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## Sensationalism Falling Through the Cracks: Why the Legal Profession Must Broaden Ethical Standards for Legal Commentators

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## **Sensationalism Falling Through the Cracks: Why the Legal Profession Must Broaden Ethical Standards for Legal Commentators**

### **Cover Page Footnote**

I would like to thank Professor Bruce Green for his invaluable help and guidance while advising me on this Note, the IPLJ Editorial Board and staff for their hard work, and my family for their support.

# Sensationalism Falling Through the Cracks: Why the Legal Profession Must Broaden Ethical Standards for Legal Commentators

A. Augustus LaSala\*

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## INTRODUCTION

Whether it was O.J. Simpson, Casey Anthony, or Scott Peterson, history has shown that Americans love an exciting criminal trial.<sup>1</sup> As a result, in the United States, the coverage and analysis of high-publicity criminal cases is ever-growing, creating many opportunities for attorneys to work in media as legal commentators.<sup>2</sup> The term “legal commentator” has no precise definition, but generally entails attorneys making statements in the media that contain legal analysis.<sup>3</sup> When attorneys speak in the media they simultaneously act in two roles: as a licensed attorney who has professional responsibilities and as a journalist who must meet viewership requirements. These two different roles can have countervailing interests

<sup>1</sup> See Sarah K. Fleisch, *The Ethics of Legal Commentary: A Reconsideration of the Need for an Ethical Code in Light of the Duke Lacrosse Matter*, 20 GEO. J. LEGAL ETHICS 599, 599 (2007).

<sup>2</sup> See *id.*

<sup>3</sup> See *infra* Part II.A.

and values. The legal profession may demand that an attorney's speech educate the public and promote respect for the judicial system, while the media may demand easily digestible soundbites that boost ratings.<sup>4</sup> In this media context, the legal profession must consider how to best ensure that attorneys provide ethical legal commentary regarding the criminal justice system.<sup>5</sup>

To better demonstrate how a legal commentator can face the temptation to provide style over substance at the expense of the legal system, consider the example of Wendy Murphy.<sup>6</sup> Murphy, a former prosecutor and adjunct professor at New England School of Law, became a prolific presence on television talk shows during the prosecution of multiple Duke University lacrosse players for an alleged rape.<sup>7</sup> Throughout the case, Murphy provided outrageous commentary that was strongly slanted toward the prosecution.<sup>8</sup> For example, over the course of several different guest appearances, Murphy referred to the defendants as rapists; speculated, without evidence, that one or more of the defendants had been molested as a child; and dismissed evidence that the defendants had good disciplinary records at school by responding that "Hitler never beat his wife either . . . So what?"<sup>9</sup> Furthermore, Murphy even questioned the presumption of innocence (one of the most important tenets of U.S. criminal law<sup>10</sup>) by stating, "I'm really tired of people suggesting that you're somehow un-American if you don't respect the presumption of innocence because you know what that sounds

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<sup>4</sup> See ABA Standards for Criminal Justice, *Fair Trial and Pub. Discourse* § 8-2.4 (2013) [hereinafter 2013 Standards]; Erwin Chemerinsky & Laurie Levenson, *The Ethics of Being A Commentator*, 69 S. CALIF. L. REV. 1303, 1313 (1996) [hereinafter Ethics I].

<sup>5</sup> This Note will only study the application of ethical standards to legal commentators providing analysis on criminal law issues and will not consider whether ethical standards should be adopted in a civil context as well.

<sup>6</sup> See STUART TAYLOR, JR. & KC JOHNSON, UNTIL PROVEN INNOCENT: POLITICAL CORRECTNESS AND THE SHAMEFUL INJUSTICES OF THE DUKE LACROSSE CASE 144 (2007).

<sup>7</sup> The Duke lacrosse rape case involved a criminal case brought in 2006 against three Duke lacrosse students that created a media frenzy until the charges were dismissed. See Fleisch, *supra* note 1; see also TAYLOR & JOHNSON, *supra* note 6.

<sup>8</sup> See TAYLOR & JOHNSON, *supra* note 6, at 164–65.

<sup>9</sup> *Id.* at 165–66.

<sup>10</sup> See *Kentucky v. Whorton*, 441 U.S. 786, 789–90 (1979) (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.").

like to a victim? Presumption you're a liar."<sup>11</sup> By providing headline-worthy but legally-deficient commentary, Murphy's behavior epitomizes why the legal profession needs to confront the ethical issues that attorneys face when speaking in the media.

The American Bar Association ("ABA") addressed the issue of legal commentary ethics in 2013 when it adopted its first-ever criminal justice ethical standards for legal commentators (the "2013 Standards").<sup>12</sup> The 2013 Standards provide ethical guidance to legal commentators by explaining how a commentator can become competent to provide commentary on a given case, what conflicts a commentator should disclose, and what types of comments a commentator should avoid making. However, the 2013 Standards do not go far enough and could benefit from certain clarifications. First, the 2013 Standards do not define "legal commentator," leaving room for interpretation as to what types of attorneys qualify as commentators.<sup>13</sup> Second, the 2013 Standards limit what statements qualify as commentary, excluding certain types of statements that could nevertheless cause harm to individuals, the public, and the legal system generally.<sup>14</sup> Third, the 2013 Standards do not encourage commentators to avoid inflicting unnecessary reputational harm on individuals involved in criminal litigation (such as defendants or subjects of investigation), despite the great damage that such commentary can cause.<sup>15</sup>

Voluntary standards should broadly construe who qualifies as a legal commentator and what qualifies as legal commentary, and such standards should address the dangers of unnecessary reputational harm caused by legal commentary. Part I of this Note will explore the media's impact on the criminal justice system, explain what makes legal commentators different from other journalists, and discuss the history of regulation of legal commentators. Part II will discuss how voluntary codes have, and have not, addressed who qualifies as legal commentators, what qualifies as legal commentary, and what should be done about the risks of causing unne-

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<sup>11</sup> TAYLOR & JOHNSON, *supra* note 6, at 166.

<sup>12</sup> *See generally* 2013 Standards, *supra* note 4, § 8-2.4.

<sup>13</sup> *See generally id.*

<sup>14</sup> *See infra* Part II.B.

<sup>15</sup> *See infra* Part II.C.

cessary reputational harm. Part III will explain why expanding the reach of voluntary standards is important. It will propose that the ABA apply its new ethical standards for legal commentators more broadly by adding an inclusive definition of legal commentator and applying the standards to all legal analysis provided by a commentator. Part III will also suggest that voluntary standards should encourage commentators to avoid causing reputational harm when their commentary has no countervailing educational purpose, and that the ABA add such language to its standards. Part IV concludes.

### I. A BACKGROUND ON LEGAL COMMENTARY

Legal commentators have a distinct and important role in the media's coverage of the criminal justice system. As licensed attorneys, legal commentators must follow mandatory ethical codes, regardless of whether they actively practice law, because each state's judicial branch or bar association regulates attorneys and enforces professional discipline for violating codes.<sup>16</sup> Journalists, on the other hand, operate under voluntary codes of ethics with no disciplinary authority.<sup>17</sup> To properly understand why legal commentators should be held to ethical standards beyond the requirements of non-attorneys in the media, one must understand the media's impact on the criminal justice system; why legal commentators differ from other journalists;<sup>18</sup> and what efforts have been made to regulate commentators.

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<sup>16</sup> See Ethics I, *supra* note 4, at 1314; Judith L. Maute, *Bar Associations, Self-Regulation and Consumer Protection: Whither Thou Goest?*, 2008 J. PROF. LAW. 53, 58 (2008). Each state develops its own ethical codes, but the ABA drafts model codes that many states adopt. See Maute, *supra*.

<sup>17</sup> See Ethics I, *supra* note 4, at 1314. However, media outlets may enforce their own employment standards to encourage ethical journalism, such as when NBC suspended news anchor Brian Williams for making a misrepresentation in an NBC broadcast. See Emily Steel & Ravi Somaiya, *Brian Williams Suspended from NBC for 6 Months Without Pay*, N.Y. TIMES (Feb. 10, 2015), <http://www.nytimes.com/2015/02/11/business/media/brian-williams-suspended-by-nbc-news-for-six-months.html> [<http://perma.cc/N8LK-5PED>].

<sup>18</sup> As stated above, journalists have their own ethical guidelines; however, their standards do not address many of the issues faced exclusively by legal commentators. See *SPJ Code of Ethics*, SOC'Y OF PROF. JOURNALISTS, <http://www.spj.org/ethicscode.asp> [<http://perma.cc/7GXT-ATRY>] (last updated Sept. 6, 2014) (discussing four principles

*A. Examples of the Media's Impact on the Criminal Justice System*

The media's coverage of high publicity trials can have a great impact on the administration of justice. For instance, trial publicity can impact the impartiality of a jury pool by exposing potential jurors to a great amount of pretrial knowledge on the case.<sup>19</sup> Media scrutiny can also pressure jurors to conform their verdict to public opinion rather than the evidence presented at trials and can even expose jurors to danger if they refuse to do so.<sup>20</sup> One-sided media coverage can also convince the public that a specific verdict is inevitable, which can lead people to lose faith in the legal system when the media's predictions are wrong.<sup>21</sup> Finally, harsh media coverage can cause great reputational harm to defendants and others involved in a criminal proceeding, which may continue to impact such persons even if they are ultimately vindicated.<sup>22</sup> This section will briefly explore the impact that media can have on the legal system by looking at the media coverage of three high-publicity criminal cases: *Sheppard v. Maxwell*,<sup>23</sup> the O.J. Simpson trial, and the Duke lacrosse rape case.

*Sheppard* is the seminal case concerning criminal trial publicity. In 1954, Samuel Sheppard's pregnant wife was brutally murdered in their home and Sheppard quickly became the prime suspect.<sup>24</sup> The case received overwhelming amounts of media publicity throughout the criminal investigation, prosecution, and eventual conviction of Sheppard.<sup>25</sup> The United States Supreme Court, con-

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that are foundational for ethical journalism: (1) seek truth and report it; (2) minimize harm; (3) act independently; and (4) be accountable and transparent).

