Media Misuse: Criminal Lawyer Advertising and Prosecutor Campaigning under the Guise of the Public's Need to Know

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I. INTRODUCTION

Media coverage of the work of lawyers is to be expected when crime provides the clients. In the vast majority of routine criminal cases, over-bearing media attention is not a problem. A high profile case involving a well-known defendant or a particularly news worthy crime, however, will receive often over-the-top media coverage.[1] The victim and defendant may be the stars of this media extravaganza, but it may be the defense lawyer and the prosecutor who seek the spotlight. These lawyers are well aware that intense media coverage of their high-profile case may be that once-in-a-lifetime opportunity to promote their individual lawyerly talents and successes.[2]

Perhaps most of us would relish seeing our names in the newspaper or viewing our interviews on television. Rules of legal ethics, however, forbid criminal defense attorneys from seeking inappropriate publicity. The legal profession fears that "trying cases in the media" will prejudice subsequent official adjudicative proceeding, a view shared by leading scholars.[3] Even assuming no intention to prejudice the official case, however, the temptation can be enormous to take advantage of the media attention in order to advance one's career.

Several scholars have explored the interesting and complicated First Amendment freedom of speech and freedom of the press issues infused in this

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1. *See*, *e.g.*, Mawiyah Hooker & Elizabeth Lange, *Limiting Extrajudicial Speech in High-Profile Cases: The Duty of the Prosecutor and Defense Attorney in their Pre-Trial Communications with the Media*, 16 GEO. J. LEGAL ETHICS 655 (2003).

2. *See*, *e.g.*, Lonnie T. Brown, Jr., "May It Please the Camera … I Mean the Court" – An Intrajudicial Solution to an Extrajudicial Problem, 39 GA. L. REV. 83 (2004); Ryan Brett Bell & Paula Odysseos, *Sex, Drugs, and Court TV? How America's Increasing Interest in Trial Publicity Impacts Our Lawyers and the Legal System,* 15 GEO. J. LEGAL ETHICS 653 (2002).

3. *See, e.g.,* Judith L. Maute, *"In Pursuit of Justice" in High Profile Criminal Matters*, 70 FORDHAM L. REV. 1745 (2002).

question.[4] Ethical restrictions and judicial gag orders prohibiting public speech raise quite serious issues. On the premise that these First Amendment topics are being adequately explored by others, this article focuses upon the use and misuse of media publicity by criminal defense attorneys seeking to advertise their practices and by criminal prosecutors seeking to accelerate their political campaigns.

These advertising and campaigning questions have less obvious constitutional dimensions, but are covered fairly extensively by various rules of ethics and standards of conduct. The overriding question is whether these ethical standards are justified and whether they provide an effective check on media-hound lawyers. How should the legal profession balance the need to prevent misuse of the media by lawyers who nonetheless want to draw attention to their practices or political campaigns?

This exploration of these questions and issues begins with a sketch of who these lawyers are and why they seek media attention. The next section lays out the basic restrictions on use of the media for advertising and trial publicity from the American Bar Association ("ABA") *Model Rules of Professional Conduct* ("*Model Rules*") and similar ethical guidelines. The effectiveness of these restrictions (or lack thereof) is then described, citing some egregious examples. The final section explores means, both practical and idealistic, by which we might more carefully harness lawyers' strong craving for media attention.

II. RECOGNIZING THE CRAVING FOR MEDIA ATTENTION

Lawyers in private practice, including criminal defense lawyers, must be attuned to publicizing their practices. From hanging out shingles and placing yellow pages ads to creating television commercials and internet websites, criminal defense lawyers seek the most effective means of parading their talents and credentials before potential clients. Lawyers quickly learn that community activities and various public services are essential to professional networking, often providing more of a boost to one's practice than standard advertisements. Lawyers in criminal practice, however, may get little boost to their careers from serving on the local school board.

