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38

Publicity: The US Perspective

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38.1 Restrictions in a criminal investigation or trial

38.1.1 Generally

The US Constitution guarantees defendants in criminal cases the right to a speedy and public trial. It also guarantees all Americans freedom of speech and freedom of the press. In the trial setting, these constitutional rights are sometimes in conflict. For instance, although freedom of the press is guaranteed, media reports about a case might taint the pool of potential jurors, or might allow sworn jurors to learn about matters not in evidence. Accordingly, lawyers practising in the United States must be aware of the multiple, conflicting rights that affect judicial proceedings. These rights include the public's right of access to trial proceedings;[2] the media's right to report what occurs in court;[3] the litigants' freedom of speech;[4]

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2 *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575-81 (1980) (holding that the right of the public and the press to attend criminal trials is guaranteed under the First and Fourteenth Amendments, and that, absent an overriding interest established after a factual hearing, the trial of a criminal case must be open to the public. In 1984, the US Supreme Court extended its ruling in *Richmond Newspapers* to jury selection. *Press-Enterprise Co. v. Superior Court of California*, 478 U.S. 1 (1986).

3 *Estes v. State of Tex.*, 381 U.S. 532, 541–42 (1965) ('Reporters of all media, including television, are always present if they wish to be and are plainly free to report whatever occurs in open court through their respective media.').

4 *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1074-75 (1991) (describing the bounds to which limitations may be placed on a lawyer's First Amendment right to free speech).

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and the defendant's right to a fair trial.[5] No one right is absolute, and each is limited by various rules and regulations.[6]

A lawyer's ethical obligations, for example, may limit the attorney's First Amendment right to speak publicly about a case. Under the American Bar Association Model Rules of Professional Conduct, which have been adopted, in whole or in part, by the vast majority of US jurisdictions, a lawyer who has or is participating in a matter must not make an 'extrajudicial statement' that 'will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.'[7] In federal criminal cases, prosecutors must also comply with these rules, as well as those published in the US Attorneys' Manual, which limits the information a prosecutor may disclose or the issues he or she may comment on.[8]

Apart from the rules prohibiting a lawyer from publicly commenting on a pending case, a lawyer's professional duty to keep client matters confidential may also prevent him or her from publicising information about a case.[9]

Investigatory and pretrial stage 38.1.2

During the investigative stage of the case, before charges have been filed, a court cannot limit an individual involved in an investigation from making public statements about the case. But because such statements can be used by a prosecutor against a defendant in a subsequent criminal proceeding (either as substantive evidence or to demonstrate that the individual waived his or her right to remain silent), lawyers often counsel their clients to exercise their free speech rights carefully, if at all. Prosecutors are more constrained, however. The US Attorneys' Manual provides that a prosecutor cannot make public statements about a case if there is substantial likelihood that the statement will materially prejudice an adjudicative proceeding.[10] Similarly, prosecutors, but not individual witnesses, are prohibited from disclosing any matters that occur before a grand jury.[11] Once charges have been filed, however, courts have greater ability to insulate their proceedings

5 *Press-Enter. Co. v. Superior Court of California, Riverside Cty.*, 464 U.S. 501, 508 (1984) ('No right ranks higher than the right of the accused to a fair trial.').

6 See *United States v. Gerena*, 869 F.2d 82, 85 (2d Cir. 1989) ('The district court must balance the public's right of access against the privacy and fair trial interests of defendants, witnesses and third parties.'); *United States v. Rajaratnam*, 708 F. Supp. 2d 371, 374 (S.D.N.Y. 2010) (explaining that '[c]ourts must balance the right [to access criminal proceedings] against other important values, like the Sixth Amendment right of the accused to a fair trial').

7 Model Rules of Prof'l Conduct R. 3.6(a) (2016).

8 U.S. Attorneys' Manual, 1-7.000 (Media Relations), available at https://www.justice.gov/usam/usam-1-7000-media-relations.