<sup>19</sup> Brian V. Breheny & Elizabeth M. Kelly, *Maintaining Impartiality: Does Media Coverage of Trials Need to Be Curtailed?*, 10 ST. JOHN'S J. LEGAL COMMENT. 371, 382-83 (1995). While judges may direct potential jurors to refrain from exposing themselves to outside information on a given case, such orders do not guarantee that jurors will actually avoid following the media coverage of a case. *Id.* at 391.

<sup>20</sup> *Id.* at 383.

<sup>21</sup> See Glenn Garvin, *Casey Anthony Verdict Outrage: Critics Blame Nancy Grace, Geraldo Rivera and Other Media Figures*, VANCOUVER SUN (July 7, 2011), <http://archive.today/4n0BO#selection-2587.0-2587.96> [<http://perma.cc/8A83-WCRJ>].

<sup>22</sup> See TAYLOR & JOHNSON, *supra* note 6, at 355 ("You can try to move on, but rape will always be associated with my name. 'Innocent' might be part of that, but when I die, they'll say, 'One of the three Duke lacrosse rape suspects died today.'").

<sup>23</sup> *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

<sup>24</sup> See *id.* at 335-36.

<sup>25</sup> See *id.*

sidering Sheppard's habeas corpus application in 1966, recounted the many ways that the media invaded the entire criminal justice process. First, prior to the trial, the media spent months providing highly biased coverage of the case, consistently emphasizing incriminating evidence and highlighting discrepancies in Sheppard's statements to authorities.<sup>26</sup> The Court also found that members of the jury had undoubtedly heard this negative publicity during the trial and likely faced pressure from the community to find Sheppard guilty because newspapers had published pictures and the addresses of jury members.<sup>27</sup> In addition, news reporters had a large and disruptive presence during the trial itself, as the judge permitted the media to practically take over the courtroom.<sup>28</sup> Lastly, throughout the trial, newspapers interpreted evidence and drew unwarranted inferences from testimony, which generally indicated to readers that Sheppard was guilty.<sup>29</sup> The Supreme Court ultimately held that the trial judge had failed to protect Sheppard from the inherently prejudicial publicity and failed to control disruptive influences in the courtroom, depriving Sheppard of his right to due process.<sup>30</sup>

Nearly thirty years later, the O.J. Simpson trial became arguably the most publicized case ever.<sup>31</sup> Prior to Simpson's arrest, his

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<sup>26</sup> *See id.* at 340. The media also deeply probed the investigation itself. For example, the coroner asked Sheppard to re-enact the events at his home and invited newspaper reporters along, who reported his performance and included photographs. *See id.* at 338. Sheppard was also interviewed three months before trial without counsel during a three-day inquest that was televised live to hundreds of people. *See id.* at 354.

<sup>27</sup> *See id.* at 353, 357.

<sup>28</sup> *See id.* at 355.

<sup>29</sup> *See id.* at 357. As aptly summarized by the Ohio Supreme Court:

Murder and mystery, society, sex and suspense were combined in this case in such a manner as to intrigue and captivate the public fancy to a degree perhaps unparalleled in recent annals. Throughout the preindictment investigation, the subsequent legal skirmishes and the nine-week trial, circulation-conscious editors catered to the insatiable interest of the American public in the bizarre . . . In this atmosphere of a 'Roman holiday' for the news media, Sam Sheppard stood trial for his life.

*Id.* at 356 (citing *State v. Sheppard*, 135 N.E.2d 340, 342 (Ohio 1956)).

<sup>30</sup> *See id.* at 363.

<sup>31</sup> *See Ethics I, supra* note 4, at 1303.

infamous “Bronco Chase” drew ninety-five million viewers.<sup>32</sup> When the jury reached a final verdict, more than 150 million people watched.<sup>33</sup> From June 1994 to October 1995, the media analyzed, dissected, and televised nearly every aspect of the trial.<sup>34</sup> The media also relied heavily on legal commentators to perform the analysis, often asking them to score trial participants, provide predictions, and release nonpublic information.<sup>35</sup> At times, the media even relied on incompetent commentators.<sup>36</sup> The media consistently asserted that the jury could only possibly reach a guilty verdict; thus, when Simpson was found not guilty, much of the American public, primarily divided on racial lines, believed that the justice system had failed.<sup>37</sup>

More recently, in 2006, the media feverishly followed yet another high-profile criminal case in which members of the Duke University lacrosse team were charged with raping an exotic dancer.<sup>38</sup> From the media’s perspective, the case had everything to captivate the public’s attention: a rape committed by “a swaggering pack of white, privileged beer-drinkers with a string of misdemeanor charges, and the accuser as a hard-working state college student stripping to stay in school and support her two children.”<sup>39</sup> The case touched three major social fault lines: class, race, and sex.<sup>40</sup> Almost immediately, the media presumed the Duke students guilty and filled the airwaves with constant one-sided coverage.<sup>41</sup> Eventually, it came to light that the prosecutor had committed serious misconduct,<sup>42</sup> leading to the dismissal of all charges against

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<sup>32</sup> Erwin Chemerinsky & Laurie Levenson, *The Ethics of Being a Commentator III*, 50 MERCER L. REV. 737, 738 n.2 (1999) [hereinafter *Ethics III*].

<sup>33</sup> *Witness to History: The Role of Legal Commentators in High Profile Trials*, 49 CLEV. ST. L. REV. 439, 441 (2001) [hereinafter *Witness to History*].

<sup>34</sup> See *Ethics I*, *supra* note 4, at 1303, 1309–10, 1320, 1324.

<sup>35</sup> *Id.* at 1309–10, 1320, 1324.

<sup>36</sup> *Id.*

<sup>37</sup> See *Witness to History*, *supra* note 33, at 441; Trey Sanchez, *Virtual Celebrity: The Right of Publicity and Video Games*, TRUTH REVOLT (Nov. 25, 2014), <http://www.truthrevolt.org/news/flashback-0j-simpson-verdict-reactions-no-justice-no-rioting> [<http://perma.cc/2TLX-UYKJ>].

<sup>38</sup> See Fleisch, *supra* note 1, at 609.

<sup>39</sup> TAYLOR & JOHNSON, *supra* note 6, at 123.

<sup>40</sup> See *id.* at 127.

<sup>41</sup> See *id.* at 122.

<sup>42</sup> See *id.* at 311–12, 317.

the students,<sup>43</sup> as well as a statement from the North Carolina Attorney General declaring that the students were innocent.<sup>44</sup> However, even exoneration could not undo the harm the media inflicted on the students' reputations.<sup>45</sup> The Sheppard, Simpson, and Duke lacrosse cases are strong examples of the media's significant influence on criminal proceedings. These examples demonstrate how unethical media coverage can prejudice juries, make the public lose faith in the legal system, or permanently damage the reputation of innocent defendants.

### B. *What Makes Legal Commentators Different From Other Journalists*

Legal commentators are unique actors in the media because, unlike non-attorneys, commentators have a distinct responsibility to educate the public on the legal system and have enhanced credibility in the eyes of the public. Due to legal commentators being regularly featured on twenty-four hour news channels such as CNN, MSNBC, and CSPAN, as well as network news programs on channels such as ABC, NBC, and CBS, their importance in the media has increased.<sup>46</sup> In addition, networks such as the CNN-owned HLN<sup>47</sup> have legal news programs that rely on legal commentators to discuss trending legal news stories.<sup>48</sup> These shows can have wide viewership, as exemplified by the program *Nancy Grace*, which draws as many as three million viewers per show.<sup>49</sup>

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<sup>43</sup> See *id.* at 317.

<sup>44</sup> See *id.* at 350–51.

<sup>45</sup> See *supra* note 22 and accompanying text.

<sup>46</sup> See Fleisch, *supra* note 1, at 599.

<sup>47</sup> HLN's website describes the network as "the national television network that focuses on the 'must-see, must-share' stories of the day. *About HLN*, HLN, <http://www.hln.com/hln-about-us> [<http://perma.cc/MR8T-SQZ3>] (last visited Sept. 25, 2015). By "[d]rawing upon the network's deep bench of talent, HLN dissects and demystifies the news stories and newsmakers people are talking about." *Id.*

<sup>48</sup> David Carr, *TV Justice Thrives on Fear*, N.Y. TIMES (May 22, 2011), <http://www.nytimes.com/2011/05/23/business/media/23carr.html> [<http://perma.cc/2STN-2P4Y>].

<sup>49</sup> Lisa de Moraes, "Nancy Grace" HLN, *Score Ratings Coup with Casey Anthony Verdict*, WASH. POST (July 6, 2011), [http://www.washingtonpost.com/lifestyle/style/nancy-grace-hln-score-ratings-coup-with-casey-anthony-verdict/2011/07/06/gIQAmv2l1H\\_story.html](http://www.washingtonpost.com/lifestyle/style/nancy-grace-hln-score-ratings-coup-with-casey-anthony-verdict/2011/07/06/gIQAmv2l1H_story.html) [<http://perma.cc/TR94-TE96>] (discussing how *Nancy Grace* reached three million viewers the night Casey Anthony received her controversial acquittal).

Given the prevalence of legal commentators in the media and their unique role amongst other members of the media, legal commentators have become even more important.

### 1. Role of Educating the Public

The primary role of the legal commentator is to educate the public.<sup>50</sup> The first sentence of the 2013 Standard's section on legal commentators codifies this educational purpose, stating that, "[a] lawyer may serve an important role of educating the public regarding the criminal justice system by providing legal commentary with respect to a criminal case."<sup>51</sup> As professionals trained in the law, attorneys can act as experts interpreting legal proceedings for both the public and the media by explaining to the public how the legal system works, the significance of evidence presented in a given case, and what legal arguments may exist for parties in litigation.<sup>52</sup> Legal commentators also help give the public perspective on the legal issues in a given case by recognizing and identifying what events are important and what events are not.<sup>53</sup> As Professors Erwin Chemerinsky and Laurie Levenson point out, "[o]ne of the greatest services a legal commentator can provide is to put the brakes on a story run amok and offer some perspective to a recent development in a case."<sup>54</sup> Skilled legal commentators both clarify aspects of the law and focus the public's attention on the important details of a given case, thus enabling the public to evaluate the issues themselves and reach well-informed conclusions.

