What to Do When Your Case Is Front Page News

Panel Discussion*

Michael E. Tigar:[1] My name is Michael Tigar, and I'm a member of the faculty here. It falls to me to moderate a panel of all these folks that are here before you. The first panel will focus on how lawyers view their relation to the media, and how they want to use the media. We've got some experienced folks here. We've got a journalist who will talk about what the media's objective is in all of this, and Judge Onion will comment on the judge's response to lawyers attempting to use the media and continue some of those thoughts about the court's relationship to journalists. In short, my job is to try to get a fight started up here.

I'm going to go down the list and introduce each of the folks that are in front of you, starting immediately to my right. And I've asked each of them to do three minutes on why they're here, a statement of position, stake out some territory. Then I'm going to play a brief excerpt from a videotape that led to the Supreme Court decisions in *Gentile v. State Bar of Nevada*.[2] You'll see a younger and somewhat differently coiffed Dominic Gentile. And then we'll get to it.

Immediately on my right is Walter Cofer, a shareholder in the Kansas City, Missouri, firm of Shook, Hardy & Bacon, which deals

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* Panel Discussion, "Mass Media's Impact on Litigation, Lawyers, and Judges: What to Do When Your Case is Front Page News," *The Review of Litigation*'s Annual Symposium (Feb. 24, 1995).

1. Joseph D. Jamail Centennial Professor in Law, The University of Texas.

2. 501 U.S. 1030 (1991) (holding that a Nevada Supreme Court rule was void for vagueness when it prohibited a lawyer from making extrajudicial statements to the press that the lawyer knew or should have known had a "substantial likelihood of materially prejudicing" an adjudicative proceeding, but holding that the "substantial likelihood of material prejudice" test applied by Nevada satisfied the First Amendment of the U.S. Constitution).

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with product liability cases and represents tobacco companies, among others.

Walter L. Cofer:[3] My name is Walter Cofer and I do products liability defense work. I guess my purpose in being here is to give you a perspective of a lawyer who represents defendants in civil litigation and what they should do with the press. It's a long story, but in a nutshell, defendants don't like publicity. They're involuntary participants in the process. Their most fervent wish is to get out of the suit as quickly and quietly as possible, hopefully with their reputation and at least some assets still intact.

So the first question you should ask yourself if a reporter calls is, "Will talking with a reporter help my client?" And if the answer is, "No," don't. If the answer is, "Yes," then play offense and not defense and decide what your message is. We'll be talking later about the best way to get it across: restraint and discretion if you're a defense lawyer.

Professor Tigar: On that happy note, immediately to the right is Scott Armstrong, who will sometime this morning answer the question, "How did you get those law clerks to tell all those things that you and Bob Woodward did in *The Brethren*?"[4] Scott Armstrong has lectured at this law school. He is an internationally renowned investigative journalist, and he is director of the Information Trust in Washington, which deals primarily with increasing accountability in government and exposing government abuses. Scott Armstrong.

Scott Armstrong:[5] I'm here as a journalist, not as a representative of mass media in a broader sense of what the mass media is. I think we all recognize the context in which we've gathered. Those of you who don't want to miss the latest episode of O.J.[6] are welcome to leave during the rest of my three minutes here.

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3. Shareholder, Shook, Hardy & Bacon, P.C., Kansas City, Missouri.

4. BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT (1979).

5. Executive Director, The Information Trust, Washington, D.C.

6. During the symposium, the murder trial of O.J. Simpson was being carried live on several television networks.

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I'm here to talk about the fact that we're in an information market, that we're in a business in which the large institutions of the press and the bar and those people that the bar represents, whether it be government's interests or other interests of private parties, get brokered out. I'm here to talk about the practical ramifications of that, not so much the mechanics of what happens in the courtroom, but how the context in which we deal with the defense bar, or we deal with prosecutors, or we deal with other attorneys, has to do with the goals that we are each achieving.

In the press, of course, we're interested in the truth, and only the truth. That's actually not true; we're interested in a plausible story that is a coherent explanation of what happened, which is somewhat different from the truth, quite often. On the other side, there are people that are interested in giving us a plausible story that will serve the interests of their clients. The press by and large is passive. I'm here to talk about the extent to which I think we roll over for the bar. We don't consider our prerogatives. It's not easy to be an investigative reporter. Most investigative reporting is reporting other people's investigations. We look for the handhold of the court process because it gives us something fixed. There are sworn statements, there are depositions, there is evidence and things we can talk about, and we're easily led to those interpretations by the parties involved. And so it's in the context of those practical implications that I'll be addressing my remarks today.

Professor Tigar: William Colby is a shareholder in the Kansas City, Missouri, firm of Shook, Hardy & Bacon. He argued on behalf of Nancy Cruzan in the right-to-die case in the United States Supreme Court[7] and brings a perspective on the media and lawyers' relationship to the media in highly publicized litigation.

