

**Judges and the Media:
Can We Just Be Friends?**

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The old saying, “Any publicity is good publicity,” is not true. What you don’t know about the media can and often will hurt you — particularly if you are a judge.

In a high-profile case, judges should expect media coverage. And these days, the term “media” means a lot more than newspapers and television. Today, “the media” include bloggers, Tweeters, FaceBookers, anonymous online commenters, and more. Often times, people in “the media” are using several forms of media in the normal course of their work. (E.g., a newspaper reporter may also use an online blog, a Twitter account, and FaceBook to communicate with his/her readers.) Despite the best efforts of attorneys and judges, intense media attention can and often does affect what happens in a courtroom. It certainly affects a litigant’s (and a judge’s) standing in the community.

Given the attorney’s ethical duty to advocate for a client to the best of his/her ability, and given a typical client’s vulnerability during the litigation process, attorneys today are often called upon to safeguard a client’s interests outside as well as inside the courtroom. That’s fine for attorneys — they at least have some First Amendment rights that they can exercise on behalf of their clients, subject to the Model Rules and Local Rules.

Judges are under a different kind of pressure. They have a duty to remain impartial — and to maintain the appearance of impartiality. The best advice anyone can give to a judge on the subject of speaking to reporters can be summed up in one word: DON’T.

As a threshold matter, judges should always be prepared to enforce the rules that apply to the legal profession. In Louisiana they include:

- (a) The Rules of Professional Conduct (Rule 3.6)
- (b) The Code of Judicial Conduct (Canon 3)
- (c) The Code of Professionalism
- (d) The Local Rules

For attorneys, the rules generally require (1) consent of the client prior to disseminating information, (2) truthfulness, and (3) avoiding any attempt to influence the outcome of a pending trial or proceeding. This includes leaking information that is not otherwise admissible at trial. The rules typically allow discussing (1) the general nature of the claim or offense, (2) any matter already in the public record, (3) whether an investigation is in progress and who/what it concerns, (4) schedules and results of procedural matters, (5) pleas for help, and (6) warnings of any dangers. In a high-profile case, it is not unusual for one or more attorneys to “cross the line.”

Judges, as impartial “referees,” are much more constrained by Canon 3 (and other canons) of the Code of Judicial Conduct. Generally, a judge should abstain from public comments about a pending or impending matter in any court — and require similar abstention by court personnel under his/her control.

Does this mean that a judge should never speak to reporters?

No. But the rules are very strict. If a reporter asks about a pending (or impending) case, the best advice remains the same: Don’t!¹ Note that Canon 3 bars a judge from commenting on any case that is “pending or impending” in any court — not just his/her own court.

¹ See, Canon 3(A)(8), Louisiana Code of Judicial Conduct, attached as Appendix B.

But what can or should a judge do if he or she is attacked or criticized in the media? Is it not appropriate for that judge to respond?

Sometimes, yes. But always, carefully.

There are several ways to for a judge to respond to criticism in the media within the rules: (a) by issuing a brief written statement sticking to the issues (and not commenting on a pending case); (b) getting his/her fellow judges to issue a statement *en banc*; (c) getting a law professor or Bar Association officer to respond on behalf of the court; or (d) by making a minute entry or “reasons for judgment” — and then letting a clerk call the entry to the media’s attention.

What about things judges should absolutely avoid doing? Here’s a partial list of DON’TS — and feel free to add to it:

- Don’t Tweet about anything having to do with the legal profession or current events. This includes cases, of course, but also lawyers, other judges, judicial matters, conferences, candidates, dockets, etc. If it has anything at all to do with the law or public matters, keep it off Twitter.

- Ditto for FaceBook. And by all means, DO NOT POST PHOTOS on FaceBook. Ever. No exceptions. Not even of your favorite pet.

- Don’t write letters to the editor. Ever.

- Don’t let anyone take your photo unless it’s at your own or your child’s wedding. And make sure you know the photographer.

- Don’t email anyone about anything relating to the law, unless it’s for a CLE. No exceptions. (Remember Earl Long’s advice...)

- Today, everyone with a smart phone is a reporter ... and a photographer ... and a publisher! Act accordingly.

Encountering Reporters

Because a judge who faces criticism in the media is mostly likely to encounter it in relation to a pending case, it is very dangerous for a judge to grant interviews to reporters. If, however, you do find yourself talking to a reporter, always remember that (1) you are on dangerous ground, (2) you are playing someone else's game, (3) you're playing on someone else's turf, and (4) you don't get to make the rules of that game.

