NJDC Fact Sheet

"ensuring excellence in juvenile defense and promoting justice for all children"

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MEDIA WORK IN JUVENILE DEFENSE ADVOCACY: AN INTRODUCTION

An attorney's duties do not begin inside the courtroom door… A defense attorney may pursue lawful strategies to obtain dismissal …or reduction of charges, including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried.
-Gentile v. State Bar of Nevada, 501 U.S. 1030, 1043 (1991) (J. Kennedy) (separate opinion)

A reporter calls and asks you to produce a young client who has been tried as an adult. You have just been appointed to represent a client referred to Juvenile Court because of a senseless Zero Tolerance policy at school. The prosecutor has just held a press conference to announce another client's arrest. For the third time in two months, the judge has sent yet another of your clients to an abominable facility despite the evidence you presented at sentencing concerning abuse by staff and inadequate services.

These are just some of the situations juvenile defense attorneys face that either attract media interest or demand media attention. Juvenile defense attorneys have traditionally maintained a low profile and have worked hard to keep cases out of the media spotlight. Sometimes, this approach will serve the client best. Sometimes, it will not. Sometimes, a low profile is not an option, and the only choice is between a media portrayal shaped by law enforcement or one shaped by, or at least balanced by, lawyers representing the youths involved. A poorly planned press strategy, like a poorly timed and awkwardly phrased objection, can inflame a situation. Having no press strategy at all simply leaves lawyers — and their clients — fighting the same battles over and over again, often with unsatisfactory results. A carefully planned and well-implemented press strategy can garner sympathy for an individual client or prompt reform of harmful policies and practices.

A press strategy may take many different forms, sometimes all within the same case. It may simply involve public statements by counsel. It may involve profiles of the client or an in-depth account of some particularly compelling injustice the client has experienced. It may involve public statements by the client himself or by his family or other supporters. Whatever form it takes, including media work within juvenile justice advocacy raises a number of serious questions. Is the public exposure actually likely to benefit the individual client whose story is told or is it more likely to help some youth who might otherwise face a similar fate if bad practices are not exposed? Is it fair to place the burden of reform on the shoulders of youth who are already disadvantaged in numerous ways? Conversely, are youth and families empowered by telling their stories and fighting against an unfair system, as young people and their parents are increasingly doing? Can a young client be expected to give informed consent to media coverage and, if so, under what circumstances? How can attorneys prepare a client and his/her family for the emotional challenges contact with the media may bring? What are the ethical obligations for an attorney considering talking to a reporter or recommending that a client talk to one? What can be done to maximize the advantage of such a strategy, and minimize the harm?[1] **This NJDC *Bulletin* hopes to answer these questions and provide practitioners with practical steps they can take when they engage the media.**

Is it ethical for an attorney to speak with the press (or to arrange for a client to do so)?

In many instances, yes. The prevailing ethical rules in most states forbid an attorney to make a statement likely to be disseminated via the media if the statement presents a "substantial likelihood of materially prejudicing an adjudicative proceeding."[2]

By its terms, the rule is intended to protect the integrity of **adjudicative proceedings**. The rule may be read to include all evidentiary hearings before the court (pretrial, trial and perhaps also sentencing[3]). The rationale is that these decisions should be made according to the law and should not be influenced by public opinion, emotion, or other political or non-rational considerations. A prosecutor's decision about whether to charge a youth (or in what forum) is different. This inherently political decision may fairly be challenged publicly.[4] When making such a challenge, counsel should be mindful of the possible prejudicial effect on any ultimate trial, per the factors set out below.

Matters of grave concern to counsel and clients (e.g., police abuse, detention center conditions, budget decisions that

negatively impact youth, and even corruption among service providers) may never be the subject of any adjudicative proceeding. Media-reported comments by attorneys on these subjects will not run afoul of Rule 3.6, and are unlikely to violate any other prohibition. It may well be that there are few legal avenues of relief available to address problems such as those identified above. Publicity may be the only means of obtaining desirable change on behalf of clients. Effective action in such circumstances requires defenders, defender offices and their allies to organize to make sure:

- the right issues are chosen
- the right forum is selected
- the timing and content of a media strategy are optimal for success.

It may be difficult for individual defenders to undertake such strategies, but collective action, through local bar groups, community groups, and other networks may be arranged. While such efforts require their own investment of time, the potential payoff is large.

Can a media strategy be employed prior to trial?

Again, yes. A prosecutor's charging decision could never be effectively challenged if attorneys had to wait until after a trial. Attorneys considering pre-trial media statements should pay attention to the following factors:

Judge or Jury?