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7. Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261 (1990) (holding that the United States Constitution did not forbid Missouri from requiring clear and convincing evidence of an incompetent's wishes to the withdrawal of life-sustaining treatment; holding that the Missouri Supreme Court did not commit a constitutional error when it concluded that evidence adduced at trial did not amount to clear and convincing evidence of a patient's desire to cease hydration and nutrition; holding that due process did not require Missouri to accept the substituted judgment of close family members absent substantial proof that their views reflected those of patient; and recognizing a constitutional liberty interest in rejecting unwanted medical treatment).

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William H. Colby:[8] Good morning. You guys are not yet lawyers. You can't be cynical yet. When I say good morning you say, "Good morning." I just came straight from Las Vegas; I was not on the same plane with Dominic. I've been out there all week at the Midas International sales meeting, listening to motivational speaker after motivational speaker, so I am so juiced up that I'm ready to talk to anybody, anywhere, and you guys are it.

Walt is my law partner and one of my best friends. What he says about defense lawyers is absolutely accurate and I think good advice. I'm also a defense lawyer. I'm here to talk about a six-year gap in my defense practice when I had the good fortune to be a plaintiff's lawyer and represent a series of families and series of cases that was an experience that few lawyers get. In 1987 I met Joe and Joyce Cruzan and their daughters, the oldest, Chris White, and the middle daughter, Nancy Cruzan, who at that point had been in the State Hospital for about four years in a type of coma, and the family was seeking to remove medical treatment so that their daughter could die. What started that day was a many-year odyssey with the Cruzans, the Busalacchis, and some other families up to the Missouri Supreme[9] and the United States Supreme Court[10] and through various parts of the media.

I see it's listed that Walt got on the morning talk shows but somehow my time there got axed out. The perspective I've got is a little bit different, and maybe that's the first rule of dealing with the media: You've got to figure out what your objective is. If you're a defense lawyer, it may be one thing. In the *Cruzan* and *Busalacchi*[11] cases, those families each made the decision early on that some good should come out of the tragedy that they were involved in. So we certainly did not shun, and in some cases courted, public coverage as much as we could, in part because they wanted to raise the level of consciousness and discussion, and in part because judges are human too—they read the paper, they watch television. And we believed so fervently that the position we had taken was ethically, morally, and legally correct that we thought it

8. Shareholder, Shook, Hardy & Bacon, P.C., Kansas City, Missouri.

9. Cruzan by Cruzan v. Harmon, 760 S.W.2d 408 (Mo. 1988).

10. Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261 (1990).

11. *In re* Busalacci, No. 73677, 1993 WL 288532, at *1 (Mo. Jan. 26, 1993) (en banc).

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certainly could not hurt us to have publicity of what we were doing and where we were going.

I've got a lot of tips about how to deal with the media and some practical ideas that as we go through the panel discussion we might share. I guess one to get out since we're going to hear from Scott later is, there is no such thing as "off the record," and there is no such thing as "deep background." Some writings on this topic will suggest that if you know the reporter extremely well, you have a trust relationship, you have confidence, then perhaps you can talk off the record. I disagree with that. I think there is no off the record, ever, as a lawyer. And if you take one thing away from me in this seminar, remember that. And more to come.

Professor Tigar: Next over there is Dominic Gentile, a partner in the firm of Gentile & Porter in Las Vegas, Nevada. He has taught at the National College of Criminal Defense Lawyers, and has an extensive practice, primarily in the criminal area. And, as you know, he was the petitioner in the case of *Gentile v. State Bar of Nevada*,[12] a case in which as the result of some publicity—one press conference that he held and which no juror remembered, and a case in which he later proved what he said he would prove and the defendant was acquitted—he got a private reprimand from the bar.[13] Instead of letting that go into his file and forgetting about it, he decided to spend the next several years and whatever it took to challenge that all the way to the United States Supreme Court and to make an issue about it. Dom Gentile.

Dominic P. Gentile:[14] After that introduction, it should be obvious to you the reason I'm here. I'm an exhibit. I've also become very good at speaking about myself in the third person over the last four years. And I stand for the proposition that a closed mouth gathers no foot. And if we had lost the case, I would never have been invited. But we didn't and I think if I'm going to share anything with you today, it's going to be primarily the observations that I've made over the last two dozen years representing the citizen

12. Gentile v. State Bar of Nev., 501 U.S. 1030 (1991).
13. *Id.* at 1033.
14. Partner, Gentile & Porter, Las Vegas, Nevada.

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accused, sometimes the poor and downtrodden, hopefully more often the rich and powerful, and to see what the media can do to the will to defend that my clients have. And to tell you a little bit about my observations in terms of the way that my adversaries use the media to demoralize my clients so that they can make them easier to convict, so that they will give up earlier.

And that is the whole reason that someone who represents the citizen accused would ever want to become involved in utilizing and communicating with the media, because rule number one really is, except in very rare instances, media attention does not do the defendant a whole lot of good, and if he or she is charged with an offense, again except in very rare instances, they're much better off letting it not come to the public's attention.

