"IN PURSUIT OF JUSTICE" IN HIGH PROFILE CRIMINAL MATTERS

Judith L. Maute*

What does it mean to practice law in pursuit of justice when one prosecutes or defends a criminal case where there is intense public interest? In her discussion of representing unpopular causes and clients, Professor Deborah Rhode remarked that the Oklahoma City bombing defendants had "difficulties" finding competent counsel.¹ That caused me to reflect upon legal ethics issues swirling amidst the emotional and legal turmoil in the aftermath of the Murrah Building bombing on April 19, 1995. Until September 11, 2001, this was the most horrific terrorist act to occur on American soil. In the wake of September 11, a massive, international investigation seeks to identify and bring to justice those responsible for the devastation and death of over three thousand persons. Customary legal restraints on police investigatory powers may be abandoned, some with the blessings of Congress, and others by executive fiat.² As the inevitable high profile criminal prosecutions unfold, the nation’s legal institutions must rededicate their commitment to justice. “From the dust will come justice. . . . The point here must be justice, the principle that inexactness has guided this country throughout its history. That justice may not be swift. It is important, though, that it be sure.”³

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*Professor, University of Oklahoma College of Law. LL.M., 1982, Yale University; J.D., 1978, University of Pittsburgh; A.B., 1971, Indiana University. The author gratefully acknowledges Kathleen Clark, Bruce Green, Jerome Holmes, Julia Summers, and Rod Uphoff, who commented on an earlier draft. Carla Mullins (J.D. candidate, 2002, University of Oklahoma) provided research support.


This essay briefly addresses two points, both of which are generally applicable to criminal cases. First, it considers the roles of defense and prosecution counsel, who are cloaked with institutional responsibilities to insure that any convictions are properly obtained, affording defendants the full panoply of constitutional rights and a fair trial that commands widespread respect of both domestic and international observers. I suggest that the lawyers undertake their tasks humbly, as devout servants of the law, with profound respect for their distinct responsibilities in our system of justice. Second, and closely related to the first, this essay urges all persons involved with either prosecution or defense of criminal matters steadfastly to refrain from all, or practically all, extrajudicial communications about the case. Whether or not prior restraint on extrajudicial communications can withstand First Amendment challenge is beyond the scope of this essay. In pursuit of justice, especially in high profile criminal cases, the prosecution and defense teams, as well as the court, constantly must be vigilant about threats to the underlying fairness of the proceedings posed by excessive media coverage.

I. INSTITUTIONAL RESPONSIBILITIES IN CRIMINAL MATTERS

A. Judge, Prosecutor, and Defense Counsel: The "Holy Trinity"

Justification for the adversary process in civil cases relies on assumptions that the partisan process works, more often than not, to produce legitimate outcomes acceptable to the litigants and public. It is assumed that the parties are represented by counsel who are relatively equal in skill and dedication to the cause and that the parties have relatively equal resources available to devote to the case. Of course, we know from practical experience that significant disparities skew the outcome in many cases. There is no room for such fictions in criminal cases, where the outcome is not merely a change of money, but deprivation of the defendant’s life or liberty and vindication of the public interest in safety and order. When the state or federal government pursues a criminal matter, it exercises vast discretion, invoking expansive police powers and resources in order to investigate, gather evidence, file charges, negotiate pleas, and prosecute those deemed legally culpable. "Pursuit of justice" in a criminal case requires that each component of the holy trinity—the judiciary, the prosecution, and the defense—faithfully perform their institutionally-defined professional roles. They each must strive

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5. ABA Standards for Criminal Justice: Prosecution Function and Defense Function § 4-1.2(a) (1993) ("Counsel for the accused is an essential component of the administration of criminal justice. A court properly constituted to hear a criminal
vigilantly to achieve a common objective, insuring a fundamentally fair outcome, whether by plea or after trial. For high profile cases, fundamental fairness is especially important to foster public confidence in the integrity of our criminal justice system.  

B. Role of the Prosecution

For routine criminal matters, the volume of cases in a prosecutor's office puts realistic pressures on allocating resources towards more serious offenses and the most culpable actors. Responsible stewardship would tend to discourage irrational vendettas and prosecutorial efforts that are wholly disproportionate to the underlying offense. However, when an especially heinous crime captures public attention, the law enforcement system experiences strong pressure to make arrests and obtain convictions, even when the evidence is weak or non-existent. Extraordinary public resources, in the form of investigative work, police activity, and prosecutorial efforts, can be devoted to high profile cases. The tendency for prosecutors, especially those who are elected, to "rush to judgment" and find someone (perhaps anyone) to charge and prosecute is well documented. Overzealous prosecutors may become too closely aligned with law enforcement personnel and forensics witnesses who are willing to shade or falsify their testimony in order to obtain a conviction. In their zeal to win at all costs, they can lose sight of the multiple harms that may result. Tainted verdicts hurt those who are wrongfully convicted, the crime victims, and the public which must suffer prolonged re-living of the traumatic events. Even when there

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7. It is estimated that the federal prosecution of the Murrah Building defendants cost approximately $82.5 million. On the defense side, about $15 million was paid to the defense team for Timothy McVeigh, and about $7 million was paid to the defense team for Terry Nichols. See Catherine Tsai, Records Show Sl.3 Million Spent on McVeigh's Defense After His Sentencing, Associated Press Newswires, Oct. 26, 2001 (on file with author); see also Interview with Rodney J. Uphoff, Nichols defense team member (state criminal charges) (July 26, 2001) [hereinafter Uphoff Interview].

