

THE ROLE AND RESPONSIBILITY OF DEFENSE COUNSEL

MOSTELLER: My role will be brief and then I will subside. I will begin by introducing the panelists and then I will turn questioning over largely to them. I'll explain that in just a second. Let me go ahead with the introductions. And I'll introduce from my right to my left.

Laurie Levenson is a Professor of Law at Loyola Law School in Los Angeles. In addition, she's Director of their Center for Ethical Advocacy. Before she went into law teaching, she had a substantial experience as a US Attorney, and in addition to her current teaching role and as part of it, she is a widely viewed and used commentator on a number of the most important legal cases that have occurred in the last decades, including Martha Stewart, Rodney King, the Menendez brothers, O.J. Simpson number one.

LEVENSON: Two and three.

MOSTELLER: Okay. Immediately to her left is Michael Tigar who we have seen -- for those of you saw the video, he was on the video. Michael is a member of the law faculty at Washington College of Law. In addition to that, he is -- at American University. In addition to that, he is visiting at Duke Law School on our law faculty and we're wonderfully blessed with having him

here. In addition to his law teaching, he is a prolific writer of books. His most recent book, which is just coming out, is Fighting Injustice in Thinking About Terrorism. In addition to those roles, he is a very well-regarded litigant with some of the most important public cases in recent time. They include Terry Nichols, John Conley, Senator Kay Bailey Hutchison, and the Don Gentile case.

Our third panelist is Hal Haddon sitting on my far left. Hal is a 1966 graduate of this law school where he was Editor in Chief. He is a lawyer in Denver, Colorado with a firm that he is the major head of. And as a result of being such a wonderful lawyer, he has represented some very high-profile clients in Denver, including my favorite among the group is Hunter Thompson. But John Ramsey and most recently Kobe Bryant.

So this is our panel. We will proceed in that order. Laurie Levenson will go first. She will give something of an overview of the ethical and legal issues involved here. Then it will be Mike Tigar's turn to talk about the role and responsibility of lawyers from his perspective. A slightly different perspective will be offered by Hal Haddon. At that point there will be some discussion within the panel and then

I hope there is sufficient time for substantial questions from the audience.

I will stay out of the middle of this. I tend to think that you will have questions, for instance, you know, if it's about Kobe Bryant, I think we know who you would direct that question to. So if you have a question that is directed to one of the panelist, direct it to the panelist. I've asked them to repeat the questions. Other people on the panel can respond and I'll be as much helpful as I need to be, but my desire right now is to become a potted plant. I will turn it now over to Laurie.

LEVENSON: Well, it's really my pleasure to be here with this distinguished panel. This what the panel was going to be, but Mark Geragos is in trial or on television or sometimes both, so instead I'm really honored to be here with Bob, Hal, Michael to discuss this topic.

As I was introduced, my role here is to be the nerdy law professor and give you the overview of some of the rules and the laws that apply. You might be saying well, how does she have a clue. She was a prosecutor, not a defense lawyer. Since that life, I've been covering the trials of the century and we have one about every six months in Los Angeles. They

often involve the same people, so I did Rodney King one and two, and Menendez boys one and two, and O.J. one, two, and three, and we're going to Specter one and two.

But from that we do sort of get a view of at least how the defense lawyers tend to interact with the media. So I want to give you an overview of the ethical rules. We're not going to focus on just North Carolina, but more the ABA Standards and talk about what particular rules might govern the defense counsel.

So what do we have? Well, we have the ABA Model Rules and those have been influenced a great deal, because of my colleague here, Mike Tigar, and his argument before the Supreme Court. The ABA Standards Relating to the Administration of Criminal Justice Defense Functions and then the ABA Standards Relating to Fair Trial and Free Press.

What I'm not going to talk about, because we have the panel coming after us, are the special obligations of prosecutors on the ABA Rule 3.8. And it's interesting just to note that although the ABA Model Rules that apply to all the lawyers have been adopted in some form by the states, the 3.8 special one for prosecutors hasn't.

But let's start out with 3.6, which is the main rule, and what does it say? Well, it says a lot like what you just saw in the documentary in the Gentile case, which is, "A lawyer is prohibited from making statements that the lawyer knows or reasonably should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."

Now, that's really hard. How do we know? And given that in a lot of these matters there's already so much out there in the airwaves. We've heard today about the blogs and about the instant reporting. You have to wonder what is it that the lawyer could say would substantially prejudice the proceedings. Particularly which I think the public is a little more sophisticated. They take, forgive me, lawyers with a grain of salt. But nonetheless that is the standard and it needs to be the standard given the constitutional principles at hand.

Well, what can we at least beware of? I'm sorry. Beware of... They give you at least some guidance unlike in Gentile where if you did one of these things you would be automatically punished, they're now in the commentary of areas to beware

of.

Statements regarding witnesses and this would be in particular probably victims and accusing the victims of all sorts of improprieties and maybe even making false accusations. But isn't that problematic? Because the victim's story has already been heard.

Opinions regarding the guilt or innocence of the criminal defendant. Now, if Mark were here, I would ask him the following. Mark, what's your favorite way of talking about your client's innocence? And during while he was representing a guy named Michael Jackson, in the beginning of that proceeding Mark would come out for his press conferences and say, "My client has authorized me to say..." Of which he believes sort of took it out of his realm of making an opinion to what his client's opinion was of his own innocence. And then that way he'd say my client has authorized me to say that he's absolutely innocent. But the commentary says beware of that.