Professor Tigar: And the final speaker, who gets his three minutes, too, and it could not be otherwise, is Judge Onion. In addition to having served on the Court of Criminal Appeals, he presided over a number of cases, including the trial of Senator Kay Bailey Hutchison,[15] which he moved from Travis County to Tarrant County.[16] Immediately before that trial started, Judge Onion signed an order barring cameras from the courtroom and making findings that the presence of cameras would not contribute to a fair trial,[17] in part because there was no way to insulate jurors against news clips that would find their way onto the television at various times during the day. And an alternative such as sequestering the jury was simply unacceptable in terms of a fair trial. During the course of that case there was a lot of publicity, and some of it the lawyers were doing, and Judge Onion would from time to time call the lawyers up and talk to them about that. So he has a lot of hands-on experience with our topic today.

The Honorable John F. Onion, Jr.:[18] Thank you. I hope it's not just because I'm a judge that I'm allowed an extra three minutes today. I've said a lot of the things that concern me, but a lot of the

15. State v. Hutchinson, Nos. 94-0008, 94-0029, 94-0039, 94-0031 (331st Dist. Ct., Travis County, Tex., filed Dec. 8, 1993).

16. *Id.*

17. *Id.*

18. Former Presiding Judge, Texas Court of Criminal Appeals.

things I've mentioned were confined to the courtroom itself. There are a lot of problems that a judge faces with pretrial publicity.

As Professor Tigar has mentioned, by the time I got in the Hutchison case, there had already been a lot of publicity and remarks made by lawyers on both sides. That's something that judges face all the time. Sometimes you can handle it by talking to the parties without a gag rule, without taking any affirmative action. Sometimes, even those agreements come unglued, as they did at times during the Hutchinson trial. But the judge in large measure wants to give the defendant a fair trial, to see that the case is going to be tried and if a conviction results, that it can be upheld on appeal. No judge likes to try a case a second time, believe me. Added to that concern that any error he might make in ruling on the law would cause reversal, he has in a highly publicized case all of the problems, some of which I've mentioned—the judge becoming a monitor, sometimes becoming more concerned with controlling the press or the operation of television cameras.

The judge has got to seek a balance between the public's right to know and the rights of the news media in a way that does not interfere in any way with the defendant's right to a fair trial. And that is not always easy for a judge. A judge should have some guidelines that let him try a case and ensure that he doesn't have to retry it merely because he didn't do the right things with regard to the press.

Professor Tigar: Let's get about three minutes of this [the Gentile tape].

[A segment of Dominic Gentile's February 5, 1988, press conference was played for the panelists and the audience.]

I'd like to get a hypothetical going here. Scott Armstrong, when you were at the *Washington Post*, you had a telephone, right? Yes, you had a telephone. We'll imagine that the telephone rings at your office at the *Post*. As it turns out, Bill Colby, you've just been retained by someone in one of these right-to-die cases, you've talked to your client, and got some sense of it. If Scott's phone rings, might that be you calling? Would you initiate contact with the press?

Mr. Colby: Well, to get back to the first point that I made, what is your objective? You've met with your client, you've talked

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about what it is you want to accomplish. In the right-to-die cases that you're talking about, it is a hypothetical, because he's going to be calling me. The press is interested. But if your objective is that you want to raise consciousness, you want to raise the discussion about this issue, and you believe that publicity will help, then initiating contact is not necessarily a bad idea.

Professor Tigar: Walter Cofer, you do represent the tobacco industry in these cases. Have you read Christopher Buckley's novel,[19] by the way?

Mr. Cofer: Yes.

Professor Tigar: And in that novel it is portrayed that the industry concentrates on trying to find reporters who are sympathetic, right?

Mr. Cofer: If you know any, let me know.

Professor Tigar: Have you ever picked out, called, a reporter because you thought you could get, from a particular reporter, a more sympathetic understanding of your client's situation?

Mr. Cofer: No, I've never called a reporter, other than to return calls. But what you do is you follow reporters to see what they're reporting on a story. I do look at the credibility of the news organization. And if it's someone who has seemed to have given you fair treatment in the past, you tend to be more forthcoming with them, you tend to volunteer more.

The first thing I do when I get called by a reporter is that I ask the questions first. I say, "What do you want to know, why are you calling, who have you talked with, and when is your deadline?" And if they won't tell me answers to those questions, then I have a good idea of the probable slant of the article. The other thing I do, just because you're a defense lawyer doesn't mean you have to take the defensive. You write down the two or three points that you want made, and you make them. And if it's a reporter that you don't

19. CHRISTOPHER BUCKLEY, THANK YOU FOR SMOKING (1994).

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have a lot of confidence in, you make them and say, "Thanks," and you hang up and go have a beer. What you don't do is start ad-libbing. Now if it's a reporter that you have confidence in, you may spend more time with them. But that's my experience.

Professor Tigar: Dom, have you ever called a reporter that you wanted? You've got a story here. The story of this case from your point of view is that the cops have put the evidence up their nose and in their bank accounts, right?

Mr. Gentile: That's the sugar-coated version.

Professor Tigar: Did you call particular reporters that you want to give something to?

Mr. Gentile: No. Not unless somebody . . .

Professor Tigar: Mr. Colby, have you ever done that?

Mr. Colby: No.

Professor Tigar: Well, the promised land is here. I've done it, I don't think there is anything wrong with it. I'll be the first if confession will help everyone open up.

Mr. Gentile: You didn't let me finish.

Professor Tigar: Go ahead.

