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## THE DUKE LACROSSE RAPE CASE—A PUBLIC BRANDING, IS THERE A REMEDY?

### INTRODUCTION

Being accused of a more callous crime is hard to imagine. In March 2006, two adult African-American female exotic dancers were hired to perform at a house occupied by members of the Duke lacrosse team.<sup>1</sup> During the performance, which most of the Duke lacrosse team members attended, the men allegedly separated one of the entertainers from her partner and pulled her into the bathroom.<sup>2</sup> The accuser claimed the door was closed behind her and that she was trapped.<sup>3</sup> According to the accuser, one of the assailants said, “sweet heart, you can’t leave.”<sup>4</sup> The woman attempted to leave, but the men allegedly prevented her from doing so.<sup>5</sup> According to the accuser, three white players held her down by her arms and legs while they gang raped her for nearly half an hour.<sup>6</sup>

The woman claimed that during the brutal rape, the lacrosse players “hit, kicked, and strangled” her.<sup>7</sup> As the anal, vaginal, and oral rape continued, the woman struggled with all her might to free herself from the rapists, or at least that was her account of the evening’s events.<sup>8</sup> She claimed that when she attempted to pry one of the Duke lacrosse player’s arms from around her neck, some of her fingernails snapped off.<sup>9</sup> After allegedly robbing the woman of her dignity, the men were accused of stealing her money before they allowed

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1. *Details in Duke Rape Investigation Emerge*, MSNBC.COM, Mar. 30, 2006, <http://www.msnbc.msn.com/id/12080776>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Details in Duke Rape Investigation Emerge*, *supra* note 1; see also Susannah Meadows & Evan Thomas, *A Troubled Spring at Duke*, NEWSWEEK, Apr. 10, 2006, at 42.

7. *Details in Duke Rape Investigation Emerge*, *supra* note 1.

8. Ed Bradley, *Duke Rape Suspects Speak Out*, CBSNEWS.COM, Oct. 15, 2006, <http://www.cbsnews.com/stories/2006/10/11/60minutes/main2082140.shtml>; Evan Thomas & Susannah Meadows, *Doubts About Duke*, NEWSWEEK, June 26, 2006, at 22; *Details in Duke Rape Investigation Emerge*, *supra* note 1.

9. Meadows & Thomas, *supra* note 6; *The Abrams Report* (MSNBC television broadcast Mar. 31, 2006) (transcript available at <http://www.msnbc.msn.com/id/12131984>).

her to flee the bathroom.<sup>10</sup> Once the woman left the house, a neighbor claimed he heard individuals from the house yelling racial slurs and other racially charged comments as the two adult entertainers left the scene.<sup>11</sup> The accuser's allegation resulted in a police investigation of "the crimes of first degree forcible rape, first degree kidnapping, first degree forcible sexual offense, common-law robbery, and felonious strangulation."<sup>12</sup>

After the above "details" of the alleged rape emerged, the Duke lacrosse rape story became the subject of what some deemed an "avalanche"<sup>13</sup> of nationwide media attention because of its "heavy overtones of race and class" and a deluge of interviews granted by Durham District Attorney Mike Nifong.<sup>14</sup> Mike Nifong appeared to voice his first public comments regarding the case on March 27, 2006, four days after reports stated that police ordered forty-six Duke lacrosse players to give DNA samples as part of the investigation.<sup>15</sup> In the following weeks, Durham District Attorney Mike Nifong granted "more than 50 interviews, many on live national television,"<sup>16</sup> during which he "ferreted out a pattern of drunken misbehavior by jocks at an elite university."<sup>17</sup> During some of these interviews, Nifong reportedly stated that he was "convinced that there was a rape"<sup>18</sup> and "[t]he circumstances of the rape indicated a deep racial motivation for some of the things that were done, . . . It makes a crime that is by its nature one of the most offensive and invasive even more so."<sup>19</sup>

After weeks of media coverage that focused on details provided by the accuser, police, and prosecutor regarding the brutal gang rape, the defense team released evidence to the media that raised serious doubts about the accuser's story and whether this assault ever occurred.<sup>20</sup> While Nifong previously "express[ed] with absolute certainty that Duke lacrosse players had committed a horrific crime," it is now clear that his beliefs, the articulation of

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10. Meadows & Thomas, *supra* note 6.

11. *Id.*

12. *Details in Duke Rape Investigation Emerge, supra* note 1.

13. Jane Stancill, *Lacrosse Defense Sways Media*, NEWS & OBSERVER, July 16, 2006, at 1B.

14. Meadows & Thomas, *supra* note 6; Benjamin Niolet & Anne Blythe, *Watch Your Words, Lacrosse Case Lawyers Told*, NEWS & OBSERVER, July 18, 2006, at 1B.

15. Michael Biesecker et al., *DA on the Spot for Comments*, NEWS & OBSERVER, Apr. 22, 2006, at 1A, 16A.

16. Niolet & Blythe, *supra* note 14.

17. Stancill, *supra* note 13.

18. *Duke Lacrosse Team Accused of Gang Rape*, MSNBC.COM, Mar. 29, 2006, <http://www.msnbc.msn.com/id/12065803>.

19. Gitika Ahuja, *Duke Rape Allegations Challenge Booming Sport*, ABCNEWS.COM, Mar. 29, 2006, <http://abcnews.go.com/Sports/story?id=1784378>.

20. Bradley, *supra* note 8 (indicating that *60 Minutes'* review of the file "reveals disturbing facts about the conduct of the police and the district attorney, and raises serious concerns about whether or not a rape even occurred").

which “fueled explosive news coverage and fed public suspicion of the team,” were dead wrong and were formed “before much of the evidence was gathered.”<sup>21</sup> In fact, Nifong’s statements were the result of a “tragic rush to accuse.”<sup>22</sup>

Initially, Nifong indicated that DNA would be the foundation on which the prosecution would build its case, since the accuser stated that there were “no condoms used” and “at least one of her three attackers had ejaculated inside her.”<sup>23</sup> However, subsequent DNA testing of every white Duke lacrosse player did not reveal a match; no DNA from any of the lacrosse players “was found on or inside the accuser or on her clothing,” despite the fact that the accuser received a full medical evaluation the evening of the attack when, presumably, the physical evidence was gathered.<sup>24</sup> In addition to the absence of DNA evidence, the accuser’s ever-evolving tale made the claim that she was raped at the Duke lacrosse party even more doubtful. The accuser gave varying accounts of the rape, claiming she was raped by “five guys,” then claiming she was raped by “three men,” while also stating that “no one had forced her to have sex.”<sup>25</sup> Months after the indictment of the three lacrosse players, the accuser wavered in her story once again, saying she was unsure whether she was penetrated.<sup>26</sup> Although the players still faced kidnapping and sexual assault charges, the accuser’s revelation forced Nifong to drop the rape charges.<sup>27</sup> After taking over the case from Mike Nifong, who is now known as a “rogue prosecutor,”<sup>28</sup> the North Carolina Attorney General conducted a full-scale review of the case and determined that “the inconsistencies [in the accuser’s story] were so significant and so contrary to the evidence that the State had no credible evidence that an attack occurred in that house that

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21. *Id.*

22. *Duke Lacrosse Players Relieved Case Has “Closure,”* MSNBC.COM, Apr. 13, 2007, <http://www.msnbc.msn.com/id/18046103>.

23. Bradley, *supra* note 8.

24. *Id.* Although the accuser later picked her alleged attackers out of a photo line-up, the circumstances under which the line-up was conducted raise serious questions as to the reliability of the identification. A few days after the party, the accuser was shown a photo line-up of thirty-six Duke lacrosse players; she did not identify any of the players as her attacker. *Id.* Two weeks later, the accuser was shown another line-up, which consisted of a photograph of every white Duke lacrosse player. *Id.* She identified one of the indicted players with “90 percent” certainty but could not be sure because the “man who raped her had a mustache.” *Id.* Photographs taken on the night of the alleged attack show the identified player never had a mustache. *See id.*

25. *Id.*

26. *Duke Lacrosse Prosecutor Could be Ousted,* MSNBC.COM, Dec. 30, 2006, <http://www.msnbc.msn.com/id/16408033>.

27. *Id.*

28. *Duke Lacrosse Players Relieved Case Has “Closure,”* *supra* note 22.

night.”<sup>29</sup> Most significantly, Attorney General Roy Cooper declared that the three Duke lacrosse players were “innocent of the criminal charges.”<sup>30</sup>

Despite the Attorney General of North Carolina’s determination that the three accused Duke lacrosse players were innocent, the reputations of the indicted Duke lacrosse players, as well as the other members of the 2006 Duke lacrosse team who were cast under an umbrella of suspicion, were severely tarnished by Nifong’s extrajudicial statements to the national news media. While the subsequent indictments necessarily damaged the players’ reputations, the never-ending interviews granted to various media outlets by District Attorney Nifong, and particularly the substance of those interviews, helped advance a media firestorm that rivaled the coverage received by the O.J. Simpson trial; in essence, the news of the alleged rape, as described and depicted by Nifong, made the Duke lacrosse rape case front page news across the country and the subject of seemingly endless discussion on cable news stations and media websites.<sup>31</sup> The compelling facts surrounding the evolution of the Duke lacrosse case, as chronicled by the national news media, raise an important question: in the current media environment, are there adequate safeguards in place to protect the reputations of individuals accused of crimes by a prosecutor? While in this case the families of the accused marshalled vast resources allowing them to effectively fight, and by most estimations win, a media war, the vast majority of Americans accused of crimes do not have the ability to do the same. This Comment shows that while some of the reputational protections available to the accused served their purpose in this case, in most cases, a person’s reputation is afforded little or no protection.

The facts surrounding the Duke lacrosse rape investigation provide a context to analyze the current legal system’s ability to protect the *reputations* of those who find themselves in a prosecutor’s crosshairs. The scope of discussion is limited to the adequacy of reputational protections available to the accused. The question of whether or not Nifong’s public comments could have prevented the Duke lacrosse players from receiving a fair trial does not receive in-depth attention.<sup>32</sup> Although District Attorney Nifong’s conduct,

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29. OFFICE OF THE ATT’Y GEN. OF N.C., DURHAM CTY. SUPERIOR CT. CASE FILE NOS. 06 CRS 4332-4336, 5582-5583, SUMMARY OF CONCLUSIONS 21 (2007) [hereinafter OFFICE OF ATT’Y GEN., SUMMARY OF CONCLUSIONS], *available at* <http://www.ncdoj.com/DocumentStreamerClient?directory=PressReleases/&file=SummaryConclusions.pdf>.

30. *Id.*

31. Stancill, *supra* note 13, at 1B, 4B.

32. Although this Comment does not analyze whether the prosecutor’s extrajudicial comments would materially prejudice the court proceeding, a discussion of Rule 3.8 necessarily involves interpreting portions of Rule 3.6 because Rule 3.8 purports to supplement Rule 3.6 and the two Rules use parallel language. *Compare* N.C. RULES OF PROF’L CONDUCT R. 3.6 (2006) *with* N.C. RULES OF PROF’L CONDUCT R. 3.8(f) (2006). Notably, the North Carolina State Bar filed an ethics complaint charging Nifong with, among other things, making extrajudicial

coupled with the facts revealed since the announcement of the indictments, makes it clear that the decision to indict the three lacrosse players was erroneous, this Comment does not provide an in-depth exploration of prosecutorial discretion or Nifong's initial decision to prosecute the players.<sup>33</sup> Furthermore, this Comment does not explore the various remedies available to the falsely accused players for non-reputational damages.

Part I of this Comment lays out some of the public statements made by Nifong and explores the impact of those statements on the reputations of the players. Part II discusses the reputational protections available to the Duke lacrosse players, including the relevant North Carolina ethical provisions governing extrajudicial statements and the availability and practicality of a defamation action against a state prosecutor. Part III proposes a number of solutions that would provide increased protection for the accused.

#### I. NIFONG'S STATEMENTS AND THE IMPACT ON THE REPUTATIONS OF THE ACCUSED

Mike Nifong conducted numerous interviews with both local and national media outlets. While Nifong's pre-indictment extrajudicial statements regarding the Duke lacrosse rape case are too numerous to chronicle in their entirety, the following sections document some of Nifong's more egregious statements and the impact these statements had on the reputations of the three accused lacrosse players.

##### A. *Nifong's Pre-Indictment Extrajudicial Statements*

In order to fully understand the significance of Nifong's statements, one must first understand the context in which they were made. The alleged rape was said to have occurred at a party, hosted by the Duke lacrosse team, which began on the evening of March 13, 2006, and ran into the early morning hours

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statements that materially prejudice an adjudicative proceeding. Amended Complaint paras. 178–81, North Carolina State Bar v. Michael B. Nifong, No. 06 DHC 35 (Disciplinary Hearing Comm'n of N.C. Jan. 24, 2007) [hereinafter Amended Complaint]. Moreover, U.S. Representative Walter Jones (R-NC, 3d Dist.) personally requested that then United States Attorney General Alberto Gonzales investigate whether Nifong violated the charged Duke lacrosse players' civil rights. *Rep. Walter Jones Wants Probe of District Attorney Nifong Handling Duke Rape Case*, FOXNEWS.COM, Dec. 12, 2006, <http://www.foxnews.com/story/0,2933,236106,00.html>.