9 See, e.g., *Sealed Party v. Sealed Party*, No. 04-2229, 2006 U.S. Dist. LEXIS 28392 (S.D. Tex. 4 May 2006) (finding breach of fiduciary duty where attorney published a press release disclosing the terms of a confidential settlement).

10 U.S. Attorneys' Manual, Media Relations, §1-7.500, available at https://www.justice.gov/usam/usam-1-7000-media-relations.

11 Rule 6(e)(2) prohibits a grand juror, interpreter, court reporter, operator of a recording device, person who transcribes recorded testimony, attorney for the government, or person to whom a proper disclosure is made under Rule 6(e)(3)(a)(ii) or (iii) from disclosing a matter occurring

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from the prejudicial effects of any publicity.[12] A judge's failure to exercise this power may, under certain circumstances, violate a defendant's right to a fair trial.[13] In widely publicised cases, the local rules may authorise the court to issue orders governing extrajudicial statements by parties, witnesses and attorneys, and the seating and conduct of spectators, as well as the sequestration of jurors and witnesses.[14] Sometimes, litigants can attempt to prevent the public disclosure of private or prejudicial information prior to trial by filing their documents under seal and pursuant to protective orders.[15] However, because the First Amendment guarantees the public's right of access to governmental proceedings, sealed filings can only be made with the court's permission and upon a showing of necessity or that unfair prejudice might result from public dissemination. Accordingly, motions to seal proceedings are not lightly granted, and government lawyers in particular are severely limited in their ability to file motions under seal or to consent to their opponent's request to close proceedings.[16] Rather than seal proceedings or files, courts must consider whether a change of venue, jury sequestration or gag orders, among other techniques, would adequately protect the rights of the parties. Upon a showing that pretrial publicity about the case will prevent the empanelment of an impartial jury or will otherwise prejudice the defendant, the defendant can move to have the case transferred to another district.[17]

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before the grand jury. Fed. R. Crim. P. 6(e). The rule does not impose any obligation of secrecy on witnesses.

12 See, e.g., *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (holding that a court may enter a 'gag' order prohibiting the reporting of evidence adduced at an open preliminary hearing if it finds 'a clear and present danger that pre-trial publicity could impinge upon the defendant's right to a fair trial').

13 *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (holding that failure of a state trial judge to protect the defendant in a murder prosecution 'from the inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom' deprived the defendant of a fair trial consistent with the Due Process Clause of the Fourteenth Amendment).

14 See, e.g., L. Cr. R 57.7(c): S.D.N.Y. L. Cr. R 23.1(h).

15 *Johnson v. Greater Se. Cmty. Hosp. Corp.*, 951 F.2d 1268, 1277 (D.C. Cir. 1991) (noting that, in permitting a party to file a document under seal, should consider '(1) the need for public access to the documents at issue; (2) the extent to which the public had access to the documents prior to the sealing order; (3) the fact that a party has objected to disclosure and the identity of that party; (4) the strength of the property and privacy interests involved; (5) the possibility of prejudice to those opposing disclosure; and (6) the purposes for which the documents were introduced'); see also *Strauss v. Credit Lyonnais, S.A.*, No. 06-CV-702, 2011 WL 4736359, at *4 (E.D.N.Y. 6 October 2011) (approving a protective order that governs the filing of documents under seal as well as the public filing of documents).

16 28 C.F.R. §50.9.

17 Fed. R. Crim. P. 21(a); see also *Sheppard*, 384 U.S. at 363 (requiring the defendant to show 'a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial').

