

THE ROLE AND RESPONSIBILITY OF THE PROSECUTOR

METZLOFF: I'd like to start with this question. In some ways the paper that Professor Cassidy and Mosteller have deal with in Ray Nifong. We definitely do not want this conference to be limited to that, but in some ways some of the reasons we're here were inspired by those events. And so let's just start with that question. We had a case in Durham. Everyone knows about it. Infamous, famous, whatever you want to describe it. And we had a prosecutor who for a period of three weeks was saying lots of things on TV. Everybody remembers certain quotable quotes. I have not yet put together the video montage of all the different statements. They're not all available. Some of them have been shown in disciplinary hearings and the like.

But what is sort of -- we're not far enough away to really answer this question definitively, but we have people here who can, I think, think about it -- what is the message that's learned from that period of time, that series of events with Mike Nifong? Because I remember giving one of the first -- sort of in this very classroom -- a panel about what was right and wrong, and there were some things that I said, looking under the rules, maybe it's okay. He asked some

people to come forward. If some people were there, I want to hear from you. He may not have said it in the way I would've liked, but those are things that are anticipated within the rules. We have a very complicated rule with things that are presumptively okay, things that are presumptively not okay.

As I've traveled around the country this summer interviewing people for my documentaries, I've talked to several prosecutors. Mike Ramsey, who was involved in the medical marijuana case that went to the Supreme Court, they all make a point of sort of saying "I'm sorry," once they find out you're from Duke. That just shouldn't have happened that way. So this is a real sort of need to say we're not all like that.

But I'm wondering if there's a flip side to that question, too. So I would like everybody to start at our end with Ms. Lynch to just sort of give us some reactions to how do we begin to understand lessons learned or perhaps lessons overlearned from the Nifong episode. Ms. Lynch.

LYNCH: What... it's an interesting case because there are so many things that are still coming from that. I approached it from the perspective of a former prosecutor obviously. I'm here seeing a hand. Is that a volume?

AUDIENCE: Volume.

AUDIENCE: Volume.

LYNCH: Okay. I'm not sure if this will help. Okay. Great.

So I approached it from the view of a former prosecutor but also someone who grew up in Durham, and I'm very familiar with sort of both sides of the community, and there is a bit of a community divide whenever there's a large campus in town. But I think that one of the things that we look at from the Nifong case is how do you find that balance as a prosecutor between how you deal with the press since that is the focus of this conference. Between obviously things that should not be said, but also the very real responsibilities that prosecutors have to interact with the press.

The press has an important role to play in a prosecutor's function in terms of informing the public in what's going on and in terms of, as you mentioned, getting people to come forward, but also in terms of being accountable is one of the ways, not the only way. It's not even the most important way, but it's one of the ways in which a prosecutor is accountable to the community that they serve whether they are elected or appointed.

My office had a practice of issuing press releases after indictments that were fairly formulaic. Some people do press conferences that, again, can be formulaic. But you have a situation where the press is not always the enemy. Now, again, there are many, many times when everyone goes overboard, both prosecutors and press, but I think it illustrates the need for balance, the need to find where is that balance. And also the need for continual training of young prosecutors in offices and how to interact with the press. There was, -- again it's only from the outside looking in -- there seemed have been a stunning lack of clarity in what could and couldn't be said by the prosecutor's office there.

So I think those are some of the first lessons that we learn from that is the need for further study and the need for better training, and the need to find that balance. Also I will tell you again that as a former prosecutor, one of the interesting issues is that the media seemed to have become part of the story in that the media coverage obviously fueled the subsequent actions against DA Nifong when as we've been discussing on the panel many of the substantive problems that he presents in terms of violations of substantive federal criminal procedural law were so much more serious and so much

more egregious that every prosecutor who learned, for example, that exculpatory DNA evidence had been withheld, everyone just shuddered in their boots at that. And initially the comments that were made while inflammatory were not what set for most prosecutors the nails on the chalkboard reaction to the overall case.

METZLOFF: Marsha?

GOODENOW: The lesson that I think should be learned that I do not think has been learned nor ever will be learned is that a criminal defendant has a right to be tried in a courtroom and the media does not have a right to try them in the paper. I don't know that that will ever be learned. I wish it would be learned. I wish that the parties to criminal cases would try their cases where they should be trying them. The aftermath of this is three young men who now have been declared innocent certainly weren't perceived by the media or this country as being innocent. They received death threats. All kinds of things happened to them because of this public's insatiable desire to know everything whether it's been confirmed or not, whether it's true or not, and the right that they think that they have a right to know instantly what the evidence is.

I'm not saying that the media and the public doesn't have a

right to access to our courts. I'm saying they have a right to the access to our courts when the case is tried in our courtrooms.

CONNOLLY:

Well, the lesson I learned, I don't think it's one that everybody would learn, and it's from a prosecutor's perspective, when I heard Hodding Carter's remarks this morning and I think a number of the remarks by various panelists is my gut reaction is that they really don't see the world the way I do. I mean, I'm a true believer that 99.9 percent of the Assistant US Attorneys in the country and the US Attorneys in the country do follow Justice Sutherland's words in Berger v. United States. They do believe that the United States does not accomplish justice by counting convictions or arrests. They believe in a way the words I guess are inscribed in the rotunda down in the main justice building that the government wins its case whenever justice is done its citizens in the courts. That's what I believe and I'm just -- it would be very hard to convince me otherwise.

So the lesson I got from Nifong was that not everybody plays by those rules. And I intend to be very skeptical when I read in the press attacks on a prosecutor having been unfairly attacked by defense attorneys before and having to recognize that as a United States Attorney I'm limited by the rules in

responding to those attacks. And that's the way the system works and I think that's the way it should work.

So as I say I take -- what I took from it as a prosecutor -- is that there really are a few folks out there who do not abide by the rules, and I didn't have to rely on press accounts of Mr. Nifong's behavior. I was able to see through video his actual words to audiences, in particular the university audience down here that he held a press conference in front of, and I was, I mean, I was shocked at what he said. I find it very hard to believe that a prosecutor, let alone a career prosecutor, could say the things that he did. I was embarrassed, and I realized that we're not all perfect. There are bad apples out there. That's the lesson I took from it.

METZLOFF: Mr. Cassidy?

CASSIDY: Well, as I say in my paper, I think that in regards to the prosecutor and speech to the media, I think that there are actually more lessons not learned from the Nifong case than there were lessons learned. And I say that because his conduct in failing to disclose exculpatory evidence, the so-called Brady Violation, and in lying to the Court, the so-called Candor Violation, were so egregious that he was going to be disbarred anyway with or without improper statements to

the media. And I take it by the end of the hearing he knew that and that's why he waived his right of appeal and didn't challenge on appeal.

