

# Articles

## THE DUKE LACROSSE MATTER AS A CASE STUDY OF THE RIGHT TO REPLY TO PREJUDICIAL PRETRIAL EXTRAJUDICIAL PUBLICITY UNDER RULE 3.6(c)

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## INTRODUCTION

The ABA's Standing Committee on Ethics and Professional Responsibility published for public comment the current version of Model Rule of Professional Conduct 3.6(c) at their February 1994 meeting.<sup>1</sup> At the subsequent August 1994 annual meeting, the Standing Committee presented a complete report to the ABA's House of Delegates, but it was clear that the recommendation was jointly created by the Standing Committee and the ABA's Criminal Justice Section.<sup>2</sup> Designed to clarify the constitutionality issues raised in *Gentile v. Nevada State Bar*,<sup>3</sup> the ABA approved Rule 3.6(c), along with other revisions to Rule 3.6 and Rule 3.8, by voice vote at the August 1994 ABA meeting.<sup>4</sup> Although adopted at one of the "quieter [ABA] annual meetings in recent memory,"<sup>5</sup> the amendments were clouded by fears that "the media circus surrounding the

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1. See Standing Comm. on Ethics and Prof'l Responsibility, 119 (1) ABA ANN. REP. 111 (1994) [hereinafter ABA ANN. REP.] (setting forth rule for public discussion). The current version of Model Rule of Professional Conduct 3.6(c) is as follows:

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.

STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS 278 (Aspen Publishers 2007). Paragraph (a), Rule 3.6(a) of the Model Rules of Professional Conduct, is as follows:

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.

*Id.*

2. See ABA ANN. REP., *supra* note 1, at 30. For a complete report and background information on the new Rule 3.6(c), see *id.* at 31.

3. See 501 U.S. 1030 (1991) (holding Nevada disciplinary rule void for vagueness).

4. See GILLERS & SIMON, *supra* note 1, at 280-83 (explaining manner in which ABA amended Rule 3.6).

5. Laura Duncan, *ABA to Lobby for Gun Ban, Child Protection*, CHI. DAILY L. BULL., Aug. 10, 1994, at 1 (highlighting relatively sedate nature of 1994 meeting).

[then-pending] O.J. Simpson [criminal] case could be a glimpse of the future of high-profile prosecutions.”<sup>6</sup> The U.S. Attorney for the Western District of Michigan, for example, proposed elimination of part (c) of Rule 3.6 because, as written, the new rule would permit “trial in the media.”<sup>7</sup>

Under the new standard, Rule 3.6(c) permits a lawyer to make a statement, even a statement substantially likely to materially prejudice a fair trial, if:

- The statement protects a client;
- From the “substantial undue prejudicial effect of recent publicity;”
- Provided neither the client nor lawyer initiated that publicity;
- And provided further that the statement protecting the client is limited to information necessary to mitigate the adverse publicity.<sup>8</sup>

The principal question that the new rule presents is whether Rule 3.6(c) expands “the adversarial relationship that is a key to the American judicial system . . . to reach outside the courtroom?”<sup>9</sup> This expansion, in turn, would recognize the public forum “as a proper arena where the attorneys’ duty to zealously defend their clients remains paramount.”<sup>10</sup>

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6. Christopher Kilbourne, *Change May Loosen Lawyers’ Gag Rules*, N.J. RECORD, Sept. 7, 1994, at A1. One former U.S. attorney, now in private defense practice, indicated that criminal defense counsel would feel obligated to respond to virtually any comment by the prosecution. *See id.* Nicole Brown Simpson and Ronald Goldman were murdered on June 12, 1994. *See Chronology of O.J. Simpson Trials*, <http://www.law.umkc.edu/faculty/projects/ftrials/Simpson/Simpsonchron.html> (last visited March 30, 2008). The funerals for both were held on June 16. *See id.* On June 17, O.J. Simpson led police on the famous “low speed” chase through the streets of Los Angeles. *See id.* He was taken into custody upon return to his home. *See id.* On July 8, 1994, a preliminary hearing found enough evidence to allow the case to go forward. *See id.* While the ABA Meeting was in progress, on July 22, O.J. pleaded “absolutely 100 percent not guilty.” *See id.* The same day that Judge Lance Ito was appointed to hear the case. *See id.*

7. *See* ABA ANN. REP., *supra* note 1, at 31. A representative of the Criminal Justice Section, however, argued that Rule 3.6(c) permitted “only statements that are limited to such information as is necessary to mitigate recent adverse publicity.” *Id.*

8. MODEL RULES OF PROF’L CONDUCT R. 3.6(c) (2007). “When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding.” GILLERS & SIMON, *supra* note 1, at 280.

9. John C. Watson, *Litigation Public Relations: The Lawyers’ Duty to Balance News Coverage of Their Clients*, 7 COMM. POLY 77, 98 (2002).

10. *Id.* In *Heffernan v. Hunter*, the court noted that in making extra-judicial comments about a case, the attorney was “acting within the scope of his representa-

Lawyer reaction to the new rule was predictable. “Critics of the rule change raised the spectacle of the O.J. Simpson case, warning that lawyers in other high-profile cases are likely to mount similar media campaigns.”<sup>11</sup> There was further concern “that the rule . . . could intensify conflicts between prosecutors and defense lawyers.”<sup>12</sup> A federal prosecutor apparently claimed that the new rule “would create ‘a right of reply free-for-all, with press releases begetting press releases.’”<sup>13</sup> On the other hand, “[s]upporters of the measure said the change was needed to give defense lawyers an equal footing with prosecutors, who are allowed to conduct news conferences” when arrests are made or indictments returned.<sup>14</sup> The new rule would permit lawyers to respond to adverse publicity “even from proper comments by prosecutors.”<sup>15</sup>

Scholars, too, were mixed in reviewing the new provision, with detractors claiming the new rule would authorize virtually unlimited public comment, so long as it was responsive. “Given the widespread media coverage of high-profile cases, ranging from general news reports to in-depth television talk shows to the unbridled commentary now provided via the internet,” almost anything would be permissive commentary.<sup>16</sup> Speaking in plainer terms, another commentator indicated that the ABA had “thrown the baby out with the bath water,” noting that the rule would provide those attorneys who wanted to litigate in the press “an aegis protecting them from professional sanction.”<sup>17</sup> Others, however, called the new rule “necessary and important” because it provides “lawyers with a means of

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tion” thus suggesting that attorneys do have some sort of obligation to zealously advocate in the press. 189 F.3d 405, 413 (3d Cir. 1999). Further, the court stated that “[w]hether the chosen means were ethical or appropriate is a separate issue” and suggested that even unethical conduct by an attorney could be within the scope of the attorney’s duties to the client. *Id.*

11. Christopher Kilbourne, *ABA Votes to Ease Rule on Lawyers’ Statements*, N.J. Record, Aug. 11, 1994, at A27 (noting concerns of attorneys that new rule will enable cases to be waged through media).

12. David Behrens, *Rules on Trial Publicity Tightening by Bar Association Expected*, NEWSDAY, Aug. 10, 1994, at A08 (identifying specific conflicts contemplated by critics of rule).

13. Watson, *supra* note 9, at 97.

14. Kilbourne, *supra* note 11, at A27. “[T]he right of reply provision can be seen as ‘a recognition of other influences’ affecting the balance between the right to a fair trial and First Amendment rights to free speech.” Behrens, *supra* note 12.

15. Watson, *supra* note 9, at 97.

16. Lonnie T. Brown, Jr., *May it Please the Camera . . . I Mean the Court – an Intrajudicial Solution to an Extrajudicial Problem*, 39 GA. L. REV. 83, 109-11 (2004) (addressing how high profile cases are increasingly being waged in “court of public opinion”).

17. Christopher A. Brown, *The Worsening Problem of Trial Publicity: Is “New” Model Rule 3.6 Solution or Surrender?*, 29 IND. L. REV. 379, 387 (1995) (addressing

countering recent” publicity prejudicial to the lawyer’s client.<sup>18</sup> For example, the judge in the first World Trade Center bombing did not issue a gag order until after a month of heavy press coverage of the potential evidence in the case.<sup>19</sup> After a month of heavy press coverage, the prejudice to the client from the adverse publicity would, necessarily, be impossible to cure.

Since its 1994 adoption, few cases have presented as good a case study of Rule 3.6(c) as the case involving the alleged rape of an exotic dancer by members of the Duke University lacrosse team in the spring of 2006. This article attempts to conduct such a case study by first looking at the historical background of the Rule. Next, the article will review the Duke case itself, consider public comments in the case, and finally, assess if the public comment was more than necessary under the rule. From this analysis, the article attempts to delineate a standard for the future assessment of comments under Rule 3.6(c).

RULE 3.6(c): AN OUTGROWTH OF *GENTILE V. STATE  
BAR OF NEVADA*.<sup>20</sup>

Public comment at the time suggested that Rule 3.6(c) arose in the shadow of the O.J. Simpson trial. Indeed, the Rule was concerned about “the fairness of the trial-before-the-trial – the trial in the press.”<sup>21</sup> In actuality, however, the rule itself was the product of another criminal case, the 1991 Supreme Court decision in *Gentile v. State Bar of Nevada*.<sup>22</sup>

In *Gentile*, Las Vegas police reported that a large amount of cocaine and negotiable traveler’s checks were missing from a vault at Western Vault Corporation, a security company.<sup>23</sup> The drugs and checks were used by police as part of an undercover opera-

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varying standards employed by state courts to deal with emergent problem of trial publicity).

18. Esther Berkowitz-Caballero, *In the Aftermath of Gentile: Reconsidering the Efficacy of Trial Publicity Rules*, 68 N.Y.U. L. REV. 494, 539-40 (1993) (exploring beneficial aspects of rule’s amendment).

19. *See id.* at 501 n.40 (noting that gag order was later overturned by court of appeals).

20. 501 U.S. 1030 (1991). *See also* Standing Comm. on Ethics & Prof’l Responsibility, 119(2) ABA ANN. REP., 30 (1994). The scribe for the ABA meeting wrote that the rule “came about as a result of the Supreme Court decision in the Janteel (sic) case.” *Id.*

21. Behrens, *supra* note 12, at A08.

22. 501 U.S. 1030 (1991).

23. *See id.* at 1039 (noting police discovery that four kilograms of cocaine and approximately \$300,000 in traveler’s checks were missing)

tion.<sup>24</sup> Despite the fact that two police officers had regular access to the vault containing the drugs and money, and despite the fact that these officers were not required to sign in or out of the vault, press reports indicated that these officers were not considered as viable suspects in the disappearance.<sup>25</sup> Over the course of the next year, media reports increasingly indicated confidence in the police officers in question and further indicated that other vault holders had reported money missing.<sup>26</sup> As the investigation continued, the media, which had once reported that Western Vault and its owner, Grady Sanders, were cooperating with police, began to report that suspicion was focusing on Sanders and Western Vault.<sup>27</sup> The media also claimed that a relationship existed between Grady Sanders and one of the targets of a police undercover operation.<sup>28</sup> Eventually, investigators said that both of the police officers who had easy access to the vault had been “cleared” of any possible wrongdoing.<sup>29</sup> This came after the subject officers passed a lie detector test, a test which, reports stated, Sanders had been unwilling to take.<sup>30</sup> In all, there were some seventeen pre-indictment articles in major local newspapers about the theft at Western Vault.<sup>31</sup>

Approximately one year after the announcement of the missing drugs and money, Western Vault principal Grady Sanders was indicted in connection with the matter.<sup>32</sup> Dominic Gentile, a Las Vegas criminal defense attorney, learned about the indictment of his client, Sanders, in advance and called a press conference shortly

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24. *See id.* at 1039-40 (“The drugs and money had been used as part of an undercover operation conducted by Metro’s Intelligence Bureau.”).

25. *See id.* at 1039-40 (“Instead, investigators focused upon Western Vault and its owner.”).

26. *See id.* at 1040 (noting that one safety deposit box customer reportedly claimed that his \$90,000 life savings had been stolen). The police claimed that they found an unexplainable amount of \$264,900 when they searched the vaults, listed by Western, as not rented. *See id.*

27. *See id.* at 1040 (“Initial press reports stated that Sanders and Western Vault were being cooperative; but as time went on, the press noted that the police investigation had failed to identify the culprit and through a process of elimination was beginning to point toward Sanders.”).

28. *See id.* (following changing story in press).

29. *Id.*

30. *See id.* at 1041 (“The story took a more sensational turn with reports that the two police suspects had been cleared by police investigators after passing lie detector tests.”).

31. *See id.* at 1041-42 (clarifying extent of media coverage concerning case). There were “at least 17 articles in the major local newspapers.” *Id.* at 1042.

32. *See id.* at 1044 (“Upon return of the indictment, the court set a trial date for August 1988, some six months in the future.”).

thereafter.<sup>33</sup> At the press conference, Gentile "made a prepared statement . . . and then responded to questions."<sup>34</sup> As noted by the Court, neither the press conference nor the written statement was the product of inadvertence or neglect by Gentile: "He did not blunder into a press conference, but acted with considerable deliberation."<sup>35</sup> In fact, Gentile's purpose was to blunt the impact of negative "information being released by the police and prosecutors, in particular the repeated press reports about polygraph tests and the fact that the two police officers were no longer suspects."<sup>36</sup>

At trial approximately six months after this press conference, a jury acquitted Gentile's client.<sup>37</sup> The Nevada Bar, however, then accused Gentile of violating Nevada's version of Rule 3.6.<sup>38</sup> A disciplinary hearing found that Gentile violated the rule, and the disciplinary panel recommended a private reprimand.<sup>39</sup> Gentile appealed to the Nevada Supreme Court, which affirmed the disciplinary finding.<sup>40</sup> Gentile petitioned for review to the United States Supreme Court, and the Court granted his request.<sup>41</sup>

The Supreme Court decided that the standard used to judge extrajudicial speech, in Nevada and, by analogy, under Rule 3.6, was constitutionally permissible.<sup>42</sup> However, the Court also found that the application of that standard to Gentile specifically was im-

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33. *See id.* at 1033 ("Hours after his client was indicted on criminal charges, petitioner Gentile, who is a member of the Bar of the State of Nevada, held a press conference."). *See also id.* at 1042 (explaining Gentile's actions in holding press conference on behalf of his client).

34. *Id.* at 1033. For the trial transcript of Gentile's statements, see APPENDIX A of this article.

35. *See id.* at 1042 (noting that Gentile had never before called press conference in his entire career).

36. *Id.*

37. *See id.* at 1033 ("Some six months later, the criminal case was tried to a jury and the client was acquitted on all counts.").

38. *See id.* (describing subsequent disciplinary action against Gentile).

39. *See id.* (reviewing disciplinary proceedings and results).

40. *See Gentile v. State Bar of Nev.*, 787 P.2d 386, 386 (Nev. 1990). "Clear and convincing evidence supports the conclusion that appellant knew or reasonably should have known that his comments had a substantial likelihood of materially prejudicing the adjudication of his client's case." *Id.* at 387. The court considered the comments made at the press conference and all comments made about the credibility of the police. *See id.*

41. *See Gentile v. State Bar of Nev.*, 498 U.S. 1023, 1023 (1991) (granting Gentile's writ of certiorari).

42. *See Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1075 (1991) ("We agree with the majority of the States that the 'substantial likelihood of material prejudice' standard constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials.").

permissible.<sup>43</sup> There were two distinct rulings, each by a different majority.<sup>44</sup> In Part II of the majority opinion, Chief Justice Rehnquist traced the history of the ethical rules dealing with attorney comment on trial.<sup>45</sup> He concluded that the standard applied by the Nevada Supreme Court - that attorneys could be disciplined if their pretrial speech "will have a substantial likelihood of materially prejudicing an adjudicative proceeding"<sup>46</sup> - was facially constitutional under the First Amendment.<sup>47</sup> Justice O'Connor joined this portion of Chief Justice Rehnquist's opinion, thereby creating a majority.<sup>48</sup>

Justice Kennedy, however, in an opinion joined by three different members of the Court as well as Justice O'Connor,<sup>49</sup> found constitutionally vague the application of the Nevada rule to Gentile's case.<sup>50</sup> Specifically, Nevada's rule contained an exception allowing attorney comment concerning "[t]he general nature of the claim or defense."<sup>51</sup> Justice Kennedy noted that prosecutors told the press that the case against Sanders and Western Vault was "legitimate" and that the state could only bring the case if it could "prove the charges . . . beyond a reasonable doubt."<sup>52</sup> Additionally, the police department told the press that the two officers who had been linked to the disappearances at Western Vault were "above reproach," and "dedicated to honest law enforcement."<sup>53</sup> As Justice

43. *See id.* at 1058 (reversing Supreme Court of Nevada).

44. *See id.* at 1032 ("Justice Kennedy announced the judgment of the Court and delivered the opinion of the Court with respect to Parts III and VI."). "Chief Justice Rehnquist delivered the opinion of the Court with respect to Part I and II." *Id.* at 1062. Justice O'Connor cast the deciding vote by joining Justice Rehnquist's opinion in Parts I and II of the case and Justice Kennedy's opinion in Parts III and VI of the case. *See id.* at 1082 (O'Connor, J., concurring).

45. *See id.* at 1066-68 (detailing historical evolution of ethical standards of legal profession, particularly in regard to trial proceedings and First Amendment).

46. *Id.* at 1033.

47. *See id.* at 1065, 1075 (rejecting Gentile's argument that he could only be disciplined if his speech violated more stringent "clear and present danger" test of *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976)).

48. *See id.* at 1082 (O'Connor, J., concurring) (asserting that "a State may regulate speech by lawyers representing clients in pending cases more readily than it may regulate the press").

49. *See id.* at 1032 (joining Justice Kennedy were Justices Marshall, Blackmun, Stevens and O'Connor).

50. *See id.* at 1048 (arguing that "the Rule is void for vagueness, in any event, for its safe harbor provision, Rule 177(3), misled petitioner into thinking that he could give his press conference without fear of discipline").

51. *Id.* at 1061. Rule 177(3) was identical in form to the then-existing ABA Rule of Professional Conduct 3.6(c). *Id.*

52. *Id.* at 1046.