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Trial and post-trial stage 38.1.3

Because the right to an impartial jury is also guaranteed by the US Constitution,[18] a defendant may question jurors about their exposure to pretrial publicity.[19] In one of the most highly publicised cases in modern history – the 1995 murder trial of football legend O J Simpson – efforts to seat an impartial jury not prejudiced by the near-constant media coverage of the case took nearly two months. During jury selection, jurors were prohibited from reading the papers, watching television or even awakening to a clock radio.[20] In widely publicised cases, courts frequently permit lawyers additional peremptory challenges (beyond the number normally allowed), which allow the lawyer to summarily disqualify a potential juror without providing a reason to the court.[21] During the trial, jurors may be sequestered to protect them from the prejudicial effect of media reporting.[22] In today's day and age, the court may instruct jurors not to read or post information about the trial on social media and other internet forums.[23] A failure to allow for a fair trial or to protect the impartiality of a jury will result in a mistrial.[24]

18 U.S. Const. amend. VI.

19 *United States v. Blanton*, 719 F.2d 815 (6th Cir. 1983) (holding that the court produced an impartial jury and fair trial by, at voir dire, through 'extensive questioning concerning prior media impact and juror associations, coupled with many dismissals based on even hints of possible prejudice, . . . very substantial increases in the number of peremptory challenges available to each defendant . . . [and] reliance on defendants' use of detailed questionnaires concerning all potential jurors coupled with sensitive responses by the court to any of defendants' challenges arising from such use.').

20 http://law2.umkc.edu/faculty/projects/ftrials/Simpson/Simpsonchron.html.

21 See, e.g., *United States v. Campa*, 459 F.3d 1121, 1135 (11th Cir. 2006) (noting that the district court twice granted the defendants' requests for additional peremptory challenges due to the publicity regarding the trial).

22 See, e.g., *United States v. Cacace*, 321 F. Supp. 2d 532, 536 (E.D.N.Y. 2004) (partly sequestering the jurors in a murder trial to reduce the risk that they may be prejudiced against the defendant, the acting boss of the Colombo crime family, by exposure to press reports of both charged and uncharged murders); *Geders v. United States*, 425 U.S. 80, 87 (1976) ('The judge's power to control the progress and, within the limits of the adversary system, the shape of the trial includes broad power to sequester witnesses before, during, and after their testimony.'). The decision whether to sequester jurors is within the 'sound discretion' of the district court; e.g., *United States v. Porcaro*, 648 F.2d 753 (1st Cir. 1981).

23 See, e.g., *Bushmaker v. A. W. Chesterton Co.*, No. 09-CV-726-SLC, 2013 WL 11079371, at *12 (W.D. Wis. 1 March 2013) (instructing the jury not to post on Twitter or Facebook); Judicial Conference Committee, Proposed Model Jury Instructions: The Use of Electronic Technology to Conduct Research on or Communicate About a Case (June 2012), www.uscourts.gov/file/18041/download.

24 E.g., *Pearson v. Rock*, No. 12-CV-3505, 2015 WL 4509610, at *2 (E.D.N.Y. 24 July 2015) (granting a mistrial after concluding that the jury had been 'incurably tainted').

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38.1.4 Discovery of internal corporate communications

Issues of public access affect areas of legal practice other than trials. Even where confidentiality of process and information is assumed, such as in a confidential internal investigation involving potential corporate misconduct, rules governing discovery in civil or criminal cases can lead to the disclosure of internal communications and records, even in sensitive investigations. The Federal Rules of Civil Procedure allow for pretrial discovery that is far more expansive compared to other jurisdictions.[25] Specifically, Rule 26(b)(1) allows parties to conduct discovery of 'any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case.'[26] As a result, companies that find themselves subject to class-action or shareholder derivative lawsuits that result from internal investigations are often forced to hand over troves of potentially damaging internal corporate communications. For example, the shareholder derivative litigation against the board of the Walt Disney Company lasted more than eight years, and the extensive discovery produced a damaging factual record about the board's corporate governance practices that ultimately forced Disney CEO and board member Michael Eisner to resign.[27]

Civil discovery is not the only means through which seemingly confidential internal communications and records can become public. Many companies are forced to initiate or expand the scope of internal investigations after a regulator issues a subpoena or civil investigative demand for internal records. Additionally, certain public institutions, such as colleges and universities, are subject to public records laws that may require the institutions to release or publish documents both during and after the investigation.[28] And, increasingly, large-scale document leaks thrust internal corporate documents into the public sphere without warning.[29] The practical reality is that any organisation undergoing an internal

25 See, e.g., Stephan N. Subrin, Discovery in Global Perspective: Are We Nuts?, 52 DePaul L. Rev. 299 (2002).

26 Fed. R. Civ. P. 26(b)(1).

27 Érica Gorga & Michael Halberstam, Litigation Discovery and Corporate Governance: The Missing Story About the 'Genius of American Corporate Law,' 63 Emory L.J. 1383, 1401-1405 (2014).

