THE LAWYER AND THE MEDIA: WHAT CAN A LAWYER SAY TO THE MEDIA?

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This paper explores the relationship between a lawyer and the media. Thirty years ago lawyers were dissuaded from, and even sanctioned for speaking to the media. However, in the contemporary setting, there is a growing appreciation for the role lawyers play in educating the public about the Canadian legal system. The role is an important one. Nonetheless, under the glare of the public eye, a lawyer acts not only as an advocate for his or her client, but as a representative of the profession as a whole. In these circumstances a lawyer must have a veyr clear appreciation of their legal and professional responsibilities. This paper will introduce the role of the lawyer as educator, but it will also explore a number of factors that limit the lawyer's right to speak to the media. It will explore limitations arising from rules of professional responsibility, statutory restrictions on disclosure and publication bans, contempt for violating the sub judice *rule or "scandalizing" the court, personal liability for defamation, contractual obligations, express and deemed undertakings, as well as tactical and other practical considerations.*

Introduction

Better to remain silent and be thought a fool
than to speak out and remove all doubt.[1]

Where there is no publicity there is no justice.[2]

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1. Benedict Goltra, *Chicago Daily Tribune* (May 10, 1923), cited in The *Yale Book of Quotations*, Fred R. Shapiro, ed. (New Haven: Yale University Press, 2006) at 466.
2. Jeremy Bentham, *The Works of Jeremy Bentham* (Edinburgh: Tait, 1843) vol. ix at 493. Source: www.ucl.ac.uk/Bentham-Project/Faqs/fquote.html.

Media are the conduit through which the public view and appraise the conduct of lawyers. In Canada, lawyers face the media on a daily basis, often in relation to high profile and controversial matters. Lawyers are ambassadors for the profession. When addressing the media, they have the opportunity to teach the public about the legal system and explain legal issues of current public interest. Most importantly, they are in an excellent position to explain and exemplify how lawyers defend individual rights, liberties, and the rule of law in our democratic society. In the contemporary setting there is a growing appreciation of the important role lawyers play in educating the public and demystifying the legal process.

The role is an important one, but one that comes with heightened responsibilities. There are a number of pitfalls that await the brazen litigant or lawyer who stands, with measured indignity, and publicly addresses the media. Under the glare of the public eye a lawyer's conduct is subject to heightened scrutiny. It stands to influence public views about the profession as a whole.

As Justice David M. Brown states in his article, *What Can Lawyers Say in Public*, "[i]n the broadest terms, the propriety of a lawyer's statement to the media will be measured against this purpose of enhancing the public's understanding of the judicial system".[3] This paper will introduce the role of the lawyer as public educator and will explain why a lawyer must be cautious when addressing the media. There are pitfalls.

This paper surveys the field and explores some of these pitfalls. This paper begins by observing the shift in contemporary views about the relationship between the lawyer and the media. This shift culminates in the present, general rule that a lawyer *may* communicate with the media in the appropriate circumstances.

This paper will then proceed to consider exceptions to this general rule. It surveys limitations to the lawyer's right to speak to the media. These limitation arise from: (I) rules of professional responsibility; (II) statutory restrictions on disclosure and publication bans; (III) contempt for violating the *sub judice* rule or "scandalizing" the court; (IV) personal liability for defamation; (V) contractual obligations; (VI) express and deemed undertakings; as well as (VII) tactical and practical considerations.

3. D.M. Brown, "What Can Lawyers Say in Public?" (1999), 78 Can Bar Rev. 283.

A Shift in Views and the Contemporary General Rule: A Lawyer *may* Communicate with the Media

Today, the general rule is that a lawyer "may communicate information to the media and may make public appearances and statements".[4] However, just 30 years ago, lawyers were scorned, and even sanctioned for speaking to the media. This section will: (1) explore historical views about the relationship between lawyers and the media; (2) explain a contemporary shift towards a more open relationship between the lawyer and the media; and finally, (3) introduce contemporary views reflected in jurisprudence and encoded in professional codes of conduct which encourage the lawyer to speak with the media in appropriate circumstances. In the sections that follow this paper will explore limitations to this general rule arising from a number of sources.

Traditional Prohibition

Previously, professional codes of conduct and common law rules effectively precluded a lawyer from communicating with the media. Prior to the mid-1980s, codes of conduct cautioned that "[t]he lawyer should *not* solicit appearances on radio, television or other public forums in his professional capacity as lawyer".[5] This stemmed from an English common law rule which condemned advertising by lawyers as unprofessional conduct.[6] The prohibition was based on a perceived need to protect a high standard of lawyer-to-client confidentiality and preclude outside information and opinions from affecting proceedings before the court.[7]

4. Canadian Bar Association, *Unified Code of Conduct*, at 113. Many Canadian Jurisdictions adopt the Federation of Law Societies Model Code of Conduct (*Unified Code)*, or something very similar. See for example: *Alberta Code of Professional Conduct*, at 6.05(1), 6.05(2); *British Columbia Code of Professional Conduct*, at 7.5, 7.5-2; *Saskatchewan Code of Professional Conduct*, at 6.05(1), 6.05(2); The Law Society of Upper Canada *Rules of Professional Conduct* at 6.06(1-2); *Law Society of Manitoba Code of Professional Conduct*, at 6.05.
5. Commentary 8, Chapter XIII, "Making Legal Services Available", *Code of Professional Conduct*, Canadian Bar Association (1974), emphasis added.
6. Andrew Boon, Jennifer Levin, *The Ethics and Conduct of Lawyers in England and Wales*, 2nd ed. (Oxford: Hart, 2008) at 118.
7. Brown, *supra* note 3 at 286.