But in my view, some of the statements that he made to the media -- that he was charged with violating the North Carolina Disciplinary Cannons for -- were actually permissible. And if they weren't permissible, if the North Carolina State Bar Disciplinary Authority had construed the rule to prohibit them then the rule is unconstitutional.

I think many of his statements were highly inflammatory and improper, clearly improper. I think the statement about a cross burning, likening it to a cross burning, was improper. The criticism of suspects for lawyering up was clearly improper. Clearly you cannot make false statements to the media. The statement that they may have worn a condom to explain the DNA evidence was known to him to be false. So that was misleading in violation of the disciplinary rules. So I think that those are all statements that were improper.

But there are many statements that he made that I think are entirely consistent with a prosecutor's responsibilities as a public official. I think saying that he was appalled by the

events and that the City of Durham wouldn't tolerate this kind of conduct is a permissible comment. I think that his statement that the victim's mental state and demeanor following the attack were consistent with a sexual assault I think was a permissible comment. I think his statement that the victim was able to identify one of her attackers without naming the attacker was a permissible comment under the disciplinary rules. And I think that the North Carolina Disciplinary Board painted with two broad a brush in mixing those two types of comments together finding them all impermissible.

And they didn't really discuss the nuances of the rule. There are lots of nuances of 3.6 and 3.8F that have yet to be clarified since Gentile. And I was personally hoping that Nifong might clarify them, but by agreeing to be disbarred and waiving his right to appeal, we've lost the ability to have an Appellant Court decision in North Carolina on those issues.

And I would also just add that I don't think that Gentile is the last word on the subject of attorney speech, especially for elected District Attorneys. People act as if this 1991 decision where The Court upheld a standard of substantial

likelihood of material prejudice to a proceeding is the final word on the permissibility of regulating attorney speech overlooking the Supreme Court's 2002 decision in Minnesota v. White. In Minnesota v. White the Supreme Court was faced with a canon of judicial ethics that prohibited candidates for judicial office from announcing their position on legal issues, and The Court struck it down. And The Court said that if we are going to elect judges, if the state is going to decide that election is its means of selecting judges, they can't gag these candidates and deprive the public of knowing their views on issues. I think the same could be said of elected District Attorneys. And I would note that Justice Rehnquist, who voted for the substantial likelihood of material prejudice standard in Gentile, voted with the majority in White. And in White there was no language of membership with the Bar comes with certain responsibilities and we're free to limit the speech more broadly of members of the Bar than members of the public. There was none of that with elected judges in White. They said a candidate is a candidate is a candidate and political speech is at the core of the First Amendment.

So I think had the Disciplinary Committee looked more closely at North Carolina Disciplinary Rule 3.6 and 3.8F they

would've found some constitutional infirmities in it as applied to Mr. Nifong. And that's not to excuse his behavior. His behavior was reprehensible. But I think that there were certain nuances of his speech that deserve better attention.

METZLOFF: Let me jump in there, because I think we need to come back to some interesting points there. The Minnesota v. White case maybe is not one that people are familiar with. Actually we did another documentary on that one. It's a fun case for those of you interested in that. The person ran for office was a guy named Greg Wersal -- who put up cutout pictures of cows all over the place -- and it's a fun case, but it is an important one, and the connection point is important here.

Let me ask this question. Most of Mr. Nifong's comments were made during his primary election. That may be part of the motivation of why he did what he did. Certainly the Disciplinary Committee hearing found a connection between his losing in the polls and his decision to kind of go public on these things.

But let's take it out of the specifics of a case. What if running for District Attorney in Durham County someone says I'm going to be tough on Duke defendants and kids. We know we've got problems in Trinity Park. We've got party problems

and noise problems and I have seen, as Mr. Nifong I think would say if we could go back there, I have seen lots of Duke defendants get off the hook that they shouldn't get off of. And if I am elected I will treat them as fairly as every other defendant and I'm not going to give them any special privileges or protections. Is that okay? I mean, that's the kind of pure kind of core political speech. I'm running on a get tough on Duke kids campaign. Okay? Not Okay? What is the context of this election and what does that mean in terms of what District Attorneys should be able to say?

LYNCH:

I think that's one of those examples, I think it's a great example, because you can be specific yet very, very general, but it's an example of where someone may be able to say something, but the issue is should they. And I'm not sure how effective that would be in a campaign in the first place, but certainly if any group is ever singled out they're ultimately going to have an equal protection claim down the road. But certainly if there's a -- if someone were to say I'm running for DA of whatever county and I promise that I'm going to equally review all cases that come before me and I promise that I'm going to be equally tough on everyone that comes before me, to me that would be acceptable.

And I think a lot of it though is the context in which you

live and I think that prosecutors do not work in a vacuum, particularly elected prosecutors. But none of us do or did. And you have a community that you're responsive to and what you're trying to do, at least what you should be trying to do, is look at the issues in that community and how do you best address them. And to the extent that there might, in fact, be a perception or even a reality that certain classes of defendants get dealt with differently by an office, whether it is along racial or educational or gender grounds, that is something that should be addressed and I think can be validly addressed in a number of ways.

If it's as clumsy as okay, I'm going to go after all of the Duke Students, that's a difficult thing to justify. Certainly whenever we hear veiled references by certain candidates, I'm going to go after all the black people, that's recognized as completely inappropriate and something that can't be said. But if you have a situation where there is a perception in the community of unequal justice, even if it's wrong, that's something that a prosecutor has a responsibility to address. How they address it, the substance of how they address it then takes you into a dialogue of how are they actually going to do their job.

But I think depending upon how you phrase that, if a prosecutor were to say "look, I'm going to make sure that every case that comes before me gets reviewed equally." Because flip it. You want to say as a prosecutor that "any victim that comes before me is going to be treated with dignity and respect regardless of who the alleged attacker is." Because maybe you want to deal with the perception by black victims that they get ignored. So I think a lot of it is how you say it, but the underlying sentiment, I think, can be very appropriately said.

METZLOFF: Reactions?

GOODENOW: I agree with everything she said. I think that there are appropriate ways to do it. I do have to differ with Professor Cassidy. I don't think that the remarks that Mr. Nifong made were appropriate. You can't talk about a specific case being appalling and saying it happened. You were expressing an opinion on the guilt or innocence of that person. You are saying that it did occur when you cannot. Nothing wrong at all with the candidate saying that I think a rape is appalling, that crime is appalling. I think if somebody running for office has to tell the voters that he thinks rape is appalling, he's probably already in a lot of trouble if they don't understand that already. But to specifically comment on a pending case or to say I am going to go after

Duke students. Nothing wrong with saying I'm going to be tough on crime. I think that's what the public expects of a prosecutor.

The State Bar allegations that they found there were several statements, once again, that Mr. Nifong made that had he made them in the context of a courtroom, not an extrajudicial proceeding, i.e. a press conference, they would've been permissible. For the State Bar to say that he can't go out and talk about the results of lab testing in a press conference and that being inappropriate they're completely right. Had there been a bond hearing where he had a legitimate purpose to protect the safety of the public and to keep defendants in jail and thus release the lab results that's a proper context. He didn't do that.