53. *Id.*

Kennedy noted, these statements were not likely to prejudice a fair trial for Sanders and Western Vault, but “given the repetitive publicity from the police investigation, it is difficult to come to any conclusion but that the [publicity] balance remained in favor of the prosecution.”<sup>54</sup> Gentile’s actions, then, while intentional, were designed to stem this “wave of publicity” being fed to potential jurors in the case.<sup>55</sup> Application of the Nevada rules to Gentile in this case, therefore, was unfair because the comments to the press were “necessary to protect the rights of [his] client and prevent abuse of the court.”<sup>56</sup>

Thus, it was almost certainly the concern of Justice Kennedy that the then-existing Nevada rule, allowing an attorney to publicly reveal “the general nature of the claim or defense,”<sup>57</sup> was a constitutionally vague trap for the unwary that led to a more specific ABA Rule of Professional Conduct 3.6(c).<sup>58</sup> Indeed, it was that “constitutionally vague trap” that the 1994 amendment sought to correct.<sup>59</sup>

#### JUDICIAL INTERPRETATION OF RULE 3.6(c)

Despite fears that disciplinary and quasi-disciplinary cases against defense counsel would rise after *Gentile*, remarkably few cases have discussed the right of reply contained in Rule 3.6(c).<sup>60</sup> Indeed, rather than chastise attorneys for comment, the cases have mostly recognized the obvious: that the 1994 post-*Gentile* version of Rule 3.6(c) provides attorneys with a right of reply.

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54. *Id.*

55. *See id.* at 1043, 1049 (noting that Court reprinted much of Gentile’s press conference as evidence that Gentile understood rules of ethics and was not willing to idly speculate about matters that could substantially prejudice fair trial).

56. *Id.* at 1058. A Connecticut Bar committee read *Gentile* as expanding the safe harbor provisions of then-existing ABA Rule of Professional Conduct 3.6(c) (now Rule 3.6(b)). Conn. Bar Ass’n Comm. on Prof’l Ethics, Informal Op. 99-3 (1999). The Connecticut Bar committee interpreted the provisions of then-existing Rule 3.6(c) to be “examples of possible permissive speech” to be used as a “guidepost” by the attorney interested in making extrajudicial comment. *Id.*

57. *Gentile*, 501 U.S. at 1061.

58. *See id.* at 1054-55 (citing empirical evidence suggesting that juries are generally able to disregard pretrial publicity and, instead, base their verdict on trial evidence).

59. *See* GILLERS & SIMON, *supra* note 1, at 280-83 (explaining rationale behind amendment of Rule 3.6).

60. *See* Berkowitz-Caballero, *supra* note 18, at 498 n.31 (“The exact number of disciplinary cases against lawyers for violations of trial publicity rules is not known because disciplinary proceedings are confidential.”). The author goes on to argue that the lower the constitutional standard is useful in assessing the permissibility of extrajudicial comments, the more lawyer speech is likely to be stifled. *See id.* at 498-99.

In *United States v. Oakley*, a criminal defense attorney sought permission from a Tennessee federal district court to publicly attempt to negate the prejudice perceived by the attorney from government “leaks” in the case.<sup>61</sup> At the time, the local federal court rule did not permit such comment.<sup>62</sup> In granting the defense counsel’s motion, the court reasoned that because Tennessee lawyers were allowed to make such comments under Rule 3.6(c), lawyers in Tennessee federal courts were thereby allowed to do the same.<sup>63</sup>

An unreported case from Delaware, *Conley v. Chaffinch*, also concerned an attorney’s response to purportedly “leaked” information.<sup>64</sup> Delaware State Police Captain Barbara Conley sued the Delaware State Police and her supervisors on grounds of alleged gender discrimination.<sup>65</sup> One element at issue in *Conley* was the leak of Conley’s confidential personnel file to the press.<sup>66</sup> In response, Conley’s lawyers told the press: “The law is the law. I don’t care what they said, they violated it. Now they have to be held accountable.”<sup>67</sup> In denying the defendants’ subsequent motion for an order to limit pretrial publicity, the court found the statements made by Conley’s attorneys to be within the right of reply provision of Rule 3.6(c).<sup>68</sup>

In *Devine v. Robinson*, a case dealing more extensively with the new Rule 3.6(c), the plaintiffs, a group of prosecutors from Illinois,

61. No. 3:07-CR-88, 2007 WL 2123907, at \*1 (E.D. Tenn. July 20, 2007).

62. *See id.* at \*2 (“Mr. Oakley’s motion concerns application of LR 83.2, which does not provide for the statements that may fall within the purview of Rule 3.6(c), above.”).

63. *See id.* (granting motion). The court found that “[t]o the extent [the local court rule] is more restrictive than the Rules of Professional Conduct adopted by the Supreme Court of Tennessee, counsel . . . are relieved from compliance with the more restrictive local rule.” *Id.*

64. *See* No. 04-1394-GMS, 2005 WL 2678954, at \*2 (D. Del. Mar. 4, 2005) (involving statements made by plaintiff’s counsel which defendants considered “a calculated effort to influence the outcome of [the] plaintiff’s lawsuit through manipulation of the media accounts of the litigation.” (citing defendants’ position)).

65. *See id.* at \*1 (reviewing background of lawsuit).

66. *See id.* at \*2 (“[S]omeone allegedly released an email containing her confidential Internal Affairs file to a Delaware newspaper . . .”).

67. *Id.*

68. *See id.* (noting that court found other statements made by plaintiff’s attorneys to either be constitutionally protected criticism of potential government misconduct or not posing “a substantial likelihood of material prejudice” to jury). *Conley v. Chaffinch*, of course, was a civil case. A civil case tried to a jury is likely to be “less sensitive” to extrajudicial speech than a criminal case. *See* GILLERS & SIMON, *supra* note 1, at 279-80 (detailing Comment [6] of ABA Model Rule of Professional Conduct Rule 3.6).

challenged the facial constitutional validity of Rules 3.6 and 3.8.<sup>69</sup> Rules 3.6 and 3.8, both adopted after the Supreme Court's ruling in *Gentile*, impose specific duties on prosecutors.<sup>70</sup> The prosecutors argued that the right of reply portion of Rule 3.6(c)<sup>71</sup> was "irrational, unfair, and foster[ed] a 'chilling effect' because it permits one side unbridled freedom . . . to respond to adverse publicity."<sup>72</sup> The court, however, found that the rule applied to all lawyers, not just prosecutors, and found that it was no more than a "shield" allowing a lawyer to protect a client from negative publicity, not a "sword" to damage the opposition.<sup>73</sup>

As these cases indicate, there are no real exemplars from which to develop a standard for when the right of reply can be used or the extent of that reply. The extrajudicial comments of the lawyers in the Duke case may help. Before examining these comments, a review of the facts surrounding the Duke case is necessary.

#### THE FACTS OF THE DUKE CASE

It was spring break at Duke University, but members of the nation's number two-ranked NCAA Division I college lacrosse team remained on the campus.<sup>74</sup> In prior years, the team's members had spent part of spring break at the alcohol-serving "Teaser's Men's Club," but because some of the players were not old enough to frequent bars, members of the team decided to hire strippers.<sup>75</sup> As a result, during the afternoon of March 13, 2006, Dan Flannery, one of three members of the Duke University lacrosse team who lived in rental property located at 610 North Buchanan Boulevard, called a Durham escort service.<sup>76</sup> Flannery placed an order with the escort

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69. See 131 F. Supp. 2d 963, 964 (N.D. Ill. 2001) (arguing that Rules "chill speech and are vague and overbroad").

70. See *id.* at 965-66 (explaining that ABA amended Model Rules to meet concerns articulated in *Gentile*).

71. See *id.* at 966 (noting that ABA Rule 3.6(c) was actually Rule 3.6(d) under Illinois' version of rule).

72. *Id.* at 970.

73. See *id.* at 970 (determining intent of Illinois rules). The court ultimately dismissed the case because the plaintiffs had not shown any likelihood of imminent prosecution under the rule. See *id.* at 972-73.

74. See Duff Wilson & Jonathan D. Glater, *Files From Duke Rape Case Give Details but No Answers*, N.Y. TIMES, Aug. 25, 2006, at A1 (stating that lacrosse team stayed on campus "to practice and party").

75. See *id.* (exploring details of night that incident took place).

76. See Summary of Conclusions, Att'y Gen. of N.C., Nos. 06 CRS 4332-4336, 5582-5583, available at [http://www.newsobserver.com/content/news/crime\\_safety/duke\\_lacrosse/20070427\\_AGreport.pdf](http://www.newsobserver.com/content/news/crime_safety/duke_lacrosse/20070427_AGreport.pdf) at 5 [hereinafter *Final Duke Report*] (describing events leading to hiring of exotic dancers who performed at Duke lacrosse team party).

service using the false name “Dan Flanigan.”<sup>77</sup> He asked for “two white dancers” to arrive at the Buchanan Boulevard address at 11:30 p.m.<sup>78</sup>

Two women, possibly from different escort services, were sent to the house.<sup>79</sup> One dancer arrived before the other and waited for about thirty minutes before the second dancer arrived.<sup>80</sup> The second dancer would later become the accuser.<sup>81</sup> Indeed, Dan Flannery called the escort service three times after 11:00 p.m. inquiring as to the whereabouts of the second dancer.<sup>82</sup> When the second dancer, the accuser, was finally dropped off at the house, she was “unsteady” on her feet.<sup>83</sup> She was “wearing a negligee and shiny white strappy high heels.”<sup>84</sup> The accuser met up with the other dancer, and the two women used the restroom to prepare for their dance.<sup>85</sup> While the women were in the restroom, there was discussion among the lacrosse players about the fact that the women were not white, as had been requested.<sup>86</sup> The players elected to continue with these two dancers and paid them each \$400.<sup>87</sup>

Neither woman expected to perform for forty men; each expected they would be working a bachelor party.<sup>88</sup> The accuser was

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77. See Wilson & Glater, *supra* note 74, at A1 (noting Flannery’s use of pseudonym).

78. See *Final Duke Report*, *supra* note 76, at 5 (detailing Flannery’s request of dancers from escort service); see also Duff Wilson & Juliet Macur, *Call to Escort Service Began a Night of Trouble at Duke*, N.Y. TIMES, Apr. 23, 2006, at Sec. 1 [hereinafter *Call to Escort Service*] (elaborating on specifics of night in question).

79. See Samiha Khanna, *Mother, Dancer, Accuser*, NEWS & OBSERVER (Raleigh, N.C.), Apr. 16, 2006, <http://www.newsobserver.com/news/durham/durham/story/429338.html> (explaining that one dancer was “sent by a second escort service”). The official report only indicates, however, that “[t]he escort service arranged for two dancers.” *Final Duke Report*, *supra* note 76, at 5. All of the sources agree that the women had not previously met. See Wilson & Glater, *supra* note 74, at A1.

80. See *Final Duke Report*, *supra* note 76, at 5 (describing events immediately leading up to party where alleged rape occurred).

81. See *id.* (explaining order of dancers’ arrivals).

82. See *id.* (demonstrating Flannery’s eagerness regarding dancer’s arrival).

83. See *id.* (mentioning apparent intoxication of second dancer).

84. *Call to Escort Service*, *supra* note 78, at Sec. 1.

85. See *id.* (noting how accuser and other dancer, Kim Roberts, met up and entered house through back door).

86. See *Final Duke Report*, *supra* note 76, at 5 (revealing players’ reactions to escort service sending African American dancers rather than Caucasian dancers).

87. See *id.* (describing resolution of issue as to whether African American dancers were acceptable in absence of Caucasian dancers).

88. See *id.* (indicating surprise of dancers upon discovering they were expected to perform for approximately forty men). The accuser indicated that she thought she was being asked to dance for about five men and was surprised when “she found herself surrounded by more than 40.” Samiha Khanna & Anne Blythe,

a twenty-seven year-old North Carolina Central student and a single mother.<sup>89</sup> She “was a stripper, not a prostitute,” and worked “flexible hours” at a strip club and an escort service.<sup>90</sup> The accuser later told police that after the dancers began to perform in the master bedroom of the house, the players “started to get excited and aggressive.”<sup>91</sup> Throughout her dancing, the accuser appeared to be unsteady.<sup>92</sup> Durham District Attorney Michael Nifong (“District Attorney Nifong”) later said that one of the lacrosse team members asked the women: “Did you bring any sex toys?”<sup>93</sup> A negative answer by the women brought the response: “That’s OK, we’ll just use a broom.”<sup>94</sup> This comment resulted in an argument between the women and the players.<sup>95</sup> The women then stopped dancing and went to another part of the house.<sup>96</sup>

At this point, the story diverges from later findings by the North Carolina Attorney General.<sup>97</sup> The accuser claimed that the two dancers were separated and that she was pulled into a bathroom by party-goers “Adam” and “Matt.”<sup>98</sup> The door to the bathroom was closed and someone told the accuser “sweetheart, you can’t leave,” and thereafter, “Adam,” “Matt,” and “Bret” “force fully [sic] held her legs and arms and sexually assaulted her anally, vaginally and orally.”<sup>99</sup> The woman said that “she was hit, kicked

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*Dancer Gives Details of Ordeal*, NEWS & OBSERVER (Raleigh, N.C.), Mar. 25, 2006, <http://www.newsobserver.com/news/durham/story/421799.html>.

89. See *Call to Escort Service*, *supra* note 78, at Sec. 1 (identifying background of claimant).

90. See Wilson & Glater, *supra* note 74, at A1 (containing many facts from interviews of parties that provided details to final police report).

91. *Attachment for Application for Search Warrant, In the Matter of: 610 N. Buchanan Blvd., Durham, NC 27701*, <http://www.thesmokinggun.com/archive/0329061duke4.html> (last visited Mar. 30, 2008).

92. See *Final Duke Report*, *supra* note 76, at 5 (describing, at one point during her dancing, she “fell to the ground”).

93. Susannah Meadows & Evan Thomas, *A Troubled Spring at Duke*, NEWSWEEK, Apr. 10, 2006, available at <http://www.newsweek.com/id/45921> (describing specifics of statements made by partiers, as alleged by claimant).

94. *Id.*

95. See *id.* (describing interaction between women and accused).

96. See *Final Duke Report*, *supra* note 76, at 6 (exposing problem in accuser’s story when police found evidence that Seligmann and Finnerty had left party when dancers went into bathroom).

97. See *id.* at 6-8 (pointing to discrepancies between accuser’s story and later established findings). For the statements of the Final Report, see *infra* APPENDIX B.

98. See *id.* at 10 (pointing to one example of story diverging from later findings).

99. *Id.*

and strangled [and] sexually assaulted for an approximate 30 minute time period by the three males.”<sup>100</sup>

Three days later, on March 16, Durham police showed the accuser pictures of twenty-four members of the Duke lacrosse team.<sup>101</sup> At that time, two days after she reported the incident, the accuser was not able to identify any of the members of the team as one of the attackers, but was able to say, with 70% certainty that Reade Seligmann “was at the party, although she could not recall where she saw him.”<sup>102</sup>

Five days later, on March 21, the accuser was shown an additional twelve photographs of lacrosse team members, one of whom was David Evans.<sup>103</sup> While she looked at all of the photographs twice, the accuser was not able to identify any of the individuals as one of her attackers.<sup>104</sup>

The Durham police then converted the photographs into a PowerPoint presentation and, on April 4, 2006, displayed this presentation to the accuser.<sup>105</sup> She was shown each player’s photograph alone, not in an array, and was told that she was viewing pictures of people that the police believed had been at the party.<sup>106</sup> She identified Reade Seligmann, with 100% certainty, as a person who forced her to have oral sex and Collin Finnerty as a person who forced her to have sex vaginally and anally.<sup>107</sup> She indicated that she was 90% sure that David Evans was the third person in the bathroom; he looked “just like” the third person, but “without the mustache.”<sup>108</sup>

Less than two weeks later, on April 17, 2006, Reade Seligmann and Collin Finnerty were each indicted on charges of Forcible

100. *Attachment for Application of Search Warrant, supra* note 91. The Final Report refers to the third male as “Brett.” *See Final Duke Report, supra* note 76, at 10.

101. *See Final Duke Report, supra* note 76, at 10 (describing process of identifying accused).

102. *Id.*

103. *See id.* (pointing to second time accuser was shown pictures of Duke lacrosse team by police).

104. *See id.* (failing to identify Evans even though she saw his picture twice).

105. *See id.* (describing third time accuser was shown pictures by police).

106. *See id.* (explaining procedure used by police to show accuser pictures of lacrosse team).

107. *See id.* (identifying two Duke lacrosse players as raping her that night).

108. *See id.* (identifying third Duke lacrosse team member as being at party). Later investigation determined that Evans was not in attendance. *See id.* The Durham Chief of Police suggests a slightly different version of these facts. Letter from Steven W. Chalmers, Chief of Police to Patrick W. Baker, City Manager, City of Durham, May 5, 2007. For the portion of Chief Steven W. Chalmers’ report to the Mayor and City Council detailing the photographic reviews, see *infra* APPENDIX C.

Rape, First Degree Sexual Offense, and First Degree Kidnapping.<sup>109</sup> Even prior to the indictments, on April 12, District Attorney Nifong moved to seal the indictments against both players alleging that because they were from New York and New Jersey, respectively, and because of their “lack of long-term ties to the Durham community and the severity of the punishment,” the two student athletes posed a “substantial risk” of flight.<sup>110</sup> David Evans was indicted on the same charges on May 15, 2006.<sup>111</sup>

#### THE BEGINNINGS OF THE MEDIA INVOLVEMENT

For the media, the case began as a back page or police blotter story on the Saturday following the Monday incident. The *Raleigh News & Observer* reported that Durham police were investigating “a report of a rape . . . near the Duke University campus.”<sup>112</sup> “A young woman told police she visited 610 N. Buchanan Blvd. about 11:30 p.m. Monday [March 13, 2006] and was assaulted by three men. . . .”<sup>113</sup> The following day, the public learned that the incident took place at “a party” attended by approximately thirty people said to be “a mix of college students and nonstudents.”<sup>114</sup> As of March 24, 2006, the investigation was focused on the Duke University lacrosse team, with the local media reporting that “[a]ll but one member of the team [had] reported to the Durham police crime lab . . . to be photographed and ‘to provide identifying information,’” including DNA samples.<sup>115</sup>

#### THE DUKE CASE AND EXTRAJUDICIAL COMMENT

While generalization is rarely true, extrajudicial comment about the Duke case nonetheless fell into four general categories:

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109. See *Duke Rape Indictment*, <http://www.thesmokinggun.com/archive/0418061duke1.html> (citing charges that Finnerty and Seligmann received).

110. See *id.* (explaining Nifong’s reasons for sealing indictments).

111. See Shaila Dewan, *3rd Duke Lacrosse Player Is Indicted in Rape Case*, N.Y. TIMES, May 16, 2006, at A5 (reporting on indictment of third and final Duke player).

112. *Woman Reports Sexual Assault*, NEWS & OBSERVER (Raleigh, N.C.), May 18, 2006, at B6.

113. *Id.*

114. *Alleged Rape Was at a Party, Police Said*, NEWS & OBSERVER (Raleigh, N.C.), Mar. 19, 2006, at B6.