The test for prejudice "will rarely be met when the judge is the trier of fact, since trial judges often have access to inadmissible and highly prejudicial information and are presumed to be able to discount or disregard it." Gentile, at 1077. (Rehnquist, C.J.) As most juvenile delinquency adjudications are bench trials, the risk of responsible media strategies improperly prejudicing such proceedings is necessarily slight. The same can be said with respect to suppression motions, in that they are also decided by the court. However, publicity regarding suppression motions is decidedly double-edged. While it may present an opportunity to highlight police misconduct, it may also draw attention to incriminating evidence that may forever be associated with the client, whatever the result of the motion or any eventual trial.

Timing

The closer in time to the proceeding, the more likely it is that a statement may prejudice the proceeding. In thinking about how timing relates to prejudice, defense attorneys should examine the caselaw developed out of the largely unsuccessful efforts to have convictions overturned based on excessive and unfavorable pretrial publicity. Publicity engineered by the defense should not be seen as any more likely to cause unfair prejudice than that orchestrated by law enforcement.

Content of the Statement

Do's & Don'ts

Most ethical rules set out, either in the text or in the comments, types of presumptively prejudicial information that will lead a court or ethics panel to presume a media statement to be unduly prejudicial. Most of the rules also list certain types of information that if stated "without elaboration" do not violate the rule. Among tthe presumptively prejudicial statements are comments on the credibility of witnesses or on the guilt or innocence of the accused. Typically, "the general nature of the defense" is included among the protected statements.[5]

Special information

The principal justification for restricting attorney speech is that attorneys, by virtue of their professional involvement in a particular case, have access to information not generally available. Thus, the argument goes, statements by attorneys will be especially influential because they will be assumed to be based on the attorney's special access to information. This justification suggests its own limitation. When an attorney's media statement contains information that was already publicly available or obviously came from some source not peculiarly exclusively? available to the attorney, it is not likely to create the sort of prejudice that violates the rule.

What if the case has already been the subject of media attention?

The current version onf Model Rule 3.6 expressly authorizes attorneys to make a statement, even if it otherwise would be presumed prejudicial, if "a reasonable lawyer would believe" the statement "is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client." Such statements "shall be limited to such information as is necessary to mitigate the recent adverse publicity." This "right of reply" was added to the Model Rule in 1994, after the *Gentile* decision.[6] Only six states have adopted the 1994 version of Model Rule 3.6. Several other states expressly provide a right of reply. However, twenty-five states are currently governed by the 1983 version of Model Rule 3.6, which is silent on the question of responsive statements.

What about Juvenile Court confidentiality laws?

Ethics rules or other laws may place certain restrictions on attorneys and other parties involved in juvenile cases. Any media strategy must take these restrictions into account as well.

Even though many states have relaxed or even withdrawn the protections of confidentiality available to youths in Juvenile Court, there are still many statutes that make it a misdemeanor to disclose information contained in court records, social records, or police records pertaining to a juvenile. Federal law also prohibits the public disclosure of information contained in records pertaining to an allegedly abused or neglected child. A media strategy that violates such laws exposes an attorney to professional discipline as well. Thus, when planning a media strategy addressing issues contained in such records, attorneys must be careful to present information obtained from other sources, including the client.

What if the judge imposes a gag order?

A gag order is a valid court order until it is set aside. Violating such orders is done at the risk of contempt. Attorneys subject to them should certainly make sure they are enforced even-handedly. If, under the circumstances of the case, a defense attorney determines that it is necessary to make a public statement that is prohibited by a gag order, the attorney must seek relief from the order before making the statement.

How can my client make an informed decision about talking to the press?

Who decides?

As with other aspects of representation, a successful media component builds upon a strong relationship between lawyer and client. Where the client trusts the lawyer, the client will feel protected, even when doing something as uncomfortable as speaking in public. When the lawyer understands the client, the lawyer will know whether a media strategy can succeed and what sort of strategy is right for that client.

It would be foolish and probably unethical to embark on a media strategy that a client does not approve. Media coverage exposes the client to a wide range of dangers that extend well beyond the case. In light of this, the final decision must rest with the client. The mere fact of the client's reluctance, even after the lawyer has explained the possible benefits, is a good sign that the lawyer may be seeing benefits that are not valuable to this client. The prospect of helping some other youth down the road may be a motivating factor for some clients. However, where the client opts not to go public,, benefits that might accrue to future clients must be foregone. It is the current client whose name and family may be exposed. Of course, a lawyer cannot force a client to participate in an interview with a reporter. What we are saying here is that a lawyer should not engage in a media strategy that calls attention to the client or the case, even if the lawyer is the only public speaker, unless the client agrees. Because the decision is so difficult, it is important that attorneys structure the representation so that the client and, where appropriate, the family have time to weigh the matter before the decision must be made.