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4. *See, e.g.*, Jessica A. Hinkie, *Free Speech and Rule 3.6: How the Object of Attorney Speech Affects the Right to Make Public Criticism*, 20 GEO. J. LEGAL ETHICS 695 (2007); Mattei Radu, *The Difficult Task of Model Rule of Professional Conduct 3.6: Balancing the Free Speech Rights of Lawyers, the Sixth Amendment Rights of Criminal Defendants, and Society's Right to the Fair Administration of Justice*, 29 CAMPBELL L. REV. 497 (2007); W. Bradley Wendel, *Free Speech for Lawyers*, 28 HASTINGS CONST. L.Q. 305 (2001); Erwin Chemerinsky, *Silence is not Golden: Protecting Lawyer Speech under the First Amendment,* 47 EMORY L.J. 859 (1998); Kathleen M. Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers' First Amendment Rights*, 67 FORDHAM L. REV. 569 (1998).

The focus here is on the private criminal defense bar. Criminal defense lawyers working in government-paid positions, typically some form of public defender office, have little interest in publicizing their practices in order to attract more clients. Indeed, public defender's offices typically are overwhelmed with criminal clients, so they might well seek ways to reduce the caseloads of their defense attorneys.

In other cases, private criminal defense lawyers may be working for and with defendants' rights organizations which thrive on media coverage of their activities. Lawyers almost always handle these cases pro bono, but the organization can be expected to use them to raise money and to cite them extensively in their fundraising campaigns.

Criminal prosecutors, like all lawyers, are also bound by the restrictions on trying their cases in the media. Of course, they are public law enforcement officials, so ethics rules provide special if limited exceptions for their allegedly necessary public comments.[5] Unlike private criminal defense lawyers, criminal prosecutors have no need to seek clients by advertising their practices. Almost always politically elected or appointed, prosecutors correctly see favorable media coverage of their key cases as critical to their political careers. This is true whether they are running for reelection as prosecutor, for judicial office, or for any other political position. No current or future political candidate can ignore the fact that political campaigns depend heavily upon favorable press coverage, especially in high profile matters.

Criminal prosecutors and district attorneys hold political office and thus must be politically savvy and opportunistic if they are to survive. A fundamental premise of anyone seeking and holding political office is that it is essential to obtain favorable media coverage of their activities, especially while in political office. When that "once in a career" case comes along, prosecutors can be expected to milk it for all of the media coverage they can get and to jump start their next campaign for prosecutor, or judge, or governor[.][6]

III. ETHICS RULES

A. Advertising and Communication

Key ethics provisions with which publicity-seeking defense lawyers and prosecutors may clash can be found under the advertising provisions. Unlike private lawyers, criminal prosecutors do not engage in private advertising of their practices, but both camps may chafe at ethics rules discouraging or even forbidding boastful and self-laudatory comments. For example, the *Model*

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5. R. MICHAEL CASSIDY, PROSECUTORIAL ETHICS 115-17 (2005).
6. *Id*. at 117.

Rules say that private criminal defense practitioners cannot claim to be certified specialists in criminal law unless such certification is by an appropriate agency.[7] However, if the media refer to that defense attorney as a "leading" or "super lawyer,"[8] chances are that more potential clients will see that newspaper or magazine article than will ever read a yellow pages ad. Might not prosecutors similarly bask in the glow of descriptions such as being a "tough" or a "law-and-order" prosecutor? Beyond the many benefits of such overt media coverage, that prosecutor may be seeking the editorial endorsement of the same media in his or her next political campaign. Is this just a ruse by which prosecutors circumvent the ethical requirements for truthful communications about their experiences and abilities?

The *Model Rules* begin this topic, appropriately enough, by stating that a lawyer "shall not make a false or misleading communication about the lawyer or the lawyer's services."[9] This admonition, essentially not to lie or mislead, applies to lawyer advertising and all other communications regarding the lawyer's services.[10] A key measure is materiality, in that it must be a "material misrepresentation of fact or law."[11] Interestingly, even truthful statements that are nonetheless misleading are prohibited.[12]

A hypothetical example I often use when teaching this area is the young lawyer who wins the first case she ever tries in federal court. She then advertises that she has never lost a case in her entire federal court practice. This is a truthful statement, but one which engenders a "substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation,"[13] namely that this lawyer has substantial and extraordinarily successful federal court experience. Even if this lawyer had tried twenty cases in federal court and won all of them, her truthful claims of being undefeated might mislead potential clients to expect the same results regardless of the

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7. MODEL RULES OF PROF'L CONDUCT R. 7.4(d) (2008).