33. In late December 2006, the rape charges against the three lacrosse players were dropped because the accuser was "no longer certain intercourse occurred." *Duke Lacrosse Prosecutor Could be Ousted*, *supra* note 26. After a full review of the case, the North Carolina Attorney General finally dismissed the indictments against the players on April 11, 2007, declaring them innocent of all charges that Nifong leveled against them. OFFICE OF ATT'Y GEN., SUMMARY OF CONCLUSIONS, *supra* note 29.

of March 14.<sup>34</sup> On March 16, a search warrant was issued, authorizing the search of the residence where the party was held and the alleged crimes occurred.<sup>35</sup> Nifong's first public statements regarding the case appeared to come on March 27, a few days after the *Durham News & Observer* reported that members of the lacrosse team were ordered to submit DNA samples as part of an ongoing rape investigation.<sup>36</sup> In the days that followed, Nifong granted interviews with local and national news media organizations.<sup>37</sup> On April 17, 2006, the first two players were indicted for the alleged rape.<sup>38</sup> On May 15, 2006, the third and final player was indicted for the rape of the same unnamed accuser.<sup>39</sup>

During the period between March 27 and April 14—before Nifong announced the first two indictments—Nifong made numerous extrajudicial statements regarding the Duke lacrosse rape case. On March 29, Nifong appeared on *The Abrams Report*, a nationally televised news program that aired daily on the cable news station MSNBC.<sup>40</sup> In response to host Dan Abrams's question, "Are you convinced there was a rape here?" Nifong responded, "I am convinced that there was a rape, yes, sir."<sup>41</sup> Nifong elaborated that he was so convinced because

. . . [t]he circumstances of the case are not suggestive of the alternate explanation that has been suggested by some of the members of the situation. There is evidence of trauma in the victim's vaginal area that was noted when she was examined by a nurse at the hospital. And her general demeanor was suggestive of the fact that she had been through a traumatic situation.<sup>42</sup>

In another interview conducted by Dan Abrams on March 31, Nifong again commented extensively on the Duke lacrosse rape investigation.<sup>43</sup> In response

34. Thomas & Meadows, *supra* note 8.

35. Search Warrant, *In re* 610 N. Buchanan Blvd. Durham, NC 27701 (N.C. Dist. Ct. Mar. 16, 2006) [hereinafter Search Warrant], available at <http://www.thesmokinggun.com/graphics/art3/0329061duke1.gif>.

36. Biesecker et al., *supra* note 15, at 16A.

37. *Id.*; see also *Duke Lacrosse Team Accused of Gang Rape*, *supra* note 18.

38. Indictment, State v. Collin Finnerty, No. 06 CRS 4331 (N.C. Super. Ct. Apr. 17, 2006); Indictment, State v. Reade William Seligmann, No. 06 CRS 4334 (N.C. Super. Ct. Apr. 17, 2006).

39. Benjamin Niolet et al., *Duke Player Indicted; Says All 3 Are Innocent*, NEWS & OBSERVER, May 16, 2006, at 1A.

40. *Duke Lacrosse Team Accused of Gang Rape*, *supra* note 18.

41. *Id.*; Amended Complaint, *supra* note 32, para. 84; Motion to Dismiss and Answer para. 84, North Carolina State Bar v. Michael B. Nifong, No. 06 DHS 35 (Disciplinary Hearing Comm'n of N.C. Feb. 28, 2007) [hereinafter Motion to Dismiss and Answer].

42. *Duke Lacrosse Team Accused of Gang Rape*, *supra* note 18; see also Amended Complaint, *supra* note 32, paras. 56, 131; Motion to Dismiss and Answer, *supra* note 41, paras. 56, 131.

43. *The Abrams Report*, *supra* note 9.

to a question in which Abrams asked Nifong whether “some of these people have not been cooperative,” Nifong, after asserting that they were cooperative in terms of giving “suspect kits,” a list of others at the party, and written statements, went on to say, “Now, if they made statements that were not true . . . that would not be cooperative.”<sup>44</sup> In a follow-up to that answer, Nifong said, “they denied that a sexual assault took place . . . and the position that the state is taking is that that is not a true statement.”<sup>45</sup> He went on to say that “none of the other members of the team, other than [the three players who rented the house where the party took place] have made statements to the police.”<sup>46</sup>

After previously mentioning, “This was not a consensual sex situation. This was a struggle, wherein [the alleged victim] was struggling just to be able to breathe,”<sup>47</sup> Nifong went on to describe, and even gesture on national television, the details of the alleged rape, saying, “the evidence that she would present . . . is that she was grabbed from behind. So that in essence, somebody had an arm around her like this, which she then had to struggle with in order to be able to breathe, and it was in the course of that struggle that [her] fingernails—the artificial fingernails broke off.”<sup>48</sup> Nifong then stated that he expected to make a decision as to whether charges would be filed no sooner “than two weeks from today.”<sup>49</sup>

On more than one occasion, Nifong highlighted the racial aspect of the alleged rape. On March 29, Nifong was quoted in an article published on *ABCNews.com* as saying, “The circumstances of the rape indicated a deep racial motivation for some of the things that were done. It makes a crime that is by its nature one of the most offensive and invasive even more so.”<sup>50</sup> In a television interview a day later, Nifong said, “I still think that the racial slurs that were involved are relevant to show the mind-set, I guess, that was involved in this particular attack, and obviously, to make what is already an extremely reprehensible attack even more reprehensible.”<sup>51</sup> In comments given to the *News & Observer* on March 28, Nifong stated:

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44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *The Abrams Report*, *supra* note 9; Biesecker et al., *supra* note 15, at 16A (noting Nifong’s demonstration).

49. *The Abrams Report*, *supra* note 9.

50. Amended Complaint, *supra* note 32, para. 154; Motion to Dismiss and Answer, *supra* note 41, para. 154; Ahuja, *supra* note 19.

51. Biesecker et al., *supra* note 15, at 16A (quoting Nifong’s comments during an interview with Harry Smith of CBS’s *The Early Show* on March 30, 2006). *See also* Amended Complaint, *supra* note 32, paras. 160, 163; Motion to Dismiss and Answer, *supra* note 41, paras. 160, 163.



I would like to think that somebody who was not in the bathroom has the human decency to call up and say, “What am I doing covering up for a bunch of hooligans?” I’d like to be able to think that there were some people in that house that were not involved in this and were as horrified by it as the rest of us are.<sup>52</sup>

It is important to note that the above statements are merely a representative sample of Nifong’s damaging statements during the first few weeks the story broke.<sup>53</sup> Nifong granted interviews to scores of local and nationally distributed print and television outlets.<sup>54</sup> The media disseminated the statements worldwide on television, in the newspaper, and on the Internet.<sup>55</sup>

### B. *The Impact on the Indicted Players’ Reputations*

This “fiasco” severely damaged the reputations of the three indicted Duke lacrosse players.<sup>56</sup> Although such a conclusion is easy to reach, it is difficult to pinpoint the source of the harm: was the damage caused by the indictment itself or the numerous press interviews Nifong granted during the early stages of the case? While it is certain that Nifong’s decision to indict the players harmed their reputations, his numerous discussions with the media, as well as the substance of the discussions, magnified the damage to the reputations of the three indicted players.

To appreciate the volume of media attention given to this case, consider the following. Before these accusations became the subject of a media firestorm, the names Collin Finnerty, Reade Seligmann, and Dave Evans meant nothing to most Americans. In fact, a Google search of the names would most likely have turned up nothing more than their picture and athletic profile from the Duke lacrosse website, along with any high school sports coverage they may have received by their hometown media. Today, however, the names of the three players are forever associated with the word “rape.” Searches in the Westlaw “All News” database using the terms “Duke,” “rape,” “lacrosse,” and each player’s last name revealed an astonishing number of articles. As of

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52. Biesecker et al., *supra* note 15, at 16A (quoting Nifong’s March 28, 2006, comments to the *News & Observer*); see also Amended Complaint, *supra* note 32, para. 137; Motion to Dismiss and Answer, *supra* note 41, para. 137.

53. See, e.g., Amended Complaint, *supra* note 32; Motion to Dismiss and Answer, *supra* note 41.

54. See Julia Lewis, *Journalists Discuss Media’s Coverage of Duke Lacrosse Rape Case*, WRAL.COM, Oct. 20, 2006, <http://www.wral.com/news/local/story/1087983>.

55. Bradley, *supra* note 8; see also Amended Findings of Fact, Conclusions of Law, and Order of Discipline paras. 19, 31, 39, North Carolina State Bar v. Nifong, No. 06 DHS 35 (Disciplinary Hearing Comm’n of N.C. July 24, 2007) [hereinafter Amended Findings of Fact, Conclusions of Law, and Order of Discipline].

56. Transcript of Hearing at 16–22, North Carolina State Bar v. Nifong, No. 06 DHC 35 (Disciplinary Hearing Comm’n of N.C. June 16, 2007) [hereinafter Hearing Transcript].

January 10, 2007, 845 news pieces contained the above terms associated with the name Evans, 1,234 news pieces contained the above terms and the name Finnerty, and 1,310 news pieces contained the above terms and the name Seligmann.<sup>57</sup> Between the dates of Nifong's first interview on March 27, 2006, and the indictments of the first two players on April 17, 2006—the period when Nifong gave his initial version of the events without any notable retort by defense attorneys—963 news pieces contained the terms “Duke,” “lacrosse,” and “rape” in the same sentence.<sup>58</sup> Again, that is 963 print news pieces stored in this database alone during a twenty-two day period. Furthermore, an October 20, 2006, a news piece—printed nearly seven months after the story broke—stated that Duke University estimated that there were “nearly 75,000 stories done on the lacrosse case.”<sup>59</sup> The sheer volume of news pieces during the above periods shows the ubiquity of the media coverage.

Clearly, this reportage shaped the reputations of the indicted players in the minds of the public. “Reputation” is defined as “[t]he esteem in which a person is held by others.”<sup>60</sup> In essence, the status of one's reputation depends upon the perception of others. Our perceptions of strangers are heavily influenced by the depiction of the individuals in the news media and the opinions and actions of those who seem to have access to “the facts.” In this case, Nifong's pre-indictment statements were particularly harmful to the reputations of the accused because Nifong is a public official whom the public assumes is familiar with, and has special access to, the facts that led to the indictment; the prosecutor is in a unique position that makes him appear to be a particularly trustworthy source of information.<sup>61</sup> This apparently trustworthy source expressed with absolute certainty that these crimes not only occurred, but were racially motivated.<sup>62</sup> Consequently, when Nifong made the statements, some of which are detailed above, the public and the media alike gave the statements significant weight when forming their opinions and framing their coverage of the players.<sup>63</sup>

57. Finnerty, Seligmann & Evans, Westlaw searches (Jan. 10, 2007) (on file with author).

58. Pre-indictment Westlaw search (Jan 10, 2007) (on file with author).

59. Lewis, *supra* note 54.

60. BLACK'S LAW DICTIONARY 1331 (8th ed. 2004).

61. N.C. RULES OF PROF'L CONDUCT R. 3.8 cmt. 6 (2006); *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1074–75 (1991); *Attorney Grievance Comm'n of Maryland v. Gansler*, 835 A.2d 548, 559 (Md. 2003).

62. See Gary L. Wright, *Lawyer: Try to Imagine the Pain*, CHARLOTTE OBSERVER, Jan. 27, 2007, at 1B, 2B.

63. An ironic illustration of the proposition that the media and the public give great weight to the assertions of those with access to the facts is found in commentary regarding the ethics complaint filed against Nifong. In discussing the severity of the ethics charges filed against Nifong, Rufus Edmisten, a former Attorney General of North Carolina, used the preliminary actions of the State Bar as evidence that a violation had occurred, stating “[w]hen you have a conservative organization like the North Carolina State Bar alleging that someone got up to the

Furthermore, the timing of Nifong's public comments was particularly harmful to the reputations of the accused. Nifong's interviews, which drove the media coverage, came at a time when there were no indictments or suspects identified by name, although Nifong did indicate that he believed lacrosse players were the perpetrators.<sup>64</sup> Consequently, while Nifong was espousing his version of the facts, and sometimes potential facts,<sup>65</sup> no one was in position to rebut his assertions. Thus, much of what he said to the media went unchallenged and was accepted as fact. Because Nifong made his public comments regarding those who would later be indicted before they were identified, the media presented a one-sided view of the alleged incident that went largely unchallenged by advocates from the other side.<sup>66</sup> Some may argue that the reputations of the players were damaged by the indictment and therefore the prosecutor's comments are irrelevant vis-à-vis their reputations. This argument, however, fails to consider that one's reputation has multiple components. The obvious component is how others perceive the individuals in question. Another component is the number of people aware of the information that negatively impacted their reputations. While an indictment necessarily harms an individual's reputation, it is a one-time, or in this case two-time, event that causes a spike in media coverage that soon dies down until new developments to report or discuss arise.

In this case, however, Nifong granted interview after interview with numerous press organizations, which created an atmosphere with new developments each day, and sometimes each hour. By granting, by some estimates, over fifty interviews in the first few days after the incident garnered public attention, Nifong was essentially creating news by answering the reporters' questions.<sup>67</sup> His continuous flow of statements, which sometimes contained pure speculation about what "may" have happened, gave print and television news new material that allowed them to rehash the lurid details of the incident over and over again.<sup>68</sup> If Nifong refused to grant the numerous interviews and refrained from speculating about details that had yet to be fully investigated, the media coverage would have been more subdued, and

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line and crossed over the line, it's pretty strong evidence that something occurred that should not have occurred." Jim Avila & Lara Setrakian, *The Prosecutor's Defense—Lawyer for Ex-Duke Prosecutor Nifong Speaks Out*, ABCNEWS.COM, Jan. 25, 2007, <http://abcnews.go.com/US/LegalCenter/story?id=2821711>.

64. See *The Abrams Report*, *supra* note 9.

65. *Id.*

66. Wright, *supra* note 62, at 2B ("There is little question that, fueled by the district attorney's comments and focused on the theme of 'privileged white males vs. poor black female,' a feeding frenzy developed among the media with one commentator after another competing to outdo each other in their condemnation [of the accused].").

67. Niolet & Blythe, *supra* note 14.

68. See *The Abrams Report*, *supra* note 9.

therefore, fewer individuals would be aware of the damaging information. If a smaller amount of the public at large was aware of the damaging information, the damage to the reputations of the players would be less severe. In summary, Nifong made numerous statements to the press in the early days of the investigation in which he expressed certainty that a rape had occurred and indicated the perpetrator was a Duke lacrosse player. He made other statements describing and sometimes speculating as to how the alleged attack occurred. Nifong also highlighted the racial aspects of the case. These statements prompted frenzied media coverage, giving the media new news to report with each interview and speculative comment. While the indictment harmed the reputations of the indicted individuals, Nifong's repeated comments were the driving force behind the continuous airplay of the story. The continuous coverage resulted in more people hearing about the alleged horrific acts and thus compounded the reputational damage to the three accused of rape.