And information that the lawyer knows or reasonably should know is likely to be inadmissible. This most likely, of course, would apply to what the prosecutors are saying as

opposed to the defense, but it could go to certain types of impeachment that are not likely to get in. On the prosecutor's side things like test results that might be inadmissible, expert testimony that might be inadmissible, false confessions, prior acts, and the like.

Then you might be saying, well, what -- I like to play it safe. I am risk averse. I know Michael Tigar is still out there, but I don't want him representing me before the Supreme Court. What can I say where I will be safe in the safety zone?

Well, explaining that the charge is a mere accusation and that the Defendant is presumed innocent. I don't know how many people are going to cover that on the 11:00 news when you say my client is innocent. But I will say this. In listening to jurors in case after case, including one this week, they actually do take that seriously by in large.

Requesting assistance in obtaining evidence. We often think of that as applying to prosecutors, but I've seen it used very effectively by defense counsel. The late, great Johnny Cochran during O.J. one had a brilliant tactic. He put out an 800 number for anybody who had tips as to the real killer.

And they were willing to pay \$250,000 reward for whoever found the real killer. Are you kidding? My husband called in and said I was the real killer to get the \$100,000. But it worked. He had enlisted frankly the public's support, input, and help, and interest by having looking for evidence.

On the other side, the prosecution looked for evidence too. They didn't find it in the criminal case, but ultimately they found those pictures through the press of O.J. wearing those shoes that were used or they believed were used. So reaching out to the public can have an effect.

Information contained within a public record without further comment. What does that refer to? Loading up your pleadings. Knowing who you're writing for. Of course you're writing for The Court, but the safest way to get your version out to the press is to have it in your pleadings. They are a little more likely to get it right. If they edit it, it's going to be a little more awkward and at least gives them a starting point and then educates them regarding your case.

And then finally scheduling information, and in some courts they have a liaison officer that will do that. In other courts, these are things that you can.

Now, you don't have to do these things, and we're going to talk during the panel about the strategy whether it helps or not. But we're just looking at the ethical rules.

There's a really important provision in the ethical rules, and we refer to this as the Tit-for-Tat Rule. That notwithstanding these rules a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial and prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. In other words, when I was on the schoolyard, this started with he started it, right. I'm just responding. And nobody wants to be the one who says let's take it inside to the courtroom. So the minute there's frankly been an indictment or a press conference, this comes into play and how does it stop? It ordinarily stops by the first one who can run in and get a gag order, because under the ethical rules, the Tit-for-Tat is at play.

Not that many people care about in California, but we didn't have any of these rules until the last Monday of the O.J. case, because, I guess, some of the defense counsel appeared to be talking to the media they adopted rules that are the

same as the ABA Standards.

What else do we have under the ABA Standards? This is somewhat of a repeat, but it's out of another portion of the ABA Standards. Those relating to the Administration of Justice Defense Function Standard 4-1.4, and it's essentially a repeat of the ABA Rule under 3.6.

But then we have something from the 1993 ABA Standards for Criminal Justice Fair Trial and Free Press. And if you want to see a better, longer explanation of all of this, in the materials that my colleagues provided there's some wonderful materials.

Looking through that, it's interesting what the ABA Standards provide. They say there should be basically no perp walks. Well, there are perp walks. They say that there should be no courthouse leaks. There are lots of courthouse leaks. And then it says there should be no prejudicial statements by judges. You be the judge. But we're focusing in our panel more on what affects the defense counsel.

Now, in terms of defense counsel and reacting to the press, what rules apply there? You know that some lawyers on

occasion would want to say Judge, please just throw them out. They've already decided how this case should come out, they misinterpret things, they are intimidating witnesses, this is not good for my case, throw them out, you can't do this. What about the idea that The Court could limit public access to information? The Court does have the power to seal orders, but they have to have a hearing to decide whether that needs to be done keeping in mind the First Amendment interests.

There's also, believe it or not, still an issue open regarding prior restraints, like legal as in the Kobe Bryant case where the judge hit the wrong button on his computer and what flowed to the media or to public access... was it?

HADDON: In fairness, it was the judge's reporter.

LEVENSON: Judge's reporter.

HADDON: The judge being here. We want a complete record.

LEVENSON: Sorry Judge. It got misreported, Judge. So this goes out and the information, the question is what can happen then. Can the Judge say oops, don't print it? Or what will happen next? So that's an open issue.

Gag orders. Well, after the Gentile case, courts began looking at the standard for gag orders, and as Michael said before our panel began, it's absolutely correct. Even though

many judges have a knee jerk reaction of you know what, we'll take care of the media by just gagging the participants that's now the law is supposed to work. It is supposed to be that there's a compelling interest. In other words, you're trying other things and they're not working, and this is the least restrictive alternative. What are the other things that the judge can try? There's a wide range from noticing that the trial won't be for a long time off, continuing the matter, change of venue, sequestration, voir dire, maybe actually just setting the record straight. But we have seen sort of I would say at least in our jurisdiction an increase in gag orders.

What is the enforcement for these rules? For ethical rule violations they go to the Bar Disciplinary Committees, but frankly not very often, and that's probably the way it should be given the legal standard. But The Court also has, as you've seen here, contempt powers as well.