8. See, for example, the magazine *Super Lawyers* (superlawyers.com),which claims not to designate individual practitioners as "super lawyers," but only to select lawyers for inclusion on their super lawyers list (the distinction may escape you). The March 2008 issue of *Super Lawyers*, which focused on the District of Columbia metro area bar, selected 141 criminal defense lawyers and two criminal prosecutors for inclusion on their Washington D.C. Super Lawyers 2008 list.

9. MODEL RULES OF PROF'L CONDUCT R. 7.1 (2008) ("A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.").

10. MODEL RULES OF PROF'L CONDUCT R. 7.1 cmt. 1 (2008).

11. MODEL RULES OF PROF'L CONDUCT R. 7.1 (2008).

12. MODEL RULES OF PROF'L CONDUCT R. 7.1 cmt. 2 (2008).

13. *Id.*

specific factual and legal circumstances of their cases.[14] Including an appropriate disclaimer in the lawyer's communication may preclude a finding that the statement is misleading.[15]

On the more specific topic of lawyer advertising, the ABA and other bar associations have fought long and hard battles against undignified hawking of legal services.[16] Today, so long as they do not misstate the facts or mislead potential clients,[17] lawyers "may advertise services through written, recorded or electronic communication, including public media."[18] Admittedly this "involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele."[19] Even the ABA has finally concluded, however, that the bar's "interest in expanding public information about legal services ought to prevail over considerations of tradition."[20] Moreover, the ABA apparently has little or no interest in continuing to police undignified advertising by lawyers.[21]

The scope of information permitted in lawyer advertising is now quite broad and nearly open ended.[22] Most pertinent to the focus of this article, lawyers are permitted to advertise "names of clients regularly represented."[23] If a lawyer were representing a client in a high profile case, that lawyer might be able to refer to that representation in her advertisements. However, the concept of clients "regularly represented" presumably is meant primarily to refer to long-term corporate clients of corporate firms. It is difficult to think of high profile criminal clients who need recurring, long-term legal services, but some white collar crime cases do go on for years and years.

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14. MODEL RULES OF PROF'L CONDUCT R. 7.1 cmt. 3 (2008).

15. *Id*.

16. *See, e.g*., Zauderer v. Office of Disciplinary Council of the Supreme Court of Ohio, 471 U.S. 626 (1985); Bates v. State Bar of Arizona, 433 U.S. 350 (1977). *See also* DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 729-32 (4th ed. 2004); MODEL RULES OF PROF'L CONDUCT R. 7.2 cmt. 3 (2008) ("Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising.")

17. *See* MODEL RULES OF PROF'L CONDUCT R. 7.1 (2008).

18. MODEL RULES OF PROF'L CONDUCT R. 7.2(a) (2008).

19. MODEL RULES OF PROF'L CONDUCT R. 7.2 cmt. 1 (2008).

20. *Id*.

21. *See* MODEL RULES OF PROF'L CONDUCT R. 7.2 cmt. 3 (2008).

22. MODEL RULES OF PROF'L CONDUCT R. 7.2 cmt. 2 (2008) ("This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.").

23. *Id*.

Our inquiry concerns lawyers seeking media coverage, so it seems unlikely that they would run afoul of the prohibition of giving "anything of value to a person for recommending the lawyer's services."[24] Rarely would a fact scenario arise in which a lawyer pays a journalist to cover the lawyer's case in a particularly flattering manner, but one does wonder about personal favors asked and offered between the players. For obvious reasons, this provision does not cover payments of standard listing and advertising fees by lawyers.[25]

Understandably, criminal defense lawyers and prosecutors want to be recognized as particularly accomplished in the practice of criminal law. The *Model Rules* allow for this.[26] For a defense lawyer in private practice, the base line would be simply to communicate or advertise that the lawyer practices criminal law. If the lawyer's practice is limited to criminal law, that limitation can be included.[27] Potential clients may well assume that lawyers who practice only in the field of criminal law will be more accomplished than generalists who practice in several fields.