8. See James S. Liebman, The Overproduction of Death, 100 Colum. L. Rev. 2030, 2079-94 & nn.138-56 (2000) (discussing "tremendous pressure" on law enforcement to solve high profile crimes and harshly punish the perpetrator, resulting in use of dubious evidence to obtain convictions).

9. See James S. Liebman et al., Capital Attrition: Error Rates in Capital Cases, 1973-1995, 78 Tex. L. Rev. 1839, 1863-64 (2000) (identifying numerous costs of serious errors in capital convictions, including loss of public confidence in courts and criminal justice system, cost to the wrongly convicted, and cost to the victim's family "whose search for justice and closure has been in vain"); see also Melissa Block, Michael Smith Discusses the Use of DNA Evidence to Exonerate the Wrongly Convicted (Natl Pub. Radio broadcast, Jan. 18, 2002), LEXIS, National Public Radio (reporting that one hundred people have now been exonerated by DNA evidence).
is overwhelming evidence of guilt, professional failings on either side may cause public resentment or disappointment with the underlying process.

Recent examples of federal and state prosecutorial misconduct crisply bring those harms into focus. In the Murrah Bombing case, the prosecution and defense agreed to exchange investigation and interview files in order to expedite the trial. Because the Federal Bureau of Investigation (“F.B.I.”) failed to turn over “thousands of pages of interview reports,” Attorney General John Ashcroft postponed the scheduled execution of Timothy McVeigh so that his current defense team would have an opportunity to review the documents. Whatever one thinks of the death penalty or of McVeigh, this official blunder prolonged the agony for all. It called into question the underlying conduct of the federal government in obtaining the conviction and death sentence. Missteps by the government can fuel extremists’ anger, causing untold future harms.

False forensic evidence used in state prosecutions may be widespread in some places. In Oklahoma City, police scientist Joyce Gilchrist was fired for shoddy work and false or misleading testimony. Her work on roughly twelve hundred cases has been under scrutiny for months. She testified in many death penalty cases, with at least one possible “wrongful execution.” Another man was freed after fifteen years in prison, for a rape conviction obtained with her false testimony. Similar problems with police forensic labs have falsely

12. To provide some historical context, the Murrah Building bombing was reputedly linked to anger at the federal response to David Koresh and the burning of the Branch Davidian compound in Waco, Texas. See William M. Erlbaum, The Lawyer’s Bookshelf, N.Y. L.J., June 8, 2001, LEXIS, New York Law Journal (reviewing Lou Michel and Dan Herbeck, American Terrorist: Timothy McVeigh & The Oklahoma City Bombing (2001)); cf. Mary Zeiss Stange, U.S. Ignores Religion’s Fringes, USA Today, Oct. 4, 2001, LEXIS, USA Today (arguing democracy’s greatest threat is “continued blindness to the darker religious forces that drive some men’s souls—and deeds”).
imprisoned innocent people in Florida, Illinois, Texas, and West Virginia.\textsuperscript{15} Defense attorneys suggest these publicized, local scandals may only be the tip of the iceberg—glaring evidence of a nationwide pattern of “false, fraudulent, exaggerated, overstated forensic science coming from police crime labs.”\textsuperscript{16} When the government uses its extraordinary powers and resources to prosecute crime, it must behave impeccably. Besides the irreparable harm to the defendants, the public costs are immeasurable, including lessened public confidence and actual costs of re-opening questionable cases.

The prosecutor is a “minister of justice.”\textsuperscript{17} As stated in the famous passage from \textit{Berger v. United States}, the prosecutor

is the representative . . . of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.\textsuperscript{18}