## II. POTENTIAL REPUTATIONAL PROTECTIONS AVAILABLE TO THE ACCUSED

Since Mike Nifong's public comments caused extensive damage to the reputations of the indicted players, the next question is what recourse is available to these players and other individuals victimized by a prosecutor's improper extrajudicial statements? This discussion of the available remedies is limited to those that provide recourse for the reputational damage sustained. This Part discusses the relevant provisions of the North Carolina Rules of Professional Conduct and their applicability to Nifong's extrajudicial statements, as well as the ability of these provisions to remedy damage inflicted by a prosecutor's impermissible extrajudicial statements. This Part also addresses the issues regarding a defamation suit individuals may want to bring against a prosecutor who makes damaging public statements aimed at those accused of notorious crimes.

### A. *North Carolina's Rules of Professional Conduct*

On December 28, 2006, the North Carolina State Bar filed an ethics complaint against Mike Nifong, alleging that many of the above statements, along with others cited in the complaint, which was subsequently amended on January 24, 2007, were made in violation of North Carolina Rules of Professional Conduct Rules 3.6(a) and 3.8(f).<sup>69</sup> On July 24, 2007, the North Carolina State Bar found that Mike Nifong had, among other things, violated Rule 3.8(f) and determined that Nifong should be disbarred for his numerous

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69. Amended Complaint, *supra* note 32, paras. 178–81. Nifong was also charged with violating other provisions of the North Carolina Rules of Professional Conduct. *Id.* para. 291.

violations of various North Carolina ethics provisions.<sup>70</sup> This section briefly examines the First Amendment issues that arise when regulating a lawyer's speech, then applies the relevant portions of Rule 3.8 of North Carolina's Rules of Professional Conduct to Nifong's statements.<sup>71</sup> Next, it examines whether a finding that a prosecutor violated ethics rules is a viable reputational remedy. Lastly, this section explores a specific provision of Rule 3.6 that could potentially provide significant protection to the accused.

### 1. Does the State Have the Power to Regulate a Lawyer's Speech?

As a preliminary matter, the question of whether a prosecutor's statements are protected by the First Amendment must be resolved. The Supreme Court addressed that question in *Gentile v. State Bar of Nevada*.<sup>72</sup> In *Gentile*, the Court recognized the state's right, under certain circumstances, to regulate lawyer speech both inside and outside the courtroom.<sup>73</sup> However, when a state's regulation implicates First Amendment concerns, the attorney's rights must be weighed against the state's legitimate interest in limiting the speech; in this case, the state has an interest in protecting the fundamental right "to a fair trial by 'impartial' jurors."<sup>74</sup>

The ethics rule at issue in *Gentile* allowed the state to limit the speech of an attorney where there was a "substantial likelihood that his statements would materially prejudice the trial of his client."<sup>75</sup> The Court determined that the "substantial likelihood" test is a constitutionally permissible standard for balancing the attorney's First Amendment right with the state's interest in "protect[ing] the integrity and fairness of [the] State's judicial system" because "it imposes only narrow and necessary limitations on lawyers' speech."<sup>76</sup>

The limitation is sufficiently narrow because it applies only to speech that is substantially likely to materially prejudice the proceedings, it applies equally

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70. Amended Findings of Fact, Conclusions of Law, and Order of Discipline, *supra* note 55, para. 117, at 20, 24.

71. Although the North Carolina State Bar found that Nifong did in fact violate Rule 3.8(f), they did not provide an in-depth analysis. *Id.* para. 117, at 20.

72. 501 U.S. 1030 (1991).

73. *Id.* at 1071–73. Specifically, the Court noted that in the courtroom, it is "unquestionable" that an attorney's right to free speech is "extremely circumscribed." *Id.* at 1071. With respect to regulating speech outside the courtroom, the Court cited decisions where ethics regulations prohibiting lawyers from soliciting business and advertising were not defeated by the First Amendment. *Id.* at 1073; *see, e.g.*, *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 620 (1995) (upholding thirty day ban of solicitation letters by personal injury lawyers); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 468 (1978) (upholding prohibition on in-person solicitations by an attorney).

74. *Gentile*, 501 U.S. at 1075.

75. *Id.* at 1062.

76. *Id.* at 1075.

to both sides, and it merely postpones the speech until the end of the trial.<sup>77</sup> These limitations focus on two major “evils”: “comments that are likely to influence the outcome of the trial” and “comments that are likely to prejudice the jury venire . . . .”<sup>78</sup> Because the rule protects the fundamental right to a fair trial by an impartial jury and only places narrow limitations on the attorney’s right to free speech, the rule is constitutionally permissible.<sup>79</sup>

Furthermore, the Supreme Court has recognized that prosecutors, who are employees of the state, do not enjoy the same broad First Amendment freedoms as are guaranteed to ordinary citizens.<sup>80</sup> In an employer-employee relationship, “the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.”<sup>81</sup> Thus, prosecutors’ status as attorneys, coupled with their employer-employee relationships with the state, makes their First Amendment rights to freedom of speech subject to curtailment by ethics regulations.

## 2. Nifong’s Violation of North Carolina’s Rule 3.8(f)

When analyzing the Rules of Professional conduct, in North Carolina or elsewhere, there are multiple sources that aid with the interpretation of the rules. These sources include, among other things, court decisions that address the rules, ethics opinions issued by state bar associations, the *Restatement (Third) of the Law Governing Lawyers*, and any legislative history.<sup>82</sup> While North Carolina cases would be helpful when interpreting the North Carolina rules, attorney discipline cases discussing 3.8(f) are rare.<sup>83</sup> Cases discussing provisions resembling North Carolina’s Rule 3.8(f) in other jurisdictions are equally rare.<sup>84</sup> An exhaustive search of ethics opinions and cases in various jurisdictions, as well as an examination of the Restatement and the history of the development of the Model Rules of Professional Responsibility—the foundation for North Carolina’s Rule 3.8(f)—revealed little helpful analysis

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77. *Id.* at 1076.

78. *Id.* at 1075.

79. *Gentile*, 501 U.S. at 1075.

80. *Attorney Grievance Comm’n of Maryland v. Gansler*, 835 A.2d 548, 573 n.21 (Md. 2003) (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968)).

81. *Id.* (quoting *Pickering*, 391 U.S. at 568).

82. THOMAS D. MORGAN & RONALD D. ROTUNDA, *PROFESSIONAL RESPONSIBILITY* 13 (9th ed. 2006).

83. 4 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE & PROCEDURE* § 20.25 (3d ed. 1999).

84. The only case that could be found that discusses, albeit briefly, Rule 3.8(f) is *In re Gansler*, which is a reciprocal discipline case. 889 A.2d 285 (D.C. 2005).

regarding Rule 3.8(f).<sup>85</sup> While the North Carolina State Bar recently found that Nifong violated Rule 3.8(f), the published findings do not provide an in-depth legal analysis; rather, it provides findings of facts and the conclusion that Nifong did in fact violate Rule 3.8(f).<sup>86</sup> Since helpful authority on point is rare, this analysis will rely heavily on the rule and the accompanying comment.

Rule 3.8, which details the special responsibilities of a prosecutor, provides in pertinent part:

The prosecutor in a criminal case shall:

...

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused . . . .<sup>87</sup>

Paragraph (f), above, is intended to supplement Rule 3.6, which seeks to prohibit extrajudicial statements that have a "substantial likelihood of prejudicing an adjudicatory proceeding."<sup>88</sup> This paragraph of the North Carolina Rules recognizes that in a criminal prosecution, the prosecutor's statements have an impact on the public's opinion of the accused.<sup>89</sup> The prosecutor's position as a public official gives him heightened visibility; thus, the prosecutor's statements are likely to reach a large audience and, depending on the nature of the comments, could "increas[e] public opprobrium of the accused."<sup>90</sup> Although the indictment of a suspect almost certainly brings about some level of public condemnation of the accused, the prosecutor should temper his or her statements so as to minimize any unfair and unnecessary condemnation before the trial.<sup>91</sup>

85. While it is difficult to prove that little authority exists, a look at Morgan & Rotunda's PROFESSIONAL RESPONSIBILITY textbook highlights the struggle to find authority. A glance at the Table of Statutes shows that MODEL RULES OF PROF'L CONDUCT R. 3.8(f) was referenced on only three pages—482, 487, and 489—in a text book containing over 707 pages of material. MORGAN & ROTUNDA, *supra* note 82, at xlvii. A closer look at the aforementioned referenced pages shows the rule is mentioned in a total of four sentences, one of which simply directs the reader to "[s]ee Model Rule 3.8(f)," see *id.* at 482, and two others simply pose questions to the reader, *id.* at 487, 489.

86. See Amended Findings of Fact, Conclusions of Law, and Order of Discipline, *supra* note 55, para. 117, at 20.

87. N.C. RULES OF PROF'L CONDUCT R. 3.8(f) (2006).

88. *Id.* at R. 3.8(f) cmt. 6.

89. *Id.*

90. *Id.*

91. *Id.*; see also STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 253 (2005).

Despite the lack of guidance beyond the rule and comment, given the inflammatory nature of Nifong's statements, the North Carolina State Bar found that Nifong violated Rule 3.8(f).<sup>92</sup> Nifong's statements, highlighted above,<sup>93</sup> certainly heightened the disgrace of the accused in the eyes of the public.<sup>94</sup> While, as the comment following Rule 3.8 predicts, the players suffered significant public disgrace from the indictment, Nifong's colorful comments, particularly those which highlighted the racial motivation behind the rape, fanned the flames of public outrage.<sup>95</sup>

The complaint filed by the North Carolina State Bar supports the claim that Nifong's racially charged statements heightened public outrage toward the accused. In the complaint filed by the North Carolina State Bar, the organization set forth twelve specific statements that Nifong made that were alleged to have violated Rule 3.8(f).<sup>96</sup> While the statements in violation of Rule 3.8(f) are "not limited to" those presented in the complaint, of the statements the Bar chose to include, half of the statements contained a reference to the racial motivation behind the alleged rape.<sup>97</sup> In finding that Nifong violated Rule 3.8(f), the State Bar specifically noted at least four separate racially charged statements Nifong made during the early stages of the investigation.<sup>98</sup>

Nifong significantly added to the public disgust of the indicted Duke lacrosse players by continuously highlighting the race issue. Thankfully, most modern societies recognize that racially motivated hatred is deplorable. In fact, many states have codified this recognition by enhancing punishments for

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92. Amended Findings of Fact, Conclusions of Law, and Order of Discipline, *supra* note 55, para. 117, at 20.

93. *See supra* Part I.B.

94. Amended Findings of Fact, Conclusions of Law, and Order of Discipline, *supra* note 55, para. 117, at 23.

95. N.C. RULES OF PROF'L CONDUCT R. 3.8(f) cmt. 6 (2006). The defense attorney for Seligmann noted that the district attorney's certainty and his insistence that the crime was racially motivated were such that "even casual viewers could not help but be outraged." Wright, *supra* note 62, at 2B.

96. *See* Amended Complaint, *supra* note 32, paras. 142–78; *see, e.g., supra* text accompanying notes 50–51.

97. Amended Complaint, *supra* note 32, paras. 142, 145, 151, 154, 160, 175. It is important to note that there were reports of racial slurs being shouted at the dancers as they left the party. Samiha Khanna & Anne Blythe, *Dancer Gives Details of Ordeal*, NEWS & OBSERVER, Mar. 25, 2006, at 1A, 16A. In fact, the accuser herself told investigators that racial slurs were being used during the alleged rape. *Duke Accuser's Contradictory Statements*, ABCNEWS.COM, Jan. 11, 2007, <http://abcnews.go.com/US/LegalCenter/story?id=2787914>. However, because there were numerous individuals at the party, and no specific individual was identified as shouting the horrific remarks as the women left the party, it is unfair to make the indicted players the face of the unidentified racist voice.

98. Amended Findings of Fact, Conclusions of Law, and Order of Discipline, *supra* note 55, paras. 23, 29, 31, 32.



crimes that are *proven* to be racially motivated.<sup>99</sup> A necessary consequence of society's welcomed recognition, however, is that anyone accused of a racially motivated crime is immediately subjected to intense public condemnation, as was the case with the Duke lacrosse players, who were the subject of almost daily neighborhood protests, which occurred before any indictments were issued.<sup>100</sup> Because these allegations of a racially motivated gang rape were communicated to the public via the prosecutor himself, the public all but accepted the detailed allegations as true.<sup>101</sup> Consequently, Nifong's statements provoked unusually vocal and protracted public condemnation to the extent rarely seen following similar accusations.

While the racially charged statements, along with the others mentioned above, served to heighten the public condemnation of the accused, the statements are not in violation of Rule 3.8(f) if the statements are "necessary to inform the public of the nature and extent of the prosecutor's action" or if they "have a legitimate law enforcement purpose."<sup>102</sup> The exceptions in Rule 3.8(f) seem to be broad descriptions of the specific safe harbor provision articulated in Rule 3.6(b).<sup>103</sup> Because many, if not all, of the specifically permitted statements in 3.6(b) seem to fall under the broad heading of either statements "necessary to inform the public of the nature . . . of the prosecutor's action" or statements that "serve a legitimate law enforcement purpose,"<sup>104</sup> and the comment following Rule 3.8 specifically states that the rule is not intended to limit the prosecutor from making any of the statements permitted in the safe harbor provision in 3.6(b),<sup>105</sup> the applicable provisions of 3.6(b) provide guidance as to what type of statements fall under the categorical exceptions listed in Rule 3.8(f).

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99. See N.C. GEN. STAT. ANN. § 14-3 (2005). Which instance Nifong was referring to during his public statements—either the slurs used during the rape or the media reports of the slurs being used when the dancers left the house—is considered below. See *infra* text accompanying notes 131–41.

100. Wright, *supra* note 62, at 16A; *Two Duke Players Indicted by Grand Jury*, MSNBC.COM, Apr. 17, 2006, <http://www.msnbc.msn.com/id/12289760>.