Can judges and reporters be friends? (Think: *When Harry Met Sally*.) The answer is yes, but it's tricky — and potentially fraught with danger.

Here's another way to look at it: When you talk to a reporter whom you don't really know, it's the judicial equivalent of having unprotected sex with someone you just sat down next to, and met for the very first time, on an airplane — and you're having that unprotected sex right there in your seat, in full view of the flight attendants and other passengers (most of whom have smart phones). If you're comfortable with that ... well, enjoy the ride while it lasts.

One thing you should never do: Ask a reporter for advice about dealing with the media. It's like asking a piranha how to swim across the Amazon.

For everyone else, the most important rule to remember, besides "Don't talk to the media," involves the very dangerous notion of "off the record." Other than "I love you," no other three-word phrase has caused more confusion and heartache in history. In both cases, the trouble arises because not everyone has the same appreciation of what those three words mean.

‘OFF THE RECORD’

What does it mean?

Going “off the record” is one of the most misunderstood — and dangerous — concepts in journalism today. Why? Because the term means different things to different people — even within the media. Know that, unlike the legal profession, there is no universally accepted Code of Professional Responsibility for reporters, nor is there an oversight committee or enforcement mechanism within the news media to “weed out” unethical or unscrupulous operators. The media are purely market-driven. Thus, “off the record” can mean:

1. “It’ll be our little secret.” The reporter will know the information, but promises never to tell anybody . . . except maybe his/her editor . . . and maybe “one or two others in the newsroom who need to know.” The bottom line: do you trust this reporter with sensitive information? Will it ever be used in a story? Will he/she call you first?
2. “I’ll use it, but I just won’t say where I got it . . . unless I get sued or subpoenaed.” Is this reporter willing to risk going to jail to preserve your identity as a “confidential source”?
3. “It’s for my background only, not to be used or discussed, and never to be associated with you — but knowing it may help me understand other, related information that I gather down the road.” In essence, you and the reporter enter into an attorney-client relationship — but the reporter stands in the shoes of the attorney and you are the client. Again, is this someone you trust?
4. “I won’t say where I got it, but I will try to verify it from other (independent) sources and then have your information to collaborate what I learn on my own. Then I can print it.” How do you know the reporter will actually get “independent” verification? Is there any way that the original disclosure can be traced to you?

IMPORTANT SAFETY TIP:

- Before you ever go “off the record” with a reporter, get the reporter to tell you his/her version of what “off the record” means. Know what you’re agreeing to before you go “off the record,” and make sure it’s crystal clear to you as well as to the reporter. Also discuss what will happen in the event the reporter/newspaper/TV station is sued as a result of the story.

APPENDIX A

The Rules for Attorneys

Model Rules of Professional Conduct

Rule 1.6 — Confidentiality of Information

- (a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by Paragraph (b).

* * *

Rule 2.1 — Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Rule 3.6 — Trial Publicity

[Revised March 6, 2002]

- (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 be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.
- (b) Notwithstanding paragraph (a), a lawyer may state:
- (1) the claim, offense or defense involved and, except when prohibited by law, 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 litigation;
 - (5) a request for assistance in obtaining evidence and information necessary thereto;
 - (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
 - (7) in a criminal case, in addition to subparagraphs (1) through (6):
 - (i) the identity, residence, occupation and family status of the accused;
 - (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
 - (iii) the fact, time and place of arrest; and

- (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.
- (c) Notwithstanding paragraph (a), a lawyer 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.
- (d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Rule 4.1 — Truthfulness in Statements to Others

In the course of representing a client, a lawyer shall not knowingly:

- (a) Make a false statement of material fact or law to third person; or
- (b) Fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Code of Professionalism

- My word is my bond. I will never intentionally mislead the court or other counsel. I will not knowingly make statements of fact or law that are untrue.
- I will clearly identify for other counsel changes I have made in documents submitted to me.
- I will conduct myself with dignity, civility, courtesy and a sense of fair play.
- I will not abuse or misuse the law, its procedures or the participants in the judicial process.
- I will consult with other counsel whenever scheduling procedures are required and will be cooperative in scheduling discovery, hearings, the testimony of witnesses and in the handling of the entire course of any legal matter.
- I will not file or oppose pleadings, conduct discovery or utilize any course of conduct for the purpose of undue delay or harassment of any other counsel or party. I will allow counsel fair opportunity to respond and will grant reasonable requests for extensions of time.
- I will not engage in personal attacks on other counsel or the court. I will support my profession's efforts to enforce its disciplinary rules and will not make unfounded allegations of unethical conduct about other counsel.
- I will not use the threat of sanctions as a litigation tactic.
- I will cooperate with counsel and the court to reduce the cost of litigation and will readily stipulate to all matters not in dispute.
- I will be punctual in my communication with clients, other counsel and the court, and in honoring scheduled appearances.