As a practical matter, it is difficult to identify enforceable ethical standards for the prosecutor with meaningful sanctions to deter repeat violations.\textsuperscript{19} Appellate courts reviewing convictions seldom reverse because of prosecutorial misconduct. Prosecutors may be admonished, sometimes repeatedly, but the convictions are routinely upheld, with any trial court errors in officiating adversary conduct deemed “harmless error.”\textsuperscript{20} Professional integrity must be foremost,

\begin{thebibliography}{99}
\item[16] \textit{Id.}
\item[20] See, e.g., Lewis v. State, 970 P.2d 1158 (Okla. Crim. App. 1998) (affirming conviction despite several improper arguments and misstatements of law explaining that “[a]llegations of prosecutorial misconduct do not warrant reversal . . . unless the cumulative effect . . . deprive[d] the defendant of a fair trial” (internal quotes omitted)); Le v. State, 947 P.2d 535, 554, 556 (Okla. Crim. App. 1997) (noting that the court remains “continually astounded that experienced prosecutors jeopardize cases, in which the evidence is overwhelming, with borderline argument” where the court had previously condemned specific comments, asserting “counsel knows better,” yet concluding that improper arguments did not taint the verdict (internal quotes omitted)). \textit{Compare} People v. Hill, 952 P.2d 673, 679 (Cal. 1998) (reversing conviction
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with the prosecutorial leadership regularly teaching by example.\textsuperscript{21} The public prosecutor wields power that is often unfettered by formal controls.\textsuperscript{22}  Overzealous prosecutors, who see themselves as combatants in the battle of “good versus evil in the war against crime,” may win individual skirmishes but poorly serve the long-term interests of justice.\textsuperscript{23}  Prosecutors should be held to insure that one of the basic tenets of the adversary system is satisfied at trial: protect the public interest in fundamental fairness.\textsuperscript{24}  Independence of professional judgment generally requires that lawyers be capable of maintaining some emotional distance from their cases.  This is especially important for prosecutors, who are charged with impartial administration of law.\textsuperscript{25}  Because the ethical culture within a prosecutor’s offices may tacitly encourage certain repeat violations, lawyer disciplinary agencies must be willing to act, thus providing a disincentive for deliberate misconduct.\textsuperscript{26}

\textbf{C. Role of Defense Counsel}

The basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the accused’s counselor and advocate with courage and devotion and to render effective, quality representation.\textsuperscript{27}

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\textsuperscript{22}  Martin H. Belsky, \textit{On Becoming and Being a Prosecutor}, 78 NW. U. L. Rev. 1485, 1485-86 (1984) (discussing prosecutor’s many hats as “a detective, a litigator, a manager, and a policymaker” in a complex and often arbitrary system).
\textsuperscript{23}  \textit{Id.} at 1487; see also People v. Kelley, 142 Cal. Rptr. 457, 467 (Cal. Ct. App. 1977) (stating that a prosecutor is held to a higher standard because of his or her unique role in exercising sovereign state power); State v. Ferrone, 113 A. 452, 455 (Conn. 1921) (stating that a prosecutor is a high public officer charged to seek impartial justice).
\textsuperscript{27}  ABA Standards for Criminal Justice: Prosecution Function and Defense Function § 4-1.2(b) (1993).
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Our adversarial system of justice is theoretically weighted against the prosecution, in favor of protecting the innocent.28 Wide disparities in available resources for the opposing sides practically tip the scales the other way. Defense counsel are not mere cogs in the criminal justice bureaucracy. They play a crucial role in guarding against governmental excesses that could jeopardize individual liberties and undermine confidence in the fair administration of justice. When representing a defendant charged with especially heinous crimes, faithful performance of one's role takes exceptional courage, dedication, and sound professional judgment. Notwithstanding public and official hostility, defense counsel must be willing to engage with the client, thereby establishing a relationship of trust and confidence. Unlike a traditional agency relationship, counsel may need to dissuade the client from making foolish strategic or legal choices.29

High profile defense work can exact high tolls, both personally and professionally. There can be enduring scars.30 It is time-consuming, emotionally draining, highly stressful, and can present significant security concerns for defense counsel and their families.31 Courageous, dedicated, and prudent counsel exist, prepared to accept the solemn mantle of representing hated defendants who are often assumed to be guilty as charged. Their awesome, delicate task in trials with such symbolic dimensions is to respect, and skillfully present, their clients as human beings whose views and value systems may have influenced their behavior.32 Initially, Timothy McVeigh was represented by superb lawyers from the federal public defender's office and appointed counsel. However, they sought, and were granted leave, to withdraw upon realizing that their intense personal feelings would interfere with their ability to provide full and proper representation.33 At various times in the proceedings, McVeigh and

29. H. Richard Uviller, Calling the Shots: The Allocation of Choice Between the Accused and Counsel in the Defense of a Criminal Case, 52 Rutgers L. Rev. 719, 724-26, 728 (2000) (positing that defense counsel's role is as de facto guardian rather than traditional agent, and that professional case management, sound judgment, and ongoing trust in relationship with client can avoid a crisis calling for legal rule determining decision-making authority).
31. Uphoff Interview, supra note 7 (discussing the real personal costs incurred by lawyers on both sides of the Murrah Building bombing case, including death threats; marital problems, with some ending in divorce; the stress of being under constant public scrutiny; and the need to devote one's entire practice to that matter).
32. See Feuer, supra note 30.
33. Susan Otto, one of McVeigh's preliminary public defenders, had friends and colleagues who were killed or injured. See Richard Barbieri, Scrambling to Find a Willing Defender, Legal Times, May 1, 1995, LEXIS, Legal Times. John Coyle, a
other bombing defendants were represented by counsel whose
dedication, loyalty, and professional conduct exemplified all that is
good about the legal profession. In every criminal matter, but
especially those involving notorious crimes, defense counsel must
show a single-minded devotion to the tasks of representation, keeping
clear focus on the legal and factual matters that are relevant and in the
best interests of the defense. Like a ship captain, the leader of a
defense team must chart the map, steer accurately towards the agreed
destination, run a tight ship, and always remember that the client—
who owns the ship and incurs the ultimate risk of loss—must be
consulted and have his or her lawful wishes fully respected.34 At least
with respect to McVeigh, the defense ship ran into rough waters,
sometimes crashing against rocks that jutted up because of conflicting
interests, dominant lawyer egos, and poor steering.35 The captain