1. Shift in Relationship Between Lawyer and Media

During the mid-1980s there was a shift in attitude.[8] This was precipitated by the advent of the *Charter of Rights and Freedoms*[9] and a push by Chief Justice Dickson to educate the public about the Canadian legal system.[10] The *Charter* gave rise to compelling constitutional issues cutting across diverse Canadian demographics. High-profile cases addressed matters of great public significance. In this setting Chief Justice Dickson advocated an increased role for lawyers and judges in educating the public. At the 1984 annual meeting of the Canadian Bar Association Justice Dickson implored his colleagues, lawyers and judges alike to communicate openly with the media.[11]

This shift continued in the Ontario Divisional Court decision of *Klein v. Law Society of Upper Canada* (1985).[12] In *Klein* the Ontario Divisional Court held that the *Charter* defended a lawyer's right to speak to the media as an extension of the right to freedom of expression.[13] The court found relevant portions of the *Ontario Rules of Professional Conduct* to be unconstitutional and declared:

> A lawyer has a moral, civic and professional duty to speak out where he sees an injustice. Furthermore, lawyers are, by virtue of their education, training and experience, particularly well-equipped to provide information and stimulate reason, discussion and debate on important current legal issues and professional practices . . . In addition, the public has a Constitutional right to receive information with respect to legal issues and matters pending in the Courts and in relation to the profession and its practices.[14]

These developments marked a clear shift in attitude about the relationship between lawyers and the media. The shift is reflected in current professional codes of conduct.

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8. See generally Charles W. Wolfram, "Lights, Camera, Litigate: Lawyers and the Media in Canada and the United States" (1996), 19 Dalhousie L.J. 373.
9. *The Constitution Act, 1982*, Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11 (*Charter*).
10. See generally, Robert J. Sharpe, *Brian Dickson: A Judge's Journey* (Toronto: Osgood Society for Canadian Legal History, 2003).
11. "Talk to Media, Chief Justice tells lawyers, judges", *Ontario Lawyers' Weekly* (September 7, 1984); Beverley G. Smith, *Professional Conduct for Lawyers and Judges*, Chapter 5, p. 1 (Fredericton: Maritime Law Book, 1998), both cited in Brown, *supra* note 3 at 4.
12. *Klein v. Law Society of Upper Canada* (1985), 16 D.L.R. (4th) 489, 13 C.R.R. 120, 50 O.R. (2d) 118 (Ont. Div. Ct.) (*Klein*).
13. *Charter*, s. 2(b).
14. *Klein*, *supra* note 12 at para. 46.

Contemporary Views and the General Rule: The Lawyer May Communicate with the Media

Presently, professional codes of conduct and jurisprudence promote the important role a lawyer plays in representing the profession and educating the public through the media. Most Canadian jurisdictions[15] adopt the *Model Code of Conduct* (*Unified Code*)[16] developed by the Federation of Law Societies of Canada.[17]

Under the heading "Communication with the Public" the *Unified Code* states:

> [p]rovided that there is no infringement of the lawyer's obligations to the client, the profession, the courts, or the administration of justice, *a lawyer may communicate information to the media and may make public appearances and statements*.[18]

Moreover, the *Unified Code* states that there are circumstances under which a lawyer *should* contact the media in order to properly serve the lawyer's client.[19] The *Unified Code* explains that:

> Lawyers are often called upon to comment publicly on the effectiveness of existing statutory or legal remedies or the effect of particular legislation or decided cases, or to offer an opinion about cases that have been instituted or are about to be instituted. This, too, is an important role the lawyer can play to assist the public in understanding legal issues.[20]

Where appropriate, the lawyer ought to inform the public about cases before the court because "the administration of justice benefits from public scrutiny".[21] This view is echoed in judicial pronouncements about the important role lawyers play in educating the public. It is based on the belief that, as Justice Martin stated, "reasonable, informed citizens . . . understand judicial decisions and the rationale for them" and that in addressing the public a lawyer "will foster respect for the administration of justice".[22]

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15. *Supra* note 6.
16. Federation of Law Societies, *Model Code of Conduct (Unified Code)*, amended December 12, 2012, available online at www.flsc.ca (*Unified Code*).
17. The Federation of Law Societies of Canada is the coordinating body for Canada's Law Societies. The Federation developed the *Model Code of Conduct (Unified Code)* to facilitate lawyer mobility and promote public confidence in a self-regulated legal profession across the country.
18. *Unified Code* at 7.5-1, emphasis added.
19. *Ibid.* 7.5-1 at Commentary 4.
20. *Ibid.* 7.5-1 at Commentary 6.
21. *Unified Code* at 7.5-2 Commentary 2.
22. *R. v. Smith*, 2001 ABQB 449, 288 A.R. 175, [2001] A.J. No. 681, at para. 13.

While the *Uniform Code* and contemporary jurisprudence encourage lawyers to speak to the media, it also cautions that the right to do so is qualified. There are a number of factors that limit the ability of the lawyer to speak with the media. There are pitfalls for the unwary lawyer. Having introduced the role of lawyer as "educator", it is now necessary to survey these pitfalls beginning with limitations arising from professional codes of conduct before moving on to consider other sources. Ironically the same codes of conduct that encourage lawyers to make public statements also provide a number of restrictions and limitations.