101. See *60 Minutes Interview with President Brodhead*, DUKE UNIVERSITY NEWS & COMMUNICATIONS, Dec. 13, 2006, [http://www.dukenews.duke.edu/2006/12/60\\_minutes.html](http://www.dukenews.duke.edu/2006/12/60_minutes.html). Referring to statements made by Nifong early in the investigation, Duke President Richard Brodhead said, "Well, at the time the statements were made, I had no way of knowing anything other than the fact that they must be true . . . . [T]hat helped to create the climate at the beginning in which an awful lot of people were absolutely certain that these kids had done this deed." *Id.*

102. N.C. RULES OF PROF'L CONDUCT R. 3.8(f) (2006).

103. See *id.* R. 3.6(b).

104. See *id.* R. 3.6(b), 3.8(f).

105. See *id.* R. 3.8(f) cmt. 6.

Rule 3.6, which governs trial publicity, provides in pertinent part:

- (b) Notwithstanding paragraph (a), a lawyer may state:
  - (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
  - (2) the information contained in a public record;
  - (3) that an investigation of a matter is in progress;
  - (4) the scheduling or result of any step in litigation;
  - (5) a request for assistance in obtaining evidence and information necessary thereto;
  - (6) a warning of danger concerning the behavior of a person involved, when there is a reason to believe that there exists the likelihood of a substantial harm to an individual or to the public interest; and
  - (7) in a criminal case, in addition to subparagraphs (1) through (6):
    - (A) the identity, residence, occupation and family status of the accused;
    - (B) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
    - (C) the fact, time and place of arrest; and
    - (D) the identity of investigating and arresting officers or agencies and the length of the investigation.<sup>106</sup>

Nifong's statements do not fall within any of the safe harbor provisions listed in Rule 3.6(b). While the statements listed in the safe harbor provision are "not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement,"<sup>107</sup> they provide a good idea as to what the North Carolina Bar considers permissible public commentary on an ongoing judicial proceeding.

As a starting point, the first safe harbor provisions considered will be those Nifong himself believes shield him from a finding of wrongdoing. During a news conference in July of 2006, Nifong is reported to have explained that his

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106. *Id.* R. 3.6. As an illustration of the above contention that most of the statements permitted in Rule 3.6(b) fall within the broad headings of statements that are necessary to inform the public of the prosecutor's action and statements that serve a legitimate law enforcement purpose, consider the following breakdown: statements necessary to inform the public of the prosecutor's actions are excepted in R. 3.6(b)(1), (3), (4), (7)(C), (7)(D); and statements that serve a legitimate law enforcement purpose are excepted in R. 3.6(b)(5), (6), (7)(A), (7)(B).

107. N.C. RULES OF PROF'L CONDUCT R. 3.6 cmt. 4 (2006).

public comments were intended to “inform the public that an investigation was in progress and to encourage cooperation from witnesses,” apparently referring to Rule 3.6, paragraphs (b)(3) and (b)(5), respectively.<sup>108</sup> In Nifong’s Motion to Dismiss and Answer to the Complaint filed against him by the State Bar, he claimed that he was attempting to “reassure the community that the case was being actively investigated” and “obtain assistance in receiving evidence and information necessary to further the criminal investigation.”<sup>109</sup> While anyone who read or heard Nifong’s statements could gather that an investigation was in progress, Nifong’s statements went well beyond the bounds of the safe harbor by speculating as to the details of the rape, the racial aspect of the rape, and on and on.<sup>110</sup> Not only did he inform the public that an investigation was ongoing, he gave a prediction, expressed with absolute certainty, as to how it would conclude.<sup>111</sup> Moreover, while Nifong may have thought his statements would encourage cooperation, publicly branding the lacrosse players “a bunch of hooligans” who were ignoring a rape just to protect one of their own must, by any reasonable interpretation, be deemed to have gone beyond the scope of permissible commentary, as contemplated by the safe harbor provision.<sup>112</sup>

Even if some of Nifong’s statements were deemed to fall within the safe harbor allowing a prosecutor to elicit cooperation of witnesses, many would not.<sup>113</sup> Nifong would be hard pressed to explain how his detailed speculation as to how the rape may have occurred, his explanation of how the absence of physical evidence could be explained away, his highlighting of the racial aspect of the attack, and his implication that the subjects of the investigation were lying to the police could accomplish such a goal in a manner consistent with the Rule.<sup>114</sup> Even if Nifong was trying to convince witnesses to come forward and provide information, as he claimed, the safe harbor does not sanction the use of any tactics the prosecutor deems necessary to accomplish such a goal. For example, Comment 5 following Rule 3.6 gives examples of some statements by a prosecutor that are more likely than not to violate Rule 3.6.<sup>115</sup> One such statement would be a prosecutor’s public expression of “any

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108. Joseph Neff, Anne Blythe & Benjamin Niolet, *DA’s Critics Ask Bar, Feds to Intervene*, NEWS & OBSERVER, Dec. 3, 2006, at 1A, 8A.

109. Motion to Dismiss and Answer, *supra* note 41, para. 10.

110. *See supra*, Part I.A.

111. *Id.*

112. *See supra* text accompanying note 52.

113. Nifong’s defense that he was encouraging the cooperation of witnesses as permitted under Rule 3.6(b)(5) and the potential defense that, in a criminal case, the prosecutor may make statements necessary to “aid in the apprehension” of the accused under Rule 3.6(b)(7)(B) are so similar that both are negated in the same analysis. *See supra* note 108.

114. *See supra* Part I.A.

115. N.C. RULES OF PROF’L CONDUCT R. 3.6 cmt. 5 (2006).

opinion as to the guilt or innocence of a defendant.”<sup>116</sup> While the prosecutor’s public declaration of his opinion of the suspect’s guilt would go a long way to securing witnesses to come forward and provide evidence to secure a conviction against the suspect, the comment following the rule cites such a statement as an example of a likely violation of the rule: a recognition that the safe harbor does not cover *any* statement, so long as it was intended to accomplish the goal of obtaining assistance in securing evidence. Thus, many of Nifong’s statements, as outlined above, would not fall under the safe harbor provision allowing an attorney to obtain assistance in gathering information about the crime, just because Nifong claims that was the desired result of his comments. The North Carolina State Bar recognized that Nifong’s comments did not fall within the aforementioned safe harbors by finding that he violated Rule 3.8(f) of the North Carolina Rules of Professional Conduct.

Nifong further defended himself by claiming that his public statements concerned information contained in a public record and are thus protected by the safe harbor provision of Rule 3.6.<sup>117</sup> While there are no North Carolina cases discussing the public record exception in Rule 3.6, the Court of Appeals of Maryland discussed a similar exception found in the Maryland Rules of Professional Conduct.<sup>118</sup> In *Attorney Grievance Commission of Maryland v. Gansler*, the court determined that there was no settled definition of “information contained in a public record” because of the widely disparate meanings given to the phrase in various Maryland statutes.<sup>119</sup> Because there was no clear guidance as to what was “information in a public record” before the *Gansler* case, the court gave the phrase “its broadest form” for the purposes of evaluating Gansler’s statements.<sup>120</sup> The court’s broad interpretation defined “information contained in a public record” as “anything in the public domain, including public court documents, media reports, and comments made by police officers.”<sup>121</sup> However, going forward, the court significantly narrowed the definition by limiting “information in a public record” to “public government records—the records and papers on file with a government entity to which an ordinary citizen would have lawful access.”<sup>122</sup>

In North Carolina, it is difficult to say whether there is a settled definition of “information in a public record.” Chapter 132 of North Carolina’s General Statutes, titled “Public Records,” defines public records as “all documents . . . made or received pursuant to law . . . in connection with the transaction of

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116. *Id.*

117. *See id.* R. 3.6(b)(2); Motion to Dismiss and Answer, *supra* note 41, para. 10.

118. *Attorney Grievance Comm’n of Maryland v. Gansler*, 835 A.2d 548, 559 (Md. 2003).

119. *Id.* at 566–67.

120. *Id.* at 567.

121. *Id.*

122. *Id.* at 569.

public business by any agency of North Carolina government.”<sup>123</sup> While this definition seems to be more in line with the narrower interpretation given by the Maryland Court of Appeals, because there is no authority specifically addressing the language in Rule 3.6 in North Carolina, Nifong will receive the benefit of the broader definition for the purpose of this analysis.

Even if Nifong is given the protection of the broad definition of “information in a public record,” his most damaging comments are not protected by the safe harbor provision. At the time Nifong made his statements, the public record included any information reported by the media regarding the case, the search warrant authorizing the Durham Police to search the residence where the alleged rape occurred, and the Nontestimonial Identification Order (NTO), which provided the basis for the gathering of DNA from the Duke lacrosse players.<sup>124</sup> While the public record safe harbor typically provides an exception “big enough to drive a tractor trailer through” because the prosecutor can include great detail concerning the crime in the indictment—a document that is part of the public record—since Nifong’s comments came before an indictment was issued, this exception provides considerably less protection.<sup>125</sup>

The contents of the search warrant and NTO are insufficient to place Nifong’s comments under the umbrella of the public records exception. The search warrant contains a brief description of the alleged rape.<sup>126</sup> This description does not contain any references to race or a racial motivation behind the attack.<sup>127</sup> In fact, after reading the warrant, it is impossible to tell the racial makeup of either the alleged attackers or the victim.<sup>128</sup> Therefore, since the search warrant does not contain *any* reference to race, let alone the conclusion that the attack was racially motivated, the contents of the search warrant are insufficient to place Nifong under the protection of the public record safe harbor. While the NTO contains a more detailed description of the alleged attack and it references the accuser as a “black female” and the attackers as “white male[s],” there is no indication, either explicitly or implicitly, that this alleged attack was motivated by race.<sup>129</sup> Because there is

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123. N.C. GEN. STAT. ANN. § 132-1 (2006).

124. See Search Warrant, *supra* note 35; Application for Nontestimonial Identification Order (N.C. Super. Ct., Mar. 23, 2006) (on file with author) [hereinafter Nontestimonial Identification Order]. At the time of Nifong’s initial statements, these were the only court filings that contained specific information relating to the alleged attack.

125. 4 ROTUNDA & NOWAK, *supra* note 83; see also *supra* notes 14, 38 and accompanying text (Nifong made his first public comments on March 27, 2006, and issued the first indictments on April 17, 2006).

126. Search Warrant, *supra* note 35, at 4.

127. See *id.*

128. See *id.*

129. See Nontestimonial Identification Order, *supra* note 124.

no reference to a racial motivation behind the alleged attack in either the search warrant or the NTO, neither of the publicly filed documents provide the basis for Nifong's claim that his statements regarding the racial motivation behind the rape, which happened to be among the most damaging to the reputations of the accused, were protected by the public record exception.<sup>130</sup>

The contents of the various media reports are likewise insufficient to grant Nifong the protection of the public record safe harbor. Although there were media reports that some unidentified individual or individuals made racial slurs as the women exited the house on the night in question, Nifong's comments were so expansive that they should not be shielded by the safe harbor. On March 25, 2006, a few days before Nifong's first comments, one media outlet reported that a neighbor recalled "one guy" yelled "[t]hank your grandpa for my cotton shirt . . . ."<sup>131</sup> Other media outlets played a 9-1-1 call during which someone reported that "there's . . . a white guy" who shouted a racial slur.<sup>132</sup> If Nifong made comments along the lines of, "some of the people at the house shouted racial epithets, which is deplorable conduct" or "such use of hateful language by someone at that house is conduct that should be condemned by all," the safe harbor would clearly apply because the comments would be discussing information already available to the public.<sup>133</sup>

Nifong's statements went well beyond discussing what was in the public record by commenting on the supposed racial hatred involved in the alleged rape itself. As noted above, the media reported that someone shouted racial epithets from the house. The individual was never identified and there were, by Nifong's estimation, over forty people at the party.<sup>134</sup> Nifong's public comments referred to the racial aspect of the *rape*, not the comments made by an unidentified partygoer.<sup>135</sup> The racial aspect of the alleged rape that Nifong was referring to becomes abundantly clear when one reads a police investigator's account of the accuser's statement given on March 16, 2006, over a week before Nifong made his first public statements regarding the case.<sup>136</sup> The accuser told the investigator that the three men who raped her "were all chanting or repeatedly saying 'fuck this nigger bitch.'"<sup>137</sup> It is this account by the accuser, which identifies the alleged rapists as using the slurs

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130. See Motion to Dismiss and Answer, *supra* note 41, para. 10.

131. Khanna & Blythe, *supra* note 97, at 16A. To ensure there is no misunderstanding, the Author personally condemns the use of such horrific language. The idea that some people in this country still harbor such hateful feelings toward others is pathetic and unfortunate.

132. *The Abrams Report*, *supra* note 9.

133. See N.C. RULES OF PROF'L CONDUCT R. 3.6(b)(2) (2006).

134. *The Abrams Report*, *supra* note 9.

135. See Amended Complaint, *supra* note 32, paras. 151–75; Motion to Dismiss and Answer, *supra* note 41, paras. 151–75.

136. See *Duke Accuser's Contradictory Statements*, *supra* note 97.

137. *Id.*

during the attack, which would lead Nifong to conclude that “[t]he circumstances of the rape indicated a deep racial motivation for some of the things that were done” or that “[t]he racial slurs involved are relevant to show the mindset . . . involved in this particular attack.”<sup>138</sup> The accuser’s statement, given to the police investigator on March 16, had not been revealed to the media when Nifong made the public statements highlighting the racial motivation behind the alleged attack.<sup>139</sup> Therefore, because Nifong made the statements regarding the racial aspect of the rape during media interviews, and this information was not part of the public record, the statements are not protected by the public record safe harbor in Rule 3.6(b).

Lastly, Nifong could have argued that his statements were really meant to warn the community of the danger posed to them by those involved in this attack, thereby giving him the protection of Rule 3.6(b)(6).<sup>140</sup> This argument would have certainly failed. A survey of some of the interviews granted by Nifong and the scores of media accounts of these interviews shows that a warning to the community is conspicuously absent. If Nifong intended to warn the community of a significant danger posed to it, one would think he would have actually communicated some sort of warning during his statements. Furthermore, at the time Nifong made many of the statements, he had not yet specifically identified any suspects; rather, he communicated that the suspects were forty or so Duke lacrosse players that attended the party.<sup>141</sup> Given the substance of Nifong’s interviews, he would have a difficult time convincing the State Bar that he was intending to warn the public of a small group of possibly dangerous individuals, whose identities had yet to be ascertained.