CASSIDY:

I don't see any difference between saying "environmental crime is going to be the number one priority of my office" or "child sexual abuse is going to be the number one priority in my office," -- which you hear DAs say all the time -- and having an elected DA say "I find this conduct appalling and that's why I am going to be the one prosecuting this case and I am going to take direct responsibility for it myself." I just -- I think that the word I find this case appalling has to be protected by the First Amendment if the First Amendment

means anything.

LYNCH:

Well, look, I think everything we're talking about here has to acknowledge the fact that there's a subtext in everything that a prosecutor says publically, because it really, I mean, you can take these statements and everyone listens to what Nifong, what anybody says, and in your mind you say what he really means is so on and so on and so forth. And the problem, I think, that Marsha, you're expressing, and that Bill, you're reacting to, is when Nifong said I find this conduct appalling, I find this case appalling, what we're really hearing is he's sending a silent coded message of these guys did this and therefore, it's appalling. As opposed to just in general if this happened, it's terrible, it's bad.

And that's why, again, even a statement, I guess where you stand depends on where you sit, but even with the statement as a DA I'm going to be tough on crime, there are people who take that and have taken it for years, because it has meant for years, I'm going to be tougher on African-Americans. Depending upon the context, depending upon what else is being said in an election, depending upon what other issues are brought out there. So there are times when these statements need further explanation, because on the surface they say one thing, but people really hear something else, and it's formed

completely by their environment and often their history.

METZLOFF:

One of the points that Professor Cassidy makes is that the Gentile case doesn't help us very much in answering what happened. I think there's no doubt about that. In Gentile we had a defense attorney who had a client, came in late in the day, there had been all kinds of prior newspaper articles and television articles, felt the need to reply about what his client has done. Gentile said it's the first time I've ever done it, because one of the first times I had a client who I knew was innocent. But that was maybe a different point. But you really had to kind of counteract what was already out there.

And in some ways I think it's perhaps unfortunate that we have a rule that sort of fits both defense lawyers who are in very different circumstances than prosecutors. Now, the rule now has a post-Gentile of a specific set of prohibitions for prosecutors. But I have this question about the rule that's being applied both to Nifong and in general. Is that rule -- does it provide sufficient guidance? Does it hit the right points as you look at Rule 3.6? Is it or should we split it up? Should we be looking at a rule that applies to defense lawyers who often are in this kind of responsive mode? And a particular question about that is -- well, no, just ask that

-- is this: do the prosecutors of the world have a good common understanding of what's okay to say and what's not okay to say? Is the current rule the right rule or have we maybe learned something that we can do to rewrite it? Maybe split it off. Make it just for prosecutors. Because it's a very different game that defense lawyers have to be playing with the media than what prosecutors are playing with the media. Anybody want to tackle that question?

CONNOLLY:

Well, I think federal prosecutors, that's really the only group I can speak to, but I think they do understand the rules. And the United States Attorneys' Manual goes further than Rule 3.6 and 3.8 and it says that you have to take particular care to avoid making any statements that would potentially prejudice a proceeding. And my experience is that we abide by that rule, and I'm sure there's people in the audience who have a different experience, but that is just my experience.

I'm astounded when I hear these stories of leaks. And, in fact, one thing I will say is I've seen this firsthand where the newspaper purports to disclose a leak and it's just wrong factually. I've actually had cases where I was, not me personally, but the government was accused of leaking information because The Philadelphia Daily News reported DNA

was found in a car. Well, DNA wasn't found in the car. The leak didn't come from the government. It wasn't true and we were in the middle of an investigation and because we're limited by the rules, we didn't correct the record. We sat silent. But the leak was coming from somewhere else, certainly not the government. I've seen lots of cases where the government gets accused of leaking stuff and it's not the source. And that is one thing.

I'm a little reluctant to start to separate the rules -- have a rule one for a prosecutor and one for a defense attorney. My experience as a practical matter is the defense attorneys don't have to play by the same rule. It's not enforced. The Tit-for-Tat Rule, if you want to call it that as Professor Levenson did, just gives, in my opinion and my experience, free reign to the defense attorneys. I mean, I've had defendants get up and hold press conferences and say post-indictment that they took a lie detector test administered by a former FBI agent and passed it, and that's the headline story. And we have to sit there and not respond to that.

CASSIDY:

I think that there are vagaries in 3.6 that need to be addressed and that's why I take the position that it's unfortunate in one respect that Nifong didn't appeal his discipline in this regard. I think it's very unclear under

3.6 what it means to be commenting on a matter that's already in the public record. Maryland faced that issue with the Gansler case. To my knowledge, no other state has faced it. Does that mean a public governmental record or does it mean it's already been the comment by others?

And there were certain things that Mr. Nifong said that were in the public domain. He made comments about things that were in a warrant for DNA swabs. He made comments about things that had already been commented about by defense counsel. And so depending on which way you construe public record, that may be warranted under the rule or not warranted under the rule.

The rule also lists as something that's ordinarily likely to materially prejudice a proceeding, identifying the witnesses. Identifying the witnesses is a presumptively off limits category. Well, unless it's a murder, the victim of a crime is usually a witness. Does that mean a prosecutor can never identify the victim of a crime? If that's the case then 98 percent of state and local prosecutors around this country are guilty of violating that crime, because it's quite common to identify the victim of an attempted murder or an armed robbery or whatever. But yet if a victim -- if that

prohibition includes the victim -- those statements would be improper.

So I think that there are lots of things that could be clarified in the rule. And I agree with Colm that I don't think a separate rule for prosecutors, although we actually have one, 3.8F, but within 3.6 is likely to satisfy constitutional scrutiny, because Justice Kennedy's opinion in Gentile to the extent that that's still good law put a lot of emphasis on the fact that the prohibition was equally applied to lawyers in both criminal and civil cases and both plaintiffs and defendants.

METZLOFF: Comments?

LYNCH: Isn't the question -- I mean, you can have a separate rule for prosecutors about specific issues, but there's really a separate rule for prosecutors that's overarching, which is you have a dual responsibility to both be an advocate for the case and to try and win your case, obviously, and vindicate your victim. But you also have a responsibility to protect the defendant throughout the proceedings and you have a responsibility to protect the process. So in a larger sense there's already a separate rule for prosecutors, because you carry this other burden all the time. And I think the real

question is how do you codify that when it comes to the specific instance of what someone can and cannot say, and I think it's very difficult to do.

I mean, as Colm noted, I mean, my experience is also in the federal system, and federal prosecutors are among the most heavily regulated lawyers in the system, because the federal guidelines in the US Attorneys' Manual are much more stringent than most State Bar restrictions on what prosecutors can and cannot say and what they are supposed to do and not do in connection with cases. So you sort of grow up in a mentality of automatically not speaking to the press. But, again, it's the balance of how do you then carry out your responsibility to inform people and so on and so forth.

