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Advocacy in the Court of Public Opinion, Installment Two: How Far Should Corporate Attorneys Go

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Advocacy in the Court of Public Opinion, Installment Two: How Far Should Corporate Attorneys Go?

MICHELE DEStEFANO BEARDSLEE*

ABSTRACT

Today, legal controversies are tried in the court of public opinion as much as in any court of law. Corporate lawyers' traditional tendency, however, has been to attempt to isolate legal activities from public relations activities. Accordingly, when providing legal advice, they have viewed media considerations as separate. Historically corporate counsels' typical media strategy often consisted of no more than, "no comment." Given today's saturated media culture, this is no longer a viable strategy. Indeed, it appears that some corporate lawyers are adapting to the new media environment and attempting to help their clients manage the public relations impact of legal controversies. To date, however, there has been little systematic evidence gathered on the role corporate lawyers play in the court of public opinion for their clients' legal controversies and little sustained examination of the implications of these trends.

The purpose of this project is to analyze: (1) how the court of public opinion impacts legal controversies of large, publicly traded corporations that have high demand for legal services; (2) how the general counsels of these corporations manage the intersection of public relations and law; and (3) what should be the corporate lawyer's ethical obligations, if any, in this extra-judicial court. To investigate these questions, the author sent a questionnaire to all general counsels of the S&P 500 and conducted fifty-seven interviews with general counsels of S&P 500 corporations, law firm partners, and public relations consultants.

The preliminary findings from this study will appear in two installments in the Georgetown Journal of Legal Ethics. The first installment focuses on how the court of public opinion can impact legal controversies and how corporate attorneys currently manage legal public relations for their corporate clients. It argues that the court of public opinion is a real part of our justice system and that

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managing legal public relations (legal PR) is a legitimate and fundamental component of corporate legal services. It contends that the role corporate attorneys play in managing legal PR for corporate clients is at odds with the conventional view and that it is time to broaden our view of the corporate attorney's role in this arena. The second installment highlights examples of wrongdoing by corporate attorneys and contends that there is little oversight of lawyers' typical management of legal PR "behind the scenes." Because professional guidelines focus on lawyers' extrajudicial statements regarding matters that are adjudicated in a court of law, they put the spotlight on the wrong place and are therefore not relevant to the way corporate lawyers manage public relations. Moreover, these professional guidelines risk a race to the bottom—where lawyers' ability to spin is valued over their ability to provide effective legal advice that accounts for PR concerns and the corporation's long-term interests. Although the court of public opinion is an extra-legal decision-maker, it does not fit the traditional adjudicative proceeding paradigm. Therefore, the second installment contends that some level of advocacy may be appropriate in that alternate-court, but that corporate lawyers should still act in a socially responsible manner and counsel their clients to act that way as well. Ultimately, this Article recommends revised education methods and disciplinary rules to provide better guidance to lawyers as to how to ethically manage legal PR for corporate clients.

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INTRODUCTION

Today, legal controversies (big and small) are tried in the court of public

opinion as much as in any court of law. Headlines about all kinds of cases emphasize the importance of the court of public opinion and the weight of its verdict.¹ Moreover, recent studies have shown that certain types of public relations (PR) and advertising can positively impact how consumers view corporate legal issues and judge corporate defendants.² Although it is claimed that people cannot control the court of public opinion,³ lawyers today vigorously try to do just that and not always in an ethical manner. Historically, there has been concern over the ethics of media and public relations professionals.⁴ Recently, however, there has been concern about the ethics of attorneys' advocacy in the court of public opinion—particularly when attorneys (especially criminal attorneys) act as spokespeople for their clients.⁵ Mike Nifong, Eliot Spitzer, and Robert Shapiro are examples of attorneys that have publicly stepped out in

1. A simple Google search of the words "court of public opinion" populates many headlines in the United States and around the world, like Richard Littlejohn, *Found Guilty by the Court of Public Opinion*, DAILY MAIL, March 3, 2009, available at <http://www.dailymail.co.uk/debate/article-1158676/RICHARD-LITTLEJOHN-Fred-Shred-guilty-court-public-opinion.html>, or Laura Smitherman, *Cardin Tried in Court of Public Opinion; His Peers Wait and See*, BALTIMORE SUN, Aug. 20, 2009, available at http://weblogs.baltimoresun.com/news/local/politics/2009/08/cardin_tried_in_court_of_public.html.

Many legal scholars have made similar contentions. See Michele DeStefano Beardslee, *Advocacy in the Court of Public Opinion, Installment One: Broadening the Role of Corporate Attorneys*, 22 GEO J. LEGAL ETHICS 1259, 1266-1277 (2009); MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 104 (3d ed. 2004) ("The First Amendment right to freedom of speech is never more important . . . [than when] publicly accused of wrongful conduct in a criminal prosecution or civil complaint."). Indeed, a lawyer named Jim Haggerty hosts a blog entitled, "In the Court of Public Opinion." <http://inthecourttopublicopinion.blogspot.com/>.

2. Cf. Amy O'Connor, *Merchant of Mercy, Merchant of Death: How Values Advocacy Messages Influence Jury Deliberations*, 34 J. APPLIED COMM. RES. 263-84 (2006) (demonstrating that focus group participants will decrease punitive damage awards after exposure to values advocacy messages).

3. See, e.g., The Court of Public Opinion, <http://www.theplan.com/court/> (last visited June 22, 2010) (claiming that "[t]he Court of Public Opinion is the only court that corporate executives, their assigns and 'spin doctors' can't control").

4. See Beardslee, *supra* note 1, at 1333 n.33; see also Richard A. Nelson, *Issues Communication and Advocacy: Contemporary Ethical Challenges*, 20 PUB. REL. REV. 225, 229 (1994) ("Too many individuals in the public relations field today lack the decision making framework tools that a broad-based knowledge of ethical theory provides."); Shari R. Veil & Michael L. Kent, *Issues Management and Inoculation: Tylenol's Responsible Dosing Advertising*, 34 PUB. REL. REV. 399, 399-402 (2008) (contending that corporate PR executives participate in manipulative and deceptive advertising techniques); *id.* at 399 (contending that corporate PR executives "are not above using deceptive tactics to protect their brand" when faced with legal issues that carry with them the potential of very negative publicity).

5. See, e.g., Elisabeth Semel & Charles M. Sevilla, *Talk to the Media About Your Client? Think Again*, 21 CHAMPION 10, 14 (1997) (focusing on criminal defense lawyers as spokespeople); Kevin Cole & Fred C. Zacharias, *The Agony of Victory and the Ethics of Lawyer Speech*, 69 S. CAL. L. REV. 1627, 1637 (1996) (concentrating on extrajudicial statements made by criminal defense and prosecution attorneys involved in the O.J. Simpson case); Jean Hellwege, *Legal Groups Consider Ethical Codes for Legal Commentators*, 34 TRIAL 16, 16 (1998) (explaining that legal professionals are concerned with legal commentary by criminal defense lawyers); Jonathan M. Moses, *Legal Spin Control: Ethics And Advocacy in the Court of Public Opinion*, 95 COLUM. L. REV. 1811, 1811 (1995) (recognizing that there are other types of advocacy in the court of public opinion but focusing on the lawyer as spokesperson); John C. Watson, *Litigation Public Relations: The Lawyers' Duty to Balance News Coverage of Their Clients*, 7 COMM. L. & POL'Y 77, 77 (2002) (discussing criminal defense attorneys' behavior in the court of public opinion).

support of their clients and been accused of crossing the ethical divide because of how they spoke about and positioned the legal issues.⁶ Little emphasis, however, has been placed on the way attorneys advocate in the court of public opinion behind the scenes on behalf of corporate rather than individual clients. Some scholarship highlights corporate clients' need for lawyers to help manage public relations concerns around legal controversies.⁷ This literature, however, generally does not address the main inquiry of this Article: How far are attorneys currently going in the court of public opinion for their corporate clients—and how far is too far?⁸

The first installment of this Article⁹ investigates the emerging trend of general counsels acting as legal public relations (legal PR) managers for legal issues facing large, publicly traded corporations. The investigation is informed by 1) a questionnaire sent to all general counsels of S&P 500 companies (eliciting a twenty-eight percent response rate); and 2) fifty-seven qualitative interviews with general counsels of the S&P 500, law firm partners, and PR executives [hereinafter the PR Study].¹⁰ Preliminary findings from the PR Study indicate

6. See *infra* notes 25-28.

7. See, e.g., Moses, *supra* note 5, at 1833 ("Corporations also may need lawyers with press savvy, especially during corporate crisis."); Kathleen F. Brickey, *From Boardroom to Courtroom to Newsroom: The Media and the Corporate Governance Scandals*, 33 J. CORP. L. 625, 636 (2008) [hereinafter *Boardroom to Courtroom*]; Kathleen F. Brickey, *Andersen's Fall From Grace*, 81 WASH. U. L. Q. 917, 919 (2003) [hereinafter *Andersen's Fall*]; David M. Sudbury, *The Role of Corporate Counsel in the Criminal Environmental Case: Advice to Quench the Fire*, 3 VILL. ENVTL. L.J. 95, 110 (1992).

8. Scholars generally do not attempt to determine what level of advocacy should be provided in this arena by corporate attorneys who do not act as spokespeople and how the regulations should be revised to better define ethical advocacy. For example, Jonathan M. Moses, a public relations specialist, wrote an article examining the ethical rules' ability to "control extrajudicial advocacy by attorneys." Although he points out issues with the ethical rules, he does not provide a recommendation for correcting them. Instead, he states that when making extrajudicial statements, lawyers have a "duty not to mislead the public about the law" and that the "greatest control of advocacy in the court of public opinion may come from an ideal of traditional lawyer ethics . . . [I]f lawyers are uncomfortable with a client's position they may be less likely to speak out in the court of public opinion or at least to engage in the most brazen forms of legal spin control." See generally Moses, *supra* note 5. See also Cole & Zacharias, *supra* note 5, at 1627-28 (analyzing the speech by attorneys involved in OJ Simpson's trial and arguing that "not everything that is legal and beneficial to the client is appropriate in the context of making public statements" but declining to propose any regulations because of First Amendment and other practical issues). Lonnie T. Brown wrote an article concerned with extrajudicial speech by criminal defense attorneys and prosecuting attorneys. See Lonnie T. Brown, "May it Please the Camera, . . . I Mean the Court"—An Intrajudicial Solution to an Extrajudicial Problem, 39 GA. L. REV. 83, 84-85 (2004). Brown recommends a rule to curb attorneys' extrajudicial speech and argues that it might also apply to non-lawyer speech for which attorneys are responsible. For a detailed description and analysis of his recommendation see *infra* notes 223-224, 395 and accompanying text.

9. See Beardslee, *supra* note 1.

10. The PR Study focused on general counsels because they lead the development of legal strategies and decide when to consult with internal or external PR consultants regarding a legal matter. Although the survey was sent to general counsels at all of the S&P500 companies, the interviews focused on general counsels working at S&P500 corporations in the banking, pharmaceutical, and petroleum industries. Companies within these sectors generally have high demand for legal services and receive significant media attention around legal controversies. Moreover, the companies within these sectors offer a variety of consumer products and services.

that the court of public opinion is an important arena for corporate legal controversies. Most of the interviewees in the PR Study believe that the way that a legal issue is spun in the media can significantly impact whether a civil lawsuit is filed, what charges or claims, if any, are brought against the corporate client, relationships with government officials and regulators, the level of negotiation power as to a given controversy, what legal strategies the corporation may pursue, and even the outcome of legal controversies. Therefore, despite the recent emphasis on lawyers as spokespeople, this research suggests that many corporate lawyers are avidly advocating in the court of public opinion, but doing so “behind the scenes.” That is, corporate lawyers are crafting and positioning messages for their clients to use in the court of public opinion, but the lawyers are not necessarily making statements to the public directly.

More than that, these findings paint a picture that is inconsistent with the conventional depiction of the lawyer’s role in this area. The conventional picture is of separate legal and public relations functions that work together only when a legal crisis arises. Under this function-compartmentalization view, lawyers are seen as legal technicians, while the PR people are seen as the spin-doctors. The portrait painted by the PR Study, however, is at odds with this depiction. Given today’s 24/7 news cycle, almost all activities of the publicly traded corporation can become high-profile with legal implications. Therefore, corporate lawyers interact regularly with PR people on PR issues—well before a legal issue turns into a crisis.¹¹ This interaction is iterative and collaborative. The lawyers, internal communication specialists, and external PR executives work together to craft the right positioning. Based in part on these findings, the first installment of this project argues that the court of public opinion is a real part of our justice system and that managing legal PR is a legitimate and fundamental component of corporate legal service.

In this installment, however, the focus turns to the existing ethical obligations that regulate attorneys’ management of legal PR. This installment contends that current ethics rules are not relevant for corporate practice as it relates to public relations. They do not provide adequate guidance to lawyers on how far they may or should go towards using the media in favor of their corporate client when they are not acting as spokespersons but instead are managing legal PR behind the scenes—especially regarding matters that may never reach a court of law. Moreover, the current rules do not actively encourage lawyers to behave socially

See Beardslee, *supra* note 1, at 1311-33. The survey and some of the original interviews with general counsels were conducted as part of a larger research project funded by a subsidiary of Harvard Law School’s Program on the Legal Profession. At that time, the author was the Associate Research Director of the subsidiary and the lead researcher on the project. For a more detailed explanation of the methodology, a description of the sample, and a copy of the interview questions, see the Research Methodology and Sample Characteristics in Beardslee, *supra* note 1, at 1311-33.

11. For more explanation of the conventional view and the way that attorneys work with internal and external PR executives see generally Beardslee, *supra* note 1.

responsibly or to convince clients to behave socially responsibly in the court of public opinion.¹² The existing rules concerning lawyers' roles in extra-legal advocacy are at once vague and malleable, yet also overly narrow—generally they are concerned with the integrity of trials and lawyers' direct speech.¹³ As such, the rules put the spotlight in the wrong place and on the wrong subjects. Fewer than five percent of cases ever make it to trial¹⁴ and lawyers often are not the spokespeople in the media. Instead, they bargain for their clients not in the "shadow of the law" but behind the spotlight of the media circus.¹⁵ Thus, the rules enable deception by attorneys that is intended to yield an unfair advantage. In a world where in-house lawyers already struggle with the tension between their role as client-centric partner and guardian of the corporate conscience, obscure guidelines grounded in the adversary ethic risk a race to the bottom—where corporate lawyers act like "hired guns," valued (professionally and economically) for manipulating legal PR over providing effective legal advice that incorporates PR concerns *and* the corporation's and public's long-term interests.¹⁶

Although the findings from the PR Study suggest that corporate attorneys have a strong set of inner checks and often try to restrain clients' or PR executives' tendency to over-spin,¹⁷ there are recent examples of lawyerly misconduct. Attorneys for corporations (e.g., Arthur Andersen and certain tobacco companies) have directly misled or helped their clients mislead the public about legal controversies in order to affect case outcomes.¹⁸ The question is: Is this how legal professionals should be supporting their clients in the court of public opinion? Should lawyers be allowed to deceive—or to help their clients deceive—the public about legal controversies in order to reap both business and legal benefits?

The first installment of this project argues that the court of public opinion acts as an extra-legal decision-maker and, therefore, impacts the fair administration of justice. Although this may, at first blush, imply that a lawyer should behave as a zealous advocate in this alternate-court, a trial in the court of public opinion proceeds with almost no procedural safeguards. This installment contends, therefore, that lawyers should be guided by a higher standard than that which is currently in place. Attorneys should help their clients' position legal controver-

12. See *infra* Part III. B.

13. *Id.*

14. U.S. SENT'G COMM'N, 2006 SOURCEBOOK OF FED. SENT'G STAT. TBL.11 (2006), available at <http://www.ussc.gov/ANNRPT/2006/table11.pdf> (reporting that 95.7% of criminal defendants plead guilty).

15. See Robert H. Mnookin & Lewis Kornhausert, *Bargaining in the Shadow of Law: The Case of Divorce*, 88 YALE L.J. 950, 950 (1979) (coining the phrase).

16. Indeed, the ABA has historically supported the "hired gun" mentality. See John C. Coffee, *The Attorney as Gatekeeper: An Agenda for the SEC*, 103 COLUM. L. REV. 1293, 1295 (2003) ("[T]he bar associations simply deny that attorneys have (or should have) any mandatory gatekeeper obligations."); *id.* at 1316 n.6 ("The American Bar Association has historically favored the 'hired gun' model of the attorney."). See *infra* Part III.C.

17. See *infra* note 32 and accompanying text.

18. See *infra* Part I.

sies in a positive way, but they should refuse to make or aid public disclosures that mislead or deceive the public about the facts or law surrounding the legal controversy. They should not make or abet public disclosures that a reasonable lawyer would realize *could* have a “substantial likelihood to materially prejudice an adjudicative proceeding”¹⁹—even if a case is not pending at the time or the purpose of the legal PR is to avoid a trial. Moreover, it contends, general counsels should counsel their clients to refrain from this type of antisocial PR.²⁰ With these ground rules in place, general counsels may be better able to play the role of counselor to their corporate clients and act, essentially, as gatekeepers to the media, that is, private intermediaries that can (and should attempt to) prevent misleading or deceitful information about corporate legal controversies from entering the marketplace.²¹ Without these ground rules, even well-intentioned attorneys may fail to resist the pressure to spin in a way that is misleading. Consequently, disrespect for lawyers and the justice system may burgeon.²²

Part I highlights examples of wrongdoing by corporate attorneys in their management of legal PR for clients. It argues that this misconduct creates externalities that negatively impact competing societal values, such as the integrity of information to the market, the fair administration of justice, and society’s confidence in our justice system.

Part II analyzes the existing guidelines that address lawyers’ management of legal PR and concludes that they are woefully incomplete because they are based on the rhetoric of adversarial adjudication and a very narrow view of the

19. MODEL RULES OF PROF’L CONDUCT R. 3.6 (2007) [hereinafter MODEL RULES]. See *infra* Part II.A (describing the inadequacies of R. 3.6) and Part IV.C.1 (recommending potential revisions).