Since most of Nifong’s extrajudicial statements are not protected by the safe harbor in Rule 3.6, they should also be deemed to fall outside the exceptions found in 3.8(f): statements necessary to inform the public of the prosecutor’s actions and statements that serve a legitimate law enforcement purpose.<sup>142</sup> The exceptions in 3.8(f) are broad categorical exceptions, and the safe harbor in 3.6 contains many permissible statements, which seem to be examples of statements or the type of statements that are permissible under the exceptions outlined in Rule 3.8. Using the safe harbor in Rule 3.6 to analyze the exceptions in 3.8(f) may be creative, but it is the best authority available

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138. Amended Complaint, *supra* note 32, at paras. 154, 160; Motion to Dismiss and Answer, *supra* note 41, paras. 154, 160.

139. Nifong uttered the above quoted statements in March of 2006, Amended Complaint, *supra* note 32, paras. 156, 162, or as late as April 3, 2006, according to Nifong, Motion to Dismiss and Answer, *supra* note 41, paras. 156, 162.

140. It does not appear that he actually made this argument. See Motion to Dismiss and Answer, *supra* note 41.

141. *The Abrams Report*, *supra* note 9.

142. N.C. RULES OF PROF’L CONDUCT R. 3.8(f) (2006).

given the dearth of material discussing Rule 3.8(f).<sup>143</sup> Furthermore, since Rule 3.8 contains the phrase “special Responsibilities of a Prosecutor,” the comment following Rule 3.8 states that paragraph (f) is meant to supplement Rule 3.6, and the comment states that Rule 3.8(f) is not meant to limit the safe harbor’s scope, there is certainly a close relationship between the two rules.<sup>144</sup> Because Nifong’s statements heightened the public condemnation of the accused and they did not fall within the safe harbor in Rule 3.6—and thus should not be covered by the exceptions in 3.8(f)—Nifong’s extrajudicial statements are a violation of Rule 3.8 of North Carolina’s Rules of Professional Conduct.<sup>145</sup>

### 3. How Is a Violation of This Rule a Cure for Reputational Damage?

Under certain circumstances, violations of ethics rules provide a reputational remedy in the form of positive publicity. Generally, when the North Carolina State Bar files an ethics complaint against a prosecutor, it calls the prosecutor’s credibility into question. By filing the complaint, the bar in essence communicates to the public that the prosecutor has not played by the rules.<sup>146</sup> Ideally, the media will publicize the complaint and the ultimate findings. This negative publicity calls into question the prosecutor’s reliability as a trustworthy source, thereby causing the citizenry, who relied on his statements and actions when forming their opinion as to the guilt of the accused,<sup>147</sup> to question the legitimacy of that position. If the complaint or ultimate finding causes the public to view the prosecutor as corrupt or driven by a motive other than the pursuit of justice, the public will likely question the legitimacy of the entire proceeding, thereby supporting the accused rather than the prosecutor.<sup>148</sup>

In the current case, the State Bar’s decision to file an ethics complaint against Nifong, and the disciplinary commission’s ultimate decision to disbar Nifong, called the prosecutor’s credibility into question and resulted in favorable publicity for the accused. The news of the filing of the ethics

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143. Even the findings of fact and conclusions of law published by the disciplinary commission do not contain any meaningful analysis. See Amended Findings of Fact, Conclusions of Law, and Order of Discipline, *supra* note 55.

144. See N.C. RULES OF PROF’L CONDUCT R. 3.8(f) cmt. 6.

145. See Amended Findings of Fact, Conclusions of Law, and Order of Discipline, *supra* note 55, para. 117, at 20.

146. See generally Amended Complaint, *supra* note 32 (alleging violations of multiple North Carolina Rules of Professional Conduct).

147. See *supra* text accompanying notes 53–55.

148. See Hearing Transcript, *supra* note 56, at 17 (North Carolina Disciplinary Commission finding that it could “draw no other conclusion but that [the] initial statements that [Nifong] made were to further his political ambition”).



complaint against Nifong was reported extensively.<sup>149</sup> Many of these reports recounted the charges against Nifong, which included the violation of multiple North Carolina ethics provisions.<sup>150</sup> The State Bar accused Nifong of making statements that materially prejudiced an adjudicative proceeding; making statements that heightened the public condemnation of the accused; engaging in conduct prejudicial to the administration of justice, engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, and withholding exculpatory evidence from the defense.<sup>151</sup> Likewise, the finding that Nifong violated the ethics rules and his subsequent disbarment were also widely reported.<sup>152</sup> Although it is difficult, if not impossible, to measure the rehabilitative impact of these charges and Nifong's eventual disbarment on the reputations of the accused, especially given the indicted players' positive publicity proceeding the ethics complaint, it is certain that these highly publicized charges and Nifong's disbarment called his credibility into question, causing the public to doubt his version of the events and ultimately his decision to pursue charges at the outset.<sup>153</sup>

While the ethics complaint filed against Nifong and the disciplinary commission's ultimate findings were a reputational remedy for the players in *this* case, the adequacy of the remedy for those defamed by a prosecutor depends on many factors, which although present in the Duke lacrosse rape case, are unlikely to be present in others.<sup>154</sup> These factors concern the distinct roles played by the public, the media, and the State Bar in facilitating the remedial aspect of the ethics complaint. First, in order to serve as a reputational remedy, the filing of an ethics complaint must be timely so the public associates the prosecutor's statements with his unethical conduct. If an ethics complaint by the State Bar is going to counteract any reputational damage caused by a prosecutor's impermissible extrajudicial statements, the complaint must be filed while the public remains engaged. If the public is not

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149. Wright, *supra* note 62, at 2B; *Duke Lacrosse Prosecutor Could be Ousted*, *supra* note 26; *see, e.g., Avila & Setrakian*, *supra* note 63.

150. *See supra* note 149.

151. Amended Complaint, *supra* note 32, para. 291; *Former Duke Lacrosse 'Rape' Prosecutor Charged With Withholding Evidence, Misleading Court*, FOXNEWS.COM, Jan. 24, 2007, <http://www.foxnews.com/story/0,2933,246281,00.html>.

152. *See, e.g., Dan Hart, Duke Prosecutor Nifong Disbarred in Ethics Case*, BLOOMBERG.COM, June 16, 2007, <http://www.bloomberg.com/apps/news?pid=20601103&sid=aW9bAiVpto.8&refer=us>; *Mike Nifong Disbarred Over Ethics Violations in Duke Lacrosse Case*, FOXNEWS.COM, June 17, 2007, <http://www.foxnews.com/story/0,2933,283282,00.html>; Lara Setrakian & Chris Fransescani, *Former Duke Prosecutor Nifong Disbarred*, ABCNEWS.COM, June 16, 2007, <http://abcnews.go.com/TheLaw/story?id=3285862>.

153. *Former Duke Lacrosse 'Rape' Prosecutor Charged With Withholding Evidence, Misleading Court*, *supra* note 151.

154. These "factors" are derived from my observations of the media and discussions with Professor John C. O'Brien, Professor of Law, Saint Louis University School of Law.

attentive to the controversy, particularly to the doubt cast upon the prosecutor, the community will maintain its negative view of the accused.

Although an ethics complaint was filed in the Duke lacrosse rape case before the trial began when public interest remained high, ethics complaints are not typically filed during an ongoing criminal proceeding.<sup>155</sup> In fact, the disciplinary commission stated that it was “unprecedented that the State Bar would take disciplinary action against a prosecutor during the pendency of the case . . . .”<sup>156</sup> The State Bar commonly postpones filing an ethics complaint because if filed during an ongoing proceeding, the accusation may hinder the attorney’s ability to represent the client.<sup>157</sup> This is especially true when a prosecutor is involved, for it creates a serious conflict of interest: does the prosecutor pursue the case in search of justice or does he pursue the charges to win a conviction in an attempt to prove his violations were not particularly egregious because the party was guilty of the crime anyway?<sup>158</sup> If an ethics complaint is not filed until after the proceeding is completed, a substantial amount of time passes before the ethics charge is adjudicated, leaving many of those who formed their opinions of the accused oblivious to the proceeding. Because ethics complaints are not typically filed until after the criminal proceeding, it is unlikely that those victimized by a prosecutor’s impermissible extrajudicial statements will reap the potential reputational protection that accompanies the Bar’s finding that a prosecutor violated the ethics rules.

Second, the complaint alleging the violation must be highly publicized. If the filing of an ethics complaint, and the ultimate finding as well, are not highly publicized, the public has no opportunity to change its perception of the accused, leaving the indicted individual’s reputation just as damaged as it was before the complaint was filed. The level of publicity the ethics complaint receives is highly correlated with the first factor—the timing of the complaint. If the complaint is filed while the case is ongoing, it receives much attention as part of the “play by play.” If the complaint is filed after the case has concluded, public interest in the matter is likely to have waned, in which case news of the complaint, as well as the ultimate findings, are less newsworthy, resulting in less public awareness of the complaint. Given the norm that ethics complaints are not filed during ongoing criminal proceedings, ethics complaints against a prosecutor will not receive the prominent media attention required to negate the reputational damage suffered from a prosecutor’s impermissible public statements.

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155. See Avila & Setrakian, *supra* note 63 (“[N]o one in Durham can remember a case where a district attorney had to defend himself on ethics charges in an ongoing case.”).

156. Hearing Transcript, *supra* note 56, at 21.

157. See *Duke Lacrosse Prosecutor Could be Ousted*, *supra* note 26.

158. See *id.*

Third, to ensure the adequacy of this remedy, the violation alleged in the ethics complaint must be accompanied by something more than a violation of Rule 3.8(f). The remedial aspect of an ethics complaint depends on whether or not the public views the prosecutor's actions as misleading. The public must view the prosecutor as an untrustworthy source of information, which would lead it to discount his public statements that harmed the reputations of the accused. However, even if the prosecutor is charged with and ultimately found to have violated Rule 3.8(f), the public is not likely to feel as though his statements were inaccurate, without something more. This "something more" consists of another ethics violation, such as withholding exculpatory evidence from the defense or engaging in deceitful conduct: two violations for which Nifong was accused and convicted.<sup>159</sup> These additional violations communicated that Nifong engaged in dishonest conduct and thus his public statements may have been misleading as well.<sup>160</sup>

If a prosecutor is charged solely with violating Rule 3.8(f), the prosecutor is accused of making impermissible public comments that tend to heighten the public condemnation of the accused; this charge does not communicate to the public that the statements were in any way inaccurate or that the source of the statements was untrustworthy. If the public has no reason to doubt the veracity of the statements that harmed the reputations of the accused, the fact that the prosecutor is charged with impermissibly disseminating these statements to the public does little to rehabilitate the reputations of those who were the subject of the impermissible commentary. In other words, the public is not likely to discount the credibility of the prosecutor simply because he violated a rule by speaking too freely. Thus, if a prosecutor violates Rule 3.8(f) and the State Bar brings no additional charges, the accused's reputational damage will not be offset by the ethics charge or even the eventual finding of a violation.

The formal accusation that Nifong violated the North Carolina Rules of Professional Conduct, and especially his eventual disbarment, helped rehabilitate the reputations of the indicted Duke lacrosse players. While the ethics complaint served as a partial remedy in this case, in many others it would not. Unless the ethics charges are filed while the public is widely interested in the controversy, the media gives the news of the complaint and finding substantial airplay, and the prosecutor is found to have violated a rule that causes the public to doubt the damaging statements made by the prosecutor, the ethics complaint will not alter the public's view of the accused. The necessity of the unlikely simultaneous presence of these factors in most situations forecloses the notion that an ethics complaint could serve as an

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159. See *supra* text accompanying notes 150–52.

160. See Hearing Transcript, *supra* note 56, at 18; Amended Findings of Fact, Conclusions of Law, and Order of Discipline, *supra* note 55, para. 117, at 20–24.

adequate remedy to the reputational damage suffered by the accused at the hands of a prosecutor's impermissible extrajudicial statements.

#### 4. A Remedy Embedded in the North Carolina Rules of Professional Conduct

Rule 3.6 contains a provision that has, thus far, proven to be the most effective reputational remedy available to the three indicted lacrosse players, and could potentially benefit others who find themselves victimized by an overzealous prosecutor's improper statements. Rule 3.6(c) provides:

Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is reasonably necessary to mitigate the recent adverse publicity.<sup>161</sup>

The comment following Rule 3.6 recognizes that when a party does not abide by the ethics rules limiting extrajudicial statements, the other side may feel compelled to respond to mitigate the damage.<sup>162</sup> The purpose of this provision is to allow a party to respond to prejudicial public commentary by the opposition's attorney in an attempt to lessen "any resulting adverse impact on the adjudicative proceeding" that may result from another's statements.<sup>163</sup> While the stated purpose of the rule is to combat prejudice, the defense's responsive statements serve an additional purpose: they offer the public an alternative to the prosecutor's point of view. This alternative version, if persuasive, serves as a significant remedy because the public receives information that calls into question the accuracy of the prosecutor's extrajudicial statements.

In the Duke lacrosse case, the defense achieved some success in the media, and in turn with the public, through its release of public statements and documents.<sup>164</sup> The defense's response to Nifong's public statements caused the media to shift from reporting on the salacious details, to asking the question, "Are the three Duke lacrosse players innocent boys falsely accused?"<sup>165</sup> "The nation's opinion leaders at influential newspapers" cast aside weighty national issues such as Iraq and Darfur "to come to the defense of the three accused players."<sup>166</sup> An anecdotal example from a renowned *New York Times* columnist tracked the shift in media coverage that stemmed from

161. N.C. RULES OF PROF'L CONDUCT R. 3.6(c) (2006).

162. *See id.* R. 3.6 cmt. 7.

163. *Id.*

164. Stancill, *supra* note 13, at 4B.

165. *Id.* at 1B.

166. *Id.*

the defense's response to Nifong's public statements: the first column discussed how young men slip into depravity, while the second discussed the stages of witch hunts.<sup>167</sup>

This drastic shift in the media's focus was fed by the "accused players' attorneys[]" [release of] a steady stream of leaks and court filings that cast doubt on almost everything about the case."<sup>168</sup> In response to Nifong's statements, the defense team conducted press conferences referring to the alleged victim as the "false accuser"; granted *60 Minutes* permission to review "nearly the entire case file" and allowed their clients to participate in a nationally televised prime time interview with Ed Bradley; attacked the prosecutor's conduct and the police department's lineup procedure; disclosed a favorable polygraph test; and released DNA results that tended to exculpate their clients.<sup>169</sup> The release of this information resulted in favorable publicity, which led to two concrete examples of how this release of information improved the players' standing in the public eye: Duke University, which suspended the two yet-to-graduate players from school, invited the two players to return before the trial began and United States Representative Walter Jones publicly called for the United States Attorney General to review Nifong's conduct.<sup>170</sup> The defense's ability to publicly respond to Nifong's public assertions without fear of sanction under the North Carolina Rules of Professional Conduct provided them with the tools to influence public opinion, resulting in the mitigation of the reputational damage caused by Nifong's public statements.