Mr. Gentile: The fact of the matter is that we all have reporters that we have relationships with, or that we have higher levels of trust with. And, as in this case, if I have faced thirteen months of preindictment publicity, by the time that the press conference was held, it was really the first chance that anybody had to really respond to it. Yes, I definitely called every one of those reporters and invited them to my office to hold that press conference.

Professor Tigar: Did you ever have any sense that this would be an exhibit in the Supreme Court of the United States?

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Mr. Gentile: Actually, it's the reason I went to law school, Mike. I decided when I was in law school that one day I would have a case with my name on it in the United States Supreme Court. It took about seventeen years while I laid all the predicates for it. It can happen.

Mr. Colby: Does calling a press conference count as calling a reporter?

Professor Tigar: No, it doesn't count. I want to come back to Scott Armstrong. Scott, in Washington, it happens all the time, doesn't it? That is to say, lawyers that have an axe, that have a position, they call a reporter that they think is going to listen to them, right? Like you call Maureen Bunion[20] if you have a human interest thing, you buy dinner for Richard Cohen[21] at the Palm if you have something that will tug at his heart strings. I've never figured out how to get to you. But it does happen, doesn't it?

Mr. Armstrong: It not only happens, it's part of the regular dialogue. I think that you have to understand it in that context. It's a long term relationship that is being built. Tobacco cases, I'm sure, are covered by a certain group of reporters that are going to stay with it for a long time. It's a human relationship that's built up.

Each side is looking at the other one's goals. I'm sitting there knowing that the tobacco companies' ultimate interest may not be getting the client off in this case. It may be that the defendant tobacco companies' interest is simply in prolonging the process long enough to sell that much more tobacco and poison that many more people.

Mr. Cofer: Equal time.

Mr. Armstrong: So I'm looking at what those motives are and I assume the other side is looking at mine. The first thing I want to do is get off the phone and get together, so we can have a candid

20. Reporter, WUSA-TV (Washington, D.C.).

21. Columnist, *The Washington Post*.

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conversation, because off the record and deep background are respected. They're the backbone of what we do, again, based on personal relationships. There are reporters who will burn you, but I think they get identified pretty quickly.

What happens in the courtroom is almost always irrelevant to my reporting on it. I've heard what's going to happen in the courtroom before it happens there. I've seen the evidence before it has been presented to the court. I've gone through the documents ahead of time. I know from each side what their characterization of the other side is going to be. I'm looking at what happens in the courtroom as the vehicle for my being able to report something that's now documented. Somebody said it under oath, it has been introduced in evidence, it has been authenticated, and whatnot. But my take on the case has been shaped by the interactions I've had with the attorneys on both sides.

Professor Tigar: Judge Onion, are you influenced? For all the years that you were on the Court of Criminal Appeals, you were deciding cases that had to do with issues that sharply divided the people of Texas, at least so far as the media perceived that. Did any of those firestorms of publicity affect your work or your colleagues?

Judge Onion: I wouldn't say it doesn't have any affect at all. When you get to the appellate level, you're looking from a legal standpoint at whether the conviction can be upheld or whether it has to be reversed. I don't think it affects the judges at the appellate level as it may others.

The problem I think trial judges have is when opposing lawyers decide that public opinion is going to affect the outcome of the trial. They decide before trial to do something about influencing that public opinion, and the judge, by the time he gets hold of it, has a problem on his hands, because one side or the other is catering to the press.

If I might ask a question, I'd like to ask Mr. Armstrong, what does he think the reporter's viewpoint is when he calls an attorney and gets a "No comment." What is the reaction of the press? Is it going to be unfavorable to the lawyer that says, "No comment?" Or is it going to be better for the lawyer to say something else, such as, "I don't think it's proper to respond to that question," or, "We'll try the case in court and put on any evidence we have at that time?"

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Does the attorney get a black eye with the press if he says, "No comment," as far as what appears in print later on?

Mr. Armstrong: My experience may not be typical, because I usually don't report on deadline. I usually work on longer things. But I would say that 90 percent of the time, when I get a "No comment," it's after I've talked to the attorney for an hour or two. And then we get to the actual questions that are now on the record: "What is your comment about the following allegations?" "I have no comment." And that's what appears in the paper. And yet, the guidance that I've had in that hour and a half is what is going to shape the story that I'm going to write. Because it gives me enough detail and information that I can play it off other sources and other people.

There are a couple of lawyers who are scrupulously willing to say, "No comment," and I think it hurts them over time. It's not because I'm bitter that they say, "No comment;" it's because they end up on the defensive. And I think they calculate from that point of view. They may have a hopeless cause, they may let all of it get out in the paper and then deal with it, but then they're not able to respond. We're all trying to whittle down information to what is relevant. I have a news hole that's a certain size. If you're a clever litigator, you're going to fill my news hole with something that helps your client or doesn't hurt him as much as something that might otherwise be there. But you know you're going to get coverage. Now, the no-comment thing is tactical.

But if it's actually "no comment," constantly stonewalling, I do think over time you hurt your client.

Professor Tigar: Now William Colby, you're nodding in agreement. If you take a right-to-die case, now you get into that case early. You know that sometime the Supreme Court of the United States is going to get this issue.