Finally a couple of other issues. Cameras in the courtroom. There has not been a court that has said that there's a constitutional right to cameras in the courtroom. I for one that would say that there's a possibility one day The Court could say that. Because if you think of the right of the

public's access to a trial, typically in these high-profile cases there would be about how many, maybe six seats total for the public to attend the trial outside of the participants and the media. So there may be a court at some point saying given the technology today what do we mean by right of access?

The federal rules don't allow cameras in the courtroom. We've had some justices say they won't as long as they breathe. But in the state system, it's left oftentimes to those individual judges.

For many years the judges have been suffering from what I would call the O.J. hangover. Nobody wants to be the next dancing Ito on the Jay Leno Show. But that is changing and there's a discussion to be had about how cameras in the courtroom do or do not affect the fairness of the proceeding and whether defense counsel feel that that's something that could help or disadvantage their side.

And then there is this, the legal commentator issue. Should there be ethical codes governing legal commentators? Now, before I sort of dress this, let me get a sense from our audience here today how many of you have talked to the press

or appeared on television regarding a matter? Raise your hand. I know there's more of you. They're sort -- the hands are going this high. Many of you had. And so the question is we don't have mandatory rules now, but Professor Chemerinsky of this law school myself have thought about it and have suggested that voluntary rules that at least help guide people so that the defense and prosecution will have a fair trial could be in play.

We have had situations where somebody who was commenting on a case, let's call them Mark Geragos, commenting on the Scott Peterson case saying no one is ever going to believe it wasn't him then becomes the defense lawyer on the case or vice versa. Does that pose particular challenges?

And speaking of challenges, I'll leave you with this. All sorts of issues are about. Should there be any restrictions? Why not just defamation laws? Why have ethical rules of the defense lawyers at all? After all, isn't their job just to represent their client? What are the outside limits? Is it okay to lie, attack witnesses or opposing counsel? And then what I suspect that really the question could come down to is not so much that these rules are designed to protect the prosecutor from being harmed by what the defense counsel

says, but to protect the defendant's case itself that sometimes the decision of whether to interact with the media is one about whether it will help your client or hurt your client.

So that's the background of the discussion I think we're going to jump into.

TIGAR: Well, everybody is going to be sharing their own experiences, and I will share mine. Much of what we've heard so far today bashes people in the media for doing things that we know they did and for which they should've been found guilty and have been, or bashing lawyers for doing what we know they did. But I want to recall for a moment some of the reasons why we have a thing called the First Amendment.

The Knight Foundation is supporting this program. It was the Knight newspapers before they were acquired by McClatchy that stood alone against Judy Miller of The New York Times and so on about the run up to the Iraq War.

In 1760s a number of British colonists were objecting to the crown getting broad scale warrants to search and seize. Now, we don't have a king anymore, so that ceased to become a problem. But John Adams was the lawyer for those folks and it

was the media campaign that led him to say then and there was the child independence born.

Thomas Jefferson's first choice on the Supreme Court was Justice Johnson who held that Jefferson had exceeded his power as Commander and Chief by blockading the Port of Charleston, and after Johnson issued that opinion in Gilchrist v. The Port of Charleston, the President had his Attorney General attack Justice Johnson in the press. First had him write a letter then published it. Justice Johnson said I would not ordinarily comment, but I will not be seen to be awed by power and he wrote and published A Defense of Judicial Independence.

Those of us old enough to remember the Civil Rights movement remember that it was The New York Times and other publications that publicized what was going on down there and helped to break the back of Southern resistance.

In my own cases, I can think of four people whose lives were confided to me as a lawyer who were helped by media coverage. One, because a New York Times reporter named Steve Labaton got interested, got at the facts, got Peter Jennings interested in the facts on ABC, got us a Times' editorial,

got the courts to take us seriously. And then the Pits/Ley case in Florida when Ed Williams sent me down there, Gene Miller of the Miami Herald courageously exposed those facts and we ran around the panhandle of Florida, got run off by a few armed Klansmen, but Gene kept with that case and finally they came off death row.

In the Terry Nichols case there were a lot of people who wouldn't talk to us, but they would talk to The New York Times and Washington Post reporters. And then they would publish it and we could send investigators out and get somewhere.

The 46 people prosecuted in Tulsa, Texas unjustly. The case of Ed Johnson lynched in Chattanooga and the Supreme Court Justice Holmes held a press conference about that and President Roosevelt, and prosecuted the sheriff who had let the lynching go forward.

So there we are. And there are some other examples. The Innocence Projects have already been mentioned.

Then on the other hand, we see cases in which there are these terrible distortions, and we wonder what we can do about it

and then how we as defense counsel should behave. We know about the Bryant case. We'll hear more about it. We know about the Haymarket case in history. The 1886 prosecution held under circumstances of hysteria, the media frenzy. And it's not just in this country. There was that pedophilia case in France.

Well, I reflect also on the fact that a few years ago I was asked to go down and represent the Charleston 5. The five people charged with having had a peaceful demonstration on the docks of the Charleston Harbor and having made with using their heads to make offensive contact with police batons. And the local prosecutor declined to go after them, but the Attorney General of the state said he was going to break the back of violent unionism in South Carolina. Held a number of prejudicial press conferences, and the first motion I filed when I got in the case was to disqualify him from proceeding further in the case. And the morning we were to have the hearing in Judge Rawls' court down in Charleston, he held a press conference and announced that he was, indeed, withdrawing from the case. Judge Rawls remarked that usually lawyers withdrawing file things called motions and then they have things called hearings, but said that that's fine, he's done it, he's not coming back, he'll never be welcome in my

court again not in this case. And then there was the disqualification of DA Macy in Oklahoma City.