This line of analysis leads us to use of the term "specialist" in referring to lawyers who practice only or primarily in criminal law. Criminal lawyers may refer to themselves as specialists in criminal law, but they must be aware that this term may carry with it a connotation of being particularly experienced and accomplished in the field.[28] Obviously, a brand new lawyer can specialize only in criminal law on the first day she begins her law practice, but normally we should not assume a beginning criminal lawyer is particularly accomplished in that field. Our personal experiences in being treated by medical specialists may lead us to assume that the very term "specialist" means that the practitioner has been so designated by some official board of certification.[29] In order to deal with this common assumption, the *Model Rules* require that

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24. MODEL RULES OF PROF'L CONDUCT R. 7.2(b) (2008).

25. MODEL RULES OF PROF'L CONDUCT R. 7.2 cmt. 5 (2008).

26. MODEL RULES OF PROF'L CONDUCT R. 7.4(a) (2008).

27. MODEL RULES OF PROF'L CONDUCT R. 7.4 cmt. 1 (2008) ("If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate.").

28. MODEL RULES OF PROF'L CONDUCT R. 7.4 cmt. 1 (2008) ("A lawyer is generally permitted to state that the lawyer is a "specialist," practices a "specialty," or "specializes in" particular fields, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services.").

29. MODEL RULES OF PROF'L CONDUCT R. 7.4 cmt. 3 (2008) ("Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to insure that a lawyer's recognition as a specialist is meaningful and reliable.").

lawyers not use or imply that they are "certified" specialists unless such certification has been granted by an appropriate organization.[30]

Prosecutors employed in full-time positions obviously limit their practices to criminal law. It might seem reasonable to refer to these government employees as criminal law specialists. If they are experienced and senior in their positions, this would not be misleading, but what about the first day on the job for the brand new assistant prosecutor? They would not be placing advertisements, of course, so they would not be holding themselves out as criminal law specialists, but that label might be applied to them in less formal communications. Might media coverage of a prosecutor's high-profile case characterize that prosecutor as "experienced," or "seasoned," or "tough"? This common media occurrence illustrates how a prosecutor might work to create or at least acquiesce in favorable media coverage that could be of critical value in a current or upcoming campaign for office.

B. Trial Publicity

Efforts of prosecutors and criminal defense lawyers to generate media coverage of their high profile cases appear to run directly counter to the bar's ethical restrictions on trying cases in the media.[31] The nature of high profile cases is to attract media attention, but at the beginning of the case the media focus is typically on the victim and the arrested suspect. If the case is still at the police stage, the prosecutor is not yet involved and typically no defense attorney has yet been appointed or retained. When the case does get to the lawyers, the prosecutor can be expected to take the lead.

Ethics rules provide for a few limited public statements by lawyers in all cases.[32] Such information centers on what is in the public record,[33] requests for information from the public,[34] and warnings about dangerous persons.[35] Several of these provisions, certainly including the last one about dangerous persons, would seem to apply most obviously in criminal cases. Several additional categories of public statements are reserved only for criminal cases:

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

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30. MODEL RULES OF PROF'L CONDUCT R. 7.4(d) (2008).

31. *See* MODEL RULES OF PROF'L CONDUCT R. 3.6(a) (2008) ("A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.").

32. MODEL RULES OF PROF'L CONDUCT R. 3.6(b) (2008).

33. MODEL RULES OF PROF'L CONDUCT R. 3.6(b)(1 to 4) (2008).

34. MODEL RULES OF PROF'L CONDUCT R. 3.6(b)(5) (2008).

35. MODEL RULES OF PROF'L CONDUCT R. 3.6(b)(6) (2008).

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
(iii) the fact, time and place of arrest; and
(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.[36]

Reading through this list suggests that prosecutors, not defense lawyers, would almost always be the lawyers making these public statements. This presents opportunities for prosecutors to be "in the news," but this list of topics provides little leeway for boastful or self-aggrandizing statements. This express list of topics is not exclusive, but other topics are limited by the concern about materially prejudicing official hearing in the matter.[37] The *Model Rules* commentary provides a sample list of obvious transgressions:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;
(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;
(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;
(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;
(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or
(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.[38]

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36. MODEL RULES OF PROF'L CONDUCT R. 3.6(b)(7) (2008).
37. MODEL RULES OF PROF'L CONDUCT R. 3.6(b) cmt. 4, 5 (2008).
38. MODEL RULES OF PROF'L CONDUCT R. 3.6(b) cmt. 5 (2008).