private Oklahoma City defense attorney, lived close to the bombing site, and he and
his family received death threats. See John Coyle, IV (Univ. of Okla., J.D. Candidate,
2004), Statement in Professional Responsibility class of Prof. Judith L. Maute (Sept.
12, 2001) (explaining the experience of his father, John Coyle, III, when he
represented McVeigh). The case was literally too close to home for them both. The
Oklahoma Rules of Professional Conduct permit a lawyer to seek to avoid a court
appointment and to decline or withdraw from representation because of repugnance
to the client's objectives “to the extent that it is likely to impair the client-lawyer
relationship or the lawyer's ability to represent the client.” Okla. Rules of Prof'l
Conduct R. 1.16(b)(1) (2001); see also id. R. 6.2 (following ABA Rule 6.2 standard of
permitting a lawyer to decline court appointment when “the client or the cause is so
repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the
lawyer's ability to represent the client”).

34. Cf. Model Rules of Prof'l Conduct R. 1.2(a), 1.4 (2001); Restatement (Third)
of the Law Governing Lawyers §§ 20-23 (1998) (allocating decision-making authority
between client and lawyer); cf. Charles L. Black, Jr. & Grant Gilmore, The Law of
Admiralty 193 (1975) (defining “voyage charter” when ship is engaged to carry a full
cargo on a single voyage with the owner providing staff and navigation). See generally
Uviller, supra note 29, at 728-29 (arguing for presumption of lawyers' responsibility
for tactical decisions, with client authority over lawful strategic choices); Telephone
Interview with Randall C. Coyne, McVeigh defense team member (Oct. 11, 2001)
[hereinafter Coyne Interview]. The criminal defendant, as principal in the agency
relationship, hires counsel to carry the case to conclusion and is entitled to direct key
decisions of navigation, after significant consultation with counsel who is the agent
hired to serve as ship captain. The metaphor of lawyer as ship captain has some
precedent. See Blanton v. womancare Inc., 696 P.2d 645, 650 (Cal. 1985); see also
Judith L. Maute, Allocation of Decisionmaking Authority Under the Model Rules of
Professional Conduct, 17 U.C. Davis L. Rev. 1049, 1063-64, 1070-72, 1095-1105 (1984)
(discussing client objectives, autonomy, and criminal defense issues).

35. For example, Stephen Jones, lead defense counsel for McVeigh, had extensive
dealings with the media. See, e.g., Nolan Clay, McVeigh Ex-Lawyer Willing to Testify,
Daily Oklahoman, Mar. 25, 2001, at 1-A; Rob Collins, Jones Reveals McVeigh's Lie
Detector Test, Norman Transcript, May 21, 2001, at A1; Letter from Timothy
McVeigh, to Houston Chronicle (May 2, 2001) (on file with author). While there
were some inter-office precautions to be careful about what was said when the media
was present in the office, Jones's defense team meetings were often interrupted by
calls from the national media, which distracted focus from the task at hand. See Coyne
Interview, supra note 34. In fairness to Jones, the court ruled in post-conviction
proceedings that Jones's dealings with the press were appropriate. See United States
must faithfully stay with the ship to the bitter end, and not get distracted by self-interest and professional opportunities created by the representation.\textsuperscript{36} Reckless bravado and distraction by extrinsic


Assuming that Mr. Jones may have been motivated by a personal desire for notoriety and, perhaps, future financial rewards from writing or speaking about the case after its conclusion, such an interest is not divergent from the defendant's interest in avoiding conviction and a death sentence. The efforts made by Mr. Jones to establish a working relationship with the news media were consistent with the perceived need to humanize his client and counter the vast amount of negative publicity about him.