20. In essence, this Article urges lawyers to advocate in the court of public opinion with what has been called a “professional conscience,” balancing public-mindedness against zealous partisanship. See *infra* discussion at Part IV.A. For a discussion of the First Amendment issues related to this recommendation, see *infra* Part IV.D.1.

21. Proposing that lawyers act as media gatekeepers is likely a contentious proposition since there has been much debate over whether and in what circumstances lawyers should behave as gatekeepers. See Sung Hui Kim, *Lawyer Exceptionalism*, 63 SMU L. REV. 73, 76 (forthcoming 2010) (describing the debates around the SEC’s efforts to obligate lawyers to gatekeep as “gatekeeping wars”). Indeed, the bar has opposed efforts by outside regulators like the SEC to impose gatekeeping duties on lawyers. *Id.* Furthermore, there are many different definitions of gatekeeper. See, e.g., JOHN C. COFFEE, *GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE* 2-3 (2006) (defining a gatekeeper as an “agent who acts as a reputational intermediary to assure investors as to the quality of the ‘signal’ sent by the corporate issuer”); Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L. ECON. & ORG. 53, 53 (1986) (defining a gatekeeper as one who is “able to disrupt misconduct by withholding their cooperation from wrongdoers” and can be held liable for failing to do so); Kim, *supra* at 73 (defining gatekeepers as “private intermediaries who can prevent harm to the capital markets by disrupting the misconduct of their client representatives”). Here, as will be discussed further *infra*, this Article uses the term gatekeeper not to invoke the idea of bulldog at the gate, forcefully preventing clients from making certain types public disclosures. Instead, this Article uses the word gatekeeper to mean something more like a sieve. The corporate general counsel, in the role of media gatekeeper, should help separate the unwanted (the misleading), from the desired (the properly positioned) information in public communications about legal controversies.

22. See *infra* Part I and Part IV.D.1 (discussing how attorney-assisted, deceptive client speech about legal controversies can damage the image of the legal profession and impede the effectiveness of the justice system).

attorneys' role in the court of public opinion. Essentially, it contends that the current ethics rules, adversarial system, and economic incentives almost predestine that attorneys will aid their clients in misleading the public about corporate legal controversies.²³

Part III analyzes whether the zealous, adversarial advocacy that is enabled and promoted by the current ethics rules is justified in the court of public opinion. It does so by comparing the court of public opinion to a court of law and the economic marketplace. It explores some of the restrictions and duties imposed on lawyers and other commercial actors in those spheres, e.g., restrictions on commercial speech and securities regulations. This part concludes that the role attorneys play in managing legal PR spin for corporate clients rests somewhere between the role the attorney plays as an advocate in a court of law and the role the attorney plays as a business partner and legal counselor in the economic marketplace. Although some level of advocacy is justified in the court of public opinion, the rationalization for applying restrictions on misrepresentations in the economic marketplace holds true for lawyers in the court of public opinion and actually supports increased regulation.

Part IV begins by describing why general counsels should aspire to be legal PR counselors and gatekeepers to the media for corporate clients. It provides a vision for how corporate attorneys should behave when managing legal PR for their corporate clients in the court of public opinion, whether in the spotlight or behind the scenes. Then it proposes revised professional ethics rules and education techniques to better define and promote ethical advocacy in the court of public opinion. Lastly, it addresses potential concerns raised by this proposal, including (but not limited to) those about its enforceability and the First Amendment.

I. WRONGDOING BY CORPORATE ATTORNEYS BEHIND THE SCENES

Many claim that "lack of truthfulness—real lying [by attorneys] about large matters or small—is on the rise."²⁴ It is unsurprising, therefore, that incidents of lawyers lying and shading the truth have been highlighted in the court of public opinion. Recently there has been a lot of emphasis on deceptive tactics by government lawyers, like Mike Nifong²⁵ and Eliot Spit-

23. See Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1304 (1978) (making a similar argument with respect to discovery abuse).

24. See W. William Hodes, *Seeking the Truth Versus Telling the Truth at the Boundaries of the Law: Misdirection, Lying, and "Lying with an Explanation,"* 44 S. TEX. L. REV. 53, 63-64 (2002); David B. Wilkins, *Team of Rivals? Toward a New Model of the Corporate Attorney-Client Relationship* 670-71 (Current Legal Problems Series, Working Paper, 2009) available at <http://ssrn.com/abstract=151734> (suggesting that inside and outside lawyers will also be charged with misconduct as it relates to their representation of the banks and other financial institutions that contributed to the recent economic meltdown).

25. During the investigation into allegations of rape made by an exotic dancer against members of the Duke lacrosse team, the investigating district attorney, Mike Nifong, made several statements to the media in an attempt to garner public support that violated North Carolina's Rules of Prof'l Conduct R. 3.6(a). For example,

zer,²⁶ class action plaintiffs,²⁷ criminal defense attorneys,²⁸ and individual or corporate defendants (such as Richard Scrushy and Arthur Andersen).²⁹ Little attention has been paid, however, to the role that corporate lawyers played behind the scenes—how they may have aided corporate clients in their ruthless manipulation of legal public relations.³⁰

The preliminary findings from the PR Study³¹ indicate that behind almost every legal news-story lurks a lawyer—somewhere. Whether they work behind the scenes or act as spokespersons, practically all the corporate lawyers in the PR Study aid their clients in managing the PR strategy and/or tactics for legal issues.³² The PR Study interviews did not elicit any stories of misconduct or

Nifong analogized the case to a “cross-burning” and expressed personal “confidence” and “satisfaction” that the evidence would show that rape occurred. N. C. STATE BAR DISCIPLINARY COMM’N FINDINGS FACT ¶¶ 22, 29, 31, 42 (July 10, 2007). Worse yet, he failed to disclose exculpatory DNA evidence and lied to the court about it. R. Michael Cassidy, *The Prosecutor and the Press: Lessons (Not) Learned from the Mike Nifong Debacle 2* (Boston College Law School Faculty Papers, Paper 211, 2008), available at <http://lsr.nellco.org/bc/bclsfp/papers/211>; see also Susan Hanley Duncan, *Pretrial Publicity in High Profile Trials: An Integrated Approach to Protecting the Right to a Fair Trial and the Right to Privacy*, 34 OHIO N.U. L. REV. 755, 761-762 (2008) (“Nifong’s actions of publicizing inflammatory statements concerning the defendants caused immediate detrimental consequences for the Duke players that likely will continue to haunt them.”). Nifong subsequently was disbarred for his handling of the investigation and statements to the media. See Cassidy, *supra* at 1-2 (examining the disciplinary rules regulating public speech by attorneys and arguing that provisions of Rules 3.6 and 3.8 may violate the First Amendment when applied to elected prosecutors during political campaigns). Some of these statements were considered egregious. *Id.* at 2-3. Adam W. Goldberg & Joshua P. Galper, *Model Conduct: What’s Your Reaction*, available at http://www.huffingtonpost.com/adam-w-goldberg-and-joshua-p-galper/model-conduct_b_501317.html (explaining that “Nifong was following a long tradition of prosecutors (including at the highest level) who chose the airwaves to help convict presumably innocent defendants [and] boost their careers”).

26. Eliot Spitzer served as the governor of New York from January 2007 until March 2008. Kelli Arena et al., *Deeply Sorry Spitzer to Step Down by Monday*, CNN, Mar. 12, 2008, <http://edition.cnn.com/2008/POLITICS/03/12/spitzer/index.html>. Although he had a “reputation as a scourge of white-collar crime,” Spitzer resigned from his post after being publicly accused of patronizing a high-price prostitution service. *Id.* See also Goldberg & Galper, *supra* note 25, ¶ 6 (“Then we had Eliot Spitzer. While N.Y. Attorney General, he went on national television—*This Week with George Stephanopolous*—and declared Hank Greenberg guilty before presenting one piece of evidence to a juror. Moreover, his office also reportedly leaked allegations against his targets that went unsourced when reported in the media.”).

27. Cf. Moses, *supra* note 5, at 1840 (explaining how “[l]egal spin control has become especially important in the mass torts area”).

28. The statements made by both the prosecution and the defense in OJ Simpson’s trial have been characterized by scholars as having “pushed the boundaries of acceptable commentary.” Brown, *supra* note 8, at 1227-28 (detailing extrajudicial comments by OJ Simpson’s lawyers e.g., Robert Shapiro and Gil Garcetti); see also Cole & Zacharias, *supra* note 5, at 1627-28.

29. See Brickey, *Boardroom to Courtroom*, *supra* note 7, at 637-52 (discussing abusive PR campaigns of Martha Stewart, Richard Scrushy, and Arthur Andersen). See also *id.* at 628 (explaining that defendants “demonize others—including prosecutors, witnesses, and the press—in order to exonerate themselves”); Peter A. Joy & Kevin C. McMunigal, *Trial by Media: Arguing Cases in the Court of Public Opinion*, 19 A.B.A. CRIM. JUST. 47, 49 (Summer 2004) (mentioning Martha Stewart and Arthur Andersen’s “media campaigns to influence the government and to sway public opinion”).

30. See *infra* Part I.

31. See *supra* note 10 and accompanying text.

32. See Beardslee, *supra* note 1, at 1279.

immoral behavior by attorneys in the court of public opinion. To the contrary, many General Counsel interviewees mentioned that they had to rein in the PR executives' instinct to spin what should not be spun. Nevertheless, because the norms and practices have not yet evolved fully, and lawyers are not educated about the right way to advocate for corporate clients in the court of public opinion, even well-meaning lawyers can easily go astray.

For example, corporate attorneys were involved (at least to some extent) in Richard Scrushy's outrageous attempt to manipulate the media.³³ Scrushy, the former CEO of HealthSouth, was charged and acquitted of fraud in a trial in Birmingham, Alabama³⁴—despite the fact that the last five officers of HealthSouth had all admitted to fraud and accused Scrushy of wrongdoing.³⁵ The lawyers negotiated the contracts to purchase talk show appearances and newspapers stories in his favor.³⁶

Attorneys were also involved to some degree in Arthur Andersen's multifaceted PR campaign (designed to protect its image and put a positive spin on legal allegations) that some have contended bordered on fraud.³⁷ For instance, lawyers authored misleading background papers that claimed to be "an analysis of the factual and legal errors in the government's case" and posted them on the company's website.³⁸ Yet, as Kathleen Brickey points out, many of the claims in these papers were devoid of a legal or factual basis.³⁹ For example, Andersen attorneys claimed that the obstruction of justice charges were "factually and legally baseless."⁴⁰ They further claimed that the government's indictment did not actually charge Andersen with a crime because there were no official proceedings pending when the alleged documents were destroyed.⁴¹ Yet the

33. See, e.g., Brickey, *Boardroom to Courtroom*, *supra* note 7, at 643-52 (discussing the abusive PR campaign of Richard Scrushy).

34. *Id.* at 648.

35. David M. Katz, *More Guilty Pleas in HealthSouth Scandal*, CFO, April 7, 2003, available at <http://www.cfo.com/article.cfm/3008958>. Scrushy was later charged with and convicted of bribery, mail fraud, and obstruction of justice unrelated to the Birmingham allegations. Brickey, *Boardroom to Courtroom*, *supra* note 7, at 649.

36. See Brickey, *Boardroom to Courtroom*, *supra* note 7, at 647. Scrushy paid reporters to write "favorable articles about Scrushy" in a black-owned newspaper and clergy members "to drum up support in the black community during the trial." *Id.* at 649.

37. See *id.* at 637. In news stories and legal filings, Andersen attempted to position prosecutors as a "politically motivated" enemy out for blood. *Id.* at 637-38. It used its website to try to damage the prosecution's case. It persuaded popular figures like former UCLA basketball coach John Wooden to publicly support the company. *Id.* Joy & McMunigal, *supra* note 29, at 50 (stating that in both the Martha Stewart and Arthur Andersen cases, the "lawyers appeared to play some role in shaping the public message that coincided with the legal defenses to be used if the cases reached the court, but the extrajudicial speech was usually that of the clients and not the lawyers").

38. Brickey, *Andersen's Fall*, *supra* note 7, at 943; Brickey, *Boardroom to Courtroom*, *supra* note 7, at 638.

39. Brickey, *Andersen's Fall*, *supra* note 7, at 931.

40. Joseph Weber, *Andersen's Dark Day—and No White Knight*, BUS. WK. (Mar. 15, 2002), available at http://www.businessweek.com/bwdaily/dnflash/mar2002/nf20020314_5342.htm.

41. Brickey, *Andersen's Fall*, *supra* note 7, at 932-33.

witness tampering statute under which Andersen was charged clearly did not require that an official proceeding be pending.⁴² Additionally, Andersen issued press releases that asserted inaccurately that the prosecutors were abusing their power and that the “government didn’t give Andersen a chance to present its case to the grand jury.”⁴³ In reality it is up to the Justice Department’s discretion to allow a target of the grand jury’s investigation to appear before a grand jury, yet Andersen attorneys did not even suggest that they wanted to appear before the grand jury until the evening of the day of indictment.⁴⁴ When questioned by the Justice Department about the evidence they wanted to present, the Andersen lawyers refused to disclose whom they wanted to call to testify or how the evidence would help exculpate the firm.⁴⁵ On the day of the indictment, the Justice Department allowed Andersen to make another presentation to support its request to appear before the grand jury but found that the evidence was not relevant.⁴⁶ Although it denied Andersen the opportunity to testify before the grand jury, the Justice Department gave Andersen yet another avenue to present its case to the grand jury: it told Andersen that its lawyers could submit a written statement describing the relevant exculpatory evidence despite the fact that the government was under no obligation to present any exculpatory evidence.⁴⁷ Still, Andersen claimed publicly that “[t]he government didn’t give Andersen a chance to present its case to the grand jury investigating the firm.”⁴⁸ These legally infused press releases were likely approved by lawyers, if not written by them, especially given that the same language was also used in the official documents and court filings prepared by lawyers.⁴⁹

The most obvious example of attorneys managing legal PR for corporate clients in a way that misled or deceived the public is the behavior of some corporate lawyers representing tobacco companies. Brown & Williamson Tobacco lawyers actively managed the research and public relations strategies⁵⁰ for precisely the same reasons that the first installment of this Article proposes that attorneys *should* manage legal PR: “The company’s campaign was, after all,

42. *Id.*

43. *Id.* at 938, 940 (“Andersen also contended that, contrary to Justice Department policy, the government arbitrarily refused to allow the firm to tell its story to the grand jury. Although this was a centerpiece of Andersen’s ‘fight against the government,’ the facts are distinctly at odds with Andersen’s claim.”). *See also* Weber, *supra* note 40, ¶ 12.

44. *Id.* at 940-42.

45. *Id.*

46. *Id.* at 941 (“The lawyers offered to produce a witness from Enron’s Houston office who would testify that he did not personally shred Enron documents. But since Andersen’s lawyers admitted that other Houston personnel shredded thousands of Enron records, the witness’s testimony would have been irrelevant to the case.”).

47. *Id.*

48. Brickey, *Boardroom to Courtroom*, *supra* note 7, at 641; John R. Wilke & Richard B. Schmitt, *Andersen Ex-Partner Might Aid U.S. Case*, WALL ST. J., Mar. 25, 2002, at A3.

49. Brickey, *Boardroom to Courtroom*, *supra* note 7, at 638.

50. *Id.*

not just a public relations or business strategy; it was a legal strategy. The lawyers oversaw the campaign, in part because the public positions taken by the company were significant for its potential civil liability and for government regulation of the tobacco industry.”⁵¹ Nevertheless, the lawyers did not just advise the client on how best to position the facts and legal issues. They played “a major and indispensable contribution to the company’s campaign to hoodwink the public.”⁵² They “participated in generating favorable research that might be used to cast doubt on the harmfulness of smoking or be otherwise employed in the tobacco industry’s public relations campaign.”⁵³ They insinuated to the public that projects funded by the “Center for Tobacco Research” were reliable because the Center was independent—when it was not.⁵⁴ Bruce Green summed up the issue as follows:

B&W’s lawyers understood that their client was marketing a lethal product, that consumers lacked the tobacco industry’s knowledge of how clearly dangerous cigarettes were, and that the company wanted to deceive the public about the danger. Through [their] actions, they meant to discourage the government from protecting the public through regulation and to insure that if the truth later became known, its customers would have difficulty obtaining legal redress for death and disease resulting from the company’s conduct in marketing a lethal product without adequate warning B&W’s lawyers worked “hand in glove” with the corporation in planning and executing a public relations campaign that many would regard as morally, if not legally, suspect. The lawyers were “hired guns.”⁵⁵

As the first installment of this Article points out, attorneys today work “hand-in-glove” with corporate clients on PR around all legal issues and indeed are involved at least to some extent in *all* press releases, even those involving non-legal matters. Given this state of affairs, coupled with the fact that the *Model Rules* focus on lawyers as spokespeople and that even those rules are vague at

51. *Id.*

52. Bruce A. Green, *Thoughts About Corporate Lawyers After Reading the Cigarette Papers: Has the “Wise Counselor” Given Way to the “Hired Gun”?*, 51 DEPAUL L. REV. 407, 416 (2001). According to experts, the lawyers’ behavior was just short of fraud but unethical nonetheless. *Id.* Some might argue that had the tobacco lawyers’ *known* the information being disseminated to the public was false, then they would have violated Model Rule 8.4(c) as it is currently written. Although this may be true under an interpretation that is consistent with the spirit of the rule, it may not be so under existing interpretations. Moses, *supra* note 5, at 1844 (questioning whether other lawyers like the tobacco lawyers will be “put in a position, due to the necessities of a public relations campaign, that might conflict with the ethical norms of the profession”). According to other sources, the lawyers recommended that documents containing negative research results about tobacco be labeled “deadwood” and shipped out of the country and/or that portions of documents be eliminated so that they would never see the light of day. Green, *supra* note 52, at 417.