I. Professional Responsibility and Professional Codes of Conduct

As set out above, lawyers play an important role in educating the public about the workings of the legal system. The ability of the lawyer to speak to the media and discuss the particulars of a case is restricted by codes of conduct and the lawyer's duty of professional responsibility. The *Unified Code* states:

> Lawyers in their public appearances and public statements should conduct themselves in the same manner as they do with their clients, their fellow practitioners, the courts, and tribunals. *Dealings with the media are simply an extension of the lawyer's conduct in a professional capacity*. The mere fact that a lawyer's appearance is outside of a courtroom, a tribunal or the lawyer's office does not excuse conduct that would otherwise be considered improper.[23]

This paper does not seek to provide a comprehensive discourse on every discrete area of professional responsibility. As the *Unified Code* notes, when addressing the media, "given the variety of cases that can arise in the legal system . . . it is impossible to set down guidelines that would anticipate every possible circumstance".[24]

This section will briefly highlight pertinent responsibilities arising from professional codes of conduct which may impact the ability of a lawyer to speak to the media. The most relevant responsibilities are as follows: (1) confidentiality; (2) the best interests of the client; (3) the

23. *Unified Code* 7.5-1 at Commentary 1, emphasis added. Note also that the *Canadian Bar Association Code of Conduct* confirms, "The lawyer who engages in public appearances and public statements should do so in conformity with the principles of the Code": Chapter XVIII, "Public Appearances and Public Statements by Lawyers". Also, Guiding Principle 1 and 2 of the *CBA Code* are adopted verbatim in the *Unified Code*. This paper focuses generally on the *Unified Code*. The *Unified Code* shares common principles and does not conflict with the *CBA Code* in any significant way.
24. *Unified Code* 7.5-1 at Commentary 4.

right to a fair hearing; (4) encouraging respect for the administration of justice; and (5) avoiding self-publicizing. Each warrants brief consideration.

Confidentiality

Before speaking with the media, a lawyer must consider his or her duty of *confidentiality*. The privileged relationship between lawyer and client has been long recognized as fundamental to the administration of justice.[25] The *Unified Code* states:

> A lawyer at all times must hold in strict confidence all information concerning the business and affairs of a client acquired in the course of the professional relationship and must not divulge any such information unless:
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> (a) expressly or impliedly authorized by the client;
> (b) required by law or a court to do so;
> (c) required to deliver the information to the Society; or
> (d) otherwise permitted by this rule.[26]

A lawyer owes his or her client a duty of "*strict* confidence"[27] that continues "indefinitely" into the future, even when a lawyer no longer acts for the client.[28] A lawyer should consult his or her client before speaking with the media, clarify specifically what will be said, and receive permission to make public disclosure of confidential information, preferably in writing. Moreover, a lawyer should explain the *full* ramifications of speaking with the media. He or she should clarify specifically what will be said with due concern for any possibility such communication may compromise the client's case.[29] The duty carries on indefinitely. Even years after a case has ended, a lawyer must *not* disclose confidential information when speaking with the media.[30]

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25. See generally, Hammond, "Lawyer and Client – Liability for Disclosure of Confidential Information" (1984), 62 Can. Bar Rev. 408; Mark Orkin, *Legal Ethics: A Study of Professional Conduct* (1957), p. 84.
26. *Unified Code* at 3.3-1
27. *Ibid.* at Commentary 1, emphasis added.
28. *Ibid.* at Commentary 4. See also *L. (A.), Re*, 2003 ABQB 905, 34 Alta. L.R. (4th) 68, 345 A.R. 201 (Alta. Q.B.).
29. Laura Legge, "Freedom of Expression of Lawyers: The Rules of Professional Conduct" (1985), 23 U.W.O. Law Rev. 165-66.
30. See generally *Stewart v. Canadian Broadcasting Corp.* (1997), 150 D.L.R. (4th) 24, 32 O.T.C. 321, [1997] O.J. No. 2271 (Ont. Gen. Div.), additional reasons (1997), 152 D.L.R. (4th) 102, 38 O.T.C. 345, [1997] O.J. No. 4077 (Ont. Gen. Div.).

Best Interests of the Client

A lawyer must *not* speak to the media if doing so is not in the best interest of the client. A lawyer's duty to his or her client is "peculiarly sacred".[31] The lawyer must provide "not only his or her best judgment and skill, but the strictest integrity and the most scrupulous good faith in dealing with his client's rights".[32] The *Unified Code* states:

> A lawyer's duty to the client demands that, before making a public statement concerning the client's affairs, the lawyer must first be satisfied that any communication is in the best interests of the client and within the scope of the retainer.[33]

Before speaking with the media, a lawyer must exercise sound judgment and consider whether such communication is in the *best interests* of the client.

The Right to a Fair Hearing

A lawyer must not communicate with the media if it prejudices the right to a "fair trial" or hearing. The *Unified Code* states:

> [a] lawyer must not communicate information to the media or make public statements about a matter before a tribunal if the lawyer knows or ought to know that the information or statement will have a substantial likelihood of materially *prejudicing a party's right to a fair trial or hearing*.[34]

The Code states that the publishing of an "inappropriate public statement before or during trial that affects trial fairness may result in a finding of contempt".[35] Canadian courts frequently address the issue of pre-trial publicity and its effect on trial fairness. This rule of professional conduct is closely related to the *sub judice* rule considered below. Of particular concern is the impact of public statements on juror impartiality.[36] Canadian courts generally attempt to balance concerns about trial fairness with the desire that the public be informed about cases, court practices and court procedures.[37]

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31. *Knock v. Owen* (1904), 35 S.C.R. 168 at 173; *Knock v. Owen* (1904), 35 S.C.R. 168, 24 C.L.T. 287.
32. *Ibid.*
33. *Unified Code*, 7.5-1 at Commentary 2.
34. *Unified Code* 7.5-2.
35. *Ibid.* at Commentary 1.
36. See generally *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, 139 D.L.R. (4th) 385, 110 C.C.C. (3d) 193.
37. See *ibid.* at paras. 26-30. See also *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442, 158 C.C.C. (3d) 449.