So judges do care about these things, and that's a remedy we really have to think about and that maybe could be considered by the Judge Panel. When we did this thing, a panel like this for the Duke Alumns, Judge Showflat stood up -- he was sitting right over there - and, in that stentorian voice that has characterized his judicial demeanor, wondered what the hell the trial judge was doing during the Duke Lacrosse case and didn't he have a responsibility to do something.

So what's the conclusion? My own view is -- and I shared this with Laurie -- I think that one reason for lawyer restraint is that it can harm them. That if you're not restrained it harms the client. I don't think jurors like it. I sat and as a perspective juror in a panel in Austin, Texas, and the lawyer asked, he said have you ever seen me on television and one juror said, oh, yes, I've seen you. And the lawyer said, wow, what did you think? And the juror said, you know, I think it makes a piss poor impression people like you doing that on the television. And so well, he made a motion for a mistrial and Judge Mary Pearl Williams said, no, I'm sorry you asked it. You got the answer. You didn't blow the panel.

Go ahead. And I do think that's right. And I've said that to Steve Jones about his demeanor in the McVeigh case. So what do we do?

In the Nichols case when the indictment was returned, we held -- I had two signs at a press conference. One said Terry Nichols wasn't there and the other said a fair trial in a fair forum -- presaging that we were going to seek a change of venue. We did not do sound bite journalism. We said we thought the people of Oklahoma had suffered enough and that they should not have placed upon them the burden of trying to judge this case, set aside all the emotion that it had generated in their community.

We did agree to do some limited media contact. I can talk about that. I can recall when Congressman Dellums called one afternoon at 2:00 saying that Ed Mease was about to leak a statement that dope was being dealt out of Congressman Dellums' congressional office and what are we going to do about it. A perfect example of which you couldn't find out before 5:00, which is kind of your drop dead time if you're going to get on the media about it, enough to do anything, other than at 4:55 I stepped out into the hall and said, Good afternoon. I'm Michael Tigar. I represent Congressman Ronald

Dellums. We deny the allegations and we are looking for the alligators. Thank you very much.

Now so what's the conclusion? You know, the right of the media to report and opine subject only to the clear and present danger clause is in my experience valuable, exhilarating, and very, very dangerous. But that, of course, can be said of speech of any description. There are irresponsible speakers and some of the remedies that are proposed simply don't do it. They don't work. Now, I agree that the least restrictive alternatives test can be effective, and Judge Mace, for example, in the Nichols and McVeigh cases sealed a whole bunch of discovery material. Why? Because it wasn't in evidence in the trial yet, and releasing it to the public in that undigested form would only help further the FBI's program that had already begun with a bunch of systematic leaks. The Dallas Morning News took it to the Tenth Circuit and you can read that opinion. It's magnificent. And I'm glad Tom Metzloff mentioned Seattle Times. I started my oral argument in the Tenth Circuit by saying: "Good morning. As you know we're all interrupting getting ready for a couple of capital trials here to come over here and do this, which is one of the problems raised by The Dallas Morning News even having standing, but I'm sure

the counsel for The Dallas Morning News wakes up sometimes at night and hears a voice. And the voice says Seattle Times v. Rinehart, Seattle Times v. Rinehart." You know, this is the power of the judge to prevent these kinds of consequences.

And then the lawyers. I think that experience teaches us that if we play sound bite journalism we inevitably lose, because we are simply not in charge. The decisions are not being made in the interest of our client. However, the fact remains that we have to figure out how to engage constructively with the media. And that's particularly so if you're representing a public figure. Ronnie Earle indicted Senator Kay Bailey Hutchison during her campaign for election to the Senate for the full term she having been appointed in the meantime. Well, what? She's not going to say anything? She's going to let her opponent have the whole thing. By the way, Senator Hutchison is the only member of the United States Senate with a piece of paper signed by 12 people that says she's not guilty. The other 99 you have to take their word for it.

And then as we think back to the history of the cases of which I spoke, I'm so pleased with Justice Kennedy's opinion in Gentile v. State Bar of Nevada. You know, when he got to The Court, he really thought that he was taking Justice

Brennan's seat there. He was deeply influenced by Justice Brennan, especially on issues of the First Amendment, and he recognized that for all of our history and the cases I have mentioned are only a few of them, lawyers have had as I said on that video tape, as much a duty as a right to recognize that the public's business of determining guilt or innocence is done in courtrooms. But the public's business about whether the Las Vegas police are corrupt, or whether prosecutors have made terribly misguided decisions that place individual liberty at risk, or whether a department that calls itself Justice has forgotten that it's justice that's supposed to be blind, not the Department of Justice that's supposed to be blind. But those are issues of concern and who better to address them than the lawyers that are involved in these cases.

MOSTELLER: Hal.