Mr. Colby: You know it's a possibility.

Professor Tigar: You know that it is a possibility. Do you have the sense that to create that attitude by the highly respected media, in your part of the world or by national media such as the *Times* or the *Post* or the network shows, that treats your plight

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sympathetically, helps to create an atmosphere within which it's easier for you to win?

Mr. Colby: Perhaps ultimately. To respond to a couple of things there, from the start of the *Cruzan* case in Missouri to the end of the *Busalacchi* case, it was about a six-year period. Many of the same reporters, both within Missouri and nationally from the *Times* and the *Post*, covered that from the start to the finish. I developed relationships with these people. I watched them go through divorces, I watched them have alcohol problems. I watched reporters covering the story meet one another covering the story and have a relationship.

Professor Tigar: When he says "watched," he means from a distance.

Mr. Colby: Absolutely from a distance. I watched guys like Scott, who have kids' softball games tomorrow. So the first issue, when I say there is no off the record or deep background, I don't mean to imply that you treat reporters with any lack of courtesy or professionalism, because I think that's very important, not to getting a leg up, but in ensuring that you're treated fairly. Scott's the exception, but reporters generally don't understand the law. So, to the extent that you help educate them, you assist. Common courtesy is appreciated. As Walt says, understanding their deadlines. All of that goes together.

Now that being said, I also believe that you fill a news hole and you create a story. Once you know your objective, then you craft what your message is. Over the six-year period and a couple of public and a couple of private cases, both in the media and in the courts, we essentially said the same thing, a paragraph about that long, over and over and over again. To use Nancy Cruzan as an example.

> Nancy Cruzan is never going to recover or interact with the world in any way around her again. A car accident has left this family with only two choices, both horrible. Their decision to stop medical treatment now is one they believe is correct and one they fervently believe their daughter would want. The decision is supported by the medical, the ethical, and religious communities, and society as a whole overwhelmingly. Such a private decision should not be interfered with by the state.

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That message, repeated over time, I don't know how it influenced the judges, but over time that became the message that led the debate, and I think ultimately became the answer to how we deal with these issues.

Professor Tigar: Notice there are a couple of levels here. One level is, "My client didn't do it," or "My client was right under the specific facts of this case." The level at which these lawyers are talking and that Scott Armstrong tries to get them to is, "There is a public issue buried in this lawsuit. This public issue should come out in a particular way."

Now on July 3, 1776, John Adams wrote home to his wife from Philadelphia about what he was going to do the next day.[22] This is a true story. He remembered that one of the things that had brought them there was his representation of John Hancock and others in the tax protests in the 1760s in Boston[23] and how he and his colleagues at the bar had worked with the press to publicize the abuses of the British to make the issue public,[24] including that now famous speech of James Otis, of which Adams later wrote, "Then and there was the child independence born."[25] So the notion that the media has some relation to the airing of public issues is a powerful one.

So now I turn to Dom. In your case, you're dealing with the alleged corruption in the metropolitan police. That's a public issue. Now if that gets resolved in a particular way, there's an atmosphere in which it's easier for your client, Grady Sanders. Under those circumstances, do you think you can influence public opinion in a way that ultimately makes it easier for your client?

Mr. Gentile: There are several ways in which you can do that. First of all, I said that there is an exception to the closed-mouth approach. And that exception is in public-corruption or police-abuse cases. I don't know of any criminal defense lawyer that doesn't do some federal civil rights work, because it goes hand in hand. And

22. 2 LEGAL PAPERS OF JOHN ADAMS 107 n.2 (L. Wroth & H. Zobel eds., 1965).

23. *Id.* at 173-210.

24. *Id.*

25. *Id.* at 107 n.2.

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in a situation like that, it's really interesting that you'll always see a public relations release or some sort of a five o'clock news shot where they want to bury your client before they make the arrest. But after they beat your client up they almost never do that.

But yes, you absolutely can, in public corruption cases in particular, you can set the stage through the use of the media to, if not turn the momentum around, at least put a giant boulder on the tracks so the locomotive will have to slow down.

Professor Tigar: Walter Cofer, we've talked about this tobacco industry thing. As I understand it, the industry is under attack by folks who want to restrict advertising. It's being sued in these tort cases of various kinds around the country. And there are also other sorts of debates in which it is involved. No doubt, there are people in the industry who are doing some kind of long-term planning about the challenges that they face. I assume that it's helpful to the industry to have a public debate about the positive aspects of its message—the ability to choose, people making their own choices, and so on. You're principally involved in the tort defense part of this, right? Now, do you feel that you are benefited by public debate that focuses on the right to choose to be a smoker?

Mr. Cofer: Yes, I think so. I think that's basically the cigarette defense. People have known for a long time about the risks associated with cigarette smoking. And if people continue to choose to smoke, the issue before the courtroom is whether they should be able to recover damages.

Professor Tigar: Let me just stop you for a second, because this is important. Is it the case that you take freedom of choice, which is a desirable notion, and as a defense lawyer in a tort case, say, "Members of the jury, what that means is that this person has exercised that freedom, has made that choice, and now must live with the consequence."