So I think the real question is given this other overarching separate rule that already exists for prosecutors, how do you make that real in the context of handling a high-profile case? And a high-profile case does bring special considerations forward, because it often becomes bigger than just the case. It often becomes more important than just these defendants and this victim, and it starts tapping into the community feeling disaffected. It starts tapping into groups of people who feel like they've ever been vindicated

before. It starts tapping into some very, very deep emotional issues on both sides of the "v". And that's the real challenge to me.

CONNOLLY: I think one thing that hasn't been discussed yet, and I think its going to be pretty interesting, is we now have victim's rights that have been legislated by Congress and the courts have not sorted out how this is going to work. But victims have a right to speak at a variety of hearings and some involvement in the plea process.

And I had a fairly high-profile case, a murder case, where the victim's family during the 18 month investigation was -- had hired a lawyer -- and they were out speaking. And we were not in a position to disclose to them information during the course of the investigation because of grand jury secrecy rules. We would meet with them and it was very frustrating for them because we wouldn't tell them anything. And we would suggest in as nice a way as we could that you really didn't help our case for them to be essentially fighting the battle publically, but we didn't have total control over that.

And then frankly some of the things they had done early on in the investigation did help the case. But I just think that's another frontier. We don't have a panel for victims to speak,

but that's on the horizon as far as I'm concerned.

METZLOFF:

Let me ask one question. One of the insights I got from talking to the reporters in the Gentile case, the two people that had written most of the articles, was that they thought having Don Gentile sort of have his press conference was one, it was fun. They enjoyed it. They were always looking for copy. I mean, they're kind of the, as somebody once put, they're kind of, you know, they're the hungry dog and you've got to feed them everyday. And if you feed them a little bit, they're happy.

But they made this point that I thought, you know, that I -- I'm sure you think about all the time, but I hadn't reflected. I said we have so many law enforcement sources. I could talk to the cops. These were crime beat guys doing it for a long time. They can pickup the phone and talk to some sergeant and the sergeant can say well, I don't know, but I've heard from somebody and you might want to ask this person. They've got lots of sources. And there is this law enforcement sort of institution. You guys are at the top of it or on the side of it or however you want to think about the chain of command, but that's kind of the question. How do you control, how can you control, should you control under the ethic rules, what the police officers are saying

informally and formally?

In the Gentile case there were a series of three or four formal press conferences that the Sheriff of Clark County had given because it involved theft of police cocaine and money that was being used in a sting operation. That's a little unusual, but that was the context of that case. So there's so many opportunities. You don't have to say something, but people who are in a sense from my perspective working for you or working with you are saying things, and ethically that kind of hits me as problematic. How do you deal with that in the real world? Is it a problem? The defense lawyers who were here would be saying you guys have so many sources of access to the media.

Reactions on any of those. I'm not sure there's a question there, but there's a context that you can respond to.

LYNCH: Well, actually I think it ties in well with a comment someone made on the previous panel which was of the defense counsel talking about the Ramsey case and the series of leaks that came from law enforcement there too, and I think that there is this perception that the prosecutors sort of control the agents and cops working for you. And you do in an investigative sense in terms of the investigative tools that

you do allow, but the reality is you really don't. And there's no remedy that I'm currently focusing on that, short of disciplinary proceedings against them, that you have when the investigative team with whom you are working chooses to leak information. And it does happen.

It happens and when it has happened in cases of mine, it's never been a plan of the prosecutors to get information out there or to do something or to put information before the public. Because look, the real reason that people get information in front of the press it is to influence the jury pool. It is to establish a viewpoint about either their client or the case or to get their point of view there. And so as a prosecutor you have to be very careful about that.

And so it's never been something that I have sought, but it has happened in cases, and it may lead to a leak investigation. It may lead to a separate investigation of the agents with whom you are working, which, believe me, makes your job tremendously fun after that. And it may lead to formal proceedings against these agents or these officers. In many instances in DOJ it's called the Office of Professional Responsibility may bring an investigation, but rarely is there ever a resolution to a leak investigation. So what you

have is these general feelings of inchoate suspension now floating on the squad, which seriously puts a negative influence on your working relationship. So it's never something you want as a prosecutor for the law enforcement sources to start leaking.

I think if it does happen, you've got to step back and figure, all right, where is the frustration within this team that this part of the team feels they've got to take this matter into their own hands and take these steps, and deal with it internally if you can.

GOODENOW:

I think step one is having a good working relationship between the District Attorney's Office and the Police Department. They don't work for us. We can't give them orders about what they can say and not say. But if they respect you and you explain to them the consequences of the leaks, I think that you have an opportunity to prevent it.

In Mecklenburg County we really don't have that issue with leaks; not on a big basis. When we have a high publicity case, we've done some things to prevent that from happening. Usually your lead detectives are not going to be the ones doing that. It's going to be people that are the fringe people around the case.

There's a system called KB Cops where police can access all of the police reports. In the high publicity cases what we have done is we've gone in and blocked patrol officers' and other investigators' abilities to pull up those police reports.

Within my office in a high publicity case, I keep those files somewhere where other people in my office can't see them, in locked rooms or in file cabinets that are locked so that people can't get to them.

When I meet with victims' families, one of the first things I tell them is that I cannot disseminate information to you if I know or have a reason to believe you're going to disseminate them to the press. So if I see you giving press conferences, do not expect me to update you on the status of your case. I will not share information with you. If you want that free flow of information then you're going to have to trust me and let me try my case, and then after the case is over you can say whatever you want.

CONNOLLY: A couple of things I guess. One is, and I think you have the same experience I do, which is as a prosecutor I don't want to try the case in the media, and there's lots of reasons. I

mean, one is to protect the integrity of the process, be fair to the accused. But I also don't think it's good for my case.

Things change. You may start out an investigation -- I mean, my case immediately comes to mind. It was a murder case without a body and we thought when we started the investigation we probably had a manslaughter passion murder. It turns out we had a first degree premeditated murder that had been planned for months. And so if you go into the investigation thinking you know all the answers and if you wanted to leak stuff to try to gather other pieces of the puzzle to make that complete picture that's in your brain when you start, I think you're hindering yourself. You're going to hurt yourself. So I don't like to have the case out in the public as a general rule.

Secondly, I do think cops and agents -- they like to talk. I mean, we don't make -- in law enforcement we say we don't make a lot of money, so we don't live in the really nice houses, we don't drive the really nice cars, but we have the scoop. I mean, that's why you hang out in a bar with cops and agents and prosecutors and a lot of gossip going around. So what we've done in high-profile cases, again, where we don't want any disclosures, is we grand jury the case. Now, the

agents and the police officers have to sign letters under Rule 6C. Now you can say to the cop and his supervisor it's a criminal violation if you leak this material. And I have found that to really help.