115. *DNA Tests Ordered for Duke Athletes*, NEWS & OBSERVER (Raleigh, N.C.), Mar. 24, 2006, at A1. It was not explained why the remaining player on the lacrosse team was not part of the group of students reporting to police. See *id.* (pointing out that one member of lacrosse team did not have to report to police based on race).

1. Comments concerning whether a (serious) crime took place;
2. Comments concerning stonewalling or silence by team members - either about the events themselves or about team members' role(s) in them;
3. Comments concerning the character (or lack thereof) of the lacrosse players and the lacrosse team;
4. Comments concerning alleged racial overtones in the case.

The purpose, here, is not to determine if any of these comments would, or could, be admissible in a trial on the merits. Nor is the purpose to determine if any of the comments violate Rule 3.6(a), (b), or (d) in "having a substantial likelihood of materially prejudicing an adjudicative proceeding."<sup>116</sup> Nor is the purpose to review every story written or produced about the Duke case. Instead, the purpose here is to review the tenor of the comments as they were published primarily in one local paper, one national paper, and one national news media, then to review the responses to those comments in an attempt to determine if a reasonable lawyer would believe the responses necessary to protect the client from prejudice. If they are necessary, then further review is needed to determine if the comments provided more information than was needed to mitigate the prejudice.<sup>117</sup>

Finally, in dealing with these extrajudicial statements, one should not be concerned about the exact chronology of the events. As was the case in *Gentile*, where the lawyer's press conference analyzed the evidence in a more "closing argument" style,<sup>118</sup> one should be concerned with the "story" prospective jurors heard between the time of the alleged event and the end of April, 2006.<sup>119</sup>

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116. MODEL RULES OF PROF'L CONDUCT R. 3.6(a) (2002). Some of the statements by District Attorney Nifong were the subject of ethics charges against him. For a further discussion of the offenses charged against Nifong, see *infra* notes 310-12 and accompanying text.

117. See MODEL RULES OF PROF'L CONDUCT R. 3.6(c) (2002) (pointing to next step of review).

118. See *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1059 (1991) (including defense attorney's attempt to exonerate his client by giving statement in similar manner as he would to jury).

119. See James R.P. Ogloff & Neil Vidmar, *The Impact of Pretrial Publicity on Jurors: A Study to Compare the Relative Effects of Television and Print Media in a Child Sex Abuse Case*, 18 LAW AND HUMAN BEHAVIOR, 507, 510 (1994) (explaining that pretrial publicity can have "a substantial impact on the public's perceptions" of facts in highly publicized cases).

## COMMENTS ABOUT THE ALLEGED CRIME: THE STATE'S SIDE

As the story of a party at a home rented to Duke lacrosse players began to unfold, police made it clear that they were dealing with a “serious crime.”<sup>120</sup> The accuser made a public appearance, “struggling not to cry, as she recounted the events of the early hours of March 14. . . . [A Durham Police Officer] emphasized the seriousness of the accusations – first-degree rape, kidnapping, assault by strangulation and robbery.”<sup>121</sup>

Within days, media informed the public that the alleged attack had taken place in a bathroom, from which the men blocked her exit, and that the victim lost three fingernails from clawing or scratching at the arms of one of her attackers.<sup>122</sup> The story became even more depraved: “the accuser reported that one of the men raised a broomstick in the air and said he was going to molest her with it. The women, frightened, left after that . . . although they returned later and were separated.”<sup>123</sup> The men, who would not identify themselves by name, but only by jersey number, and who alleged they were members of the baseball or track team, then raped one of the women “for about 30 minutes.”<sup>124</sup>

According to the news, medical authorities appeared to corroborate the accusations. A media report indicated that an affidavit supporting a search warrant in the case indicated that the accuser “was examined by a forensic sexual assault nurse and a physician”

120. See generally *Statement by Richard H. Brodhead on Indictments in Lacrosse Case*, [http://www.dukenews.duke.edu/2006/04/Brodhead\\_indict\\_statement.html](http://www.dukenews.duke.edu/2006/04/Brodhead_indict_statement.html) (last visited Apr. 12, 2008) (mentioning severe nature of charges against players).

121. Khanna & Blythe, *supra* note 88, at A1. The Durham police officer’s statement must now be considered curious, at best. Apparently around the same time the police were making this statement to the press, they were also telling Duke officials something completely different. See *Duke Told Case Would ‘Blow Over’*, WASH. POST, May 9, 2006, at E2 (expressing to Duke that accuser was not credible). For example, on May 9, 2006, *The Washington Post* reported that:

Duke underestimated the rape allegations against members of the lacrosse team in part because Durham police initially said the accuser “kept changing her story and was not credible,” according to a university report . . . . The day [following the alleged incident] Durham police told campus officers that “this will blow over,” the report said. It said that the woman initially told police she was raped by 20 white men, then said she was attacked by three.

Police told the Duke officers that if any charges were filed, “they would be no more than misdemeanors,” the report said.

*Id.*

122. See *Final Duke Report*, *supra* note 76, at 12-13 (describing events of attack as demonstrated through evidence).

123. Duff Wilson & Viv Bernstein, *Duke Cancels Season and Initiates Critiques*, N.Y. TIMES, Apr. 6, 2006, at D1.

124. See *id.* (describing specifics of claimant’s allegations).

near the time of the alleged attack.<sup>125</sup> “Medical records and interviews that were obtained by a subpoena revealed the victim had signs, symptoms, and injuries consistent with being raped and sexually assaulted vaginally and anally.”<sup>126</sup> Her physical injuries matched her “emotional behavior [which was] consistent with going through a traumatic experience.”<sup>127</sup>

By the end of March 2006, authorities were able to say that they “were building a solid case that disputed the team’s contention that no sexual assault had occurred.”<sup>128</sup> The fact that a crime took place was a recurring theme of District Attorney Nifong. On March 29, March 31, April 3, April 10, April 17, and April 23, news accounts from various media quoted or reported that District Attorney Nifong believed either that a rape occurred or that the woman’s physical condition convinced him that a sexual assault took place.<sup>129</sup> This was coupled with ongoing stories about the investiga-

125. *Id.*

126. *Id.*

127. See Rick Lyman & Joe Drape, *Duke Players Practice While Scrutiny Builds*, N.Y. TIMES, Mar. 30, 2006, at D1 (supporting District Attorney Nifong’s comments that evidence was building against players).

128. *Id.*

129. See Ames Alexander, Sharif Durhams & David Perlmutter, *No Match Found in Duke DNA Tests*, CHARLOTTE OBSERVER, Apr. 10, 2006 [hereinafter *Duke DNA Tests*] (quoting Nifong, “I believe a sexual assault took place . . .”). The article also states that “Nifong . . . has said he believes physical evidence shows a rape occurred.” *Id.*; see also Ames Alexander, Sharif Durhams & David Perlmutter, *Two Duke Players Indicted in Rape Case*, CHARLOTTE OBSERVER, Apr. 17, 2006 [hereinafter *Two Duke Players Indicted*] (“Nifong has said he believes the woman was raped. Nurses who examined the woman found injuries consistent with a sexual assault, he has noted.”); see also CNN Live (CNN television broadcast Mar. 29, 2006) (quoting Carol Costello, CNN Correspondent, “Forty-six players have been swabbed for DNA. And Durham’s district attorney is awaiting the lab results. He says he believes a rape did occur and that soon the students will start talking.”); see also Joe Drape, *Lawyers for Lacrosse Players Dispute Accusations*, N.Y. TIMES, Mar. 31, 2006, at D1 (“Nifong, who is in a heated race for re-election in May, said Wednesday that the case was based on more than DNA evidence. He has repeatedly said that he believes a sexual assault occurred, and he challenged team members to come forward with information.”); see also *Duke Suspends Team in Wake of Rape Allegation*, WASH. POST, Mar. 29, 2006, at E2 [hereinafter *Duke Suspends Team*] (quoting Nifong as saying: “I feel pretty confident that a rape occurred.”); see also Mark Johnson, *DA Aims to File Charges in Duke Case by End of Semester*, CHARLOTTE OBSERVER, Apr. 3, 2006 (“Nifong said he is convinced a sexual assault took place. A Duke University Medical Center nurse who specializes in such cases examined the woman and found injuries consistent with a sexual assault.”); see also Mark Johnson & Kytja Weir, *Lawyers for Duke Team Lash Out at DA, ‘Lynch-Mob Mentality,’* CHARLOTTE OBSERVER, Mar. 31, 2006 (“Nifong, who did not return several phone calls Thursday, has said he believes a sexual assault occurred, citing bruising on the woman that he said appears consistent with a sexual assault . . .”); see also Wilson & Macur, *supra* note 78, at A1 (“Mr. Nifong says a sexual assault occurred, based on hospital records and the account of the accuser, who is black.”).

tion, including a search of a second house, as well as the fact that the woman's fingernails were recovered, along with her purse.<sup>130</sup> At the house where the party took place, police found "a stack of \$20 bills consistent with the woman's statement that \$400 in cash was taken from her purse after the attack."<sup>131</sup>

When the members of the Duke lacrosse team indicated that no attack took place, as evidenced by the absence of DNA evidence, Durham authorities, including District Attorney Nifong, dismissed these remarks. "I would not be surprised if condoms were used," Nifong said in an interview. . . . "Probably an exotic dancer would not be your first choice for unprotected sex."<sup>132</sup> Indeed, as questions arose concerning the allegations, District Attorney Nifong stood by the accuser indicating both that his investigation would continue and that he believed her story.<sup>133</sup>

Even when DNA evidence failed to link Duke lacrosse players to the accuser, information about the crime continued to be reported. "New DNA testing has revealed a possible link between a Duke University lacrosse player and a woman who accuses team members of raping her, several news outlets reported . . . ."<sup>134</sup> The extent of the match was not much of a concern to the media which noted only that the DNA "might match the DNA of a player who was at the mid-March party where the woman says she was raped by three white men."<sup>135</sup> Further, the media reported that "[a] male pubic hair also has been linked to the case. . . . The newspaper's sources didn't specify where the hair was found, but did say the hair came from a white man."<sup>136</sup>

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130. See Drape, *supra* note 129, at D1 (finding of fingernails and purse were consistent with accuser's account of attack).

131. *Id.*

132. *Duke DNA Tests*, *supra* note 129; see also, Lyman & Drape, *supra* note 127, at D1.

133. See *Duke DNA Tests*, *supra* note 129; see also Liz Clark & Joe Holley, *Lawyers: Assault Evidence Lacking: DNA Tests on Duke Player Are Cited*, WASH. POST, Apr. 11, 2006, at E1 (reporting that Nifong did not think case was "over," and warned defense counsel not to expect end of matter: "If that's what they expect, they will be sadly disappointed."). Nifong reportedly made these statements at a "candidates forum."

134. Eric Frazier & David Perlmutter, *Reports Say DNA link Possible for Third Duke Lacrosse Player*, CHARLOTTE OBSERVER, May 11, 2006.

135. *Id.*

136. *Id.*

The Herald-Sun said scientists concluded that the tissue came from the same genetic pool and was consistent with the "bodily makeup" of one of the 46 white players. The newspaper said that because a complete DNA pattern was not obtained from the tissue, it didn't provide a 100 percent match.

Finally, the media attributed specific statements to the accuser herself:

In an interview with MSNBC's Rita Cosby aired Monday night, the accuser's father said his daughter had positively identified her three attackers as members of the lacrosse team.

Father: "And she ID'd them through the mug shot."

Cosby: "Was she able to ID all three?"

Father: "Yes."

Cosby: "Positively?"

Father: "Yes."

Cosby: "No doubt in her mind it was those three?"

Father: "No, no doubt in her mind, she says those were three that did it."<sup>137</sup>

#### COMMENTS ABOUT THE ALLEGED CRIME: THE DEFENSE SIDE

By the end of March 2006, lawyers for the Duke lacrosse players responded to the allegations against the players. On numerous occasions, the players or their lawyers denied that any sexual misconduct took place,<sup>138</sup> or that any of the players were ever "alone with" the accuser.<sup>139</sup>

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*Id.* Further, no DNA could be recovered from the pubic hair because it did not have a root. *See id.*

137. Johnson, *supra* note 129; *see also Two Duke Players Indicted, supra* note 129 (stating that second dancer believed claims made by accuser).

In an MSNBC interview aired Monday, [the other] dancer who accompanied the woman the night of the party said she, too believed the allegations. "I can't imagine that a woman would do that to herself if she didn't feel like it was worth doing it," said the second dancer, who wasn't identified. "And the only reason it would be worth doing it is if she was raped. So, I have no reason to believe she was lying."

*Id.*

138. *See* Ames Alexander, *Duke Lacrosse Defense Lawyers Say Timeline is Solidified for Client*, CHARLOTTE OBSERVER, Apr. 20, 2006 (quoting Mr. Osborn, "I don't believe a crime occurred, but if it did, [Mr. Seligmann] couldn't possibly have been there."); *see also* Drape, *supra* note 129, at D1 ("Lawyers for the players said Thursday that all of the team members denied that a sexual assault took place."); *see also Two Duke Players Indicted, supra* note 129 ("The team's captains have maintained the sexual assault allegations are 'totally and transparently false.'"); Duff Wilson, *Lawyer Says Two Duke Lacrosse Players Are Indicted in Rape Case*, N.Y. TIMES, Apr. 18, 2006, at A1 (citing lawyer stating: "Today, two young men have been charged with crimes they did not commit."); *see also* Duff Wilson & Juliet Macur, *2 Duke Athletes Charged With Rape and Kidnapping*, N.Y. TIMES, Apr. 19, 2006, at A1 [hereinafter *2 Duke Athletes Charged*] (quoting Kirk Osborn, Seligmann's lawyer: "[Seligmann] is absolutely innocent and we intend to show that sooner rather than later.").

139. *See* Drape, *supra* note 129, at D1 (quoting defense lawyer's assertion: "no one was in the bathroom with the complainant. No one was alone with her.").

Additionally, the players' lawyers said on multiple occasions that their clients were "eager" for the results of DNA tests, claiming those results would "exonerate the team members."<sup>140</sup> When preliminary DNA test results were returned and supported the players' claim, their lawyers asked for dismissal of the charges: "'No charges should be brought; the investigation should be closed,' said Charlotte lawyer Pete Anderson, who represents one of the players. 'There's no scientific evidence to corroborate the allegations.'"<sup>141</sup> Another lawyer pointed out the extent of the absence of evidence, "No DNA material from any young man tested was present in the body of this complaining witness. . . . The DNA was not present within her body, not present on the surface of her body, and not on any of her belongings or articles of clothing."<sup>142</sup> The lawyers pointed out that it was District Attorney Nifong who sought the DNA testing, "a very extraordinary procedure."<sup>143</sup> Perhaps recalling the evidence about the alleged victim's loss of fingernails while clawing at the arms of one of the attackers, the lawyers said: "'There is no DNA evidence that shows any of those boys were touched by her fingernails,' [attorney Joe] Cheshire said." According to the

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140. Johnson & Weir, *supra* note 129. "[Senior team member Matt] Zash, [house resident Daniel] Flannery and the other captains — David Evans and Bret Thompson — issued a statement . . . saying that the DNA results would prove the allegations false . . . ." Drape, *supra* note 129.

141. *Duke DNA Tests*, *supra* note 129.

142. *Id.*

143. *See id.* (criticizing District Attorney Nifong's investigation); *see also Duke Lacrosse Team DNA Test Said Negative*, UPI NEWSTRACK, Apr. 10, 2006 (reporting defense attorneys' statement that "the tests may have cleared their clients of possible sexual assault charges."); *see also Lawyer: Lacrosse Players Pass 2nd DNA Test*, UPI NEWSTRACK, May 13, 2006 (quoting defense attorney as saying: "semen obtained from the accuser did indicate that she had sex with a non-Duke student."); *see also Nancy Grace* (CNN television broadcast Apr. 10, 2006) (featuring interview by Nancy Grace with Larry Kobilinsky, Forensic Scientist). Grace asked Kobilinsky about the absence of DNA evidence and the possibility of rape with condoms:

Grace: OK. Big and crucial question to forensic scientist Dr. Kobilinsky . . . . If condoms were used, would there be evidence of latex?

Kobilinsky: Well, it's not the latex that we look for. We look for the condom lubricant. Most condoms have some sort of lubrication, and we do have tests for that. Failure to find that would indicate that condoms were not used . . . .

Grace: [A]re you telling me that every time a condom is used, there will be lubricant result in the DNA results?

Kobilinsky: Well, no. What I'm saying is, is most condoms have lubrication, lubricants, and we have tests for those lubricants.

*Id.* Grace then asked a Durham local radio reporter if he knew if any tests had been run to determine the presence of such lubricants. *See id.* The local radio reporter responded: "According to defense attorneys, there was no trace of any condoms or lubricant from the DNA released today." *Id.*

attorneys, the only evidence left, then, of any sexual assault was “the word of this one complaining person.”<sup>144</sup>

The lawyers reiterated these positions after a second round of DNA testing, the results of which were, according to the players’ lawyers, “leaked” to the press, with incorrect information about a possible match to one player.<sup>145</sup> The lawyers held a press conference at that time to discuss the DNA results, and again reiterated that there was no positive match to any of the athletes.<sup>146</sup> “[T]here is no conclusive match of DNA,” attorney Joe Cheshire said.<sup>147</sup> Another lawyer said the same: “Once again, a DNA report indicated not a smattering, not a spider web of indication that there was any DNA from these boys.”<sup>148</sup> Responding to the fact that some DNA was found on a press-on fingernail taken from a trash can in the house where the party took place, the lawyers pointed out that the DNA was not a match for either of the players then indicted.<sup>149</sup> The lawyers also pointed out that it was the players themselves who took the fingernail from the trash can and turned it over to the police.<sup>150</sup> “It would be a real story if there was no DNA that could show some genetic strain of some of the Duke lacrosse players who

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144. Duff Wilson & Juliet Macur, *Lawyers for Duke Players Say DNA Evidence Clears the Team*, N.Y. TIMES, Apr. 11, 2006, at D1. To counter the claim that condoms might have been used, thereby eliminating any DNA from the accuser, one of the lawyers said:

Our experts tell us that the gang rape by three men would leave DNA material to be examined. Also the D.A. said in his filing with the court that DNA evidence would conclusively prove who was guilty and would also clear the innocent. I take him at his word. I think that’s a correct statement and I think this test clears these young men conclusively.

*Larry King Live* (CNN television broadcast Apr. 11, 2006); see also Clark & Holley, *supra* note 133 (quoting attorney who represented one of athletes, Joe Cheshire, evidence of rape “wasn’t here two weeks ago. It’s not here today. It won’t be here tomorrow. It won’t be here next year. No rape or sexual assault happened in that house, and this DNA report shows it loud and clear . . .”). The news of the absence of DNA “was met with suspicion by many in the African American community. . . . [S]aid Carl Kenney, a pastor with Compassion Ministries of Durham . . . ‘I knew this was going to happen. Black people never get justice.’” *Id.*

145. See *Nancy Grace* (CNN television broadcast May 12, 2006) (airing press conference live). For the text of the statement made at the press conference, see *infra* Appendix D.