28 In 2014, after the University of North Carolina at Chapel Hill released a public report of an investigation into academic irregularities at the university, media organisations made requests through the North Carolina Public Records Law for the nearly 1.7 million electronic records that were collected and analysed during the investigation. The University of North Carolina at Chapel Hill, University Responds to Public Records Requests for Legal, Communications Firm Expenses, http://carolinacommitment.unc.edu/updates/university-responds-to-public-records-requests-for-legal-communications-firm-expenses/ (last visited 5 August 2016).

29 For example, in 2007, an employee at HSBC Suisse surreptitiously downloaded client data from approximately 30,000 accounts and provided that data to French authorities. A portion of these files were then obtained through an international collaboration of news outlets and published in 2015 by the International Consortium of Investigative Journalists. See David Leigh et al., HSBC files show how Swiss bank helped clients dodge taxes and hide millions, The Guardian, 8 February 2015, https://www.theguardian.com/business/2015/feb/08/hsbc-files-expose-swiss-bank-clients-dodge-taxes-hide-millions?CMP=share_btn_tw.

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investigation must prepare for the possibility that it will have to produce internal documents at some point.

Although a detailed description of all the defensive measures available to companies is beyond the scope of this article, a basic list should include confidentiality agreements to cover sensitive communications with third parties; protective orders (where available) to limit the scope and permitted usage of produced materials; and the careful maintenance of the attorney–client and work-product privilege during investigations.

Consulting a public relations expert 38.1.5

Given the likelihood that the public may become aware of internal corporate communications relating to an investigation, many organisations (and some well-resourced individuals) resort to hiring a public relations expert to assist counsel during the course of an investigation. Public relations experts can serve a variety of functions, including preparing executives for public appearances during investigations, developing communications strategies around key investigation events (e.g., press conferences regarding investigation status), and planning for potential crises (e.g., a witness leaking the preliminary findings of an investigation prior to the investigation's completion). For many organisations, the relentless 24-hour news cycle makes hiring a public relations expert to advise during an internal investigation a foregone conclusion. Volkswagen, for example, hired three public relations firms based in three different countries to advise during its investigation of alleged emissions cheating.[30] During an investigation into potential corporate misconduct, special considerations arise when the public relations specialist works closely with legal counsel for the company. Frequently, questions of whether the attorney–client privilege applies to protect communications between lawyers and public relations experts arise during an investigation. Although the attorney–client privilege normally requires that the protected communication occur between a lawyer and his or her client and exclude third parties, in some circumstances the privilege extends to communications between a non-lawyer consultant and the lawyer's client. In *United States v. Kovel*, for example, the Second Circuit held that communications from the client to a consultant are privileged if they are made in confidence and 'for the purpose of obtaining legal advice'.[31]

Kovel, however, does not create a blanket privilege to protect communications between attorneys, their clients and public relations experts. Instead, after *Kovel*, courts determining whether to apply the attorney–client privilege to communications with consultants such as public relations experts have focused on whether the communications with the consultant were 'imparted in connection with the

30 Danny Hakim, VW's Crisis Strategy: Forward, Reverse, U-Turn, N.Y. Times, 26 February 2016, available at http://www.nytimes.com/2016/02/28/business/international/vws-crisis-strategy-forward-reverse-u-turn.html.

31 296 F.2d 918, 922 (2d Cir. 1961) (protecting the communications from an accountant to the client that were made in confidence for the purpose of obtaining legal advice from the lawyer, not for the purpose of obtaining the accountant's advice).