So - but I do -- I guess I would just leave it with there's been a lot of talk here as if government prosecutors love to try their cases in the media. I don't think good prosecutors or smart prosecutors, let alone their ethics, really want to do that.

CASSIDY: Well, a couple of points. On what you can do, I think it depends on the setup of your office. I agree with everything that has been said that leaks are 99 times out of 100 leaks hurt the prosecutor. They hurt the prosecutor because you're proof might deviate from whatever was said in the leak, you might get wackos taking responsibility for the crime in knowing more facts and therefore, being able to take responsibility for a crime that they didn't commit, and that happens a lot. You may get copycats. So it really can complicate things for prosecutors.

When I was the chief prosecutor in the Massachusetts Attorney General's office, I was fortunate that state police were assigned to our office and it was considered a plum

assignment in Massachusetts to be assigned to that office and they were assigned at the discretion of the Attorney General. So if I suspected somebody of leaking, they were out of the office. And what I did was I'd call people in and I'd talk to them about the case and then, you know, granted that takes time, you're right about that, Loretta, but there's no process that's required, at least, for a change in status of a policeman. He can be back on the road writing tickets.

So it's a little bit more difficult with District Attorneys and local Police Departments, because there you really don't have any official hierarchical relationship, and I think that the answer there is to be found in the first sentence of Model Rule 3.8F that you have to take reasonable actions to train them on their responsibility. And you think of a prosecutor's duties as fighting crime and prosecuting cases. Well, there are training responsibilities too, and you're just going to have to send somebody out to the DAs -- to the police officers to do in service training on these very types of issues.

CASSIDY: I guess one other thing I'd just add, on the federal level, and not that it works perfectly, I'd be the first admit, but under our regulations and policies the investigative agencies within the Department of Justice including FBI are not to

issue a public statement without it being approved by the US Attorney or the designated Assistant Attorney General. Not a thing that always works, but it is a policy matter, it's written there.

METZLOFF: Well, we just heard somebody says it comes up in ethics class so much that the ethics rules let you do this and do that and maybe you can do that, but you really shouldn't, because it's not good practice. So I'm always sort of saying that to students. I'm wondering here with this ethics rule, why isn't the better rule to simplify Rule 3.6 in some ways and really move towards no talking by lawyers about cases? In some ways you're saying you don't want to do that, you don't want to try them in the press. What's the advantage that we have of permitting any lawyers in a sense to open this up to the press?

There's a flip side to that question, but let me -- and that's kind of a radical suggestion. It's quite contrary to Professor Cassidy who is saying there is a great deal of First Amendment rights. But maybe when we sort of see what's been happening since then both with defense lawyers and you can't respond and concerns with leaks, maybe we should go back and revisit Gentile the other way. Let's really keep the lawyers out of this process. Let the media do whatever they

want to do, but let's not give any of the official imprimatur of lawyers, defense lawyers, or prosecutors in this process. Is that a good idea? Is that a better future for us?

CONNOLLY:

I think you have to make some public statement to be a responsible member of the Executive Branch. Let the tax payers know you're actually doing something. And, I mean, I can also, and we do this in the department. For instance, our policy we almost always say we can neither confirm nor deny the existence of an investigation. But there are some exceptions, and it might be a case of importance. In my state right now there have been a number of newspaper articles about abuse of patients in a psychiatric center run by the State. It's generating a lot of attention and I think the public wants to know is somebody in the state or federal government at least look into this.

So that's where I don't -- and we have, for instance, made a public statement already that we have consulted with the Civil Rights Division in Washington and we're exploring that question. And usually in these situations, if we do decide to initiate a formal investigation, we will make a public statement to that effect. And I think we're responsible to tax payers and we're a democracy, they should know that.

So I actually think the current rule is okay, and I do think it limits what prosecutors and defense attorneys should say and for the most part I actually think it works.

LYNCH:

Yeah. I think that it's difficult to say that lawyers, be they prosecutors or defense, who do -- who are officers of the court, no matter what side of the "v" they're on and who do have a very public responsibility, don't also have the responsibility of providing accurate information to the press. But I would say -- I would stress accurate and I would stress, again, in a way that advances the interests that we're all talking about here throughout this entire conference, which is, as Colm, you just mentioned, I think it's very important that the public know what public prosecutors either elected or appointed are doing. I think it's important that they know what are the priorities of the Department of Justice.

I think it's important that they know where we're going to be focusing most of our resources in terms of what types of crimes are of issue. Because people have a right to weigh in on those things and they do so. They do so through the election of DAs. They do so through their elected officials in Washington trying to essentially tell the Department of Justice things that they want focused on. That happens all

the time. And you have to have that give and take. So you have to have the ability to communicate and you have the responsibility to communicate.

So I don't think the answer is neither side should say anything absolutely. And I think the issue is where a freedom like speech is concerned do we want to err on the side of advancing that freedom or pushing it down? And I always err on the side of advancing the freedom.

Having said that, I do think that, again, to me it comes down to responsibility. There are a lot of things that people can say. The issue is should they. In daily life I am stunned by what people say to me on a daily basis, so what they say in the press comes as no surprise at all. And I will say that in any case I've ever tried, high-profile, low, the press has never gotten it right.

So on the one hand you have this responsibility to it. On the other hand I don't want to put too much on what the press is or is not going to say, because I do think that sadly they do always get it wrong and maybe that's partly our fault also. I think a large part of the responsibility of prosecutors is to explain things to the press and there are times when you

cannot comment on a case publically, but my position always was I can't tell you specifics, I can't give you anything before it comes out in court, but I will certainly explain to you what something means. If you're going to write a story about a particular kind of motion in a case and you're telling me you filed a motion to do so and so, I'll explain to you this type of motion doesn't do that, it does this, because that helps you get it right. And you've got an obligation to do your job correctly as well and that's in my interest.

So I don't think the answer is to shut everybody down or cutoff the communication. I think the press does serve an important function in letting people know what's happening both in and out of court. And so my vote would be no to that rule.

Do we need a special rule for prosecutors? I don't really know the answer to that. I think, again, it depends on the system in which you're working whether elected or appointed because the rules are so different in different states. Training, obviously, absolutely. Absolutely. I think it's key both on the issues and on what to do and how to do it. But I think that -- and we all sit up here and we say, as in every

panel, yes, we represent the defense or the prosecutor, this is how we do things, and, of course, we're ethical and there are these outliers out there. The fear that we all have is they aren't just outliers. That's the real fear that we have that there's more than just Nifong out there. So I think that another question, another issue for us is taking responsibility for what our brethren are doing in the field.

CASSIDY:

I think for a lot of the reasons that have been mentioned I think that not only would having that rule be unconstitutional, but I think it would be unwise as a matter of public policy. I think that how our government is conducted is an important matter for citizen concern, and I think the Judicial Branch is an important part of our government, so I think it's important for the public to understand the progress of cases through the criminal justice system.