\textit{Id.}

Nevertheless, Jones's media interaction embroiled McVeigh's defense in prejudicial and embarrassing complications. Shortly before trial was set to begin, the \textit{Dallas Morning News}, the \textit{Playboy} website, and \textit{Newsweek} published sensational reports of documents, which allegedly were lawfully obtained from the defense team, in which McVeigh admitted to his involvement in the bombing and gave chilling details that it was timed to obtain a "body count" that would demand public attention. See Tom Kenworthy, \textit{Report of Admission Throws Oklahoma Bomb Case into Turmoil}, Wash. Post, Feb. 28, 1997, LEXIS, Washington Post. Legal observers called the resulting turmoil "frightening, bizarre and stranger than fiction." Julie DelCour, \textit{Leaks Hurt McVeigh Defense; Recent Articles on the OK Bombing Have Led to Questions on Client Confidentiality}, Tulsa World, Mar. 17, 1997, LEXIS, Tulsa World. First, Jones claimed that the summaries were fakes. Peter Annin, \textit{Groping for a Strategy}, Newsweek, Mar. 17, 1997, LEXIS, Newsweek. He then claimed that the Dallas paper broke into defense computers and stole thousands of documents. Robert E. Boczkievicz & Nolan Clay, \textit{McVeigh's Attorney Rips Dallas Paper: Computer Data Stolen}, Jones Says, Daily Oklahoman, Mar. 4, 1997, LEXIS. Daily Oklahoman. Finally, he conceded that the "confession" was indeed based on confidential defense-team documents, but that it was a fabrication—a ruse devised "by members of the defense team who were trying to con potential witnesses into telling what they knew about the bombing plot." Annin, supra. Jones's credibility, and his reputation for competence and skill at manipulating the media, were badly damaged—to the point that Judge Matsch was urged to ask McVeigh if he wanted a new lawyer. \textit{Id.}

Those events raise significant questions of competence and confidentiality, as well as the ethical issues surrounding fabrication. It is possible that Jones's professional judgment in dealing with the leaked document was influenced by the potential advance publicity. The leak would attract to the books Jones was writing during his work with McVeigh. Jones's 1998 book was published three years before McVeigh's case was ultimately resolved with his execution in June 2001. See Stephen Jones, Others Unknown: The Oklahoma City Bombing Case and Conspiracy (1998). Multiple violations of ethical rules may be involved. See, \textit{e.g.}, Model Rules of Prof'l Conduct R. 1.6, 1.7, 1.8(d), 5.1 (1999); Randall Coyne & Lyn Entzereth, Capital Punishment and the Judicial Process 583-84 (2d ed. 2001) (discussing Jones's book contract); Monroe H. Friedman, \textit{Oklahoma City Bombing Case}, The Conscience, Feb. 2001 (publishing the unsubmitted testimony of Monroe H. Freedman, scheduled to appear as an expert witness on lawyers' ethics in the Timothy McVeigh trial); Michael E. Tigar, \textit{Lawyer, Defend Thyself!}, Nat'l L.J., May 7, 2001, at A23; Coyne Interview, \textit{supra} note 34. Indeed, Jones's persistent comments to the media caused widespread concern among local and national lawyers who are knowledgeable about legal ethics. See, \textit{e.g.}, Freedman, \textit{supra}; Tigar, \textit{supra}; Postings of Mead Hedglen, Stephen Presson, Carolyn Smith, Avery Eeds, Jr., and Jimmy Turner to www.obanet.org (Mar. 29, 2001) (copies on file with author).

\textsuperscript{36} See Coyne Interview, \textit{supra} note 34 (relating that after McVeigh's conviction, Stephen Jones left Denver to appear at congressional hearings on proposed terrorism legislation and did not stay to work on post-trial motions, when there was already a
forces can lead the ship off course. Counsel for the defendant accepts a solemn mantle of trust, which must be faithfully executed as a humble servant of the law and the client. This is not to suggest defense counsel slavishly follow all client directions or display humility that is atypical for trial lawyers. Rather, the notion of humble servanthood suggests the lawyer must be dedicated to insuring that the client is treated fairly, with respect, and receives the due process of law.

Few lawyers are prepared to accept this monumental task in a high profile case, and fewer still are called to serve. Yet, all lawyers and the organized bar bear some responsibility to show support for the courageous few and to help educate the public about defense counsel’s critical role in the American criminal justice system. Those defense counsel who serve their clients with skill and dedication deserve accolades for insuring that the Constitution and a legitimate adversarial process protect us all. They deserve our active and vocal support to prevent their suffering from “guilt by representation” and “the hazards of being undone” when representing unpopular clients.37 Besides giving general support to a strong and respected criminal defense bar, in high profile cases, the organized bar should actively encourage the judiciary to appoint and fairly compensate the best defense counsel available, helping to promote widespread respect for legitimacy of the process and eventual outcome of the case.38

Selection of defense counsel is critical in criminal cases involving terrorism or other actions that reflect deep political or cultural conflicts. These cases have tremendous symbolic importance to the larger community. Integrity of process is paramount. For that reason, defense counsel should have impeccable credentials and a national reputation for their expertise in handling difficult criminal matters. Because of intense local feelings that naturally occur in response to terrorist acts, strong consideration should be given to appointing lead counsel from outside the affected area in order to better assure that counsel can maintain the necessary professional distance. While the inevitable publicity surrounding the case will certainly influence the lawyers’ later public standing, the court should exercise great care to

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37. See ABA Standards for Criminal Justice: Prosecution Function and Defense Function § 4-1.6 cmt. (1993); Daniel Pollitt, Counsel for the Unpopular Cause: The “Hazard of Being Undone,” 43 N.C. L. Rev. 9 (1964); see also Model Rules R. 1.2(b) (stating that representation “does not constitute an endorsement of the client’s political, economic, social, or moral views or activities”).