146. See *id.* (disclosing there was no DNA match).

147. *Id.*

148. *Attorneys: DNA Bolsters Lacrosse Players’ Defense*, CNN.COM LAW CENTER, May 13, 2006, at <http://cnn.com/2006/LAW/05/12/duke.dna/index.html>. (quoting other player’s attorney concerning fact that no inculpatory DNA evidence had been recovered at scene).

149. See *id.* (“Cheshire said DNA was found on a plastic press-on fingernail, but the genetic material did not belong to either of the players who have been indicted.”).

150. See *id.* (illustrating players’ cooperation with investigation).

used that bathroom. . . . What a stunner that would be.”<sup>151</sup> According to a lawyer for one of the indicted players, this second round of testing “bolster[ed] his client’s assertion that he did not rape the dancer.”<sup>152</sup>

Lawyers for the players also questioned the prosecution’s timeline of the events. On March 30, 2006, for example, the press printed a story in which an attorney for one of the players living at 610 North Buchanan Boulevard “said her client was locked in his room watching ‘The Late Show with David Letterman’ at the time the woman said the incident took place.”<sup>153</sup> The lawyer indicated that her client would have heard “if something happened in the bathroom, he would have heard it in the three-bedroom house.”<sup>154</sup>

Moreover, lawyers and players questioned what the media published as “facts” about the case. By mid-April, for example, lawyers for the players indicated that there were “time-stamped” photographs, taken by several different people, that contradicted the story as presented by the accuser.<sup>155</sup> For example, these lawyers said:

The photographs showed that the accuser “had a cut on one of her knees, lacerations on the side of her foot and bruise marks” when she arrived at the house;

The photographs tended to show that the woman was “impaired,” perhaps by alcohol, at the time she arrived;

The photographs were taken during the time the woman said she was raped by three of the players;

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151. *Id.*

152. *Id.* According to attorney Joe Cheshire: “In other words, it appears this woman had sex with a male . . . . It also appears with certainty it wasn’t a Duke lacrosse player.” *Nation in Brief*, WASH. POST, May 13, 2006; see also Sharif Durhams, *Lacrosse Attorneys Say No Solid DNA Match to Players in 2nd Tests*, CHARLOTTE OBSERVER, May 12, 2006. According to defense counsel, the DNA analysis of the fake fingernail “is about as weak a DNA analysis as you could ever have.” Shaila Dewan, *3rd Duke Lacrosse Player Is Indicted in Rape Case*, N.Y. TIMES, May 16, 2006. The same story did reveal that “semen obtained from vaginal swabs of the accuser indicated that she had sex with a man who is not a Duke student. Cheshire would not identify that man, saying it would not be fair to him.” *Id.*

153. *Duke Lacrosse Investigation*, INSIDE LACROSSE.COM, March 31, 2006, at <http://www.insidelacrosse.com/print.cfm?pagerid=2&news=fdetail&storyid=118938> (presenting defense’s theory of night’s events).

154. Johnson & Weir, *supra* note 129. The lawyer said that the player, “a team captain . . . is upset. ‘He’s painted as a rapist. A liar. He’s led a model life up until this point and now all of a sudden his face has been slammed into a brick wall.’” *Id.*

155. See generally *Overview of Duke Lacrosse Scandal*, dukelacrosse.us, July 4, 2006, at <http://www.dukelacrosse.us/overview-of-duke-lacrosse-scandal/> (referring to significance of time-stamped photographs).

The photographs showed the two hired dancers performing for the players: “We . . . know [that the accuser] is not in any distress whatsoever because she’s smiling”;

At least some of the photographs were taken shortly before a “911” call to police. They showed “the accuser fumbling through her purse. Her negligee is ‘not disheveled or unbuttoned and not torn - not even close’”;

The photographs also showed team members helping the accuser into the other dancer’s car.<sup>156</sup>

As to at least two of the players, Collin Finnerty and Reade Seligmann, lawyers attempted to show that the players could not have committed any crime because they were not at the scene during the time period mentioned by the accuser. “[A] collection of evidence shows Finnerty and Seligmann weren’t at the party when the woman said she was assaulted.”<sup>157</sup> Lawyers alleged that the evidence to back up this claim would include “cell phone records, restaurant and ATM receipts, a photo of one of the players captured by a security camera and interviews of witnesses, including a cab driver.”<sup>158</sup> Particularly as to Reade Seligmann, according to the lawyers, the timeline of events was as follows:

12:00 midnight – the accuser was dancing in the house;  
 12:07 a.m., 12:09 a.m. and 12:11 a.m. – calls were made from Reade Seligmann’s cell phone;  
 12:14 a.m. Seligmann called a taxi;  
 12:19 a.m. Seligmann was picked up by the taxi;  
 12:24 a.m. Seligmann made a withdrawal from an ATM machine.<sup>159</sup>

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156. David Perlmutter & Shariff Durhams, *Players’ Lawyers Say Pictures Offer Timeline Countering Rape Report*, CHARLOTTE OBSERVER, Apr. 4, 2006. The lawyers said that the photographs “not only help to set the scene, a scene different that what has been described, but also create an appropriate timeline.” *Id.* The lawyers would later say: “These photographs corroborate the statement of all 46 of these young men. It’s very clear that the victim in this case came to the house with injuries to her.” *American Morning* (CNN television broadcast Apr. 11, 2006); see also *Two Duke Players Indicted*, *supra* note 129; see also Ames Alexander, Sharif Durhams & David Perlmutter, *Duke Lacrosse Attorneys Say They Have Evidence That Clears Clients*, CHARLOTTE OBSERVER, Apr. 19, 2006 [hereinafter *Evidence That Clears*].

157. *Evidence That Clears*, *supra* note 156.

158. *Id.*

159. *Id.* “[E]vidence that defense lawyers have collected so far makes it clear that the two students ‘could not have been where she says they were.’” Ames Alexander, Sharif Durhams & David Perlmutter, *Two Duke Players Arrested; Defense Says Athletes Not at Scene*, CHARLOTTE OBSERVER, Apr. 18, 2006 [hereinafter *Athletes Not at Scene*]. One of Seligmann’s lawyers stated: “The evidence will clearly show that

12:46 a.m. Seligmann's Duke ID indicated he entered his dormitory.<sup>160</sup>

After the indictment of team member David Evans, an article focused on the evidence in his case. Evans asserted his innocence and indicated: "You all have been told some fantastic lies and I look forward to watching them unravel in the weeks to come."<sup>161</sup> Evans' lawyer stated that he had requested a meeting with District Attorney Nifong, but was turned down.<sup>162</sup> "Never in my entire life has a prosecutor refused to look at evidence that I was willing to show him."<sup>163</sup> The lawyer indicated that he had forwarded a copy of a polygraph analysis done by a former FBI polygraph expert, but that District Attorney Nifong had not responded.<sup>164</sup> Again, the lawyer refuted the accuser's identification of Evans, during which she said that Evans looked like one of the attackers "without the mustache."<sup>165</sup> "Evans has never worn a mustache . . . photos of him shot a day before and a day after the party show him without one. . . . 'scores and scores' of people" would so testify.<sup>166</sup>

Finally, there was media coverage tending to discredit credibility of the accuser. The other dancer told a local media outlet that the accuser was "'definitely under some sort of substance' when she left the party. The lawyers then indicated that the woman was too impaired to perform more than a few minutes as an exotic dancer."<sup>167</sup> Additionally, media reported that the accuser had had

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there is no way he could have been at that place at that time . . . ." *Two Duke Athletes Charged*, *supra* note 138. The lawyer said that District Attorney Nifong showed little interest in Mr. Seligmann's alibi. *See id.*

160. *Call to Escort Service*, *supra* note 78. Finnerty, the lawyers allege, "was at a restaurant several blocks away when the women were dancing." *Id.*

161. David Perlmutter, Shariff Durhams & Eric Frazier, *3rd Lacrosse Player Indicted in Duke Rape Case Proclaims Innocence*, CHARLOTTE OBSERVER, May 15, 2006.

162. *See id.* (noting District Attorney Nifong's refusal to meet with defense attorneys).

163. *Id.*

164. *See id.* (stating that Evans had "asked police to administer a polygraph test, but they didn't.").

165. *See id.* (noting accuser "was 90 percent certain that Evans was one of the three men who attacked her.").

166. *Id.*

167. *Two Duke Players Indicted*, *supra* note 129. "Defense lawyers say the accuser was drunk when she arrived at the party, and fabricated the assault." *Call to Escort Service*, *supra* note 78. The statement by the other dancer led to release of a statement by a police officer who saw the woman soon after the party and said that "she was 'passed out drunk.'" *Officer Describes Woman in Duke Case as Drunk*, N.Y. TIMES, Apr. 14, 2006. This police conversation reportedly "took place about 1:30 a.m. on March 14, about five minutes after a grocery store security guard called 911 to report a woman in the parking lot who would not get out of a car. The police officer gave the dispatcher the police code for an intoxicated person." *Id.*

previous problems with the law. On April 11, media revealed that the accuser “stole a taxi of a man to whom she gave a lap dance . . . and led a sheriff’s deputy on a chase at more than 70 mph.”<sup>168</sup> Moreover, on April 28, media reported that about ten years previously, the accuser claimed that she had been the victim of another rape some thirteen years ago.<sup>169</sup> Charges were not filed as a result of that incident, although the local authorities did not know why.<sup>170</sup>

Another of the defense lawyers questioned the complaining witness’ credibility because of the time lapse between the incident and an identification of suspects.<sup>171</sup> According to this lawyer, the accuser “didn’t identify her alleged assailants until three or four weeks after the party when she reviewed photos of Duke lacrosse players.”<sup>172</sup>

Finally, lawyers attacked the accuser’s credibility by again pointing to the transcript of her photo lineup identification of David Evans. “[T]he woman said: ‘Well, if he had the mustache he was wearing that night, I would be 100 percent sure.’”<sup>173</sup> Other photographs of Mr. Evans would reveal that he did not have a mustache either before or after this event.<sup>174</sup>

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When asked if the woman needed medical help, the police officer reportedly said: “She’s breathing and appears to be fine. She’s not in distress. She’s just passed-out drunk.” *Id.*

168. Liz Clark & Joe Holley, *Lawyers: Assault Evidence Lacking: DNA Tests on Duke Player Are Cited*, WASH. POST, Apr. 11, 2006 (noting that accuser pleaded guilty to “misdemeanor counts of larceny, speeding to elude arrest, assault on a government official and driving while impaired.”).

169. *See CNN Live* (CNN television broadcast Apr. 28, 2006) (discussing fact that accuser had brought prior claims of rape). Relatives of the accuser stated that she did not report the earlier incident “out of fear for her safety.” *Duke Accuser Also Filed an Assault Complaint in 1996*, WASH. POST, Apr. 28, 2006. For District Attorney Nifong’s response to these allegations against the accuser, see *infra* APPENDIX E.

170. *See id.* (raising suspicion as to why alleged victim did not report previously alleged rape).

171. *See generally* Duff Wilson & Jonathan D. Glater, *Files From Duke Rape Case Give Details but No Answers* (enumerating defense attorneys’ complaints about prosecution’s investigation).

172. *Athletes Not at Scene*, *supra* note 159.

173. Sylvia Adcock & Anne Hull, *Bethesda Man Indicted in Duke Rape Case*, WASH. POST, May 16, 2006.

174. *See id.* (mentioning fact that alleged victim’s identification of Evans did not jibe with facts). David Evans graduated from Duke on Sunday and surrendered to authorities the following day. *See id.* He evidently knew during the graduation ceremony that his indictment was pending. *See id.* Evans was one of the Duke students who rented the house where the party was held. *See id.* His attorney, Joe Cheshire, repeated the facts that there was no DNA match with any of the Duke players and that there was a DNA match with an identifiable person who was not part of the team. Sylvia Adcock & Anne Hull, *Bethesda Man Indicted in Duke Rape Case*, WASH. POST, May 16, 2006. However, Cheshire noted that “DNA tests from a fake fingernail from the accuser show genetic material from ‘a number of

COMMENTS ABOUT STONEWALLING OR SILENCE BY THE PLAYERS:  
THE STATE'S SIDE

Early in the investigation, Durham authorities accused the players of establishing a "wall of silence": "authorities vowed to crack the team's wall of solidarity. 'We're asking someone from the lacrosse team to step forward,' Durham police [Corporal] David Addison said."<sup>175</sup>

The national media picked up on the lack of cooperation theme before the end of March 2006, with a prediction that the wall would collapse when the going got tougher for the players:

Carol Costello, CNN Correspondent: The question, which [members of the Duke lacrosse team are involved?] So far team members have refused to answer questions.

Unidentified Female: We want the members of the Duke lacrosse team to come clean. . . .

Mike Nifong, District Attorney: My guess is that some of this stone wall of silence that we have seen may tend to crumble once charges begin to come out.<sup>176</sup>

District Attorney Nifong continued to criticize the team, both for not having the courage to stop an attack or the courage to come forward with information.<sup>177</sup> District Attorney Nifong urged the lacrosse players to have "the human decency to call up and say, 'What am I doing covering up for a bunch of hooligans?'"<sup>178</sup> He indicated that he hoped at least one of the players who was not involved

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people' and show that Evans cannot be eliminated." *Id.* That same day, attorney Cheshire released the results of a polygraph examination conducted by a former FBI agent. See Sharif Durhams, *Lacrosse Player Facing Rape Charge Releases Polygraph Test*, CHARLOTTE OBSERVER, May 16, 2006. The results of the polygraph examination conclude that Evans was telling the truth when he said that neither he nor anyone else at the lacrosse party assaulted the accuser on the night in question. See *id.* "I passed it, absolutely," Evans said. "I have done nothing wrong." *Id.*

175. Khanna & Blythe, *supra* note 88 (describing Durham police's early request for members of lacrosse team to come forward with information about incident).

176. *CNN Live* (CNN television broadcast Mar. 29, 2006). "I feel pretty confident that a rape occurred," District Attorney Mike Nifong said." *Duke Suspends Team*, *supra* note 129.

177. See Viv Bernstein & Joe Drape, *Rape Allegations Against Athletes Is Roiling Duke*, N.Y. TIMES, Mar. 29, 2006 (noting District Attorney Nifong's grievances with players for not coming forward with information against their teammates).

178. Anne Blythe & Jane Stancil, *Duke Puts Lacrosse Games on Hold*, NEWS & OBSERVER (Raleigh, N.C.), Mar. 29, 2006. "We're talking about a situation where had somebody spoken up and said, 'Wait a minute, we can't do this,' this incident might not have taken place," Nifong said." Benjamin Niolet, *15 Players Had Prior Charges*, NEWS & OBSERVER (Raleigh, N.C.), Mar. 28, 2006.

would be “as horrified by [the incident] as the rest of us are.”<sup>179</sup> “I’m disappointed that no one has been enough of a man to come forward.”<sup>180</sup>

Soon, the alleged secrecy of the team created public outrage with “[m]any [in the Durham community being] angry about the team’s lack of cooperation and the university’s seemingly tepid response.”<sup>181</sup> Calling the party a “shameless dishonoring of women” and a “dishonor” to the university, one Raleigh editorial stated: “There are not sufficient words to describe the near-silence of the men’s lacrosse team and Duke University . . . .”<sup>182</sup>

Public outcry soon led to public scorn and stereotyping of the Duke lacrosse team:

I don’t know much about lacrosse. Maybe it only seems as if a team is not complete unless it features players named Chip, Carter, Biff and Gray. The monikers suggest khaki pants and wide-striped rugby shirts, late-night parties and late-morning lattes, good old frat boys having a good old frat-boy time. Now a woman emerges, saying members of the lacrosse team at Duke raped her two weeks ago. In the meantime, players appeared reluctant to assist in the investigation—a situation that reeked of rich-boy, frat-boy arrogance and entitlement.<sup>183</sup>

#### COMMENTS ABOUT STONEWALLING OR SILENCE BY THE PLAYERS: THE DEFENSE SIDE

By March 30, 2006, a little more than two weeks after the incident, lawyers for Duke players noted District Attorney Nifong’s claim that the players were “stonewalling” the investigation.<sup>184</sup> The lawyers denied this allegation, instead indicating that “the lacrosse

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179. *See id.* (citing District Attorney Nifong’s appeal to players to come forward with information).

180. Bernstein & Drape, *supra* note 177.

181. Lyman & Drape, *supra* note 127 (describing nascent dissatisfaction of Durham community concerning university’s inaction in dealing with controversy).

182. Editorial, *Cancel the Season*, NEWS & OBSERVER (Raleigh, N.C.), Mar. 29, 2006.

183. Tom Sorenson, *Time to Find the Truth in Duke Lacrosse Case*, CHARLOTTE OBSERVER, Mar. 30, 2006.

184. *See generally* Ann Blythe, *This Time, Rape Case Gets Muted Reaction*, NEWS & OBSERVER (Raleigh, N.C.), Feb. 21, 2007 (noting District Attorney Nifong’s dissatisfaction with players’ cooperation in investigation).

players have cooperated completely with investigators.”<sup>185</sup> In fact, attorneys for team co-captain Matt Zash, one of the students who lived in the house, “gave police a lengthy interview and written statement . . .”<sup>186</sup> According to his attorneys, Zash also “offered to take a polygraph test.”<sup>187</sup> Zash was reportedly told that such an examination “takes too long to set up, it’s too much trouble, and it is not admissible in court.”<sup>188</sup> According to both Zash’s and some of the other players’ lawyers, they shared information with the prosecution.<sup>189</sup> If no one was stepping forward with information, there was an easy answer. It was not because the players or the lawyers were stonewalling. “It [ ] [was] because no one was in the bathroom with the complainant. No one was alone with her. This didn’t happen. [The players] have no information to come forward with.”<sup>190</sup> By April 10, 2006, the players’ lawyers had turned around the stonewalling allegations.<sup>191</sup> For example, they indicated a desire to share the time-stamped photographs of the party with District Attorney Nifong because that would aid in establishing the correct version of the events.<sup>192</sup>

#### COMMENTS ABOUT THE CHARACTER OF THE PLAYERS: THE STATE’S SIDE

In addition to extrajudicial comments about the apparent “arrogance” of members of the lacrosse team in not revealing information about those involved in the alleged incident, within two weeks of the incident, comments arose suggesting that the players lacked character. On March 25, 2006, two weeks after the party and one week after a report of the incident first appeared in a Raleigh newspaper, neighbors of the house where the party took place indicated

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185. Johnson & Weir, *supra* note 129. “The lawyers added that the lacrosse players have cooperated completely with investigators, despite charges of stonewalling made by Durham County District Attorney Michael Nifong.” *Id.*

186. *Duke Lacrosse Investigation*, INSIDE LACROSSE.COM, March 31, 2006, at <http://www.insidelacrosse.com/print.cfm?pagerid=2&news=fdetail&storyid=118938> (describing one player’s efforts to assist investigation).

