 and it is not the government but the bar which restricts

the speech of its attorneys.20 Accordingly, when the bar, which is not a government actor, chooses to restrain attorney speech, the First Amendment may allow the restraint.21

Scholars disagree about the desirability of a rule limiting attorneys' speech about trials in which the attorneys are involved. Professor Judith L. Maute believes that "[cjriminal cases should be tried in court, not in the media. Period."22 Maute would "urge" all attorneys involved in the administration of criminal justice "steadfastly to refrain from all, or practically all, extrajudicial communications about the case."23 Such silence would promote public confidence in the integrity of the criminal justice system and the outcome of trials by supporting a belief that the trials were "fundamentally fair" based on the procedure involved.24 Because the media's objective is to report a newsworthy (and possibly sensational) story, the result of speech is very rarely helpful to the defendant in a criminal proceeding.25 Furthermore, silence would prevent lawyers whose interests are tainted by a desire for their own publicity from prejudicing their clients' chances of obtaining a fair trial.26

Another justification for limiting attorneys' speech is the promotion of the long-term interests of criminal defendants as a class.27 Professor David A. Strauss has argued that, as a general rule, defense attorneys likely would be "unwilling to appear to lend their personal reputation and credibility ... to their client's cause."28 A defense attorney's job is to represent his clients in court, not to vouch for his clients' characters out of court.29 Moreover, even a defense attorney who would be willing to speak may appear to "lack . . . enthusiasm" in his client's cause; and failure to speak in a society where out-of-court advocacy is the norm risks damaging the interests of the defendant in the courtroom.30

In contrast, Professor Erwin Chemerinsky believes that a lawyer's duty to advocate zealously for his client is best served by speaking with the press in an effort to advance the client's interests.31 He recommends implementing a standard of strict scrutiny for restricting attorney speech:32 a standard which would protect attorney speech, even speech that is false, as long as the speech was not made with "actual malice" (i.e., with knowledge of the falsity or in reckless disregard of it).33 This is because, assuming trial publicity influences juries,34 the only way to counter negative speech in the media and to ensure a fair trial is to speak to the media in the client's favor.35 Publicity may negatively affect the client, Chemerinsky contends, even where both sides are silenced.36 This is because leaks occur and are just as entitled to counter-speech as any other negative publicity.37 Furthermore, Chemerinsky believes that the current standards are unconstitutional in their restriction of lawyer speech.38

Finally, it is useful to note the disagreement among scholars as to whose right to free speech is implicated by the restriction on attorneys' speech. Some scholars believe that the right to speak belongs to the attorney so that it is his right that is infringed when the state bar chooses to limit the attorney's speech.39 Nonetheless, some of these scholars believe that the attorney's right to speak harms defendants more than it helps, particularly when the attorney's incentives directly conflict with the interests of the client.40 Such incentives may include an interest in career promotion at the expense of the client's freedom.41

Other scholars believe that the right of the attorney to speak belongs to the defendant as principal in the agency relationship.42 These scholars believe that limiting attorneys' speech hurts the defendant because speech by the attorney on behalf of the defendant tends to work in the client's favor.43 Accordingly, they believe that attorneys' free speech should not be limited because their speech increases the likelihood of a fair trial.44

B. HISTORICAL BACKGROUND OF TRIAL PUBLICITY

As early as the nineteenth century, there has been growing concern about the potentially prejudicial impact of extensive trial publicity, especially in criminal cases.45 Although the United States' largest case involving concerns of publicity is probably the O.J. Simpson trial,46 trial publicity first became an "institutional" concern after the trial of Dr. Sam Sheppard for the murder of his wife, and again after the assassination of President Kennedy.47 The Sheppard Court interpreted the Canons to ban speech about the trial by prosecutors because such speech could interfere with the defendant's right to a fair trial.48 The Warren Commission noted in its reports that it would be a "most difficult task" to select an impartial jury to try Lee Harvey Oswald because of the unrestricted release of information about the suspected killer and "the intense public feelings."49

In recent years, trials have commanded increasing media attention. High-profile cases have proliferated since the 199Os and have included the trials of the police officers who beat Rodney King, the Susan Smith murder case, and the trial of Timothy McVeigh for the Oklahoma City bombing. Commentators have generally agreed that the most excessive trial publicity occurred during the O.J. Simpson trial.50 Commentators, however, have not agreed on the effect of the increased publicity.51 It may be clear that widespread publicity in some cases has prevented the defendant from obtaining a jury whose members do not recognize the defendant's name or know the details of his story before he reaches the trial. It is not clear whether such widespread publicity prevents the defendant from obtaining a fair trial.52