Most of these prohibited public statements seem difficult to argue about. However, if a defendant has been charged with a crime, by definition that means that the prosecutor has probable cause to believe that the defendant committed the crime charged.[39] Formally this is only an accusation and the presumption of innocence stands, but we should assume that the act of charging the defendant is a clear expression of belief by the prosecutor that the defendant is guilty.[40]

The *Model Rules* provide one last escape clause for muzzled lawyers. If recent publicity substantially prejudices the defendant, the defendant's lawyer may make limited public statements to mitigate adverse publicity.[41] This prejudicial publicity may come from the prosecution but seems more likely to come from angry friends and family members of the victim. One worries that this tit-for-tat provision leaves an opening for spiraling downward into a nasty media battle.

So if lawyers are so closely limited in making public statements about criminal cases, who are all of these lawyer-talking-heads on television? They are talking about high profile cases in process, and their comments could arguably prejudice the official proceedings. They may be referred to as "legal experts" by the journalists involved interviewing them and just the fact that their opinions are being sought by the media indicates that they are held in some esteem. The *Model Rules* skirt this issue by limiting the prohibition on public statements to "a lawyer who is participating or has participated in the investigation or litigation" of the matter in question.[42] These directly-involved lawyers are thought to have much more power to prejudice official proceedings than do lawyers not involved in the proceedings and this latter group of lawyers can provide the informed commentary of great value to the general public.[43] This latter group of lawyers nonetheless basks in the glow of intense media coverage of high profile cases even though, and essentially because, they have no connection to the case.

The final ethics rule to be considered in this analysis is that providing special ethical responsibilities for prosecutors.[44] The pertinent provision for this analysis addresses inappropriate public comments:

> The prosecutor in a criminal case shall . . . [,] 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

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39. *See* MODEL RULES OF PROF'L CONDUCT R. 3.8(a) (2008).
40. *See* MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 5 (2008).
41. MODEL RULES OF PROF'L CONDUCT R. 3.6(c) cmt. 7 (2008).
42. MODEL RULES OF PROF'L CONDUCT R. 3.6(a) (2008).
43. MODEL RULES OF PROF'L CONDUCT R. 3.6 cmt. 3 (2008).
44. MODEL RULES OF PROF'L CONDUCT R. 3.8 (2008).

> purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.[45]

To a large extent, this provision simply makes specific the application to prosecutors of the general provisions of Rule 3.6 which limit extrajudicial statements by all lawyers.[46]

A sensitive issue raised here is the prevention of similar extrajudicial statements about the case by police officers. Rule 3.6(d) makes this application to other lawyers associated in the case,[47] and Rule 3.8(f) makes specific the application to police officers associated in the case. Certainly, as police action dominates the early stages of a case, the public announcement of the arrest of a suspect, while permitted,[48] will "have a substantial likelihood of heightening public condemnation of the accused[.]"[49] However, the police neither work for prosecutors nor are lawyers subject to ethics rules, so probably the best prosecutors can do here is to inform the relevant police agencies of their concerns and to caution them against inappropriate extrajudicial statements.[50]

IV. EFFECTS OF ETHICS RULES

The professional context provided by the *Model Rules* must be stretched considerably to be appropriate for both criminal defense lawyers and prosecutors. Both of these lawyering roles require comprehensive knowledge of criminal law and procedure, but they come at the criminal justice system from diametrically opposed approaches. And, within the context of the issues raised in this article, prosecutors and defense attorneys have quite different personal reasons for using and perhaps misusing the media.