APPENDIX B

CODE OF JUDICIAL ETHICS

CANON 3

A Judge Shall Perform the Duties of Office Impartially and Diligently

The judicial duties of a judge take precedence over all other activities. Judicial duties include all the duties of office prescribed by law. In the performance of these duties, the following standards apply:

A. Adjudicative Responsibilities.

- (8) A judge shall not, while a proceeding is pending in any Louisiana state court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness, and shall require similar abstention on the part of court personnel subject to his or her direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. **[Amended effective February 1, 2005]**
- (9) Except as herein provided a judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto at least during sessions of court or recesses between sessions.
- A trial judge may authorize:
- (a) the use of cameras placed inside the courtroom for security purposes without audio;
 - (b) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record for the court or for counsel, or for other purposes of judicial administration;
 - (c) the broadcasting, televising, recording or photographing of investitive or ceremonial proceedings;
 - (d) the photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions:
 - (i) the means of recording will not distract participants or impair the dignity of the proceedings;
 - (ii) the parties have consented, and the consent to being depicted or recorded has been obtained from each witness appearing in the recording and reproduction;
 - (iii) the reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and
 - (iv) the reproduction will be exhibited only for instructional purposes in educational institutions.
- An appellate court may permit broadcasting, televising, recording, and taking photographs of public judicial proceedings in the courtrooms of appellate courts in accordance with the guidelines set forth in an appendix to this Canon, subject, however, to the authority of each court and the presiding judge of each court or panel to (a) control the conduct of proceedings before the court, (b) ensure decorum and prevent distractions, and (c) ensure the fair administration of justice in the pending cause. **[Amended effective April 29, 2015]**
- (10) A judge shall not, with respect to cases, controversies or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office. **[Enacted effective February 1, 2005]**

CANON 7

**A Judge Or Judicial Candidate Shall Refrain
From Inappropriate Political and Campaign Activity**

A. A Judge or Judicial Candidate Shall Not, Except to the Extent Permitted By These Canons:

- (11) in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

B. A Judge or Judicial Candidate Shall:

- (1) maintain the dignity appropriate to judicial office and act in a manner consistent with the impartiality, integrity and independence of the judiciary;
- (2) review and approve the content of all political advertisements produced by the judge or judicial candidate or his or her campaign committee, as authorized by Canon 7D, before their dissemination;
- (3) take reasonable measures to ensure that other persons do not undertake, on behalf of the judge or judicial candidate, any activities prohibited under this Canon; and
- (4) except to the extent permitted by Canon 7D, not authorize or knowingly permit any person to do for the candidate what the judge or judicial candidate is prohibited from doing under this Canon.

**APPENDIX TO CANON 3
Guidelines for Extended Media Coverage
of Proceedings in Appellate Courtrooms**

I. As used in these guidelines,

A. 'Extended coverage' means any recording or broadcasting by the news media of court proceedings using television, radio, photographic or recording equipment.

B. 'Presiding Judge' means the Chief Justice of the Supreme Court of Louisiana, the Chief Judge of a Court of Appeal, or the senior judge of a panel of which the Chief Justice or Chief Judge is not a member.

C. 'Proceeding' means any hearing, motion, argument on appeal or other matter held in open court which the public is entitled to attend.

D. 'Party' means a named litigant of record who has appeared in the case, and includes a party's counsel of record.

E. 'Media' means legitimate news gathering and reporting agencies and their representatives.

F. 'Court' means an appellate court and includes the Supreme Court of Louisiana and the Courts of Appeal of the several circuits.

II. All extended media coverage of court proceedings shall be governed by the principle that the decorum

and dignity of the court, the courtroom and the judicial process will be maintained at all times. Resolution of any question of coverage or procedure not specifically addressed in this section will be guided by this overriding principle.

III. A. The consent or approval of parties to extended coverage is not required. Parties may object to extended coverage by filing a written objection stating the reasons therefor with the clerk of court at least 10 days prior to the date of the proceedings. Upon objection by a party, or on the court's own motion, the presiding judge may prohibit or limit extended coverage of a proceeding.