While Rule 3.6(c) certainly served as a reputational remedy in this case, again, there are reasons to believe that it is inadequate in most others. The remedial aspect of the defense's ability to plead its side of the case to the media depends heavily on the amount of coverage news organizations grant the retorts.<sup>171</sup> If the media deems the story to be non-newsworthy, the retorts, although perhaps persuasive, receive minimal coverage and are unable to lessen the reputational damage caused by the prosecutor's indiscretions.

Perhaps the most significant limitation to this remedy in a criminal proceeding is the precarious question it presents the defense team: is it wise to release statements and seemingly favorable information and risk presenting potential jurors with information that may inhibit a future defense? If the

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167. *Id.*

168. *Id.*

169. See Niolet et al., *supra* note 39, at 14A; Stancill, *supra* note 13, at 4B; Bradley, *supra* note 8.

170. Chris Cuomo, Lara Setrakian & Chris Francescani, *Duke Reinstates Embattled Lacrosse Players*, ABCNEWS.COM, Jan. 3, 2007, <http://abcnews.go.com/US/LegalCenter/story?id=2768179&page=1>; Rep. Walter Jones Wants Probe of District Attorney Nifong Handling Duke Rape Case, *supra* note 32.

171. See *supra* text accompanying notes 164–69.

defense team decides to release statements and information to the media, potential jurors will likely view this information and remember it. By releasing the information at an early date, the defense attorneys in essence lock themselves into a defense before trial. While there is no hard and fast rule preventing them from changing the story to fit a different defense strategy, as a practical matter, any jurors who paid attention to the media coverage at the time the defense released its original story would be extremely skeptical of a changed story at trial. Thus, the defense team is left with a choice, which is really no choice at all: either attempt to salvage the reputation of the defendants or wait to present the defense at trial in order to maintain the best possible chance of preventing the defendants from going to prison. In the Duke case, the defense team took a seemingly calculated risk and aggressively respond to Nifong's public statements.<sup>172</sup> While the Duke lacrosse attorneys' defense strategy was successful, the strategy employed is coupled with the significant risk of undermining a potential defense at trial. This risk is likely to deter many from taking a similar approach.

*B. The Feasibility of a Defamation Suit*

When discussing remedies available to the accused in the Duke lacrosse case, many ask, why not sue the prosecutor for defamation? If not the prosecutor, can the players sue the state? After all, the prosecutor is employed by the state and made statements to the public that seem to be untrue, and these statements severely harmed the boys' reputations. A defamation suit would potentially provide the players with monetary compensation for their injured reputations. However, because Nifong is a county prosecutor, a position created by the North Carolina Constitution,<sup>173</sup> the chances of a successful defamation action against the county, the state, or the prosecutor in his official capacity are remote. If the players sue Nifong for defamation in his personal capacity, the particularly egregious facts of his case make a successful outcome likely. However, in most cases, public official immunity renders a defamation suit against a prosecutor impractical. This section discusses the various difficulties that arise when pursuing a defamation action in this context.

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172. See *supra* note 164 and accompanying text.

173. N.C. CONST. art. IV, § 18.

In North Carolina, a “defamation”<sup>174</sup> action is rooted in the common law. Defamatory comments are actionable if the communication “tend[s] to prejudice another in his reputation . . . .”<sup>175</sup> A communication is deemed defamation per se if an individual makes an accusation to a third party accusing another of “commit[ting] a crime involving moral turpitude.”<sup>176</sup> Once a false statement is deemed defamation per se, “a *prima facie* presumption of malice and a conclusive presumption of legal injury and damage arises . . . .”<sup>177</sup> However, statements which are defamatory may nonetheless be protected by a qualified privilege.<sup>178</sup> Before such a privilege is addressed, an examination of the applicable immunities afforded to Nifong, North Carolina, and Durham County is appropriate.

If the accused lacrosse players sue Nifong in his official capacity, they must overcome the protection of sovereign immunity. Generally, governmental or sovereign immunity “grants the state, its counties, and its public officials, in their official capacity, an unqualified and absolute immunity from law suits”<sup>179</sup> stemming from “torts committed while performing a governmental function.”<sup>180</sup> A governmental function, as distinguished from a proprietary function, “is one in which only a governmental agency could engage . . . .”<sup>181</sup> For example, courts determined that a county entering into a lease agreement is an action proprietary in nature,<sup>182</sup> while law enforcement is governmental in nature.<sup>183</sup> While this immunity is absolute and unqualified,<sup>184</sup>

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174. Defamation is used here as a generic term to describe the causes of action of libel—which is written—and slander—which is spoken. *See Phillips v. Winston-Salem/Forsyth County Bd. of Educ.*, 450 S.E.2d 753, 756 (N.C. Ct. App. 1994). However, “[w]hen defamatory words are spoken with the intent that the words be reduced to writing, and the words are in fact written, the publication is both slander and libel.” *Id.* (internal quotations omitted). While the correct terminology for the cause of action is either libel or slander, for sake of simplicity, defamation will be used in place of libel and slander, throughout. *See id.*

175. *Averitt v. Rozier*, 458 S.E.2d 26, 28 (N.C. Ct. App. 1995) (internal quotations omitted).

176. *Id.* (internal quotations omitted). Murder and kidnapping are examples of two crimes involving moral turpitude. *Id.* at 28–29.

177. *Id.* at 28.

178. *See infra* text accompanying notes 220–28.

179. *Dalenko v. Wake County Dep’t of Human Servs.*, 578 S.E.2d 599, 603 (N.C. Ct. App. 2003).

180. *Price v. Davis*, 512 S.E.2d 783, 786 (N.C. Ct. App. 1999) (internal quotations omitted).

181. *Data Gen’l Corp. v. County of Durham*, 545 S.E.2d 243, 249 (N.C. Ct. App. 2001).

182. *See id.*

183. *Schlossberg v. Goins*, 540 S.E.2d 49, 52 (N.C. Ct. App. 2000). The court found that although the police officers were alleged to have severely and repeatedly beaten a suspect during an apprehension, the beating occurred during the performance of a governmental function. *Id.* at 52, 56–57.

184. *Price*, 512 S.E.2d at 786.

it can be waived if the state consents to suit, purchases liability insurance, or enacts a statute that waives suit for particular torts.<sup>185</sup>

In this case, Nifong (in his official capacity), Durham County, and the State of North Carolina are likely immune from a defamation suit. When Nifong made his statements during press interviews, he was carrying out a governmental function: he was speaking to the Durham community regarding an alleged crime, which his office was preparing to prosecute. Although there is no authority on point, just as the broad description of “law enforcement” is a governmental function, by analogy it seems the closely related prosecutorial process would also qualify. Thus, even if his statements were otherwise actionable, because he appeared to commit the tort while carrying out a governmental function, the accused cannot bring a defamation suit against Nifong in his official capacity, the state, or the county.

The suit may still go forward, however, if the immunity is waived. There is no reason to believe that North Carolina or Durham would waive immunity by consenting to such a suit. Furthermore, although North Carolina has a statute that makes funds available to those found to have been injured by the negligent acts of government employees, negligence does not include the tort of defamation, thus making the statute inapplicable.<sup>186</sup> Since this defamation suit is merely hypothetical at this point, it is difficult to come to a definitive answer on the issue of waiver through the purchase of liability insurance. If a governmental entity purchased liability insurance, sovereign immunity is waived, but only to the extent that the policy covers the particular tort committed and only up to the amount of coverage provided by the policy.<sup>187</sup> Thus, if the policy “excludes claims against the insured for [defamation],” immunity is not waived.<sup>188</sup> Without the insurance policy, a definitive answer as to waiver based upon liability insurance is not available. Assuming there is no insurance policy that provides adequate coverage and the state does not consent to being sued, since no statutory provision provides relief for a government official’s defamation, sovereign immunity remains intact, thereby barring any defamation suit brought against Nifong in his official capacity, Durham County, or North Carolina.

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185. *See id.* (state may waive immunity through consent or purchase of insurance); *Mazzucco v. North Carolina Bd. of Med. Exam’rs*, 228 S.E.2d 529, 531 (N.C. Ct. App. 1976) (state may waive immunity through enactment of statute).

186. *See* N.C. GEN. STAT. ANN. § 143-291 (2005); *Mazzucco*, 228 S.E.2d at 531.

187. *See Schlossberg*, 540 S.E.2d at 53 (immunity is waived up to the amount that insurance covers the damages); *Houpe v. City of Statesville*, 497 S.E.2d 82, 90 (N.C. Ct. App. 1998) (immunity is waived only for claims covered by insurance).

188. *Houpe*, 497 S.E.2d at 90.



Since the players, absent a waiver, cannot sue the state or the county for defamation, their next best option is to sue Nifong personally.<sup>189</sup> As a starting point, keep in mind that “prosecutors are virtually immune from civil liability.”<sup>190</sup> In order to succeed in a suit against Nifong in his personal capacity, the accused players would have to overcome his public official immunity.<sup>191</sup> Public official immunity shields an official from “personal liability for mere negligence in the performance of his duties, but he is not shielded from liability if his alleged actions were corrupt or malicious or if he acted outside and beyond the scope of his duties.”<sup>192</sup> The policy behind this immunity is that “it would be difficult to find those who would accept public office . . . if they were to be held personally liable for acts or omissions involved in the exercise of discretion and sound judgment which they had performed to the best of their ability . . . .”<sup>193</sup> Thus, to succeed in a suit for defamation, one must “allege . . . and prove . . . that [the official’s] act . . . was corrupt, or malicious . . . or that he acted outside of and beyond the scope of his duties.”<sup>194</sup>

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189. Suing Nifong personally may not be ideal because a state prosecutor may not have the financial resources to pay the sort of damages the players would seek.

190. Hearing Transcript, *supra* note 56, at 24. The commission goes on to state: “The only significant deterrent upon prosecutors is the possibility of disciplinary sanction.” *Id.* at 24.

191. As a side note, Nifong, as a prosecutor, enjoys absolute immunity for any defamation that occurs during the course of a judicial proceeding. *See Mazzucco*, 228 S.E.2d at 532. Thus, he cannot be sued for any defamatory statements made in the course of a trial or in any documents filed with the court. *See id.* Likewise, Nifong enjoys the same absolute immunity from a malicious prosecution suit. *Id.* Furthermore, a section 1983 action against Nifong for his public statements is equally doubtful. In *Buckley v. Fitzsimmons*, a prosecutor was accused of making false and inflammatory statements to the press before his trial, “thereby defaming him, resulting in deprivation of his right to a fair trial, and causing the jury to deadlock rather than acquit.” 509 U.S. 259, 276–77 (1993). Buckley filed suit, claiming the deprivation of due process. *See Buckley v. Fitzsimmons*, 20 F.3d 789, 798–99 (7th Cir. 1994). On remand, the Seventh Circuit held that his due process claim was “doomed” unless he could show the state “failed to provide judicial procedures adequate to guard against the effects of pretrial publicity generated by the prosecutor.” *Id.* at 799. Thus, unless the accused is convicted, it does not appear the claim is actionable, because the procedures adopted by the court, whatever they may be, resulted in a beneficial result for the defendant. In the Duke case, there will be no trial because the case was dismissed. Thus, the players will have difficulty claiming their due process rights were violated.

192. *Schlossberg*, 540 S.E.2d at 56 (internal quotations omitted).

193. *Miller v. Jones*, 32 S.E.2d 594, 597 (N.C. 1945).

194. *Hawkins v. North Carolina*, 453 S.E.2d 233, 241 (N.C. Ct. App.1995) (internal quotations omitted). An allegation of an intentional tort claim, such as defamation, is enough to survive a motion to dismiss. *See id.* at 242. This is because malice includes “the intentional doing of a wrongful act . . . with an intent to inflict an injury . . . ,” and “malice encompasses intent . . . .” *Id.* (internal quotation omitted). However, since the plaintiff has the burden of proof and one of the three exceptions must be proven to bypass public official immunity, getting past summary judgment could prove a difficult task. *See Campbell v. Anderson*, 576 S.E.2d 726, 730

In cases involving public official immunity, one must be careful to distinguish between a public official and a public employee. While a public official enjoys the protection of this immunity, a public employee does not.<sup>195</sup> A public official occupies a position created by statute and exercises some level of discretion in the performance of his duties.<sup>196</sup> Here, Nifong is clearly a public official, for his position is created by the North Carolina Constitution<sup>197</sup> and his duties entail discretionary acts, such as deciding what cases to prosecute.<sup>198</sup>

Nifong loses the protection of his public official immunity if the players can show that Nifong's statements were the result of a corrupt purpose. However, what corruption entails is not at all clear. "Corruption" is defined as "inducement . . . by means of improper considerations . . . to commit a violation of duty."<sup>199</sup> Using this definition, if Nifong's public statements were motivated by bribery or political purposes, as opposed to the pursuit of justice, one could make a strong argument that his actions were corrupt. Although there has been no allegation—and there is no reason to believe—that Nifong had any financial motive to hold the numerous press interviews, there is a strong indication that his motivation for making the extra judicial statements to the press was political. After a thorough investigation of the Duke lacrosse rape case, from beginning to end, the North Carolina State Bar stated, "we can draw no other conclusion but that those initial statements that [Nifong] made were to further his political ambition."<sup>200</sup> This determination was likely based on the findings that Nifong was in the midst of seeking election, the sheer volume of public statements, and the certainty with which he spoke publicly given the contrary information we now know he had but did not disclose.<sup>201</sup>

Although the commission determined that Nifong's statements were driven by political motivations, in most cases, it would be very difficult to prove that a prosecutor's statements were politically motivated. A recent case from the North Carolina Court of Appeals held that the question of whether a rape occurred is one for the jury, even when the accuser's statements are "all over

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(N.C. Ct. App. 2003) (summary judgment is appropriate when the complaint does not offer evidence from which the existence of an exception can be inferred).