### 2. Enhanced Credibility of Legal Commentators to Journalists

Legal commentators also differ from journalists due to the heightened credibility owed to attorneys and hired experts.<sup>55</sup> The public is likely to take the statements of a legal commentator more seriously than those of non-attorneys because the media presents them as experts who are highly trained professionals with advanced

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<sup>50</sup> See Ethics I, *supra* note 4, at 1307–08; *Witness to History*, *supra* note 33, at 443.

<sup>51</sup> 2013 Standards, *supra* note 4, § 8-2.4.

<sup>52</sup> See Laurie L. Levenson, *Reporting the Rodney King Trial: The Role of Legal Experts*, 27 LOY. L.A. L. REV. 649, 652 (1994).

<sup>53</sup> See Ethics I, *supra* note 4, at 1308.

<sup>54</sup> *Id.*

<sup>55</sup> See Levenson, *supra* note 52, at 663.

degrees.<sup>56</sup> In addition, viewers may presume that attorneys who are also former prosecutors are even *more* trustworthy because viewers may impute the credibility of the government to the commentator.<sup>57</sup> Once a prosecutor leaves his or her position and becomes a commentator, the commentator can capitalize on the reputation of the government by invoking his or her past experience.<sup>58</sup>

For example, during the Duke lacrosse case Wendy Murphy, who was regularly introduced on MSNBC, FOX, and CBS news programs as a former prosecutor, referenced her experience as a prosecutor to bolster her credibility and support her own outlandish statements, once stating, “I never, ever met a false rape claim, by the way. My own statistics speak to the truth.”<sup>59</sup> As one former defendant in the Duke lacrosse case bluntly stated, “[w]hen Wendy Murphy goes out and compares me to Hitler, she’s clearly out of her mind. But because they say she’s a former prosecutor, she gets credibility.”<sup>60</sup> As this example shows, legal commentators can use their credibility to support extreme statements and make them appear more reliable to the public.

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<sup>56</sup> See *id.* (“When the term ‘expert’ is attached to a legal commentator, the public tends to give added credibility to that individual’s comments.”); see also Ethics I, *supra* note 4, at 1305 (finding that the media, in part, uses commentators because they enhance the credibility of their coverage).

<sup>57</sup> See TAYLOR & JOHNSON, *supra* note 6, at 164 (discussing how the public can take even the most outrageous comments about defendants in a criminal trial seriously when a former prosecutor makes them); Abigail H. Lipman, *Extrajudicial Comments and the Special Responsibilities of Prosecutors: Failings of the Model Rules in Today’s Media Age*, 47 AM. CRIM. L. REV. 1513, 1533 (2010) (finding that statements made by active prosecutors, “have increased likelihood to influence the public because the attorneys speak with ‘the inherent authority of the government’”).

<sup>58</sup> *No DNA Match Found in Duke Rape Scandal*, CNN (Apr. 10, 2006, 8:00 PM), <http://transcripts.cnn.com/TRANSCRIPTS/0604/10/ng.01.html> [<http://perma.cc/D7HH-T7TJ>] (providing an example of Wendy Murphy invoking her experience as a prosecutor to support one of her arguments).

<sup>59</sup> KC Johnson, *The Wendy Murphy File*, DURHAM-IN-WONDERLAND BLOG (Dec. 31, 2006), <http://durhamwonderland.blogspot.com/2006/12/wendy-murphy-file.html> [<http://perma.cc/F2KP-4VGC>].

<sup>60</sup> TAYLOR & JOHNSON, *supra* note 6, at 165.

### C. History of Regulation of Legal Commentators

#### 1. Mandatory Ethical Codes

In 1887, Alabama adopted the first United States Legal Ethics Code, which encouraged lawyers to avoid speaking to newspapers unless strongly justified, stating that it is unprofessional to make statements anonymously.<sup>61</sup> Then in 1908, the ABA published its first ethics code, The Canons of Professional Ethics, which adopted nearly identical language regarding statements to the media.<sup>62</sup> In 1969, the ABA promulgated disciplinary rule DR 7-107 of the Model Code of Professional Responsibility, which implemented far greater restrictions on what lawyers can say to the media.<sup>63</sup> DR 7-107 stated that, “[a] lawyer . . . associated with a criminal matter . . . shall not . . . make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to” certain listed aspects of the case.<sup>64</sup> Some courts have found DR-7-107 to be unconstitutional.<sup>65</sup>

In 1983, the ABA promulgated Rule 3.6 on trial publicity in the ABA’s Model Rules of Professional Conduct, establishing that a lawyer previously or currently participating in a litigation cannot make extrajudicial statements to the public that have “a substantial likelihood of materially prejudicing an adjudicative proceeding on the matter.”<sup>66</sup> Comments to Rule 3.6’s also clarify that the rule only applies to lawyers participating in a proceeding because legal commentary is valuable, and further, the likelihood that commentary from a lawyer not involved in the case will cause prejudice is small.<sup>67</sup>

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<sup>61</sup> Fleisch, *supra* note 1, at 600 (citing Peter R. Jarvis & Bradley F. Tellam, *Lawyers and Trial Publicity—A Brief History of Regulation*, 1995 PROF. LAW. SYMP. ISSUES 167 (1995)).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*; *see also* MODEL CODE OF PROF’L RESPONSIBILITY DR 7-107 (AM. BAR ASS’N 1980).

<sup>64</sup> MODEL CODE OF PROF’L RESPONSIBILITY DR 7-107; Fleisch, *supra* note 1, at 600–01.

<sup>65</sup> Fleisch, *supra* note 1, at 600–01 (citing *Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976)).

<sup>66</sup> *Id.* at 601; *see also* MODEL RULES OF PROF’L CONDUCT r. 3.6 (AM. BAR ASS’N 2004).

<sup>67</sup> *See* MODEL RULES OF PROF’L CONDUCT r. 3.6. cmt.

In 1991, the Supreme Court addressed what constitutes a “substantial likelihood of material prejudice” as established by Rule 3.6.<sup>68</sup> In *Gentile v. State Bar of Nevada*,<sup>69</sup> the Court considered an appeal by a lawyer whom the Nevada State Bar found had violated Nevada Supreme Court Rule 177, which is almost identical to Rule 3.6.<sup>70</sup> The Court did not decide Rule 3.6’s constitutionality, and only considered Rule 177 as it was interpreted and applied by the Supreme Court of Nevada. The Court held that the “substantial likelihood of material prejudice” standard contained in both Rule 3.6 and Rule 177 does not violate the First Amendment rights of attorneys involved in a pending case.<sup>71</sup> In addition, the Court determined that limiting attorney speech when it will likely prejudice that attorney’s case, is narrowly tailored to protect a defendant’s right to a fair trial.<sup>72</sup> *Gentile* upheld a narrow standard for regulating one type of lawyer speech, but did not indicate that broader regulations of attorney speech would survive judicial scrutiny.<sup>73</sup> Further, legal scholars have interpreted *Gentile* as holding that any mandatory restriction on extrajudicial statements made by lawyers not engaged in the representation of a party in a criminal proceeding to be unconstitutional.<sup>74</sup> Following *Gentile*, no serious attempts have been made to create mandatory ethics rules for commentators.<sup>75</sup> Instead, legal scholars have advocated for the adoption of voluntary ethical standards.<sup>76</sup>

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<sup>68</sup> *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991).

<sup>69</sup> *Id.*

<sup>70</sup> “Rule 177(1) prohibits an attorney from making ‘an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.’” *Id.* at 1033.

<sup>71</sup> Fleisch, *supra* note 1, at 601 (citing *Gentile*, 501 U.S. at 1075).

<sup>72</sup> *Id.*

<sup>73</sup> *See generally Gentile*, 501 U.S. 1030.

<sup>74</sup> *See Ethics I, supra* note 4, at 1315–16 (distinguishing *Gentile* and finding that placing restrictions on commentator speech would violate the First Amendment for three main reasons: first, unlike in *Gentile*, commentators are not “officers of the court;” second, there is no evidence that regulating commentators speech is necessary to assure fair proceedings; and third, a mandatory ethics code would be unconstitutionally overbroad); Fleisch, *supra* note 1, at 607 (finding that an argument that restrictions on commentator speech could be narrowly tailored under *Gentile* and therefore constitutional is debatable).

<sup>75</sup> *See generally* Fleisch, *supra* note 1.

<sup>76</sup> *See generally infra* Part I.C.2.

## 2. Voluntary Ethical Standards

With *Gentile* precluding judiciaries and bar associations from adopting mandatory ethical rules for legal commentators, the next option is for these organizations to adopt voluntary ethical codes or standards. Voluntary ethical standards avoid the constitutional questions presented by mandatory codes, as they are not government-imposed restrictions on speech.<sup>77</sup> Courts have also frequently and approvingly cited to voluntary standards in many cases.<sup>78</sup> While any commentator can choose to disregard voluntary standards, they present a number of potential benefits. First, voluntary standards put commentators on notice that they should take their ethical obligations seriously by publicly demonstrating how commentators should act.<sup>79</sup> Second, voluntary standards will help commentators navigate difficult ethical issues by providing a guide of best practices, while also providing clear examples of situations where a commentator is unqualified to provide legal commentary.<sup>80</sup> Third, voluntary standards can potentially give the public greater confidence in the work of commentators by showing the public that the legal profession considers commentary ethically important.<sup>81</sup> Fourth, voluntary standards provide commentators with support when they face pressure from the media to cross ethical lines by allowing commentators to fall back on explicit standards.<sup>82</sup>

Legal scholars and organizations have presented several proposals for voluntary ethical guidelines. First, in response to the numerous ethical abuses committed by legal commentators during the O.J. Simpson trial, law professors Erwin Chemerinsky and Laurie Levenson proposed the creation of voluntary ethical guidelines

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<sup>77</sup> See Ethics I, *supra* note 4, at 1314 (contrasting voluntary ethical codes for commentators with government-imposed mandatory ethical codes, which “would surely violate the First Amendment since many provisions of an [mandatory] ethical code would concern the speech of the commentators”).

<sup>78</sup> Martin Marcus, *The Making of the ABA Criminal Justice Standards Forty Years of Excellence*, 23-WTR CRIM. JUST. 10, 10-11 (2009) (finding that more than 120 Supreme Court cases and more than 700 federal circuit cases have cited to the ABA Criminal Justice Standards). “In 1986, Justice O’Connor, speaking for the Court, agreed that the Court ‘frequently finds [the ABA Standards] helpful.’” *Id.* at 11.

