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PRESS ADVOCACY AND THE HIGH-PROFILE CLIENT

*Robert S. Bennett**

With rare exception, it is best when the media ignore a client's problems. However, when representing a high-profile client, most often the issue is not whether an attorney deals with reporters, but only how that attorney deals with them.

In practice I often find my clients in what can best be described as a "Bermuda Triangle"—the cross-currents and winds generated by a criminal investigation, the media, and Congress. If not navigated carefully, the result can be the humiliation of individuals and their families, and the destruction of businesses and careers.

Representing a high-profile client caught in this Bermuda Triangle almost always requires the lawyer to engage in aggressive press advocacy not called for in a traditional case. One must engage in such advocacy because the client's reputation, which is often of primary importance, is at stake. A business executive or political leader who has built a reputation for honesty and integrity over many years often considers this aspect of legal representation every bit as important as the more traditional legal defense functions.

In political and other high-profile cases, effective press advocacy can help neutralize the forces that encourage a prosecutor to initiate a criminal investigation. And if an investigation is initiated, effective press advocacy can create a climate in which a prosecutor, particularly an elected one, will not be pressured by constituents to indict, or, if an indictment is returned, a jury will not be disposed to convict.

Prior to Watergate, when I was a young prosecutor, the media did not have the impact on the law enforcement process that it has

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today. Except for the occasional case, most media coverage was limited to reporting what occurred at trial. Things are far different today. We live in an era where prosecutors use journalists to publicize their ongoing investigations, while journalists, through their news stories, can generate public and congressional demands for investigations and indictments from prosecutors. Many criminal prosecutions, particularly in political and business crime cases, are born in the pages of newspapers where investigative reporters, seeking to be the Woodwards and Bernsteins of their day, print titillating allegations, and where government agents who dislike the plea bargains struck by lawyers, leak information to the press in the hope that public attention will kill the deal.

Congress compounds the problem. Members and their staffs view splashy public hearings as vehicles to enhance national reputations, impress hometown constituents, and discredit political opponents. As political power changes hands, it becomes "get even time." Under the guise of legislative oversight, these hearings are little more than efficient tools to humiliate and destroy one's opponents publicly, either directly or by attacking friends and colleagues who are unfortunate pawns in a grander political scheme. I use the word "efficient" because those who conduct these partisan investigations are not burdened with the time consuming task of obtaining the facts before reaching conclusions.

The recent hearings of the Senate Whitewater Committee and the House Government Operations Committee provide archetypal examples. Both are highly politicized, and the conclusions reached by the committees have little to do with the evidence before them and everything to do with politics. How else does one explain that virtually all conclusions and interpretations of evidence divide along party lines? Yet these congressional investigations are presented to the public as quasi-judicial proceedings clothed in the trappings of a criminal trial—complete with hired prosecutors. A congressional hearing is a forum, however, where the rules of evidence do not apply and where witnesses have none of the constitutional rights and protections available to defendants in real criminal proceedings.¹

Moreover, once Congress obtains otherwise confidential documents, control is lost, and they are invariably released to the media, to the client's detriment. Whether it be a leak, or simply a

1. See *United States v. Deutch*, 147 F. Supp. 89, 92 (D.D.C. 1956).

committee chairperson abusing the power to release committee records to the public, the damage is done unless the client responds promptly, through his lawyer. For these reasons, representing clients in criminal cases involving concurrent congressional investigations, or in criminal cases that are generated by congressional inquiries, requires special skills beyond those usually employed in the courtroom, and these include dealing with the media.

The Independent Counsel statute² has further institutionalized a role for Congress in the criminal law process. Traditionally, prosecutors respond to crimes that already have occurred and are known. Independent counsel, by contrast, on a minimum of evidence, are given a wide-ranging mandate to find a crime. They are virtually unaccountable both as to what they do and how much they spend. Beware of the lawyer with one case and a deep pocket. As Justice Scalia said in his dissenting opinion in *Morrison v. Olson*:

How frightening it must be to have your own independent counsel and staff appointed, with nothing else to do but to investigate you until investigation is no longer worthwhile And to have that counsel and staff decide, with no basis for comparison, whether what you have done is bad enough, willful enough, and provable enough, to warrant an indictment. How admirable the constitutional system—that provides the means to avoid such a distortion. And how unfortunate the judicial decision that has permitted it.³

It is a reflection of our times that many independent counsel have their own press spokesperson to deal with the news media who, in turn, carefully track the distorted process engaged in by independent counsel. One of my clients, former Secretary of Defense Caspar Weinberger, was victimized by an independent counsel who used the media to justify his investigation—an investigation long in tenure but short in results. Indeed, in June 1992, only days after a five-count indictment was returned against Weinberger, the independent counsel appeared on the television program *Nightline*. During that appearance, Lawrence Walsh explained how “as long as [his office] continue[s] to work up toward

2. 28 U.S.C. §§ 591-599 (1995).