HADDON: And I want to add in my time a caution to what Michael said, as Michael calls it a caution of prudence. I titled my discussion about this She Who Speaks to the Media Seizes a Wolf by the Ears. That's a knockoff of a great Richard Burton line from Anatomy of Melancholy. Burton was being melancholy about having been involved in a protracted legal proceeding, and he penned the line, "He who goes to the law seizes a wolf by the ears." I think that it's an apt analogy for a criminal

defense lawyer.

Sometimes when you're cornered, you have to talk to -- deal with the media. Certainly in high-profile cases it's a necessity. But when you're dealing with a wolf, even a trained wolf, you have to understand that the wolf does what the wolf's natural instinct is and that is to run the story and run it not with your varnish, but with whatever varnish the wolf chooses to put on it. So I consider it a very dangerous undertaking for a criminal defense lawyer. And my default position in criminal cases high and low is that I don't talk. And if I do, I do it in writing, because that can't be misunderstood. And it isn't subject to elaboration in the form of questions that can invade my client's confidences and otherwise be misinterpreted.

That said, I'm hardly pure on the subject of press conferences and talking to the media be the electronic or otherwise, but I think that you need to be careful with it and once you do it, you need to shut up and go about your business. And your business to me is preparing and presenting your case, because to paraphrase James Carvel -- I'm into paraphrasing today -- it's about the evidence stupid. Ultimately the jury determines based on the evidence what

happens to your client. And what you say on the periphery in a criminal case high or low I think rarely filters down except in a very generic sense impression way to the jurors and the judges who are going to decide your case.

But that said, I think also that in high-profile cases, first impressions are indelible, and they're indelible in ways positive and negative that are very hard to erase. And my view of what the press, be they traditional or new media, try to do very early on in a case, sometimes within the first 36 seconds, is to define who the villain is and who the victim is, and once defined, especially if you're defined as the villain, it's very hard to get out of that box.

I'd like to talk about the Ramseys in that context, because John and Patsy Ramsey for the last 11 years have been publically vilified, and if you ran a poll today, which somebody did in the wake of this John Mark Karr fiasco, some 58 percent of the American public still think one or both of them had something to do with murdering their daughter despite the fact that all objective evidence, including objective evidence that was weighed by a federal judge in Atlanta in a 97 page opinion, demonstrates, I think conclusively -- perhaps beyond a reasonable doubt -- that

they had nothing to do with the murder of their daughter. Still 11 years later 58 percent of the American people think that they did.

Why is that? Because in the first week of that case there was a media explosion accompanied by some incredibly reckless and defamatory leaks from Boulder authorities who early on within the first 24 hours convinced themselves that this fit the profile of a parent murdering a child. Someone must have done it. It was either John or Patsy. And they embarked upon a media leak campaign that was fueled in part by advice they got from FBI profilers, by advice they got from a retained psychiatrist who told them that the way that you crack one or both of these parents is to convince the less culpable parent that the other one did it. And so they leaked, falsely, that there had been evidence of prior sexual abuse of JonBenet. There wasn't. There never was. They leaked falsely that there was evidence of semen on the body. There wasn't. They leaked falsely that there had been fresh snow at the Ramsey house and that there were no footprints in or out of the house, so it must have been an inside job. One of the two parents must have killed their daughter. When, in fact, there hadn't been any fresh snow at that location for 48 hours. And when finally almost a year and a half later the police photographs

were revealed publically, it looked like a herd of elephants had been through the very old snow to and from that house; hundreds of footprints. Yet the police leaked all of these things and much more in a deliberate effort to try to break the Ramseys.

Maybe that works and maybe that's sound psychological law enforcement. We can debate that, but it only works on guilty people, and the Ramseys in my view, and I think supported by all of the objective evidence, suffered from the virtue of innocence. And they were literally destroyed by the leaks that were deliberately put out in the first week to ten days of that case. And we were never able to erase that indelible impression.

I take a lot of heat and I do today from people who said why didn't you do more. Why didn't you speak out? The answer in part was that I was skiing when the case happened and I didn't come back for three days. But more probatively and to my point, we didn't know the facts in that case. When I say we, my partners and my investigators and I didn't know on the front end of that case what the real facts were. And we had only the vaguest of sense impressions after having met with our clients who we didn't know before what they were about,

whether they were capable of such a thing, and the problem you have as a criminal defense lawyer on the front end of a case is that the police always leak. If the prosecutors don't leak, they hold frequent press conferences to announce their intentions and then the reality of criminal charges. And the defense lawyer very rarely has the kind of command of the facts that the authorities do on the front end of a case. And so although you can say defense lawyers ought to be out there, ought to be out there batting down false leaks and inflammatory statements by prosecutors as soon as their aired publically and that's the conventional media wisdom, fight back immediately. If you don't know the facts it's very dangerous stuff.

If in a sexual assault case you stand up and say there was no sex or somebody else was there, I didn't do it, and then when the DNA evidence comes back and it indicates that you did have some sexual contact, your client did have some sexual contact with the alleged victim, you look like an idiot, because you are an idiot. You didn't know what you were talking about and you get pilloried, not only get pilloried in the court of public opinion and perhaps by jurors who remember it, although my life experience tells me that jurors seldom remember what happens and what's reported a year

before or a year and a half before trial, but judges and prosecutors have been known to read the paper and they've been known to if not watch television at least get statements, idiot statements, by defense lawyers and prosecutors reported back to them, and it ruins your credibility.