What are the possible benefits of working with the media?

Correcting the public record about your client's behavior

- Spurring on juvenile justice reforms
- Putting your client's case in a more favorable light in the eyes of various justice system actors, such as probation staff or prosecutors
- Providing your client with the empowered feeling of speaking for themselves for a change

What are some of the possible risks?

- Publicizing your client's delinquency, impacting employment and educational opportunities
- Alienating or otherwise negatively affecting the judge, probation department and/or prosecutor
- The spotlight can be traumatic in itself

Once I give a reporter access to my client, do I lose all control over the situation?

No. Interaction with a reporter is a negotiation. If your client has a compelling story that a reporter wants to cover, you can negotiate a great deal of protection. You can insist that your client's name and photo not be used; you can be present during the interview; you can negotiate ground rules about what can and can't be discussed. Instinctively, reporters will want no limitations, so getting what you want in terms of protection will take work. The more interesting your client's story is to a reporter, the more the reporter they will be willing to bend.

Isn't there a way to tell my client's side of the story without

exposure to the media?

Absolutely. And sometimes you, as defense counsel, don't need to be quoted either. Surrogates can carry the weight of media work if you determine that media coverage is desirable but that it's not advisable for you or your client to be directly quoted. Ministers, coaches, teachers, civil rights leaders, relatives and friends can all serve as wonderful spokespeople, and can often speak more freely, more eloquently, and more credibly than either the attorney or the client. While an attorney cannot be disciplined for the independent statements of such spokespeople, if the attorney is involved in the discussions about whether, when, and by whom such statements should be made, she should be sure that they will not contravene the governing ethical rules. In other words, an attorney should not send someone out to make a statement that she would not find ethically acceptable to make herself.

How can I minimize any negative impact on my client from working with the media?

Media exposure can have unintended consequences for your client, and you should be aware of those and take steps to reduce them. Suggest that your client's parents or guardians stay attentive to him after his case has been publicized to talk to him about his reaction. Alert your client's counselors that his case was recently publicized to watch for reactions. And call afterwards yourself to see how your client is reacting to his press attention. You won't be running to the press every day with a different client's case. For the few that do get media exposure, it's worth taking the time to see that your client doesn't have a negative emotional reaction.

Another kind of negative impact that defenders should be concerned about is justice system reprisals. For example, it's not unreasonable to conclude that young people who "snitch" on institutional conditions could be subject to retribution by staff whose oxen are gored. As with emotional fallout, warding off departmental reprisals requires follow up. Letting institutional staff know that you will be watching can be a prophylactic against retribution. Alerting the reporter you've worked with that there might be untoward consequences for your client and suggesting that you might be calling them in such an event can also help keep the system honest. Just because a client has the courage to speak out about her experience does not mean she does not still need protection.

Litigation planning provides is especially a useful analogy in thinking about avoiding bad outcomes from media work. Primacy is one of the basic principles of trial advocacy. Frame the case your way from the beginning. Make the other side have to operate on your terms. The same is true with media work. You want your view to be the lead, with the other side getting a response in later, perhaps after the reader or viewer has moved on to something else. If you wait too long to get your story out, it may never be fully presented or heard. No responsible attorney would say something in an opening statement, no matter how superficially catchy, if she knew the other side would have a devastating rejoinder. Likewise, iIt would be improper to prepare a client or witness to testify without also preparing him for cross-examination. Before exposing a client (or a client's case) to the media, an attorney must be sure she has the facts straight. the spokesperson is prepared for the media contact, as described below. She must anticipate what the representatives of the other side will say when the reporter approaches them[1]. The failure to do this preparation is no more excusable with the press than it would be in the courtroom.Successful media work, like successful trial work, depends on this combination of preparation and ability to control the
agenda.

How do I prepare my client to speak to the media?

A successful media strategy requires attorneys to take the time to explain to a client not just why he should work with media, but how he can most effectively conduct interviews. Before you arrange any interviews with your client, or his family, you need to help them understand how the media works, and how he can be an effective spokesperson.