3. *Morrison v. Olson*, 487 U.S. 654, 732 (1988) (Scalia, J. dissenting).

the center of responsibility, it's very difficult to give a good reason for stopping [the investigation of Iran-Contra]."⁴

After we successfully moved to dismiss a key part of that indictment, the independent counsel, fully aware of the media feeding frenzy that would result, returned a second indictment that attempted to repackage the dismissed charge against Weinberger. He did this only days before the 1992 presidential election, and the new indictment unnecessarily included specific, inculpatory references to then-President Bush. Predictably, this caused front-page headlines and lead television news stories focusing on Iran-Contra in the final days of the campaign, at a time when Weinberger stood indicted but not yet tried. We successfully argued that the new charge should be dismissed as having been filed beyond the statute of limitations, but the impact of the news coverage was irreversible.

In representing Weinberger, therefore, one of the most delicate yet important tasks we had was to communicate to the public, including politicians and the press, that he was being abused by an overly zealous prosecutor. In particular, I determined that it was important to take advantage of the independent counsel's missteps by showing that this second indictment—and its politically damaging language—was not a legal necessity, but that it was either, at its most benign, a media strategy to hype the case, or at worst, a calculated effort to cause political damage to President Bush.

Had we not been able to do this, we might not have succeeded in obtaining a pardon for Weinberger. President Bush, who appreciated the unfairness of the actions of the independent counsel, did the right and honorable thing by pardoning him, and the public accepted the pardon with little criticism. This public acceptance was largely the result of their recognition that Weinberger should not have been charged. This was accomplished, in part, by aggressive press advocacy in response to the independent counsel's public statements.

A further example of this unfair conduct—arguably permitted by the Independent Counsel statute—was Walsh's final report to Congress. This public report attempted to justify the independent counsel's almost seven-year investigation and failed prosecutions. The special division of the court overseeing the independent coun-

4. *Nightline: A Conversation with Lawrence Walsh* (ABC television broadcast, June 23, 1992).

sel was highly critical, finding that the report:

[R]epeatedly accuses named individuals of crimes, although in many instances the individual was never indicted, if indicted was never convicted, or if convicted the conviction was reversed. These accusations include charges that named individuals were guilty of a conspiracy charged in a count that was dismissed before trial, that various named public officials engaged in efforts to obstruct justice, where such individuals were never indicted, let alone convicted, and instances in which the Report charges that individuals were "factually guilty" even though the United States Court of Appeals for the District of Columbia Circuit had reversed the only conviction relevant to the charge under discussion.⁵

A case does not have to be brought by an independent counsel, however, for there to be prosecutorial abuse of the media. In another recent high-profile matter, our firm represented Clark Clifford and Robert Altman in connection with the New York District Attorney's grand jury investigation and subsequent prosecution of allegations that the Bank of Credit and Commerce International (BCCI) unlawfully gained control and ownership over First American Bankshares, a domestic multistate banking institution on the East Coast.⁶ Needless to say, this was a controversial case upon which the media expended tremendous resources. When put to the test, however, the prosecution had no case. Clifford was never tried and Altman was acquitted.

Never before in my thirty years as a lawyer have I witnessed such blatant use of the media by a prosecuting authority as occurred in this case, both prior to the indictment and during trial. At every phase, the New York District Attorney's Office used the media to tout its own actions and foster public support for allegations against Clifford and Altman. For example, in April 1992, two months prior to the indictment, the district attorney and his staff were interviewed and posed for pictures for an article appearing in that well-known legal journal, *Vanity Fair* magazine.⁷ The article, entitled, "How They Broke the Bank," addressed the district attorney's investigation and indictment of BCCI, and the

5. *In re North*, 16 F.3d 1234, 1237-38 (D.C. Cir. 1994).

