

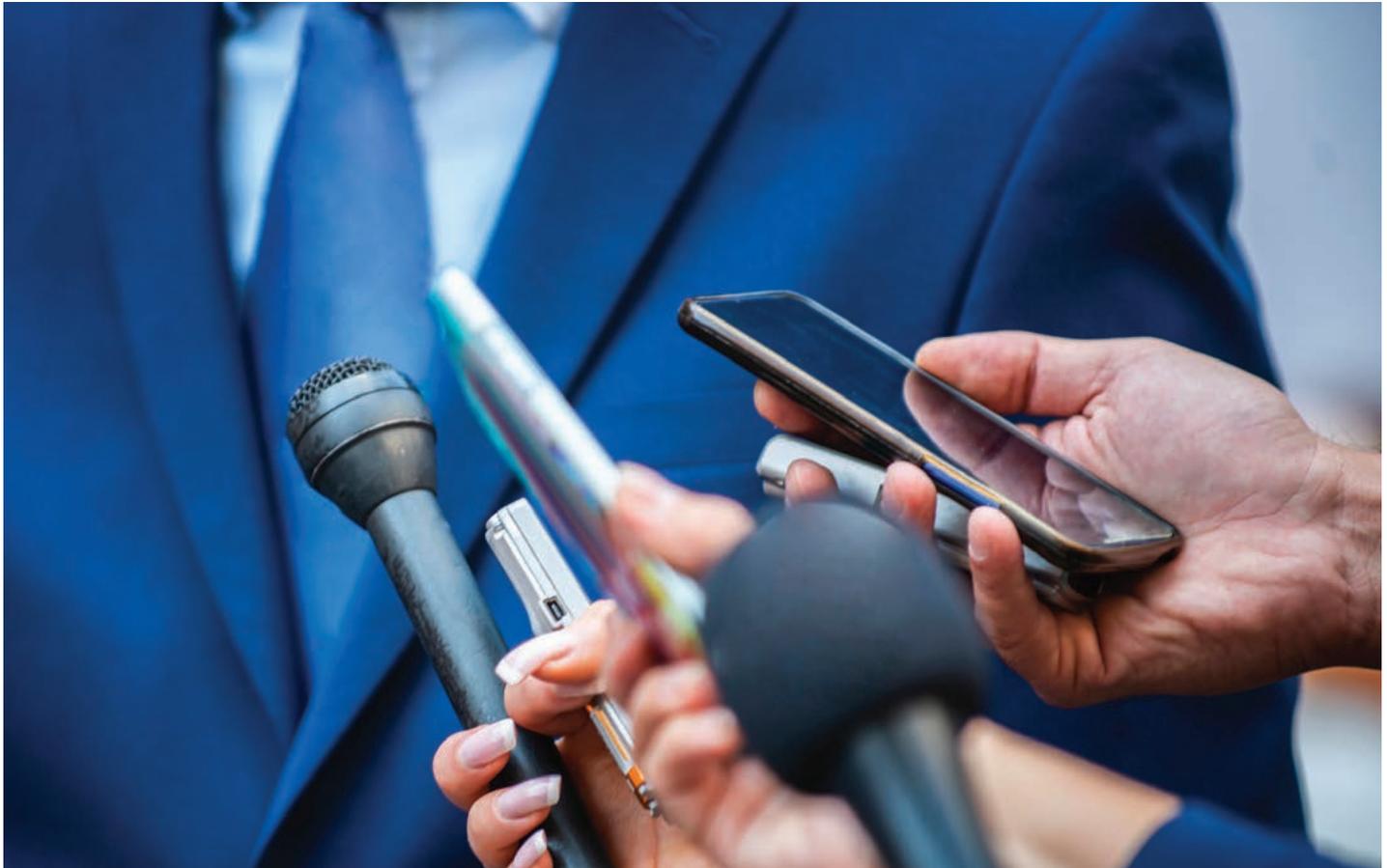


Toni Jaramilla

TONI JARAMILLA, APLC

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Meeting the press

WHEN AND HOW TO PUBLICIZE YOUR CIVIL CASE WITHOUT RUNNING AFOUL OF ETHICAL RULES

Social-justice issues are constantly in the news. In past years, sexual-harassment cases dominated headlines due to the #MeToo movement. More recently, the Black Lives Matter movement has been in the forefront of public outcry along with protests against police brutality and systemic racism. Civil rights and employment-law attorneys are being retained in cases that are more likely to garner public and media interest. To successfully handle a potentially high-profile case, the client's best interest is paramount. Deciding to involve the press requires good judgment, sound strategy and an understanding of the ethical rules that apply to trial and litigation publicity. What you and your clients say publicly,

when it is said, or how you respond to news inquiries can have important consequences to the case.

Engaging the press to publicize a case allows you to bring attention to issues of public concern, such as discrimination and civil-rights violations occurring in our communities. It is an avenue for demanding public accountability for injustice. On the other hand, refraining from responding to press inquiries may result in an unfavorable spin on your case and render your client vulnerable to unfair or unjust public opinion.

This article will discuss important considerations when deciding on whether to involve news media in civil cases. It will also provide suggestions on how to use

the power of the press ethically, professionally, and successfully.

Ethical rules on trial and pre-trial publicity

Ethical rules regarding trial publicity developed from the landmark case of *Sheppard v. Maxwell* (1966) 384 U.S. 333. *Sheppard* involved the murder trial of Dr. Sam Sheppard, who was accused of bludgeoning his pregnant wife to death. The case experienced widespread pre-trial publicity. The Supreme Court held that massive, pervasive, and prejudicial publicity regarding the petitioner's prosecution prevented the accused from receiving a fair trial in violation of the Due Process Clause of the 14th

Amendment. (*Sheppard*, 384 U.S. 349-363.) The Supreme Court held that the trial court should have prohibited attorneys or parties from making out-of-court statements that discussed prejudicial matters. *Sheppard v. Maxwell* became the standard for gag orders designed to prevent prejudicial trial publicity.

Rules of Professional Conduct-California and ABA