<sup>79</sup> See Ethics I, *supra* note 4, at 1312.

<sup>80</sup> See *id.*

<sup>81</sup> See *id.*

<sup>82</sup> See *id.* at 1313.

for legal commentators in a series of three law review articles published in the mid-to-late 1990s (the “C&L Proposal”).<sup>83</sup> Shortly thereafter, in 1998, the American College of Trial Lawyers proposed a set of ethical guidelines for legal commentators (the “ACTL Proposal”) and the National Association of Criminal Defense Lawyers adopted ethical considerations for its members (the “NACDL Considerations”).<sup>84</sup> Finally, in 2013 the ABA supplanted the ABA Criminal Justice Standards on Fair Trial and Free Press with the ABA Criminal Justice Standards on Fair Trial and Public Discourse and adopted Standard 8-2.4,<sup>85</sup> which provided criminal justice ethical standards for statements made by legal commentators.<sup>86</sup> Each of these proposals provided recommendations for best practices for legal commentators, including that legal commentators should be competent to provide commentary, avoid conflicts of interest, maintain confidentiality; avoid providing personal opinions; use their commentary to educate the public; and avoid materially prejudicing the fair administration of justice.

#### a) Competence

Each proposal states that a legal commentator should be competent, emphasizing that commentators must know the law and

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<sup>83</sup> See Ethics I, *supra* note 4; Erwin Chemerinsky & Laurie Levenson, *The Ethics of Being A Commentator II*, 37 SANTA CLARA L. REV. 913, 916 (1997) [hereinafter Ethics II]; Ethics III, *supra* note 32, at 738–39.

<sup>84</sup> *Excerpt from Report on Fair Trial of High Profile Cases*, 50 MERCER L. REV. 773, 774 (1999) [hereinafter ACTL Proposal]; *Ethical Considerations for Criminal Defense Attorneys Serving as Legal Commentators*, 50 MERCER L. REV. 777 (1999) [hereinafter NACDL Considerations]. Both the ACTL Proposal and NACDL Considerations cite to Chemerinsky and Levenson’s work, with the NACDL stating that “[w]e owe a debt to Professors Chemerinsky and Levenson for their thought-provoking and thorough examination of issues involved in legal commentary and their suggestions for a proposed voluntary code for commentators generally.” NACDL Considerations, *supra*, at 777 n.2; see also ACTL Proposal, *supra*, at 774 n.2.

<sup>85</sup> 2013 Standards, *supra* note 4, § 8-2.4.

<sup>86</sup> *Id.* The ABA has not yet provided commentary for these standards, but will likely adopt commentary in the future. See *id.*; *Criminal Justice Standards*, A.B.A., [http://www.americanbar.org/groups/criminal\\_justice/standards.html](http://www.americanbar.org/groups/criminal_justice/standards.html) [http://perma.cc/TSY6-9KTM] (last visited Sept. 25, 2015) (stating that after the ABA adopts new criminal standards, the ABA’s Standards Committee helps prepare and approves accompanying commentary).

facts of a matter in order to provide competent commentary.<sup>87</sup> The C&L Proposal recommends that commentators have a duty of competence, requiring “substantive knowledge of the law, practical experience in the courtroom, familiarity with the proceedings at bar, and a willingness to do the research necessary to answer the many questions that arise in a case.”<sup>88</sup> Similarly, the ACTL Proposal requires that “[t]he commentator has an understanding of the background of the case so as to be competent.”<sup>89</sup> Further, the NACDL Considerations’ duty of competence requires commentators to “know the legal and factual issues in a case” and also encourages media outlets seeking commentary to “gather as much relevant and reliable data regarding the case as possible to permit competent commentary.”<sup>90</sup>

#### b) Avoiding Conflicts of Interest

The C&L Proposal, ACTL Proposal, NACDL Considerations, and 2013 Standards each state that lawyers should avoid conflicts.<sup>91</sup> While a lawyer generally must avoid conflicts of interest with his or her clients, in the case of legal commentators the lawyer’s client is often considered to be the public.<sup>92</sup> Some of the conflicts that commentators face include when commentators comment on proceedings that they have a personal stake in or when they represent a client or former client who may be affected by the proceeding.<sup>93</sup> The C&L Proposal lists seven types of conflicts, while the 2013 Standards list three.<sup>94</sup> Every proposal suggests that commentators

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<sup>87</sup> 2013 Standards, *supra* note 4, § 8-2.4; NACDL Considerations, *supra* note 84, at 778; ACTL Proposal, *supra* note 84, at 774.

<sup>88</sup> Fleisch, *supra* note 1, at 602 (quoting Ethics I, *supra* note 4, at 1320–21).

<sup>89</sup> ACTL Proposal, *supra* note 84, at 774.

<sup>90</sup> See NACDL Considerations, *supra* note 84, at 778.

<sup>91</sup> See 2013 Standards, *supra* note 4, § 8-2.4; Ethics I, *supra* note 4; NACDL, *supra* note 84; ACTL Proposal, *supra* note 84.

<sup>92</sup> See Ethics I, *supra* note 4, at 1328.

<sup>93</sup> See Ethics III, *supra* note 32, at 745; ACTL Proposal, *supra* note 84, at 774.

<sup>94</sup> Fleisch, *supra* note 1, at 603 (citing Ethics III, *supra* note 32, at 745) (The seven conflicts are: “(1) conflicts created by a commentator’s personal relationship with a party in a case, (2) conflicts created by a commentator’s assistance to one party in a case, (3) conflicts created by a commentator’s stake in the outcome of a proceeding or a legal ruling, (4) conflicts created by a commentator’s political or organizational affiliations, (5) conflicts created by speaking to more than one media outlet, (6) conflicts created by contacting witnesses placed under gag orders or represented by counsel, and (7) conflicts

can at a minimum attempt to avoid conflicts by providing full disclosure.<sup>95</sup> The C&L Proposal suggests that legal commentators provide full disclosure by doing, “everything in their power to ensure both the media and the public are aware of any potential conflicts.”<sup>96</sup> The C&L Proposal recommends that legal commentators not only disclose potential conflicts to the media outlet they are contributing to, but also make disclosures directly to the public, because the media outlet may never convey the commentator’s disclosure to the public.<sup>97</sup>

### c) Confidentiality

Only the C&L Proposal and 2013 Standards include recommendations on preventing legal commentators from revealing confidential information, and each proposal presents a different interpretation of “confidentiality.”<sup>98</sup> The C&L Proposal includes an expansive interpretation of confidentiality, suggesting that commentators should keep confidential any statement made to them by a source when the commentator and source expressly promises to maintain confidentiality.<sup>99</sup> The 2013 Standards have a more traditional approach to confidentiality, only recommending that a commentator avoid revealing any information made confidential by the court, by the prosecutor, or by the lawyer’s duties of confidentiality or loyalty.<sup>100</sup>

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created by directly or indirectly assisting the court.”); *see also* 2013 Standards, *supra* note 4, § 8-2.4 (The three conflicts are: “(A) the representation of a client, past or present, who may be affected by the proceedings; (B) any relationships with the lawyers, judge, victim, witnesses or parties in the proceedings; and (C) the fact that the lawyer is being compensated for providing commentary, if that is the case, and the source of such compensation.”).

<sup>95</sup> *See* 2013 Standards, *supra* note 4, § 8-2.4; Ethics I, *supra* note 4; NACL, *supra* note 84; ACTL Proposal, *supra* note 84.

<sup>96</sup> Ethics I, *supra* note 4, at 1329.

<sup>97</sup> *See id.* While this recommendation could theoretically ensure that the public is aware of all potential conflicts, commentators might avoid complying with it because making such a disclosure against an employer’s will would likely anger the employer and prevent the commentator from receiving further employment opportunities.

<sup>98</sup> *See* 2013 Standards, *supra* note 4, § 8-2.4; Ethics I, *supra* note 4, at 1325.

<sup>99</sup> Ethics I, *supra* note 4, at 1325.

<sup>100</sup> 2013 Standards, *supra* note 4, § 8-2.4 (stating that a legal commentator “should not help provide information: (i) that is under seal; (ii) that was obtained in violation of a

#### d) Personal Opinions

Each proposal cautions legal commentators against providing personal opinions or predictions for cases. The C&L Proposal emphasizes that a commentator should not make predictions, as predictions are often wrong and can cause unnecessary havoc, such as when predictions that the O.J. Simpson trial would result in a hung jury created fear in both the courtroom and in the public.<sup>101</sup> The C&L Proposal also finds that a commentator should be careful when providing a personal opinion because commentators should always remain objective.<sup>102</sup> The ACTL Proposal provides a more restrictive standard on personal opinions, recommending that commentators refrain from making any statements that include personal opinions or predictions.<sup>103</sup> The NACDL Considerations suggest that commentators “exercise caution when asked to give an opinion about the quality of performance, strategy or tactics of another criminal defense lawyer.”<sup>104</sup> Finally, the 2013 Standards provide a slightly more flexible standard that does not ban personal opinions outright, but suggests that a commentator exercise great caution before providing opinions, and further, specifically identify the basis for those opinions.<sup>105</sup>

#### e) Educate the Public

Each proposal, except for the ACTL Proposal, emphasizes that legal commentators have a distinct role in educating the public about a case and the legal system generally. The C&L Proposal states that the first role of the legal commentator is to educate the

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protective order; (iii) that is grand jury information that has not been released; or (iv) the disclosure of which would violate the lawyer’s duty of confidentiality or loyalty”).

<sup>101</sup> See Ethics I, *supra* note 4, at 1309–10 (citing Paul Pringle, *O.J. Mistrial? Retrial and Tribulation*, SAN DIEGO UNION-TRIB., Aug. 20, 1995, at A1; Sandra Torry, *TV Analysts Give Own Verdict: Deadlocked Simpson Jury*, WASH. POST, Sept. 25, 1995, at 7).