6. *People v. Abedi*, 595 N.Y.S.2d 1011 (Sup. Ct. 1993).

7. Marie Brenner, *How They Broke the Bank*, VANITY FAIR, Apr. 1992, at 168.

continuing grand jury investigation of Clifford and Altman.⁸ Amazingly, the district attorney's staff provided, in graphic and unflattering terms, information that occurred in confidential meetings with our clients.⁹

Even as the prosecution was closing its case, members of the district attorney's staff spoke with a reporter for *New York Magazine*, a publication that enjoys widespread dissemination throughout the city. The following was reported:

Prosecutors say that they have proved their case, and that Altman will be convicted "We're sure about most jurors," says one [prosecutor]. "But there are one or two who just may not be getting it." Other officials in Morgenthau's office have begun to talk of fallback possibilities. Among them: that the U.S. Justice Department will revive its own case against Altman if the state's case fails.¹⁰

Keep in mind that these statements were made at a critical juncture of the trial and that the jury was not sequestered. The prosecutors stated opinions as to the strength of their case and their personal belief in the guilt of the defendant.¹¹ These quotes were intended to infect the jury and salvage what was clearly a dying prosecution.

It is obvious from conduct such as this that criminal defendants cannot rely on rules of ethics to protect them from media abuse by prosecutors.¹² The rules have little teeth and require after-the-fact enforcement actions that are no help to cure damage done in mid-trial. Lawyers who represent clients in high-profile cases involving public figures must, where appropriate—and, I must emphasize, always consistent with the canons of ethics and the rules of court—engage in their own press advocacy as part of their defense on behalf of a client, just as we had no choice but to respond to these unfair tactics by engaging in our own press advocacy in Altman's case.

Indeed, courts recognize that it is the client's right to have a

8. *Id.*

9. *Id.*

10. Christopher Byron, *The Bottom Line: The Hard Case*, N.Y. MAG., July 19, 1993, at 10.

11. *Id.*

12. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8(g) (1995) (barring prosecutors from making statements that increase the likelihood of greater public condemnation of a defendant).

lawyer vigorously defend the client's reputation in the public forum and to neutralize the media-generated pressures, which can lead to an indictment and conviction. In reversing a district court pretrial gag order imposed against lawyers for Congressman Ford, the Sixth Circuit Court of Appeals explained that:

He is entitled to fight the obvious damage to his political reputation in the press and in the court of public opinion, as well as in the courtroom and on the floor of Congress. He will soon be up for reelection. His opponents will attack him as an indicted felon. He will be unable to respond in kind if the District Court's order remains in place. He will be unable to inform his constituents of his point of view. And reciprocally, . . . this issue of undoubted public importance.¹³

Even ultimate acquittal is insufficient to restore an individual's reputation; once lost, it is gone. Several years ago former Secretary of Labor Raymond Donovan, upon being acquitted after a lengthy trial—which itself had followed a lengthy special counsel investigation—asked the assembled press, “which office do I go to get my reputation back?”¹⁴ The lawyer, therefore, not only has a right, but indeed an obligation, to advocate for his or her client outside the courtroom.¹⁵

In *Gentile v. State Bar of Nevada*,¹⁶ Supreme Court Justice Kennedy eloquently stated:

An attorney's duties do not begin inside the courtroom door. He or she cannot ignore the practical implications of a legal proceeding for the client. Just as an attorney may recommend a plea bargain or civil settlement to avoid the adverse consequences of a possible loss after trial, so too an attorney may take reasonable steps to defend a client's reputation and reduce the adverse consequences of indictment, especially in the face of a prosecution deemed unjust or commenced with improper motives. A defense attorney may pursue lawful strategies

13. *United States v. Ford*, 830 F.2d 596, 601 (6th Cir. 1987).

14. Elkan Abramowitz, *Cases Against Politicians: A History of Failed Prosecutions*, N.Y.L.J., Jan. 3, 1995, at 3.

15. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6(c) (1995) (permitting defense counsel, in the appropriate case, to take steps to mitigate adverse publicity).

16. 501 U.S. 1030 (1991).

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.¹⁷

I agree. Sometimes the only way to navigate your client out of the Bermuda Triangle is to throw overboard the traditional “no comment” and vigorously advocate your client’s cause in the court of public opinion.

17. *Id.* at 1043.