So my default position is if your client has been seriously defamed in the media and if you have a sufficient command of the facts that justify a statement publically, make one. Make one immediately after indictment. Make one after there's been provocation so that Rule 3.6C allows you a reasonable right of response, but make one that is very limited and, I think, if you can -- as was very effectively done I thought in the Duke Lacrosse case -- let your client be seen and heard in a simple statement I'm innocent and the protestation of the kinds of media slander that your client has endured.

I thought David Evans' statement at the press conference right after he was indicted was brilliant. And I thought it had a real significant effect on public opinion of him and of the case. And I thought although you don't win these cases in the court of public opinion, ultimately you have to win them in court, I thought it went a long way towards if not turning

the tide, at least stabilizing the water.

So I think that it's important if the prosecutors had a press conference and if the police have been leaking I think it's important to make a statement. But then shut up. And if you don't have anything to say, because occasionally your client may be more guilty than not, either say nothing or -- and it's my preferred bromide, say, you know, ladies and gentlemen, I'm really outraged at the leaks that the prosecutor and the police have been putting out in this case. I think it's highly inappropriate. I think it's an insult to the jury who is going to hear this case that these people think that they can try to manipulate them through the media. I will have a lot to say when I get to court and I'll see you in court. That's my standard response in cases where I either don't know the facts or I think the facts are a little bit slippery for my client.

I'm always astounded, and it seems to be vogue -- Bob Mosteller raised it with me the other day -- it seems to be vogue that whenever there is an indictment of a highly publicized case, a lawyer issues a written statement that says something like this indictment is an outrage. John Smith is absolutely innocent. He's devastated by this. When all the

facts come out, he's going to be conclusively shown to be innocent and you're going to have to retract all of this. And two or three weeks later cut to Michael Vick to take a recent example, two or three weeks later they cut a deal. I don't think that it serves anyone's purpose even if it makes the defendant's family happy for three or four days to issue a statement like that if the facts are demonstrably bad and if you're ultimately sooner or later going to have to craft some sort of a plea bargain.

So my cautionary tale is simply this. If you have to seize the wolf by the ears, do it with care. Remember what happened to Siegfried and Roy. I think it was Roy the lion tamer. Even though it may be a well-trained beast, it's programmed to eat and if you play the media game in my life experience you will, if you're lucky, just lose a few fingers, or in the case of Mr. Roy, lose part of your head.

MOSTELLER: Thank you. Before we go to questions, I wanted to see if Laurie or Mike wanted to comment on things that happened after they spoke to begin with.

TIGAR: No. I think Haddon and I probably agree and we'd said that everybody in the room that does these things has been burned one time or another by the media, and so I'm reminded of that Mark Twain thing. We should be careful to get out of an

experience only the wisdom that is in it and stop there, lest we be like the cat that sits down on a hot stove lid. She will never sit on a hot stove lid again, and that is well. But she also will never sit down on a cold one either.

LEVENSON: I'm actually going to jump in with just some thoughts that they prompted in my mind, which is from what I've seen. You know, I think there is some misperception that all defense lawyers have to have the same strategy, and I don't think that's true, because people are -- have different cases, different experiences, different manners, and that I think it would be wrong to say this is the model of how you're going to deal with the press.

There are some lawyers who are really good at it. They know instinctively to wear a blue shirt. They get it. They have the sound bite. It works. They know their community. I'll mention Cochran again. Johnny Cochran knew that case and that community and he had been framing that argument for 30 years, including while he was in the DA's office. He knew the LAPD. He was ready to go. And it wouldn't have sounded right coming out of anybody else's mouth.

On the other hand you have someone like Tom Mesereau who secured the acquittal for Michael Jackson. He would not talk

to the press. He had nothing to do with the press. He didn't want to. He felt that that wasn't where his strength would be, and I asked him about it and he said there are many downsides and I'll share them with you.

He says first of all no one taught us in law school of how to talk to the press. And that's probably very true. We teach trial advocacy. We don't teach, you know, advocacy to the media. He said it's a distraction. I got enough work to do to try this case. If I'm going to talk to the press, the other side will automatically see my strategy. How does that help me? Fourth, maybe if I want to float a balloon, I'll let it leak out there, but ordinarily I don't want them to see what I have. It creates undo expectations and finally it heats up the fight, and I don't want to heat up the fight. I want to have only the fight I have.

So his challenge, and that for other lawyers who feel that maybe, okay, I'm going to play it safe, not talk to the media is, and maybe these gentlemen will share their experiences, is that's fine until people start talking for you. Which is the PR. A lot of these high visibility cases there's a family friend who feels like they have to go and defend or a PR person or an agent or jury consultant. And so you now have

the responsibility of not just controlling what you say, but what other people are saying, let alone your clients.

And then when we learn today that oh, there's that blog issue. And as I understand this little case that's developing in Las Vegas right now you had the alleged witnesses of O.J. three going to the media and going on the blogs before they were ever interviewed, and so for both sides that will pose a challenge.

So I don't know if any of that prompts in your mind strategy calls or not.

HADDON:

I was going to talk about blogs and websites, because I think it's a really interesting issue for defense lawyers. One thing we always do in a sexual assault case as defense lawyers is go to Myspace and grab if we can the postings by the accuser and his or her friends, but sometimes they're his. And we grab them before they can delete them or alter them, because they're really, really good evidence.

