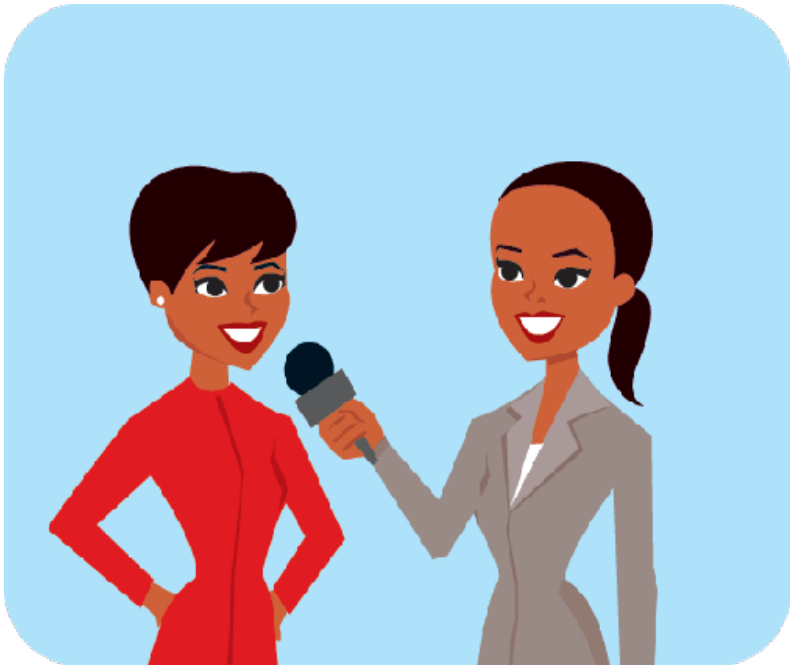
YES, COMMENT!

ETHICS AND BEST PRACTICES FOR

DEALING WITH THE MEDIA



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Sylvia Borunda Firth

Sylvia Borunda Firth very recently completed her term as President of the State Bar of Texas. That experience created many opportunities for her to interact with all types of media outlets regarding newsworthy events. As the El Paso City Attorney, she was often called upon to function as the spokesperson for the City regarding controversial matters that either involved litigation or were likely to lead to the courthouse. She has practiced law for 38 years and more than half of that time has been as a municipal lawyer. She is currently a contract attorney with the Bojorquez Law Firm and provides legal support to the Town of Horizon City, City of San Elizario and Clint. She received her B.B.A Magna Cum Laude from St. Mary's University in San Antonio and her J.D. from the University of Texas.

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Sarah Megan Erb recently finished her second year at Baylor Law School. While at Baylor Law, she has had the opportunity to provide research assistance to the Baylor Law LL.M Program and Assistant Dean Stephen Rispoli. As Managing Executive Editor of the *Baylor Law Review*, she assists associate editors in the process of writing articles for submission. This summer, she is interning at Katten Muchin Rosenman's Chicago office. She received her B.S. from Vanderbilt University in 2020.

ETHICS AND BEST PRACTICES FOR DEALING WITH THE MEDIA

I. Introduction

With today's 24-hour news cycle and the widespread presence of social media, news travels at light speed. So, it is essential that attorneys equip themselves to deal with the media within the ethical constraints of the legal profession. An Anna Delvey[1] case only appears once in a lifetime, but lawyers often work together with the media to inform communities about cases of great public interest. In fact, lawyers sometimes use the media to frame messages on behalf of their clients, help manage crisis situations or influence public perception of litigation.

Dealing with the media is a delicate balance of ethical considerations and providing the public with information they are entitled to have. For example, a lawyer's right of free speech and desire to advocate must be weighed against the constitutional right to a fair trial; governmental transparency must be measured against making statements in the press that might prejudice court proceedings; and the ethical obligation to maintain client confidentiality must always be respected when providing information to the public.

While engaging with the media can be daunting task, learning a few tricks of the trade makes it possible for attorneys to work with the media effectively and without running afoul of the Texas Disciplinary Rules of Professional Conduct.