53. Green, *supra* note 52, at 417.

54. *Id.*

55. *Id.* at 418-19.

best,⁵⁶ it is easy to cross the ethical line.⁵⁷

Lawyers are under extreme pressure today to help their clients reach legal and business objectives that are often inextricably intertwined. Mitt Regan has raised this concern with respect to outside lawyers: "As devotion to the client becomes the defining value of the legal profession, concerns about craft autonomy and preserving the integrity of the legal system may begin to fade. Rather than engage in the complex task of trying to accommodate multiple professional values, the lawyer . . . faces a simpler imperative: Do whatever the client wants."⁵⁸ The concerns are even more poignant with respect to inside lawyers. For example, Robert Nelson and Laura Nielson conducted research that suggested that in-house lawyers "were willing to 'discount . . . their gatekeeping function in corporate affairs' in order to be seen as part of the company, rather than as obstacles to getting things done."⁵⁹ This study, along with research conducted by

56. See *infra* Part II.

57. Such manipulation is even worse when it comes directly from the attorneys' mouths. Although findings from the PR Study indicate that corporate lawyers are managing legal PR for their clients behind the scenes, they sometimes behave as spokespeople. For example, Ken Frazier was Merck's lead General Counsel and PR person during the Vioxx scandals. Although there has not been any accusations that Ken Frazier has ever misled the public, there are examples where, lawyers, acting as spokespeople, have misled the public. See, e.g., *supra* notes 25-29; cf. Peter Margulies, *The Detainees' Dilemma: The Virtues and Vices of Mobilization Strategies for Human Rights in the War on Terror*, Working Paper, SSRN Research Paper 68, 45, available at <http://ssrn.com/abstract=1263442> (detailing scenario where a lawyer publicly asserted that the client's friend offered the client the use of his passport because the client's passport had been stolen but failed to explain that the client's "use of the passport entailed removing the passport holder's picture and substituting his own"). That said, lawyers that are spokespeople may be less tempted to manipulate the truth since their own reputations are on the line. Regardless, whenever lawyers act as spokespeople a whole set of other problems and conflicts emerge. See Beardslee, *supra* note 1, at 1302-03 (discussing the risks and benefits of lawyers acting as spokespeople); see also *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1056, 1032 (1991) (explaining that attorneys' "contact with the press" is not "inimical to the attorney's professional role" but that in the criminal context, lawyers' "extrajudicial statements pose a threat to a pending proceeding's fairness, since they have special access to information through discovery and client communication, and since their statements are likely to be received as especially authoritative"); Semel & Sevilla, *supra* note 5, at 10 (explaining that a "trial attorney as commentator on his or her own case" can be "embarrassing to the attorney, harmful to the client, and damaging to the legal profession" because lawyers "lose sight of their core responsibilities" to their client); Watson, *supra* note 5, at 80 (suggesting that it's better for the attorney, as opposed to the PR person, to be the spokesperson "because spin control may be counterproductive when it is recognized as such"); cf. FREEDMAN & SMITH, *supra* note 1, at 105 (claiming that "defense counsel . . . is frequently the most appropriate person to speak publicly on behalf of the defendant").

58. Milton C. Regan, Jr., *Corporate Norms and Contemporary Law Firm Practice*, 70 GEO. WASH. L. REV. 931, 941 (2000). According to William Simon, there is a "market for bad legal advice"; that is, clients are willing to buy lawyers that are willing to give legal opinions validating legally dubious or meritless transactions. W. H. Simon, *The Market for Bad Legal Advice: Academic Professional Responsibility Counseling as an Example*, 60 STAN. L. REV. 1555, 1556-57 (2008) (contending that some academic ethics advisers have provided just this type of bad legal advice); see also COFFEE, *supra* note 21, at 226 ("[M]onogamy has thus given way to polygamy as the company flirts with any outside counsel [thereby] providing less shelter . . . within the firm for the independent professional who resists the client.").

59. Robert L. Nelson & Laura Beth Nielsen, *Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 LAW & SOC'Y REV. 457, 477 (2000). This, however, may be changing. See *infra* note 249 (discussing research that suggests the opposite).

Kimberly Kirkland, suggests that “despite their sense of professional independence, it is sometimes difficult for lawyers to separate themselves and their professional ethical obligations from organizational objectives and the norms elevated by the most powerful players in those organizations.”⁶⁰ This appears to be true of both inside and outside counsel.

The pressure is acute: The court of public opinion is perhaps as important as a court of law to the resolution of legal controversies. Yet, as will be discussed in the next section, there are few guidelines for what is fair, honest, or ethical; and those guidelines that do exist are interpreted narrowly. Moreover, the protections afforded in a court of law (such as the presumption of innocence, evidentiary standards, and appellate review) do not apply in the court of public opinion;⁶¹ and there is little regulation of journalists.⁶² Therefore, even well-intentioned lawyers—especially general counsels—may succumb to the pressure to spin facts around legal issues in a manner that is, at best, misleading.⁶³ If, as scholars contend, “local collective practices in which lawyers and clients participate shape lawyer’s professional values,”⁶⁴ the way lawyers handle legal PR may turn into a race to the bottom where lawyers are lauded for being shrewd spin doctors,⁶⁵ instead of a race to the top in which lawyers are valued for comprehensive advice that incorporates PR concerns along with long-term interests of the corporate client.

60. Kimberly Kirkland, *Ethics in Large Law Firms: The Principle of Pragmatism*, 35 U. MEM. L. REV. 631, 634-40 (2004) (finding that “when large-firm lawyers make decisions in which ethical concerns are implicated, they are likely to make those decisions according to the logic of their firms”); see also Sarah Helene Duggin, *The Pivotal Role of General Counsels in Promoting Corporate Integrity and Professional Responsibility*, 51 ST. LOUIS U. L.J. 989, 1023 (2007).

61. See Brown, *supra* note 8, at 137 (making similar point); Tamar Frankel, *Court of Law and Court of Public Opinion: Symbiotic Regulation of the Corporate Management Duty of Care*, 3 N.Y.U. J. OF L. & BUS. 353, 356 (2007) (questioning whether court of public opinion is a fair court).

62. See generally Alberto Bernabe-Riefkohl, *The First Amendment and the Business of Journalism: Some Thoughts on Media Ethics* (1996) (unpublished manuscript, on file with The Georgetown Journal of Legal Ethics) (tracing the history of journalism ethics and reviewing common journalism ethical dilemmas); Frankel, *supra* note 61, at 371 (2007) (recognizing that reporters have “strong incentives to discover scoops” but lack meaningful ethical restraints).

63. See Joy & McMunigal, *supra* note 29, at 48 (stating that attorneys “are under great pressure to ‘spin’ the facts and law favorably to their clients”); cf. Moses, *supra* note 5, at 1843 (explaining that the press packets that are developed by lawyers in conjunction with PR specialists “may raise ethical questions for lawyers if the demands of public relations work push them to exaggerate language that will grab the attention of journalists”).

64. Tanina Rostain, *Ethics Lost: Limitations of Current Approaches to Lawyer Regulation*, 71 S. CAL. L. REV. 1273, 1278 (1998). See also Cole & Zacharias, *supra* note 5, at 1646 (“[I]n high visibility cases, very real pressures exist for lawyers to surrender their objectivity.”).

65. Lonnie T. Brown predicts a similar downward spiral for lawyers’ extrajudicial speech “under the ostensible mantra of zealous advocacy.” Brown, *supra* note 8, at 137 (“Given the lack of meaningful ethical or procedural oversight or constraints with regard to the limits of such conduct, there is legitimate concern that extrajudicial advocacy is being, and will continue to be, utilized in an increasingly unprofessional deleterious fashion.”); see also Moses, *supra* note 5, at 1850-51 (“Judge Frankel’s nightmare about lawyers only obfuscating the truth may get scarier in the court of public opinion, with its sophisticated spin control techniques designed to—at the very least—shade the truth.”).

We should be concerned.⁶⁶ Just because a lawyer's behavior does not rise to the level of fraud or comports with other lawyers' conduct does not mean that it does not violate general notions of professionalism.⁶⁷ In a world in which lawyers are continually viewed as complicit in corporate misconduct, the reputation of the legal profession can't handle another hit.⁶⁸

Lawyers' contribution to unfair, deceitful media communication around legal controversies poses risks above and beyond lawyer professionalism. Undoubtedly, inaccurate, misleading information will pervade the court of public opinion even if attorneys refrain from manipulating the facts or aiding their clients in doing so. When attorneys do this, however, it is different. A lawyer can spin a legal controversy more effectively than any layperson. First, a lawyer knows how to skirt the law and the public may be more inclined to believe a statement made or approved by a lawyer.⁶⁹ Second, because the lawyer approves all outgoing public statements, the public may assume that the lawyer has vouched for those statements and that they are trustworthy representations.⁷⁰ It behooves the legal profession and the administration of justice if the public believes it can rely on the integrity of lawyers' statements or approved statements.⁷¹ With such reliance, when lawyers speak or stand behind their client's speech, they send a strong signal to the marketplace. Without such reliance, however, the public's confidence in the legal system and willingness to abide by legal results deteriorates.⁷²

66. Brickey, *Boardroom to Courtroom*, *supra* note 7, at 652 (asking, perhaps rhetorically, "[s]hould we be concerned about well-orchestrated campaigns to publicly impugn the motive and integrity of prosecutors or credibility of witnesses?").

67. See Cole & Zacharias, *supra* note 5, at 1645 (making similar point with respect to direct speech by attorneys involved in OJ Simpson trial); William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1130 (1988) ("Individual lawyers should be willing to consider that the prevailing practices of the bar may fail to live up to the relevant standards of the legal culture and even that legal standards may be out of step with the broader surrounding culture."); Fred C. Zacharias, *Reconciling Professionalism and Clients' Interests*, 36 WM. & MARY L. REV. 1303, 1307 (1995) (explaining that professionalism requires lawyers to be objective and "to distance oneself from personal and client desires in order to evaluate the effect of potential actions on clients, third parties, and the legal system"). Some might argue that there exist two notions of professionalism: 1) professionalism as defined by non-lawyers that expect more from lawyers than the common man; and 2) professionalism as defined by lawyers and the adversary ethic that may be more client-centered and less public-focused. When using the word "professionalism," this Article refers to the former and not the latter definition.

68. Some skeptics believe that arguments regarding professionalism and the reputation of the legal profession are simply tactics to enhance the profession's prestige and monopoly of law and regulation of lawyers.

69. See *infra* notes 272-280 and accompanying text.

70. *Id.* A lawyer can lend credibility to a person's cause because third parties believe that lawyers would not practice blatantly unethical conduct. In essence, lawyers lend their reputations as members of a profession to their clients.

71. See *infra* note 356-365 and accompanying text. Arguably, even when manipulation is behind the scenes, the public can easily decipher that lawyers were behind the statements.

72. Brown, *supra* note 8, at 134-35 (making similar argument with respect to extrajudicial statements by lawyers); *id.* at 93 ("In the absence of such accountability, lawyers are likely to continue to test the ill-defined limits that presently exist, to the collective detriment of the profession and the public's perception of the justice

In sum, although corporate lawyers should help clients manage legal PR, there is a risk that lawyers will not do so in an ethical manner and will contribute to the level of misinformation in the public arena. If this is the case, it is not only the reputation of the legal profession that is at risk but also the fair administration of justice and the perceived validity and effectiveness of the justice system itself.⁷³

As a state supreme court justice explained:

Lawyers themselves are recognizing that the public perception that lawyers twist words to meet their own goals and pay little attention to the truth, strikes at the very heart of the profession—as well as at the heart of the system of justice. Lawyers serve our system of justice, and if lawyers are dishonest, then there is a perception that the system, too, must be dishonest. Certainly, the reality of such behavior must be abjured so that the perception of it may diminish.⁷⁴

II. INADEQUACIES OF CURRENT ETHICS RULES

Before discussing what should be the ethical guidelines for the attorney's participation in the court of public opinion, this part critically examines the existing guidelines. The most direct restriction on lawyers' behavior in the court of public opinion is Model Rule 3.6 (Trial Publicity).⁷⁵ There are a few other pertinent rules as well: 8.4(a) (Misconduct: Acting Through Another),⁷⁶ 4.1

system as a whole.”); cf. Ammon Reichman, *The Dimensions of Law: Judicial Craft, Its Public Perception, And the Role of the Scholar*, 95 CAL. L. REV. 1619, 1663-64 (explaining that along with judging and legal scholarship, lawyering “play[s an] important role in . . . generat[ing] [public] confidence (or the lack thereof) in a decision or in the institution of law”). It is for this reason that the *Model Rules of Professional Conduct* used to specifically prohibit conduct that resulted in the appearance of impropriety. Bruce A. Green, *Conflicts of Interest in Legal Representation: Should the Appearance of Impropriety Rule be Eliminated in New Jersey Or Revived Elsewhere?*, 28 SETON HALL L. REV. 315, 318-20 (1997) (identifying “the virtues of the rule in contexts involving alleged conflicts of interest on the part of lawyers for public entities and in related contexts”). Although this prohibition has to a degree fallen out of favor for various reasons (and was removed in the 1983 revisions), the idea that lawyers should behave morally and that they have duties above that of laypeople is still alive within the profession. See Hodes, *supra* note 24, at 63 (explaining that the Professional Reform Initiative of the National Conference of Bar Presidents, which is comprised of lawyers, non-lawyers, and judges, “seeks to rejuvenate the old adage that a lawyer’s word is his bond and the old notion that honesty and integrity are her stock-in-trade,” and that there is a lot of evidence “prov[ing] that courts and disciplinary agencies and bar admission authorities are taking more interest in this issue”); see also *infra* Part IV.A.

73. Many might argue that this is already the case given the number of corporate attorneys that have been implicated in recent corporate scandals. Nevertheless, “[t]he commonly accepted justification for lawyer discipline is protection of the public and the judicial system, not the punishment of errant lawyers as such.” Peter R. Jarvis & Bradley F. Tellam, *The Dishonesty Rule, A Rule with a Future*, 74 OR. L. REV. 665, 688-89 (1995).

74. *In re Pautler*, 47 P.3d 1175 (Colo. 2002); see also Hodes, *supra* note 24, at 72-74 (explaining and analyzing *In re Pautler*).

75. MODEL RULES R. 3.6.

76. MODEL RULES R. 8.4(a). Arguably, Rule 4.4 (Respect for Third Persons), Rule 3.3 (Candor toward the Tribunal), and Rule 3.4 (Fairness to the Opposing Party and Counsel) also restrain a lawyers’ PR-related conduct but only in very limited circumstances. For example, Rules 3.3 and 3.4 generally apply to pretrial or

(Truthfulness in Statement to Others), and 8.4(c) and (d) (Misconduct: Dishonesty and Misrepresentation). Although these rules may provide some guidance to attorneys working within the traditional judicial court, the following sections demonstrate that they are both vague and overly narrow when applied to the court of public opinion.

A. MODEL RULE 3.6 (TRIAL PUBLICITY)

Model Rule 3.6 (followed by over forty states)⁷⁷ bars lawyers who are currently participating in the investigation or litigation of a matter from making “an extrajudicial statement the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.”⁷⁸ Aside from the general problems associated with defining terms such as “substantial,” “material,” or “undue,”⁷⁹ the rule suffers from other problems.

The first and most significant problem with Rule 3.6 is that it is too easily circumvented. It only specifically bars *lawyers as spokespeople* from making extrajudicial statements. Although lawyers are sometimes spokespeople, like Kenneth C. Frazier has been for Merck, they often do not play that role for corporate clients⁸⁰ but instead advise clients on their potential disclosures.⁸¹ Thus, the rule does not address the typical role that corporate attorneys play in

trial proceedings. This Article does not address Rule 3.8 because this rule guides prosecutorial conduct in the court of public opinion. Prosecutors are held to a higher standard and are outside the scope of this Article. *See, e.g.,* MODEL RULES R. 8.4 cmt. 5. *See generally* Cassidy, *supra* note 25 (examining the disciplinary rules regulating public speech by attorneys and arguing that provisions of Rules 3.6 and 3.8 may violate the First Amendment when applied to elected prosecutors during political campaigns). This Article does not analyze Rule 5.7 (Responsibilities Regarding Law-Related Services) separately because it merely applies the *Model Rules* to law-related services. Also, this Article recognizes that there are informal mechanisms to constrain lawyer’s PR-related conduct such as public criticism in judicial opinions or “societal disapproval.” *See also* Gentile v. State Bar of Nevada, 501 U.S. 1030, 1058 (1991); Judith A. McMorrow, *The (F)utility of Rules: Regulating Attorney Conduct in Federal Court Practice*, 58 SMU L. REV. 3, 9, n.22 (2005). Indeed, better employment of some of these informal mechanisms to control lawyer’s advocacy in the court of public opinion is recommended in Part IV.C.

77. Joy & McMunigal, *supra* note 29, at 49.

78. MODEL RULES R. 3.6. This rule also contains a fair reply clause that permits lawyers to make statements “to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer’s client” if it is limited to information “necessary to mitigate” that publicity. *Id.* For a detailed history of the development of Rule 3.6, see Moses, *supra* note 5, at 1816-28.

79. Kevin C. McMunigal, *The Risks, Rewards, and Ethics of Client Media Campaigns in Criminal Cases*, 34 OHIO N.U. L. REV. 687, 695 (2008) (“Terms such as ‘substantial’, ‘material’, and ‘undue’ may require fine judgments by the lawyer concerning issues of degree, judgments with which later disciplinary authorities may disagree.”). For example, it is unclear whether the decision is based on the content of the publicity or the amount. *See* Sheppard v. Maxwell, 384 U.S. 333, 362 (1966) (indicating the amount or “pervasiveness” of publicity matters); *see also* Brown, *supra* note 8, at 106-07 (explaining how easy it is to “maneuver and argue around the intended ethical proscription” and the “difficulty in establishing the requisite level of prejudice”).