195. *Hawkins*, 453 S.E.2d at 242.

196. *Vest v. Easley*, 549 S.E.2d 568, 572 (N.C. Ct. App. 2001).

197. N.C. CONST. art. IV, § 18.

198. *State v. Ward*, 555 S.E.2d 251, 260 (N.C. 2001).

199. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 512 (3d ed. 1993).

200. Hearing Transcript, *supra* note 56, at 17.

201. *See id.* at 17; *see also* Amended Findings of Fact, Conclusions of Law, and Order of Discipline, *supra* note 55, paras. 14, 15, 23, 26 (describing Nifong's private acknowledgment of the case's weaknesses and his unwavering public statements that a rape had occurred).

the place.”<sup>202</sup> Even if there were “[c]ontradictions and discrepancies” in the victim’s testimony, the question of credibility was one for the jury and “[did] not fall within the province of the trial judge or the appellate courts.”<sup>203</sup> If the North Carolina Court of Appeals determined that a victim’s accusation of rape, no matter how questionable, is enough to survive a motion to dismiss, defendants will have a very difficult time arguing that a prosecutor spoke to the press for purely political purposes when he had an accusation, which is enough to get the case before a jury. Rather, it would take a special set of circumstances, such as a reelection campaign, coupled with the prosecutor making statements behind closed doors contrary to his public comments, that would allow one to conclude that a prosecutor’s motivation for speaking was purely political. These special circumstances are unlikely to arise (unless the prosecutor is extremely sloppy, as Nifong was), and thus, in most cases, corruption will be difficult to establish.

Likewise, the players here will likely be able to prove malice, but it is unlikely other defendants will be able to do the same. “Malice is defined as the intentional doing of a wrongful act without just cause or excuse, with an intent to inflict an injury . . . .”<sup>204</sup> To prove actual malice in a defamation context, the players must show “ill-will or personal hostility on the part of the declarant . . . or . . . that the declarant published the defamatory statement with knowledge that it was false [or] with reckless disregard for the truth or with a high degree of awareness of its probable falsity.”<sup>205</sup> The existence of ill-will or personal hostility may be proven through evidence of an extrinsic nature—that is, evidence other than the statement.<sup>206</sup> The statements, as well as the circumstances surrounding publication, are also evidence to be considered.<sup>207</sup>

While the statements themselves are certainly damaging to the reputations of the accused, it is unlikely the players can produce sufficient evidence to prove that Nifong’s statements were a result of personal hostility. In making his statements to the press, Nifong did not appear to be speaking with the

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202. *State v. Lofton*, No. COA05-1231, 2006 WL 2946888, at \*6 (N.C. Ct. App. Oct. 17, 2006).

203. *Id.*

204. *Hawkins v. North Carolina*, 453 S.E.2d 233, 242 (N.C. Ct. App. 1995) (internal quotations omitted).

205. *Clark v. Brown*, 393 S.E.2d 134, 138 (N.C. Ct. App. 1990) (quoting *Kwan-Sa You v. Roe*, 387 S.E.2d 188, 193 (N.C. Ct. App. 1990)).

206. *See e.g.*, *Ponder v. Cobb*, 126 S.E.2d 67, 76 (N.C. 1962) (“[M]alice may be proved by some *extrinsic* evidence, such as ill-feeling, or personal hostility, or threats . . . .”); *Clark*, 393 S.E.2d at 139 (holding there was a genuine issue of material fact as to actual malice because defendant’s public comments regarding the reason for firing the plaintiff occurred just after plaintiff’s mother was quoted in a newspaper as supporting defendant’s political opponent); *Kwan-Sa You*, 387 S.E.2d at 193 (finding issue of fact as to personal hostility because plaintiff and defendant “had been at odds for some time”) (internal quotation omitted).

207. *Ponder*, 126 S.E.2d at 76.

intention of injuring the reputations of the accused. Rather, he was making statements regarding a violent crime that he believed some lacrosse players committed and, according to the State Bar, was seeking to win a primary.<sup>208</sup> In the context of a rape prosecution, one would expect some level of hostility because of the disturbing nature of the allegations. However, given the circumstances surrounding the comments, namely that the statements were made during press interviews regarding an impending rape prosecution, the statements do not demonstrate an adequate level of personal hostility from which an intent to inflict injury on the reputations of the players can be inferred. Furthermore, there is no extrinsic evidence that demonstrates Nifong's personal hostility towards the accused at the time the statements were made, for the accused players and Nifong had no known prior dealings that could create such personal hostility.

On the other hand, it seems likely that the accused players can establish that Nifong exhibited reckless disregard for the truth. According to the findings of fact published by the State Bar, before Nifong made his first public comments,

Nifong was briefed . . . about the status of the investigation to date. [The detectives] discussed with Nifong a number of weaknesses in the case, including that [the accuser] had made inconsistent statements to the police and had changed her story several times, that the other dancer who was present at the party during the alleged attack disputed [the accuser's] story of an alleged assault, that [the accuser] had already viewed two photo arrays and had not identified any alleged attackers, and that the three team captains had voluntarily cooperated with police and had denied that the alleged attack occurred.<sup>209</sup>

"During or within a few days of the initial briefing," Nifong apparently stated that the case would be very difficult to win and said, "[Y]ou know, we're fucked."<sup>210</sup> Because the players can show that any assertion of certainty that a rape had occurred is completely divergent from the information that was available to Nifong and can pinpoint exactly when Nifong became aware of these facts, namely before he made his statements, the players can establish that Nifong exhibited reckless disregard for the truth, thus establishing malice.

Again, in most situations, establishing that a prosecutor displayed reckless disregard for the truth is extremely difficult. It is safe to say that most prosecutors who make impermissible extrajudicial statements that are damaging to the reputations of the accused will not be so blatantly reckless. For the majority of defendants, the scenario is likely to be closer to a situation

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208. Hearing Transcript, *supra* note 56, at 17–18.

209. Amended Findings of Fact, Conclusions of Law, and Order of Discipline, *supra* note 55, para. 14.

210. *Id.* para. 15.

where the prosecutor makes impermissible statements to the press about a defendant who the prosecutor thinks is guilty, with no regard for the damage the statements inflict on the reputation of the individual who has yet to be convicted in a court of law. Under the current state of the law, so long as a prosecutor has some basis to believe the individual is guilty—say a victim claims she was raped and has a minimal level of credibility—he will be shielded from liability by public official immunity. Therefore, although this particularly egregious violation by Nifong has the potential to expose him to liability, the current state of the law provides little hope for a defendant who is defamed by a minimally competent prosecutor.

The last means of defeating Nifong's public official immunity is to prove Nifong acted beyond the scope of his duties. The scope of a North Carolina prosecutor's duties is not entirely clear. A North Carolina statute lays out the duties of the district attorney.<sup>211</sup> While this statute enumerates specific duties—and giving interviews to the press is not listed—the statute does not provide an in-depth outline of the scope the district attorney's duties. Rather, it provides general duties such as “prosecute in a timely manner . . . all criminal actions . . . .”<sup>212</sup>

It is not entirely clear what “prosecute” entails. Does this duty include keeping the public abreast on the status of the prosecution? North Carolina courts have not addressed this issue. Courts in other jurisdictions have held that press conferences are within the scope of the duties of district attorneys or their representatives.<sup>213</sup> In a section 1983 case, the United States Supreme Court determined that a prosecutor speaking at a press conference “did not act in his role as advocate for the State,” thus entitling the prosecutor to qualified immunity rather than absolute immunity.<sup>214</sup> However, at the same time, the Court recognized that “[s]tatements to the press may be an integral part of a prosecutor's job . . . and they may serve a vital public function.”<sup>215</sup> While *Buckley* appears to be a source of guidance, the North Carolina Court of Appeals cautioned otherwise, noting, “North Carolina law regarding the immunity of government actors to suit under state law claims differs from the law of immunity in federal section 1983 actions.”<sup>216</sup>

The lack of clarity of North Carolina law provides significant cover for Nifong's decision to speak to the press. When tackling the scope of duties

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211. N.C. GEN. STAT. ANN. § 7A-61 (2005).

212. *Id.*

213. *Pickering v. Sacavage*, 642 A.2d 555, 559 (Pa. Commw. Ct. 1994); *see also Chase v. Grilli*, 512 N.Y.S.2d 125, 126 (N.Y. App. Div. 1987) (holding that the prosecutors had a duty to report on criminal activity in the community).

214. *Buckley v. Fitzsimmons*, 509 U.S. 259, 277–78 (1993) (internal quotations omitted).

215. *Id.* at 278.

216. *Andrews v. Crump*, 547 S.E.2d 117, 123 (N.C. Ct. App. 2001).

question, the issue is not the actual outer boundaries of the scope, but rather whether the official's determination that his actions were within the scope was reasonable.<sup>217</sup> "In many cases, an officer is under a duty to make a preliminary determination of whether he has the authority" in question.<sup>218</sup> When exercising this discretion, and taking action pursuant to it, the official is protected by official immunity even if the determination is wrong, so long as the decision is reasonable.<sup>219</sup> Because there is no clear answer as to whether, in North Carolina, the scope of a district attorney's duties includes providing interviews with the press, Nifong's discretionary determination that he was acting within the scope of his duties cannot be said to be unreasonable, leaving his public official immunity intact. This analysis would seem to apply to most prosecutors, barring specific precedent or legislation defining exactly what a prosecutor's duty entails.

Although it seems that Nifong's public official immunity could be defeated by showing that his impermissible public statements involved corruption or malice, thereby making him subject to a defamation suit that the players would have a solid chance at winning, the typical defendant is unlikely to enjoy the benefit of the specific set of circumstances required for the prosecutor to be subject to such a suit.

Even if the players were able to defeat the sovereign or public official immunity, Nifong's otherwise defamatory speech could be protected by a qualified privilege. The qualified privilege doctrine is rooted in the policy of "encouraging a full and fair statement by persons having a legal . . . duty to communicate their knowledge and information about a person in whom they have an interest to another who also has an interest in such person."<sup>220</sup> A statement is protected "when made (1) on subject matter . . . in which the declarant has an interest . . . (2) to a person having a corresponding interest . . . (3) on a privileged occasion, and (4) in a manner . . . warranted by the occasion and duty, right or interest."<sup>221</sup> If the statement is protected by a qualified privilege, the qualified privilege becomes an absolute privilege, unless malice and falsity can be proven.<sup>222</sup>

While Nifong can make a case for the first three elements, his privilege almost certainly fails on the requirement that the statement be made in a manner warranted by the occasion. This final element is not met if there is excessive publication of the defamatory material.<sup>223</sup> Excessive publication

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217. RESTATEMENT (SECOND) OF TORTS: IMMUNITIES § 895D cmt. g (1979).

218. *Id.*

219. *Id.*

220. *Clark v. Brown*, 393 S.E.2d 134, 138 (N.C. Ct. App. 1990).

221. *Id.*

222. *Averitt v. Rozier*, 458 S.E.2d 26, 29 (N.C. Ct. App. 1995).

223. *See Troxler v. Charter Mandala Ctr., Inc.*, 365 S.E.2d 665, 669 (N.C. Ct. App. 1988).

occurs when the defamatory material is spoken “to anyone outside of those who had a corresponding interest in the communication . . . .”<sup>224</sup> However, if “the matter is of public interest within a limited territory, [and] the publication takes place . . . beyond that territory,” the privilege remains intact so long as the publication beyond the territory is “incidental.”<sup>225</sup>

In this case, Durham County and the surrounding community had a corresponding interest to Nifong’s communications regarding an alleged rape in their neighborhood.<sup>226</sup> Nifong had an interest in relaying the status of the investigation to the community, and the citizens had a corresponding interest in learning of the progress of an investigation of a violent crime allegedly committed in their neighborhood. However, by granting over fifty interviews,<sup>227</sup> some of which were with national media outlets such as MSNBC,<sup>228</sup> Nifong’s publication of the information, beyond those with a corresponding interest, cannot be deemed “incidental.” Because Nifong granted dozens of interviews with various news outlets, both local and national in scope, Nifong’s public statements were not made in a manner fairly warranted by the occasion. Thus, since the previously discussed immunities do not shield Nifong and his statements would not be protected by a qualified privilege, given the nature of his public accusations, it is likely that he would be liable for defamation. However, as has been previously discussed, it is unlikely that a typical defendant would be able to get past a prosecutor’s public official immunity.

The final major obstacle to a defamation action against a prosecutor is the statute of limitations. In North Carolina, the statute of limitations for a defamation claim is one year.<sup>229</sup> Thus, to preserve the claim, the action must begin within one year from the date of publication of the defamatory words.<sup>230</sup> Under normal circumstances, the one year statute of limitations would not be overly restrictive; an individual is likely to know whether he has been defamed rather quickly after the damaging words are published. However, when a prosecutor is the potential defendant in a defamation suit, there are very real practical restraints that could prevent the harmed individual from filing a defamation suit until after the statute of limitations has run.

First, if the prosecutor defames an individual who is the subject of an ongoing criminal investigation, the accused may be reluctant to anger the

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224. *Id.*

225. *Ponder v. Cobb*, 126 S.E.2d 67, 78 (N.C. 1962).

226. *See Clark v. Brown*, 393 S.E.2d 134, 138 (N.C. Ct. App. 1990) (“[T]he citizens and voters of the county . . . [have] a public interest in their elected district attorney’s official acts.”).

227. *See supra* note 16 and accompanying text.

228. *See supra* notes 13–17 and accompanying text.

229. N.C. GEN. STAT. ANN. § 1-54(3) (2005).

230. *Iadanza v. Harber*, 611 S.E.2d 217, 222–23 (N.C. Ct. App. 2005).

prosecutor. The risk that the prosecutor, or a member of his office, would file charges as retribution is enough to justify foregoing the suit. Moreover, because falsity must be proven to succeed in a defamation suit,<sup>231</sup> filing a defamation claim against the prosecutor gives him an incentive to go forward with the prosecution in order to prove, in a court of law, the truth of the statements.<sup>232</sup> Depending on how long the individual remains a suspect, the statute of limitations may run before the victim of the defamation becomes comfortable filing suit, without fear of reprisal.