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legal representation.'[32] For example, when Martha Stewart and her attorneys hired public relations consultants to assist them in dealing with the media in her high-profile insider trading case, the court protected those communications under the attorney–client privilege because the communications were made for the purpose of giving or receiving advice directed at handling Stewart's legal problems.[33] Applying *Kovel*, the court explained:

> *[T]his Court is persuaded that the ability of lawyers to perform some of their most fundamental client functions – such as (a) advising the client of the legal risks of speaking publicly and of the likely legal impact of possible alternative expressions, (b) seeking to avoid or narrow charges brought against the client, and (c) zealously seeking acquittal or vindication – would be undermined seriously if lawyers were not able to engage in frank discussions of facts and strategies with the lawyers' public relations consultants.*[34]

In contrast, the court in *Haugh v. Schroder Investment Management* found that the attorney–client privilege did not apply to a public relations expert retained for the plaintiff when the plaintiff could not show that the expert's services were 'anything other than standard public relations services' for the client, and were not necessary for plaintiff's counsel to provide the plaintiff with legal advice.[35] The conclusion to be drawn from these two cases is simple. To cloak communications with public relations experts advising clients in legal matters, the lawyer needs to retain the public relations expert, and the communications between the consultant and the client must be intended to assist the attorney in advising his or her client.

38.2 Social media and the press

38.2.1 Social media as an investigatory tool and as evidence

For better or for worse, social media is more than just a tool for friends and family to connect and communicate. The prevalence of social media has created a continuously updated record that is increasingly used to investigate wrongdoing and that can be admitted as evidence in judicial proceedings.

With respect to investigative activities, whether by the government or private parties, social-media users generally do not have an expectation of privacy in the information they post publicly.[36] However, some of the typical features

32 *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989).

33 *In re Grand Jury Subpoenas*, 265 F. Supp. 2d 321 (S.D.N.Y. 2003).

34 Id. at 330.

35 No. 02-CIV- 7955, 2003 U.S. Dist. LEXIS 14586, at *8 (S.D.N.Y. 25 August 2003) ('Plaintiff has not shown that Murray was "performing functions materially different from those that any ordinary public relations" advisor would perform.'); see also *Scott v. Chipotle Mexican Grill*, 94 F. Supp. 3d 585 (S.D.N.Y. 2015) (holding a factual report from a human resources consultant to employer's counsel was not protected by attorney–client privilege because the employer did not show that it or counsel engaged consultant for anything more than factual research and to assist employer in making a business decision).

36 *U.S. v. Lifshitz*, 369 F.3d 173, 190 (2d Cir. 2004).

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of social media – for example, the fact that social media users generally have password-protected accounts and various privacy settings to control what information other users can view – have created some legal distinctions. Courts have distinguished between public and non-public postings and focused on a user's privacy settings when determining whether Fourth Amendment protections extend to social media content accessed by the government.[37] However, even where a user limited viewable postings to his or her 'friend network', the government is not precluded from seeking co-operation from one of the user's friends authorised to view the user's content.[38] Unlike investigators, private American lawyers are constrained by ethical rules in their use of social media. For example, the New York State Bar Association's Committee on Professional Ethics has ruled that 'friending' an investigatory target or opposing party, or instructing a third party to do so on the lawyer's behalf, is a prohibited act of deceptive conduct or making of a false statement.[39] Accordingly, for private lawyers, care needs to be taken in how social media content is collected and used.

From the standpoint of admissibility as evidence in a proceeding, social media content is not fundamentally different from other paper or electronic evidence. The same evidentiary considerations apply: to be admissible, the evidence must be relevant, have probative value outweighing its potential to unfairly prejudice, and be authentic and free of hearsay.[40] Some courts treat evidence from social media similarly to other types of evidence and require only a threshold showing of authenticity.[41] Other courts require evidence that affirmatively disproves the possibility that evidence from social media was sent or manipulated by anyone other than its putative creator.[42]

Social media and the jury 38.2.2

In jury trials, issues surrounding social media generally fall into two categories: lawyers using social media to screen potential jurors, and jurors using social media improperly during a proceeding.