II. MODEL RULE 3.6

The modern version of Rule 3.6, governing attorneys' communications with the media, was first adopted by the ABA in 1983.53 It was amended in 1994 in response to the Supreme Court's opinion in Gentile v. State Bar of Nevada.54 The Supreme Court ruled that the Nevada State Bar Rule governing attorney communications with the media was too broad;55 thus, Model Rule 3.6 had to be changed because it was substantially similar to the Nevada Rule.56 Accordingly, the new Rule 3.6 prohibits attorney speech when such speech has a "substantial likelihood of material prejudice" to the proceeding.57

On February 5, 2002, Ethics 2000 became the official ABA policy.58 The Commission on Evaluation of the Rules of Professional Conduct ("Commission") began its work to amend the Model Rules a year earlier in August 2001.59 The primary reason behind the decision to revisit the Model Rules was the interest in resolving the growing disparity in state ethics codes.60 Among many other proposals, the Commission initially proposed to make an amendment to Comment 5 to Rule 3.6.61 However, after a number of critical comments, the Commission reconsidered and decided not to change the comment.62

Model Rule 3.6 discusses what a lawyer involved in a public trial can and cannot say. It provides:

A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.63

However, there are exceptions to the general rule,64 and the comments further state that the list of exceptions is not exhaustive.65 The comments identify subjects "more likely than not to have a material prejudicial effect on a proceeding."66 Finally, Rule 3.6 and its comment give an attorney permission to make an extrajudicial statement that might otherwise violate the rule if the lawyer reasonably believes that a public response is required in order to avoid prejudicing the lawyer's client.67 Despite the direction Rule 3.6 provides, there has been some controversy concerning it.

A. ROLE OF THE PROSECUTION

The prosecutor's duty is well-settled. The duty of the prosecutor is to seek justice, not merely to convict.68 The ABA notes that it is difficult to find a balance between protecting the right to a fair trial and safeguarding the right of free expression.69 Preserving the right to a fair trial necessarily entails a limit on publicized information.70 On the other end of the balance, however, lies the public's right to know about the matters of general public concern.71

The Model Rules detail the facts which an attorney is allowed to reveal concerning a public trial.72 In a criminal trial, a lawyer may state the following to the public:

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.73

Additionally, in a criminal case, the prosecutor has a responsibility to exercise reasonable care to prevent others, such as investigators and law enforcement personnel, from making extrajudicial statements that the prosecutor is prohibited from making under the Model Rules.74 Even with the ABA's direction, there is some debate about how much a lawyer should say.75 The question is whether Rule 3.6 provides sufficient guidance in this regard. It may be that the determination to speak in a particular case must come from another source, such as an attorney's legal professionalism.

The prosecutor has a duty to inform the public of matters of public concern, such as the status of criminal cases.76 It is important for the public to know that, for example, an investigation is ongoing, whether there is a suspect, and whether law enforcement has apprehended the suspect. The prosecutor's duty to the public is uncontested. The controversy is whether it is appropriate for the prosecutor or the investigation team (under the supervision of the prosecutor) to bring negative attention to suspects or potential suspects before a trial.

Allowing the prosecution to speak freely has both benefits and detriments, some of which Rule 3.6 does not address.77 Chemerinsky argues that speech by attorneys about pending cases has social value.78 One benefit that comes from allowing the prosecution to speak is his resultant ability to gather crucial evidence through public assistance.79 Additional benefits resulting from prosecutorial speech include encouraging settlement and educating the public.80 The main problem with allowing extrajudicial speech is that the public may be adversely affected, making it difficult for the defendant to have a fair trial. However, it is unclear whether the attorney's statements affect a trial at all.81 Aside from the prosecutor's duty to update the people on issues of public concern, allowing prosecutorial extrajudicial speech has both positive and negative potential.

