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Raymond M. Brown

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A Ransom Note from the Opposition to the Proposed Rules of Ethics for Legal Commentators

by Raymond M. Brown*

Hijack the question!

That is a soupçon of tactical knowledge that every lawyer sojourning on the TV frontier absorbs quickly. In the fast-paced realm of the electronic media, there are limited opportunities to speak. To be effective you must disregard the dictates of politeness ingested at your mother's knee, ignore the question presented, and make *your* point succinctly. To wit:

Question: Do you think Bill Clinton should be impeached?

Answer: I think the abuse of power by Ken Starr doomed the Office of Independent Counsel and set a dangerous example for a whole generation of prosecutors.

Because the proponents of ethical rules for commentators are bringing their considerable skills to bear on the wrong problem, we must "hijack" the commentator-ethics question and refocus the discussion. We should abandon further development of a code of ethics for commentators¹ and instead address the more pressing problem of the lack of ethical and strategic understanding demonstrated by lawyers dealing with the media on behalf of clients. It is distressingly common for lawyers to misunderstand that talking to a reporter may serve the lawyer's interest at the

* Court TV Anchor and host of *On Appeal* (1996-present). Host of the New Jersey Network's two-time Emmy Award winning program "Due Process" (1995-present). Graduate of Columbia University (1969) and Boalt Hall School of Law, University of California at Berkeley (1994). Partner in the firm of Brown & Brown, Newark, New Jersey. Member, New Jersey Bar and New York Bar. Fellow of the American College of Trial Lawyers.

1. I distinguish a *codification* from a *discussion* of appropriate conduct for commentators. The dialogue fostered by Professors Levenson, Chemerinsky, and Scheck has been, and will continue to be, extremely valuable.

expense of the client. An unpaid media appearance is the best "advertising" a lawyer can have. On the other hand, many clients, particularly in criminal cases, are ill-served by extensive public comments by counsel.

When there is strategic and ethical justification for using the media, lawyers often fail to do so effectively. Many have been slow to learn that the lawyer who is not yet prepared to give an opening statement is similarly not ready to talk in detail to the press. To make matters worse, this tendency to make ill-advised extrajudicial statements is gaining currency at a time when sound guidance on the standards governing such statements is in short supply because of the Supreme Court's opinion in *Gentile v. State Bar of Nevada*² and the ABA's responsive 1994 amendments to the Model Rules of Professional Conduct ("Model Rules").³

The level of awareness and skill demonstrated by otherwise competent lawyers in dealing with the media is so disturbingly low that our current mantra should be "just say no" to talking to the press.⁴ As long as this state of affairs exists, our first priority should be to address the problem of lawyers as *advocates* who respond unethically or inartfully to the media.

In drafting this note, I resorted to hijacking the commentator-ethics question to emphasize the dangers of complicating the ethical universe with a *new*, unenforceable, free-floating set of rules aimed in many cases at lawyers who haven't troubled to understand the *old* ones. It is more important, more logical, and more consistent with the traditions of bar regulations to begin to alter the media-related conduct of lawyers "participating" in litigation than to attack the relatively new and more diffuse problems posed by lawyers as commentators.⁵

2. 501 U.S. 1030 (1991).

3. MODEL RULES OF PROFESSIONAL CONDUCT Rules 3.6, 3.8 (1994). In response to *Gentile*, the Model Rules were amended in 1994 to create a new "safe harbor." Rule 3.6(c) now permits a lawyer to make an extrajudicial statement "to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client." This amendment was appropriate because of experiences like *Gentile*, in which a lawyer might be required to fight back on his client's behalf. However, it created new areas of uncertainty concerning when such conduct should be permitted and whether a statement of a lawyer acting under 3.6(c) was "limited to such information as is necessary to mitigate the recent adverse publicity." *Id.*

4. My colleague, Wanda M. Akin, and I have entitled our lecture on this subject "Just Say No—Then Use the Media Before It Uses You!"