And while I would say that as a practical and strategic matter as a prosecutor, 9 times out of 10, or maybe even 99 times out of 100, my policy would be I'm not going to have any comments about this outside of court other than describing the charges when they're issued, period.

There are certain cases which have -- which are like the

perfect storm of criminal cases with regards to public speech, and they're the perfect storm because of high media interest and high public vulnerability. And I don't think that you can say in those cases the prosecutor should never make a statement to the media for the reasons Loretta mentioned. I think it's consistent with your fiduciary responsibilities to explain to the public what's going on and why you're doing what you're doing.

I'm thinking about a very high-profile case in Massachusetts that was going on about the same time as the Mike Nifong matter. We spent \$14 billion on a new tunnel underneath our city in Boston and the tunnel collapsed. And the Attorney General of the State of Massachusetts went on television and public radio and said in my view this a crime scene. In my view this a manslaughter investigation. I am investigating it as a manslaughter to see who is responsible for this tunnel - - a woman died in the tunnel on the way to the airport. I think it would've been irresponsible for the Massachusetts Attorney General to say nothing about his investigation of that case between the year when the woman was killed and the year when Powers Fasteners was indicted for involuntary manslaughter in Massachusetts.

The public was concerned about whether they could drive through the tunnel. The public was concerned about whether they were going to get its \$14 billion back from public contractors who paid for the tunnel. The public was concerned about whether other tunnels in the city might be affected by that, and I think it would've been a real disservice to the public function the prosecutors perform by taking a no comment policy.

METZLOFF:

Let me toss this in then, because one of the things that we kind of look back on from the lacrosse case but also from other cases is how do we make sure the media gets the point that innocent until proven guilty, the presumption of innocence, is important? That's not expressly in the rule. I mean, could there be a rule that says something about you guys as prosecutors that at appropriate time, we have to do Miranda warnings when you arrest somebody, can there be the Miranda warnings sort of point that in the press conference or in whatever statement you have to say whether they -- as you say whether they get it right and they report it right, whether that's going to make the news at 11:00 or not we don't know, but you say of course, as we all know every defendant, including this defendant, is innocent until proven guilty. With that said, I have a few comments. How do we -- how do we get that point reinstated as a fundamental

premise of American law that the media and the people get? Because they don't -- they understand it at some level, but they don't want to deal with that.

We've all been wanting to get O.J. convicted for awhile now. I'm from Buffalo, New York. He's still one of my heroes. He's a great running back, so I'll be one of his defenders today. But now everybody is kind of happy we've got another chance to get at O.J. And it's kind of like well, golly, that's weird. I don't know what went on in that room. Something very strange. Is there someway -- forget the O.J. -- how do we get there? Is there someway to do something with this approach of prosecutors to the media given the problems with leaks that it's your responsibility to make that point, whether it's heard or not? But you need to make it and you need to make all the time.

LYNCH: But it is made all the time.

METZLOFF: By you?

LYNCH: In press releases you have to say that these are allegations only and that the defendants are innocent until proven guilty. At least under DOJ guidelines and under most state guidelines as well. And even in press conferences, you have to describe the charges as allegations only. And honestly one of my frustrations as a prosecutor that's been touched on a

little bit in this conference is, and I have a great respect for the press and in many, and I say they get it wrong a lot, but they get right a lot too and they serve a vital function, but this is -- to me this is really an issue of press ethics. Because I can't tell you how many times as a prosecutor the press will call you and try and get you to comment knowing that you cannot, and their pitch is, you know, you should get your side of the story out there, because unless you talk to me, unless you give me the real facts, I'm going to have to write a one-sided story. And my response always was so what you're saying to me is you view it as perfectly appropriate for you to write a one-side story. Why is that my problem? Why is that my problem? With all due respect, it isn't. I mean, that's irresponsible journalism on my part, because honestly I think the prosecutors do say it.

Now, should it be -- should that bell be rung every single time? Probably so. It should be. Should it be rung loudly? Yes, it should be. But things do get reported, and there is this desire, as has been discussed here, to pick a victim, to pick a villain, to tell a story, and to have an answer. And sometimes there is no answer. Sometimes you don't know what happened. You have an allegation and you don't have a conclusion. But the press will give you one and the press

will come up with something that no one in a million years thought was ever in the case. And honestly, I do not know how prosecutors control that.

GOODENOW: I think the example of what the Attorney General of Massachusetts said, I think what he said was wrong. There's a way to communicate that to the public, which would be we don't know what happened. Until we know what happened, we are going to investigate this case. We are going to preserve the evidence at the scene and my position as a government official if I -- if I find evidence of criminal negligence then I will pursue that investigation and consider my prosecutorial options. I think you can communicate to the public that you're looking into it and that you're going to be responsible as an elected official without commenting on it's already a crime when he didn't know if it was a crime at that point.

CONNOLLY: I don't think I have very much to add frankly. I disagree with the first two comments.

METZLOFF: (Inaudible).

CONNOLLY: No, these two. Sorry. Speaking of two different points and I'm agreeing with both of them.

CASSIDY: I think it's interesting that it is already in Rule 3.6, Tom, Comment 5 says that a prosecutor shall not state that charges have been filed without also stating that the defendant is

presumed to be innocent. I think I agree with you that it's widely under-enforced, but it's there. And what can get prosecutors to pay attention to it? Well, I'd say a few \$30 million defamation suits might make state prosecutors sit up and pay attention. And if there's big settlement with the Duke lacrosse players and the City of Durham has to pay, I think other prosecutors might be more cautious in following that obligation in the future.

METZLOFF: Mr. Nifong was a state employee, not a city employee.

LYNCH: Exactly.

METZLOFF: As a citizen of Durham, I --

CONNOLLY: One thing I guess I will say with the premise of the question though is that people believe what they read and this has been alluded to by some prior panelists, and, again, my experience even in -- high-profile cases for Delaware, of course, are nothing compared to like the Nifong situation, but you go in and you start interviewing the veneer and you think a case that's on the front page everyday for the last three months they're going to know everything about it and they're amazingly ignorant about it. And they have not made up their minds.

METZLOFF: Well, that was one question I was going to ask is we worry about the material prejudice, you know, it's administration of justice. What is it that we're worrying about? Is it just

the juries? And, in fact, is that a problem? I mean is it a real problem at which time that we should go rule the other way? Why -- people say whatever the hell you want.

CONNOLLY: Well, look what happened to O.J. I mean, he got off, so that's --

METZLOFF: So is it ever a real problem?

CONNOLLY: I don't know. I can't say it's never, but it hasn't been in my experience to be as much a problem as you would be led to believe by conferences like this. I mean, I think it's a great conference by the way, but -- and I do. I don't -- I think we should worry about it, but I don't know as a practical matter is it as big a problem.