B. ROLE OF DEFENSE ATTORNEY

The objective of the defense attorney is to best serve the interests of his client within the bounds of the law.82 His duty is to advocate for his client as best he can because, by so doing, the defense attorney ensures that the prosecution meets its burden of proof.83 This, in turn, ensures the healthy working of the adversary system and thereby promotes justice throughout society.84

In accordance with these objectives, the defense attorney in a high-profile case has the duty to ensure that his client get a fair trial despite any media attention.85 The concern that legal scholars and judges have identified is that the public, through the jury system, will have tried and convicted a defendant before the trial has occurred.86 Where "undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client" has occurred, the lawyer may be "permi[tted]" to make "extrajudicial statements" in response.87 If preventing a prejudicial effect requires counter-publicity, the lawyer's statement should be limited to "such information as is necessary to mitigate the recent adverse publicity."88

Accordingly, in cases where the prosecutor has spoken against the client or where the client has received other negative media attention, it may be in the client's best interests for the lawyer to speak on the client's behalf.89 Except in response to negative statements, however, the lawyer may have a duty to remain silent.90 Where the duty of advocacy conflicts with the duty to refrain from "materially prejudic[ing]" a trial through publicity, the duty to refrain from creating a result of material prejudice likely obtains.91

Scholars disagree as to whether speech generally helps or hurts the defendant. Professor Judith L. Maute argues for a "personal default rule" of silence.92 "[M]ore often than not, lawyers involved in criminal matters best serve the public interest and their professional obligations by remaining silent . . . ."93 She recommends letting the record speak for itself.94 Not only should the attorney refrain from speaking in the first place, but the attorney should refrain from speaking even in response to negative publicity.95 This is because the legitimate response would "often prompt increased extrajudicial comment by others," serving further to harm the defendant's interests.96

Other scholars have argued for a default rule that defense attorneys should speak out in response to negative publicity.97 The

duty to speak out is part of the role of the defense attorney as advocate.98 Although it is "uncertain and likely unknowable" whether juries are affected by publicity, "the attorney should always speak out and counter potentially harmful publicity unless the harm is clearly trivial" because the public, consisting of potential jurors, needs to be reminded of "the presumption of innocence."99 Otherwise, the concern is that the defendant will be tried and convicted in the "court of public opinion,"100 rendering slim the possibility of a fair trial with an impartial jury.

III. CURRENT HIGH-PROFILE CASES

A PERSON OF INTEREST: STEVEN J. HATFILL

1. THE FACTS

After September 11, 2001, the United States' next big scare involved the distribution of anthrax throughout the nation via the United States Postal Service ("USPS").101 A year after the attacks, one of the persons under investigation for sending the anthrax-laced envelopes that killed five people has spoken out about how the media destroyed his life.102 On June 28, 2002, a story linking Steven J. Hatful to the anthrax attacks first appeared in the media.103 Since then, Hatfill has had reporters banging on his door, an internet web site dub him "Steven 'Mengele' Hatfill, Nazi Swine," and a talk show host discuss whether he was the distributor of the lethal letters.104 The FBI has very publicly swept through Hatfill's apartment.105 Additionally, Attorney General John D. Ashcroft continues to refer to him in the media as a "person of interest."106 This characterization is unusual-a "person of interest" is not an official legal term and does not necessarily connote guilt or arrest.107 The characterization is particularly unusual in that the Department of Justice has yet to charge Hatfill with a crime.108 Still, his name is equated with the anthrax attacks. Although thirty other people are also under investigation, their names have not been released to the public.109 Based on the most current opinion of experts, as of this writing, it is unlikely that just one person would have the requisite technological knowledge, funding, and machinery to propagate such attacks.110

As a biological expert, Hatfill's experience ranges from research to teaching. In 1997, Hatfill began viral research at the Pentagon's top center for investigating pathogens, the Army Medical Research Institute of Infectious Diseases at Fort Detrick.111 However, at Fort Detrick, anthrax, a bacteria, is researched separately from viruses; Hatfill never worked with anthrax.112 Later, Hatfill took a job with Science Application International Corp., a defense contractor.113 Hatfill became lead instructor for a course in national preparedness for weapons of mass destruction, developed a biological warfare curriculum for the State Department, and helped the Air Force design a biological weapons defense program.114

In 1999, after hoax letters claiming to contain anthrax were mailed across the country, Hatfill commissioned William Patrick, III, to write a report on how to deal with anthrax sent through the mail.115 Hatfill and a colleague submitted Patrick's report to the bio-terrorism preparation center of the Centers for Disease Control and Prevention (CDC) in Atlanta.116 The results of the CDC anthrax project were similar to the findings in Patrick's report.117 A report two years before the attacks intrigued the FBI, especially because of the similarities between Patrick's report and the actual anthrax mailings.118 Patrick's research discussed mailing 2.5 grams of anthrax powder, about the same amount contained in the anthrax letters.119 Hatfill's lawyer, Glasberg, says that Patrick poured 2.5 grams of talc into an envelope, as a test, to see how much could pass undetected through the mail.120 Additionally, Glasberg claimed that the report Hatfill commissioned was a public service,121 but, now, Hatfill's history of helping the United States is questioned.