That said, it is a fine line for a lawyer to walk. A lawyer should generally avoid all appearances of impropriety. The lawyers should not disparage the character of the opposing party, of opposing counsel, of other litigants, or of an accused. As an officer of the court a lawyer should acknowledge that a case is tried in a court of law and not in the court of public opinion.[38]

Encouraging Respect for the Administration of Justice

In communications with the media, a lawyer must at all times encourage respect for the administration of justice. This is a unifying theme in professional codes of conduct. The *Uniform Code* stresses this and charges the lawyer with a duty to "encourage public respect for and try to improve the administration of justice".[39] A lawyer must discharge his or her duties "honourably and with integrity",[40] and "uphold the standards and reputation of the legal profession".[41] Thus, when addressing the, media a lawyer must at all times be "courteous and civil and act in good faith to the tribunal and *all persons* with whom the lawyer has dealings".[42]

Self Promotion

Finally, when a lawyer addresses the media the lawyer should *not* advertise or boast about his or her abilities. The *Unified Code* states:

> [p]ublic communications about a client's affairs should not be used for the purpose of publicizing the lawyer and should be free from any suggestion that a lawyer's real purpose is self-promotion or self-aggrandizement.[43]

The seminal case on the issue is *Stewart v. Canadian Broadcasting Corporation*.[44] In *Stewart*, defence attorney Edward Greenspan worked with CBC as a consultant and narrator for an episode of the show "Scales of Justice". The episode portrayed a client that Mr. Greenspan had successfully represented 10 years earlier. The client sued. At trial the court considered, among other things, whether Mr. Greenspan had used the opportunity to self-promote.

38. See by contrast, James Haggerty, *In the Court of Public Opinion: Winning Your Case With Public Relations* (Washington: Library of Congress, 2003).
39. *Uniform Code* 5.6-1.
40. *Ibid.* at 2.1-1.
41. *Ibid.* at 2.1-2.
42. *Ibid.* at 5.1-1, emphasis added.
43. *Ibid.* at 7.5-1 at Commentary 3.
44. *Stewart v. Canadian Broadcasting Corp.* (1997), 150 D.L.R. (4th) 24, 32 O.T.C. 321, [1997] O.J. No. 2271 (Ont. Gen. Div.), additional reasons (1997), 152 D.L.R. (4th) 102, 38 O.T.C. 345, [1997] O.J. No. 4077.

The court held the appropriate legal test is whether self-advertisement or aggrandizement was the "*substantial motivating factor*" of a lawyer's communication with the media.[45] The court held that Mr. Greenspan's participation in the show was not substantially motivated by self-promotion. The primary purpose was legal education. The court also noted that Mr. Greenspan's portrayal was modest given the "superb representation which he provided",[46] and acknowledged Mr. Greenspan's propensity towards legal education both in the legal community, and in public.[47]

Therefore, when a lawyer addresses the media, modesty and professionalism must govern, and the substantial motivating factor must *not* be self-promotion.

Conclusion – Professional Responsibility

To summarize, when addressing the media, a lawyer must be aware of his or her professional duty to maintain confidentiality, to represent the best interests of the client, to not prejudice a fair trial, to encourage respect for the administration of justice, and to avoid self-promotion. This list of responsibilities is not exhaustive, and beyond professional responsibilities, there are other pitfalls a lawyer faces when addressing the media.

II. Statutory Restrictions and Publication Bans

When addressing the media, the lawyer must be aware of *statutory* restrictions and publication bans that may prevent public discussion of the case. A comprehensive list of statutes is not practical here but there are a few areas that warrant specific consideration.

This paper will now: (1) introduce Canada's "open court" tradition; (2) explore prohibitions against media contact in the regulatory setting; (3) explore prohibitions against media contact in criminal law matters; (4) explore prohibitions against media contact in proceedings involving children;and (5) foreground the possibility of common law publication bans.

Open Court Tradition

As a general rule, Canada adopts an "open court" tradition that it inherits from its British heritage. An open court ensures that all are treated equally before the law, encourages witnesses to speak with

45. *Ibid.* at 28.
46. *Ibid.* at 29.
47. *Ibid.* at 61.

candour in the face of public scrutiny, and inspires the confidence of the public by satisfying them that justice is done. That said, there are circumstances in which justice demands proceedings be closed to the public and that the details of the proceedings be held in highest confidence.

Regulatory Proceedings

During regulatory proceedings a lawyer must be aware of limitations surrounding confidentiality and communication with the public. In the regulatory setting there are often express provisions that prohibit identification of the parties to the public.[48] A lawyer acting within the ambit of a regulatory regime *must* be aware of the legislation and regulations governing their proceedings and ensure that there are no restrictions on what they may discuss with or disclose to the media.