Mr. Cofer: In a nutshell, that's a major part of our defense.

Professor Tigar: I'm sorry. I interrupted you. And there's nothing accusatory about this, this is what a lot of products liability defense is about, right? That somebody chose to use a product and

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they, rather than the defendant, should bear the economic consequences of the choice.

Mr. Cofer: Yes, a lot depends on the product. If the product is one about which a lot has been reported and a lot is known, and it's a personal-consumer product like coffee, beer, tobacco, that's right. Basically, we try to establish that the person made their decision with their eyes open, choosing to use the product. They made a knowing and voluntary decision and if someone should be responsible for that choice, it's the person who exercised the choice in the first instance.

Professor Tigar: Well, Scott Armstrong, you for a lot of years have lived in Washington, and I'd like to relate an example here and get a reaction. In the *Demjanjuk* case,[26] we litigated in the Sixth Circuit, and the case had begun to get some publicity. We felt that the fact that Steve Labaton of the *New York Times* and Saundra Tory of the *Post* were writing stories that presented a view of the government's misconduct that was pretty favorable to us were good things. Jack McKenzie, on the *Times* editorial board, got in an editorial suggesting that the justice department had done wrong and that the extradition judgment should be set aside. That a leading American national newspaper, well known for its general support of Israel, had taken this position editorially, was important, and that was likely to have some influence on what the Supreme Court might do in denying certiorari. Do you have that sense, that judges could be influenced by opinion-making media?

Mr. Armstrong: Judges read papers. They watch the news. I'm not so sure that your target audience there was the judges as much as it was senior officials in the justice department. It's time to cut their losses. They were taking a beating. If they want to preserve what public policy prerogatives they have, they don't want to have things set in concrete. So there are a lot of messages I'm aware of as a reporter I'm essentially conveying.

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26. Demjanjuk v. Petrovsky, 10 F.3d 338 (6th Cir. 1993), *cert. denied sub nom.* Rison v. Demjanjuk, 115 S. Ct. 295 (1994).

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By the same token, I'm probably getting information back in the other direction, that, "Wait a minute, there may have been some misconduct, but this guy's guilty of other things. There's another case to be made." But of course, you cleverly are going to turn that around and say, "If they have that case, then they should present it." And the debate ultimately is a public-policy debate with the justice department played out in the newspapers. And the court gets to watch that and probably scratch their head and say, "Why is this case coming to us?"

Professor Tigar: Dom Gentile, your opponent in the Grady Sanders case is the DA's office and the cops. But the DA's office can overrule the cops, right?

Mr. Gentile: They can.

Professor Tigar: Now are you, in your publicity, trying to speak to the DA's office? You're not talking about potential jurors out there, we won't ask you to cop to that, but are you trying to speak to the DA's office and tell them, "Look, you can avoid some potential embarrassment here?"

Mr. Gentile: Well, I did that before the indictment, but they didn't want to hear it. I have to make a comment, sort of a spin on a question you asked Scott. You asked that question of a person who lives and works in Washington, D.C., where all the judges are appointed. I live in a place where judges run in contested elections.

Professor Tigar: Yes, we all do too.

Mr. Gentile: If you don't think that using the media can influence a judge who runs in contested elections, you're flat-out wrong. And it's a valid tool for that. But in this particular case, in the Sanders case, actually I was consciously hoping and trying to get my message across truly to level out the playing field, because I came into this thing thirteen months after the publicity started. But my focus wasn't only on society as a whole. I wanted to make sure that that judge got an earful early on. He wasn't the trier of fact in that case, but the way he handled the trial—it didn't do any good, by the way, but that's another story—but the way he handled the trial

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was going to have a lot to do with the outcome, and if he just believed the thirteen months of publicity before jeopardy attached, then I was going nowhere with that case.

Professor Tigar: Now William Colby, your opponent, as it were, in the right-to-die cases was the state, correct?

Mr. Colby: The attorney general.

Professor Tigar: The attorney general. Did you feel that your contact with the media influenced the way these elected officials described their position in any way?

Mr. Colby: Well, again, if you look at it as an evolutionary process over six years, we now still have about 50,000 people a year die in Missouri, 70 percent as a result of medical treatment being stopped or not started. The public debate goes on, so I think sticking with that theme, sticking with that basic theme and trying to have that become part of the consciousness, helped us prevail in our cases and I think affected others as well.

And let me just finish out one thing about "off the record," because Scott and I have such differing points of view on that. When you're a lawyer, there are a few basics you have to look at before you even think about talking to the press. In every state there are rules about when you can and cannot talk to the press, and you better read those and know what those are when you're representing a client before you do that. And the second thing is you have a duty to your client—client confidence—that you have to discuss with them about preserving or not preserving. And I believe every time you talk to a reporter, whether you call it off the record or not, you're now outside your client's confidence. And as Scott said, he's got a story to fill in, someone gives him the information and then says, "No comment." That's still now disclosed as part of the public consciousness and I just found, again, this is anecdotal, it's not a statistical study, but my personal experience from talking with people is that if you make a decision early on that what I say publicly is going to be public, and understand that, and what I do not say publicly I make clear.