The characterization as a "person of interest" must have had some negative effect on the public because this once prominent professional has lost one job and has been suspended from another.122 Although the negative publicity has detrimentally affected Hatfill's reputation, the real question is whether this same media attention would prevent him from getting a fair trial.

2. EFFECTS OF THE PROSECUTOR'S AND OFFENSE ATTORNEY'S STATEMENTS IN THE MEDIA ON HATFILL'S PROSPECT FOR A FAIR TRIAL

It is unclear whether the statements of either Attorney General John Ashcroft or Hatfill's attorney, Victor M. Glasberg, affected Hatfill's prospects for a fair trial should he be charged with propagating the anthrax attacks of 2001. As discussed above,123 the prosecutor has a duty to inform the public of possible dangers when a suspect is at large.124 The language of Model Rule 3.6(b)(6) does not specifically provide that, where a danger to the public is involved, the person who is posing the danger must have been officially charged with the crime.125 One interpretation, therefore, is that where a danger to the public exists, the prosecutor has a duty to warn the public if such a warning would not impede law enforcement. According to that interpretation, if Ashcroft believed that Hatfill posed a continuing danger to the public, it was appropriate for him to warn the public of the danger even if the publicity of such information would "have a substantial likelihood of materially prejudicing"126 Hatfill's prospective trial. It is not at all clear, however, that at the time when Hatfill's name was released, the public continued to be in danger of receiving letters filled with anthrax spores. It is possible, however, that the release of this information was what stopped the anthrax attackers from continuing their criminal activities.

Another justification for release of "prejudicial" information by the prosecutor is to enlist public assistance in providing information to law enforcement personnel.127 Ashcroft may have needed the public's assistance to provide information. Nonetheless, the language of Model Rule 3.8(g), which refers to the "accused," seems to presume that the person about whom information is sought and an extrajudicial statement is made has already been officially charged with the crime.128 If this is a threshold requirement for extrajudicial speech so as not to jeopardize the prospective defendant's right to a fair trial, then Ashcroft likely should not have released Hatfill's name in this case. Because Hatfill had not been charged, Ashcroft may have had an ethical responsibility according to the Model Rules not to release Hatfill's name if his only purpose was to enlist the aid of the public to obtain information about Hatful.

In addition, it seems clear that the FBI leaked information to the press regarding prospective searches of Hatfill's residence.129 Model Rule 3.8(e) provides that a prosecutor has a responsibility to "exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6."130 Based on this Rule, Ashcroft may have had a duty to prevent these leaks if they rose to the level of extrajudicial statements which would serve to prejudice a prospective trial.

It is unclear what Glasberg's role should be in defending Hatfill where, as of the writing of this note, he has not been accused of any crime. Ashcroft has never officially accused Hatfill; he merely referred to him as a "person of interest."131 In fact, one could say that even the media failed to accuse him in any straightforward fashion.132 Therefore, absent allegations, a response may not have been necessary to avoid the "substantial undue prejudicial effect of recent publicity."133 On the other hand, the effects of the negative publicity on Hatfill's employment status134 may have been enough to determine that the non-allegations were having a substantial detrimental effect and may therefore serve to prejudice a proceeding should Ashcroft ever charge him. If this is the case, zealous advocacy135 required a response, and Glasberg, by speaking out on behalf of his client,136 acted appropriately and in accordance with the Model Rules.

If a response was needed, then the scope of Glasberg's remarks were likely limited to "mitigat[ing] the recent adverse publicity," as required by the Model Rules.137 Glasberg responded to the portrait of his client which the FBI and media had painted. He noted that the evidence does not suffice to show his client's guilt.138 Perhaps most important, he held a press conference in which his client proclaimed his innocence.139 Furthermore, he challenged the language of "a person of interest" used in reference to his client by calling the public's attention to the fact that the term did not have an official legal meaning.140 Glasberg pointed out that this standard does not exist in law; it does not suffice to charge a person with a crime.141 All these actions were likely necessary to neutralize the prejudicial effect on his client in a prospective adjudicative proceeding.