II. MEDIA: the Basics

M – Mind Your Rules

There are several ethical rules implicated whenever a lawyer undertakes to work with the media; or is not able avoid the interaction. The following are the most common:

- Texas Disciplinary Rule of Professional Conduct 3.07 – Trial Publicity
- Texas Disciplinary Rule of Professional Conduct 1.05 - Confidentiality
- Texas Disciplinary Rule of Professional Conduct 4.01 - Truthfulness of Statements
- Texas Disciplinary Rule of Professional Conduct 1.08 - Conflict of Interest

Rule 3.07 – Trial Publicity

Texas Disciplinary Rule of Professional Conduct 3.07 specifically addresses trial publicity. Rule 3.07(a) provides:

> *(a) In the course of representing a client, a lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicatory proceeding. A lawyer shall not counsel or assist another person to make such a statement.*

The comments to paragraph (a) provide further guidance by explaining that the rule is premised on the idea that preserving the right to a fair trial necessarily requires the curtailment of information that may be disseminated about a party **prior** to trial.

However, for municipal attorneys it is important that the notes acknowledge that there are "vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves." Further, "the public also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy."

Rule 3.07(b) outlines specific instances that will likely be a violation of (a):

[1]For those who were more productive during the COVID lockdown and not binge-watching Netflix, "Inventing Anna" is a series about a journalist who formed a relationship with socialite fraudster Anna Delvey while chasing down the story of how Ana convinced New York's elite she was a German heiress

(b) A lawyer ordinarily will violate paragraph (a), and the likelihood of a violation increases if the adjudication is ongoing or imminent, by making an extrajudicial statement of the type referred to in that paragraph when the statement refers to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or 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; 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, refusal to perform, or results of any examination or test; the refusal or failure of a person to allow or 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; or

(5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial.

The notes to Section (b) state that in order to strike a balance between the rights of free expression and interest in of protecting fair trials the rules qualify the actions of the lawyers to times when there is a "reasonable likelihood" that their statement will "materially prejudice an adjudicatory proceeding."

Section (c) of Rule 3.07 provides more clarification by outlining instances that will ordinarily not violate 3.07(a):

(c) A lawyer ordinarily will not violate paragraph (a) by making an extrajudicial statement of the type referred to in that paragraph when the lawyer merely states:

(1) the general nature of the claim or defense;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense, claim or defense involved;

(4) except when prohibited by law, the identity of the persons involved in the matter;

(5) the scheduling or result of any step in litigation;

(6) a request for assistance in obtaining evidence, and information necessary thereto;

(7) a warning of danger concerning the behavior of a person involved, when there is a reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(8) if a criminal case;

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

(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.

Comment 3 to Rule 3.07 provides that, "an otherwise objectionable statement may be

excusable if it is reasonably calculated to counter the unfair prejudicial effect of another public statement." So, if an opposing party has made a prejudicial statement in the press, it *may* be acceptable for the opposing party to throw something back. Some commentators refer to this as an "eye for an eye" The use of the word "may" signals that this is not a fixed safe harbor, and a lawyer should exercise great care before deciding to issue a prejudicial statement just to even the playing field.

The rule additionally prohibits a lawyer from assisting or coaching a non-lawyer to make a statement he could not make. If the statement is not acceptable for a lawyer to make, the lawyer is subject to discipline if he counsels or assists another to say it.

The final note to Rule 3.07 reminds us that rules of confidentiality may prohibit the disclosure of any information.

Rule 1.05 – Confidentiality of Information

Rule 1.05 outlines basic rules for keeping client information confidential, and (c) provides instances where disclosure is allowed. Rule 1.05 provides that a lawyer may reveal "confidential information" (1) when the lawyer has been expressly authorized to do so in order to carry out the representation; and (2) when the client consents after consultation. The rule provides more instances, but those two are likely to come up most frequently in connection with the media.

Municipal lawyers are often called upon to be the "spokesperson" when there is pending litigation. The question then becomes whether the client has authorized the release of confidential information. Most often that is not the case. The very reason the lawyer has been tossed to the media scrum is because the elected officials expect the lawyer to understand what information should be maintained confidential and knows how to protect attorney-client privilege. A lawyer in the spokesperson role would be wise to not only review Texas Rules of Disciplinary Conduct but also evidence rules and agency laws.

Rule 4.01 – Truthfulness in Statements to Others

Section IV of the Texas Disciplinary Rules of Professional Conduct pertains to non-client relationships and may come into play when lawyers disseminate information though media. Rule 4.01(a) provides:

In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person;

Comment 2. *A lawyer violates paragraph (a) of this Rule either by making a false statement of law or material fact or by incorporating or affirming such a statement made by another person. Such statements will violate this Rule, however, only if the lawyer knows they are false and intends thereby to mislead.*

This seems clear: do not knowingly lie to the media/public.