80. There are many arguments for and against lawyers acting as spokespeople for their clients. *See supra* note 57.

81. For discussion of how Rule 8.4(a) applies, see *infra* Part II.B.

this arena.⁸² That is, there is little constraint on how corporate attorneys typically manage legal PR for their corporate clients and, as discussed in Part I, this may lead to legal PR that is misleading at best.

Second, the rule focuses on the integrity of an adjudicatory proceeding, that is, literal trial prejudice.⁸³ It does not define what constitutes ethical behavior in the court of public opinion for matters not yet in litigation or that may never be adjudicated.⁸⁴ Chief Justice Rehnquist's claim that "[t]he basic premise of our legal system is that lawsuits should be tried in court, not in media"⁸⁵ may be accurate but the premise does not dictate reality. Fewer than five percent of cases go to trial.⁸⁶ Further, as discussed in the first installment, the first trial is often held in the court of public opinion and that verdict can ruin a party's case or negotiation power long before a legal controversy is ever tried in a court of law.⁸⁷ Thus, parties may not be "bargaining in the shadow of the law"⁸⁸ but instead, in the spotlight of the press. As such the rule's focus is out of touch with reality.

Third, the rule's breadth is unclear and under-inclusive by focusing on only certain types of lawyers and legal matters i.e., those in litigation or under investigation. By limiting its provisions to lawyers who are "investigating" or "litigating" the matter (and only addressing the effect extrajudicial statements have on an "adjudicatory proceeding"), Rule 3.6 could be interpreted to only apply to legal matters already in litigation as opposed to legal matters that are being addressed in the court of public opinion before a case has been filed or charges have been brought.⁸⁹ Further, since the rule only applies to attorneys working on current litigation or investigations, it may not apply to those attorneys

82. GEOFFREY C. HAZARD, JR., *ETHICS IN THE PRACTICE OF LAW* 140 (1978) (showing that interactions between corporate clients and attorneys do not match that described in model ethics rules); CHARLES WOLFRAM, *MODERN LEGAL ETHICS*, § 4.1, at 148 (1986) ("Corporate clients, the poor, clients with disabilities, those accused of serious crime, government agencies, and other clients are as much unlike the [standard model of the lawyer-client relationship] as they are unlike each other."); Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 606 (1985) (explaining that the rules are written for the individual criminal defense bar); David B. Wilkins, *Who Should Regulate Lawyers*, 105 HARV. L. REV. 799, 865 (1992).

83. Similarly, Rule 3.4 prohibits lawyers from "allud[ing] to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence" during trial. MODEL RULES R. 3.4.

84. Cf. Joy & McMunigal, *supra* note 29, at 49 ("[T]here are some areas of pretrial and trial publicity where regulations of lawyers' speech do not reach.").

85. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1030 (1991) (J. Rehnquist dissenting).

86. See U.S. SENT'G COMM'N, 2006 SOURCEBOOK OF FED. SENT'G STAT. TBL.11 (2006), available at <http://www.ussc.gov/ANNRPT/2006/table11.pdf>.

87. See Beardslee, *supra* note 1, at Part I.B.

88. Mnookin & Kornhauser, *supra* note 15.

89. For example, the Committee recommending the adoption of the rule specifically recognized that "attorneys for the defense occupy a position that might require them to speak publicly in their client's behalf." Max D. Stern, *The Right of the Accused to a Public Defense*, 18 HARV. C.R.-C.L. L. REV. 53, 92 (1983) (explaining that this was in a footnote of the report); see Watson, *supra* note 5, at 95 ("This small concession was made in a footnote to an advisory study that produced the rule, but achieved greater importance three years later in a dissenting opinion in a U.S. Supreme Court case that in some respects advanced the cause of litigation public relations.").

who are not working on the litigation or investigation but instead are hired specifically to manage other issues or fallout (like PR issues) that are related to the same controversy. These lawyers, who are instrumental in delivering public messages about the legal controversy in all its stages, may view themselves as outside the scope of the Rule.

Fourth, the public filing exception in Rule 3.6 that allows lawyers to repeat or state publicly "information in a public record"⁹⁰ is a potential loophole. The interviews in the PR Study support the contention made by others that external PR consultants work with lawyers to "carefully craft pleadings, briefs, and motion papers so that interested parties including the media, non-party regulators, and shareholder activists are presented with a clear, compelling, and timely articulation of the company's position" in an effort to influence the outcome.⁹¹ For example, some lawyers include information in filings that would be inadmissible at trial, like prior criminal, sexual, or mental histories of defendants or complainants.⁹² Attorneys can repeat the content of these pleadings in press releases or interviews without violating Rule 3.6 because, if it is in the pleadings, it is considered part of the "public record."⁹³ Although Federal Rule of Civil Procedure Rule 11(b)(1)⁹⁴ presumably prohibits content in pleadings that is included for improper purpose or to harass, it does not have much bite because sanctions are discretionary and not even applicable if the party retracts the content within the twenty-one day safe-harbor provision.⁹⁵ At that point, however, the damage may already have been done. As discussed in the first

90. MODEL RULES R. 3.6(b)(2).

91. Harlan A. Loeb, *Public Opinion Counts: Companies Must Aim for a Clear and Timely Expression of the Truth*, LEGAL TIMES, July 19, 2004, at 4. Samuel A. Terillia et al., *Lowering the Bar: Privileged Court Filings as Substitutes for Press Releases in the Court of Public Opinion*, 12 COMM. L. & POL'Y 143, 147 (2007) (discussing examples where lawyers have been accused of using court filings as "substitute press releases"); FREEDMAN & SMITH, *supra* note 1, at 109 (explaining that "[f]or many years, prosecutors have created a fulsome public record with a 'speaking indictment,' which details the charges and any other defamatory information that the prosecutor wants to trumpet in press conferences" and that lawyers in both civil and criminal cases include information that they want to discuss publicly by including it in complaints, answers, motions, bail applications, pleadings and discovery documents filed with the court); *see also supra* note 49 and accompanying text (describing similar behavior by attorneys).

92. Joy & McMunigal, *supra* note 29, at 50.

93. Filings are favored because they navigate around gag orders and generally do not give rise to defamation and privacy suits. Terillia et al., *supra* note 91, at 147-48.

94. It appears that approximately thirty to thirty-five states have adopted the Federal Rules of Civil Procedure in their entirety. *See, e.g.,* Clermont & Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 831, n.40 (explaining that "thirty or so" have adopted them as their pleading model but that there is disagreement about the number of states that have adopted the Federal Rules of Civil Procedure); *see also* Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 632 n.1 (1994) (noting that over thirty-five states have adopted the Federal Rules of Civil Procedure for their trial courts).

95. FED. R. CIV. P. 11 (2002). Moreover, pleading rules do not require that a party amend the pleadings if evidentiary support is not eventually obtained. Instead the rules only require that "the litigant not thereafter . . . advocate such claims or defenses." *Id.* at advisory committee's note.

installment, first impressions last and once something is out in the public arena, it is hard to erase.⁹⁶ A motion to strike is similarly ineffectual. Courts often disfavor motions to strike and are hesitant to do so at the pleading stage. Moreover, they are only granted when 1) it is obvious that the assertions are completely unrelated to the litigation's subject matter; 2) there is no admissible evidence in support of the allegations; and 3) not striking the material would result in prejudice to the moving party.⁹⁷

Lastly, and most importantly, the rule is temporally under-inclusive. It states that a lawyer is only prohibited from extrajudicial statements that the lawyer reasonably should know "*will* have a substantial likelihood of materially prejudicing an adjudicative proceeding."⁹⁸ There are three problems with this language. First, it has been interpreted to mean that a lawyer is off the hook if a statement is made far enough in advance of proceedings.⁹⁹ Attorneys may purposefully make extrajudicial statements about the opposing party early on that, if made close to a trial, would arguably inflame a jury or judge. But because they are made far enough in advance of a potential trial, they do not violate the rule. Yet the negative publicity from the statements works to pressure the opponent to settle—to avoid conviction by the public (as opposed to a jury). In essence, then, attorneys can make an end-run around the rule's purpose, which is to prevent "sufficiently serious and imminent threat(s) to the fair administration of justice."¹⁰⁰ Additionally, it is unclear whether time can really ever undo reputational damage.¹⁰¹ Even the Supreme Court has commented about how difficult it is for juries to forget negative publicity "[g]iven the pervasiveness of

96. See Beardslee, *supra* note 1, at Part I; see also *infra* Part IV.D.1.a.

97. Hart v. Dresdner Kleinwort Wasserstein Securities, F. Supp. 2d 2006 WL 2356157 (not reported) (S.D.N.Y. 2006) at *3-4. See also Fuchs Sugars & Syrups, Inc. v. Amstar Corp., 402 F. Supp. 636 (S.D.N.Y. 1975). But see Hughes v. Kaiser Jeep Corp. 40 F.R.D. 89, 93 (D.S.C. 1966) (striking reference to car as a "death trap"); Budget Dress Corp. v. ILGWU, 25 F.R.D. 506 (S.D.N.Y. 1959) (striking description of alleged conspiracy defendants as "strong arm men" and "racketeers").

98. MODEL RULES R. 3.6. (emphasis added).

99. Brickey, *Boardroom to Courtroom*, *supra* note 7, at 641 (suggesting that timing and content are important); Cassidy, *supra* note 25, at 12 (arguing that the rule is vague and "says nothing about timing"); Moses, *supra* note 5, at 1839 (remarking that the "efficacy" of the rule is "questionable since the legal proceeding [can be] too far in the future to be substantially influenced").

100. GEOFFREY C. HAZARD JR. & WILLIAM HODES, THE LAW OF LAWYERING, A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT 397 § 23.3 (Aspen 3d ed. 2004-2 Supp.) (1985). Some scholars contend that the purpose of Rule 3.5 is "to safeguard adjudicatory proceedings." Cassidy, *supra* note, 25, at 3. Yet the reason why the Rule is concerned with safeguarding adjudicatory proceedings is because it assumes that is where justice is administered. This Article (and the first installment of this project) argues that justice is administered outside adjudicatory proceedings e.g., in the court of public opinion. See *infra* Part III.A and Part IV.D.1. Admittedly, this argument is contentious. Some may believe that justice can only be administered in a courtroom and that this type of harm, therefore, is not "injustice" and that there is something special and different about courtroom justice.

101. For further discussion of how rumors are solidified in the media, see *infra* notes 181-184 and accompanying text.

modern communications.”¹⁰² Second, although the Supreme Court has stated that there is no *need* to “show actual prejudice to a judicial proceeding before an attorney may be disciplined for extrajudicial statements,”¹⁰³ the language of the rule implies a “no harm, no foul” standard. Thus, an extrajudicial statement may not be considered unethical if the trial is not ultimately affected.¹⁰⁴ Third, the rule is apparently intended to apply with more force in the criminal as opposed to civil context and, therefore, appears to condone more prejudicial extrajudicial commentary in the civil as opposed to the criminal context. One of the comments to the rule explains that “the likelihood of prejudice may be different depending on the type of proceeding” and that “[c]ivil trials may be less sensitive” to extra-judicial speech than criminal jury trials. Yet the comment does not clarify how the standard differs for civil as opposed to criminal trials.¹⁰⁵ Problematically, until a corporation is charged, all legal controversies are “civil” as opposed to criminal.

B. MODEL RULE 8.4(A) (MISCONDUCT THROUGH THE ACTS OF ANOTHER)

Rule 8.4(a) prohibits attorneys from “knowingly assist[ing] or induc[ing] another” “to violate or attempt to violate the Rules of Professional Conduct.”¹⁰⁶ This rule complements Rule 3.6 by covering statements that the attorney may have been involved in crafting but did not make him or herself. Thus, there is some overlap between the two rules as they are applied, even if as written they appear to cover distinct activities. Although Rule 3.6, on its face, applies only to statements by attorneys themselves, courts have construed Rule 3.6 to apply to how a lawyer prepares a client for press interviews because of the prohibition in Rule 8.4(a). Indeed, courts have disciplined attorneys for attempting to circumvent Rule 3.6 by using the client as the mouthpiece for inaccurate or misleading statements, or statements that might inflame a jury.¹⁰⁷

102. *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966).

103. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1081 (1991).

104. An added issue is that the Supreme Court has been very reluctant to find that a trial has been made “unconstitutionally unfair by trial publicity.” FREEDMAN & SMITH, *supra* note 1, at 106; *Nebraska Press Association v. Stuart*, 427 U.S. 539, 555 (1976) (“[P]retrial publicity even pervasive, adverse publicity does not inevitably lead to an unfair trial.”).

105. Debra S. Katz et al., *Advanced Employment Law and Litigation, Extrajudicial Statement: Lawyer’s Ethical Obligations in Communicating with the Press*, SH039 ALI-ABA 1015, 1021-22 (2007) (making a similar point about former version of Model Rule 3.6).

106. MODEL RULES R. 8.4. This is true even when PR services are provided as an ancillary service. MODEL RULES R. 5.7 cmt. 2 (explaining that the lawyer is subject to the *Model Rules of Professional Conduct* for providing services “even when the lawyer does not provide any legal services to the person for whom the law-related services are performed”). See Linda Galler, *Problems in Defining and Controlling the Unauthorized Practice of Law*, 44 ARIZ. L. REV. 773, 778-79 (2002) (same).

107. See, e.g., *State v. Grossberg*, 705 A.2d 608, 613 (Del. Super Ct. 1997) (explaining that Rule 3.6 would be “meaningless” unless the preparation by the attorney of the client is “limited to those areas which he himself would have been permitted to comment”); Pa. Bar Assoc. Comm. on Legal Ethics and Prof’l Responsibility Op.

Even though Rule 3.6 as applied and Rule 8.4(a) as written both appear to constrain attorneys' abilities to assist clients in making public statements that violate Rule 3.6, substantial gaps remain.¹⁰⁸ Rule 8.4(a) does not prohibit a lawyer from advising or assisting a client "concerning any action the client is legally entitled to take."¹⁰⁹ Hence, pursuant to Rule 8.4, a lawyer can explain to the client that the client is within its legal rights to conduct PR warfare that may taint a jury or pressure prosecutors; moreover, this might be done legitimately in the context of reviewing or approving the client's press releases. Consider the role an attorney may have played in counseling Ken Lay, former CEO of Enron. Lay made public commentary about the lead prosecutor's "sudden and unexpected" departure and insinuated that the prosecutor left because of prosecutorial misconduct charges.¹¹⁰ However, the prosecutor's departure had been planned months in advance and all misconduct charges had been cleared fourteen days prior to the comment.¹¹¹ Granted, if the attorney told Lay to say what he did *in order* to create a misrepresentation of the known facts and/or prejudice potential jurors, the attorney would be liable under any interpretation of Rule 8.4(a) for attempting to circumvent Rules 3.6, 8.4(c), or 4.1.¹¹² This is because Rule 8.4(a) essentially states that an attorney cannot directly tell a client to say or do anything that, *if it were said or done by an attorney*, would violate the Rules of Professional Conduct. Nevertheless, the attorney may not be disciplined for simply counseling Lay on the matter or even telling Lay that it was within his rights to make these statements. Thus, in the end, it would depend on what the attorney said, how he or she said it, and if he or she did so "knowingly."¹¹³ That's a lot of wiggle room.

C. MODEL RULES 4.1, 8.4(C), AND 8.4(D) (TRUTHFULNESS, MISREPRESENTATION, AND MISCONDUCT)

Rules 4.1 and 8.4(c) prohibit attorneys from engaging in conduct that is dishonest, misrepresentative, or deceitful. Thus, they appear to monitor the type

94-27 (1994) (explaining that a lawyer may only prepare a client for press interviews regarding areas in which the lawyer would be allowed to comment under Rule 3.6).

108. Joy & McMunigal, *supra* note 29, at 49 (explaining that most enforcement "occurs in very clear cases, and much of the regulation is left to trial judges employing gag orders and contempt powers"); McMunigal, *supra* note 79, at 695-96 (claiming that Rule 8.4 is unclear).

109. MODEL RULES R. 8.4 cmt.1; *see also* Pa. Bar Assoc. Op. 94-27, *supra* note 107 ("[T]he only restriction on the client's comments are those which stem from the client's own conscience.").

110. Brickley, *Boardroom to Courtroom*, *supra* note 7, at 640-41 (explaining that Lay also "asked whether it was a 'coincidence' that he left the prosecution team 'only days' after defense lawyers had filed a motion alleging prosecutorial misconduct in handling the cases").

111. *Id.*

112. The comments were likely intended to "plant the seeds of distrust among potential jurors." *Id.* at 641.

113. *See generally* William H. Simon, *The Kaye Scholer Affair: The Lawyer's Duty of Candor and the Bar's Temptations of Evasion and Apology*, 23 LAW & SOC. INQUIRY 243, 252-53 (1998) (discussing the difficulty in defining and proving knowledge in the context of the Kaye Scholer debacle).

of conduct described in Part I. From a practical standpoint, however, these rules may not restrict many deceitful or misleading statements. Rule 4.1 prohibits attorneys from “knowingly” making false statements to third parties. There are the obvious problems with defining “knowingly.” Clearly, “knowledge” is more than a reasonable belief,¹¹⁴ but aside from that, it is not clear what level of knowledge is required or whether the level of knowledge changes based on the rule. The *Model Rules* define “knowingly” inconsistently. For example, in Rule 1.0 “knowingly” is defined as both “denot[ing] actual knowledge of the fact in question” but also inferable from the circumstances.¹¹⁵ And courts have applied a definition different than both of these definitions.¹¹⁶ Further problems exist. Although the comments explain that Rule 4.1 proscribes “misrepresentations” that are “partially true but misleading,”¹¹⁷ the rule itself only applies to false statements or misrepresentations around “material fact[s].” The limitation of the rule to “material facts” has permitted lawyers to interpret the rule in a very technical manner.¹¹⁸ Consider the public commentary in support of Ken Lay mentioned above. The insinuation that the prosecutor was “fired” was arguably not a material fact but still was misleading. Under the prevailing interpretation, therefore, it could be acceptable under Rule 4.1. Further, the rule prohibits attorneys from “knowingly” misrepresenting material facts. This raises the tricky question of whether “knowingly” modifies “misrepresent” or “material facts.” Arguably, an attorney might know that a given statement is a misrepresentation of a fact—yet still not know, at that particular point in an investigation or litigation, that the fact is “material.” Given how much a case can evolve from, say, the pre-indictment phase to the post-indictment phase, at what point does an attorney know a certain fact is material?¹¹⁹

114. MODEL RULES R. 3.3 cmt. 8 (noting that “[a] lawyer’s reasonable belief that evidence is false does not preclude its presentation to the trier of fact” but that a lawyer’s knowledge that the evidence is false does).