The California Rule of Professional Conduct 3.6 – Trial Publicity (which is virtually identical to American Bar Association Rule 3.6) provides that (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will (i) be disseminated by means of public communication and (ii) have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

Subsection (b) provides:

Notwithstanding paragraph (a), but only to the extent permitted by Business and Professions Code section 6968, subdivision (e), and Rule 1.6 a lawyer may state:

- (1) the claim, offense or defense involved and the identity of the persons involved;
- (2) information contained in a public record;
- (3) that an investigation of a matter is in progress;
- (4) the scheduling or result of any step in the litigation;
- (5) a request for assistance in obtaining evidence and information necessary thereto;
- (6) a warning of danger concerning behavior of a person involved, when there is reason to believe there exists likelihood of substantial harm to an individual or to the public but only to the extent that dissemination by public communication is reasonably necessary to protect the individual or the public; and . . . (for brevity, section (7) applying to criminal cases are omitted).

Subsection (c) states:

Notwithstanding paragraph (a), a lawyer



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may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

Statements that could violate Rule 3.6

What types of statements to the press could constitute a violation of Rule 3.6? A discussion of clearly inadmissible evidence that addresses a material issue in the case is a violation. Another example is presenting information that the attorney knows to be false or deceptive. Or making a statement that violates a lawful protective order pursuant to statute, rule of court, or special rules of confidentiality.

Civil cases in general

In civil cases, statements to the media regarding documents and their contents, or testimony in a deposition which are subject to a protective order would be a violation. Some settlement agreements not only prevent disclosure of the settlement amount, but also the fact that a settlement agreement even exists. As such, a press release announcing that the case settled for an unspecified amount, could be a violation of Rule 3.6.

Employment-law cases

In employment-law cases, determine whether the client signed an arbitration agreement which may preclude you from making public statements about the arbitration proceedings or other aspects of the client's employment. Also, you should review any nondisclosure agreements that the client may have signed when hired, to ensure that any statements to the press do not violate the agreement.