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45. MODEL RULES OF PROF'L CONDUCT R. 3.8(f) (2008).

46. MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 5 (2008) ("Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding.").

47. *See also* MODEL RULES OF PROF'L CONDUCT R. 5.1 & 5.3 (2008).

48. MODEL RULES OF PROF'L CONDUCT R. 3.6(b)(7)(iii) (2008).

49. MODEL RULES OF PROF'L CONDUCT R. 3.8(f) (2008).

50. MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 6 (2008).

A. Criminal Defense Lawyers

Return now to the criminal defense lawyers who have a professional need and a personal desire to publicize their criminal law practices. When once-in-a-lifetime high profile criminal cases drop in their laps, we might expect them to want to ride those cases to new, higher levels of respect and recognition as criminal lawyers. For once, they will not have to call the media because the media will be calling them. Assuming they check their jurisdiction's version of the *Model Rules* before they jump into the media fray, these ethical standards and regulations still may not have the effect we would want. Criminal defense lawyers typically see their primary role, nearly their only role, as protecting their clients' legal rights while either avoiding conviction or minimizing punishment.[51] Both this client advocacy role and the desire to publicize themselves may lead them to "go public."

A legitimate source of tension may be the requirement that the defense lawyer provide "effective assistance of counsel" for the defendant.[52] The premise behind this Sixth Amendment right is that defense counsel is essentially the only person on the defendant's team and may well be overwhelmed by the combined players on the police force and in the prosecutor's office. Observers note that this role requires defense counsel to push their advocacy to extremes. "[C]riminal defense lawyers play close to the line. Prosecutors play in the center of the court."[53] If one of those lines is the limitation on using the media to help one's case, we might expect at least an occasional stepping over the line. Providing zealous advocacy for the criminal client may require the use of all avenues, including the media.[54]

It is the misuse of media for personal gain, however, that this article examines. Criminal defense lawyers no doubt can spin the facts so as to make their use of the media seem to be entirely client focused, but a more objective analysis may reveal the lawyer's personal agenda. Also camouflaging this personal agenda is the comparatively loose leash the *Model Rules* generally provide for criminal defense lawyers in representing their clients.[55] It is not

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51. CASSIDY, *supra* note 5, at 3.

52. Strickland v. Washington, 466 U.S. 668 (1984).

53. Bruce A. Green, *Why Should Prosecutors Seek Justice?*, 26 FORDHAM URB. L.J. 607, 617 (1999).

54. MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2008) ("A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.").

55. *See, e.g.,* MODEL RULES OF PROF'L CONDUCT R. 3.1 (2008), which requires that claims and contentions be meritorious and not frivolous. However, this Rule provides and exemption for criminal lawyers ("A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established."). MODEL RULES OF PROF'L CONDUCT R. 3.1 cmt. 3 (2008) also reminds us that

unrealistic for criminal defense lawyers to believe that the world is out to get their clients, given the almost automatic adverse media coverage and public announcements of the client's arrest and prosecution. Providing otherwise prohibited public statements in order to counter this nearly automatic adverse publicity would seem to be a routine part of representing criminal clients.[56]

B. Prosecutors

The *Model Rules* apparently assume that the prosecutor's role in the criminal justice system needs much more attention and guidance than does the criminal defense attorney's role. Only prosecutors have their own special rule[57] and even key parts of other general rules apply most obviously to prosecutors.[58] In contrast, criminal defense lawyers have a single focus of advocating for their clients, while the criminal prosecutor has a dual role. "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice[.]"[59] In this dual role, the prosecutor represents society at large and not an individual party such as the victim or the victim's family.[60] The prosecutor's client is not an individual with whom the prosecutor can discuss the course of the litigation. This means that decisions about certain tactics, such as when and how to use the public media in the case, are left to the prosecutor's judgment as to "what is best for society."[61] Key within this collective client is the victim or the victim's family and prosecutors routinely seek their views. However, "the prosecutor does not "represent" the victim and cannot be guided solely by the victim's wishes."[62] This lack of a specific client and the reliance therefore on the prosecutor's personal judgment as to what is best for society is an example of the enormous discretion inherent in the prosecutor's office.