In the pretrial process, lawyers are ethically permitted to screen jurors based on social media profiles. On 24 April 2014, the American Bar Association issued Formal Opinion 466, which clarified that the act of passively observing a potential juror's public social media information is not improper *ex parte* contact with a juror or potential juror.[43] However, a lawyer may not send an invitation or request

37 See e.g., *People v. Harris*, 949 N.Y.S.2d 590, 592 (N.Y. Crim. Ct. 2012).

38 See e.g., *U.S. v. Meregildo*, 883 F. Supp. 2d 523, 525 (S.D.N.Y. 2012).

39 Robert H. Giles and Jason I. Allen, Will You Be My Friend? Ethical Concerns for Prosecutors and Social Media, Child Sexual Exploitation Program Update (National District Attorneys Association), 9-12 October 2012, at 2, available at http://www.ncdsv.org/images/NDAA-CSPE_WillYouBeMyFriend_2012.pdf.

40 See generally Fed. R. Evid. Authentication of evidence from social media is generally the biggest hurdle for admission, and two approaches are predominant.

41 See, e.g., *Tienda v. State*, 358 S.W.3d 633, 638 (Tex. Crim. App. 2012).

42 See, e.g., *Griffin v. Maryland,* 19 A.3d 415, 423-24 (Md. 2011).

43 ABA Comm. on Prof'l Ethics & Grievances, Formal Op. 466 (2014).

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to friend or connect with a potential juror to gain access to the potential juror's information. Social media websites that provide notifications to users when their information is viewed, such as LinkedIn, also do not constitute improper contact as long as the lawyer does not make an active request to view non-public information.[44] If defence counsel learns from internet research that a prospective juror has made misrepresentations during *voir dire*, counsel should bring this misconduct to the court's attention. Failure to do so could potentially result in a waiver, and an impairment of the defendant's right to an impartial jury.[45]

During trial, jurors' use of social media presents a risk of mistrial. To address this risk, counsel may request jury instructions on the use of social media prior to commencement of trial. Formal Opinion 466 also suggests that courts deliver jury instructions on the use of social media 'early and often' and even 'daily in lengthy trials.'[46] This guidance comes as jurors have used social media to publicly discuss trial issues or access witnesses and litigants, which ultimately has resulted in remands, reversals and other judicial inefficiencies.

For example, in *Dimas-Martinez v. State*, in part owing to a juror's tweets during trial, a death row inmate's murder conviction was reversed and remanded.[47] The jury received instructions at the beginning of the trial warning them not to tweet or use social media but a juror nonetheless tweeted at the conclusion of the evidence in the sentencing phase of the trial.[48] The defendant's lawyer notified the court, and the court questioned the juror.[49] The juror admitted to the tweet and promised to discontinue use of social media for the duration of the trial.[50] But even though the juror tweeted at least two more times, the trial court refused a motion for a new trial, finding that the defendant suffered no prejudice from the tweets.[51] The Supreme Court of Arkansas disagreed, concluding that the juror's tweets were impermissible public discussion of the case, and that the insubordination of the juror to the court's instructions contributed to the defendant's denial of a fair trial.[52]

44 Id.

45 See *United States v. Parse*, 789 F.3d 83, 114 (2d Cir. 2015) (holding that defence counsel did not knowingly waive the defendant's right to an impartial jury where, even though a Westlaw report indicated a juror may have in fact been a suspended attorney with the same name, the juror 'lied [so] comprehensively in *voir dire* and "presented herself as an entirely different person"' that defence counsel could have reasonably relied on her representations).

46 Id.

47 385 S.W.3d 238 (Ark. 2011).