187. *Id.*

188. Drape, *supra* note 129.

189. *See id.* (refuting District Attorney Nifong’s allegations that players were not cooperating).

190. *Id.*

191. *See generally* Perlmutter & Durhams, *supra* note 156 (noting shifting of tide as players’ attorneys took offensive).

192. *See id.* (specifying instances of cooperation on behalf of players’ attorneys).

that they were “accustomed to hearing loud parties at the house.”<sup>193</sup> The property was described as one “where police stay busy, breaking up rowdy parties and rounding up minors suspected of underage drinking . . . .”<sup>194</sup> The same story then linked the players’ alleged misconduct to the study of a Duke law professor who was reported to have indicated that “violence against women is more prevalent among male athletes . . . and higher still among such ‘helmet’ sports as football, hockey and lacrosse.”<sup>195</sup> The University’s president created the impression that the behavior was “disgusting and disturbing.”<sup>196</sup>

Following up evidence of “rowdiness,” three days later, the media printed the “criminal” records of members of the lacrosse team, indicating that “about a third of the members of the Duke lacrosse team, under investigation in a reported gang rape, have been charged with misdemeanors stemming from drunken and disruptive behavior.”<sup>197</sup> Whether any such proceedings would be independently admissible in evidence did not prevent the media from then listing each of the offenses for which team members had been convicted.<sup>198</sup> This was followed the next day with the editorial comment: “Fingernails on the floor of the bathroom, scratches on faces, a neighbor overhearing the debauchery and racial slurs; there is no doubt that disgraceful behavior went on even without evidence of rape via DNA.”<sup>199</sup> The commentator then recommended that the Duke lacrosse team’s season be cancelled.<sup>200</sup>

By mid-April, not only had the media reported stories of the players’ other interactions with the law, but the media advised the public of difficulties the players had with University authorities: “In

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193. See *Woman Reports Sexual Assault*, NEWS & OBSERVER (Raleigh, N.C.), Mar. 18, 2006, at B6 (noting first newspaper to report incident); see also *911 Calls Lead the Police to Duke’s Lacrosse Team*, N.Y. TIMES, Mar. 30, 2006, at D6 (detailing timeline of events in case through March 29, 2006).

194. Khanna & Blythe, *supra* note 88.

195. *Id.*

196. Lyman & Drape, *supra* note 127 (noting statement by Duke President Richard H. Broadhead explaining that, although allegations were disgusting, students should wait until conclusion of investigation to pass judgment).

197. See Niolet, *supra* note 178 (specifying prior charges against each player). For the full text of the *News & Observer’s* listing of each player’s prior charges, see *infra* APPENDIX F.

198. See Niolet, *supra* note 178 (explaining that newspaper repeated fact that 15 players “had misdemeanor charges related to drunken and disruptive behavior” on March 29 and again on March 30).

199. See Editorial, *supra* note 118 (positing commentator’s belief that rape occurred as alleged).

200. See *id.* (stating commentator’s recommendations about cancelling lacrosse team’s season).

October, 2004, the University found that nearly half of the lacrosse team's members had come before the judicial affairs office. . . . Many of the violations involved alcohol consumption . . . ."<sup>201</sup> The Dean of Students reported that: "A significant number of students seemed to be engaging in disorderly, disruptive behavior," enough to prompt the athletic department to warn the lacrosse coach "that his team was 'under the microscope' and that players needed to improve their conduct."<sup>202</sup>

Finally, one member of the lacrosse team, Collin Finnerty, was singled out as having a prior arrest in Washington, D.C. the previous fall.<sup>203</sup> That arrest, it was alleged, involved an assault by Finnerty and two high school lacrosse teammates. The alleged victim in that matter told police that at 2:30 in the morning, "the men had 'punched him in the face and body, because he told them to stop calling him gay and other derogatory names.'"<sup>204</sup> It was further alleged "that the three men 'without provocation had attacked him, busting his lip and bruising his chin.'"<sup>205</sup> The alleged victim "was treated for minor injuries."<sup>206</sup>

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201. *See id.* (noting players' past indiscretions).

202. *Athletes Not at Scene*, *supra* note 159 (noting reactions to arrests from Duke campus and North Carolina Central campus, where accuser was student). The next day, a Duke resident assistant on the floor above many of the Duke lacrosse team players indicated that the players had a history of rowdiness, "drinking and shouting late into the night. This past fall, he was walking by the dorm when a plastic crate came flying out of a window past his head. One of the lacrosse players had thrown it, he said." *Evidence That Clears*, *supra* note 156. Since the incident became news, however, the resident assistant indicated that the players had been "much quieter." *See id.* The University confirmed its concerns about player conduct on May 2, 2006. *See Duke Panel Says Team Should Play Next Season*, WASH. POST, May 2, 2006. A University committee noted that the lacrosse team had a history of alcohol-related problems. *See id.* "A large number of the members of the team have been socially irresponsible when under the influence of alcohol." *Id.* Problems associated with campus rape were the subject of a lengthy article on April 28, 2006. *See Ames Alexander & Adam Bell, Campus Rapes Often Not Reported*, CHARLOTTE OBSERVER, April 28, 2006. District Attorney Nifong is quoted as saying that "he has recently received letters from two former Duke students who said they were sexually assaulted by other students but chose not to report it because the public scorn they would receive outweighed any benefits." *Id.* In one of the later paragraphs of the story, it is noted: "Many hope the Duke case will lead to fewer rapes and better reporting." *Id.*

203. *See generally* Steve Wieberg & Jack Carey, *Two Players Arrested in Duke Lacrosse Case*, USA TODAY, Apr. 19, 2006 (highlighting fact that Finnerty had prior record).

204. Juliet Macur, *Amid Scrutiny at Duke, Details Emerge of '05 Assault*, N.Y. TIMES, Apr. 5, 2006 (providing details concerning Finnerty's prior arrest).

205. *Id.*

206. *Id.*

Probably the most damning media statement came on April 5, 2006 when the media published an email by one of the lacrosse players, complete with syntax and spelling errors:

‘To whom it may concern  
 ‘tommrow night, after tonights show, ive decided to have some strippers over to edens 2c. all are welcome. . however there will be no nudity. I plan on killing the bitches as soon as they walk in and proceeding to cut their skin off.’<sup>207</sup>

COMMENTS ABOUT THE CHARACTER OF THE PLAYERS:  
 THE DEFENSE SIDE

On March 30, 2006, while the alleged rape was still under investigation, *The New York Times* printed an article in which “Rev. Luke L. Travers, headmaster of Delbarton School . . . described the five alumni who are members of the Duke lacrosse team as good athletes with the intelligence to succeed at Duke . . . .”<sup>208</sup> The article then mentioned that the Duke lacrosse team included “26 players from New York, New Jersey and Connecticut high schools,” and then gave Rev. Travers’ opinion that “[t]hese are wonderful boys from wonderful families.”<sup>209</sup>

These comments, of course, were not by lawyers. Initially, lawyers for the players remained silent.<sup>210</sup> Once public comment by others began to criticize the morals of the team players, the lawyers became involved: “[Reade Seligmann] is just an honorable kid, never did anything wrong in his life,” said his lawyer, Kirk Osborne.<sup>211</sup>

Thereafter, the media reported on two of the three young men charged in the case. On April 26, 2006, CNN’s Paula Zahn ran a piece featuring Reade Seligmann and how he coped with these charges.<sup>212</sup> His lawyer indicated that he had turned to the Bible,

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207. *Email Shocker In Duke Lacrosse Case*, CBS News, Apr. 6, 2006.

208. Lyman & Drape, *supra* note 127. Reade Seligmann’s father is also quoted in this article: “It’s unfortunate, but it will all be resolved positively very shortly . . . .” *Id.*

209. *Id.*

210. *See id.* (noting players’ attorneys’ reluctance to speak).

211. Wilson & Macur, *supra* note 144 (describing players’ attorneys’ efforts to clear their clients’ good names, after they had been sullied by previous media reports).

212. *See Paula Zahn Now* (CNN television broadcast Apr. 26, 2006) (including statement by Seligmann’s lawyer that his client was not at party during time of alleged crime). As to Collin Finnerty, an article about him appeared in the *Char-*

particularly the “Book of Job, a man who had everything but was forced to suffer to prove his faith.”<sup>213</sup> Seligmann’s friends described him as “kind and outgoing,” “a great guy” with character.<sup>214</sup> He was not seen as the type of person who would commit rape. The mayor of his hometown said “Reade is an upstanding citizen, a good man. He’s - I’ve known Reade since probably he was six or seven-years-old.”<sup>215</sup>

Following the indictment of David Evans on May 15, 2006, an article focused mainly on the prosecution’s case against him.<sup>216</sup> The article also discussed Evans’ personal life, attempting to make him a victim.<sup>217</sup> His lawyer said that “Evans was supposed to be experiencing the best months of his life. . . . [H]e’d just graduated with a ‘very high’ grade average; he was to start a job. . . . ‘Obviously . . . [a]ll the plans he had for his life are on hold.’”<sup>218</sup>

Again, the most damning comment concerning the character of the players was the hate-filled email sent by one of the team members, indicating that the author was going to “kill” strippers and “cut their skins off.”<sup>219</sup> Lawyers for the players did not deny this email but said instead that the email “supports team members who said they hired dancers, but the women left the party early. . . .”<sup>220</sup> “Attorney Joe Cheshire said that ‘while the wording of [the email] is, at best, unfortunate, . . . this e-mail and . . . other e-

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*lotte Observer* on April 25. See Tim Funk, *Duke Lacrosse Player Must Stand Trial in Washington Case*, CHARLOTTE OBSERVER, Apr. 25, 2006. The article indicated that, as a result of being charged in the Duke case, Finnerty would have to defend assault charges in Washington, D.C. because the events at Duke negated a diversion program arrangement in D.C. See *id.* Finnerty’s attorney in the D.C. case, however, was quick to put a positive spin on that case indicating that the case was one alleging simple assault and saying other media reports “grossly mischaracterized” the charges which, according to this lawyer, did not involve any allegations characterizing the event as a hate crime. See *id.* See also *Paula Zahn Now* (CNN television broadcast Apr. 25, 2006) (repeating similar story).

213. *Paula Zahn Now* (CNN television broadcast Apr. 26, 2006).

214. *Id.*

215. *Id.*

216. See Frazier & Perlmutter, *supra* note 134 (reporting results of new DNA testing).

217. See Perlmutter, Durhams & Frazier, *supra* note 161 (focusing on personal consequences of indictment).

218. *Id.*

219. See *Email Shocker In Duke Lacrosse Case*, *supra* note 207 (exhibiting contents of email).

220. *Id.*

mails that exist contemporaneous with these events, [make it] quite clear that no rape happened in that house.’”<sup>221</sup>

#### COMMENTS WITH RACIAL CONNOTATIONS: THE STATE’S SIDE

Extrajudicial comments suggesting a racial component to the case began in late March 2006 with the release of a “911” call from an unidentified woman on the night of the incident as well as another “911” call from a grocery store thirty minutes later that brought police to the alleged victim.<sup>222</sup> “I saw them come all out like a big frat house. And me and my black girlfriend are walking by. And they called us (INAUDIBLE).”<sup>223</sup> “I’m just so angry I didn’t know who to call.”<sup>224</sup> These facts quickly highlighted the fact that while “the accuser is black, a mother and a student at North Carolina Central; the Duke lacrosse team is virtually all white . . . .”<sup>225</sup> “It’s bringing simmering racial tensions in the city of Durham to a boil . . . .”<sup>226</sup>

District Attorney Nifong picked up on this tension, indicating that same day that he was taking over the case himself because of “the combination of gang-like rape activity accompanied by the racial slurs and general racial hostility.”<sup>227</sup> District Attorney Nifong would follow this comment with a later one: “I am not going to allow Durham’s view in the mind of the world to be a bunch of lacrosse players from Duke raping a black girl in Durham.”<sup>228</sup> The

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221. *Duke Coach Resigns, School Cancels Season*, WASH. POST, Apr. 6, 2006 (explaining defense attorney’s argument that email alone should not be basis for finding players guilty).

222. See *CNN Live*, *supra* note 169 (explaining how racial concerns came into play).

223. *CNN Live*, *supra* note 129. The Durham police tried to identify this caller and issued a plea for help the following day. See Lyman & Drape, *supra* note 127, at D1. The woman told police that she lived in the neighborhood and correctly gave the address of the house where the Duke lacrosse players were having their party. See *id.* She said that “she was passing the house where the party was going on and was cursed at by at least one man standing in front of it.” *Id.* “‘We don’t know who she is and would like to talk to her,’ Kammie Michael, a spokeswoman for the Durham Police Department, said.” *Id.* “While the public outcry in this college town of 210,000 residents over this incident was channeled into the Take Back the Night march, signs of uneasiness were everywhere. The community is disturbed by the violent nature of the alleged attack and its racial overtones.” *Id.*

224. Lyman & Drape, *supra* note 127.

225. *Id.*

226. *CNN Live*, *supra* note 169.

227. Bernstein & Drape, *supra* note 177 (illustrating District Attorney Nifong’s emphasis on underlying racial issue, which motivated him to take greater control over case).

228. Sam Mellinger, *Duke Lacrosse Scandal: Old Wounds and Exaggerations Collide: Taking Back Durham*, KAN.CITY. STAR, June 11, 2006. As the media spotlight

case was said to have sparked deep racial tension in the Durham community.<sup>229</sup>

#### COMMENTS WITH RACIAL CONNOTATIONS: THE DEFENSE SIDE

Perhaps recognizing that almost nothing could undo the racial overtones of the case, lawyers for the Duke lacrosse players largely ignored the issue, instead concentrating their efforts on showing there was no crime. This tactic was consistent with their apparent theory of the case: “This case is not about race.”<sup>230</sup>

The one area where the lawyers did comment on race concerned the allegations made by the “911” caller to the Durham police the night of the party.<sup>231</sup> Acknowledging that the transcript of

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dims and life gets back to normal, the city tries to dispel perceptions of a strife-torn community divided along racial lines. *See id.* This report indicated that Durham’s population was 44% black and 45% white. *See id.*

229. *See Duke Divided Over Alleged Rape, CNN Live* (CNN television broadcast Apr. 5, 2006) (examining case’s impact on Durham community). “African American leaders in this shaken community issued a statement here . . . demanding that lawyers representing Duke University lacrosse players involved in a rape investigation not vilify the accuser.” Duff Wilson, *Blacks Call For Calm In Duke Rape Case*, N.Y. TIMES, Apr. 7, 2006. “‘We are in the midst of a community and legal crisis,’ said the joint statement, which was issued by six local and state N.A.A.C.P. ministerial and community groups.” *Id.*

230. Ruth Sheehan, *Race Has a Place in Duke Case*, NEWS & OBSERVER (Raleigh, N.C.), May 18, 2006. The author criticizes attorney Joe Cheshire, arguing: “This case is about race because the slur-slipping . . . is the one allegation that defense attorneys have not disputed.” *Id.* The article states that drunkenness is not an excuse for racial slurs; the case is about race both because of the way African-Americans have been treated in the United States and because “some people cannot believe nice boys from upper-crust homes could commit a crime against what talking heads such as Rush Limbaugh and Tucker Carlson have the dubbed the ‘ho’ or ‘crypto-hooker.’” *See id.* Civil Rights activist Jesse Jackson stated that he doubted the players’ innocence and announced that the Rainbow/PUSH coalition would provide a college scholarship to the accuser. Allen G. Breed, *Race Heats Up Duke Probe Mayor Says Durham Is Not Plagued with Racial Tension*, FORT WAYNE J. GAZETTE, Apr. 17, 2006. The article suggests that perhaps Jackson felt the crime was “particularly horrible because . . . white men hired black women to strip for them.” *Id.* Attorney Cheshire disagreed with Jackson’s understanding: “There is no slave-master mentality here, and that’s just another perfect example of . . . self-absorbed race pandering.” *Id.* Cheshire indicated that the players neither asked for nor knew that they had hired black women. *See id.*

231. Drape, *supra* note 129. The most likely scenario is that this call did take place and that it was made by the non-accusing dancer. Both *The Final Duke Report* and *The New York Times* reported that the other dancer said she made the call. Wilson & Glater, *supra* note 74, at A1; *see also Final Duke Report, supra* note 76, at 8. She told *The New York Times* that she made the call because “[s]he did not know what do do with” the accuser who was either “drunk or high,” and “incoherent.” *See Wilson & Glater, supra* note 74. According to the final police report, the other dancer, after both she and the accuser got into the car, yelled racial epithets at the players, who responded. *See Final Duke Report, supra* note 76. The other dancer then made the “911” call “to report that a group of white men were yelling racial comments at passerby outside of North Buchanan Boulevard.” *Id.*

that call reveals a caller's claim that a white man near the house rented to Duke students had yelled racial epithets at the caller and a friend, the lawyers challenged what they called "inconsistencies" in the call.<sup>232</sup> "The caller at first said the pair were driving by and later said they were walking by, according to the transcript. . . . Three times she [gave] the exact address of the house," according to the lawyer for one of the players. "And there is no address numbers to see, especially at night. It seems too pat to me."<sup>233</sup>

#### WERE COUNSEL STATEMENTS MORE EXTENSIVE THAN NECESSARY?

Under Rule 3.6(c), the defense in the Duke lacrosse case could make any statement a reasonable lawyer would believe necessary in response to a prejudicial statement.<sup>234</sup> The rule, however, limits the lawyer statements to "such information as is necessary to mitigate the [previous prejudicial statement]."<sup>235</sup> How, then, should a reasonable lawyer decide if a proposed response is "necessary" or "too much"? The comments to the Rule provide only a partial standard.<sup>236</sup> In contemplating a response to a prior statement, the appropriate question is whether a reasonable lawyer would believe that a statement was necessary to protect her client.<sup>237</sup> Without specific guidance from the current rules and comments, it is necessary to review the historical background of the rule to attempt to glean some context for when responsive comments might be too extensive.

While a majority of the Court in *Gentile* found that the Nevada rules relative to lawyer comment about pending trials were a consti-

232. Drape, *supra* note 129.

233. *Id.*

234. MODEL RULES OF PROF'L CONDUCT R. 3.6(c) (2007). Compare Rule 3.6(c) with Rule 3.6(a), *supra* note 1.

235. *Id.*

236. *See id.* (indicating ambiguities that are inherent in rule).