Helping your client develop realistic expectations about working with the media is an important part of preparing her to be a spokesperson. Some people are overly cynical about the media and think that it will always misrepresent their story. Other people have exaggerated expectations and hope that the media will be the one venue where they will finally get to tell their side of the story. Both expectations are not accurate and need to be corrected. Your client needs to understand that working with the media is a tool that can help accomplish a specific goal, such as improving his chances at sentencing or helping to reform the juvenile justice system. The media is not going to tell his entire story, nor are they likely to deliberately misrepresent a story. Rather, the media is interested in your client for specific reasons— because of the crime he committed, his personal experiences in the juvenile justice system, his ability to turn his life around, or the basic human-interest aspects he contributes. Once your client understands why the media is interested in him, and what he can expect from the reporter, he will be better prepared to conduct interviews.
To prepare your client for interviews with the media, it

helps to explain the importance of developing and using a "message." Most TV televised interviews last only **15 seconds,** and one sentence is the average length of quotes for print media. Developing a message is a way to make sure that that 15 seconds or one sentence is the most effective quote possible. A message consists of a few simple points that your client should use in all of his answers during the interview. Unlike interviews on the stand, your client should NOT ANSWER the question in a media interview. If he always answers the reporters' questions, he will most likely not communicate effectively. Rather, he should find a way to communicate the messages that you have established.

One way to help a client avoid answering a reporter's questions without totally ignoring the question is to explain the "ABC" trick of interviewing. When using the ABC approach, he should "**A**ddress" the reporter's question, "**B**ridge" to his message and then "**C**ommunicate" that message. For example, if a reporter asks your client about why he committed a crime, your client can use the ABC

The Story of Nathan and Robert

During the summer of 2001, Todd Richissin, a *Baltimore Sun* reporter who had given consistently excellent coverage to juvenile justice issues, was working on an in-depth story about three troubled Maryland juvenile justice facilities. When the article appeared in November 2001, it featured the story of a youth, **Nathan**, who had been subject to abuse and severe lack of services for over two years while in Department of Juvenile Justice facilities.

The pleas of Nathan and his motherNathan's and his mother's pleas had gone unheeded until they began working with advocates and publicizing their story, which helped them get the services, he needed. Earlier that yearin 2001, working with youth advocates, Nathan and his mother chose to talk with a television reporter to expose their situation and that of other similarly situated youth. The resulting coverage got the attention of the Department of Juvenile Justice. So, bBy the time the *Sun* article appeared, Nathan had been placed in a therapeutic community-based program – an outcome which defense counsel had been unable to achieve prior to garnering media coverage.

Media coverage of Nathan's case and generally debilitating conditions in Maryland's institutions alerted many parents to systemic problems at facilities where their children had been placed. The week following the publication of the *Sun* article, advocates held a press conference and appeared on a prominent talk radio program demanding the closure of the Victor Cullen Academy, one of the offending institutions. A father called in to the show to voice his concern about his son, Robert's, safety in Victor Cullen. Two days later, despite the fact that special monitors had been placed thereat Cullen, the father's worst fears were realized when Robert was the target of a sexually motivated attack that he managed to fend off.

Robert's father called the Center on Juvenile and Criminal Justice after calls to administration and elected officials produced no help. CJCJ then referred him to the program coordinator/founder of Juvenile Justice Family Advocacy Initiative and Resources (JJ FAIR)who is also an attorney. The youth had no representation at the time. Although the parents initially had wanted to hire another attorney they opted to work with a JJ FAIR parent/partner advocate to discuss various strategies. They decided to request a review of Robert's case before the sentencing judge and simultaneously seek media coverage. JJ FAIR then called CJCJ in to spearhead the media strategy.

Robert and his father spoke during the court review during which Robert was ordered out of Victor Cullen and back home on electronic surveillance. The parents, who understood that many other youth were not as fortunate as Robert, continued to pursue media coverage as part of efforts to get Victor Cullen closed down. JJ FAIR advocates educated the family about the benefits and pitfalls of working with the media. CJCJ staff took them through mock interviews and otherwise prepared them for their encounters, while brokering their story with various carefully chosen reporters. Robert's story was told sympathetically in several newspapers and on local television.