B. Extended coverage shall not be permitted in any proceeding which by law must or may be held in private.

C. The decision of the presiding judge on any question of coverage shall be final and shall not be subject to review by any other court.

IV. Extended coverage of a proceeding shall not be permitted unless notice of intention to provide extended coverage of a proceeding is given by the media to the clerk of court at least 20 days in advance of the proceeding, provided that only reasonable notice shall be required for coverage of expedited proceedings not regularly calendared.

V. Extended coverage of court proceedings may be provided by news media agencies and their representatives. Film, videotape, photographs, and audio reproduction shall not be used for commercial or political advertising purposes. Such use of these materials will be regarded as an unlawful interference with the judicial process.

VI. Extended coverage of investitive or ceremonial proceedings at variance with these guidelines may be authorized by the court.

VII. When extended coverage is permitted, all media representatives shall have equally the right to provide coverage. When extended coverage is to be provided by more than one media representative, the media collectively should designate one representative to coordinate with the court all matters dealing with extended coverage. Any pooling arrangements among the media required by the limitations and restrictions on equipment and personnel contained in these guidelines shall be the sole responsibility of the media and must be made in advance of the court proceedings to be covered. Judges and court personnel will not mediate any dispute as to the appropriate media representative or equipment authorized to cover a particular proceeding. If pooling arrangements cannot be made or if there are unresolved media disputes, the presiding judge may deny extended coverage of proceedings.

VIII. A. No more than two portable television cameras, each operated by no more than one camera person and positioned as unobtrusively as possible at locations approved by the court, shall be permitted to be physically in the courtroom. Only television equipment which does not produce light or distracting sound will be permitted. Videotape recording equipment which is not a component part of a television camera shall, whenever possible, be located in an area outside the courtroom.

B. No artificial lighting device of any kind shall be employed in connection with the television camera. With the approval of the court, modifications and additions to existing courtroom lighting may be made provided such modifications or additions are installed and maintained without public expense. Multiple video/audio feeds may be permitted but must be provided by a video/audio distribution system, furnished by the media, located outside the courtroom.

IX. A. No more than one still photographer, using not more than two still cameras with not more than two lenses for each camera without flash or other artificial light, shall be permitted to be physically in the courtroom. Still cameras must not produce distracting sound and should produce no greater sound than the

Leica M Series Rangefinder camera. Motorized film advance systems will not be permitted.

B. The photographer shall be positioned in a place designated by the presiding judge and remain in that area except when the proceeding is in recess. Changing of lenses or film will only be done during a recess.

X. Only one audio system for radio broadcast purposes will be permitted in the courtroom. Audio pickup should be made from existing audio systems in the courtroom whenever possible. If no technically suitable audio system exists in the courtroom, microphones and related wiring shall be permitted but must be unobtrusive and located in places designated in advance by the presiding judge. Multiple radio feeds rather than a pooling system may be permitted but must be provided by an audio distribution system, provided by the media, located outside the courtroom.

XI. When extended media coverage is authorized, individual journalists may bring tape recorders into the courtroom and use them to record proceedings so long as they do not cause any distraction. Journalists using tape recorders may sit at any place in the audience portion of the courtroom, but must keep their tape recorder on their person at all times. Changing of tape cassettes during proceedings is not permitted and should only be done during a recess.

XII. All camera and audio equipment must be in position at least 15 minutes before the start of the proceedings and can only be moved or removed after the proceedings are over or during a recess. Television camera persons and still photographers must remain in their designated area and are not permitted to move about the courtroom. Television cameras and radio broadcast equipment, once in position, may not be moved during the proceedings. Movement by television and still photographers should be held to a minimum and in no way should be distracting or call undue attention to the operators.

XIII. Camera and audio equipment authorized by these guidelines shall not be operated during a recess in a court proceeding. Extended coverage in the judicial area of a courthouse or other court facility is limited to proceedings in the courtroom in the presence of the presiding judge.

XIV. The dignity and decorum of the court must be maintained at all times during extended media coverage activities. Court customs, including appropriate dress, must be followed.

XV. The confidentiality of the attorney/client relationship must be protected. Therefore, there will be no audio recording, radio, television, or tape-recording, made or broadcast of any conference between attorneys and their clients, between co-counsel of a client, between counsel and the presiding judge when held at the bench, or of proceedings held in chambers. No parabolic microphones shall be used.

[Added April 23, 1985. Amended and effective June 3, 1993.]