237. *See* MODEL RULES OF PROF'L CONDUCT R. 3.6(c), cmt. 7 (2007) (explaining governing standard for lawyers in responding to prior statement by opposing party). "In determining the meaning of the rule, however," the comment repeats the language of the rule: does the responsive statement contain only so much "information as is necessary to mitigate [the prejudice]." *Id.* The American Law Institute's Restatement of the Law Governing Lawyers provides a similar comment using the language of the Rule to explain it. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 109 (2000). Under § 109, a lawyer is permitted to make a public statement, without regard to its prejudice if the statement is "reasonably necessary to mitigate the impact on the lawyer's client of substantial, undue, and prejudicial publicity recently initiated by [another]." *Id.* The comment indicates that this language is similar to Rule 3.6(c) and then indicates that the lawyer is permitted "to make corrective public statements necessary to combat recent publicity prejudicial to the lawyer's client . . ." *Id.* at cmt. c.

tutional trap, the fact is that the original Canons provided the same trap.<sup>238</sup> ABA Canon 20 recognizes that comments by lawyers about “pending or anticipated litigation may interfere with a fair trial.”<sup>239</sup> As a result, such comment was “[g]enerally . . . to be condemned.”<sup>240</sup> Under Canon 5, however, a lawyer in a criminal case is “bound by all fair and reasonable means to present every defense that the law of the land permits . . . .”<sup>241</sup> As noted by Justice Kennedy in *Gentile*, the duties of an attorney to a client “do not begin inside the courtroom door.”<sup>242</sup> Canon 5 in conjunction with Canon 20 could, therefore, create the impression that a lawyer was authorized to try the case, to the extent legally possible, in the media.

In 1964, when the American Bar Association (“ABA”) contemplated revision of the Canons, into what would become the Code of Professional Responsibility, ABA President-elect Lewis F. Powell<sup>243</sup> spoke in favor of the appointment of a Special Committee: “The recent events in Dallas, familiar to all of us, have stimulated a new and intense interest in the Canons, particularly those designed to prevent prejudicial publicity and to ensure fair trial.”<sup>244</sup> The “recent events” to which Justice Powell spoke were, of course, the assassination of President John F. Kennedy, the subsequent shooting of Lee Harvey Oswald, and the trial of Jack Ruby for the murder of Oswald.

The Ruby criminal trial “took place in the same building to which Lee Harvey Oswald was being moved at the time he was shot.” The courtroom was “approximately one hundred yards” from the site of the assassination of the President.<sup>245</sup> The entire Dallas area believed it was on trial for the failure to prosecute Os-

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238. See *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1048 (1991) (holding Nevada Supreme Court’s interpretation of rule void for vagueness).

239. *American Bar Association, Canons of Professional Ethics*, Canon 20 (As Amended to 1969).

240. *Id.*

241. *American Bar Association, Canons of Professional Ethics*, Canon 5 (As Amended to 1969).

242. 501 U.S. at 1043 (implying that attorneys have duty to represent clients ethically immediately after formation of attorney-client relationship).

243. Justice Powell joined the Supreme Court, after appointment by President Nixon in January 1972, and he retired from the Court in 1987. See *Members of the United States Supreme Court*, <http://www.supremecourtus.gov/about/members.pdf>.

244. 89 A.B.A. Rep. 381 (1964).

245. See *Rubenstein v. State*, 407 S.W.2d 793, 796 (Tex. Crim. App. 1966) (McDonald, J., concurring) (demonstrating that courtroom’s geographical proximity to locations of President Kennedy’s and Lee Harvey Oswald’s assassinations created great bias against defendant Ruby).

wald for the Kennedy assassination. There was extensive pretrial publicity prejudicial to Jack Ruby. He was portrayed in the media “as a ‘tough guy,’ a ‘Chicago mobster,’ a strip joint owner.”<sup>246</sup> Ruby, it was said by the press, was involved in a “Communist conspiracy” with Lee Harvey Oswald.<sup>247</sup> Publication of the fact that Ruby had changed his name from Rubenstein fueled Anti-Semitic prejudice against Ruby. The press prejudice against Ruby was so strong that Dallas’ Parkland Hospital, where President Kennedy was taken after the assassination, refused to admit Ruby for a mental examination.<sup>248</sup> Based in part on this pretrial publicity, Ruby could not receive a fair trial in Dallas; consequently, the appellate court ruled that the trial court erred when it failed to grant a change of venue and reversed the trial court’s conviction.<sup>249</sup>

In *Irvin v. Dowd*, a case that predated *Rubenstein v. State*, the Supreme Court convicted and sentenced to death a criminal defendant for committing one of the six murders to which he allegedly confessed.<sup>250</sup> The crimes and the defendant’s arrest received extensive publicity in the local media. Shortly after the defendant was indicted, the prosecutor “issued press releases, which were intensively publicized, stating that the [defendant] had confessed to the six murders.”<sup>251</sup> By the time of trial, although 430 people were called for potential jury service, eight of the twelve jurors ultimately seated for the case “thought [the defendant] was guilty.”<sup>252</sup> Concurring with the reversal of the conviction and death sentence, Justice Frankfurter noted, “rudimentary conditions for determining guilt are inevitably wanting if the jury . . . comes to its task . . . ineradicably poisoned against” the defendant.<sup>253</sup>

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246. *See id.* at 796 (McDonald, J. concurring) (explaining defendant’s unfavorable portrayal in local news media).

247. *See id.* (showing political and religious animus towards Ruby).

248. *See id.* (illustrating how local prejudice against defendant was not confined to only unfavorable portrayals in press).

249. *See id.* at 798 (noting that trial judge in case “retained the services of a prominent public relations counselor to handle the courtroom seating, the press, the trial publicity, and public relations.”).

250. *See* 366 U.S. 717, 718-19 (1961) (mentioning how shortly after petitioner’s arrest, local police officials issued widely disseminated press releases, which stated that petitioner had confessed to murders).

251. *Id.* at 719-20.

252. *See id.* at 727 (illustrating juror bias created by pretrial press releases).

253. *Id.* at 729-30 (Frankfurter, J., concurring). Justice Frankfurter saw “inflammatory newspaper accounts—too often, as in this case, with the prosecutor’s collaboration, exerting pressures upon potential jurors before trial and even during the course of trial . . .”, as one of the major barriers to achieving fairness in such trials. *Id.* at 730.

Similarly, in *Rideau v. Louisiana*, the Supreme Court reversed a conviction and death sentence of a defendant who allegedly robbed a bank, held bank employees hostage, and subsequently murdered one of them.<sup>254</sup> Following the defendant's arrest, the sheriff interviewed him in jail, on camera.<sup>255</sup> Local television stations, throughout the area from which potential jurors would be selected, then aired the video, in which the defendant admitted guilt on three separate occasions.<sup>256</sup> In reversing the conviction, the Court found that the conviction violated due process, not because it involved "physical brutality," but because "the people . . . heard, not once but three times, a 'trial' of [the defendant] in a jail, presided over by a sheriff, where there was no lawyer to advise [him] of his right to stand mute."<sup>257</sup> Although Justice Clark, who wrote the majority opinion in *Irvin v. Dowd*, dissented, he agreed with the basic proposition: "one is deprived of due process of law when he is tried in an environment so permeated with hostility that judicial proceedings can be 'but a hollow formality.'"<sup>258</sup>

In 1966, the Supreme Court appealed directly to the ethics of lawyers when it considered the issue of pretrial publicity in *Sheppard v. Maxwell*.<sup>259</sup> Dr. Sam Sheppard told police that his pregnant wife had been murdered by a "form" which he had seen "standing next to his wife's bed."<sup>260</sup> Sheppard claimed that after wrestling with the form, both in the house and on the grounds, the form rendered him unconscious.<sup>261</sup> Police immediately focused their investigation

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254. See 373 U.S. 723, 724 (1963) (providing another example of how prejudicial disclosures in media can constitute cause for mistrial).

255. See *id.* at 723 (describing events occurring after defendant's arrest).

256. See *id.* (noting how "[t]he filmed 'interview' was broadcast over a television station in Lake Charles, and some 24,000 people in the community saw and heard it on television. The sound film was again shown on television the next day to an estimated audience of 53,000 people.").

257. *Id.* at 727. "Under our Constitution's guarantee of due process, a person accused of committing a crime is vouchsafed basic minimal rights. Among these are the right to counsel, the right to plead not guilty, and the right to be tried in a courtroom presided over by a judge." *Id.* at 726-27.

258. *Id.* at 729 (Clark, J., dissenting). Justice Clark perceived no nexus between the televised jail interview and the trial, "which occurred almost two months later." See *id.*

259. See 384 U.S. 333, 363 (1966) ("Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.").

260. See *id.* at 336 (discussing facts of case).

261. See *id.* (claiming that, upon regaining his consciousness second time, Sheppard found himself on beach "laying face down with the lower portion of his body in the water.").

on Sheppard himself.<sup>262</sup> The case received sensational media coverage.<sup>263</sup> The prosecutor “sharply criticized” the Sheppard family for not allowing “immediate questioning” of Sheppard and for refusing questioning outside of the presence of an attorney.<sup>264</sup> The media “also played up Sheppard’s refusal to take a lie detector test,” as well as the fact “that other possible suspects had been ‘cleared’ by such tests.”<sup>265</sup> A subsequent coroner’s inquest became a circus as police searched Sheppard in front of spectators; women in the audience erupted in “cheers, hugs, and kisses” when the coroner ejected Sheppard’s chief counsel from the proceeding for trying to introduce documentary evidence.<sup>266</sup> Sheppard was convicted of second degree murder in his wife’s death.<sup>267</sup>

Eventually, Sheppard brought a habeas action in federal court alleging that media coverage surrounding his case denied him due process and resulted in his conviction.<sup>268</sup> In reversing his conviction, the Court reiterated that “[l]egal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the television.”<sup>269</sup> A jury’s verdict must “be based on evidence received in open court, not from outside sources.”<sup>270</sup> Prejudice can result when the press “‘misrepresent[s] entirely the testimony’ in the case.”<sup>271</sup> Finally, the Court noted that instances of “prejudicial news comment on pending trials has become increasingly prevalent.”<sup>272</sup> While the press cannot be prevented from reporting events that surround a trial, prosecutors, defense counsel and

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262. *See id.* at 337-38 (demonstrating one-sided nature of investigation and its consequent unfairness to Sheppard).

263. *See id.* at 338-39, 343-45 (discussing media coverage of case).

264. *See id.* at 338 (noting that Sheppard eventually “agreed to submit to questioning without counsel”).

265. *Id.* at 338-39, 339 n.5. Additional stories publicized the fact that Sheppard would not allow himself to be injected with “truth serum.” *See id.* at 339 n.5.

266. *See id.* at 339-40 (describing inquest as taking place in school gymnasium, in presence of hundreds of people, “broadcast with live microphones,” and “a swarm of reporters and photographers”). The court opinion recounts a sampling of the types of prejudicial news stories published concerning Sheppard. *See id.* at 341-42.

267. *See id.* at 335 (reporting finding of state court).

268. *See id.* at 335 (stating basis for appeal).

269. *Id.* at 350 (quoting *Bridges v. State*, 314 U.S. 252, 271 (1941)).

270. *Id.* at 351.

271. *Id.* at 360.

272. *Id.* at 362.

others within the court's jurisdiction need rules that protect litigants from "prejudicial news prior to trial."<sup>273</sup>

This history, while not providing a standard for judging comments under Rule 3.6(c), does help provide insight into Justice Kennedy's comments in *Gentile v. State Bar of Nevada*. In *Gentile*, Justice Kennedy referred to the importance of the attorney in recommending plea agreements and civil settlements in order to avoid the possible prejudice of a criminal conviction.<sup>274</sup> In carrying out these roles, "an attorney may take reasonable steps to defend a client's reputation and reduce the adverse consequences of [a proceeding]."<sup>275</sup>

Those justices dissenting from Justice Kennedy's view of the retaliatory comments criticized his opinion because, in their view, "Justice Kennedy appears to contend that there can be no material prejudice when the lawyer's publicity is in response to publicity favorable to the other side."<sup>276</sup> The dissenters argued that "Justice Kennedy would find that publicity designed to counter prejudicial publicity cannot be itself prejudicial, despite its likelihood of influencing potential jurors."<sup>277</sup>

So, is there a standard? If we couple Justice Kennedy's comments with the history, an answer emerges. While the language of Rule 3.6(c) seems to suggest that responsive comments can be made without regard to their impact on the trial under Rule 3.6(a), that reading must be somewhat tempered by whether the comment itself is responsive. What the rule is really saying is that even if the original prejudicial comments could have "a substantial likelihood of materially prejudicing an adjudicative proceeding," reply is still permissible.<sup>278</sup> That reply would be shielded from discipline even if it could have "a substantial likelihood of materially prejudicing an adjudicative proceeding," but only if it is truly responsive.<sup>279</sup> Responsive comments would not, however, be protected if:

273. *See id.* at 363 (stating that attorneys and officers of court are held to higher standard than members of press, in regards to leaking potentially prejudicial news about case).

274. *See* 501 U.S. 1030, 1043 (1991) (stressing that "an attorney may take reasonable steps to defend a client's reputation and reduce the adverse consequences of indictment . . .").

275. *Id.* These steps are especially necessary "in the face of a prosecution deemed unjust or commenced with improper motives." *Id.*

276. *Id.* at 1080 n.6 (Rehnquist, C.J., dissenting).

277. *Id.*

278. *See* GILLERS & SIMON, *supra* note 1, at 278 (interpreting Rule 3.6(c)).

279. *See id.* (offering standard for responsive comments within reasoning of Rule 3.6(c)).

the comments have the potential of poisoning a jury pool or preventing a fair trial;<sup>280</sup>

the comments have the potential of rendering a trial a “meaningless formality”;<sup>281</sup>

the comments “misrepresent entirely” the evidence that will be considered;<sup>282</sup>

the comments go beyond what is necessary in response;<sup>283</sup>

comments go beyond what is necessary when they turn the trial into “an election” or a public “town hall meeting”;<sup>284</sup>

comments also go beyond what is necessary when they prevent a prospective jury from rendering a decision based on evidence heard in the courtroom, as opposed to what they have heard in the press.<sup>285</sup>

Those Justices dissenting from Justice Kennedy’s opinion in *Gentile* stated that “[a] juror who may have been initially swayed from open-mindedness by publicity favorable to the prosecution is not rendered fit for service by being bombarded by publicity favorable to the defendant.”<sup>286</sup> These justices suggest that voir dire examination, appropriate jury instruction, change of venue, and the possibility of a reversal are the appropriate tools for controlling comments, not responsive comments.<sup>287</sup>

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280. *See* *Irvin v. Dowd*, 366 U.S. 717, 729-30 (1960) (Frankfurter, J., concurring) (purporting that when juror’s mind is already “ineradicably poisoned against” defendant, juror cannot reach “disinterested verdict”); *see also* *Rubenstein v. State*, 407 S.W.2d 793, 798 (Tex. Crim. App. 1966) (reasoning that jurors’ exposure to media coverage denied defendant “a fair trial by a panel of ‘impartial, indifferent’ jurors”).

281. *See* *Rideau v. Louisiana*, 373 U.S. 723, 729 (1963) (Clark, J. dissenting) (agreeing with majority opinion that “when [defendant] is tried in an environment so permeated with hostility that judicial proceedings can be ‘but a hollow formality,’” “one is deprived of due process of law . . .”).

282. *See* *Sheppard v. Maxwell*, 384 U.S. 333, 360 (1966) (quoting argument by defense counsel).

283. *See* GILLERS & SIMON, *supra* note 1, at 280 (stressing that responsive comments “may be permissible when they are made in response to statements made by another party . . .”).

284. *See* *Sheppard*, 384 U.S. at 350 (“The principle that justice cannot survive behind walls of silence has long been reflected in the ‘Anglo-American distrust for secret trials.’”).

285. *See id.* at 351 (elaborating on importance of having cases tried in court, not through media, protected by legal procedures).

286. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1080 n.6 (1991) (Rehnquist, C.J., dissenting).

287. *See id.* (offering tools to protect defendant from media).

Unfortunately, at least one commentator has noted that today's world is laden with "instant journalism."<sup>288</sup> Although the amount of time is actually decreasing, Americans still "log an average of 9.7 hours each day consuming media."<sup>289</sup> That is, Americans spend "40 percent of all hours, including sleep time," with both "traditional and digital offerings, in print and onscreen."<sup>290</sup> Again, while it is unclear whether internet use continues to increase, as it did through the 1990's, seventy percent of adult Americans are "online," with more than a quarter of Americans agreeing that they go online for news "every day."<sup>291</sup> While the exact numbers are certainly subject to debate, it is clear that the number of Americans who have ever used the internet for news has risen from slightly more than ten percent in 1995 to more than sixty percent in 2007.<sup>292</sup>

In this media-saturated world, then, those subscribing to the premise that voir dire, jury instructions, change of venue, and the threat of reversal, are sufficient to ensure a fair trial are more likely than not, mistaken. What does this mean, then, for high-profile legal matters like the Duke case?

On March 29, 2006, when the incident on Buchanan Boulevard itself was less than two weeks past, *The New York Times* published an article highly favorable to the Duke lacrosse team, largely based on the fact that twenty-six members of the team were from the New York metropolitan area.<sup>293</sup> The article reported that "Robert C. Ekstrand, a lawyer who is representing many of [the

288. See *Cable News: A Maturing Platform with an Uncertain Future*, PEW RESEARCH CTR. PUB., Aug. 14, 2006, <http://pewresearch.org/pubs/51/cable-news-a-maturing-platform-with-an-uncertain-future> (last visited Mar. 30, 2008) (according to George Niessen, "the responsibility for 'getting the whole story' has devolved from the journalist to the consumer.").

289. See Jessica Marsden, *Media Consumers Finally Saying, "Enough!,"* HARTFORD COURANT, Aug. 8, 2007, at A1 (reporting "0.5 percent drop [in 2006] from 2005.").

290. See *id.* ("Some experts say we're at the saturation point."). "One-fifth of infants and toddlers under age 2 have a television in their bedrooms . . ." *1 in 5 Little Ones Has TV in Room*, FORT WORTH STAR-TELEGRAM, May 7, 2007, at A6. Some people argue that "the nation's television audience [has] burned out on serious news[.]" Jim Rutenberg, *Suffering News Burnout? Rest of America Is, Too*, N.Y. TIMES, Aug. 11, 2003 (noting that overall viewership of news was down during summer of 2003, perhaps due to fact that news had been so stressful over preceding two years).