115. MODEL RULES R. 1.0(f).

116. For example, in interpreting Model Rule 8.3, courts have set the knowledge standard as “more likely than not that a violation has occurred.” *In Re Michael G. Riehlmann Attorney Disciplinary Proceedings*, No. 04-B-0680, 12 (La. 2005).

117. MODEL RULES R. 4.1 cmt. 1.

118. See, e.g., Cole & Zacharias, *supra* note 5, at 1642 (explaining that Rule 4.1 has been “limited by convention” or “interpreted narrowly by lawyers claiming that the subjects of their speech are not ‘material’ facts covered by the rule” despite the fact that arguably any statement made to persuade decision-makers could be viewed as material); Jarvis & Tellam, *supra* note 73, at 687-88 (“[T]he definition of materiality is subject to manipulation and . . . the inclusion of a materiality requirement in Model Rules 3.3 and 4.1 can make it too easy for lawyers to rationalize a decision not to tell the truth.”).

119. However, a court might be able to determine a statement is material and that the attorney knew it was material simply from the fact that the attorney or client chose to make it. This does not appear to be prevalent practice. Additionally, it may be that Rule 4.1 will now begin to have a bit more teeth. The first comment to the rule has recently been revised. In 2002, the comments stated that “[m]isrepresentations can also occur by failure to act.” MODEL RULES R. 4.1 cmt. 1. In 2009, this comment was revised to read: “Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements.” MODEL RULES R. 4.1 cmt. 1. See also E. Cliff Martin & T. Karena Dees, *The Truth about Truthfulness: The Proposed Commentary to Rule 4.1 of the Model Rules of Professional Conduct*, 15 GEO. J.

Rule 8.4(c) appears to have more potential to limit statements made, assisted, or approved by attorneys that mislead the public. It prohibits “conduct involving dishonesty, fraud, deceit or misrepresentation.”¹²⁰ The comments explain that the traditional way to determine whether conduct is prohibited is if it involves “moral turpitude,” but that “a lawyer should be professionally answerable only for offenses that indicate *lack* of those characteristics relevant to law practice,” such as “dishonesty, breach of trust, or *serious* interference with the administration of justice.”¹²¹ Seemingly, this might prevent attorneys from purposefully or negligently misleading the public. Along those lines, other scholars have contended that Rule 8.4(c) is (or could be) a “broad and powerful” rule prohibiting even those misrepresentations that fall short of fraud and requiring revelation of “underlying facts which might be necessary to avoid misleading someone.”¹²² Unfortunately, courts have not interpreted the rule broadly and the Restatement (Third) of the Law Governing Lawyers actually warns courts to “avoid . . . overbroad readings.”¹²³ Alternatively, therefore, a court could interpret the rule to require real knowledge and/or intent.¹²⁴

Additionally, the rule does not specifically prohibit “misleading” commentary. Although some judges and lawyers would contend that media spin is dishonest and barred by Rule 8.4(c),¹²⁵ others might consider media spin within the bounds of zealous, ethical advocacy and an indication not of the “*lack*” but of the *presence* “of those characteristics relevant to law practice.”¹²⁶ Indeed, the comments to Rule 1.3 explain that a lawyer should “take whatever lawful and

LEGAL ETHICS 777, 779 (contending that these revisions to the comment of Rule 4.1 “may change the way lawyers think of their ethical obligations. The new language may also indicate that lawyers are being held to a higher standard of conduct than before”).

120. MODEL RULES R. 8.4(c).

121. MODEL RULES R. 8.4(c) cmt 2.

122. See Jarvis & Tellam, *supra* note 73, at 665-76 (detailing the history of Rule 8.4 and contending that it is broader than the original Canon 22 that required candor and fairness to the court, lawyers, and others).

123. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 5 cmt. C (2000) (urging courts to “avoid . . . resorting to standards other than those fairly encompassed within an applicable lawyer code”); see also John A. Humbach, *Shifting Paradigms of Lawyer Honesty*, 76 TENN. L. REV. 993, 993 n.4 (2009) (making a similar point).

124. Some courts, however, do not require knowledge or intent but instead a certain level of negligence. See, e.g., Vt. Prof’l Responsibility Board, Decision 113 (2008); Vt. Prof’l Conduct Board, Decision 62 (1993) (disciplining attorney for misrepresentation despite no intent to mislead). The ABA Standards provide sanctions for negligent misrepresentation. See ABA Standards §6.13 and §6.14 (imposing higher sanctions for actions that cause or have the potential to cause more injury); Vt. Prof’l Responsibility Board, Decision 113 (2008) (explaining that “[t]he real distinction under the two cited ABA Standards is the extent and character of the injury”).

125. See, e.g., *In re Hiller*, 694 P.2d 540, 544 (Or. 1985) (interpreting misrepresentations under 8.4(c) to include nondisclosure and explaining that “[t]he transaction was hardly what [the lawyers] had to expect their chosen words to communicate without further disclosure. The failure to make that disclosure . . . was a misrepresentation”). See generally Jarvis & Tellam, *supra* note 73 (claiming that the ABA and courts have interpreted 8.4(c) broadly).

126. MODEL RULES R. 8.4(c) cmt. 2 (emphasis added).

ethical measures are required to vindicate a client's cause or endeavor" and that a lawyer "must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."¹²⁷ Thus, the nature of legal representation itself leads attorneys into grey areas where aggressive but appropriate positioning can shade into misconduct.¹²⁸ The fact that lawyers' very talents can become their ethical Achilles' heel simply reinforces the need for clear rulemaking and guidance. In sum, although R. 8.4(c) may have been designed to promote more ethical conduct, it is not clear that it does (or will) in the PR context.¹²⁹

Rule 8.4(d) defines professional misconduct as that which is "prejudicial to the administration of justice."¹³⁰ Although the first installment to this project argues that communications in the court of public opinion can prejudice the administration of justice, Rule 8.4(d) does not do much to constrain attorneys in this venue. First, the rule appears to be interpreted narrowly and apply only in very serious, egregious situations.¹³¹ Second, the rule appears to only apply when the interference is immediate and is part of an actual formal proceeding.¹³² An argument is easily made that interference with the administration of justice cannot occur in the court of public opinion because it is not part of a formal proceeding. Thus, this rule suffers from the same issues as Rule 3.1 in terms of timing. If the communications in the court of public opinion are made early, well before adjudication by a judge or jury, they arguably will not be considered by the Bar or a court to seriously impact the administration of that adjudication.

127. MODEL RULES R. 1.3 cmt [1] (emphasis added); see also MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1983) (stating that "a lawyer should represent a client zealously within the bounds of the law").

128. Indeed, it has been said that lawyers "are often required by their roles to work to obscure inconvenient truths and to prevent the truth from coming out." Hodes, *Seeking the Truth*, *supra* note 24, at 60-61.

129. Jarvis & Tellam, *supra* note 73, at 671.

130. MODEL RULES R. 8.4(d).

131. See, e.g., D.C. Bar Legal Ethics Comm., Op. 260 (1995), available at http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion260.cfm (finding that attorney's "agreement with former client to execute a release in which the client agrees not to file a complaint with Bar Counsel against the lawyer constitutes conduct that 'seriously interferes with the administration of justice'") (emphasis added); Glenn Machado, *Amicably Resolving Client Claims? Good Idea. Asking the Client to Withdraw a Bar Complaint? Bad Idea*, NEV. LAW., August 2009, available at <http://www.nvbar.org/publications/nevadalaawyer/2009/August/practicetips.htm>; Ariz. State Bar Ass'n, Op. 91-07 (1991), available at <http://www.myazbar.org/Ethics/opinionview.cfm?id=622> (implying that if an attorney threatens criminal prosecution to gain an advantage in a civil case, Rule 8.4(d) might only be implicated if "such a threat were to constitute extortion under the Criminal Code").

132. See *supra* note 131; see also David A. Elder, "Hostile Environment" Charges and the ABA/AALS Accreditation/Membership Imbroglio, *Post-Modernism's "No Country for Old Men": Why Defamed Law Professors Should "Not Go Gentle Into that Good Night,"* 6 RUTGERS J. L. & PUB. POL'Y 434, n.123 (2009) (explaining that "jurisdictions following Model Rule 8.4 (d) and comment 3 may limit discriminatory 'words or conduct' violations to client representational contexts" but that "it is possible other jurisdictions may interpret their rules more broadly"); *In re William McNova Howard, Jr.* Arkansas Bar ID No. 87087 CPC Docket No. 2008-036 (on file with author) (finding 8.4(d) violation when attorney failed to file brief in support of appeal for client); 17-Sep NVLAW 44 Bar Counsel Report (Sept. 2009) (issuing public reprimand and finding lawyer violated R. 8.4(d), *inter alia*, by failing to file a case appeal statement and submit the filing fee after being ordered by the Supreme Court of Nevada to do so within 30 days).

D. SUMMARY

*"The really vile things that go on, happen not because someone is doing them but because we are letting them happen Letting things happen is ten times more dangerous than doing them."*¹³³

The current *Model Rules* that address attorneys' advocacy in the court of public opinion are "letting things happen." For statements that misrepresent or stretch the truth, the current interpretations of the *Model Rules* do little to constrain the behavior with which this Article is concerned.¹³⁴ Although a more robust interpretation of the rules may prohibit misleading statements made or aided by attorneys, the rules are often interpreted to only prohibit 1) outright lying,¹³⁵ and 2) extrajudicial statements disseminated publicly that actually materially corrupt a jury or court proceeding.¹³⁶ The rules relevant to legal PR do not do that which scholars have suggested the *Model Rules* are generally intended to do: They do not "align the parties' incentives appropriately" or "correct the lawyers' imbalance in perspective."¹³⁷ Although the court of public opinion is arguably part of the adjudicative system, there are few prohibitions to ensure fair competition¹³⁸ or ethical advocacy.¹³⁹ And those that do exist do not promote socially responsible behavior on the part of lawyers nor do they urge lawyers to encourage clients to behave in a socially responsible manner.¹⁴⁰ Although there is no consensus that lawyers should be ethically obligated to promote socially

133. ROBERT MUSIL, *THE MAN WITHOUT QUALITIES VOL. 1: A SORT OF INTRODUCTION AND PSEUDO REALITY PREVAILS* 386 (Sophie Wilkins & Burton Pike trans., Vintage Books 1995) (1930).

134. Cf. Cole & Zacharias, *supra* note 5, at 1645 ("[T]he codes have little to say."); Brown, *supra* note 8, at 89 ("Indeed, lawyers for the most part appear free to exaggerate and speculate regarding the law or facts of their cases with little fear of ethical reprisal, provided they stay within the malleable dictates of Rule 3.6 and 3.8(f)."); James J. Alfini, *Settlement Ethics and Lawyering in ADR Proceedings: A Proposal to Revise Rule 4.1*, 19 N. ILL. U. L. REV. 255, 256 (1999) (making similar complaints with respect to the ethical infrastructure's regulation of "gamesmanship and misrepresentations during ADR proceedings" and recommending a revision to Rule 4.1 that applies a lawyer's duty of truthfulness to settings other than a court of law).

135. See *supra* Part III.B; *supra* note 61 and accompanying text. See also Cole & Zacharias, *supra* note 5, at 1645 (explaining that the sole clear boundary from Model Rules 4.1 and 8.4 is deceptive).

136. See *supra* Part II.A (discussing the problems with Rule 3.6).

137. See Margulies, *supra* note 57, at 31 (explaining that these are the intentions of ethics rules and they are the same as "any constitutional mechanism").

138. See *infra* note 160.

139. See Margulies, *supra* note 57, at 28 (explaining that "asymmetries in accountability between traditional judicial forums and crossover venues such as the media cause risks. Lower levels of accountability in crossover forums can lead to reckless advocacy, [and] opportunity costs for clients").

140. See Green, *supra* note 52, at 419 (explaining that the *Model Rules* in general do not "exhort lawyers to discourage clients from engaging in harmful or antisocial behavior"); Nancy J. Moore, *The Usefulness of Ethical Codes*, 1989 ANN. SURV. AM. L. 7, 18 ("[T]he format of an ethics code is no longer adequate to inspire, sensitize or even give useful guidance in the subtle, often controversial dilemmas now confronting the legal profession."). Neither 8.4(a), 8.4(c) nor 4.1 is aspirational. These rules do not encourage lawyers to attempt to discourage clients from doing that which the attorney could not.

responsible behavior in any context,¹⁴¹ as Robert E. Rosen points out: “To the extent that the bar has power and wants to exercise it to control its market to further professional norms, it remains possible to suppose current market practices are not inevitable and ask whether they advance professional goals.”¹⁴² As discussed, “current market practices” are far from “advanc[ing] professional goals.” To the contrary, they pose risks to the public’s access to accurate information, the professionalism of the legal profession, and the administration of justice. And our current *Model Rules* are letting “these really vile things” happen.¹⁴³

III. POTENTIAL SOURCES OF ETHICAL OBLIGATIONS

Given the ubiquity of media outlets and the potential for press on legal issues big and small, it is likely that the corporate lawyer’s role in managing legal PR for clients will continue to grow.¹⁴⁴

On the one hand, the first installment argues that corporate attorneys can and should help their clients position legal issues to deter lawsuits or regulatory action. On the other hand, this installment is concerned that lawyers, in playing this new role, may assist the presentation of inaccurate and misleading information to the public. The concern is also that this misinformation will affect the process and outcome of legal controversies and the fair administration of justice. Therefore, the questions are these: What ought to be attorneys’ ethical obligations in the court of public opinion? And do the nature, framework, and influence of the court of public opinion justify lawyer-assisted deception tactics?

141. See generally Green, *supra* note 52. See also Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1, 10 (2005) (explaining that “[t]he question of whether an advocate must pursue the client’s objectives without regard to the justness of the client’s cause is, of course, a central question of professional obligation”); Nancy J. Moore, *Lawyer Ethics Code Drafting in the Twenty-First Century*, 30 HOFSTRA L. REV. 923, 930 (2002) (“For example, early in its deliberations, the Commission considered whether it was desirable to make the ethics code more ‘ethical’—rather than strictly ‘legal’—by incorporating some form of ‘best practices’ or ‘professionalism’ concepts, perhaps in the comments. The Commission quickly concluded that, given the regulatory sophistication of the *Model Rules*, it was simply impossible to return to the exhortatory or aspirational nature of the earlier codes. Indeed, at this point, any attempt to give such guidance clearly would be misperceived as having a regulatory dimension.”).

142. Robert Eli Rosen, *The Inside Counsel Movement, Professional Judgment and Organizational Representation*, 64 IND. L.J. 479, 492 (1989) (“Perhaps most fundamentally, the legal profession may reconstruct the market for its services; any claim that market demand inevitably shapes ‘the way in which law is practiced’ denies the profession’s power to shape its own market.”).

143. This is not to say that simply by revising the *Model Rules*, the “really vile things” won’t continue to occur. However, as a profession, our *Model Rules* should not be set up from the get-go to let things happen.

144. Some scholars, including the author of this Article, have hypothesized that use of external PR consultants by attorneys will continue to increase given the importance of the court of public opinion on legal controversies. See Brown, *supra* note 8, at 147–48. These communications, however, may not be protected by the attorney-client privilege doctrine. See generally, Michele DeStefano Beardslee, *The Corporate Attorney-Client Privilege: Third Rate Doctrine for Third Party Consultants*, 62 SMU L. REV. 727 (2009) (analyzing the attorney-client privilege doctrine that applies to consultation with third-party consultants and contending that it remains confusing and unpredictable at best).

One way to tackle this question is to consider whether, in the context of the media court, the corporate attorney is—or should be—acting as an “advocate” within the adversary system or, instead, as a “non-advocate,” that is, as a negotiator or counselor outside the adversary system.¹⁴⁵ If the lawyer is (or should be) acting as an advocate, then according to the principles outlined by Murray L. Schwartz in 1978, the lawyer may (or must) “maximize the likelihood that the client will prevail” and is not “legally, professionally, nor morally accountable for the means used or the ends achieved.”¹⁴⁶ If, however, the lawyer is playing the role of a non-advocate, e.g., a counselor or negotiator, these maxims may not automatically apply.¹⁴⁷ Importantly, the lawyer needs to know which role he or she is playing to guide his or her behavior.¹⁴⁸ This part thus seeks to answer this question by analogizing the court of public opinion to: 1) a court of law in which the adversarial ethic is ‘alive and kicking,’ and 2) the economic marketplace wherein the lawyer is generally considered as playing a non- (or, at least, less) adversarial role. In doing so, it analyzes the types of restrictions and duties imposed on lawyers in those spheres by the *Model Rules of Professional Conduct*, First Amendment jurisprudence, and securities regulations.

A. A COURT OF LAW AND THE MARKETPLACE OF IDEAS

One indication that the lawyer may be justifiably acting as an advocate in the

145. Murray L. Schwartz, along with others, has argued that this distinction should affect which ethical and moral principles apply to the lawyer. See, e.g., Murray L. Schwartz, *Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 695-97 (1978) (contending that lawyers acting as non-advocates should be held to a higher standard than when acting as advocates); Judge Alvin Rubin, *A Causerie on Lawyers' Ethics in Negotiation*, 35 LA. L. REV. 577, 589-93 (1975) (arguing that lawyers, when acting as negotiators, should behave honestly and in good faith and should not “negotiate an unconscionable result” or take “unfair advantage of another”).