Rule 1.08 – Conflict of Interest: Prohibited Transactions

Rule 1.08 prohibits business transactions with a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed in a manner which can be reasonably understood by the client;
(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
(3) the client consents in writing thereto.

The section relevant to this paper is contained in Section (c) which provides:

Prior to the conclusion of all aspects of the matter giving rise to the lawyer's employment, a lawyer shall not make or negotiate an agreement with a client, prospective client, or former client giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

Note 4 states, "An agreement by which a lawyer acquires literary or media rights concerning

the conduct of representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (c) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property if the arrangement conforms to Rule 1.04 and to paragraph (h) of this Rule."

The rule says, "don't do it," but the rule is limited to the term of representation. At the closing of the term of representation, it is possibly ethical for an attorney to enter into a media rights deal concerning the subject of representation. However, note that Rule 1.05 (confidentiality) applies to former clients and current clients, so content shared in the media rights deal will be subject to confidentiality rules.

E – Explain Your Client's Story in English

Most lawyers have little, if any, experience communicating with the media. Along with minding rules, using plain English can help media communications go smoothly. Here are some helpful legalese translations:

Acquitted → Found not guilty
Affidavit → Signed statement under oath
Complaint → Allegations
Convicted → Found guilty
Deposition → Statement under oath
Judgment → Decision
Precedent → Controlling decision
Tort → Wrongdoing or negligence

Rather than getting caught up in the weeds of your client's narrative, briefly synthesize your client's story into a few words that the reporter can quote. Hovering on the surface of the case will satisfy the media and protect the lawyer from violating an ethical rule.

D – Don't Lie, Guess, or Say "No Comment"

Lying is never a good idea and can be fatal to an attorney or client's reputation and credibility. Not only is it embarrassing and damaging, but it is also a violation of Texas Disciplinary Rule 4.01 (Truthfulness in Statements to Others). If speaking the truth would be a violation of other ethical rules, attorneys should straightforwardly explain the ethical rule preventing them from sharing information. This same strategy can be used when tempted to say "no comment"–explaining why you cannot talk is better.

On a similar vein, resist the temptation to make a guess. It is best practice to stick to what you know, and if necessary, you can tell the reporter you will give them a call when you have the answer. When the time comes, do return the call to maintain civil relationships with reporters and your own credibility.

Finally, although it seems like the easiest way to escape this media dance is to respond, "no comment," it is not a good idea (with one exception: court-ordered gags). The reporter asking you questions intends to run a story and will do it with or without your statement. Answering media questions within the confines of 3.07 and 1.05 allows you to help the reporter do their job as well as share your client's story. This can help your client's reputation particularly when the other side is aggressive with media comments.

I – Intentional Speech

Whenever answering questions from media reporters, attorneys should speech intentionally. This means thinking before speaking, keeping composure, and sharing information that is both helpful and ethically okay to share. Even if you get frustrated with a media reporter, never lose your cool. This is important particularly when working on behalf of the government because one attorney's actions and reputation reflects the larger entity. Thinking before speaking may sometimes mean delaying your answer, which again, is perfectly fine. Simply call the reporter when you do have the information they want, or when you know exactly what you want to say.

A – Anticipate the Media

It is much easier to plan and think about what you might say to the media when you can anticipate the cases the press will be interested in. People are interested in what governmental entities are doing and lawsuits have a particularly high probability of capturing media attention. With court filings publicly available, media sources routinely review them to pick up newsworthy cases. Cases involving schools, police, regulatory takings, eminent domain, and civil rights, are likely to especially capture the public interest. If

you can anticipate the press, you will not be surprised when you receive the call from the reporter and you can formulate exactly what you want to say ahead of time.

Additional Resources:

Charles L. Babcock, What To Do When the Media Calls (2013): https://www.tmcec.com/files/3214/0174/4260/Session_1_25_Babcock_-_Ethically_Dealing_with_Media.pdf

John G. Browning, Ethical Restrictions on Commenting on a Case (2019): https://jolttx.com/2019/12/09/cyber-ethics-part-3-ethical-restrictions-on-commenting-about-a-case/

Wayne Polluck, Why Attorneys Need to Speak in Sound Bites (2019): https://copocetic.com/why-attorneys-need-to-speak-in-sound-bites-and-how-doing-so-can-serve-as-a-defense-to-a-claim-of-a705595f1383

Texas Center for Legal Ethics: https://www.legalethicstexas.com/Ethics-Resources/Rules