And the other thing else is, you know, I don't think agents or cops or the bad apple prosecutors leak to pollute the veneer. That's not my experience. They leak because of the arrogance that they know stuff and they think they'll read their name in the paper or their institution's name in the paper. I don't think they really believe they can influence the veneer.

LYNCH: I disagree a little bit with that point in terms of sometimes I think in -- it depends on the media market I think. I think it's an issue. I think it's hard to say how big a problem it is, because certainly we've had a number of cases in New York

where because of the nature of the case and the type of publicity that it generates in advance, and, again, like the Duke Lacrosse case, these are cases where usually where race is a factor, where class may be a factor, where government agents may be a factor, where police misconduct cases in particular, civil rights cases in particular, and so you end up using a lot of jury questionnaires to see how the jurors do feel about that. And you have to pull in a very, very large jury pool for that. And you do end up eliminating a lot of people who say they have a view about the case from the press, and then when they write out on the questionnaire what their view of the case is, it's, of course, completely wrong in terms of the facts of the case, because people don't remember. It's someone else's life. It happened a long time ago. They read it, they saw it, and they moved on. But they do remember it to the degree that it does disqualify them from the veneer pool.

It's hard to see if you can go back and say well, had there not been press would this person have been a qualified juror anyway. It's just hard to say. But it does have an impact and... Just one anecdote about that. When we were prosecuting the Louima case, which was a case where a Haitian immigrant had been brutalized by the police, we had a questionnaire and

then shortly before the trial another African immigrant was shot by the police and at least two people wrote in the jury questionnaire, "Poor Mr. Louima. Brutalized by the police and then they went and shot him 41 times." And you would sit there and you would think what do people read. Where do they get this from?

But it does have an impact on people. It has an impact on how they perceive law enforcement, whether they perceive law enforcement as credible or not credible. It has an impact on how they perceive the prosecutors or the defense. And those are the things that you sort of smoke out in these processes that they will write, I saw so and so defense lawyer on TV and he'll say anything for his client. Well, obviously you want to find that out. You need to know that.

So I think it's hard to say the actual impact, but I think it does -- I think the publicity does have an impact of sorts on these types of cases.

CASSIDY: I think there's one other concern and that is that during jury venter a perspective juror might answer the question "no, I haven't read or seen anything about the case" and then remember as the case unfolds and they're in the jury room that "oh, in fact, I did." And so one of the things that's

underlying Rule 3.6 I think is that we accept that the jury impanelment is an imperfect system. And there are many states, Massachusetts included, where lawyers are not allowed to ask any questions or submit any written questions during impanelment. And the only question that gets asked is have you read or seen anything about this case. And I think that in states like that the likelihood of imperfection is even greater.

METZLOFF: We have a lot of talented, interesting, and interested people in the audience, so I'd like -- we have about 15 minutes left. I want to make sure if there's any questions from the group please. And I will probably restate the question so that it ends up on whatever is recording this. Please.

AUDIENCE: (Inaudible) comes from a layman, so (inaudible). Do you all know if a group of scholars (inaudible) are reviewing this case in the Nifong situation that were high attorneys on the defense side? Was anybody reviewing this (inaudible)? For example, what about the errors other folk committed other than Nifong? Take the Attorney General who dismissed the case and is running for governor. What kind of dismissal is that? Who is running for governor in North Carolina wants to offend Duke University? I'm talking about (inaudible).

METZLOFF: I think there's --

AUDIENCE: He was accused of doing this because he was running for

office. What was the Attorney General thinking about who is running for Attorney General when he said (inaudible) they're innocent? In other words, what about the errors other folk committed than Nifong?

METZLOFF: Okay. So the question is other people, we've got police officers, they're certainly being scrutinized. We had a committee in Durham that was studying that and other questions about other officers. But Roy Cooper he's a prosecutor, Attorney General. How do -- are there other lessons from other lawyers in this case that we should be looking at?

AUDIENCE: Could I add one more?

METZLOFF: Let's take that one first if that's okay.

AUDIENCE: No. No. That's fine. (Inaudible).

METZLOFF: We're short of time.

AUDIENCE: No. No. Are women less willing to come forward now since this case as before? I think those are the things a high panel ought to review.

METZLOFF: That's -- I'll include that question as well. One reason the prosecutor should be permitted to make statements to be aggressive with the media is to in a sense give confidence to the public that their claims as victims will be treated appropriately. Comments.

CONNOLLY: I think it's highly extraordinary for a prosecutor in

dismissing a case to say that somebody is innocent. I think it's not only highly extraordinary, but I think it's in some respects disrespectful to the victim. So if that's the thread of your comment, I agree with that. It may be that these young men were innocent, but --

AUDIENCE: There was no victim.

CONNOLLY: The alleged victim. I think that in terms of is there anybody else scrutinizing this, I think that one of the things we have to ask is it a good idea for prosecutors to be elected or would it be a better if they were appointed and subject to removal. I guess that's at the heart of your question. Does making prosecutors run for election put too much pressure on them either the DA or the Attorney General that we don't want that system of law enforcement?

METZLOFF: Let me focus on that question and ask some of the others who are prosecutors, because the moment, and certainly the defendants in the lacrosse case said that was something they needed and wanted and was the most refreshing when the "I" word used. In a sense the question I asked before was should there be something very express in the rules about the presumption of innocence. When we deal with actual innocence, is that unethical for a prosecutor, as suggested, not necessarily stated, but suggested, what about that? What about when you review something and it turns out that your

evidence shows that there is not a case that you can prosecute, but, in fact, (inaudible) something else? Was Attorney General Cooper right ethically in stating innocence in this case?

CONNOLLY: I don't even know this, I mean, what the regulations are, but if I had a case and I was shown evidence at post-indictment that the defendant was actually innocent, I would publically state that. Now, I would not say that if a guy was acquitted, because -- and I do think that's one -- it's funny. We're talking about it being unfair for people to be tried in the media, but there could be cases where an injustice occurs within the judicial system and then we want the media to disclose to the public that injustice that the system may have caused. So -- but if I had absolutely, I mean, and, in fact, I feel so strongly about it that's why I'm saying I'm not even looking at the rule. I think you are morally obligated as a prosecutor at that point to declare the person's innocence if you've already said that they're guilty.

METZLOFF: (Inaudible).

CASSIDY: I think if that -- my answer to that would depend on whether there was uncontradicted evidence of actual innocence or there was evidence that could go both ways then you just --

CONNOLLY: I'm assuming --

CASSIDY: If it's uncontroverted and uncontrovertible I would agree with Colm. But that is an infrequent experience.

CONNOLLY: Never been my experience.

METZLOFF: Professor Tigar.