146. Schwartz, *supra* note 145, at 673; see also *id.* at 671 (explaining that the principles that apply to the advocate are that the lawyer is “oblige[d] within professional constraints to maximize the likelihood that the client will prevail” and that the lawyer is relieved of “legal, professional, and moral accountability for proceeding according to the first principle”). Although Schwartz argues that “neither the idea of the adversary system nor its effectuation requires the use of truth-defeating techniques,” it appears that he believes these techniques are allowed or justified in certain circumstances. Murray L. Schwartz, *The Zeal of the Civil Advocate*, 1983 AM. B. FOUND. RES. J. 543, 551 (1983).

147. See Schwartz, *supra* note 145, at 671. This Article accepts as true Schwartz’s claims that the same obligations imposed on the advocate in the adversary system may not exist or properly be applied to the non-advocate. See *id.* at 679-95.

148. Although the preamble to the *Model Rules* attempts to describe three different types of lawyers (advocate, negotiator, evaluator), and section 2 is labeled “counselor,” and section 3 “advocate,” the *Model Rules* do little to define when a lawyer is acting in each of these roles. See MODEL RULES pmb. It is unclear how lawyers are supposed to know the difference between these roles. One distinction that has been made by the profession is that when a lawyer is acting as advocate, he or she “for the most part deals with past conduct and must take the facts as he finds them. By contrast, a lawyer serving as advisor primarily assists his client in determining the course of future conduct and relationships.” MODEL CODE OF PROF’L RESPONSIBILITY EC 7-8 (1980) (citations omitted); see also Thomas D. Morgan, *Thinking About Lawyers as Counselors*, 42 FLA. L. REV. 439, 440 (1990) (refining this distinction).

court of public opinion is that there are many similarities between a court of law and the court of public opinion¹⁴⁹—the latter of which is situated within or is perhaps synonymous with the marketplace of ideas.¹⁵⁰ As discussed in more detail in the first installment of this project, corporate legal controversies are “tried” in the court of public opinion.¹⁵¹ Therefore, the court of public opinion not only affects the administration of justice in a court of law, but also often acts like the administrator of justice itself.¹⁵² The court of public opinion issues verdicts that have as much, if not more, weight than a court of law.¹⁵³ In that sense, it is a “place” where disputes are adjudicated much like a court of law. Moreover, like the adversarial system at work in a court of law, the parties are accountable for presenting their case and challenging that of their opponents in the court of public opinion.¹⁵⁴ Indeed, as another author explains, “the goals of legal spin control are remarkably similar to advocacy inside the courtroom.”¹⁵⁵ Speech around legal controversies in the news—just like speech around legal controversies in a court of law—seeks to impact the legal consequences of past conduct and how justice is ultimately administered. Finally, like a court of law, the court of public opinion is charged with the task of uncovering the truth.¹⁵⁶ Historically, academics have posited that the purpose of the open and free exchange in the marketplace of ideas is to reach the truth and protect the processes that facilitate that exchange of ideas.¹⁵⁷ In keeping with that, the

149. Frankel, *supra* note 61, at 369 (asking if the “rules that apply to courtroom can also apply to the court of public opinion”).

150. According to other scholars, the marketplace of ideas theory was originally “based on an analogy between products and ideas.” Alberto Bernabe-Riefkohl, *Freedom of the Press and the Business of Journalism: The Myth of Democratic Competition in the Marketplace of Ideas*, 67 REV. JUR. U.P.R. 447, 453 (1998). Like “merchants,” individuals or journalists “place their ‘products’ [i.e. ‘ideas’] in the market to compete with those of others for the consumers to choose from.” *Id.* (explaining that Oliver Wendell Holmes is “usually credited with introducing this concept into American jurisprudence”).

151. See Beardslee, *supra* note 1, at 1259.

152. *Id.* See also *supra* Part I; Brown, *supra* note 8, at 85 (“[T]here is indeed a court of public opinion which may informally determine culpability based almost entirely on what is communicated by the media.”); Moses, *supra* note 5, at 1850 (“If legal spin control has such influence, then perhaps it will unfairly place a thumb on the scales of justice.”).

153. See Beardslee, *supra* note 1, at 1259.

154. Schwartz, *supra* note 145, at 672 (explaining that this is one of the four “essential” elements of a “system for adjudicating disputes”).

155. Moses, *supra* note 5, at 1850.

156. See Beardslee, *supra* note 1, at 1268-69; Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1035, 1045 (1975) (explaining that judges often claim that “the basic purpose of a trial is the determination of the truth” but that “the critical flaw of the system” is “the low place it assigns to truth-telling and truth-finding”) (internal quotations and citations omitted); see also Schwartz, *The Zeal of the Civil Advocate*, *supra* note 146, at 551 (“Whatever else may be said about the [legal] system’s purposes, one of its necessary objectives is to ascertain truth: to reconstruct the past event as accurately as possible.”).

157. See Cass R. Sunstein, ‘She Said What?’ ‘He Did That?’: *Believing False Rumors* 3 (Harv. Pub. Law, Working Paper No. 08-56, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1304268 (arguing “the processes that underlie the marketplace of ideas sometimes work poorly” because they sometimes “fail to produce the truth” and, therefore, “some kind of chilling effect on false statements of fact is important”);

Supreme Court has prohibited restrictions on speech, including attorney-speech, in order to protect the “uninhibited, robust, and wide-open” freedom of exchange of ideas by individuals and journalists.¹⁵⁸ For all these reasons, therefore, one might argue that the court of public opinion is analogous to a court of law and a lawyer truly is (and should act as) an advocate for clients in that alter-court.

Yet taking this analogy to its fullest extent may not be appropriate. There are crucial differences between the two courts: Mainly, the safeguards against dishonesty and misconduct that are present in a court of law do not exist in the court of public opinion. In a court of law, one of the lawyer’s major duties as an officer of the court is to uphold the public’s confidence in the justice system.¹⁵⁹ Although there is still the expectation that attorneys will behave competitively in court, there are rules to ensure that the adjudicatory process is fair,¹⁶⁰ that lawyers behave with integrity, and that decisions are reached on the merits.¹⁶¹ Although the court of public opinion is arguably part of the adjudicative system, as discussed in the proceeding part, there are few prohibitions to ensure fair competition or ethical advocacy.¹⁶² In a court of law, however, there is an

Duncan, *supra* note 25, at 791 (“The purpose of the First Amendment is to allow for the discovery of truth and to promote democratic self-governance.”). *But see* Bernabe-Riefkohl *supra* note 150, at 453 (arguing that the Supreme Court “has accepted the notion that ideas cannot be true or false” and, therefore, that “the process by which ideas are exchanged” is “the justification for protection” “rather than the result of the exchange”).

158. *New York Times v. Sullivan*, 376 U.S. 254, 271 (1964); *see also* Bernabe-Riefkohl, *supra* note 150 at 454 (listing the many Supreme Court opinions that have cited this case); *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966) (referring to the press as “the handmaiden of effective judicial administration” because “it does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism”). As such, the Court applies strict scrutiny to restrictions on speech that is political or related to a public issue. *See* Cassidy, *supra* note 25, at 6 (“Where the government seeks to restrain religious speech or speech related to a political/public issues, such a restriction must withstand ‘strict scrutiny.’”); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975) (explaining that to survive strict scrutiny the government must show that the restriction is “(1) narrowly tailored to serve (2) a compelling state interest”).

159. MODEL RULES pmbi. cmt. 1 (“A Lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.”); *see also* MODEL RULES R. 3.3 cmt. 2 (2007); Judith A. McMorro, Jackie A. Gardina & Salvatore Ricciardone, *Judicial Attitudes Toward Confronting Attorney Misconduct: A View From the Reported Decisions*, 32 HOFSTRA L. REV. 1425, 1440 (2004) (citing case opinions that show that this role is “alive and well in federal court practice”).

160. MODEL RULE 3.4 cmt. 1 (“The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure and the like.”).

161. Simon, *supra* note 67, at 1086 (“[The regulatory approach] sees the lawyer’s basic function as contributing to the enforcement of the substantive law, and it inclines toward forbidding her to use procedural rules in ways that frustrate the enforcement of substantive norms . . . [H]er basic duty is to clarify the issues in ways that contribute to a decision on the merits, not to manipulate information to serve the client’s goals. The job still involves advising the client on ways to advance her interests and presenting the client’s case, but it also involves a duty to develop and disclose adverse information that would be important to the responsible official.”).

162. *See supra* Part II.C.

affirmative duty to disclose information, correct false statements, and "avoid conduct that undermines the integrity of the adjudicative process."¹⁶³ Additionally, attorneys are obligated to ensure that claims made in court are meritorious¹⁶⁴ and "to present evidence and argument so that the cause may be decided according to the law."¹⁶⁵ In the media court, however, attorneys can make statements that they believe are not relevant or that will not be supported by evidence that would be admissible in a real court.¹⁶⁶

More importantly, in addition to the higher duty of candor and more stringent rules of professionalism, generally there is an evenhanded arbiter, i.e., a judge or jury, in a court of law.¹⁶⁷ According to Schwartz, lawyers, acting as advocates in a court of law, "try to impeach truthful witnesses," make arguments with which [they] personally disagree, decline to introduce probative, adverse evidence against [their] client[s], and attempt to present matter in ways [they] think personally are inaccurate"¹⁶⁸ However, this zealous adversarial behavior is diffused by the very aspects that are often missing from the court of public opinion. As Schwartz points out, the presence of an arbiter "assures that there is one—and only one—part of the system charged with the responsibility of reaching the correct decision" and that this one source "then decides who has prevailed."¹⁶⁹ The presence of the arbiter also acts like a pressure device on the lawyers, positively impacting their behavior because lawyers know they are accountable to a legitimate audience that is well-informed, in charge of the process, and dedicated to determining the truth.¹⁷⁰ None of these things are true in the court of public opinion. Nor is it true that there are equally zealous

163. MODEL RULES R. 3.3 cmt. 2. Rule 3.3 only applies to lawyers' conduct on behalf of a client in proceedings of a tribunal. A "tribunal" is "a court, an arbiter in a binding arbitration proceeding or a legislative body, administrative agency or other body act[ing] in an adjudicative capacity" i.e., "when a neutral official . . . render[s] a binding legal judgment directly affecting a party's interests in a particular matter." MODEL RULES R. 3.3 cmt. 1, R. 1.0 (m).

164. MODEL RULES R. 3.1 (Meritorious Claims and Contentions) only applies to legal procedures and proceedings.

165. MODEL RULES R. 3.5 cmt. 4. *See also* Humbach, *supra* note 123, at 996 ("[L]awyers have a higher duty of candor to the courts than they do to each other or to the public generally.").

166. MODEL RULES R. 3.1, 3.3, 3.4 (d) and (e) and 3.5 only apply to pretrial and trial proceedings.

167. Schwartz, *supra* note 145, at 672 (explaining that the existence of "an impartial tribunal of defined jurisdiction" is one of the "essential elements" of a "system for adjudicating disputes").

168. *Id.* at 673-74.

169. *Id.* at 677.

170. Research suggests that to whom a person is accountable affects behavior and that "[s]elf-critical and effortful thinking is most likely to be activated when decision makers learn prior to forming any opinions that they will be accountable to an audience (a) whose views are unknown, (b) who is interested in accuracy, (c) who is interested in processes rather than specific outcomes, (d) who is reasonably well-informed, and (e) who has a legitimate reasons for inquiring into the reasons behind the participant's judgments." Jennifer S. Lerner & Philip E. Tetlock, *Accounting for Effects of Accountability*, 125 PSYCHOL. BULL. 255, 259 (1999) (defining legitimacy as a "multidimensional concept" that includes "overlapping constructs" such as "power, expertise, [and] trustworthiness"). As argued elsewhere, "when corporate actors believe that there is little chance of discovery, they are more apt to misbehave." Beardslee, *supra* note 144, at 773.

advocates on both sides. Sometimes it is not clear who is the adversary; there are inequalities in type and quality of representation, and the media plays favorites.¹⁷¹ Indeed, when dealing with the media, the lawyer is truly only accountable to the client and, as explained in a prior article, the media is hardly a well-informed, trustworthy audience dedicated to finding and presenting the truth.¹⁷² These missing pieces prevent the media court from distributing the impartial justice courts are supposed to deliver and make it impossible to legitimate the level of zealous advocacy that is currently accepted in a court of law.¹⁷³

In the marketplace of ideas, the lawyer's major duty is to the client, not to the public.¹⁷⁴ And, as discussed above, the few restrictions that exist (in the form of *Model Rules*) do not provide adequate guidance to corporate lawyers on how far

171. See *infra* notes 178-79 and accompanying text.

172. See Beardslee, *supra* note 1, at 1333 n.33 (contending that "journalists do not always present an accurate, objective or complete picture of current events" and detailing why this may be so). Although the marketplace of ideas is charged with the task of uncovering the truth, it is not clear that journalists or other media professionals seek this objective or that truth is even achievable. See *infra* Part IV.D.1. In addition to having conflicts of interests, journalists sometimes do not even check their sources. For example, on April 1, 2010, the New York Times ran an article stating that attorney Eric Turkewitz was going to become the official White House law blogger without fact checking. See Posting of J. David Goodman to City Room, <http://cityroom.blogs.nytimes.com/2010/04/01/when-lawyers-blog/> (Sept. 28, 2007, 18:26 EST) (admitting that the New York Times had earlier posted this information but now believes it might be a hoax); see also New York Personal Injury Blog, <http://www.newyorkpersonalinjuryattorneyblog.com/2010/04/about-that-white-house-blogger-post-from-yesterday-nyt-gets-punked.html> (April 2, 2010). Also, in September of 2004, Dan Rather admitted that the documents he used to justify stories about George W. Bush might not be authentic. See The Dan Rather File: Decades of Media Bias, <http://www.mrc.org/profiles/rather/crisis.asp> (last visited June 26, 2010).

173. Schwartz, *supra* note 145, at 678. Similar arguments have been made in other contexts. For example, Susan P. Koniak made a similar argument in the context of SEC disclosure advice. Susan P. Koniak, *When the Hurlyburly's Done: The Bar's Struggle With the SEC*, 103 COLUM. L. REV. 1236, 1276 (2003) ("There is good reason to distinguish between lawyers in an adversarial setting and lawyers acting as advisors. . . . In the adversarial setting, a lawyer is justified in presenting all nonfrivolous arguments, because the opposing party's attorneys, the judge, and the jury all operate as potential checks against abuse. But these checks are all absent when a lawyer is counseling a client on the legality of their contemplated actions."). Others have made a similar argument in the context of settlement negotiations because this context is "not monitored by the safeguard of the adversary process." Zacharias & Green, *supra* note 141, at 62; see also Zacharias, *supra* note 67, at 1334 n. 99; Simon, *supra* note 67, at 1086 (explaining that lawyers are obligated to seek fair settlements and disclose adverse information in negotiations in order to ensure that the resolution is closer to what "responsible officials would have imposed," in part because they are officers of the court); Nathan M. Crystal, *The Lawyer's Duty to Disclose Material Facts in Contract or Settlement Negotiations*, 87 KY. L.J. 1055, 1058, 1096 (examining cases where "lawyers have been subject to disciplinary action and legal liability, and contracts that they have negotiated have been rescinded, because of their failure to disclose information in certain circumstances," and arguing that "[i]t is unethical for a lawyer to fail to disclose material information when the nondisclosure amounts to misrepresentation or when the failure to disclose violates discovery rules or other law"). This notion is not uncontested, however, and may be a minority view. See Hazard, *infra* note 194, at 191-92 (explaining that the Kutak Commission's proposal to incorporate a Model Rule of Professional Conduct that required fairness to other participants in negotiations was rejected with "vehemence" and ultimately concluding that "in light of the . . . constraints, legal regulation of trustworthiness cannot go much farther than to proscribe fraud").

174. Moses, *supra* note 5, at 1850 (explaining that "[t]he ethical rules make it quite clear that a lawyer's prime responsibility is to her client" but "this duty has some limits").

they may or should go towards using the media in favor of their clients when the matter may never reach a court of law, the lawyer is not the spokesperson, or the commentary is merely misleading as opposed to fraudulent.¹⁷⁵ As such, the *Model Rules* do not apply to the reality of corporate practice or the way that many lawyers manage legal PR for corporate clients. Thus, lawyers may go too far in their advocacy in the media. Lawyers may deceive the public or assist their clients in doing so to gain what some might call an “immoral or unjust advantage.”¹⁷⁶ Lawyers (perhaps in part because they often work behind the scenes in this context and, therefore, are not putting themselves on the line) facilitate public disclosures that put forth not just the strongest legal arguments in favor of the corporate client, but even those legal and non-legal arguments that purposefully create a false impression that they would never even attempt to put forth in a court of law.

The major counterargument to these concerns (and to heightened restrictions on attorneys’ involvement in the court of public opinion) is that in the marketplace of ideas, the antidote to misleading speech made or approved by attorneys is simply more speech.¹⁷⁷ However, this may not actually play out. True, there are many modes of communication; corrections can be made quickly, and that which is publicly disclosed can be scrutinized by all. Speech, however, is not actually “free”—not all corporate clients can afford to have lawyers and external PR consultants creating positive legal PR spin in order to counter negative spin or falsehoods.¹⁷⁸ Moreover, as discussed in the first installment, the PR executives and lawyers purposefully spin material and the press often provides slanted information and unequal airtime—all under the guise of objectivity.¹⁷⁹ Thus, the court of public opinion cannot stand in the place of the

175. *Id.* at 1841-42, 1845 (“[The rules] do not tell lawyers how to advocate in the court of public opinion once it is clear that a jury is unlikely to be influenced. . . . [The rules] may not control all ethically suspect speech The rules say nothing about the manner and conduct of the speaker.”).