5. This struggle over the question of priorities in the realm of ethics caused me to stray close to the boundaries of proper debate by committing a hijacking. Curiously, it is only in this same area that the professors stray from the Marquis of Queensbury Rules. Claiming that their "critics" want to resolve all other "ills" and "pressing problems" of the

This brings us to one of the primary barriers to the construction of a workable commentator code. How can we determine who is a "participant"⁶ bound by traditional bar regulations and who is a commentator within the ambit of a proposed new code? Despite the professors' assertion that there is a "profound difference in the role of commentator and participant,"⁷ there are great obstacles to determining who is who. The ABA's 1994 amendments did more than create a new "safe harbor." They began a process of redefining a participant (It is safe to assume that we would want clarity on the question of whose conduct was governed by traditional rules, rather than the commentator code).

Professor Lawrence Hellman, who drafted a revision of Model Rule 3.6 for the Oklahoma Supreme Court, argues that a literal interpretation of the ABA's version of 3.6(a) would subject lawyers serving as "news analysts and commentators" to the strictures of the Model Rules.⁸

A New York trial court, ruling in the media-intense trial of Joey Buttafuoco,⁹ added another layer to the "commentator/participant" analysis. The court banned extrajudicial statements by the lawyer representing Buttafuoco's wife, Mary Jo, during Buttafuoco's trial.¹⁰

legal system before turning to those presented by legal commentary, they have violated the prohibition against "straw men." Erwin Chemerinsky & Laurie Levenson, *The Ethics of Being a Commentator III*, 50 *MERCER L. REV.* 737 (1999). In fact, the problem of irresponsible media conduct by commentators is a "lesser included" aspect of the same misconduct by lawyers engaged in representation of clients (The rules governing the modern sport of boxing are patterned after those formulated in 1867 by the 8th Marquis of Queensbury).

6. Model Rule 3.6(a) would extend the prohibitions on extrajudicial statements to any lawyer who "is *participating* or has *participated* in the investigation or litigation of a matter." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6(a) (1994) (emphasis added).

7. Chemerinsky & Levenson, *supra* note 5, at 752.

8. Lawrence K. Hellman, *The Oklahoma Supreme Court's New Rules on Attorneys' Trial Publicity: Realism and Aspiration*, 51 *OKLA. L. REV.* 1, 32-33 (1998).

Rule 3.6(a) presently applies to any lawyer, regardless of whether the lawyer is participating in the matter in question. *Literally, then, a lawyer serving as a news analyst or commentator could be disciplined under the present rule.* This broad reach of the rule significantly curtails the First Amendment freedom of all lawyers as well as the public's access to relevant and helpful information. The 1994 ABA amendment suggests that such a broad sweep extends too far. The language proposed here which restricts the applicability of the Rule to lawyers participating in the relevant matter (and, through proposed Rule 3.6(c), to lawyers associated with participating lawyers) is taken verbatim from the ABA's approved 1994 amendment.

Id. (emphasis added).

9. *People v. Buttafuoco*, 599 N.Y.S.2d 419 (N.Y. Crim. Ct. 1993).

10. *Id.* at 424-25. New York includes the phrase "associated with" in its equivalent of Model Rule 3.6(a) and Disciplinary Rule 7-107. N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.38 (1998).

Mary Jo was not a defendant in her husband's case and had been a victim with respect to the earlier attempted murder trial of her husband's erstwhile paramour, Amy Fisher.¹¹ In effect, a lawyer, two layers removed from a trial, was found to be a "participant" and bound by the rules against public comment.

Of course, difficulties in interpretation or draftsmanship should not, by themselves, defeat an effort to draft a new code. However, the problems touched on in this note and at the symposium are symptomatic of the fact that the code proposed by the professors seeks to regulate political or *esthetic* judgments that should not be covered in any code of ethics and seeks to govern conduct that is already adequately addressed by existing legal and journalistic standards.