291. See *The State of the News Media 2007: An Annual Report on American Journalism*, [http://www.stateofthemediamedia.org/2007/narrative\\_online\\_audience.asp?cat=2&media=4](http://www.stateofthemediamedia.org/2007/narrative_online_audience.asp?cat=2&media=4) (last visited Mar. 30, 2008) (citing figures for 2006).

292. See *id.* (analyzing percentage of Americans who now get news from internet mediums).

293. See Bernstein & Drape, *supra* note 177 (stating that Duke University suspended lacrosse team for rest of season); see also Duff Wilson, *2 Duke Athletes Are*

team members], did not return phone calls . . . .”<sup>294</sup> Certainly, this failure to comment suggests that, at that time, defense lawyers were attempting to avoid having the decision in the case come about as a result of a “town hall” forum. In addition, on March 30, 2006, *The New York Times* published an article both quoting and paraphrasing District Attorney Nifong as saying that he believed the police “were building a solid case that disputed the team’s contention that no sexual assault had occurred,” as well as comments about the lack of cooperation by the team.<sup>295</sup>

More important, however, was the media’s report on April 10, 2006, indicating that preliminary DNA results showed no match between the Duke lacrosse players and the victim.<sup>296</sup> That evening, on his CNN program, Larry King interviewed Seyward Darby, the editor of the *Duke University Chronicle*.<sup>297</sup> King asked Darby: “What’s your feeling at this point with the information today?”<sup>298</sup> Noting that information of the preliminary DNA results was the “biggest development” in the investigation to that point, Darby indicated that his newspaper sent “reporters out to talk to students, to talk to [university] administrators, [and] to talk to neighbors who live near 610 North Buchanan . . . .”<sup>299</sup> Duke students, evidently, were not surprised by this announcement “based on the assertions that the lacrosse players had made and the captain’s statements they didn’t think that the DNA was going to come back as a positive match.”<sup>300</sup> Others in the community were not as sanguine as the students “based on how assertive the D.A. has been up until now.”<sup>301</sup> Still

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*Arrested and Charged*, N.Y. TIMES, Apr. 18, 2006 (noting that five members of Duke lacrosse team attended private school in New Jersey).

294. *Id.*

295. See Lyman & Drape, *supra* note 127 (illustrating unbalanced publicity that existed at outset of case).

296. See *Duke DNA Tests*, *supra* note 129 (“Raleigh lawyer Wade Smith . . . said he hopes the results will prompt Nifong to drop the case and help the community heal.”).

297. See *Larry King Live* (CNN television broadcast Apr. 10, 2006) (noting Larry King interview aired same night as media event). See generally *The Chronicle*, <http://www.dukechronicle.com/aboutus/> (last visited Mar. 30, 2008). *The Chronicle* is a daily newspaper funded entirely by advertising revenue “[w]ith a circulation of about 15,000 . . . [and] a print readership of about 30,000.” See *id.* The online version of the paper “gets an average of more than 70,000 hits every day.” *Id.* First published as *The Trinity Chronicle* in 1905, the newspaper continued its coverage of Duke events when Trinity College became Duke University in 1924. See *id.*

298. *Larry King Live*, *supra* note 297.

299. *Id.*

300. *Id.*

301. See *id.* (reflecting one group’s reaction to fact that DNA results did not link lacrosse players to victim).

other members of the community “are saying that there are still other issues that need to be examined here, for instance the alleged racial epithets that were hurled at people on the street that night, things that the university said that they will be investigating.”<sup>302</sup> There was similar public reaction to an email allegedly sent by one of the lacrosse players after the alleged assault. While all agreed “that the language in [the] email is vulgar [and] horrible,” Darby indicated that the public was unclear as to the meaning of the email:

some people say, the defense lawyers included . . . that it shows that no assault took place. Why would anyone go and e-mail something like that right after a gang rape had taken place? Other people are saying that the aggressiveness . . . and the brutality of the language indicates that maybe someone on the team might have been capable of a gang rape.<sup>303</sup>

Still others, expressing a third view, “are saying it’s just a really sick joke . . . .”<sup>304</sup>

Assuming editor Darby is a reliable source, his report is proof that Rule 3.6(c) worked. This report shows no evidence that the community at large has been so inundated with one-sided information so that trial would be a “mere formality,” or that the public mind was poisoned against the lacrosse team. In actuality, his report shows that a prospective jury pool was now split, a conviction far different than the original public sentiment before defense lawyers started to repair the damage they perceived was caused by the statements of others. At the time of Darby’s comments, some people tended to believe the prosecution’s side of the case; some people tended to believe the defense’s responses to the prosecution; and some people tended to not think much at all about the case. This, then, is far different from the *Irvin v. Dowd* scenario where two-thirds of the sitting jurors were pre-convinced of the defendant’s guilt.<sup>305</sup> In the Duke case, the potential evidence had not been fundamentally misrepresented to the jury and there was no evidence, at least from editor Darby’s report, that a “town hall” mentality was at work.

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302. *Id.*

303. *Id.*

304. *Id.*

305. See *Irvin v. Dowd*, 366 U.S. 717, 728 (1960) (quoting some as saying “it would take evidence to overcome their belief [that defendant was guilty].”).

When it comes to looking towards a potential jury pool, in a highly public case, isn't this result just about as good as it gets? In a modern, media-dominated world, it is simply unreasonable to assume that there will never be "leaks" to that media of important events in such public cases. Without allowing defense counsel to make retaliatory comments, our system runs the very real risk that only the "leaks" of one side will reach the public. In the Duke case, both sides made statements. Regardless of how we view those statements, and regardless of whether the initial statements had a substantial likelihood of material prejudice to a fair trial for the lacrosse players, the retaliatory comments served to bring the public sentiment back to some semblance of neutrality.

If, then, a jury pool was comprised of members of the groups of people surveyed by editor Darby, isn't it more likely than not that they would have to listen to the evidence in the case, presented in the courtroom, in order to arrive at a verdict? Because the group would have feelings about the case, from all sides, the only way the jury could arrive at a unanimous decision would be to view the evidence presented to them. Assuming a jury subject to mostly balanced media coverage would be required to review the actual evidence, the responsive comments of the lawyers in the case, even if they would have violated Rule 3.6(a) standing alone, had a salutary effect and Rule 3.6(c) thus accomplished its purpose. After the retaliatory comments, then, the balance of publicity in the case did not remain "in favor of the prosecution."<sup>306</sup>

#### CONCLUSION

We now know that, in the Duke case, District Attorney Nifong was "not . . . a minister of justice, but . . . a minister of injustice."<sup>307</sup> Nifong himself acknowledged that "no credible evidence" existed to tie the Duke lacrosse team to any sexual misconduct in conjunction with the incident on March 13, 2006.<sup>308</sup> He also acknowledged

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306. See *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1046 (1991) (showing how responsive comments of defense counterbalanced negative comments of prosecution).

307. See *Bar: Duke D.A. Was "Minister of Injustice,"* USA TODAY, June 15, 2007, [http://www.usatoday.com/news/nation/2007-06-15-nifong\\_N.htm](http://www.usatoday.com/news/nation/2007-06-15-nifong_N.htm) (last visited Mar. 30, 2008) (noting that District Attorney Nifong was ultimately publicly censured for his conduct).

308. See *Nifong: Offers Apology, Says No "Credible Evidence" of Crimes in Lacrosse Case*, FOXNEWS.COM, July 26, 2007, <http://www.foxnews.com/story/0,2933,290904,00.html> (last visited Mar. 30, 2008) ("Nifong's apology came as a judge began considering whether to hold the former Durham County district attorney in criminal contempt of court for his handling of the case.").

the impropriety in calling the players “a bunch of hooligans” and inflaming racial tension by saying that “he wouldn’t allow Durham to become known for ‘a bunch of lacrosse players from Duke raping a black girl.’”<sup>309</sup>

We also now know that the organized bar found that Nifong made public comments that he knew “would prejudice a jury” and “would heighten public condemnation of [the Duke defendants].”<sup>310</sup> We know that he simply lied, participating in an “intentional decision” with the head of a private DNA lab to improperly report the results of DNA testing.<sup>311</sup> Nifong was eventually disbarred for his conduct.<sup>312</sup>

Finally, we now know that the players themselves were “innocent of these charges,”<sup>313</sup> and that the players and their families were able to reach an amicable settlement with Duke.<sup>314</sup> The play-

309. See Lisa Porteus, *Nifong Apologizes for Missteps in Duke Lacrosse “Rape” Case, Resigns as Durham DA*, FOXNEWS.COM, June 16, 2007, <http://www.foxnews.com/story/0,2933,282874,00.html> (last visited Mar. 30, 2008) (“I think clearly some of the statements I made were improper,” Nifong said.”).

310. See *The North Carolina State Bar vs. Michael B. Nifong*, WRAL.COM, <http://www.wral.com/news/local/page/1506296> (last visited Mar. 30, 2008) (enumerating offenses upon which North Carolina State Bar’s Disciplinary Hearing Commission found Nifong guilty).

311. See Joseph Neff, Benjamin Niolet & Anne Blythe, *Head of DNA Lab Says He and Nifong Agreed Not to Report Results*, NEWS & OBSERVER (Raleigh N.C.), Dec. 15, 2006, available at <http://www.newsobserver.com/1185/story/521773.html> (noting that samples taken at hospital from victim just hours after alleged attack revealed “DNA from unidentified men in the underwear, pubic hair and rectum of the [accuser].”).

312. See Duff Wilson, *Prosecutor in Duke Case Disbarred by Ethics Panel*, N.Y. TIMES, June 17, 2007, available at [http://www.nytimes.com/2007/06/17/us/17duke.html?\\_r=2&oref=slogin](http://www.nytimes.com/2007/06/17/us/17duke.html?_r=2&oref=slogin) (“The panel ruled that Mr. Nifong had misled a judge and defense lawyers about findings from a private laboratory that showed DNA from four unidentified men on the body and clothes of the stripper. No DNA from any lacrosse players was found.”). Nifong was convicted of criminal contempt and sentenced to one day in jail for “withholding of DNA evidence from defense counsel,” which a trial judge said was “an affront to the integrity of the judicial system.” See *Nifong Held in Criminal Contempt by Judge, Sentenced to Day in Jail*, CNN.COM, [http://edition.cnn.com/2007/US/08/31/nifong.contempt/index.html?eref=edition\\_us](http://edition.cnn.com/2007/US/08/31/nifong.contempt/index.html?eref=edition_us) (last visited Mar. 30, 2008). Nifong served that one day in jail on September 7, 2007. See *Nifong Serves One-day Sentence for Contempt*, ESPN.COM, <http://sports.espn.go.com/ncaa/news/story?id=3009967> (last visited Mar. 30, 2008).

313. See Anne Blythe, *Duke Lacrosse Players “Innocent”: State Attorney General Roy Cooper Criticized Nifong’s “Rush to Accuse,”* NEWS & OBSERVER (Raleigh N.C.), Apr. 12, 2007, available at <http://www.newsobserver.com/1185/story/563248.html> (noting use of the word “innocent – a word prosecutors rarely use.”).

314. See *Duke, Ex-lacrosse Players Reach Settlement*, CNN.COM LAW CENTER, June 18, 2007, <http://www.cnn.com/2007/LAW/06/18/duke.lacrosse/index.html> (last visited Mar. 30, 2008) (noting that Duke lacrosse players falsely accused of rape reach undisclosed settlement with Duke).

ers and their families, however, are keeping their options open as to a suit against former District Attorney Nifong.<sup>315</sup>

It would thus be tempting to look at the Duke case only in light of the results. That analysis, however, does not show that the defense lawyers' public comments were justified under the rules. If lawyers are able to win cases solely in the press, then the law becomes what the *Sheppard* Court feared: a "town hall" election.<sup>316</sup> By the same token, however, it is impossible to view the Duke case without looking at the results. If the lawyers had not done what they did, how different would those results have been?

And maybe that is the lesson from the Duke case. First, Justice Kennedy, in *Gentile*, and those who supported the revision of ABA Rule 3.6(c), expressed fear that without comment by the defense, a publicity imbalance would exist in favor of the prosecution.<sup>317</sup> Certainly, the initial public clamor in the Duke case showed that these fears were very real. Second, those who supported the new rule argued its necessity in avoiding unreasonable prejudicial pretrial publicity.<sup>318</sup> Again, the Duke case tends to prove those advocates correct. Finally, critics of the new rule feared that pretrial publicity would become an all-consuming free-for-all, not permitting an ultimately fair trial.<sup>319</sup> To this concern, the Duke case provides only a partial answer. Because of the tenor of the comments by defense lawyers, the pretrial portion of the Duke case did not appear to become a media circus. Indeed, at least one source thought public opinion was about evenly split.<sup>320</sup>

Will the Duke case spur defense counsel in future cases to more elaborate public comment? That fear is why the Duke case must stand for the notion that Rule 3.6(c) cannot be interpreted to

315. See *Duke Lacrosse Players: Case Closed*, CNN.COM LAW CENTER, Apr. 12, 2007, <http://www.cnn.com/2007/LAW/04/11/duke.lacrosse/index.html> (last visited Mar. 30, 2008) (stating that accused lacrosse players called for legal system reforms). The players do not plan to sue the accuser. See *id.*

316. For a further discussion of the court's opinion in *Sheppard*, see *supra* notes 268-73 and accompanying text.

317. See *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1046 (1991) (discussing fear of publicity imbalance). For a further discussion of the motivations that led to a revision of Rule 3.6(c), see *supra* notes 14-15 and accompanying text.

318. For a further discussion of the necessity of a Rule 3.6(c) revision, see *supra* notes 18-19 and accompanying text.

319. For a further discussion of the criticism of pretrial publicity, see *supra* notes 16-17 and accompanying text.

320. For a further discussion of public opinion after the announcement of the DNA results, see *supra* notes 296-304 and accompanying text. Without an actual trial, however, there is simply no way to know if any of the comments were actually prejudicial.

allow unlimited responsive comment. Even a responsive comment, however, must be tailored. When responsive comments go beyond those “necessary to mitigate” the recent prejudice, and do so in a way that raises material concerns about the overall fairness of an ensuing trial, the conduct remains “highly censurable and worthy of disciplinary measures.”<sup>321</sup>

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321. *See* Sheppard v. Maxwell, 384 U.S. 333, 363 (1966) (“The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences.”).

APPENDIX A: EXCERPT FROM *GENTILE V. STATE BAR OF NEVADA*<sup>322</sup>

Petitioner's Opening Remarks at the Press Conference of February 5, 1988. . . .

Mr. Gentile: I want to start this off by saying in clear terms that I think that this indictment is a significant event in the history of the evolution of the sophistication of the City of Las Vegas, because things of this nature, of exactly this nature have happened in New York with the French connection case and in Miami with cases-at least two cases there-have happened in Chicago as well, but all three of those cities have been honest enough to indict the people who did it; the police department, crooked cops.

When this case goes to trial, and as it develops, you're going to see that the evidence will prove not only that Grady Sanders is an innocent person and had nothing to do with any of the charges that are being leveled against him, but that the person that was in the most direct position to have stolen the drugs and money, the American Express Travelers' checks, is Detective Steve Scholl.

There is far more evidence that will establish that Detective Scholl took these drugs and took these American Express Travelers' checks than any other living human being.

And I have to say that I feel that Grady Sanders is being used as a scapegoat to try to cover up for what has to be obvious to people at the Las Vegas Metropolitan Police Department and at the District Attorney's office.

Now, with respect to these other charges that are contained in this indictment, the so-called other victims, as I sit here today I can tell you that one, two-four of them are known drug dealers and convicted money launderers and drug dealers; three of whom didn't say a word about anything until after they were approached by Metro and after they were already in trouble and are trying to work themselves out of something.

Now, up until the moment, of course, that they started going along with what detectives from Metro wanted them to say, these people were being held out as

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322. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1059 (1991).

being incredible and liars by the very same people who are going to say now that you can believe them.

Another problem that you are going to see develop here is the fact that of these other counts, at least four of them said nothing about any of this, about anything being missing until after the Las Vegas Metropolitan Police Department announced publicly last year their claim that drugs and American Express Travelers' c[h]ecks were missing.

Many of the contracts that these people had show on the face of the contract that there is \$100,000 in insurance for the contents of the box.

If you look at the indictment very closely, you're going to see that these claims fall under \$100,000.

Finally, there were only two claims on the face of the indictment that came to our attention prior to the events of January 31 of '87, that being the date that Metro said that there was something missing from their box.

And both of these claims were dealt with by Mr. Sanders and we're dealing here essentially with people that we're not sure if they ever had anything in the box.

That's about all that I have to say.

APPENDIX B: EXCERPT FROM SUMMARY OF CONCLUSIONS, ATTORNEY GENERAL OF NORTH CAROLINA<sup>323</sup>

Narrative of a Sequence of Events that Occurred at 610 N. Buchanan Blvd. on March 13-14, 2006. Based on Interviews of Witnesses and Reviews of Photographic, Video, Documentary, Medical and Scientific Evidence.

. . . [The women] were followed by David Evans, Dan Flannery, and possibly others who tried to assuage their feelings about the broomstick comment while pointing out that the party attendees had paid \$800 for only a brief performance. The dancers returned to the bathroom where they had left their belongings. The two women remained in the bathroom alone together for a period of time.

At approximately 12:05 a.m., just after the dancing ended, Reade Seligmann, began using his cell phone and initiated a series of phone calls to his girlfriend and others. At 12:14 a.m., he called a taxi cab company to pick him up. He and another party attendee then walked around the corner and got into a cab at approximately 12:19 a.m. The cab driver took Seligmann and the other party attendee to an automatic teller machine, arriving at approximately 12:24 a.m. After Seligmann made a withdrawal, the cab driver took Seligmann and the other player to a take-out restaurant and then back to Seligmann's dormitory. Seligmann entered his dormitory at 12:46 a.m.

There was a range of other activities going on by the party attendees during this time. In addition to Seligmann, Collin Finnerty and other attendees decided to leave after the dancing ended. Others stayed and expressed displeasure at having paid money for a short performance that was expected to have lasted for two hours, and wanted a refund or a continuation of the performance. Some party attendees were milling around both inside and outside the house.

The dancers eventually left the bathroom and went to the back yard together. Flannery went outside to talk with them. He urged them to come back into the house to continue the performance. He apologized for the comment that was made during the performance. The danc-

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323. *Final Duke Report*, *supra* note 76, at 6-8.

ers went to “Nikki’s” car. David Evans and others came to the car and talked with them.

Inside the house, some of the party attendees continued to express their displeasure with the truncated performance. Some said they had been cheated. Two of the attendees, while using the bathroom, noticed that one of the dancers had left her cosmetics bag behind in the bathroom. Each separately took money out of the bag and were told by Flannery and Evans to return the money to the bag. During this time, more attendees were leaving the house to go elsewhere.