176. Schwartz, *supra* note 145, at 693.

177. For this reason, Jonathan M. Moses argues that the “courtroom model is not the model for the court of public opinion. Instead, the model should be the more free-flowing form of debate of the political world.” Moses, *supra* note 5, at 1852 (explaining, however, that lawyers should not “make unfounded allegations that they would not make in the courtroom”).

178. True, there are many cases in which parties are not equally represented and certain players have greater access to lawyers, but “the imbalance [should] be reduced as much as possible.” Schwartz, *The Zeal of the Civil Advocate*, *supra* note 146, at 547. Indeed, there are other negative consequences to a lack of control in the court of public opinion, such as prosecutors rushing to indict, less time negotiating, harsher sentences, and decreased efficiency. McMunigal, *supra* note 79, at 701 (explaining why those that “welcome client media campaigns as providing some measure of balance and possibly even an antidote to exploitation of the press by some prosecutors and police” are misguided).

179. Beardslee, *supra* note 1, at n.33. See Bernabe-Riefkohl, *infra* note 334, at 451, 458 (“[E]conomic competition in the marketplace of ideas is increasingly leading to less press independence and more misinformation” and [t]he ideology of objectivity, however, serves to hide the contradictory effects of economic market competition on the availability and exchange of ideas in the marketplace of ideas.”). Studies have reported in the most recent Presidential election, the media gave now President Barack Obama more coverage and more positive coverage than his opponent, John McCain. See, e.g., Howard Kurtz, *Study: Coverage of*

judge because the two essential attributes of an impartial arbiter are absent: lack of bias and non-participation in the prosecution and presentation of the case.¹⁸⁰ Furthermore, negative press—whether truthful or deceitful—can last a lifetime.¹⁸¹ And, as Cass Sunstein points out in an article on falsehoods on the Internet, responses or corrections can “produce greater polarization,” “increase people’s commitments to those perceptions,” and be “self-defeating.”¹⁸² Recent studies have shown that even when presented with accurate, contradictory information from credible sources, people cling to their beliefs—indeed, the presentation of contrary evidence can “intensify” the original belief.¹⁸³ Whether it is due to the lack of journalism ethics, the concentrated ownership of media outlets, or the staying power of beliefs, it appears that the marketplace of ideas may not enable the truth to emerge.¹⁸⁴ Far worse, it can entrench misperceptions. Thus, it is not clear that more speech really is an antidote to misleading speech made by attorneys in the court of public opinion.

On the one hand, then, because the key elements that generally justify adversarial advocacy (like an impartial arbiter, a real adversary, and procedural and ethical rules curbing misconduct)¹⁸⁵ are missing, lawyers may not be justified in performing like traditional *advocates* or *litigators* when campaigning in the court of public opinion.¹⁸⁶ That is, it does not appear that a lawyer, when helping a client navigate the court of public opinion, should be immune from legal, moral, or professional accountability like the traditional advocate that, according to some, “must, within the established constraints upon professional

McCain Much More Negative Than That of Obama, WASH. POST, Oct. 22, 2008, available at <http://voices.washingtonpost.com/44/2008/10/study-coverage-of-mccain-much.html>.

180. Schwartz, *The Zeal of the Civil Advocate*, *supra* note 146, at 546 (explaining that these are essential attributes of an evenhanded arbiter).

181. See Beardslee, *supra* note 1, at Part I.D.

182. Sunstein, *supra* note 157, at 16-18, 21 (explaining why skepticism and instant correction may not be really act as “safeguards against widespread belief in false rumors”).

183. Prasad et al., “*There Must Be a Reason*”: *Osama, Saddam, and Inferred Justification*, 79 SOC. INQUIRY 142, 144, 148, 153 (2009) (analyzing why the misperception that Saddam Hussein was partly responsible for terrorist attacks of Sept. 11, 2001 “persisted despite mounting evidence and a broad official consensus that no such link existed”); cf. Lerner & Tetlock, *supra* note 170, at 258 (reporting research showing that “[p]eople who sense that an audience wants to control their beliefs will often respond to the threat to their autonomy by asserting their own views all the more vigorously”).

184. Sunstein, *supra* note 157, at 26 (“The marketplace of ideas will not work well if social influences and biased assimilation ensure that false rumors can spread and become entrenched.”). Admittedly, Cass Sunstein explicitly confines his conclusions to false rumors as opposed to true but misleading statements, yet his analysis of how and why people tend to believe deceptive information that is publicly disseminated arguably applies to either. *Id.* at 24. See also Bernabe-Riefkohl, *supra* note 150, at 450-51 (arguing that it is not clear that “truth will always be the result of the operation of the marketplace of ideas” in the context of the press because the exchange of ideas occurs in an active, “economic market characterized by competition for profits”).

185. Schwartz, *supra* note 145, at 672 (identifying these three elements as three of the four necessary elements to justify adversarial advocacy) and 677 (emphasizing the importance of the neutral arbiter to reach a correct decision).

186. See Kim, *supra* note 21, at 119-22 (making similar point with respect to lawyers’ obligations under SEC regulation Part 205).

behavior, maximize the likelihood that the client will prevail.”¹⁸⁷ On the other hand, however, it is not clear that the lawyer should view him or herself as a non-advocate either simply because there is no neutral judge “yet,” or it is not apparent “yet” who the adversary is, or the procedural rules around litigation do not “yet” apply. When news around a legal controversy first breaks, no one knows whether litigation will ensue, or if it does, whether it will be civil or criminal. Importantly, the way the court of opinion is negotiated wags the tail of the dog—it determines whether litigation will ensue, and if it will be civil or criminal. It also impacts how the controversy might be decided. In this way, then, the lawyer is acting both as a counselor (assisting his client in how to manage future conduct and legal PR) and as an advocate (attempting to affect legal consequences based on past conduct).¹⁸⁸ Therefore, although the court of public opinion does not fit the traditional adjudicative proceeding paradigm, it is not completely removed, and some level of advocacy may be appropriate in that alter-court.¹⁸⁹ Simply concluding, however, that the lawyer is not justified in acting like the full-blown advocate does not end the inquiry. The question still remains: What level of advocacy should be pursued in the court of public opinion and how accountable should the lawyer be in that court to the client, the public, and the justice system?

B. THE ECONOMIC MARKETPLACE

One way to answer that question may be to analogize the court of public opinion to the economic marketplace wherein corporate lawyers work on behalf of corporate clients outside, but in the shadow of, a court of law. As will be further explored, in the economic marketplace corporate lawyers do not behave as traditional “advocates” but instead are charged with a duty to guard the public

187. Schwartz, *The Zeal of the Civil Advocate*, *supra* note 146, at 544; See Schwartz, *Professionalism and Accountability*, *supra* note 145, at 693 (“The moral justification for enabling a client to obtain an immoral or unjust advantage when no third-party tribunal is available to review the transaction is far less clear.”).

188. See Frankel, *supra* note 148 (describing a common distinction that is made between advocates and counselors). Indeed, it is not clear at what point the non-advocate general counsel becomes a civil or criminal litigator for the corporate client. Many scholars act like there is a line in the sand that can easily be drawn between the non-advocate and the advocate, and even between the criminal and the civil litigator. See, e.g., Schwartz, *The Zeal of the Civil Advocate*, *supra* note 146, at 548-550 (describing the differences between the criminal and civil contexts).

189. Kim, *supra* note 21, at 122 (“[T]he farther one moves away from the paradigm of adjudicative proceedings (and the attendant structural elements), the tougher it becomes to argue that either the relevant conduct constitutes advocacy or that the situation justifies it.”). For example, the role lawyers play in developing public messages around legal controversies is not unlike the role lawyers play in the Department of Justice when providing formal opinions to the President’s administration about the legal authority for certain conduct. According to Norman W. Spaulding, in the latter situation, there is no justification for “import[ing] adversarial ideology” because these lawyers are serving a pure “counseling function in which there is no adversary.” Norman W. Spaulding, *Professional Independence in the Office of the Attorney General*, 60 STAN. L. REV. 1931, 1970 (2008).

interest, even sometimes expected to play something akin to a gatekeeping role.¹⁹⁰ The following section analyzes some of the restrictions against misrepresentations that apply to lawyers and other commercial actors in the economic marketplace. Specifically, this section briefly analyzes regulations that apply to statements by lawyers and/or other commercial actors that are predicted to have some effect on consumers and stockholders or potential investors. It then examines whether the *justifications* underlying these restrictions against misrepresentations in the economic arena could equally apply to restrictions on lawyers' misrepresentations when creating (or aiding the creation of) messages around legal controversies in the court of public opinion.

1. REGULATIONS ON STATEMENTS TO CONSUMERS

In the economic marketplace, commercial speakers are prohibited from making false or misleading advertisements. The First Amendment does not protect this type of speech.¹⁹¹ One of the primary justifications for regulating commercial speakers in this way is that they "have extensive knowledge of both the market and their products" and "are well situated to evaluate the accuracy of their messages and the lawfulness of the underlying activity."¹⁹² Additionally, the Supreme Court has determined that such regulation is justified because commercial speakers are not easily "chilled" from speaking because they have an economic incentive to continue to address the public.¹⁹³ Similarly, lawyers have "extensive knowledge" of the law, their clients' business, and the immediate legal controversy. They are "well situated to evaluate the accuracy of their messages."

190. As John C. Coffee and others have asserted, although "[f]ew attorneys probably consider themselves gatekeepers . . . presenting the attorney as primarily an advocate profoundly misrepresents the functional activity of the corporate lawyer." COFFEE, *supra* note 21, at 192 (explaining that the bar "prefers to view the attorney as an advocate, whose sole duty is the zealous representation of the client"). Indeed, many scholars argue that the SEC and the Sarbanes-Oxley Act of 2002 have attempted to "deputize a public corporation's CLO as a gatekeeper of our national securities markets." Sung Hui Kim, *The Banality of Fraud: Re-situating the Inside Counsel as Gatekeeper*, 74 *FORDHAM L. REV.* 983, 986 (2005) (asserting, however, that inside counsel have been unable to rise to their potential to play this gatekeeping role and criticizing SEC regulations and the *Model Rules of Professional Conduct* for "set[ting] [general counsels] up for failure"); see also Elizabeth Cosenza, *Rethinking Attorney Liability under Rule 10B-5 in Light of the Supreme Court's Decisions in Tellabs and Stoneridge*, 16 *GEO. MASON L. REV.* 1, 47-48 (2008) (viewing "secondary actors' traditional roles as gatekeepers of the securities market" and, therefore, arguing for a standard of liability under Rule 10b-5(b) that "promotes the securities laws' goals of accurate and continuous disclosure and enforces" this gatekeeping role).

191. See *Kasky v. Nike, Inc.*, 45 P.3d 243, 249 (2002) ("We have also recognized that these laws prohibit 'not only advertising which is false, but also advertising which [,] although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public.'"); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 564 (1980) (explaining that commercial speech can be regulated if it is misleading).

192. *Central Hudson Gas*, 447 U.S. at 564 n.6 (citing *Bates v. State Bar of Arizona*, 433 U.S. 350, 381 (1977)). That being said, an argument that lawyer speech is akin to commercial speech is outside the scope of this Article.

193. *Kasky*, 45 P.3d at 257 ("[C]ommercial speech, being motivated by the desire for economic profit, is less likely than noncommercial speech to be chilled by proper regulation.").

As Geoffrey Hazard Jr. stated in the 1980s, attorneys have “peculiar access” to the facts and truth.¹⁹⁴ They also have “peculiar access” to clients and persuasive power with those clients. The findings from the PR Study support this contention. They indicate that general counsels are in charge of the communication about legal controversies; they approve and provide counsel regarding all public disclosures that relate to legal issues and most public disclosures that do not.¹⁹⁵ Moreover, lawyers and their clients are not likely to be chilled from speaking in the court of public opinion about legal controversies since this is where the battle is first fought and often won or lost. As explained in the first installment, silence is not an option. In order to survive, corporate clients must, at least, talk back to the media.¹⁹⁶

True, the regulations on commercial speech are justified because that speech affects consumer-purchasing decisions, and, to date, speech about potential legal controversies has not been identified as commercial speech.¹⁹⁷ The point, however, is that the *rationale* for regulating commercial speakers holds true for regulating attorney speech in the court of public opinion.¹⁹⁸ Like commercial

194. Geoffrey C. Hazard, Jr., *The Lawyer's Obligation to be Trustworthy when Dealing with Opposing Parties*, 33 S. C. L. REV. 181, 184-85 (1981). Arguably, this is even truer of general counsels today given how their role has developed since 1981.

195. Beardslee, *supra* note 1, at Part II.A.4.

196. *Id.* at 1272-73.

197. Although a full argument that press releases related to legal controversies should be considered commercial speech is outside the scope of this Article, arguably speech around legal issues is an indirect attempt to get consumers to continue to buy a corporation's product and in some ways serves as a warranty for the products or the corporation itself. Indeed, findings from the PR Study and other studies indicate that creating consumer confidence so that consumers continue to buy products is one of the main objectives of legal PR. See Beardslee, *supra* note 1, at 1295-96; cf. Bryan H. Reber & Karla K. Gower, *Avow or Avoid?: The Public Communication Strategies of Enron and WorldCom*, 18 J. PUB. REL. RES. 215, 236 (finding that legal and PR communication strategies of Enron and WorldCom after each organization's financial crisis “are starting to blur”). Moreover, similar arguments were successfully made in *Kasky v. Nike* at the state level. See *Kasky*, 45 P.3d at 247. In that case, Nike responded to negative publicity indicating that Nike products were illegally made in sweatshops. The California Supreme Court found that Nike's public response was commercial speech because Nike was also trying to get consumers to continue to purchase its products. *Id.* (“Because the messages in question were directed by a commercial speaker to a commercial audience, and because they made representations of fact about the speaker's own business operations for the purpose of promoting sales of its products, . . . [the] messages are commercial speech.”). That said, in a recent case, two justices of the Supreme Court indicated that they would have voted to overturn the California state decision that found publicity around legal controversy to be commercial speech. See *Nike, Inc. v. Kasky*, 539 U.S. 654, 665-85 (2003) (O'Connor and Breyer dissenting) (declining to decide the case on the merits); Eugene Volokh, “*Nike and the Free-Speech Knot*,” THE WALL ST. J., June 30, 2003, at A16 (explaining that these two Justices normally take a very narrow view of the First Amendment); Moses, *supra* note 5, at 1848 (stating that “[p]rotecting the public from being misled about the law is a strong governmental interest,” but explaining that “the law is a matter of public concern and speech concerning it should get a great deal of protection” and that a rule that prohibits lawyers from making misleading legal arguments in the court of public opinion “will be a closer call under the First Amendment”).

198. See *Kasky*, 45 P.3d at 256 (explaining that the Supreme Court “has not adopted an all-purpose test to distinguish commercial from noncommercial speech under the First Amendment” but that generally the “two relevant considerations are advertising format and economic motivation”); *Id.* at 256 (“Speech in advertising

speakers, attorneys have the power to influence the accuracy and integrity of the information around legal controversies provided by corporations to the marketplace. Beyond enhancing the corporation's reputation and encouraging the public to continue to purchase the product, however, attorney-generated legal PR is interested in convincing the public to believe a certain version of events to positively affect the way a legal controversy is resolved. This further supports restrictions on lawyers akin to those of commercial speakers.

2. REGULATIONS ON STATEMENTS TO STOCKHOLDERS AND POTENTIAL INVESTORS

Commercial actors are also restricted in the economic marketplace from making misrepresentations by section 10(b) of the 1934 Securities and Exchange Act,¹⁹⁹ and Rule 10b-5 of the Securities and Exchange Commission (SEC).²⁰⁰ Generally, these antifraud provisions prohibit any publicized deceit, misrepresentative statement, or omission that materially affects the purchase or sale of securities.²⁰¹ They apply to any public statement or press release.²⁰² Although there is no private right of action against secondary actors (like attorneys or auditors) for aiding and abetting securities fraud,²⁰³ courts have interpreted these

format typically, although not invariably, is speech about a product or service by a person who is offering that product or service at a price, directed to persons who may want, and be willing to pay for, that product or service.”).

199. 15 U.S.C. § 78j (2009).

200. 17 C.F.R. § 240.10b-5 (2010), 15 U.S.C.S. 78j(b) (2009).

201. 17 C.F.R. § 240.10b-5 (2010), 15 U.S.C.S. 78j(b) (2009).

202. See J. Robert Brown, Jr., *Corporate Communications and the Federal Securities Laws*, 53 GEO. WASH. L. REV. 741, 754-55 (1985); *id.* at 747-49 (explaining that “the Commission and the courts have gradually and haphazardly subjected less formal corporate communications to increasing regulation via the 1933 and 1934 Acts’ antifraud provisions” but that “the provisions’ impact on corporate communications is often unclear and, thus, a source of constant uncertainty”).