<sup>102</sup> See Ethics I, *supra* note 4, at 1310. The authors originally recommended in Ethics I that legal commentators remain objective and neutral when providing commentary, but in Ethics III the authors change this requirement. See Ethics III, *supra* note 32, at 754. In Ethics III, they instead find that commentators can ethically act as advocates for particular sides of an argument, as long as the commentators clearly communicate to the media that they see themselves as partisan advocates. See *id.*

<sup>103</sup> ACTL Proposal, *supra* note 84, at 774.

<sup>104</sup> NACDL Considerations, *supra* note 84, at 779.

<sup>105</sup> 2013 Standards, *supra* note 4, § 8-2.4(c).

public by not only reciting the law, but also by putting into perspective issues from the legal proceeding.<sup>106</sup> The NACDL Considerations impose upon members of the criminal defense bar a “special obligation to educate the public about what it means to be ‘liberty’s last champions’—our constitutional and ethical responsibilities as advocates for the accused.”<sup>107</sup> The 2013 Standards state that commentators have an important role in educating the public by enhancing their understanding of a criminal matter and the criminal justice system generally, and by promoting respect for the judicial system.<sup>108</sup>

f) Not Materially Prejudicing the Fair Administration of Justice

Finally, both the C&L Proposal and 2013 Standards emphasize that a lawyer’s commentary should not materially prejudice the fair administration of justice. Conversely, neither the ACTL Proposal nor NACDL Considerations contain such a duty.<sup>109</sup>

II. THREE ISSUES NOT FULLY ADDRESSED BY ANY VOLUNTARY STANDARD

The voluntary standards discussed above each aim to promote ethical practices for legal commentators speaking in the media. However, each of these standards leaves unresolved who qualifies as a legal commentator; what statements qualify as legal commentary; and whether legal commentators should avoid providing

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<sup>106</sup> See Ethics I, *supra* note 4, at 1307–08 (finding that commentators can put events into perspective by differentiating between significant and trivial issues and viewing a case from both sides).

<sup>107</sup> NACDL Considerations, *supra* note 84, at 779. This obligation includes a “duty to ensure adherence to the presumption of innocence, insist that the government’s burden of proof in seeking conviction be met, foster respect for the system of trial by jury, and generally seek to improve the public’s understanding of and appreciation for the state and federal constitutional guarantees that protect persons accused of crime.” *Id.*

<sup>108</sup> 2013 Standards, *supra* note 4, § 8-2.4.

<sup>109</sup> See generally NACDL Considerations, *supra* note 84; ACTL Proposal, *supra* note 84. The ACTL Proposal does caution that some commentators can “pose dangers to the public and to the administration of justice,” but does not explicitly encourage commentators to refrain from making statements that pose such risks. ACTL Proposal, *supra* note 84, at 774.

commentary that may cause unnecessary reputational harm to those involved in a criminal proceeding.

*A. Who Qualifies as a Legal Commentator*

While each of the ethical standards discussed above purport to apply to legal commentators, none of these standards explicitly defines “legal commentator.”<sup>110</sup> In Ethics I, Chemerinsky and Levenson addressed the issue of defining commentator, finding that “[t]here is no precise definition for ‘commentators’ . . . [f]unctionally, by ‘commentators,’ we are referring to lawyers and law professors who are speaking to the press about cases in which they are not a party, an attorney, or a witness.”<sup>111</sup> The ACTL Proposal does not state who qualifies as a commentator, but implicitly applies the proposal to lawyers “who appear on television or radio or address the media and opine on ongoing court proceedings.”<sup>112</sup> The NACDL Considerations do not define legal commentator, but present their standards as a way to address all lawyers’ “unique responsibilities when offering ‘expert’ legal commentary about legal proceedings.”<sup>113</sup> Finally, the 2013 Standards only state that, “[a] lawyer may serve an important role . . . by providing *legal commentary* with respect to a criminal case.”<sup>114</sup>

The C&L Proposal is the only standard that mentions lawyers who host legal talk shows, and none of the standards clarify wheth-

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<sup>110</sup> Black’s Law Dictionary defines legal as “[o]f or relating to law; falling within the province of law” and does not have a contemporary definition of commentator. *Legal*, BLACK’S LAW DICTIONARY (9th ed. 2009) (directing searches for a definition of “commentator” to “glossators” and “postglossators,” which are terms for Italian students of Roman law from the 11th–12th and 14th–15th centuries respectively). The Oxford English Dictionary has the same definition of legal and defines commentator as, *inter alia*, “[o]ne who gives commentary” or “[o]ne who reports or comments on current events, esp. on radio or Television.” 8 OXFORD ENGLISH DICTIONARY 803 (2nd ed. 1989).

<sup>111</sup> See Ethics I, *supra* note 4, at 1316–17. Co-author Laurie Levenson previously stated in a footnote from an earlier article that, “[t]he term ‘legal commentator’ encompasses a wide number of roles ranging from answering questions for the news media, to appearing live on television, to explaining ongoing legal proceedings.” See Levenson, *supra* note 52, at 668 n.2.

<sup>112</sup> ACTL Proposal, *supra* note 84, at 774.

<sup>113</sup> NACDL Considerations, *supra* note 84, at 778.

<sup>114</sup> 2013 Standards, *supra* note 4, § 8-2.4 (emphasis added).

er such “lawyer-hosts” constitute legal commentators.<sup>115</sup> Cheme-rinsky and Levenson recognized the importance of lawyer-hosts in improving the quality of legal commentary because, unlike other members of the media, lawyer-hosts have a greater understanding of what issues are important to a legal discussion and what issues are simply sensational and do nothing to enhance the public’s understanding of a legal matter.<sup>116</sup> The professors found that the lawyer-host has an essential role in directing a discussion and preventing commentators from taking control and gravitating towards purely sensational topics.<sup>117</sup> However, the C&L Proposal never states whether lawyer-hosts constitute legal commentators covered by their proposed standards.<sup>118</sup>

### B. *What Statements Qualify as Legal Commentary*

As stated above, the C&L Proposal, ACTL Proposal, and NACDL Considerations all apply their standards to legal commentary on criminal proceedings.<sup>119</sup> The 2013 Standards appear to only apply to commentator statements made regarding a “criminal case” or “criminal matter.”<sup>120</sup> The 2013 Standards do not define criminal case, but do define a criminal matter<sup>121</sup> as beginning after an individual “has been publicly identified as a subject of a criminal investigation, arrested, or named in criminal charges, whichever is earliest,” and ends “with a dismissal or verdict” unless there is “a

<sup>115</sup> See Ethics III, *supra* note 32, at 756–57. See generally 2013 Standards, *supra* note 4, § 8-2.4; NACDL Considerations, *supra* note 84; ACTL Proposal, *supra* note 84.

<sup>116</sup> See Ethics III, *supra* note 32, at 756–57.

<sup>117</sup> See *id.*

<sup>118</sup> See generally Ethics I, *supra* note 4; Ethics II, *supra* note 83; Ethics III, *supra* note 32.

<sup>119</sup> See *supra* text accompanying notes 72–74.

<sup>120</sup> See 2013 Standards, *supra* note 4, § 8-2.4. Examples of limits on Standard 8-2.4’s application are: “A lawyer may serve an important role . . . by providing legal commentary *with respect to a criminal case*,” “A lawyer may also legitimately provide consulting services . . . *about a criminal case*,” “A lawyer who is participating in a criminal matter should not undertake either of these roles—commentator or consultant—*with respect to that criminal matter*,” “A lawyer who is serving as a legal commentator should strive to ensure that the lawyer’s commentary enhances the public’s understanding *of the criminal matter*.” *Id.* (emphasis added).

<sup>121</sup> See *id.* § 8-1.2. For the purposes of this section, this Note considers a “criminal case” and a “criminal matter” as synonymous, although the ABA should clarify this point as well.

reasonable likelihood of a new trial.”<sup>122</sup> While Standard 8-2.4 never explicitly states that it is limited to comments regarding a criminal matter, the standard’s scope is at best ambiguous.<sup>123</sup> If Standard 8-2.4 only applies to comments regarding a criminal matter, then it necessarily exempts legal commentary where no individual or entity has been identified as a subject of investigation, on criminal law generally, and on criminal matters after the court has reached a final verdict.

### C. *How Should Commentators Prevent Undue Reputational Harm*

The C&L Proposal, ACTL Proposal, and NACDL Considerations do not address the potential for legal commentators to cause undue reputational harm to persons involved in a criminal case.<sup>124</sup> Instead, the 2013 Standards only address reputational harm caused by attorneys participating in a criminal matter.<sup>125</sup>

## III. VOLUNTARY STANDARDS SHOULD BROADLY APPLY TO ALL LAWYERS PROVIDING LEGAL ANALYSIS IN THE MEDIA AND ADDRESS COMMENTARY CAUSING UNDUE REPUTATIONAL HARM

The 2013 Standards represent a significant step forward in the effort to encourage legal commentators to act ethically when making statements in the media. However, any voluntary standard should broadly apply to all lawyers who provide legal analysis through the media, and to all statements that constitute legal analysis. Furthermore, such standards should not be restricted to state-

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<sup>122</sup> *See id.*

<sup>123</sup> *See generally id.* § 8-2.4.

<sup>124</sup> *See generally* Ethics I, *supra* note 4; Ethics II, *supra* note 83; Ethics III, *supra* note 32; NACDL Considerations, *supra* note 84; ACTL Proposal, *supra* note 84.

<sup>125</sup> *See* 2013 Standards, *supra* note 4, § 8-2.1 (stating that a lawyer participating in a criminal matter should not make extrajudicial statements “unnecessarily heightening public condemnation of a defendant or a person or entity who has been publicly identified in the context of a criminal investigation, or of a witness or victim”). The ABA has addressed reputational harm more directly in its ABA Standards for Criminal Justice on Prosecutorial Investigations, where the ABA directs prosecutors to consider harm to reputation when deciding to conduct an investigation or when selecting investigation techniques. *See* ABA Standards for Criminal Justice, *Prosecutorial Investigations* §§ 2.1–2 (2008).

ments made about ongoing criminal proceedings. Also, any voluntary standard must encourage legal commentators to avoid causing unnecessary reputational harm to persons involved in a criminal case. The ABA can begin to address these issues through its standards by clarifying aspects of Standard 8-2.4 and by adding language to Standard 8-2.4 that encourages commentators to avoid causing undue reputational harm.