We may suspect that prosecutors are particularly sensitive to media coverage during election campaigns. Perhaps the most extreme example is that of Mike Nifong, former District Attorney in Durham County, North

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constitutional requirements are paramount ("The lawyer's obligations under this Rule are subordinate to federal and state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.").

56. *See* MODEL RULES OF PROF'L CONDUCT R. 3.6(c) (2008).
57. MODEL RULES OF PROF'L CONDUCT R. 3.8 (2008).
58. *See, e.g.,* MODEL RULES OF PROF'L CONDUCT R. 3.6 (2008).
59. MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2008).
60. *See* CASSIDY, supra note 5, at 2-3 & 8-9.
61. *Id*. at 2.
62. *Id*. at 8 (quotation marks in original).

Carolina.[63] On March 24, 2006, Nifong took charge of the investigation into rape allegations against several Duke University lacrosse players.[64] Shortly thereafter, he began to make several inflammatory and unethical statements to the media.[65] At least some observers have surmised that Nifong's primary motivation was to use this racially charged rape allegation to his advantage in his pending political campaign.[66] Nifong was subsequently re-elected as District Attorney for Durham County and his public statements and other actions in the Duke lacrosse case appear to have been key factors in his victory.[67] He soon was brought up on disciplinary charges and disbarred,[68] but how many other prosecutors who misuse the press for political gain are ever disciplined for this ethical violation?

It may be argued that the great power prosecutors have within the criminal justice system gives rise to the need for more ethical restraints on the use of that power.[69] It also seems that the careers of prosecutors, certainly in comparison to those of criminal defense lawyers, depend quite heavily on favorable media coverage. The need, therefore, to have strict ethical limitations on prosecutors' misuse of the media may be greater than for almost any other category of lawyer.

V. CONCLUSIONS

Media coverage of real world crime stories is unlikely to diminish, certainly not as television continues to turn out "megahit lawyer shows."[70] Just as the stars of those fictional television shows are the lawyers, the prosecutors and criminal defense attorneys in real world cases can be expected to see themselves as the stars of their cases. So much is pushing them toward the life of the media darling that the thin restraint supplied by the *Model Rules* and related regulations may well be inadequate. Beyond the unclear limitations provided by these ethical standards, it appears that only a miniscule

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63. *See generally* Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to "Do Justice,"* 76 FORDHAM L. REV. 1337 (2007).

64. *Id.* at 1348.

65. *Id*. at 1349-52.

66. *Id*. at 1354-58.

67. *Id.*

68. *Id*. at 1361-64.

69. ANGELA J. DAVIS, ARBITRARY JUSTICE (Oxford Univ. Press 2007); Green, *supra* note 53, at 629-33; Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System,* 2006 WIS. L. REV. 399, 408 (2006); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?,* 44 VAND. L. REV. 45, 58-59 (1991).

70. *See, e.g.,* Stephanie F. Ward, *Making TV Legal; Behind those Megahit Lawyer Shows are some Pretty Unusual Lawyers*, A.B.A. J., June 2008, at 52.

percentage of lawyers are ever disciplined in any meaningful way as a result of ethical violations.[71]

It also is not clear that the organized bar or practicing lawyers are opposed to favorable media coverage of the work of lawyers.[72] We may be envious when another lawyer in our field competing with us for clients gets favorable media coverage, but our desired solution may be that we should have gotten the media attention rather than the other guy. If it is an experience that we envy and think we would like to have, then it is hard to categorize it as bad.

I, and I suspect other lawyers, long for a return to the time (if it ever existed) when lawyers were modest and shunned publicity. Yes, we also rue the day when professional athletes got into trash talking and end zone dancing after particularly impressive feats, rather than just quietly going on with the game. At least in the fictional world, my ideal of the great lawyer is Atticus Finch in *To Kill a Mockingbird.* Somehow I do not see Atticus parading his talents before press conferences or pontificating as a television talking head.

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71. *See* RHODE & LUBAN, supra note 16, at 951-64.

72. *Super Lawyers, supra* note 8, may be one indication of our appetite for laudatory media coverage.