Another thing that is increasingly in vogue, and Michael can talk a little bit about it from the Lynn Stewart experiences, the use of websites. At least the United States Department of Justice uses websites in big cases, because they'll have a

cookie on their webpage that says if you've got information about this or that terrorist or this or that indicted case come in here. And they're doing it to solicit information, witnesses, and evidence, and I think defense attorneys in important cases that catch public imagination have to consider using that same kind of tool.

I know Lynn Stewart had a website. I don't know what fruit it yielded. In the Ramsey case we had a website asking for leads, offering rewards, doing all those things, and we got some decent leads through that vehicle. So I think that the new media can be really important in these cases.

I also troll. I don't post, but I troll extensively the blogs and commentaries on cases I'm doing, because I'm looking for witnesses and I'm looking for plants, because sometimes as one of the speakers mentioned. This morning for example lawyers in the Libby case were planting if not phony at least misleading kinds of leads that they hoped would catch media fire and distract the Department of Justice. So I'm looking for what the other side is doing, whether the other side be law enforcement, the prosecutor, or people just bent on smearing my clients. But it's a very interesting and important new venue that none of us old guys have really

mastered.

TIGAR:

When we say innocent, we almost never mean innocent. Right? We mean reasonable doubt. But we don't even mean that, do we? We mean to present to the jury a plausible alternative reality, and if that alternative reality, our theory of the case, raises a reasonable doubt then we get an acquittal.

Now, the Nichols case we presented 80 witnesses in our case in chief. Where did we find those people? Because our theory was that Tim McVeigh had reached out to others, not Terry Nichols. That the FBI had shut down its investigation two days after the bombing and that there were a lot of people out there who had had contact with McVeigh, who had seen him, who had known about him, and where are they. Now, this today there'd be even a lot more. They were in this alternative print media. They were in what has now become the blogosphere. They were in all sorts of places where and, you know, there's a lot of weirdness out there. And by golly McVeigh was at Elohim City. McVeigh had reached out to a known bomber saying that, you know, this other guy was thinking of having this, wouldn't do it, so therefore. And from those leads we could send investigators out that worked for us.

In the Stewart case the main purpose of the website was to put on the legal arguments that -- and to frame the case in a way that as you know we came in second with the jury, but the judge -- none of us up here has ever lost a case. We've come in second a few times. And the -- but the judge at sentencing accepted that. Where the internet research helped us was I ran into Judge Webster, who had been FBI Director and CIA Director and I said, Judge, I think the FBI completely screwed up the 88,000 electronic intercepts in this case. I just can't make head nor tale of it. He said, well, let me write down some URLs for you. You don't know half the story of how bad it is over there. So we managed to get in there and make a record about that.

So yes, I think that's the part of the world of which we need to take advantage.

LEVENSON: And I want to make one more comment from a slightly different perspective, which is how often and how effective defense lawyers can be actually in using another messenger. How I often get pleadings from the defense lawyers that they're about to file, because they know the media is going to call and they intend to say no comment, but they know when they say -- or not no comment, they won't be answering their phone that day, they'll be in another court appearance, that the

media will then make calls to the usual suspects to sort of say what do you think about this motion.

So there are ways to be able to get your information to the media without it distracting from your time and without you having to do that.

TIGAR:

But control. I mean, I can -- Senator Hutchison, for example, fairly needed, wanted to have contact with the media, but the problem was that for Dick DeGuerin and Ron Woods and I putting together the defense we wanted to make sure that while she was serving that, we didn't dis-serve the cause of trying to win the lawsuit. Now fortunately she had a media adviser. A guy named Karl Rove and who later went on to do other things. And it was important for the lawyers to say look, you have a media guy who is well known for certain tactics. We're in control of the lawsuit. And while we can't control your behavior, please understand as we say to every client here's a list of things that might be done by you or your adviser that would definitely be contraindicating in terms of your liberty. And that, you know, usually gets their attention.

MOSTELLER:

I think we now have time and there may be some more comments, but I think we ought to go with some questions. And I will be happy to field them, but I think it may be more efficient to

direct them to the person that you think is most likely to have the first answer and then other people can pipe in. Yes.

AUDIENCE: I guess this is a question for Mr. Haddon about the Ramsey case. (Inaudible) reality than a question. (Inaudible) point out that (inaudible) about 58 percent of American people still think the Ramseys are guilty. On the other hand in another context you pointed out that in your experience most of us don't remember things that were in the media a year ago. In fact, there's research showing (inaudible) last night (inaudible). And so I wondered -- I believe that that that 58 percent (inaudible) had very little to do with the specifics but rather the gestalt (inaudible) one thing that remains in American's mind is the video and we had the sense that these were strange parents (inaudible) --

HADDON: Oh, sure. I saw it.

LEVENSON: Repeat the question.

HADDON: The video was indelible. And I have had people tell me at cocktail parties well, if the Ramseys didn't kill their daughter, they certainly precipitated it by letting her be in beauty pageants. I don't think Little Miss Sunshine has done much to pull the stinger from that frankly. Although it cast a lot lighter light on beauty pageants for little girls, but that was indelible. There's nothing we could do about it.

And the other thing that's indelible internationally. I got in a big fight with a bunch of Irish lawyers about a year ago about the Ramsey case, and they kept saying, well, they must have done it, one of them must have done it, because there were no footprints in the snow. And I'm just tearing my hair. I'm saying there was no fresh snow. There were hundreds of footprints. Oh, no. We know that there were no footprints in the fresh snow. That stuff is indelible in that case.