*A. Voluntary Standards Should Include a Comprehensive Definition of “Legal Commentator”*

Voluntary standards regulating legal commentators should include a definition of “legal commentator.” This definition should apply the standards to any lawyer that provides legal analysis to the media, either directly or through others, or provides legal analysis directly to the public. Before examining what a definition of legal commentator should entail, a primary inquiry must be made into when a lawyer qualifies as a legal commentator. Voluntary standards can distinguish between legal commentators and other lawyers based on the medium a lawyer uses (e.g. television, radio, newspaper, blog, social media website, etc.), whether a lawyer is making statements in the media specifically as a lawyer or only as a journalist, or the content of the lawyer’s speech (e.g. only regulating lawyer statements regarding legal issues).

When Chemerinsky and Levenson wrote their series of articles on legal commentators, they considered commentary provided on television, radio, and in newspapers.<sup>126</sup> However, since the 1990s, the rise of the Internet has led to a great increase in available media outlets, including blogs,<sup>127</sup> social networking websites<sup>128</sup> such as

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<sup>126</sup> See Ethics I, *supra* note 4, at 1303–04.

<sup>127</sup> Blogs are “maintained websites with regular posted entries of commentary, news, or other topics.” Nicola A. Boothe-Perry, *The “Friend”ly Lawyer: Professionalism and Ethical Considerations of the Use of Social Networking During Litigation*, 24 U. FLA. J.L. & PUB. POL’Y 127, 133 (2013).

<sup>128</sup> Social networking sites “allow individuals and organizations to connect virtually with others to communicate privately, share photographs and other digital media, and make public or semi-public announcements.” Michael E. Lackey Jr. & Joseph P. Minta, *Lawyers and Social Media: The Legal Ethics of Tweeting, Facebooking and Blogging*, 28 TOURO L. REV. 149, 151–52 (2012).

Facebook and Twitter, and video-sharing sites such as YouTube.<sup>129</sup> With all of these different mediums for lawyers to reach the public, lawyers should be held to the same standard when making statements in each forum.

The overarching goal of Standard 8-2.4 is for legal commentators to educate the public and the standard encourages legal commentators to “strive to ensure that the lawyer’s commentary enhances the public’s understanding of the criminal matter and of the criminal justice system generally, promotes respect for the judicial system, and does not materially prejudice the fair administration of justice, in the particular case or in general.”<sup>130</sup> If a journalist is asking a lawyer to provide legal analysis, these goals are implicated regardless of the way in which the public receives the commentary.<sup>131</sup> If a commentator’s statements are released to the public, the commentator can potentially misinform the public, diminish the public’s respect for the judicial system, or materially prejudice the fair administration of justice, regardless of whether the public watches, listens to, or reads the unethical statements. Furthermore, it should not matter whether this type of commentary reaches the public through traditional means or through the Internet (i.e. on-line video, radio streaming, or written news on websites).

In addition, the rise of the Internet has given lawyers a new ability to provide legal analysis directly to the public without going through a journalist, which further magnifies the issues addressed above. Lawyers publicly providing legal analysis on social media and blogs should also be held to ethical standards. Commentary provided on the Internet can potentially reach a large audience, with popular social networking sites such as Facebook and Twitter having approximately 1.49 billion and 316 million monthly active users respectively.<sup>132</sup> Further, there are approximately 3,500 legal

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<sup>129</sup> *See id.*

<sup>130</sup> *See* 2013 Standards, *supra* note 4, § 8-2.4(b). The author of this Note agrees with Standard 8.24’s goals and so recommends that any voluntary standard conform to them.

<sup>131</sup> Indeed, neither the C&L Proposal, ACTL Proposal, nor NACDL Considerations differentiate between the types of media that commentators use when making statements. *See generally* Ethics I, *supra* note 4; NACDL Considerations, *supra* note 84; ACTL Proposal, *supra* note 84.

<sup>132</sup> *Company Info*, FACEBOOK, <http://newsroom.fb.com/company-info/> [<http://perma.cc/F48J-D8UG>] (last visited Oct. 23, 2015) (reporting 1.49 billion monthly active users at

blogs on the Internet as of 2014 and the number of blogs will likely continue to grow significantly over the coming years.<sup>133</sup> Therefore, due to the huge potential audience, an increasing number of lawyers are using the Internet in an attempt to reach more and more people.

In addition to creating a number of potential ethical issues for lawyers,<sup>134</sup> use of social media by commentators can implicate the goals of Standard 8-2.4. Prolific legal commentators, including Nancy Grace and Dan Abrams, regularly use social media to reach thousands of people daily.<sup>135</sup> When commentators comment on legal issues, their words can have a great impact, even if the message is brief. For example, Grace started a controversy when she tweeted the hashtag “#VomitMom” to her followers when referring to a criminal case involving the drunk driving death of a mother.<sup>136</sup> Even this single phrase implicates the standards because it involves Grace sensationalizing a legal case and potentially impacting a future jury pool by encouraging her audience to refer to the case by a derogatory nickname. With such large audiences, legal

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the end of June 30, 2015); *Company: About*, TWITTER, <https://about.twitter.com/company> [<http://perma.cc/4KYK-U3RF>] (last visited Oct. 23, 2015) (reporting 316 million monthly active users).

<sup>133</sup> Kevin O’Keefe, *How Many Blogs Are There and Where Are We Headed?*, LEXBLOG (Apr. 20, 2014), <http://kevin.lexblog.com/2014/04/20/law-blogs-how-many-are-there/> [<http://perma.cc/KY75-CX9G>] (finding that the number of legal blogs should grow twenty-five to thirty percent per year).

<sup>134</sup> See generally Lackey & Minta, *supra* note 128, at 150 (discussing how use of social media can lead to potential ethical violations including violating a lawyer’s duty of confidentiality, legal advertising rules, and the prohibitions against unauthorized practice of law).

<sup>135</sup> Grace and Abrams’ Twitter accounts have tweeted more than 15,000 and 5,000 messages respectively and have more than 450,000 and 66,000 followers respectively. Nancy Grace (@NancyGraceHLN), TWITTER, <https://twitter.com/nancygracehln> [<http://perma.cc/4RUZ-GM4W>] (last visited Oct. 23, 2015); Dan Abrams (@danabrams), TWITTER, <https://twitter.com/danabrams> [<http://perma.cc/2R4J-KEWL>] (last visited Oct. 23, 2015).

<sup>136</sup> Jason Overholt, *Nancy Grace Stirs Controversy with Posts About Mishawaka Mother’s Death*, WSBT (Aug. 6, 2014), <http://www.wsbt.com/news/local/nancy-grace-stirs-controversy-with-posts-about-mishawaka-mothers-death/26548178> [<http://perma.cc/ZN34-8ZCT>] (discussing how Grace created the #VomitMom hashtag after a man was charged in the death of his wife, who died in a car accident when she placed her head outside of the passenger window to vomit while both she and the driver, her husband, were intoxicated).

commentators should be encouraged to act ethically when providing legal analysis on social media. Because of the increasing diversity and reach of different mediums, the ABA should not restrict the application of the 2013 Standards based on the medium a lawyer uses to provide legal analysis.

The next consideration for the definition of legal commentator is whether the term should be limited only to commentators that explicitly rely on their legal expertise and experience as lawyers to comment on a legal issue, or whether it should apply to anyone with a law degree that comments on a legal issue.<sup>137</sup> Voluntary standards should apply to any lawyer that provides legal analysis, but should exclude a lawyer who is only reporting on a case as a journalist (i.e. reporting the facts or issues of a criminal case without analyzing its legal aspects).

One type of lawyer that would qualify as a legal commentator under such a definition would be any lawyer that hosts a legal talk show.<sup>138</sup> Each of the current voluntary standards are ambiguous as to whether they apply to “lawyer-hosts,” as distinguished from legal commentators.<sup>139</sup> While the C&L Proposal correctly identifies the importance of lawyer-hosts, the proposal misses a very significant issue: often the lawyer-host seeks sensational storylines and directs commentators to act unethically. When discussing Nancy Grace’s program, David Carr of the *New York Times* stated that “Ms. Grace races toward judgment, heedlessly ignoring nuance and evidence on her way to finding guilt,” as her experts have “all the independence of a crew of trained seals.”<sup>140</sup>

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<sup>137</sup> This section will not consider commentators who are asked to comment on legal issues specifically as legal experts or analysts. Lawyers that are interviewed as legal experts or analysts necessarily rely upon their role as a lawyer to provide commentary, so they should necessarily constitute legal commentators.

<sup>138</sup> The host of a legal talk show contrasts with the host of a news program not specializing in the law. For example, Chris Cuomo, a lawyer and journalist, hosts a show covering international events and breaking news. See *About Chris*, CHRIS CUOMO, <http://chriscuomo.com/about-chris/> [<http://perma.cc/QSS9-KBZ3>] (last visited Sept. 25, 2015). This definition of legal commentator would only apply to Cuomo if he discussed the legal aspects of a criminal case or issue, not if he was solely reporting on the case or issue as a journalist, without providing legal analysis.

<sup>139</sup> See 2013 Standards, *supra* note 4, § 8-2.4.

<sup>140</sup> Carr, *supra* note 48.

One way lawyer-hosts act unethically, without providing commentary themselves, is by eliciting inappropriate legal commentary from guest speakers. For example, in their book on the Duke lacrosse case, legal commentator Stuart Taylor and history professor KC Johnson described how, in an episode of *Nancy Grace*, Grace had an exchange with a commentator and former prosecutor where she both made sensational statements and encouraged her guest to provide unethical comments.<sup>141</sup> After stating that the defendants' only defenses were "I didn't do it," "I did it, but it was consensual," and "[s]he's a hooker," Grace asked the former prosecutor about the discovery of the alleged victim's false nails in the house of some of the defendants.<sup>142</sup> After characterizing the alleged victim as beaten and battered, the commentator stated, "[a]nd based on the bruising and beating and the broken nails, Nancy, this is rape. If, in fact, there's DNA, they can say consent all they want, but the other evidence speaks volumes, and it's going to negate that."<sup>143</sup> Nancy Grace had already decided the defendants must be guilty, so she selected guests that would likely support this position and encouraged them to join her in condemning the defendants.<sup>144</sup>

Later, on the same program, Grace interviewed a number of non-lawyer guests, including a neighbor of the defendants, a graduate student at Duke, and a clinical psychologist. First, Grace asked the neighbor if she recalled having any problems with the defendants that lived nearby.<sup>145</sup> The neighbor responded by accusing the students of "date rape" and "driving while intoxicated," without any evidence.<sup>146</sup> While Grace later stated, "[o]f course, those are allegations," this single statement does not absolve her from the responsibility of eliciting inflammatory, unsubstantiated, and legally irrelevant commentary.<sup>147</sup> She then brought on a Duke graduate

<sup>141</sup> See TAYLOR & JOHNSON, *supra* note 6, at 124; Jeffrey Rosen, *Wrongly Accused*, N.Y. TIMES (Sept. 16, 2007), <http://www.nytimes.com/2007/09/16/books/review/Rosent.html> [<http://perma.cc/383M-CCZK>].