Criminal Law Context

As most criminal trial lawyers are aware, the *Criminal Code*[49] often prohibits public disclosure to ensure the proper administration of justice. The *Criminal Code* restricts media coverage of, or media contact related to, many pre-trial criminal matters such bail hearings and preliminary hearings.[50] Moreover, information heard in the absence of the jury if the jury is not sequestered during the trial is subject to a media ban.[51]There is also generally a permanent ban on the publication of information which will or *may* identify victims of certain offences, such as sexual assault.[52] Before discussing a criminal case with the media a lawyer must be very cautious of these limitations.

Children and Child Protection Hearings

The law is vigilant in defending the best interests of children and shielding them from potentially harmful publicity. Therefore, in any proceeding involving children, a lawyer has a solemn duty to proceed with extreme caution in addressing the media.

48. See for example *The Domestic Violence and Stalking Act*, S.M. 1998, c. 41, s. 13, *The Medical Act*, R.S.M. 1987, c. M90, s. 56; *The Occupational Therapists Act*, S.M. 2002, c. 17, s. 37.
49. R.S.C. 1985, c. C-46.
50. *Ibid.* at generally ss. 517, 539 and 542. This may be at the request of the defence, the Crown, or at the demand of the court.
51. *Ibid.* at s. 648.
52. See for example *Criminal Code*, s. 486.4.

For example, federal law such as the *Youth Criminal Justice Act*[53] precludes the release of *any* information which may identify young persons involved in criminal proceedings, including a young accused, a young victim, or a young witness.[54] In child protection hearings, all Canadian jurisdictions adopt legislation that prohibits any person from making public disclosure that will, or may, identify persons involved including the child or children subject to the hearing, any witness or participant, and the child's parents, foster parents, or family members.[55] Beyond just identifying parties, a court may order *any* information from the hearing be excluded.[56]

Again, wherever children are involved, a lawyer has a solemn obligation to ensure that the best interests of the child are paramount, and must exercise prudence when speaking with the media.

Common Law Publication Ban

Finally, a court may initiate a common law publication ban prohibiting contact with the media. A court may grant such a ban if it determines that the ban is necessary to "prevent a real and substantial risk to the fairness of the trial" and that "the salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban".[57] Where a court invokes a common law publication ban, naturally this restricts a lawyer's right to speak with the media.

III. Contempt of Court: *Sub judice* and Scandalizing the Court

When discussing matters with the media, a lawyer must also be cautious of attracting personal liability for contempt of court. Chief Justice Dickson explains that contempt is a broad and diverse body of law that defends against conduct that interferes with the business of the court, obstructs officers of the court in their duties, or "hinder[s] the course of justice [and] show[s] disrespect to the court's

53. S.C. 2002, c. 1 (*YCJA*).
54. See *ibid.* at ss. 110 and 111. Note, publication is permitted if the young person received an adult sentence; see s. 110.
55. See for example *Child and Family Services Act*, R.S.O. 1990, c. C.11 at s. 45 (*CFSA*). See also *Alberta Child, Youth and Family Enhancement Act*, R.S.A. 2000, c. C-12.
56. *CFSA*, s. 45(7).
57. *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12, 94 C.C.C. (3d) 289 (S.C.C.).

authority".[58] Contempt is either civil or criminal and is punishable by fine, imprisonment, or both.

If a lawyer breaches many of the duties or responsibilities explored above, the lawyer may find him- or herself in contempt of court.[59] However, a lawyer's statements may also attract a finding of contempt if those statements (1) violate the *sub judice* rule or (2) "scandalize the court". These discrete rules are a subset of the law of contempt, but are united by common, fundamental principles that demand respect for the integrity and authority of the judicial process.

Sub Judice

The term *sub judice* means "under judgment" or "under judicial consideration". The *sub judice* rule governs what statements persons may make about legal proceedings that are presently "before the court". It defends against statements that may prejudice the outcome of a trial, usurp the role of the judiciary, or risk significant adverse effect on the administration of justice.[60]

Rogacki v. Belz[61] is the leading contemporary case on the rule. In *Rogacki* the editor of a newspaper was charged with contempt. The editor had been involved in a libel action. During the early stages of litigation, he had published two articles discussing his involvement in a pre-trial mediation, and criticizing the nature of the questions he was asked. He was found in contempt for speaking to matters *sub judice*. The editor appealed.

On appeal, Justice Borins of the Ontario Court of Appeal observed that the *sub judice* rule represents an "intersection of two principles of fundamental importance: freedom of expression, and the rule of law which precludes interference with the administration of justice".[62] He held that a matter is "before the court" even when it is in preliminary

58. *B.C.G.E.U., Re*, [1988] 2 S.C.R. 214 at 234, 53 D.L.R. (4th) 1, 44 C.C.C. (3d) 289 (S.C.C.), citing *Jowitt's Dictionary of English Law*, 2nd ed. (London: Sweet & Maxwell Ltd., 1977) vol. 1 at 441. Note that contempt of court may involve actions taken "in the face of the court" or "not in the face of the court". Statements to the media fall in the latter category.

59. For example, disregard for professional standards of responsibility, (I) *supra*; breach of statutory conditions and publication bans, (V) *infra*; and breach of *express or implied undertakings* (VI) *infra*.

60. See generally, C.J. Miller, *Contempt of Court*, 3rd ed. (Oxford: Oxford University Press, 2000) at Chapter 7.

61. *Rogacki v. Belz* (2003), 232 D.L.R. (4th) 523, 41 C.P.C. (5th) 78, 67 O.R. (3d) 330 (Ont. C.A.), additional reasons (2004), 236 D.L.R. (4th) 87, 183 O.A.C. 320.