In cases involving sexual harassment, gender discrimination, or retaliation for complaining of workplace sexual harassment or gender discrimination, Code of Civil Procedure section 1001 bans confidentiality agreements entered into on or after January 1, 2019, as to these types of claims *if the plaintiff filed a complaint* with the Department of Fair Employment and Housing or filed a civil lawsuit or arbitration demand. The monetary amount of a settlement can still be made confidential. Therefore, a press release or press conference that discusses the facts of a sexual harassment or gender equality case after settlement are fair game (not the amount of the settlement), so long as a DFEH charge was filed or civil claim was filed in court or in the arbitration forum.

Model rules of professional conduct

With regards to ethical rules that apply to pre-litigation publicity, Rule 1.4(a)(2) of the Model Rules of Professional Conduct provides that an attorney must reasonably consult with the client about how the client's objectives are to be accomplished. To ensure compliance, you should fully involve your client in the strategy decision to call a press conference or speak with the media. Make sure that your client knows and understands the purpose and consequence of involving the press in their case and obtain the client's consent.

Business and Professions Code

A third rule to consider when dealing with the press at any point of the case, is Business and Professions Code section 6968, subdivision (a) regarding the duties of an attorney: "To maintain inviolate the

confidence and at every peril to himself or herself to preserve the secrets of his or her clients.” The exception to this is if the attorney reasonably believes that disclosure will prevent a criminal act which the attorney reasonably believes may result in death or bodily harm to an individual.

To comply with section 6968, subdivision (a) of the Business and Professional Code, use good judgment and common sense. Instruct your client to direct all press inquiries to you. Obviously, do not disclose information that your client disclosed in confidence or that is attorney work product. Do not reveal your trial strategy to the press. Sometimes journalists will contact you for an interview, not necessarily in front of a camera. Although your discussion with a journalist may feel informal, you should never let your guard down so that you inadvertently disclose more than you intend. This can be detrimental to your client’s case. Always remain vigilant, whether speaking in front of a camera or telephonically with a journalist. Do not let your client speak to the press without your presence, and only if you feel that the client would present well and is prepared.

In summary, do not make statements to the press that will materially prejudice the legal proceeding of the case. In an abundance of caution, I invariably avoid contact with the press during trial. Typically, my contact with the press is prior to filing suit, and only after fully discussing the consequences of publicizing the case and after obtaining the client’s permission.

Trial by public opinion – pros and cons

With ethics in mind, each attorney must decide whether to publicize the case in the press in the first instance, or whether to respond to media inquiries regarding the case. Should you go public with your case? And if so, when?

Plaintiffs’-side employment and civil rights lawyers are often activists. Cases involving racial justice and equality in the

workplace are newsworthy, in and of themselves, particularly in the current political climate of society. The need to hold law enforcement and discriminatory businesses accountable is a fight that can occur not just in courtrooms, but also in the courtroom of public opinion. Getting results in the courtroom of public opinion may be faster than in a court of law. Both serve to hold the offender accountable.

There are several benefits in garnering media attention. First, public support for the client has far-reaching implications. In many of my high-profile cases, civil rights leaders and activists have assisted by organizing boycotts and social media campaigns calling for justice.

Media attention and public support of your case can uncover otherwise hidden witnesses. It can attract “me too” plaintiffs with similar claims. Press releases often result in calls from witnesses to the incident, or members of the public who have perhaps had similar experiences with the defendant. Or employees who have worked for the offending employer, who can provide guidance or information as to discriminatory practices that have been ongoing for years.

Negative public scrutiny can persuade the defendant to informally resolve the case. Public scrutiny can prompt negotiation of non-monetary terms like training on racial sensitivity or sexual harassment prevention, or may prompt the employer to terminate the perpetrator of the offending act. All of these are benefits that can be derived from publicity of the client’s case.