A week before Christmas, Robert's parents participated in the delivery of a life size holiday card and message to state executives, demanding the closure of the Victor Cullen Academy and other juvenile justice reforms. This event received enormous print and television coverage. The JJ FAIR/CJCJ team likewise prepared all of the families who participated in this event. The result of this and other media pressure, and the work of many dedicated parents and advocates in Maryland, was a decision by the state to substantially downsize Victor Cullen and devote more resources to community based services – an outcome that advocates have been working many years to achieve.

interview technique to say: "I was a troubled teenager who needed the help of positive mentors and counseling services. When I was locked up, I only got worse. But now that I'm in a community based program with the guidance of caring adults, I'm finally able to start turning my life around." The bottom line is that your client should understand that he doesn't have to –and probably does not want to — share every detail of his life. Rather, his life story should be told in a way that helps you achieve your specific goal of improving his chances at sentencing, getting him placed in a community based program, or reforming a broken juvenile justice system.

Finally, attorneys need to prepare their clients for the possible outcomes of a media interview. A long interview may result in wonderful, extensive coverage. Or, it may result in a one-sentence quote in an article. Or worse, no quote in an juvenile justice article. Or worse, no article may ever run. Parents and youth should be informed of these possibilities so that they are not disappointed and disillusioned afterwards.

It is exceedingly important for juvenile crime and young people to be more accurately depicted in the media, because media portrayals of youth exaggerate their violence and surveys show that the public is highly reliant on media accounts to form their opinions about crime. For a discussion of the disconnect between the juvenile crime patterns and the public perception of crime, see School House Hype: Two Years Later, Justice Policy Institute, April 1000 (available www.cjcj.org). For a discussion of media coverage of juvenile crime, see Off Balance: Youth, Race and Crime in the News, Building Blocks for Youth. April 2001.

[1] For a look at some of the harmful consequences youths may experience as a result of media coverage, see Laura Cohen, Kids, Courts and Cameras, New Challenges For Juvenile Defenders, 18 Quinnipiac Law Review 701 (1999). This article covers many of the issues raised in this Bulletin in greater depth.

[2] This standard is drawn from ABA Model Rule 3.6. Interpreted narrowly, it does not violate an attorney's First Amendment rights. *Gentile v. United States*, 501 U.S. 1030 (1991). *Gentile* is a confusing case. Chief Justice Rehnquist and Justice Kennedy wrote opinions that set out starkly different visions of the defense attorney's role generally and interactions between attorneys and the media specifically. Each of these opinions was the opinion of the Court on different issues. Of course, attorneys must consult the ethics opinions and other guidelines in their states before deciding whether and how to work with the media. A minority of states have rules that are more protective of attorneys' free speech rights, prohibiting only statements that create a serious and imminent risk of prejudice to a proceeding.

[3] DR 7-107(E) of the Model Code of Professional Responsibility expressly extends the prohibition to statements that might affect a sentencing. It is worth noting that the Model Code is considerably more restrictive of speech than are the Model Rules.

[4] In the week that this Bulletin was undergoing final revisions, attorneys, executives, and employees of Arthur Andersen have been engaged in an aggressive media campaign designed to convince the Justice Department to dismiss the indictment against the company for Enron-related document destruction.

[5] Granted, permission to state the "general nature" of the defense, qualified by the requirement that an attorney do so "without elaboration," may leave an attorney wondering just what she can say. This confusion led five justices of the Supreme Court to rule that, as interpreted by its courts, Nevada's rule, while constitutional on its face, could not be constitutionally applied to the attorney involved in the *Gentile* case. The attorney in *Gentile* had stated, at a day-of-indictment press conference, that his client was innocent of the alleged thefts and that "[t]here is far more evidence that will establish that [a specific named detective] took these drugs and took these American Express Travelers' checks than any other living human being." The attorney went on to say that his client was "being used as a scapegoat." Gentile, at 1059. These statements certainly pushed the entitlement to state the nature of the defense "without elaboration" to, or at least near, its limits.

[6] The propriety of responsive media statements was another issue on which the Rehnquist and Kennedy opinions differed.

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Please call or email if you would like to write a future bulletin or would like to suggest a topic that would be helpful to juvenile defenders.

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ensuring excellence in juvenile defense and promoting justice for all children

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National Juvenile Defender Center

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Statement of Beliefs

All the children in the justice system must have ready and timely access tocapable, well-resourced, well-trained legal counsel.

All children are entitled to legal representation that is individualized, developmentally and age appropriate, and free of racial, ethnic, gender, social, and economic bias.

All children have strengths and the potential to become productive members of society and each has the right to constitutional and statutory protections.

The juvenile defense bar must build its capacit, develop leadership and demonstrate a commitment to professionalism.

The juvenile defense bar must promote accountability and bring about reform in the juvenile justice system.

The juvenile defense bar's role in the justice system will be advanced through collaboration and partnerships.

The juvenile defense system will be enhanced by greater community involvement.