And so while I do say that in my life experience with jurors they don't remember specific facts in that case, they remember that video and they think they remember that there were no footprints in the fresh snow. And it's not anything we could rid of. We could and have screamed it to the heavens, and it's just there, because it got pounded, pounded, pounded internationally as well as nationally.

MOSTELLER: Either of the other panelists want to? Okay. So --

LEVENSON: Well, I'm going to jump in here and it's probably more appropriate for the media people to say, but things that in my experience people remember have much more to do with images than what lawyers say. So if you're going to talk to the media, think of what your prop is going to be, because it's the prop that they remember, not so much your golden words.

MOSTELLER: Okay. When someone takes a question, repeat it.

HADDON: Okay.

AUDIENCE: If you all (inaudible) often the government has this unique tool that allows legal extortion. In parallel proceedings they'll do criminal proceedings at the same time they're doing civil proceedings (inaudible) as well. And often the goal is really not about (inaudible), but really having negotiated leverage. I'm interested in your comments about how far can you go to combat that government sort of (inaudible) tactic that (inaudible).

HADDON: The question -- and if I don't get it right correct me -- the question is in parallel proceedings, which you very often see in federal cases where the government initiates a criminal investigation and at the same time initiates some sort of regulatory investigation. You saw it a lot in the early to mid 2000s with all of these securities investigations that go on. And so the government basically has got two hammers that they're pounding you with simultaneously. And I take it that the question, ultimate question, is what can you do about that?

AUDIENCE: How far can you go to combat that (inaudible).

HADDON: How far can you go to combat that? The best you can. What -- I represented Quest Communications the company, which was subjected to parallel proceedings, SEC and criminal

investigation as were its executives, and we weren't very effective at combating that, but when the SEC finally brought suit against a number of the individuals, and there were still criminal investigations going on pre-indictment, we were successful in staying the SEC suit and we've continued to stay that thing until this day. But other than stays and I think a liberal application of the Fifth Amendment, which a lot of companies and their executives don't like to use, there isn't much you can do to stop those two trains.

Although there is some really interesting recent case law in my jurisdiction and actually the Scrushy case in Alabama which says that the regulatory agencies and the criminal agencies shouldn't be sharing information. And that was a District Court ruling in Scrushy and we've got a comparable, although wavier ruling in some of the Quest litigation. So you can also seek an order to that effect. And all else fails in the criminal case if the criminal side and the regulatory side are sharing information you can move to suppress that shared information in the criminal case and that's also been successful in some instances. And that doesn't have much to do with the media. I'm sorry.

AUDIENCE: My experience has been (inaudible) dealing with (inaudible) drives the prosecutor crazy and they'll immediately shut down

the civil case (inaudible).

HADDON: Yeah. And in the Quest litigation, the federal prosecutor successfully moved to stay all the litigation in the civil case for five years while they got their criminal indictments up, running, and fully prosecuted. So that's the antidote that federal prosecutors, I think, very successfully use around the country.

LEVENSON: I actually want to offer a different take not related to the corporate cases, which I think have their own dynamic. But when you have some of these other types of crimes, for example, a murder case, you'll have a companion wrongful death civil suit and sometimes it can actually help the defendant. For example, in the Specter case where there was a hung jury this week, what we started to hear from people on the street was why should we pay the money to retry this case. Can't they just do it in the civil case? And so sometimes there's a silver lining there.

HADDON: And I think that's a good point. I was telling Judge Ruckriegel on the way in yesterday that my office has handled in the last year I would estimate no fewer than five sexual assault cases where immediately after and once before any criminal complaint was made we get a call from a lawyer who wants money. And you have to be careful to record that call in a way that you can use as evidence, but it's substantial

evidence in any case whether it's a sexual assault case, a murder case, or any other kind of criminal case where it is provably a money grab. I think jurors tend to discount the testimony of the complainant substantially.

TIGAR:

There's another aspect to that and this responds to the concerns expressed this morning about naming victims in sexual assault and other cases. The prosecutors only prosecute a fraction of the prosecutable criminal behavior that goes on. That's prosecutorial discretion. We know that that happens. And given the breadths of modern sexual assault statutes, that is the kind of conduct that can legitimately be prosecuted as sexual assault, so called date rape cases, it may very well be that some accommodation that serves the needs of the complainant, the accused, and the institutions can be worked out that puts things back together. And that's why we have parallel civil and criminal systems. And if the media frenzy has begun then the process that could lead to a resolution, and this may be typical of all civil/criminal parallel tracks, is out of everybody's hands, because none of the actors, especially public actors, feels then free to pull back, take a more reasonable position and try to get things resolved.

HADDON:

I take the position that if there's a criminal case that's been filed or even being seriously investigated, I won't talk

to the other side, the attorney for the complaining witness about money, because it can be construed as extortion if you pay it, and it can be construed as being complicit in attempted bribery if you even have the discussions. And I've taken that position in cases where my clients would've been happy to pay rather than play, but I think it's a very dangerous game.

MOSTELLER: Other questions? Any final words from the panel?

HADDON: Beware of the wolf.

MOSTELLER: I'd like to thank the panel and give you a little bit longer break.