<sup>142</sup> See TAYLOR & JOHNSON, *supra* note 6, at 124.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 123.

<sup>145</sup> *Was Young Woman Assaulted by Duke Lacrosse Team?*, CNN (Mar. 31, 2006, 8:00 PM), <http://transcripts.cnn.com/TRANSCRIPTS/0603/31/ng.01.html> [<http://perma.cc/3EYF-K4MZ>] [hereinafter *Young Woman*].

<sup>146</sup> See TAYLOR & JOHNSON, *supra* note 6, at 124.

<sup>147</sup> *Young Woman*, *supra* note 145.

student, who said that there was “clear evidence of some sort of an assault having happened.”<sup>148</sup> Finally, Grace spoke with a clinical psychologist who, as described by Taylor and Johnson, “at Grace’s invitation ridiculed a lacrosse team defender who cautioned against rushing to judgment and asked how viewers would feel if these were their own sons.”<sup>149</sup> While voluntary standards cannot and should not apply to non-lawyers, in each of these examples Grace directly elicited commentary designed to sensationalize a criminal case by selecting guests she knew would make unethical comments. Voluntary standards should apply to a lawyer-host when he or she knowingly elicits unethical legal commentary from guests (lawyers or otherwise). Even if the host does not personally provide the unethical commentary, voluntary standards should apply because lawyer-hosts should not be permitted to skirt ethics standards by using non-lawyer third parties.

Many legal talk shows are formatted as debates between a lawyer advocating for the prosecution and a lawyer advocating for the defense, which can encourage hosts to invite unqualified lawyers to comment on a case.<sup>150</sup> For instance, after the prosecution’s case in the Duke lacrosse rape case fell apart, legal talk shows still needed advocates for the prosecution in order to maintain their debate format.<sup>151</sup> Even Dan Abrams, who was often complimented by Taylor and Johnson for his unbiased coverage of the case, brought guests on his show to defend views he knew to be “indefensible.”<sup>152</sup> One such guest, Georgia Goslee, was wholly unqualified to provide commentary, as she had no criminal law experience, knew very little about the Duke case and even admitted that she was not familiar with North Carolina statutes.<sup>153</sup> While Goslee’s comments on the case would have violated the 2013 Standards were they in place at the time, Abram’s decision to bring her on his show likely

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<sup>148</sup> See TAYLOR & JOHNSON, *supra* note 6, at 124.

<sup>149</sup> *Id.*

<sup>150</sup> See TAYLOR & JOHNSON, *supra* note 6, at 205 (describing how legal news television shows often use a debate format where two lawyers face off against each other and advocate for different sides of an argument, even when one side lacks serious merit).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

would not be a violation of the ethics standards.<sup>154</sup> Voluntary standards should not only hold unqualified commentators responsible for acting unethically, but should also admonish lawyer-hosts that invite unqualified commentators to act unethically.

The ABA should add a definition of legal commentator that applies to any lawyer that provides legal analysis, either to the media or directly to the public, regardless of the medium the lawyer uses.<sup>155</sup> Furthermore, this definition should include lawyer-hosts and apply to such hosts when they encourage their guests to provide unethical commentary, use non-lawyers to make unethical legal statements, or recruit unqualified lawyers to provide commentary.

*B. Voluntary Standards Should Apply To All Commentator Statements Made in the Media that Include Legal Analysis*

Another way that voluntary standards can better address the ethical concerns raised by lawyers speaking in the media is to apply ethical standards to all lawyer statements that include legal analysis. Voluntary standards should encourage legal commentators to act ethically whenever they provide any legal analysis to the public, as opposed to only applying standards to statements made regarding ongoing criminal proceedings as proposed by the C&L Proposal, ACTL Proposal, NACDL Considerations, and 2013 Standards. Furthermore, Standard 8-2.4 provides exemptions that contravene several of the standard's overarching goals by permitting lawyers to provide unethical commentary in situations where such statements can cause harm to persons involved in a criminal case, the public, and the criminal justice system generally.<sup>156</sup>

Standard 8-2.4 discusses several overarching goals that ethical commentators should promote, including educating the public regarding the criminal justice system; promoting respect for the judi-

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<sup>154</sup> See 2013 Standards, *supra* note 4; TAYLOR & JOHNSON, *supra* note 6, at 205.

<sup>155</sup> Standard 8-2.4 also applies to "consultants," stating that "[a] lawyer may also legitimately provide consulting services to a newsgathering entity or individual about a criminal case." 2013 Standards, *supra* note 4, § 8-2.4. However, this Note only considers lawyers acting as legal commentators and does not directly address lawyers acting as consultants.

<sup>156</sup> See *id.* §§ 8-2.4, 8-1.2(b).

cial system; and avoiding materially prejudicing the fair administration of justice.<sup>157</sup> However, instead of promoting these goals, Standard 8-2.4's current exemptions allow legal commentators to contravene each of the aforementioned overarching goals.

First, Standard 8-2.4 excludes any legal commentary statements made about a criminal investigation when authorities have not publicly identified a subject of the investigation.<sup>158</sup> This exemption allows commentators to potentially misinform the public and materially prejudice the fair administration of justice by making statements that likely do not have a sufficient factual basis because the facts are underdeveloped at such an early stage of a criminal investigation. Unethical comments in situations where authorities have not publicly identified a subject can potentially mislead the public, harm the reputation of innocent people, and set back an investigation.<sup>159</sup> Therefore, the ABA should apply Standard 8-2.4 to situations where authorities have not publicly identified a subject of a criminal investigation.

Second, not applying Standard 8-2.4 to commentator statements on criminal law generally has little impact on the fair administration of justice, but could affect the goals of educating the public and promoting respect for the judicial system. While discussing an aspect of criminal law outside the context of an active criminal case would likely not affect an individual defendant's trial rights, there is no justification for allowing the 2013 Standards to enable commentators to act unethically when speaking about criminal law generally. If a commentator is not competent to speak on a given issue, has undisclosed conflicts of interests, or has acted unethically in another manner proscribed by Standard 8-2.4, then the commentator could cause harm to the public by spreading misinforma-

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<sup>157</sup> See *id.* § 8-2.4.

<sup>158</sup> See 2013 Standards, *supra* note 4, § 8-1.2(b) (defining "criminal matter" as beginning only when an individual or entity has been publicly identified as a subject of a criminal investigation, arrested, or named in criminal charges).

<sup>159</sup> See Al Tompkins, *Let's Remember Richard Jewell as We Cover Boston "Suspects,"* POYNTER (Apr. 18, 2013), <http://www.poynter.org/news/mediawire/210731/lets-remember-richard-jewell-as-we-cover-boston-suspects/> [<http://perma.cc/98LT-8GP3>] (discussing how the media, when suggesting that individuals are suspects in a criminal investigation without evidence, can harm both the individuals and law enforcement efforts to identify suspects).

tion or hurting the public's respect for the judicial system. The potential for the aforementioned misbehavior justifies applying Standard 8-2.4 to statements made on criminal law generally, even if those statements do not affect the fair administration of justice for an individual defendant.

Third, not applying Standard 8-2.4 when a court reaches a final verdict in a criminal case can cause great harm to the public and the judicial system. An example of this potential harm is the coverage of the Casey Anthony trial and the subsequent not guilty verdict. Casey Anthony was tried for the murder of her two-year-old daughter in a case that received large amounts of media coverage and became a national sensation.<sup>160</sup> After Anthony was found not guilty, many people on talk shows and social media denounced the verdict and voiced outrage.<sup>161</sup> Nancy Grace, who mockingly called Anthony "Tot Mom" during the proceedings, exclaimed after the verdict, "Tot Mom's lies seem to have worked. The devil is dancing tonight."<sup>162</sup>

Such unethical comments constitute commentary "designed to sensationalize a criminal matter" and can potentially misinform the public and hurt the public's respect for the judicial system.<sup>163</sup> In this instance, Grace seriously questioned the findings of a full jury trial and implied that the judicial system had failed by reaching a not guilty verdict. Many Americans voiced their displeasure with the result on social media, exemplifying that such statements from legal commentators can influence the public into believing that the criminal justice system has failed.<sup>164</sup> Standard 8-2.4 should not allow commentators to mislead the public and hurt the standing of

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<sup>160</sup> See John Cloud, *How the Casey Anthony Murder Case Became the Social-Media Trial of the Century*, TIME (June 16, 2011), <http://content.time.com/time/nation/article/0,8599,2077969,00.html> [<http://perma.cc/RAF3-TX8Z>].

<sup>161</sup> See Garvin, *supra* note 21 (stating that one digital bean-counting company found that people on Twitter condemning the jury's finding outnumbered those praising it by sixty-four to one).

<sup>162</sup> See *id.*

<sup>163</sup> See 2013 Standards, *supra* note 4, § 8-2.4(b).

<sup>164</sup> See *id.* ("These lawyers on TV during the Anthony trial only offered one side, everybody believed them, and now you've got a big chunk of the population that thinks the legal system let them down. Every time that happens, you lose part of the national community.").

the judicial system through sensational statements simply because a defendant's trial is over and the legal commentator disagrees with the jury's verdict. As Standard 8-2.4 has several overarching goals beyond simply preventing commentators from making statements that materially prejudice the fair administration of justice, the ABA should not limit Standard 8-2.4's scope to statements made prior to the end of a trial.