62. *Ibid.* at 21.

or "quiescent" stages of litigation. He stressed that the standard for a finding of contempt is high, and the test is whether statements made

> (1) . . . prejudged in a manner *likely to affect the mind of the trier of fact* [or presented]
> (2) . . . a *real risk of prejudice* as opposed to a mere possibility of interference with the due administration of justice;[63]

The Ontario Court of Appeal reversed the finding of contempt. It found the editor's statements did *not* present a "significant adverse effect on the administration of justice".[64]

Thus when speaking to the media about a case "before the court", a lawyer must carefully assess whether, in all of the circumstances, the statements are likely to affect the mind of the trier of fact or bear a significant risk of adverse effect on the administration of justice. The lawyer ought to avoid bold claims about the strength of a client's case, prejudicial comments about the veracity of witness testimony, adversarial pronouncements about facts in issue, or polemic assertions about how a case will or ought to be decided. This is particularly so in high profile cases where statements made to the media risk influencing prospective jurors and polluting the juror pool.

Today it is not uncommon to observe many lawyers refuse to comment on matters that are "before the court". However, properly conceived, the *sub judice* rule does *not* preclude comments about matters before the court *tout court*. Based on *Rogaki* there is a strong indication that, under the ambit of freedom of expression, a lawyer is justified in speaking to the media about matters before the court in a prudent manner in a variety of circumstances. Clearly a lawyer ought to exercise caution when discussing litigation that involves or may potentially involve, jurors. But in many other cases, in the interest of public education, a lawyer may address the media to *inter alia* (a) explain the nature of the proceedings, (b) discuss relevant legal practices or procedures, (c) identify the role that the lawyer plays in proceedings, and (d) describe the relevant laws and legal principles and explain their bearing on important political or social issues of public interest. Statements going to the *merits* of a pending case are more problematic. Nowadays it is not uncommon to see lawyers speaking to the *merits* of a case before a court. *Prima facie* such statements would not appear to be prohibited under the *Rogacki* test

63. *Ibid.* at para. 21, citing Jeffrey Miller in *The Law of Contempt in Canada* (Scarborough: Carswell, 1997) at 101-02 (emphasis added). He also notes that "The rule applies even if the litigation is in a quiescent stage, such as during protracted settlement discussions".
64. *Ibid.*

so long as they do not present a "real risk of prejudice".[65] That said, such statements may well affect a lawyer's reputation, and the manner in which the *court* may see a lawyer. Such considerations are surveyed in greater depth below.[66]

Scandalizing the Court

Contempt for "scandalizing the court" is a related, but separate issue. It speaks to the conduct of a lawyer in addressing the media, and defends against strong statements denigrating the court, or the outcome of judicial proceedings. Consider the following statement an Ontario lawyer made after a court dismissed a claim for conspiracy against the RCMP:

> The decision is a mockery of justice. It stinks to high hell . . . Mr. Dowson and I have lost faith in the judicial system to render justice.[67]

At trial, the lawyer was convicted of contempt. The Ontario Court of Appeal overturned the decision. It held that the *Charter* defended the lawyer's right to free speech and permitted him to express his dissatisfaction with the decision. Reviewing the comments as a whole, the court found, while the comments were poorly worded, they were an "expression of a sincerely held belief on a matter of public interest".[68] It stressed that courts are not "fragile flowers" and can withstand even severe criticism.[69] Needless to say, however, while such statements may not represent contempt, similar comments may well run afoul of professional codes of conduct based on considerations set out above.[70]

IV. Personal Liability for Defamation

When a lawyer addresses the media the lawyer runs the risk of exposing himself or herself to personal liability for defamation. While a lawyer enjoys protection against such claims in some instances due to privileges associated with participation in a trial, the time and manner in which the lawyer addresses the media are of significant importance.

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65. *Rogaki*, *supra* note 61 at 21.
66. See *infra* (VI) "Tactical and Practical Considerations".
67. *R. v. Kopyto* (1987), 47 D.L.R. (4th) 213, 39 C.C.C. (3d) 1, 62 O.R. (2d) 449 (Ont. C.A.) at p 455g-h cited in *Brown*, *supra* note 3.
68. *Ibid.*
69. *Ibid.*
70. See generally (I) *supra*.

Defamation

Defamation consists of spoken words, written words, printed words, audible matters, visible matters, or other acts that harm the way in which others view a person, or cause the person to be avoided, ridiculed, shunned, or exposed to hatred.[71] The test is measured against the perception of a "right-minded member of society".[72] A mere insult or slight towards a person is not defamatory.[73] What is required is a statement that is "calculated" to diminish the confidence and respect that others hold towards the plaintiff.[74]

Defamation is further divided into two forms: libel and slander. Comments to the media involve words which are printed or recorded in a permanent nature and will almost always constitute libel. In any event, most jurisdictions have eliminated the distinction between the two.[75]

For a successful action in defamation a plaintiff must prove the words of the defendant:

(1) are defamatory (would lower the reputation of the plaintiff in the eyes of a reasonable person);
(2) referred to the plaintiff; and
(3) were *published* (i.e. communicated to at least one other person aside from the plaintiff).[76]