This brings to the fore interesting questions of taste, politics, and esthetics. I suspect that if I viewed hours of legal commentary in the professors' living rooms, we would all cringe at the same times, particularly when lawyers engaged in excessive predictions of trial outcomes.

However, I cannot agree that the lawyer foolish enough to "score" or "predict" outcomes of trials, rulings, or deliberations has violated an *ethical* norm. He or she is taking a risk which, in the universe of free and open debate, may subject him or her to justifiable ridicule when the inevitable poor scores mount up. However foolish, such crystal ball gazing should not be formally proscribed.

During the symposium, Barry Scheck offered the piquant observation that I supported his guidelines as a member of the National Association of Criminal Defense Lawyers ("NACDL"). This support materialized after months of discussion had caused the proposed NACDL principles to evolve from a proposed ethics code to a statement of principles to guide members in their public comments. Professors Chemerinksy and Levenson are critical of the fact that Principle 2 urges members serving as commentators to focus on the rights of the criminal accused.¹² This exhortation reflects the organization's *raison d'être*. It presents an open policy recommendation that would be out of place in a real code of ethics but is proper in this NACDL document.

These political and esthetic differences suggest that the code proposed by the professors wanders too often into areas of content regulation. While everyone knows the proponents of this code are well-motivated, the concerns expressed at the symposium about its possible use to suppress unpopular and unorthodox thoughts are ripened by an analysis of its political and esthetic component.

11. 599 N.Y.S.2d at 420. Fisher's trial ended with a guilty plea to assault. *Id.*

12. Chemerinksy & Levenson, *supra* note 5, at 753-54.

The only conceivable justification for creating this Trojan Horse-like code would be to combat evils that cannot otherwise be cured. However, the areas of concern raised by the proponents are adequately addressed elsewhere. When client confidences are not preserved, when conflicts of interest are not disclosed, and when minimum standards of competence are not maintained, the problem we face is *not* solved by drafting new rules, but by enforcing old ones.

Competence and the problem of violations of client confidences are adequately addressed by both the Model Rules and the Model Code,¹³ when it still governs. Again, the problem, like the wholesale violations of O.J. Simpson's privilege by Robert Kardashian in providing assistance to Lawrence Schiller,¹⁴ is a lack of enforcement.

Standards governing the resolution of "conflicts of interest" have long existed in both the legal and journalistic communities. The preferred solution in both of these universes is disclosure. There may be problems of "enforcement," but the norms are absolutely clear.

I share the frustration of the professors on the question of competence. I certainly empathize with Barry Scheck who, during the Simpson trial, was often the target of criticism by commentators who could only find the courthouse by being arrested. Having tried criminal cases for more than twenty-five years, I was frequently annoyed to witness or even argue with "lawyers" I knew had little experience. This is particularly true when the questions under discussion focus on trial tactics and performance. Again, however, I cannot imagine a journalist who would not *claim* to be interested in consulting the most competent lawyer available. Additionally, the rest of us must be willing to enter the lists and openly challenge those who speak from an abundance of ignorance rather than knowledge.

The professors have provided a valuable service by persuading the legal community to think more precisely about how it should behave when commenting publicly on the law. They have performed a similar service for serious legal journalists (much of the rest of the media wouldn't recognize a serious thought unless it had high Nielsen ratings). The debate they have inspired should continue, but in the form of open discourse and not a formal code of ethics for legal commentators.

13. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1992).

14. LAWRENCE SCHILLER & JAMES WILLWERTH, *AMERICAN TRAGEDY: THE UNCENSORED STORY OF THE SIMPSON DEFENSE* (1996). The volume is filled with confidential material and information supplied by Kardashian to Schiller after the criminal trial but before Simpson's civil trial (Barry Scheck commented on this problem during the symposium). As far as I know, Kardashian, a member of the defense team, has not been disciplined for his conduct.