TIGAR: Mr. Cassidy, as a First Amendment (inaudible) I appreciate your comments. Given the fact that the Massachusetts Attorney General's Office believes that prosecutors may have a First Amendment right to comment on many cases and that at the same time there is no lawyer voir dire in Massachusetts to weed out jurors who would be affected by publicity, would the Attorney General be willing to say that in order to gain this First Amendment right the Attorney General is constitutionally obliged to see that lawyers do get voir dire so they can weed out these jurors to make sure that the other side (inaudible) First Amendment right that would undermine the process?

CASSIDY: Well, that's an excellent question. I don't work for the Attorney General's Office, I haven't for ten years, so I can't speak for the Massachusetts Attorney General. When I worked for them, it was ten years ago. But that's an excellent question. Is it incumbent upon prosecutors to see that the voir dire system is fair and more accurate?

TIGAR: That really is (inaudible).

CASSIDY: Yeah.

TIGAR: I didn't think you could get the job done, but I just wanted to (inaudible).

CASSIDY: I believe in limited -- in well-conducted lawyer voir dire.

AUDIENCE: I'm wondering to what degree -- I'm kind of curious what the (inaudible) as well, but to what degree there is a crisis in competence in the grand jury system? Because if we look at the last couple of years that's where a lot of the First Amendment issues are going, that's where a lot of leaks or not leaks are happening that are in high-profile cases. So if you guys could comment particularly Colm. He said I'll just grand jury this and that'll get the FBI to shut up, but to some degree that's exactly what the press distrusts is this black box where there are ways -- there's the witnesses before the grand jury who can come out and say anything, but you don't see what else is going on (inaudible).

CONNOLLY: Well, it's incredibly frustrating as a prosecutor. I was an Assistant US Attorney for many years and then as US Attorney I get to do the orientation for the grand jurors, and I tell them that you are going to inevitably during your 18 months of service you're going to read something in the newspaper which purports to say what occurred in this room and it didn't and you can't say anything. And as frustrating it is as a grand juror, imagine as a prosecutor when they're maybe attacking you or -- in making claims that somebody went in

and fully cooperated and they took the Fifth Amendment, and you have to sit mum as a prosecutor.

I've had a situation where three witnesses wrote an op-ed piece to the newspaper and declared how in this article how they were abused within the grand jury room and had very specific things, and we just sat silent.

But I think that the grand jury system does work. I think it's a great system. And I think it works largely because of the secrecy provisions. I think it actually -- the secrecy does more to protect innocent people who could be wrongfully accused and I think that outweighs any interest the press may have.

METZLOFF: All right. We have a couple of minutes. I thought we'd have any final points I guess. This question is sort we have we've been dancing around a little bit is what really is the relationship between the prosecutor and the media? Friend? Foe? Something you're scared of? Something you can play? Something you -- whatever you want to sort of fill in with that. Is it getting worse? I mean, what is the direction of change? In some ways you have good -- you know who they are. You're kind of repeat players in that system. What is the sort of real world apart from the ethics worlds of that

relationship between your office and the media and in a sense what's the biggest problem that you see? We talked about that, but I thought I'd like to hit that on the head and we'll close on that. Anyone?

LYNCH:

I would just say in my experience it's a working relationship. It is sometimes adversarial in the sense that the press always wants more information than you can provide for a variety of reasons. But generally what you find is that the press that cover your courthouse tend to cover the courthouse over and over again, so you get to know people, you know their personalities. You know how they write, you know what they're looking for, and hopefully they get to know you and what you will and won't say. But it's a working relationship like any other. But an arm's length one at all times I think. And I think it has to remain that way. No matter how friendly you get, you have to be very cognizant of the fact that whatever you say unless you are very, very clear... And people get burned by this all the time making casual comments to someone that they thought they were having a simple off the record conversation with and then the reporter said but you never told me it was off the record. You never said it wasn't for attribution, and so I felt that under my obligations I could use it. And all it takes is being burned once in that way and you are forever shy of

them.

And I think it has to be a working relationship, because I think that the press does have a job to do. They have an important responsibility in explaining the criminal justice system to people who don't understand it and explaining what's happening in our overall system of government to everyone. They are the eyes and ears of the public in the courthouse and we have to be cognizant of that.

I have always felt that with those rights come responsibilities, and I guess what I would like to see happen -- in a perfect world I'd love to see the press get it right more often. I'd love to pick up the paper and read about a case where I sat in the courtroom and realize oh, yeah, this is what happened in court today. And I have yet to have that happen.

GOODENOW:

I would I think would like for the media to understand what the prosecutor's role is. I know -- I understand what the media's role is. I understand that they have a job to do and a story to report. But I would ask them to respect my job and I would also ask them to once in awhile step back and remember that when they're reporting these events, these are people. The Duke lacrosse players were people. Crystal Mangum

is a person. Everybody seems to have lost sight of the lives that have been ruined in this case, the lives that can be ruined in other cases.

I had a case in Charlotte that garnered a lot of publicity. A father murdered his two twin daughters and stabbed them a total of 33 times and called 911 and told 911 operator what he had done. And those girls were not in the grave and I was in a courtroom with a media attorney who was trying to get that 911 call so he could play it over the airwaves and that mother could hear what had been done to her children and everybody else could hear what had been done to those children before they were even buried. And I don't think that was responsible. And I think that they should step back. That story can be told and it can be told later, but every once in awhile just remember what we're dealing with.

CONNOLLY:

I think generally in Delaware we have a very good relationship with the press. My experience is that the press does try to get it right -- the reporters is my experience try to get it right, and usually when we have a problem with the press it's because some editor cut significant parts out of the story or gave a headline to a story which does not reflect what the facts are that are set forth in the story.

Just a personal like example of that: I was one of the US Attorneys mentioned in one of the many lists to be considered for firing and I found out about this, and the headline on my Sunday paper, in the one statewide paper, read "Connolly Caught in Gonzalez Scandal." Now, I got my revenge that Sunday or the following Sunday when the editor of the paper who happens to go to church where I do, I had said oh, yeah, I want to say something to you and had him come down to the bottom of the steps where my four kids were and I said to him, you need to understand when you let your guys print a headline which doesn't reflect the story, it doesn't just affect me. It affects people like these guys who have to go to school and listen to their teachers and their students, their fellow students, ask embarrassing questions.

But I will say the story was fine and I've always been able to live with any story, because my experience is definitely that the reporters, the line reporters, do try to get it right.

CASSIDY: I think it's a love/hate relationship, and I think that most prosecutors approach conversations with the media with a lot of trepidation. Either because they're fearful that they're going to say something that they shouldn't under rather

opaque rules or the fear that they're going to be misquoted or mischaracterized in the media. But I think that the responsible prosecutor and the responsible reporter recognize that citizen knowledge of what's going on in the courts of this country are essential to a democracy, and so the key is not squelching speech but exercising speech responsibly. And that's I think the challenge.

METZLOFF: Thank you very much. It was a great panel. We enjoyed it.