An additional risk exists when Standard 8-2.4 does not apply to statements made about a case after the court has reached a verdict and there is no "reasonable likelihood of a new trial."<sup>165</sup> No "reasonable likelihood of a new trial," while somewhat ambiguous, clearly does not mean "no possibility of a new trial." Therefore, harm can result when a commentator speaks unethically about a case in a situation where the defendant wins an unlikely appeal. An example of this situation is the case of Michael Skakel, who was convicted of murdering his 15-year-old neighbor Martha Moxley in 1975.<sup>166</sup> Skakel was sentenced to 20 years to life in 2002, with his conviction initially being upheld in 2006 after the U.S. Supreme Court declined to hear his appeal.<sup>167</sup> However, a subsequent appeal for a new trial in 2013 based upon ineffective assistance of counsel succeeded, and Skakel is currently awaiting the outcome of a new trial.<sup>168</sup> Prior to Skakel winning his appeal, he sued Nancy Grace and three others for libel, claiming that the comments made on Grace's show contained a serious misstatement that could prejudice a future jury;<sup>169</sup> Grace eventually settled the lawsuit.<sup>170</sup> Ska-

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<sup>165</sup> See 2013 Standards, *supra* note 4, § 8-1.2(b).

<sup>166</sup> Alison Leigh Cowan, *At Issue in Skakel's Libel Suit Against TV Host, Degrees of Tarnish on a Reputation*, N.Y. TIMES (Jan. 1, 2014), <http://www.nytimes.com/2014/01/02/nyregion/at-issue-in-skakels-libel-suit-against-tv-host-degrees-of-tarnish-on-a-reputation.html> [<http://perma.cc/CLJ2-XZZH>].

<sup>167</sup> *Michael Skakel Fast Facts*, CNN, <http://www.cnn.com/2013/05/27/us/michael-skakel-fast-facts/> [<http://perma.cc/3AUH-N2Q2>] (last updated Sept. 5, 2015, 9:42 AM).

<sup>168</sup> See *id.*

<sup>169</sup> Cowan, *supra* note 166. The statements in question include Grace asking, "[i]sn't it true that the Kennedy cousin apparently was up in a tree masturbating trying to look into her bedroom window?," a legal commentator replying, "[w]ell, his DNA was found, yes, up in the tree," Grace replying, "Beth, I love the way you put it so delicately, 'his DNA,' you know it was sperm," and the commentator concluding, "[c]orrect." *Id.*

<sup>170</sup> *Id.* (discussing how Skakel's defense team argued that even though Skakel stated previously that he had intended to masturbate in the tree, no DNA evidence was ever found there, making the commentator and Grace's statements to that effect libelous);

kel's situation exemplifies the potential harm that exempting commentary on verdicts that have no "reasonable" likelihood of a new trial can cause by permitting unethical statements in situations where appeals are still possible.

Voluntary standards should apply to all legal commentary, including legal analysis. The ABA should clarify the scope of Standard 8-2.4 and ensure that it applies to any legal commentary provided by a commentator, regardless of whether the commentator is discussing a case without a suspect, a case that has reached a final verdict, or a facet of criminal law that is unrelated to any specific case.

*C. Voluntary Standards Should Address the Issues Created by Commentators Statements that Cause Unnecessary Reputational Harm*

Any voluntary standards should include language that encourages lawyers to avoid making statements that have no legitimate educational purpose and will likely increase public condemnation or cause reputational harm to a person involved in a criminal case. Although some true statements will inevitably cause reputational harm, if such a statement also educates the public about a legal aspect of a case, the statement should not be discouraged because educating the public outweighs protecting an individual's reputations. However, voluntary standards should reprimand commentators for making statements that unnecessarily damage a defendant or subject's reputation when the statement has no countervailing educational benefit to the public. The 2013 Standards can and should discourage commentators from causing unnecessary reputational harm by adding new language that addresses this issue.

A powerful example of the great harm that can occur from an unjustified attack on a defendant's or subject's reputation is the case of Tony Medrano. Tony Medrano was charged with manslaughter after she consumed nearly a fifth of vodka, fell asleep while sitting on a couch with her 3-week-old son, and accidentally

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*Skakel Settles Lawsuit Against HLN's Nancy Grace*, BOSTON HERALD (Nov. 11, 2014), [http://www.bostonherald.com/inside\\_track/celebrity\\_news/2014/11/skakel\\_settles\\_lawsuit\\_against\\_hlns\\_nancy\\_grace](http://www.bostonherald.com/inside_track/celebrity_news/2014/11/skakel_settles_lawsuit_against_hlns_nancy_grace) [<http://perma.cc/E39B-X854>].

asphyxiated him.<sup>171</sup> A day after the prosecution charged Medrano, Nancy Grace dubbed Medrano “Vodka Mom,” stating, “I don’t care if she was driving a car, holding a pistol or holding a fifth of vodka. [It] doesn’t matter to me. The baby is dead at the hands of the mommy.”<sup>172</sup> According to family members, Medrano watched Grace’s show and burst into tears after hearing the statement. Soon thereafter, Medrano committed suicide and both her family and the police believed that Grace’s show potentially played a significant role in her decision to do so.<sup>173</sup>

Outside of the fact that Grace’s statements would likely violate the 2013 Standards for sensationalizing the case and potentially prejudicing a future jury, her statements also caused great reputational harm with tragic consequences. Describing Medrano as “Vodka Mom” did nothing to educate the public on the relevant legal issues and was only meant to sensationalize the case and harm Medrano. The 2013 Standards should make clear that such unnecessary reputational attacks are unethical.

Similarly, the Casey Anthony trial presents another example of unjustified reputational harm that occurred as the result of media coverage. Nancy Grace led the media’s fascination with Anthony as her “nightly attacks on the woman she scornfully referred to as ‘Tot Mom’ almost single-handedly inflated the Anthony case from a routine local murder into a national obsession.”<sup>174</sup> Members of the legal and journalistic communities explained that “some television news shows built their ratings up by taking an openly prosecutorial stance against Anthony, leading to public expectations that a conviction was a slam-dunk certainty.”<sup>175</sup> After Anthony’s not guilty verdict, many pundits and members of the public were outraged.<sup>176</sup> During Nancy Grace’s live coverage of the verdict, many of the people interviewed outside the courthouse or on the phone

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<sup>171</sup> David Lohr, *Toni Medrano, Dubbed “Vodka Mom” By Nancy Grace, Committed Suicide, Police Say*, HUFFINGTON POST (July 11, 2012), [http://www.huffingtonpost.com/2012/07/11/toni-medrano-vodka-mom\\_n\\_1665792.html](http://www.huffingtonpost.com/2012/07/11/toni-medrano-vodka-mom_n_1665792.html) [http://perma.cc/3F8A-KB9H].

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> Garvin, *supra* note 21.

<sup>175</sup> *Id.*

<sup>176</sup> *See supra* note 161 and accompanying text.

expressed dismay, including one woman who exclaimed, “[t]hat woman just got away with murder, Nancy.”<sup>177</sup>

After the verdict, Anthony received numerous death threats and was even described as “one of the most hated women in America” by the Florida Department of Corrections, which decided not to publicly disclose her parolee information in order to protect her safety.<sup>178</sup> The constant attacks and pro-prosecutor slant of many legal talk shows convinced America that Anthony was guilty and completely ruined her reputation.<sup>179</sup> Without a countervailing educational purpose, such attacks only cause harm and should therefore be strongly discouraged. Any voluntary standards, including Standard 8-2.4, should urge commentators to refrain from making statements that have no legitimate educational purpose, a substantial likelihood of damaging a defendant’s or subject’s reputation, or causing increased public condemnation.

#### CONCLUSION

Despite the ABA’s adoption of voluntary ethical standards for legal commentators, commentators such as Nancy Grace and Wendy Davis likely will not change their practices. Nevertheless, Standard 8-2.4 provides general guidance for legal commentators and encourages them to act ethically, which will hopefully have a positive impact on the legal news field. The ABA’s current standards do an admirable job of supporting commentary that educates the public, promotes respect for the judicial system, and avoids materially prejudicing the fair administration of justice.<sup>180</sup> However, at this point, no voluntary ethical standard clearly states: who qualifies as a legal commentator; what statements qualify as legal commentary; or addresses the potential harm that can occur to a per-

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<sup>177</sup> David Bauder, *Anthony Lawyers Blast Cable News After Acquittal*, ASSOCIATED PRESS (July 6, 2011), <http://news.yahoo.com/anthony-lawyers-blast-cable-news-acquittal-232233047.html> [<http://perma.cc/D26N-WF4E>].

<sup>178</sup> Jessica Hopper, *Casey Anthony Called “One of the Most Hated Women in America” By Probation*, ABC NEWS (Aug. 25, 2011), [http://abcnews.go.com/US/casey\\_anthony\\_trial/casey-anthony-called-hated-women-america/story?id=14377966](http://abcnews.go.com/US/casey_anthony_trial/casey-anthony-called-hated-women-america/story?id=14377966) [<http://perma.cc/8239-PGXY>].

<sup>179</sup> See *supra* text accompanying notes 174–78.

<sup>180</sup> See 2013 Standards, *supra* note 4, § 8-2.4(b).

son's reputation from commentary that has no educational purpose.

The ABA's 2013 Standards can address these concerns by making three significant changes to the 2013 Standards. First, the ABA should draft a broad definition of legal commentator that applies to any lawyer providing legal analysis to the public, including lawyers hosting legal talk shows. Next, the ABA should ensure that the 2013 Standards apply equally to all legal commentator statements that provide legal analysis, regardless of whether the commentator is discussing a case without a suspect, analyzing a case that has reached a final verdict, or is focusing on criminal law in a general sense. Lastly, the ABA should draft language that encourages commentators to refrain from making statements with no legitimate educational purpose that have a substantial likelihood of either damaging the reputation of a person involved in a criminal proceeding or causing increased public condemnation. By exploring these issues further, and drafting new language that clarifies and broadens Standard 8-2.4's scope, the ABA can increase the potential impact of its standards. As the 2013 Standards are only intended to provide a guide to best practices, and are not mandatory, the ABA should draft these standards liberally and ensure that Standard 8-2.4 reaches the widest audience possible.<sup>181</sup>

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<sup>181</sup> *Id.* § 8-1.1(a).