You never lie, you never dissemble in life, and with reporters you certainly don't. And anyway, as long as you have a clear, bold

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line ahead of time that you know about, that if I say this, it's on the record, and if I do not then it's not part of the public record, then it just helps keep things clear in your head. One article that I read when we were getting ready for this, talking about why you do not lie to the media, had all these long passages, but then the section about why you don't lie to the media was only a line long. "They will find out. They will be furious. Remember Nixon?"[27]

Professor Tigar: So what you are saying is that the lawyer is the agent of the client for these purposes. Therefore, the lawyer's talk is the client's talk under the rules of evidence. Nothing you say to the media is privileged, even if you say it under threat of background. The lawyer may say, "I invoke the shield law," but that's no guarantee that eventually the reporter isn't going to give you up.

Mr. Colby: Not just under the rules of evidence, but under the rules of ethics. Once it's in the reporter's mind, even if it is in the deep background or off the record of the reporter's mind, a year-and-a-half later it'll come out to you in a press conference somehow.

Professor Tigar: Or it may become admissible in evidence later on. The client who has assiduously "taken five to stay alive" but blabs to the press sees it coming back. I want to ask Judge Onion, in a recent case in Texas,[28] the defendant was actually involved in a contested election at the time the case was going on, and so was defending her political position. There was an elected district attorney. There was a great deal of media coverage. Did you feel that the parties and the lawyers were maneuvering for objectives that were beyond simply jury influence, but were playing out roles in some larger political process? Is that something that you feel comfortable in commenting about?

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27. Robert S. Weider, *How to Manipulate the Media: Twenty Timeless Tips For When The Press Comes Calling*, *in* FIFTH ANNUAL LITIGATION MANAGEMENT SUPERCOURSE, at 548 (PLI Litig. & Admin. Practice Course Handbook Series No. H4-5185, 1994).

28. State v. Hutchinson, Nos. 94-0008, 94-0029, 94-0039, 94-0031 (331st Dist. Ct., Travis County, Tex., filed Dec. 8, 1993).

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Judge Onion: If you're talking about the same case that I think you're taking about, yes. I think, as I mentioned awhile ago, public opinion may well affect the trial outcome. What is the effect on the jury, no one knows. You just sometimes hope, the lawyers hope when they get into it, that it will affect the outcome of the case. I don't think there's that much affect on the judges, myself. Now, you say you have judges running for election. You have judges and judges. Now after your remark a minute ago, I wanted to ask you what's your favorite method of the selection of judges, whether you liked appointed or elected judges?

Mr. Gentile: Draft.

Judge Onion: Is that like the military?

Mr. Gentile: Exactly.

Judge Onion: At any rate, it's hard to say in any individual case, because there are judges and there are judges. Some judges may, if they are running for election, look at this as a golden opportunity to have that kind of coverage.

I told some people last night that back in the early days when television cameras started coming into my courtroom—which was a wonderful experiment—cameramen started filming by focusing in on the courtroom door where my name was. I didn't object to that because it was on the nightly news. There were three stations there in San Antonio at the time, and all three may have been in the courtroom on a given day. When I began to run for the Court of Criminal Appeals, much to my surprise sometimes I'd get out at a gas station in the area covered by San Antonio news media and give them my credit card and they'd begin to ask me if I was the judge they'd seen on television. Well, that certainly didn't hurt me, running statewide, in that particular area.

Professor Tigar: Judge, you have a practice, do you not, of not responding even when lawyers attack your rulings in the press. That has happened within the memory of a lot of people in this room. Can you comment on that?

Judge Onion: Not attacking the lawyers?

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Professor Tigar: That is to say, a lawyer might stand up and say on television, "Judge Onion was wrong about this, this, this."

Judge Onion: I've gone through that on a number of cases. Sometimes the grievance committee has responded pretty actively. In more recent times, the state bar did nothing, even though the things the lawyer said about the judge were totally erroneous, had no basis in fact whatsoever, saying, "I talked to the judge and I knew the judge was going to do so and so," when there had been no conversation with the lawyer, nothing in the record to indicate that.

We have a code of professional responsibility. We're often criticized by the news media because we have a code of professionalism but weak enforcement. But that comes, of course, from people that have no code of professional responsibility, either. But it's very difficult for a judge to stand and listen to all of that. It's like one judge wrote me recently after a trial: "If all else fails, attack the judge." I suppose that's often true when a person has lost a case and is looking for an explanation, to look to the public official to seek out. But these standards make it difficult for a judge to sit there and take that sort of criticism when the state bar and lawyers do nothing to correct the situation.

Professor Tigar: There is a practical counsel in all of this. I remember a lawyer in New York who launched a full-scale attack on the judge in an argument in the Second Circuit.[29] Some of it was picked up by the dissenting judge there.[30] The lawyer, Paul Bergman,[31] saw the judge at a Christmas party a few weeks later. He turned around and, by golly, there was Judge Bartels. He said, "Judge Bartels, how are you?" The Judge said, "I'm going to live, Mr. Bergman, and that's not very good for you." So, that is a canon of practical wisdom that one may want to indulge, particularly if you practice in a relatively small community. Scott Armstrong.