38. Cf. Dan Barry, For Blacks, Louima Case Is Justice Done, Then Undone, N.Y. Times, Mar. 3, 2002, at 33 (discussing black community’s reaction to Second Circuit’s reversal of three New York City police officers’ convictions in the brutal assault of Abner Louima because of defense counsel’s conflict of interest which, “among many of the city’s black residents, . . . stirred up a cauldron of complex emotions, most of them laced by feelings of hurt and betrayal”).
select counsel with a flawless reputation for quality work, assiduously
avoiding those with a known propensity to try cases in the media
rather than in the courtroom.

II. EXTRAJUDICIAL STATEMENTS BEFORE, DURING, AND AFTER
TRIAL: AVOIDING MCJUSTICE AND A McMEDIA CIRCUS

The continued existence of a free and democratic society depends

Chi. Legal F. 53, 107-08 (giving detailed account of efforts to control against
prejudicial media coverage in McVeigh case and concluding that “prophylactic
measures” instituted by Judge Matsch “came too late to achieve justice”). Given the
widespread criticism of Jones for his extensive comments to the electronic and print
media, this conclusion is ironic at best. See supra note 35. But see supra note 35
(discussing Judge Matsch’s justification of Jones’s media interaction). After
McVeigh’s conviction, successor counsel replaced Jones and moved for a new trial on
grounds, inter alia, that Jones rendered ineffective assistance. See Arnold Hamilton,
McVeigh Attorney Is Down-to-Earth, Dallas Morning News, May 20, 2001, LEXIS,
Dallas Morning News. Subsequently, Jones has made numerous statements to the
media, some of which I believe seriously prejudice the ability of the state to provide a
fair trial for Terry Nichols. See, e.g., Clay, supra note 35; Rob Collins, Further Delay?:
Former McVeigh Attorney Says Execution Could Be Delayed Further, Norman
Transcript, May 20, 2001, at A1 (reporting that Jones “thinks McVeigh has
exaggerated his guilt to protect others”); Rob Collins, Jones Reveals McVeigh’s Lie
Detector Test, Norman Transcript, May 21, 2001, at A1 (discussing second edition of
Jones’s book, Others Unknown, that contains new details of client’s lie detector test
and Jones’s belief as to the identities of others involved in the bombing). Further, to
the extent that Jones has publicly revealed alleged statements by Tim McVeigh
implicating others, it may be that Jones was acting in direct opposition to his client’s
stated, expressed, and well-known wishes. See Coyne Interview, supra note 34. In
recent months, to justify his post-trial disclosures of client confidences, Jones
circulated a file memorandum contending that McVeigh’s assertion of ineffective
assistance claims completely waived the attorney-client privilege. See Posting of
Stephen Jones, kerryd@fullnet.net, to www.oba-net.org (Mar. 29, 2001) (on file with
author); Letter from Lee Ann Jones Peters, Appellate Defense Counsel, State of
Oklahoma, Oklahoma Indigent Defense System, to Judith L. Maute, Professor,
University of Oklahoma College of Law (Sept. 25, 2001) (on file with author);
Memorandum from Stephen Jones to the File, Waiver of the Attorney-Client
Privilege (July 10, 2000) (on file with author) (detailing McVeigh’s claims of
ineffective assistance as justifying complete waiver of privilege). Although the ethical
rules clearly recognize that a lawyer has a right to reveal client confidences in self-
defense of allegations of misconduct against the lawyer, that right is limited “to the
extent the lawyer reasonably believes necessary.” Model Rules R. 1.6(b)(2). The
Oklahoma rule is in accord. See Okla. Stat. Ann. title 5, ch. 1 app. 3-A., R 1.6(b)(3)
(1993); see also Restatement (Third) of the Law Governing Lawyers § 64 cmt. f (1998)
(discussing confidentiality counterpart to waiver of attorney-client privilege which
allows lawyer to disclose confidences in responding to inquiries by disciplinary
authority and in defensive testimony); id. § 80(1)(b) cmts. b, c (discussing waiver of
attorney-client privilege when client puts lawyer’s assistance in issue by claiming
ineffective assistance and stating that considerations of “forensic fairness” requires
opportunity for interested parties to establish “facts underlying the claim” in the
proceeding). Undoubtedly, Jones could properly defend himself against those
charges in any post-trial hearing held by the trial court. In my opinion, his frequent
press conferences and interviews with the media far exceeded the limited disclosures
contemplated by the ethics rules.
upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and his capacity through reason for enlightened self-government. Law so grounded makes justice possible, for only through such law does the dignity of the individual attain respect and protection. Without it, individual rights become subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible.

Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system. A consequent obligation of lawyers is to maintain the highest standards of ethical conduct.40

Criminal cases should be tried in court, not in the media. Period. Whatever may be said about the “free speech rights” of lawyers,41 extrajudicial communications about a pending criminal matter by the lawyers on either side, or nonlawyers working on the case, can seriously jeopardize the right to fair trial, distract attention from the matters properly at hand, and create a carnival atmosphere that undermines confidence in the legal system, furthering public distrust in the legal profession.42 Wish as we might for a way to avoid intense media coverage of high profile criminal cases, the First Amendment broadly protects public access to information and limits government efforts to restrict what can be said.43 Canadian courts are vested with authority to issue publication bans in controversial cases in order to protect the defendant’s right to fair trial.44 Any such efforts in America would not be tolerated by the journalism industry, the American public, or the First Amendment.45

43. See, e.g., David Johnston, Lindh Coerced After Capture, Lawyers Assent, N.Y. Times, Feb. 6, 2002, at A1 (discussing “harrowing” details of John Walker Lindh’s confinement after capture in Afghanistan, as contained in defense document filed with court in support of motion that he be released from jail pending trial).
44. Tammy Joe Evans, Comment, Fair Trial vs. Free Speech: Canadian Publication Bans Versus the United States Media, 2 Sw. J. L. & Trade Am. 203, 206-09 (1995) (discussing Canadian constitutional authority to restrict freedom of press when demonstrably justified by accused’s paramount right to a fair trial).
45. Gerald F. Uelmen, Leaks, Gags and Shields: Taking Responsibility, 37 Santa Clara L. Rev. 943, 946, 971-72 (1997) (maintaining that it would be unrealistic to try to
As a practical matter, it is difficult to make and enforce valid restrictions on extrajudicial communications, particularly where there is intense public interest, and hence great incentives for unauthorized disclosures, especially leaks from “anonymous confidential sources.”

Disciplinary enforcement for prosecutorial violations of the ethical restrictions are rare and tend to be reserved for egregious cases. Professor Gerald Uelmen, personally experienced with high profile cases, suggests that

[r]ather than making futile efforts to control the uncontrollable,...
[energy should be focused] on goals that are readily achievable: ascertainments of the information that presents a clear and present danger to the fairness of trials; prompt and clear protective orders limiting the release of such information; and strict enforcement of those orders when they are violated.

Lawyers associated with a criminal case may have mixed motives for making statements to the media or allowing “surreptitious leaks” outside the trial process. Personal agendas, such as self-aggrandizement and future ambitions, may enter the picture—literally as well as figuratively. Prosecutors may hope for higher office. Defense counsel may benefit from the publicity. They may entertain ideas of their own media careers or book and movie contracts. As a default guide for the discretionary conduct of lawyers associated with high profile litigation, I suggest: shut up; do not speak in the first place.

“purge trials of any trace of external publicity;” that focus should be on responsible reporting, requiring public identification and accountability of lawyers and their staff who provide information; and that no lawyer be given a right of privacy under applicable shield laws; Cf. H. Patrick Furman, Publicity in High Profile Criminal Cases, 10 St. Thomas L. Rev. 507, 525 (1998).

46. Uelmen, supra note 45, at 965.
47. See Zacharias, supra note 24, at 103-13 (citing cases and arguing for increased disciplinary actions when prosecutors intentionally violate rules against extrajudicial publicity, reflecting office decision to enhance public image or chances of conviction); cf. In re Holley, 729 N.Y.S.2d 128 (App. Div. 2001) (illustrating the public censure of an attorney for improperly disclosing a sealed court document to a journalist and thereafter falsely denying such conduct).
48. Uelmen, supra note 45, at 978. See, for example, Oklahoma Statutes Annotated title 5, chapter 1, appendix 3-A, Rule 3.6(a) (1997), which imposes narrower restrictions on extrajudicial statements by lawyers, to matters involving lay fact-finders or possibility of incarceration where a lawyer “reasonably should know that it will have an imminent and materially prejudicial effect on the fact-finding process.” See generally Lawrence K. Hellman, The Oklahoma Supreme Court’s New Rules on Attorneys’ Trial Publicity: Realism and Aspiration, 51 Okla. L. Rev. 1 (1998).
49. Uelmen, supra note 45, at 950-53.
50. Id.
51. Furman, supra note 45, at 533, 535-36 (arguing lawyers should fight urge to speak with the press and persuade all others associated with the case to do likewise and emphasizing importance in each case to insure proper balance between the constitutional right to a fair trial and issues of free press).
Because it is suggested as a default rule, it recognizes that there are times when it is appropriate to speak. Professional self-restraint by the prosecutor would prevent inflammatory public statements to which the defense would have a legitimate right of reply. Sometimes public comment may be necessary to help preserve the possibility of receiving a fair trial before an unbiased jury. This, however, often prompts increased extrajudicial comment by others. Lawyers' self-interest in garnering favorable publicity for themselves may color their judgment as to whether comments serve the clients' interests more than their own. A personal default rule of remaining silent should trigger a degree of conscious self-reflection before the lawyer begins to speak.