The dancers had a conversation at the car. Then they both re-entered the house through the back door. Once inside the house, other attendees apologized to the dancers for the earlier comments. The individual who earlier held up the broomstick then approached the dancers which caused “Nikki” to become angry again, and the dancers went back into the bathroom alone together and refused to come out.

Flannery tried again to coax the dancers out of the bathroom. Zash and Evans began to encourage everyone else to leave [because of concern for excessive noise]. Flannery continued to talk to the dancers, who were alone together in the bathroom, in an attempt to get them to leave the house.

While the dancers were still at the house, Collin Finnerty walked to 1105 Urban Street, a nearby house rented by other Duke students. At 12:22 a.m. Finnerty made a . . . call to a fellow lacrosse player using his cell phone. At 12:27 a.m. another lacrosse player called Finnerty’s cell phone looking for him. Finnerty told the player that he was at 1105 Urban St., and that player walked to the house and met Finnerty there.

Finnerty called Domino’s Pizza at 12:30 a.m. and again at 12:33 a.m. Finnerty and three other players walked from 1105 Urban St. to Cosmic Cantina restaurant where they ordered food and paid at 12:56 a.m.

The dancers opened the bathroom door and left 610 N. Buchanan Blvd. for the second time through the back door sometime before 12:30 a.m. “Nikki” and Flannery together walked to her car parked on the street in front of the house. . . .

At 12:26 a.m., the accusing witness placed a telephone call to the escort service. Moments later, at 12:30 a.m., she was observed and photographed outside the house on the back porch steps, smiling and rummaging through Evan's shaving kit. Under her arm is her cosmetic bag containing an object that appears to be her cell phone.

Other party attendees outside the house at the same time observed her behavior. She was overheard talking incoherently, apparently to no one in particular. In a video recorded at 12:31:26 a.m., she is talking to one of the party attendees saying, "I'm a cop" and making other comments which were difficult to understand. The video also shows the difficulty she was experiencing with her balance as she attempted to walk from the back porch down the stairs, as well as her attempt to engage in a disjointed conversation with party attendees who were nearby.

At 12:34 a.m., while Flannery and "Nikki" were in the front of 610 N. Buchanan Blvd. and the accusing witness was outside the house as previously described, Evans called his girlfriend and spoke with her for approximately 16 minutes.

At 12:37 a.m. the accusing witness was observed and photographed lying in a prone position on the back porch. Flannery was called by other attendees from the rear of the house and told that there was a problem. Flannery left "Nikki" and returned to the back of the house where he observed the accusing witness lying in the position described above. Flannery then assisted the accusing witness in walking from the back porch to "Nikki's" care where she was placed in the front seat by Flannery. Both dancers were in the car at 12:42 a.m.

After the accusing witness was placed in "Nikki's" car, "Nikki" yelled a sexually and racially based comment at a group of party attendees standing across the street near the wall to East Campus at the university. One or more of the party responded with racial epithets. After this exchange, "Nikki" drove away with the accusing witness in the car. At approximately 12:53 a.m., "Nikki" called 911 to report that a group of white men were yelling racial comments at passersby outside of North Buchanan Boulevard.

The two dancers arrived at a . . . grocery store in Durham. The accusing witness refused to get out of “Nikki’s” car and appeared to be unconscious. “Nikki” went in to the . . . store and requested a security guard to notify the Durham Police Department. At 1:22 a.m., such a call was received at the 911 center.

Sergeant J.C. Shelton of the Durham Police Department responded to the 911 call from the security guard. Shelton arrived at the grocery store at approximately 1:32 a.m. Shelton observed the accusing witness, still apparently unconscious, in the front seat of “Nikki’s” car. Shelton described the accusing witness as dressed in a flimsy outfit. He observed that the clothes were not torn. . . .

Shelton unsuccessfully tried to rouse the accusing witness. When she was unresponsive to his efforts, he held smelling salts near her nose and she began to breathe through her mouth. The accusing witness was removed from the car, but was unable to stand on her own. She refused to identify herself or say where she lived. Shelton then instructed one of the officers on his shift to take the accusing witness to the Durham Center Access, an organization that offers access to mental health, substance abuse, and developmental disabilities services.

APPENDIX C: EXCERPT FROM DURHAM CHIEF OF POLICE REPORT<sup>324</sup>

On March 16, 2006, subsequent to the four photo arrays . . . , investigators spoke with Dave Evans and Dan Flannery pursuant to their execution of a search warrant at 610 Buchanan Boulevard. While speaking to the investigators, one of the men indicated that he could not recall certain details of the night in question, but within a short period of time provided a written statement which included such details. While investigators found the men during the night of March 16th to be generally cooperative, issues such as the aforementioned matter caused the investigators to question whether the men were being completely forthcoming.

By March 21, 2006, investigators had been unable to determine with certainty which persons were actually at the residence the night of the alleged attack. However, they had been able to establish that the two tenants of the home with whom they had spoken on the 16th, Dave Evans and Dan Flannery, had been at the residence the night of the party and that they were the individuals who had made arrangements for the party including hiring and paying for the dancers. By this point, investigators were becoming suspicious as to the accuracy of names provided by the complaining witness. Officers knew that Dan Flannery had used a false name when hiring the dancers. . . .

Because investigators had previously focused upon individuals with names provided by, or similar to those provided by, the complaining witness and that those names now seemed to be of questionable accuracy, Evans and Flannery had confirmed that they were at the residence the night of the alleged attack, and that Evans and Flannery had made arrangements for the party including hiring and paying for the dancers, investigators began to turn their attention to these individuals and decided to conduct photo arrays on March 21, 2006 with Evans and Flannery as the potential suspects. One array contained a photo of Evans and one array contained a photo of Flannery.

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324. Letter from Steven W. Chalmers, Chief of Police, City of Durham, to Patrick W. Baker, City Manager, City of Durham (May 5, 2007) (on file with Villanova Sports and Entertainment Law Journal).

nery. Consistent with Durham Police Department General Order 4077 Eyewitness Identification:

- [The complaining witness] was not shown the photo arrays in the presence of any other potential witnesses;
- The photo arrays were presented to [the complaining witness] by an independent administrator. . . .;
- Five fillers were used per suspect photo. Photos of Duke University lacrosse team members identified as persons other than Evans and Flannery were utilized;
- The fillers selected resembled the suspect in each of the arrays in significant features such as race, gender, facial features and weight. . . .;
- Different fillers were used in each of the arrays;
- Photographs were presented sequentially;
- [The complaining witness] was given standard verbal instructions for each array which included advising her that the photograph of the person who committed the crime may or may not be included in the particular array.
- [The complaining witness] did not identify her alleged attackers from the arrays presented to her that day.

On March 31, 2006, Investigator Himan and his immediate supervisor, Sgt Mark Gottlieb, met with District Attorney Nifong to update him on the case. . . . The District Attorney suggested showing [the complaining witness photographs that were taken as a result of the non-testimonial identification order] to see if she could provide any additional information or details about the night in question. Investigators hoped that this would develop some leads, such as potential witnesses, for them since those initially developed in the case were becoming exhausted. In addition, investigators had been unable to determine whether [the complaining witness] was impaired on the night of her alleged attack and, if so, by what substance. Certain date rape drugs, such as Rohypnol and GHB, often result in amnesia of the victim but other substances, such as ecstasy and alcohol, typically do not. If the victim had some recollection of any of the individuals

in the photographs, then this could help establish that she was not impaired by a memory altering substance which would then assist in gauging the reliability of [the complaining witness]'s allegations.

On April 4, 2006, Sgt. Gottlieb, [among others], showed [the complaining witness] the recently acquired team photographs. In the process of describing her recollection of persons and events at the party, she began identifying certain individuals as potentially her attackers. Officers did not intend, nor were they expecting, [the complaining witness] to positively identify her alleged attackers during this process, particularly since she had not done so in any of the earlier photo arrays which contained individuals she had identified by name or which had been placed at the party and closely associated with its arrangements. . . . Faced with this turn of events, the investigator decided to note [the complaining witness]'s comments and proceed to show her the remainder of the photographs. Abruptly stopping the observations after such comments could have been construed by the witness as confirmation that she had selected the "right" individuals and could arguably taint either these, or future, identifications.

APPENDIX D: EXCERPT FROM *NANCY GRACE* TRANSCRIPT<sup>325</sup>

Excerpt from May 12, 2006 press conference held by attorneys representing Duke lacrosse players. The press conference was aired live on CNN's *Nancy Grace* television show:

Joe Cheshire, Defense Attorney: This is Wade Smith, and my name is Joe Cheshire. . . I represent a player who's one of the captains, named Dave Evans, who also was one of the young men who rented the house at which the party took place that resulted in the false accusations that have been made against Duke lacrosse players. Today, also, as you know, the state of North Carolina has released—and I do not know whether you all have seen it. There doesn't seem to be much in this case that the press doesn't get a chance to see. But the district attorney's office has released to us their so-called second DNA report. The first thing I would like to say about that report is that I think that it is very interesting. . . that this report was leaked by the district attorney's office, according to press people who have told me specifically that they leaked it to them, several days ago. We only received this report at 5:00 o'clock. I received it at 5:02 this afternoon by fax. I find it interesting that it was leaked that way and faxed to us in a way that was apparently done so that we would not have the opportunity to respond to it. That's the first thing. The second thing is, it makes me sad the way it was leaked and the way it was reported by many people that there was a match in the second DNA test to one of the Duke lacrosse players. Those types of reports that go out all over this nation create a false impression about this particular case and makes it very difficult for these young men to receive a fair trial. And that is one of the reasons that we are speaking out tonight. We feel compelled by the actions of the district attorney's office to continue to speak out about this case. Let me also emphasize to you all that none of the lawyers in this room are experts in DNA. So we have now had approximately three hours to review a very complex scientific report. That is not a long time. But we can say to you categorically that this report shows no conclusive match between any genetic material taken on, about, in or from the false accuser and any genetic material of

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325. *Nancy Grace* (CNN television broadcast May 12, 2006).

any Duke lacrosse player. It does show that there was DNA material from multiple different people on one plastic fingernail, and that in that material was some of the same characteristics as the genetic—some of the Duke lacrosse players, and let me emphasize, none of the Duke lacrosse players that have been indicted. What that says—and you can talk to your experts on DNA—is that there is no conclusive match of DNA. Now, I also want to go back, if I can, briefly with you and discuss what I said at the initial press conference about the DNA. This one plastic fingernail that was supposed to have been, according to this false accuser, ripped off during this horrific struggle, was taken from a trashcan that was in the bathroom used by two of the players who lived in that particular house. In that bathroom and in that trashcan where those fingernails were placed by the lacrosse players when they cleaned up their bathroom—and I'll talk to you about that in a second—also had in it—I'm talking about the trashcan—things such as Q-tips, Kleenex where people blew their nose, toilet paper, and every other possible type of material that carries the people that use the trashcan's DNA. So it would be a real story, ladies and gentlemen, if there was no DNA that could not conclusively match but show some genetic strain of one of the lacrosse players who used that bathroom. What a stunner that would be. And that is important for you all to understand. And it is further important for you to understand this fact about that one plastic fingernail. This woman says, again—and you will see those fingernails at some point in time—that they were ripped off of her in this horrific struggle. As I've told you, they were picked up by lacrosse players and placed in that trashcan. They were given to the lacrosse—they were given to the Durham Police Department, physically given to the Durham Police Department, by the same lacrosse players that put them in the trashcan. And they were given to the Durham Police Department after the lacrosse players were told by Duke University that there had been accusations of a rape in that house and that the police may be coming by to talk to them. And I simply ask you all to try to consider, is that consistent with someone that knowledgeably and knowingly committed a rape, that they would leave fingernails that were ripped off a person in a violent struggle in

their trashcan after they're told there's an investigation and the police were going to come to their house, and when the police do, they give them the fingernails?

So there is no conclusive match . . . that ties any of these young men to this woman who has made these false accusations. Let me also say what this report shows. It once again shows, as the SBI report showed, that there is absolutely no—and I emphasize to you—no scientific or genetic evidence that any rape or assault occurred on this false accuser. Of all of the things taken on her and in her and about her, none of any of the Duke lacrosse players' DNA, or even anything that someone can say is consistent or could be or may be or has one tiny little iota of a genetic marker tied any of these men to this woman's person, or to anything she was wearing or anything that she had. And I ask you again to go back and review your own reports of what this woman said happened to her—anal rape, oral rape, vaginal rape—and there are no—no!—genetic or scientific evidence in this report that ties this woman to any type of behavior like that with these players. And that leads us to what is really important about this report. And I want you to listen to this part, ladies and gentlemen, because this wasn't leaked to you by the district attorney's office. . . .

Even though the district attorney's office has previously and earlier said that no semen was collected from this false accuser, we now find from this DNA report that, in fact, they did retrieve male genetic material from a single source, from this false accuser, from vaginal swabs.

Now, let me say that to you again. Even though they said earlier that there was no semen taken from the vaginal swabs of this woman, we now find that they did retrieve male genetic material from a single source, a single male source, from vaginal swabs and that that source has been named in this report, is a person known to the Durham Police Department, but is not any of the Duke lacrosse players.

APPENDIX E: STATEMENT OF DISTRICT ATTORNEY NIFONG<sup>326</sup>

Durham District Attorney Michael Nifong made the following statement in response to the media's report that the accuser had had previous interactions with the law:

As you know, the Associated Press broke the story yesterday alleging that the victim in what has come to be known as the Duke lacrosse rape case had reported approximately 10 years ago that she had been sexually assaulted approximately 13 years ago. I will not comment specifically on either the facts of the current case or the circumstances of the previous allegations. But in light of that report having been made, I offer the following observations and explanation.

North Carolina, like most states has in its rules of evidence what is commonly referred to as a rape shield law. That law makes the prior sexual behavior of the victim in a rape prosecution irrelevant unless it falls into one of four narrowly defined categories. It further provides that, before either side in such a case may offer such evidence at trial, they [sic] side must first request that the court conduct an in-camera hearing to determine the relevance of such evidence and the circumstances under which it may be offered. In short, the jury that decides this case may or may not hear "the evidence"—in quotations—reported by the Associated press. The media, of course, are not bound by the same rules that govern our courts. Their decisions on what to report and how they report it can have a substantial impact on the ability of our system to effectuate justice. That impact is often positive. Unfortunately, it can also be negative.

As you might imagine, I have received hundreds of letters, e-mails and telephone calls from across the country about this case since the beginning of April. They run the full gamut of reaction to what is happening and how I'm approaching it. But five of those letters are of particular significance to me because each comes from someone who was once herself the victim of a sexual assault and who chose not to report it to law enforcement.

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326. *Duke Accuser Also Filed an Assault Complaint in 1996*, WASH. POST, Apr. 28, 2006, at E02.

Two of those letters are from former Duke students who were sexually assaulted by other Duke students. The common thread of these five situations is that each of these young women believe that the cost of the public scorn she would receive for reporting such an event outweighed the benefit to herself and to society of pursuing justice.

Sadly, we are seeing exactly what they are talking about playing out in Durham today, as people who know none of the facts are standing in line to offer their condemnation. Much has been said about the presumption of innocence in conjunction with this case.

The statement of District Attorney Nifong is interesting because he takes a negative—the release of information about the victim’s past and turns it into a positive—the need to protect women, including Duke women who have been the victims of sexual assault. While he acknowledges that there are at least some exceptions that would allow the victim’s past history into the case, he offers no explanation of how sexual assaults of totally unrelated Duke students or others in Durham might be admissible in the case.

Attorney Joe Cheshire indicated that he wanted “to know if prosecutors in the current case knew about the earlier allegation, or if the accuser told them about it. . . . ‘These are serious allegations, particularly for a person that age. In my mind, it would raise real issues about her credibility.’”<sup>327</sup> Another attorney, Pete Anderson, who represented an uncharged Duke lacrosse player, indicated that “the earlier accusation should make Nifong think twice about pursuing the case.”<sup>328</sup>

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327. Sharif Durhams, *Accuser in Duke Lacrosse Case Made Rape Allegations in 1996*, CHARLOTTE OBSERVER, Apr. 27, 2006.

328. Sharif Durhams, *DA Says 1996 Rape Allegations Not an Issue in Duke Lacrosse Case*, CHARLOTTE OBSERVER, Apr. 28, 2006.

APPENDIX F: EXCERPT FROM NEWS & OBSERVER LISTING OF PRIOR CHARGES OF PLAYERS<sup>329</sup>

The following charges against players on the Duke lacrosse team were obtained from Durham County court records. Deferred prosecution is a deal with prosecutors in which first-time offenders are placed on probation and often are required to do community service. If they stay out of trouble, the charges are dismissed.

- Edward James Crotty, 19, cited Aug. 27 for public urination. Deferred prosecution; review July 14.
- Matthew Edward Danowski, 20, cited Sept. 3 for underage possession of malt beverage. Found not guilty by judge.
- Kyle W. Dowd, 21, cited Aug. 21, 2004 for underage possession of malt beverage. Charge dismissed after completion of first-offenders program.
- David Evans, 22, cited Aug. 25 for possessing a can of beer in passenger area of a car; also cited Jan. 10 for noise ordinance violation. Deferred prosecution; review in August.
- Daniel P. Flannery, 22, cited Jan. 10 for noise violation. Court date: April 18.
- Zachary R. Greer, 20, cited Oct. 28, 2004 for possessing a plastic cup of beer while under 19 years old. Case dismissed after completion of deferred prosecution.
- Erik Steven Henkelman, 22, cited Aug. 24 for noise violation. Deferred prosecution; review in June.
- Frederick B. Krom, 21, cited Aug. 22, 2003 for underage possession of beer. Dismissed after completion of deferred prosecution.
- Kevin Michael Mayer, 19, cited Feb. 12, 2005 for obtaining property by false pretenses. Deferred prosecution; review in July.
- Kenneth Joseph Sauer III, 22, cited Aug. 25 for possessing an open container of alcohol in a vehicle and Oct. 1 on a noise ordinance violation. Accepted into first-offenders program.
- Robert R. Schroeder, 19, cited for obtaining property by false pretenses on Feb. 11, 2005, and April 3 and 8, 2005. Deferred prosecution; review in July.

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329. Nicolet, *supra* note 178.

- Christopher James Tkac, 19, cited Dec. 2 for underage possession of malt beverage and public urination. Court date: July 28.
- Michael C. Ward, 20, cited Sept. 3 for underage possession of a malt beverage. Found not guilty by a judge.
- Matthew Peter Wilson, 21, cited Nov. 21, 2003 for public urination on a private residence. Dismissed; wrong city ordinance listed on citation.
- William Eldon Wolcott, 22, cited Feb. 10, 2005 for helping a 20-year-old obtain a mixed beverage. Case dismissed through deferred prosecution.