48 Id. at 247-48.

49 Id. at 246.

50 Id. at 246-47.

51 Id. at 247.

52 Id. at 249.

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Risks and rewards of publicity 38.3

Risks 38.3.1

High-profile criminal cases often generate media attention. And while courts may adopt judicial measures to limit the adverse effects of publicity, it may become so pervasive that it prejudices jurors' opinions regarding the question of guilt. In such cases, a court may declare a mistrial to protect the defendant's Sixth Amendment guarantee to have his or her case decided by an impartial jury.[53]

In other extraordinary situations, defence attorneys may face disciplinary measures – the most severe of which is disbarment – for improperly engaging the media in a manner that prejudices the proceedings.[54] Prosecutors are held to a higher standard than civilian attorneys under the professional rules.[55] For example, in June 2007, Michael B Nifong, the North Carolina prosecutor who pursued a false accusation of sexual assault against three Duke University lacrosse players, was disbarred by the State Bar Disciplinary Commission for making inflammatory statements to the media in violation of Rules 3.6 and 3.8(f) of the State Bar's Rules of Professional Conduct, among other violations.[56]

Unpopular defendants can face extraordinary difficulties in managing publicity while seeking an impartial hearing, which can increase both the cost and complexity of the defence. An example of this situation is the prosecution of Martin Shkreli, a former pharmaceutical CEO and hedge fund manager who was convicted of securities and wire fraud violations stemming from losses suffered by investors in his funds and companies.[57] Prior to his arrest, as the then CEO of Turing Pharmaceuticals, Mr Shkreli unapologetically raised the price of a life-saving drug by 5,000 per cent[58] and became known in the media as 'the most hated man in America'.[59] Mr Shkreli's notoriety generated daily news coverage of his subsequent federal trial which, combined with his ill-advised attempts to personally manage the publicity, required the trial judge to issue orders addressing

53 See *Sheppard*, 384 U.S. at 363; see also *Arizona v. Washington*, 434 U.S. 497, 505-06 (1978) (mistrial is reserved for those special cases in which there is a 'manifest necessity').

54 See, e.g., Model Rules of Prof'l Conduct R. 3.6 (Trial Publicity) (prohibiting a lawyer from making an 'extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter').

55 See, e.g., Model Rules of Prof'l Conduct R. 3.8(f) (Special Responsibilities of a Prosecutor) (prohibiting a prosecutor from making extrajudicial comments that have a 'substantial likelihood of heightening public condemnation of the accused').

56 Id.

57 Superseding Indictment, *United States v. Shkreli*, No. 1:15-cr-637 (E.D.N.Y. 3 June 2016), ECF No. 60.

58 Andrew Pollack, Drug Goes from $13.50 a Tablet to $750, Overnight, N.Y. Times, 20 September 2015, available at https://www.nytimes.com/2015/09/21/business/a-huge-overnight-increase-in-a-drugs-price-raises-protests.html.

59 Phil McCausland, 'Fraud Trial for Martin Shkreli, "Most Hated Man in America," Begins Monday', NBC News, 25 June 2017, available at https://www.nbcnews.com/news/us-news/fraud-trial-martin-shkreli-most-hated-man-america-begins-monday-n776581.

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the media's and Mr Shkreli's potential influence on the jury.[60] Mr Shkreli was convicted on two counts of securities fraud and one count of conspiracy to commit securities fraud.[61]

Civil defamation claims may also follow highly publicised cases. When numerous women accused actor and comedian Bill Cosby of sexual assault, Mr Cosby and his team publicly denied the allegations and accused the women of lying.[62] Several of the alleged victims filed civil defamation suits against Mr Cosby. A federal judge in Pennsylvania dismissed one of the suits on the basis that Mr Cosby's statements did not support a claim for defamation under state law,[63] while another defamation suit remains pending in federal court in Massachusetts.[64]

38.3.2 Rewards

When properly executed, tactical media coverage during an investigation or trial can counter negative public impression and alleviate prosecutorial pressure to bring charges. The public relations consultants hired by Martha Stewart in connection with her insider trading case focused narrowly on neutralising the media coverage that reached the prosecutors and regulators responsible for charging decisions so that they could make their decisions without 'undue influence from the negative press coverage.'[65] In ruling on the attorney–client privilege afforded to certain communications among Stewart, her attorneys and the public relations firm, the Court recognised the necessity of developing a communications plan in high-profile cases:

> *Just as an attorney may recommend a plea bargain or civil settlement . . . so too an attorney may take reasonable steps to defend a client's reputation and reduce the adverse consequences of indictment . . . . A defense attorney may pursue lawful strategies to obtain dismissal of an indictment or reduction of charges, including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried.*[66]

60 Docket Order, *United States v. Shkreli*, No. 1:15-cr-637 (E.D.N.Y. 5 July 2017) (following Mr Shkreli's courthouse visit with reporters covering his trial, when he remarked on evidence and the credibility of a witness, prosecutors moved for a gag order to prohibit Mr Shkreli from making any public statements about the case. Two days later, the court issued a limited gag order prohibiting Mr Shkreli from making 'comments to the press regarding the case, evidence or witnesses within the courthouse or the courthouse perimeter . . .').

61 Verdict, *United States v. Shkreli*, No. 1:15-cr-637 (E.D.N.Y. 4 August 2017), ECF No. 305.

62 See Mike Nunez, 'Bill Cosby to FLORIDA TODAY: I won't mention allegations', Florida Today, 22 November 2014, available at http://www.floridatoday.com/story/news/local/2014/11/21/bill-cosby-to-florida-today-i-wont-mention-allegations/19367957/.

63 Memorandum Opinion, *Hill v. Cosby,* No. 16-0133 (W.D. Pa. 21 January 2016).

64 *Green v. Cosby*, No. 3:15-cv-30111 (D. Mass. filed 26 June 2015).

65 *In re Grand Jury Subpoena*, 265 F. Supp. 2d at 323-324.

66 Id. (quoting *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1043 (1991) (Kennedy, J., plurality opinion)).

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Given the importance of advocating outside the courtroom, it may also be beneficial for an attorney to exercise the right to reply under the Model Rules of Professional Conduct. Notwithstanding the prohibition at Rule 3.6(a) against extrajudicial statements that are substantially likely to materially prejudice a fair trial, Rule 3.6(c) permits a lawyer to make extrajudicial statements that protect a client from the 'substantial undue prejudicial effect' of recent publicity that was not initiated by the lawyer or the client to the extent that they are necessary to mitigate the adverse publicity.

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Appendix 1

About the Authors

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Jodi Avergun is a partner in the white-collar defence and investigations practice in the Washington, DC, office of Cadwalader, Wickersham & Taft LLP. Her practice focuses on representing corporations and individuals in criminal and regulatory matters involving, among other things, the Foreign Corrupt Practices Act (FCPA). Her experience in FCPA matters includes directing due diligence reviews in connection with mergers and acquisitions in a number of industries and jurisdictions; designing and implementing robust FCPA compliance policies, systems and training for corporate clients; and counselling clients in voluntary disclosures of FCPA violations. Jodi also advises clients in securities enforcement, healthcare and other white-collar matters, and has successfully represented both companies and senior executives in internal investigations, matters before regulatory bodies, including the SEC, and civil and criminal matters in federal court.

Jodi was an assistant US attorney and senior trial counsel in the US Department of Justice for 17 years. She was recognised in the 2014 edition of *The Legal 500 US* as a 'Key Individual' in the white-collar criminal defence area, and was named one of the 2016 '150 Women in White Collar' by *Corporate Crime Reporter*. Additionally, Cadwalader was named a 'Highly Recommended' firm for FCPA by *Global Investigations Review* in its 2016 rankings of Washington, DC's FCPA Bar.

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Bret Campbell is a principal at Northstar Consulting LLC. Previously he was a partner in the white-collar defence and investigations group and co-managing partner of the Washington, DC, office of Cadwalader, Wickerhsam & Taft LLP. Bret represents clients in a broad range of complex criminal, regulatory and civil litigation matters involving international corruption and the Foreign Corrupt Practices Act, money laundering and export controls, as well as

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