When and how to invite press coverage

News outlets place a priority on reporting newsworthy incidents as soon as possible after the triggering event. Issuing a press release or calling a press conference to announce the filing of a lawsuit is an optimal time to publicize the case. At the conclusion of a case is another good time to issue a press release to announce a favorable verdict or that a settlement was reached, after making

sure the statement does not violate any provisions of the settlement agreement. In high profile cases, you may consider negotiating with the defense a joint press release that announces a mutually satisfactory resolution of the case.

There are several means of notifying the press regarding your newsworthy case: press release, press conference, and individual interviews with the press.

Press release

A press release is the easiest and least time-consuming way to notify the press of your case. One benefit of a press release is that you can provide comments from your client without exposing the client to giving an unfiltered statement. Some clients may be less comfortable or capable of speaking to the press directly or in front of a news camera.

The press release should be drafted in a way that will attract the interest of the news media. Avoid legalese. Include a powerful headline that highlights the unlawful conduct and the identity of the defendant. For example, *“Three Black Teens were Racially Profiled by Corporate Giant Target, and Assaulted by LA County Sheriffs.”* The press release (one to two pages) should include your name and contact information and announce the action that is about to be taken by your firm: *“Attorneys (identify yourself) for the plaintiffs will be filing a civil rights lawsuit in Los Angeles Superior Court.”* Include the factual allegations briefly and succinctly, include a quote from your client and a quote from lead counsel. Here is an example of a client quote that can enhance your presentation to the press:

“Our children, including my son, were racially profiled. Instead of being treated like customers, Target employees identified them as criminals based solely on their race...”

Provide your name or the name of the press contact at your firm and a mobile number and email address so that the press can reach you quickly for questions.

You should create a “press kit” which consists of a list of news outlets and newswires, the names of news reporters,

civil rights leaders, and organizations, along with their email addresses and phone numbers. Email your press release to the individuals and organizations listed in your press kit.

Press conference

Press conferences are the most effective way to generate publicity. To coordinate a press conference, prepare a press release as described above, but also include the date, time, and location of your press conference. Also identify the individuals who will be present at the press conference, including your client, the attorneys, and if applicable, civil rights leaders who plan to attend. If photographs or videos of the incident are available, email those as an attachment to your press kit. Make sure you identify photographs and videos of the incident as your property and provide permission for their use by the news media. Send the press release to the news outlets and newswires listed in your press kit. Notify the press of your press conference at least 24 hours ahead of time.

While it is preferable to include your client in the press conference, it is important that the client is emotionally able and willing to attend and is well prepared. Prepare the client to describe how she felt when the incident occurred, rather than the facts of the case. If the client is a minor, it is effective to have the parents speak to the press about the emotional trauma they are feeling regarding what happened to their child. It is persuasive and powerful for a mother to talk about how she felt when she heard about her son dying at the hands of law enforcement. Prepare them to answer inevitable questions from the press, such as, "What do you hope to get out of this lawsuit," or "Is there a message you want to tell the public regarding what happened to you?" Or "what do you say to the critics who say that 'the police were just doing their job?'"

The press will always ask the lawyer whether a lawsuit will be filed, what entities or individuals will be sued, and

what you will be seeking, such as punitive damages. I would never state a dollar amount, but rather "*We will be seeking full justice for the harm Mr./Ms. (say their name) suffered, and we will demand policy changes, such as re-training and ensuring diversity in management positions and safety measures to end sexual assault in the workplace!*"

The location of the press conference is also important. Given the current pandemic, the press conference should be held outdoors, and masks worn. Holding the news conference in front of your office building is convenient. Alternatively, in police shooting cases, holding it in front of the police station or at the site of the shooting can be very impactful.

The format of a press conference is up to you. I typically conduct press conferences in the following format: I start by thanking the press for coming and all who are in attendance for their support. I then introduce myself and spell my full name for the press and state that I am an employment law and civil rights attorney. I introduce my client by name and anyone else who is present, such as a parent, co-counsel, or civil rights activists if they intend to speak. I then briefly describe the facts of the case, using "sound bites" that the press can capture and feature on the news.