Mr. Armstrong: A couple of quick points. It shouldn't come as a surprise that I'm used to talking to judges. I wrote a book about an appellate court. But I've been called by trial judges to have

29. United States v. Busic, 592 F.2d 13 (1978).
30. *Id.* at 39 (Lumbard, J., dissenting).
31. Paul B. Bergman, P.C., New York, New York.

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either a correction noted for me—this is federal court, appointed judges—or to note that there was a hole in the accounts of what was going out, that somebody was not doing their job with the press—if not me, then someone else. This was sometimes not about my reporting, but they knew that this was going to get passed along and was going to lead in another direction. So I don't think anyone's immune from this dialogue.

One other argument for the fact that I think you have to have a media strategy, and even if you decide not to talk to the media, to have a media strategy, but one other reason to talk to the media is that we can do things that you can't do. You can't get somebody under subpoena, you can't get them to give you a deposition, but you know. Or it's somebody you can't use because they've come to you maybe through your client and are themselves sensitive about being drug into the case, but they will talk off the record or on background. And we can expand the epistomological framework in which you are working. We can come up with the witness that you need. We can cite on background. He may lead us to other evidence.

I can remember an instance where it was a corruption case, not unlike what Dom's talking about, and the defense attorney had somebody that wasn't going to testify, absolutely wasn't going to get involved in the case, but was helping him help me. He told me to go—this was a police corruption case, there was not apparent additional assets of the police, the alternative defendants, if you will, in the jurisdiction—but they told me to go to Annapolis and look at a particular boat dock and see if I didn't find an awfully expensive boat that was registered to this particular defendant. Well, I not only went there, but I found somebody who chartered the boat—it was a captain who had the log—and found out they were involved in a lot more than that. So there are things that can be done in that back channel as it occurs.

Lastly, the media strategy of not talking to the press can be very effective. Brendan Sullivan,[32] who defended Oliver North, did not help reporters. Nor did, to the best of my knowledge, anybody else at Williams & Connolly. They did not give background briefings.

32. Brendan V. Sullivan Jr., Partner, Williams & Connolly, Washington, D.C.

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Professor Tigar: Well, I'm glad to know that all those lawyers have seen the light since I left the firm.

Mr. Armstrong: But there is a reason for it in that case, because I'm not suggesting this was a mistake. He wanted his client to be crucified and to only have three nails driven into him when he was put on the cross. Because he was going to be raised on that cross. That was the public strategy—to be resurrected later. And that is exactly what they did, and they did it very well. It was a calculated strategy. But no one can deal with any of this in an important publicly notorious case without having a media strategy.

Professor Tigar: Well, we're just about at the end. Let me give folks a minute to wrap up. Walter Cofer.

Mr. Cofer: Well like I said, if you're a defendant, the first thing you need to decide is whether speaking to the press is going to help your client. Let's face it, lawyers love to see their names in the paper.

Professor Tigar: It has taken us fifty-eight minutes to get that confession.

Mr. Cofer: That's because I assumed you all knew it. And you can't let that factor influence you. If you do have something to say, make sure it's a positive message. What I typically do, is I make one or two or three points. I write them down, so I say them just exactly the way I want them said. I want to make sure it shows up in print the way I meant to have it in print. Then after I finish telling the reporter, I ask him or her to read it back. So I think Scott's right. You have to have a media plan, and then you have to have discipline to follow it.

Professor Tigar: Scott, did you want to add anything?

Mr. Armstrong: One very short thing. The practical realities are that you're dealing with the ordering of information, or a process that is finite. There is only so much energy that a newspaper reporter can give to it. If you take your case and order it in a way that helps them structure their story, they're going to be grateful and

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you're going to get the play. The press is more often manipulated than it is the manipulator. I'm not sure that we're the better for it, but that's the name of the game. That's the way it's played.

Professor Tigar: Bill Colby.

Mr. Colby: Media Plan. Know your objective. Once you know your objective, craft your message very carefully. Never, ever, ever, compromise your integrity with a reporter—with anybody as a lawyer—and certainly with a reporter. Treat reporters with respect. And remember, there is no off the record.

Professor Tigar: Dom Gentile.

Mr. Gentile: When Secretary Ray Donovan was acquitted, he stood on the courthouse steps and said to reporters, "Which office do I go to, to get my reputation back?"[33] That's a valuable lesson for all of us. The fact of the matter is that it's important not only to win, but if you're in a public-profile case, it's important for your client to be perceived to have won. And it's important to have a press strategy if for no other reason than the fact that you know when you start that you're going to win your case.

Professor Tigar: Judge Onion.

Judge Onion: Well I think the sum result of this is that for all trial judges in the future, if you have a high profile case, there is going to be some contact between the attorneys and the media, and you're going to hope that they carry it out with some sort of degree of fairness and that by the time you get to trial it's not going to be that big of a problem for the trial court. I agree with Mr. Colby here, that if you're dealing with the press—I don't care whether you're a judge or a lawyer—the best thing is honesty.

33. *Nightline: The Media and Fair Trials* (ABC Television Broadcast, Jan. 23, 1990).

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