Hatfill may never be tried, and thus, concern about a fair trial may be moot. However, if Hatfill is charged, there may be an argument that the media attention will make it more difficult to find an impartial jury. On the other hand, if justices Holmes and Brandeis were correct that counter-speech can serve to remedy the negative effects of trial publicity,142 then finding an

impartial jury may not be a problem. The defense attorney's actions and a powerful declaration of innocence made by Hatfill himself143 may create strong doubt in potential jurors' minds about his guilt. Based on these counter-statements, therefore, a jury could be capable of giving his case impartial consideration. Accordingly, although Hatfill's reputation may be "destroyed,"144 his right to a fair trial likely has not been abridged.

B. THE D.C. AREA SNIPER

1. THE FACTS

The Washington, D.C., area sniper killed ten people and wounded three more between October 2 and October 24, 2002.145 John A. Muhammad, 41 years old, and John Lee Malvo, 17 years old, are the suspects charged with the sniper shootings.146 Allegedly, the two carried out these crimes from a Chevrolet Caprice in Maryland, Virginia, and Washington, D.C.147 The multiplicity of jurisdictions in which the crimes were perpetrated led to a race between states concerning where Muhammad and Malvo would be prosecuted.148 In addition to Virginia and Maryland, Alabama wanted to prosecute the two men for an earlier shooting, and the state of Washington wanted to prosecute them for a homicide in Tacoma, Washington.149 However, there is a concern that Muhammad and Malvo have been tried in the media before the trial.

The sniper suspects, who are being tried under Virginia law, seem to have a difficult case, particularly since the request for a gag order was denied,150 but D.C. attorney Steven Kiersh (who is not representing either suspect) has asserted that every case is defensible.151 Mary E. Davis, another D.C. lawyer, says that the public has heard the story from only one side and that nobody has reviewed the evidence to determine whether it establishes the defendants' guilt beyond a reasonable doubt.152 Unless there is an eyewitness or an admissible statement from Muhammad or Malvo, the government may have a difficult time proving who pulled the trigger in each case.153 Despite this legal analysis in favor of the defendants, it may be impossible to get an impartial jury, considering that every potential juror in the D.C. metropolitan area was also a potential victim. For several weeks people stayed home and avoided gas stations (where many of the shootings took place) to prevent being victimized by the snipers. The prosecutors have flocked to gain jurisdiction over this case, and Attorney General Ashcroft has called for death sentences, labeling the killings as "atrocious."154

2. EFFECTS OF THE PROSECUTORS' AND DEFENSE ATTORNEYS' STATEMENTS IN THE MEDIA ON MALVO'S AND MUHAMMED'S PROSPECTS FOR A FAIR TRIAL

Based on the widespread publicity of the D.C. Sniper case, it is unclear whether either Malvo or Muhammad will be able to be tried before a jury who has not heard their names or their story. In addition, because the case is being tried in Virginia155 where many of the shootings occurred and where all citizens were potential victims during the shooting spree, it may be especially difficult for jurors to be impartial in their judgments. Court-appointed attorney for Muhammad, Peter Greenspun, recognized this fact and "appealed [to] the public to maintain 'an open mind.' "156 The Model Rules, however, served to protect the public when the suspects were still on the loose, and insofar as that was the cause of the material prejudice, it could not be helped.157

It is likely that the communications of the prosecutors, even their mere competitive scrambling to prosecute the Sniper suspects in their respective jurisdictions, and the communications by the police to the media have made it very difficult for the Sniper suspects to obtain a fair trial. The dual purposes of public safety and law enforcement, however, served to justify the speech of prosecutors and law enforcement officers during the investigation. The prosecutors' statements were "necessary to inform the public"158 of the danger that a sniper was on the loose. The details of the random murders served as important warnings to the public. Furthermore, the prosecutors' speech in this case enlisted the aid of the public through which law enforcement officers obtained crucial information enabling them to apprehend the suspects.159

Aside from the necessary comments made to the public concerning the Sniper attacks, the denial of a gag order may allow for inappropriate extrajudicial statements. The Maryland Attorney Grievance Commission has charged Montgomery County

State's Attorney Douglas F. Gansler with violating rules of professional conduct.160 The Commission cites to Gansler's "proclivity to 'entertain press conferences' that run afoul of pretrial publicity standards."161 Without the gag order, the high emotion of the public coupled with extrajudicial statements may make it difficult to have a fair trial.