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71. *Gatley on Libel and Slander*, 9th ed. (Sweet & Maxwell, 1998), at 7, §1.5; G. Fleming, *The Law of Torts*, 9th ed. (LBC Information Services, 1998) at 581-82.
72. *O'Malley v. O'Callaghan* (1992), 89 D.L.R. (4th) 577, [1992] 4 W.W.R. 81, 1 Alta. L.R. (3d) 88 (Alta. Q.B.).
73. *Ibid.*
74. Fleming, *supra* note 71 at 582.
75. By way of very brief introduction *libel* are written words and are actionable *per se*. "Written" includes words printed, recorded and more of a permanent nature, such as letters, newspapers, radio broadcasts, televisions and films. *Slander* on the other hand involves spoken words, or other "transient" forms of communication such as sounds, looks and gestures. The distinction is relevant because at common law *libel* is actionable on its own. *Slander* requires proof of actual loss or damage. (See generally *Gatley on Libel and Slander*, 9th ed. (Sweet & Maxwell, 1998), at 71-74, §§3.8-3.9; John G. Fleming, *The Law of Torts*, 9th ed. (LBC Information Services, 1998), at 602-603, 604.) Provincial statute generally diminishes the distinction between the two, and limits the rule that damages need not be proven for *Libel* (see generally *Defamation Act*, R.S.A. 2000, c. D-7; *Libel and Slander Act*, R.S.B.C. 1996, c. 263; *Defamation Act*, R.S.M. 1987, C.C.S.M., c. D20; *Libel and Slander Act*, R.S.O. 1990, c. L.12; *Libel and Slander Act*, R.S.S. 1978, c. L-14).
76. *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640, 314 D.L.R. (4th) 1.

When a lawyer makes a statement to the media, it is almost always made with the intention or knowledge that it will be republished.[77] Thus, when a lawyer speaks to the media, the lawyer should be aware that what is said may attract liability for defamation.

Defamation – Exceptions to the Rule

The law of defamation defends against attacks on a person's reputation. However, assessing defamation involves balancing competing rights. A court must balance the need to defend a person's reputation, with the right of every person to free speech. As such, there are a number of defences against a claim in defamation. For example, it is a defence where:

(1) the statement is true;
(2) the statement is a fair comment;
(3) the statement is a responsible communication on matters of public interest; or
(4) the statement is otherwise *privileged*.[78]

Fair and Accurate Report of Judicial Proceedings

Exception (3), privilege, is directly relevant when a lawyer addresses the media. Even if a lawyer's statement to the media turns out to be untrue, and damages a person's reputation, she may be protected by *privilege*. Privilege is either absolute or qualified, and shields persons from defamation for certain types of communications.[79] Of particular note, there is a qualified privilege where statements made to the media represent a "fair and accurate report" of judicial proceedings.

In *Hill v. Church of Scientology of Toronto*, Justice Corey explained that this defence stems from the right to freedom of expression and the fact that the "public has a right to be informed about all aspects of proceedings to which it has the right of access".[80] In *Hill*, Justice

77. *Stopforth v. Goyer* (1978), 87 D.L.R. (3d) 373, 4 C.C.L.T. 265, 20 O.R. (2d) 262 (Ont. H.C.), reversed (1979), 97 D.L.R. (3d) 369, 8 C.C.L.T. 172, 23 O.R. (2d) 696 (Ont. C.A.).
78. *Ibid.*
79. For absolute privilege, the motivation and purpose of the person speaking is irrelevant. However, qualified purpose is defeated where they exceed the scope of the privilege, including where the statements are made for an improper purpose or with express or implied malice (David A. Potts, Roger D McConchie, *Canadian Libel and Slander Actions* (Toronto: Irwin Law, 2004) at 363.
80. *Hill v. Church of Scientology of Toronto*, 1995 SCC 67, [1995] 2 S.C.R. 1130, (*sub nom.* Manning v. Hill) 126 D.L.R. (4th) 129, at para. 151.

Corey held that privilege extends not only to proceedings in court but to pleadings and court documents filed before trial.[81] Thus, where a lawyer speaks to the media about proceedings before the court, the lawyer is not liable in defamation so long as he or she (a) provides a "fair and accurate" report, that is (b) published at the same time as the hearing, (c) is not "seditious, blasphemous or indecent" and (d) is not motivated by malice.[82]

To summarize, a lawyer must be wary of personal liability for *defamation*. He or she must ensure comments to the media are either fair comment, are responsible communications for public interest, are true (at least to the best of their knowledge), or provide a "fair and accurate" report of the litigation. In line with a lawyer's professional duties explored above, statements to the media must not be motivated by either express or implied malice, and must not cross the line and become "seditious, blasphemous or indecent".

V. Contractual Agreements and Express or Implied Undertakings

A lawyer may *not* speak to the media about matters (1) prohibited by court order, (2) prohibited by contractual agreement, (3) subject to express undertakings, or (4) subject to "deemed" undertakings.

Contractual Agreements

Trial lawyers, or those closely involved in the litigation process, are no strangers to contractual agreements requiring confidentiality. These agreements are governed by their discreet terms and conditions, the content of which generally speak for themselves. There may be terms in a contract between the parties that limit disclosure of information by the lawyer's client. Failure of a lawyer or her client to abide by these contractual obligations may attract damages for breach of contract, sanctions for unprofessional conduct, and disrepute for the offending lawyer. In addressing the media, a lawyer must ensure that he or she honours any agreement their client has made to keep matters private. The lawyer must also ensure that the client does the same.

Express Undertakings

During the course of litigation, a party may request, a lawyer may volunteer, or a court may demand an express undertaking that will

81. *Ibid.*
82. *Ibid.*

ensure that certain documents or matters remain confidential. It stands to reason that a lawyer must *not* discuss or in any way disclose these matters with the media.