Yes, lawyers have rights of free speech that are guaranteed by the Constitution. Yes, defendants might find it in their self-interest (misguided or not) to authorize their lawyers' comments to the media. Yet, as a normative matter, in the exercise of sound discretion, more often than not, lawyers involved in criminal matters best serve the public interest and their professional obligations by remaining silent or almost so. I understand that the media aggressively searches for information whether or not attributed to an identified source. I understand the motives—professionally sound or not—to add to the flow of information. Even though, when pressed, an attorney might establish a constitutionally protected "right" to speak, the question is whether one, in the exercise of professional discretion and in furtherance of the public interest in a properly ordered legal system, has a higher professional duty to remain silent. With discretion being the better part of valor, the best default rule is to be quiet. Let the record speak for itself. There are innocuous and polite ways to satisfy the media's insistence for a sound bite: "In the end, when all the evidence is presented, I'm confident justice will be done." That is all.

52. For example, if a dangerous actor remains at large, legitimate law-enforcement purposes may warrant public statements to aid apprehension and to protect public safety. See Model Rules of Prof'l Conduct R. 3.6(b)(6) (2001); Restatement (Third) of the Law Governing Lawyers § 109(2) (1998).
53. § 109(1) (permitting statements necessary to mitigate effect of substantial, undue, and prejudicial publicity recently initiated by one other than the lawyer or the lawyer's client); R. 3.6(c) (same); see also Gentile v. State Bar, 501 U.S. 1030 (1990).
54. See, e.g., United States v. Scarfo, 263 F.3d 80, 95 (3d Cir. 2001) (holding unconstitutional a gag order against former criminal defense counsel and recognizing the importance of an orderly, fair trial and of public awareness and criticism, where the gag order did not identify the risk of a "carnival-type atmosphere").
55. See Furman, supra note 45, at 510-11; see also Marjorie P. Slaughter, Lawyers and the Media: The Right to Speak Versus the Duty to Remain Silent, 11 Geo. J. Legal Ethics 89, 90, 99 & n.93 (1997) (maintaining that lawyers should voluntarily "restrain their extrajudicial speech to the extent that it breaches client confidentiality or otherwise interferes with the fulfillment of their duties as officers of the court to protect the integrity of the judicial system" and quoting prominent criminal defense
Moreover, even when the case is done, the lawyer should generally refrain from speaking, writing, consulting on movie re-enactments, and the like. In agreeing to represent the client, the lawyer assumed a solemn vow of secrecy. The ethics rule prohibiting lawyers from entering into literary or media contracts during the course of representation is solid.\(^{56}\) Despite a lawyer’s best efforts to obtain the client’s “informed consent” and to represent the client faithfully, undeterred by the potential literary value of the representation, the risk of compromising the lawyer’s professional judgment is just too great. In the few instances where lawyers have had the chutzpah to enter literary contracts while representing criminal defendants, courts have routinely chastised the lawyer for violating the rule and affirmed the conviction because there was no clear showing of prejudice.\(^{57}\) Further, the lawyer’s post-representation conduct may jeopardize the rights of others when related criminal proceedings have not yet concluded. Like priests in the confessional, lawyers involved in criminal cases should remain forever silent, whether they are involved in the prosecution or the defense. They should leave it to others to search the public record, to interview participants, and to produce the books and movies that help educate the public about the law.\(^{58}\) They must allow clients the unfettered, arm’s length right to grant or deny consent to allowing researchers access to information. As lawyers, our solemn obligation is to represent clients humbly within the legal system.

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attorney Brendan Sullivan, who advocates as an “absolute rule” to “[n]ever deal with the press, ever, never”).

\(^{56}\) See R. 18(d).

\(^{57}\) See, e.g., Beets v. Scott, 65 F.3d 1258, 1273 n.20 (5th Cir. 1995), cert. denied (citing cases and noting that despite “widely shared professional disapproval of media rights contracts, ... hardly any convictions have been reversed for a pernicious influence of such contracts on counsel’s effectiveness”); see also Coyne & Entzeroth, supra note 35, at 583-84 (arguing impairment of defense in capital cases because of lawyers’ interests in literary and film rights; both clients—Betty Lou Beets and Timothy McVeigh—have since been executed); cf. United States v. Marrera, 768 F.2d 201 (7th Cir. 1985), cert. denied, 475 U.S. 1020 (1986) (finding no actual conflict or adverse effect); Maxwell v. Superior Court, 639 P.2d 248 (Cal. 1982).