Although the press conference may last about 30-45 minutes, TV news will only feature about two minutes of the conference. The press wants good sound bites to feature, not dull legal jargon. In addition to describing the events that led to a lawsuit, I will announce a call for action. For example, in a police shooting case, I will demand that law enforcement release body cam videos immediately. In an employment discrimination case, policy changes, or a meeting with the CEO of the company to address our concerns.

I then transition to my client and say, "My client, Mr./Ms. (name) will now describe how he/she felt when she was targeted because of her race...." After everyone who planned on speaking finishes making a statement, I then take

questions from the press. I conclude the press conference by thanking the press and all who attended.

The press also appreciates being provided with a copy of the lawsuit being filed. Have several copies available for handout and be prepared to email copies. It is also helpful to have pertinent videos or photographs conveniently available on your cellular phone so that you can airdrop them to the reporters' phones for convenience. The press likes to feature photos of your client in more pleasant circumstances, such as with family, or on graduation day. Let the public see the client as a good and kind person with people who love and are inspired by them.

Individual interviews with reporters

After you issue a press release, the press should hopefully take interest. You will then begin to receive inquiries from reporters who want to cover the story. The interview with your client may be conducted in person, by phone or Zoom. In all interviews, prepare your client so that she is consistent in describing what happened. Focus primarily on how they felt at the time of the incident and how they are currently feeling (e.g., hurt, fear, humiliation, etc.). Of course, the attorney should take the lead in discussing legal aspects of the case such as what laws were violated and by whom.

Do's and don'ts on publicity

- Do not give away trial strategies when speaking to the media.
- Build a good rapport with reporters and journalists so that they write about the story in a favorable light.
- Get the facts right – misstatements of fact undermine the client's credibility and the credibility of the case. Statements to the press are discoverable.
- Never comment or seek publicity if there is a pending criminal case against your client.
- Know and be conversant with the legal claims you will pursue.
 - ❖ Address the legal elements and application of the facts to key elements.

- ❖ Avoid speaking in legalese.
- Have the client's permission to speak to the press, after an explanation of the potential consequences.
- Instruct the client to direct press inquiries to you and be present in all interviews.
- Give the press written permission to use photographs and/or videos.
- Collect photographs that cast the client in a favorable light, e.g.
 - ❖ A star athlete
 - ❖ Doing community service
 - ❖ Giving a public presentation – showing the client in leadership roles
 - ❖ Receiving awards
 - ❖ Family photograph during happier times
 - ❖ Use helpful videos, if available
- Practice sound bites (of the facts, the wrongful conduct)
- Be prepared for questions you are likely to be asked:
 - ❖ Will you be filing a civil lawsuit?
 - ❖ Who will you be suing?
 - ❖ What do you hope to gain by filing a lawsuit?
 - ❖ What message would you like to give to the public?

- ❖ What is your response to the critics?
 - Use social media to republish the news reports and print media.
 - Join or build alliances with civil rights organizations and leaders. They will be instrumental in bringing public and media attention to the case. Mention their attendance in press releases.
- Prepare family members who may be interviewed. Typically, the media prefers to speak with parties involved in the incident, not just the lawyer. The press will inevitably try to speak directly to your client. Instruct your client to refer all press calls to you. You will want your client to remain involved in all press interviews, but you should control the process. You must decide whether the clients are able to tell their own story, and whether they are reliable and consistent in reciting the facts. You will want to limit and control what information is shared and how it is shared.

If the client is asked, “What do you want to get from this?” either intercede with a response or have the client ready with a succinct response, such as: “I want people to know that

racism still exists, and it is happening in our own community...”

Conclusion

Advocating for your client with the help of news media is a powerful tool, only to be used while remaining mindful of ethical obligations and the client's best interest. Publicity on the right case is an opportunity to be both a lawyer and an activist. With the power of the press, you can positively influence the public impression of the client and their case. You can also shed light on social justice issues that inspire positive change that benefit society.

Toni Jaramilla is an employment lawyer and civil rights attorney in Los Angeles. She litigates employment cases on behalf of workers in claims of discrimination, harassment, retaliation, and sexual assault. In her civil rights practice, she represents victims of police brutality and murder. 