Implied or "Deemed" Undertakings

Beyond contractual agreements and express undertakings, a lawyer must honour "deemed" undertakings. During the course of litigation, parties often attain information through rules of civil procedure related to discovery. Generally such information is subject to a "deemed undertaking" that the information must be treated as confidential and may be used only for the purpose of the action.[83] This rule stems from the common law[84] and is now codified under rules of civil procedure.[85] The rule extends broadly, not only to examination for discovery, or discovery from written or oral questions, but to information derived through, or naturally flowing from, the discovery process, such as information attained through medical examination or inspection of property.

As a general rule, a lawyer should always be cautious of discussing matters with the media during the discovery stage of litigation. The central question a lawyer should ask is whether the information he or she purports to discuss with the media flows from information attained through the discovery process. Breach of an express or implied undertaking of non-disclosure may result in a finding of contempt.[86]

VI. Tactical and Practical Considerations

Finally, even in circumstances where a lawyer is not foreclosed from speaking to the media under any of the previously mentioned limitations, there may still be compelling tactical and practical reasons for a lawyer to refrain from comment.

Professional Reputation

It is axiomatic that a lawyer's reputation is a non-renewable resource. The manner in which a lawyer addresses the media affects the way in which the public, and others in the profession, view that

83. *Kitchenham v. AXA Insurance (Canada)*, 2008 ONCA 877, 306 D.L.R. (4th) 68, 69 C.C.L.I. (4th) 51 (Ont. C.A.).
84. *Goodman v. Rossi* (1995), 125 D.L.R. (4th) 613, 12 C.C.E.L. (2d) 105, 37 C.P.C. (3d) 181 (Ont. C.A.).
85. *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 30.1.01(3).
86. *Orfus Realty v. D.G. Jewellery of Canada Ltd.* (1995), 41 C.P.C. (3d) 148, 24 O.R. (3d) 379, 83 O.A.C. 35 (Ont. C.A.).

lawyer. Even if a lawyer's interaction with the media is not necessarily prohibited by any limitations discussed herein, the manner in which the lawyer conducts himself or herself when addressing the media may put his or her reputation in jeopardy. Moreover, it may affect the manner in which the *court* views the lawyer.

Confidence of the Court

The propensity of a lawyer to "throw off the mantel of responsibility of independence and take the case to the public"[87] will affect the way in which the court views the lawyer. As Chief Justice of Ontario Charles Dubin stated:

> . . . [t]he advocate who takes his case to public does not advance the client's case and indeed we intuitively subjectively hurt him because the court might be more hesitant to accept the submissions of an advocate, accept his frankness, his candour and credibility, if outside the court room he has prejudged the matter and made a commitment to his client.[88]

Duty Extends to Client and Informing Clients

This paper largely addresses communications between a *lawyer* and the media. However, it is also the duty of a lawyer to make sure that his or her client understands these duties. This is of heightened concern in an age of social media, where off-hand comments by clients about ongoing litigation can spread like wildfire.[89]

Insurance Issues

There is another risk a lawyer may face when addressing the media. If comments made to the media attract liability, or trigger a claim from an unhappy client, there is some indication that insurance

87. Address bythe Honourable Chief Justice of Ontario Charles Dubin, 7th Annual Advocacy Symposium, Toronto, May 6 and 7, 1998.
88. *Ibid.*, cited in Brown, *supra* at note 3.
89. Christopher J. Edwards, "Throwing the (Face)book at Em — The Use and Abuse of Social Media in Civil Litigation: Facebook, Twitter, the Rules of Civil Procedure and the Rules of Professional Conduct" (2011), 38 Adv. Q. 19; John G. Browning, "Keep Your Friends Close and Your Enemies Closer: Walking the Ethical Tightrope in the Use of Social Media" (2013), 2:1 *St Mary's Journal on Legal Malpractice and Ethics* 204-241; Andy Radhakant and Matthew Diskin, "How Social Media Are Transforming Litigation" (2013), 39:2 *Litigation Magazine* 20 (American Bar Association).

coverage for such a claim may be denied on the grounds that the claim does not fall within the definition of "professional services".[90]

Potential Media Distortion

Finally, as a practical matter, a lawyer must be wise in the manner in which he or she addresses the media. As the *Unified Code* cautions,

> [l]awyers should be aware that, when they make a public appearance or give a statement, they ordinarily have no control over any editing that may follow or the context in which the appearance or statement may be used or under what headline it may appear.[91]

For practical reasons, a lawyer must assess what it is that they hope to achieve in speaking to the media. The lawyer must weigh any anticipated benefit against the adverse publicity these comments may attract. This includes accounting for the possibility of media "spin". There is always a possibility that the media will take comments out of context or present them in such a way to influence public opinion or perception unanticipated ends.

Conclusion

A lawyer who stands to address the media plays an important role. The lawyer has an opportunity to educate the public about important legal issues and act as an advocate for the profession. However, a lawyer must also be aware of his or her responsibilities, and potential risks. The lawyer must act in accordance with professional responsibilities, be aware of statutory imperatives, obey court orders, honour contractual obligations and implied duties of confidentiality and be mindful of tactical and practical considerations surrounding media contact.

In navigating these complex and technical matters, as in all endeavours a lawyer undertakes, good judgement, common sense, and prudence equip the lawyer with the tools necessary to make important decisions about his or her interaction with the media.

90. LAWPRO Magazine Online, "Speaking to the Media", available at http://www.practicepro.ca/information/speakingtomedia.asp.
91. *Unified Code*, 7.51 at Commentary 7.