If an individual charged with a crime is publicly defamed by a prosecutor in the run up to a criminal trial, he is all but forced to wait until the conclusion of the criminal proceeding to pursue a defamation suit. If the defendant were to sue the prosecutor, he would face the possibility of concurrent proceedings where he would have to present evidence that proves the falsity of the charges in the civil suit<sup>233</sup> and defend himself in the criminal suit. No competent defense attorney would allow such maneuvering, for the tactical disadvantages are both obvious and perilous. With a criminal proceeding of reasonable length, it is possible the statute of limitations could run before there is a legitimate chance to file a defamation claim against the prosecutor.

Presuming it was feasible for the accused Duke players to file a defamation suit, and assuming Nifong's last damaging out of court statement was made on April 11, 2006, which is the most recent extrajudicial comment referenced in the State Bar's Findings of Fact and Conclusions of Law, the players would have had to file their defamation suit on April 11, 2007, the same day the Attorney General dismissed the case.<sup>234</sup>

While at first glance a defamation action appears to be a viable remedy, the various immunities afforded to the state, the county, and the prosecutor make a successful outcome doubtful. Assuming the players are able to circumvent the immunities, the statute of limitations forecloses the players' ability to seek redress through a common law defamation suit. Other defendants victimized by a prosecutor's impermissible public statements are likely to be prevented from filing suit not only by the various immunities, but also by the statute of limitations.

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231. *Clark*, 393 S.E.2d at 138.

232. An interesting issue to explore would be the conflict of interest issues that arise if a defendant brought a defamation action against a prosecutor during a prosecution of a criminal matter.

233. *Clark*, 393 S.E.2d at 138.

234. See Amended Complaint, *supra* note 32, paras. 15–16; Amended Findings of Fact, Conclusions of Law, and Order of Discipline, *supra* note 55, para. 50; OFFICE OF ATT'Y GEN., SUMMARY OF CONCLUSIONS, *supra* note 29.



### III. SOLUTIONS

While under certain circumstances individuals may have a mechanism for rehabilitating their reputations, most individuals must rely on deterrence and currently, “[t]he only significant deterrent upon prosecutors is the possibility of disciplinary sanction.”<sup>235</sup> Minor changes to the ethics rules, as well as the state laws, could both deter the conduct and broaden the protection for those harmed. Slight changes to Rule 3.8(f) would provide increased awareness and enforcement of the provision, which would deter prosecutors from making prohibited extrajudicial statements. Purchasing insurance and amending the North Carolina statutes to waive sovereign immunity are two other possible solutions that would provide increased protection for those damaged by impermissible comments made by a prosecutor.

While North Carolina Rule 3.8(f), as well as the corresponding ABA Model Rule, makes it clear that a prosecutor should not make extrajudicial statements that “have a substantial likelihood of heightening the public condemnation of the accused,”<sup>236</sup> the rule seems to be an afterthought and is rarely enforced.<sup>237</sup> To encourage increased enforcement, Rule 3.8(f) should be changed in a way that makes it clear that a violation of the rule is a serious matter and that provides clear guidance as to what sort of comments “have a substantial likelihood of heightening the public condemnation of the accused.”<sup>238</sup>

A relatively minor modification to Rule 3.8(f) would increase the likelihood of enforcement. First, the rule should include language that makes it clear that a violation of the rule is a serious matter because of the resulting reputational damage that follows. While any violation of the Rules of Professional Conduct is by definition serious, it is necessary to include the language to communicate how potentially devastating a violation can be to the reputation of the accused.<sup>239</sup> It is tempting to dismiss the importance of the rule because the reputation of the accused is, or will be, damaged by an indictment and thus the impact of further commentary is easily misjudged.<sup>240</sup> However, as demonstrated above, a prosecutor’s extrajudicial statements compound the damage. By including language that communicates the serious

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235. Hearing Transcript, *supra* note 56, at 24.

236. N.C. RULES OF PROF’L CONDUCT R. 3.8(f) (2006); MODEL RULES OF PROF’L CONDUCT R. 3.8(f) (2006).

237. *See supra* text accompanying notes 82–84.

238. MODEL RULES OF PROF’L CONDUCT R. 3.8(f).

239. This modification could be as simple as adding a sentence at the end of paragraph (f) that states, “due to the potential damage such comments could have on the reputation of the accused, a violation of this rule is considered a serious matter.”

240. *See* discussion *supra* Part I.B.

damage a prosecutor's impermissible public statements may have, the rule will receive increased attention, which should result in increased enforcement.

Second, the rule, or the comment, should be amended to include some guidance as to what sort of statements more likely than not constitute a violation. For example, Rule 3.6(a) prohibits “extrajudicial statements that . . . have a substantial likelihood of materially prejudicing an adjudicative proceeding . . . .”<sup>241</sup> Comment 5 following the rule gives examples of “certain subjects that are more likely than not to have a materially prejudicial effect on a proceeding . . . ,” such as “the character, credibility, reputation or criminal record of a party, . . . the possibility of plea of guilty. . . or contents of any confession, . . . [and] any opinion as to the guilt or innocence of a defendant . . . .”<sup>242</sup> By including these examples in the comment, lawyers have a more precise idea of the sort of statements the rule prohibits. Thus, when an attorney makes a statement pertaining to subjects listed in Comment 5 following Rule 3.6, the statement is likely to receive close scrutiny to determine if a violation has occurred. By including concrete examples of statements that have a substantial likelihood of heightening public condemnation of the accused in 3.8(f), comments that relate to those categories will receive heightened scrutiny as well.<sup>243</sup>

Another possible solution is for the state or counties to purchase liability insurance that waives sovereign immunity. The liability insurance must cover damages resulting from defamation; otherwise, the insurance will not serve as a waiver.<sup>244</sup> Furthermore, since sovereign immunity is waived only to the extent that the insurance policy covers the damages awarded, the policy must provide sufficient coverage to ensure adequate funds are available to the injured party.<sup>245</sup> However, any waiver should be accompanied by an extension of the statute of limitations for defamation actions in order to ensure the practical availability of the suit.<sup>246</sup> Waiving sovereign immunity through the purchase of insurance, accompanied by an extension of the statute of limitations when the suit is against a prosecutor, guarantees a remedy to those damaged by the prosecutor.

241. MODEL RULES OF PROF'L CONDUCT R. 3.6(a).

242. *Id.* R. 3.6 cmt. 5.

243. The comment should also include examples of what sort of statements qualify as “statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose . . . .” *Id.* 3.8(f). Perhaps a reference to the safe harbor in Rule 3.6 would be sufficient to allow the sort of analysis in Part II.A.2, *supra*.

244. *See supra* note 185 and accompanying text.

245. *See id.*

246. *See supra* text accompanying notes 229–34. The statute could allow for an increase in the statute of limitations if a prosecutor is the subject of the defamation suit.

Waiver of sovereign immunity through statute is another possibility for securing a remedy for the accused.<sup>247</sup> Currently, the State of North Carolina has waived sovereign immunity for all negligence actions against state officers and employees, up to \$500,000.<sup>248</sup> The statute created an administrative court, named the “North Carolina Industrial Commission,” which is vested with jurisdiction over all negligence claims against state officers and employees.<sup>249</sup> The statute provides, “The Industrial Commission shall determine whether or not each individual claim arose . . . under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina.”<sup>250</sup> Thus, the legislature created an administrative court where those victimized by the negligence of a state actor can seek redress through the state, and the legislature also specified the standard under which the court would determine the state’s liability: North Carolina negligence law.

North Carolina could amend this statute to provide the North Carolina Industrial Commission jurisdiction over any claims for damages when the North Carolina State Bar deems a prosecutor violated Rule 3.8(f). If the State Bar finds that a prosecutor violated Rule 3.8(f), the individual harmed by the comments made in violation of the rule would be afforded the opportunity to present a case for damages before the administrative court. Just as the current statute proscribes the standard for granting relief in a negligence action—the state negligence laws—the amended statute would presume relief is necessary if the State Bar finds Rule 3.8(f) was violated, leaving only the matter of damages to be determined. While the scope provision of the North Carolina Rules of Professional Conduct provides that “[v]iolation of a Rule should not give rise *itself* to a cause of action against a lawyer,”<sup>251</sup> there is nothing preventing the state from enacting a law that creates liability if the rule is found to be broken. Furthermore, the cause of action will not be against the lawyer who broke the rule, but rather against the state. Thus, enacting such a rule would not undermine the North Carolina Rules of Professional Conduct.

Enacting this administrative remedy, in accordance with overhauling Rule 3.8(f), is the best solution for all parties involved. From the plaintiff’s perspective, this is a viable solution because it affords the opportunity for monetary compensation for any reputational damage sustained. There is no immunity to contend with, for public official immunity is afforded to the

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247. Douglas Dowd, a renowned plaintiff’s attorney in the Saint Louis area and a good friend, provided the impetus for the development of this proposed solution.

248. N.C. GEN. STAT. ANN. § 143-299.2(a) (2005).

249. *Id.* § 143-291(a).

250. *Id.*

251. N.C. RULES OF PROF’L CONDUCT R. 0.2 cmt. 7 (2006) (emphasis added).

prosecutor when he is sued personally,<sup>252</sup> and enacting the statute waives sovereign immunity up to the statutorily proscribed amount.<sup>253</sup> Moreover, unlike a defamation action, there is no qualified privilege or statute of limitations that could potentially prohibit recovery when otherwise warranted.<sup>254</sup> If the improved Rule 3.8(f) is enforced, individuals defamed by prosecutors would be afforded a remedy for their damaged reputations.

From the state's perspective, this administrative solution is preferable to waiving sovereign immunity through the purchase of liability insurance because it limits potential litigation. By waiving sovereign immunity, anyone would have the right to pursue a defamation action in state court.<sup>255</sup> The state would be forced to bear the expense of defending itself against anyone who filed suit. In the administrative solution above, the state's involvement, other than the State Bar proceeding, would be limited to contesting damage claims from those who were the subject of a prosecutor's comments made in violation of Rule 3.8(f).

Relatively straightforward modifications of a provision of the Rules of Professional Conduct and the North Carolina statute waiving sovereign immunity for negligence claims would provide a remedy for those damaged by a prosecutor's extrajudicial statements prohibited by Rule 3.8(f). If the statute were amended in the manner discussed above, given Nifong's violation of Rule 3.8(f),<sup>256</sup> the accused Duke lacrosse players would have had an excellent chance of securing compensation from the state for their damaged reputations.<sup>257</sup> In the Duke case, perhaps the only limitation to securing the appropriate amount of compensation for the damage done to their reputation would be the \$500,000 statutory ceiling.<sup>258</sup>

#### CONCLUSION

The Duke lacrosse rape spectacle is a tale of complete tragedy. A night of drinking and debauchery at the Duke lacrosse house ended up being more than the team members bargained for. Soon after the party, the Durham District Attorney, Mike Nifong, conducted press interviews discussing the details of a gang rape that he was certain had occurred. The media was eager to indulge Nifong in his repeated commentary on the case, resulting in countless interviews and articles implicating Duke lacrosse players in a horrific crime. Nifong granted numerous interviews that provided the material for seemingly

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252. See *supra* notes 189–91 and accompanying text.

253. See *supra* note 185 and accompanying text.

254. See *supra* notes 220–33 and accompanying text.

255. See *supra* note 185 and accompanying text.

256. See Amended Complaint, *supra* note 32.

257. See discussion *supra* Part III.

258. N.C. GEN. STAT. ANN. § 143-299.2(a) (2005).

endless speculation on the details of the alleged rape. After the subsequent indictment of three Duke lacrosse players, the defense team waged a formidable media campaign, during which they were able to win the support of the media and public through its artful disclosure of fact after fact, which revealed a scenario that caused every rational mind to question whether a rape ever occurred. The latest developments in the case seem promising for the accused Duke lacrosse players: Nifong dropped the most serious of the three charges, was brought up on ethics charges, recused himself from the case, and the North Carolina Attorney General's office declared the players "innocent."<sup>259</sup> Moreover, Nifong was eventually found to have violated numerous ethical provisions and was disbarred for his conduct.<sup>260</sup> However, even though all the charges against them were finally dropped, for the players, it was a Pyrrhic victory. The accused players will likely forever be known as the "accused rapists," and to some unfamiliar with, or uninterested in, the facts, the "rapists."

Even with the egregious conduct of the prosecutor in this case, the *reputational* remedies available to the players are not promising. While both the publicity surrounding Nifong being charged with, and ultimately found to have committed, multiple ethics violations as well as the defense's sanctioned retorts to Nifong's claims rehabilitated the players' reputations to some degree, they are left with a legal framework that makes it difficult to obtain monetary redress. Although the players would likely have been able to "pierce the cloak of immunity,"<sup>261</sup> because of Nifong's outrageous conduct,<sup>262</sup> the time pressure brought to bear by the statute of limitations made it impractical for the players to pursue a defamation action. While practicability is the concern for the accused in the Duke lacrosse case, monetary redress for reputational damage through a defamation action for other defendants is nearly unattainable.

While some courts insist that the remedy for the individuals harmed by a prosecutor's defamatory comments rests in the rules of professional conduct,<sup>263</sup> I am confident the accused Duke lacrosse players, whose reputations are forever damaged, will not feel whole, regardless of the severity of Nifong's discipline. A minor modification of Rule 3.8(f) coupled with a revision of a North Carolina statute, as suggested above, are concrete steps the legislature should take to ensure individuals victimized by a prosecutor's impermissible

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259. OFFICE OF ATT'Y GEN., SUMMARY OF CONCLUSIONS, *supra* note 29.

260. Amended Findings of Fact, Conclusions of Law, and Order of Discipline, *supra* note 55, para. 117, at 20–24.

261. *Ellis v. White*, 575 S.E.2d 809, 814 (N.C. Ct. App. 2003).

262. *See supra* text accompanying note 151.

263. *Sims v. Barnes*, 689 N.E.2d 734, 738 n.4 (Ind. Ct. App. 1997) ("We note . . . that our decision will not leave actual and potential criminal defendants wholly unprotected from unscrupulous prosecuting attorneys . . . [P]rosecutors are still subject to professional discipline if their actions stray beyond the bounds of ethical conduct.") (internal quotation marks omitted).

comments in the future have an adequate avenue for monetary redress. Although a change in the system will do little to comfort the victims of this indisputably tragic tale, it will ensure there will not be a sequel, which is perhaps the best that can be done.

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