IV. REMEDIES TO MITIGATE THE NEGATIVE EFFECTS OF TRIAL PUBLICITY

Scholars have discussed various remedies to balance the interest of the attorney's right to speak with the right of the client to a fair trial. Gag orders are the most effective restraint.162 Other less effective remedies for the problem of speech that adversely affects a fair trial include: a change in venue, a change in venire, postponement of a trial, extensive voir dire, strong jury instructions and jury sequestration.163 Defendants may also sue lawyers for defamation.164

Gag orders are common, but scholars discuss various problems with the restraint, and the Supreme Court has not yet addressed the constitutionality of gag orders on lawyers and parties to litigation.165 Although gag orders are generally known as prior restraints which have "a heavy presumption against [their] constitutionality,"166 lower courts have adopted their own standards for gag orders.167 For example, in the criminal prosecution of those accused of bombing the World Trade Center in 1993, Judge Duffy of the United States District Court for the Southern District of New York placed draconian sanctions on the violators of his gag order.168 The first fine for violation of the gag order would be $200 with subsequent violations squared, meaning that the second sanction would cost $40,000 and the third $1.6 billion.169 However, soon after Judge Duffy's ruling, the Second Circuit reversed his decision in a brief per curiam opinion.170

Although there is no Supreme Court case that directly addresses gag orders, the Court's decision in Gentile v. State Bar of Nevada71 demonstrates that the Court believes that the language of Model Rule 3.6 safeguards attorney free speech while preserving the State's interest in a fair trial.172 In Gentile, the Court held that the Nevada rule's (and Model Rule 3.6's) language, "substantial likelihood," was constitutionally sufficient to protect First Amendment rights.173 Chief Justice Rehnquist, however, also said that lawyers' statements pose a threat to the fairness of proceedings because the public takes the statements, presumably based on special access to information, as authoritative.174 We are left with a decision holding the Model Rules sufficient to protect free speech but also stating that unrestrained free speech may hinder a fair trial. In light of Gentile, is the information released on Hatfill protected as free speech? How much can Hatfill's attorney say to counter the negative impact publicity has had on his client? In the case of the Sniper, can the suspects have a fair trial even though the defense attorneys decided not to speak?175

It appears that the scholarly discussion of gag orders and the Supreme Court's support of the language of Model Rule 3.6 do not give guidelines that are specific enough to balance the interests involved in that there is no definitive answer in particularly close cases, as in those detailed above. Thus, it may be the responsibility of the attorney to use legal professionalism in deciding when to speak and what to say. "Speaking to the press may not be part of the lawyer's role . . . [;]the lawyer can do his job without saying a word . . . [; t]he decision to participate in pretrial publicity . . . is . . . discretionary."176

One aspect of professionalism that may help an attorney to reach the decision whether or not to speak is "objectivity."177 Objectivity would help the attorney be impartial so that the lawyer could evaluate the conflicting interests and the resultant effect an extrajudicial statement would have on a client and others.178 Objectivity in this sense, however, implies that there may be a limit on an attorney's duty to zealously represent the interests of the client.179 Whether the attorney speaks will depend on how the attorney defines zealous advocacy.180 Glasberg may believe that it is his professional obligation zealously to represent Hatful by countering the investigation team members' speech, which stigmatized Hatful as a "person of interest." The prosecution in the Sniper case may believe that, as an advocate for the public, the prosecutor must say whatever it takes to calm the fears of citizens. In this way, the lawyers may have to look to other sources to balance the competing interests of free speech and fair trial.

CONCLUSION

Model Rule 3.6 provides a guideline for the attorney involved in a widely-publicized trial. It strives to strike the balance between free speech rights and the right to a fair trial, in order to maintain both. It does so by weighing duties and interests: by weighing the prosecutor's duty to protect the public and keep it informed and the defense attorney's duty of zealous advocacy against the defendant's right to a fair trial. Although the Model Rules give some guidance, Rule 3.6 fails to yield a definitive answer in particularly close situations, such as in the cases of the anthrax investigation and the sniper prosecution. Furthermore, gag orders and court-issued remedies do not always provide a solution because they are rarely issued. In the end, the preservation of a fair trial comes not from a rule which balances many interests, nor from court-ordered remedies, but from the ethics of many individual attorneys who strive daily to preserve the integrity of the criminal justice system.

MAWIYAH HOOKER* & ELIZABETH LANGE** ***

* J.D., Georgetown University Law Center (expected May 2004).

** J.D., Georgetown University Law Center (expected May 2004).

*** The authors thank God for the completion of this project that has broadened their perspectives. To Twane L. Duckworth, thank you for your invaluable contribution to this work. The authors would also like to thank their families for enduring support. Finally, to the editors, the authors are grateful for your encouragement and comments.