203. See *Stoneridge Inv. Partners, Inc v. Scientific-Atlanta, Inc.*, 128 U.S. 761 (2008); *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 194 (1994); Elizabeth A. Nowicki, *10(b) or Not 10(b)?: Yanking the Security Blanket for Attorneys in Securities Litigation*, 2004 COLUM. BUS. L. REV. 637, 639 (“[Central Bank] was a windfall for attorneys and other non-issuer defendants such as accountants, analysts, and underwriters who had historically been brought into Section 10(b) lawsuits as aiders and abettors. [And its] implications were huge: the attorney conspirators who were critical to effectuating fraudulent transactions now appeared to be almost unreachable by defrauded investors.”). Furthermore, although private parties cannot bring suits against lawyers for aiding and abetting, the SEC can. See *Stoneridge Inv. Partners, Inc.*, 128 U.S. at 761; Sung Hui Kim, *Gatekeepers Inside Out*, 21 GEO. J. LEGAL ETHICS 411, 429 n.90 (2007) (The “PSLRA clarified that the SEC (but not private parties) may bring enforcement actions and administrative proceedings against aiders and abettors of securities fraud, so long as the SEC could prove that such persons “knowingly” did so”). In an often-cited case, *In re Carter*, the lawyers had made recommendations to the client regarding what should be disclosed in press releases, SEC forms (e.g. Form 8-k), and other reports regarding the companies financial issues. These recommendations were not followed. See *In re William R. Carter & Charles J. Johnson, Jr.*, Exchange Act Release No. 17,597, 47 SEC Docket 471 (Feb. 28, 1981). Although the SEC did not uphold the administrative law judge’s conclusion that this behavior constituted aiding and abetting, it noted that it was a “a very close factual question.” *Id.* at 518 (Evans, Comm’r, concurring in part and dissenting in part). In other words, failure to disclose or withdraw when a client refuses to follow disclosure advice may result in aiding and abetting liability for the lawyer.

provisions to apply to attorneys; that is, they prohibit attorneys from directly or substantially participating in misrepresentations or manipulative and deceptive practices in connection with a sale or purchase of a security.²⁰⁴ The rationale behind 10b-5 is that even if the statements are later corrected, the harm is still incurred.²⁰⁵ Moreover, these regulations are concerned with market protection, that is, the integrity of information provided to the market.²⁰⁶ They seek to prevent the public (e.g., stockholders and potential investors) from relying on inaccurate or misleading material information—even, according to scholars, when it is an issue of nondisclosure or when “what was said was not a clear misrepresentation of the truth.”²⁰⁷ As mentioned earlier, lawyers aid their corporate clients in drafting and preparing many types of public disclosure documents, including filings for the SEC, documents on securities offerings, and

204. Some courts have ascribed liability to attorneys (and other secondary actors) as primary violators of securities laws under other theories like the “substantial participation” standard and the “creator” standard despite the recent decision by the Supreme Court in *Stoneridge* that frames the issue under scheme liability. See, e.g., *In re Enron Corp.*, 235 F. Supp. 2d 549, 583-90 (S.D. Tex. 2002) (describing three different standards “to determine when the conduct of a secondary actor makes it a primary violator” and applying the SEC proposed standard, sometimes referred to as the “creator” standard); Cosenza, *supra* note 190, at 18-26, (describing the different standards). Under the bright line standard, courts cannot impose primary liability on secondary actors unless there is reliance and the statement or document can actually be attributed to the secondary actors at the time of public dissemination, i.e., if they sign the document containing the misrepresentation. *In re Enron Corp.*, 235 F. Supp. 2d at 583; *Wright v. Ernst & Young, LLP*, 152 F.3d 169, 175 (2d Cir. 1998); Cosenza, *supra* note 190, at 26. Under the substantial participation standard, secondary actors can be held liable if there is reliance and the secondary actors knowingly or recklessly participate in the misrepresentations of clients’ public disclosures and “the participation is substantial enough that the statements rightfully could be attributed to [the secondary actors].” Cosenza, *supra* note 190, at 21; *In re Software Toolworks Inc.*, 50 F.3d 615, 628 (9th Cir. 1994); *In re Enron Corp.*, 235 F. Supp. 2d at 584-85 (citing *Howard v. Everex Systems, Inc.*, 228 F.3d 1057, 1061 n.5 (9th Cir. 2000)); see also *ZZZZ Best Securities Litigation*, 864 F. Supp. 960, 967-68 (C.D. Cal. 1994). Under the “creator” standard, proposed by the SEC, a lawyer can be held primarily liable under the securities laws for misleading statements or omissions when the lawyer “alone or with others, creates a misrepresentation [on which the investor-plaintiffs relied]” and “he acts with the requisite scienter,” that is, he knows of the misrepresentations. *In re Enron Corp.*, 235 F. Supp. 2d at 588 (quoting the SEC’s proposal); *id.* at n.24 (explaining that liability can ensue if the lawyer “could be fairly said to be the author or co-author of the statement and the other requirements of primary liability are satisfied” even when “the attorney did not sign the documents and was never known to the investor as a participant in the document’s creation”) (quoting *Kline v. First W. Gov’t Sec., Inc.*, 24 F.3d 480, 490-91 (3rd Cir. 1994)).

205. See *Wool v. Tandem Computers Inc.*, 818 F.2d 1433, 1437 n.3 (9th Cir. 1987) (“[E]ven a complete corrective disclosure may never eliminate the spread between the price and value of the security caused by the misrepresentations of the defendant. This is because the prolonged nature of the fraud may have introduced other market variables which affected the amount the market reacted to the disclosure.”) (citing *Blackie v. Barrack*, 524 F.2d at 909 n.25 (1975)).

206. *Santa Fe Indus. Inc. v. Green*, 430 U.S. 462, 476-78 (1977) (explaining that 10b-5 is concerned with market protection and “full and fair disclosure”); *Piper v. Chris-Craft Indus. Inc.*, 430 U.S. 1, 43 (1977) (“Rule 10b-6 . . . is ‘an antimanipulative provision designed to protect the orderliness of the securities market during distributions of stock.’”).

207. *Langevoort & Gulati, The Muddled Duty to Disclose Under Rule 10b-5*, 57 VAND. L. REV. 1637, 1640 (2004) (explaining that this along with silence is when the question of duty becomes more difficult).

press releases of many sorts.²⁰⁸ These regulations constrain lawyers' behavior indirectly and, to a degree, deter a lawyer's complicity with corporate clients' delivery of misinformation.²⁰⁹

This Article is similarly concerned with the public's reliance on inaccurate or misleading information and how that reliance affects the stories people "buy" and, subsequently, the likelihood of settlement and success at trial. In other words, the stories people are told affect the outcome of legal controversies. And, as with inaccurate public disclosures in the securities context, the harm from misleading statements about legal matters made in the court of public opinion is still incurred even if such statements are later corrected.²¹⁰ In some ways attempting to ensure the integrity of information in the media by regulating lawyers is like trying to kill an elephant with a flyswatter. Nevertheless, like some of the securities regulations, this Article seeks to promote the integrity of information provided by lawyers and discourage lawyers from contributing to the unfair administration of justice by misleading the public or contributing to misleading statements by corporate clients.

Like Rule 4.1, however, 10b-5 only prohibits misrepresentation or omission of *material* facts.²¹¹ Therefore, the obligations imposed on disclosures affecting the economic marketplace are arguably no stricter (and no more lax) than those imposed on lawyers by the *Model Rules of Professional Conduct*. Like Rule 3.6, which requires that extrajudicial statements have actually substantially prejudiced a trial, 10b-5 requires proof that consumers actually relied on the material and reckless or intentional misrepresentations and that this reliance caused damage to their shares.²¹² Moreover, the 10b-5 regulations (like the current *Model Rules*) merely prohibit the lawyer from contributing to blatant market

208. See Cosenza, *supra* note 190, at 1 (explaining that "lawyers play a crucial role in the public disclosure process" despite the fact that they "are seldom identified by name or appear as signatories in their clients' disclosure documents"); *id.* at 5 (explaining that lawyers at Vinson & Elkins "advised on and drafted, at least in part, many of Enron's quarterly and annual reports on Forms 10-Q and 10-K, respectively, as well as all of its proxy statements").

209. See *supra* note 204 (explaining how courts have applied 10b-5 violations against lawyers).

210. See Beardslee, *supra* note 1, at Part I.

211. *Basic Inc. v. Levinson*, 485 U.S. 224, 238 (1988) ("In order to prevail on a Rule 10b-5 claim, a plaintiff must show that the statements were *misleading* as to a *material* fact. It is not enough that a statement is false or incomplete, if the misrepresented fact is otherwise insignificant."); see also Langevoort & Gulati, *supra* note 207, at 1644 ("Materiality refers to the matter of whether a piece of information would likely be important to the reasonable investor.") Additionally, "[m]anipulation" is 'virtually a term of art when used in connection with securities markets.' *Santa Fe Indus.*, 430 U.S. at 476.

212. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 734 (1975) (finding that standing to sue for a violation of 10b-5 is limited to actual purchasers or sellers of securities that by nature can show "actual damages" as required under Section 28(a) of the 1934 Act). See also *id.* at 747 (explaining that "the virtue" of the rule is that it limits the class of plaintiffs to those who have at least dealt in the security to which the prospectus, representation, or omission relates. And their dealing in the security, whether by way of purchase or sale, will generally be an objectively demonstrable fact in an area of the law otherwise very much dependent upon oral testimony"); *Dura Pharmaceuticals v. Broudo*, 544 U.S. 336, 344 (2005) (clarifying what constitutes loss causation).

fraud; they are not aspirational and do not encourage lawyers to counsel clients to refrain from behavior short of fraud.²¹³ That said, this may change in the future if the legal profession does not step in and step up. The SEC has the authority to promulgate standards of professional conduct for attorneys that appear or practice before the Commission.²¹⁴ It can and does hold lawyers to higher standards than those currently maintained by the Bar. For example, Part 205 of the SEC's Rules and Regulations (promulgated under Section 307 of the Sarbanes Oxley Act of 2002), arguably requires a reporting-up scheme that is more onerous than the Bar's corollary Model Rule 1.13.²¹⁵ Moreover, it was not until the American Bar Association (ABA) passed 1.13 that the SEC backed away from its original provision that required noisy withdrawal.²¹⁶ Similarly, the SEC has proposed, in the past, a higher standard of professional conduct for attorneys as follows:

When a lawyer with significant responsibilities in the effectuation of a company's compliance with the disclosure requirements of the federal securities laws becomes aware that his client is engaged in a substantial and continuing failure to satisfy those disclosure requirements, his continued participation violates professional standards unless he takes prompt steps to end the client's noncompliance.²¹⁷

Although this standard, like Part 205 and the *Model Rules of Professional*

213. See *supra* notes 140-142 and *infra* notes 234-251 and accompanying text.

214. The definition of attorneys practicing or appearing before the Commission is very broad. 17 C.F.R. § 205.2(e) (2004) (defining "appearing and practicing before the commission" as, "transacting any business with the commission," "[r]epresenting an issuer in a Commission . . . proceeding or . . . investigation," and "[p]roviding advice" about securities laws or the Commission's rules and regulations).

215. For example, before requiring lawyers to report up the ladder within a corporation, Rule 1.13 requires that the attorney *know* there is a violation, as compared to Part 205, which only requires that there be "credible" evidence of a violation. 17 C.F.R. § 205.2(e) (2004); MODEL RULES R. 1.13. Also, Rule 1.13 requires that the violation be likely to cause substantial injury to the corporate entity, but there is no such provision in 205. The violation must be only material, that is, where there is a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." See, e.g., *Basic, Inc.*, 485 U.S. at 231-32. Thus, as Freedman and Smith point out, there may be instances where a "material" violation would actually not cause substantial harm to the corporate entity and disclosure might. FREEDMAN & SMITH, *supra* note 1, at 149-50 (explaining that in Rule 1.13 "the lawyer is expressly directed to act 'in the best interest of the organization'"). Lastly, according to the SEC, the lawyer's conduct is supposed to be judged based on an objective standard under section 205 whereas this does not appear to be the case in Rule 1.13. See 17 C.F.R. § 205 executive summary, available at <http://www.sec.gov/rules/final/33-8185.htm>; see also Wilkins, *supra* note 24, at 758-59 (explaining that Rule 1.13 is weaker than the Act, which, among other things, applies an objective standard). But see Susan B. Koniak, *When the Hurlyburly's Done: The Bar's Struggle With the SEC*, 103 COLUM. L. REV. 1236, 1275 (2003) (arguing that the SEC's standard does not "bear the markings of an objective standard").

216. In that instance, "the issuer would be required to disclose its counsel's withdrawal to the Commission as a material event." See 17 C.F.R. § 205 executive summary, available at <http://www.sec.gov/rules/final/33-8185.htm>.

217. *In re William R. Carter & Charles J. Johnson, Jr.*, Exchange Act Release No. 17,597, 47 SEC Docket 471, 511 (Feb. 28, 1981).

Conduct, is not aspirational (it does not motivate lawyers to encourage clients to refrain from behavior that is on the shy-side of fraudulent or that is not “substantial and continuing”), it does hold lawyers responsible for failure to act.²¹⁸ And fraud in this context, as in tort, can in certain situations be committed by silence or omission.²¹⁹ Such a provision, or one that imposes even greater gatekeeping responsibilities, could be in the legal profession’s future.²²⁰ In sum, then, the justifications for the current and potentially more rigorous future SOX regulations also hold true for stricter regulations on attorneys’ conduct in the court of public opinion.²²¹

C. SUMMARY

The misrepresentations targeted by the restrictions on commercial speech and SEC regulations create a false reliance that induces or deters economic purchase behavior; that is, they affect a sale or purchase of a consumer good or securities by a market participant. Similarly, publicized misrepresentations of legal controversies affect what goods and services people buy or refrain from buying, and what deals they make or refrain from making. (Indeed, one of the purposes of

218. This is also true of the duty to update and correct and the half-truth rule. Langevoort & Gulati, *supra* note 207, at 1685. When analyzing the duty to correct and update “courts ask whether some prior statement is still ‘alive’ and whether the failure to correct or update was misleading.” *Id.* The Restatement (Second) of Torts defines a half-truth as a “representation stating the truth as far as it goes but which the maker knows or believes to be materially misleading because of the failure to state additional or qualifying matter is a fraudulent misrepresentation.” RESTATEMENT (SECOND) OF TORTS § 529 (1977); see also Donald C. Langevoort, *Half-Truths: Protecting Mistaken Inferences by Investors and Others*, 52 STAN. L. REV. 87, 91 (1999) (explaining that courts are less rigorous in applying the half-truth doctrine in the securities law context than in the common law context); *id.* at 92 (“situating the half-truth doctrine on a continuum roughly half way between the duty to avoid affirmative misrepresentations and the more controversial and contingent duty to reveal hidden private information”).

219. Langevoort & Gulati, *supra* note 207, at 1656 n.56. According to Langevoort and Gulati, “the analysis is much the same as though an affirmative statement were being attacked as misleading.” *Id.* at 1685 (explaining that “what is alleged to be misleading is some combination of speech and context”).

220. Coffee, *supra* note 16, at 1301-02 (explaining that “the breadth of the phrase ‘minimum standards of professional conduct’ sweeps far more broadly and easily could encompass other, potentially more extensive gatekeeping duties, at least to the extent that any such duty can be fairly characterized as a ‘minimum standard of professional conduct’”); see also Wilkins, *supra* note 24, at 671 (contending that the “brave new world” will be one “in which all corporate actors—lawyers included—will almost certainly face increased scrutiny”).

221. Although there is not space in this Article to more fully develop this point, it serves mentioning that there are other examples of restrictions against misrepresentation in the economic marketplace. For example, the Restatement (Second) of Contracts makes a statement of opinion actionable under a misrepresentation claim if it misrepresents the state of mind of the maker. See RESTATEMENT (SECOND) OF CONTRACTS § 168 (1981). Under that doctrine, when a person asserts an opinion that “expresses only a belief, without certainty” or “expresses only a judgment as to quality value and authenticity,” others can assume that a) “the facts known to [the assertor] are not incompatible with his opinion” and b) that the assertor “knows facts sufficient to justify him in forming [his opinion].” See RESTATEMENT (SECOND) OF CONTRACTS § 168.1-2, cmt. a (explaining that the asserted opinion may be that of a third person). Although assertions in the court of public opinion are not made in order to induce another party to sign a contract, they are made to induce the other party (or government officials) to settle, forgo litigation, or positively affect future litigation.

legal PR is to quell fears of consumers and potential investors.) Thus, restrictions similar to those regulating speech and promulgated by the SEC may seem appropriate for the court of public opinion. However, misrepresentations of legal controversies also impact how justice is administered. And this idea (that what is said in the court of public opinion affects justice) supports some level of advocacy and therefore may lead to the conclusion that less restrictions than those in the economic marketplace are appropriate, i.e., that more zealous advocacy should be enabled in the court of public opinion. This Article, perhaps counterintuitively, posits the opposite. It contends that some level of advocacy is appropriate, but because of the potential for grave consequences—and the lack of a neutral arbiter—heighted restrictions above those imposed on lawyers in the economic marketplace may be justified. In a court of law, a paradox exists. Because the consequences can be grave, lawyers are given more leeway to advocate zealously. Indeed, zealous advocacy is not just enabled, it is expected. As such, all participants are on notice that the ends justify the means, that the lawyer may be pushing the envelope of the truth, pressing for every advantage. But because the consequences can be grave, an impartial tribunal imposes extra restrictions on lawyers to ensure candor and integrity of the process. This is not the case in the court of public opinion (or in the economic marketplace). As mentioned earlier, a commonly held belief is that the marketplace of ideas leads to the truth and that journalists are required to report with integrity and lack of bias. Yet neither appears to be true. Another belief is that lawyers, because they are officers of the court, have a higher duty of candor than laypeople and other professionals. However, in the marketplace of ideas, lawyers are not held to a standard that is much higher than that of a journalist or a layperson—and it is extremely tempting and easy to canopy the truth.²²² Thus, the zealous, often misleading, advocacy by attorneys in the court of public opinion does not occur in the shadow of the law, since there is very little law regulating behavior. Instead, it occurs in the dark—because it is not transparent, that is, people do not know that lawyers are authoring the messages or that they are not held to a higher standard. When lawyers act as spokespeople or authors, people know who is creating or delivering the message, but when they work behind the scenes it is not obvious that lawyers are in the driver's seat, and the rules do not adequately cover this situation.

Based on this, one might conclude that the best solution is to unveil the zealous advocacy that is currently disguised, apply all the *Model Rules of Professional Conduct* to the court of public opinion, and “let the wild rumpus [continue].”²²³

222. See *supra* note 63.

223. MAURICE SENDAK, *WHERE THE WILD THINGS ARE* (1963). At least one scholar, Lonnie T. Brown, has contended that all the rules that apply in a court of law, including those that require heightened duties of candor and fairness, should apply to all extrajudicial commentary by attorneys in the court of public opinion. See Brown, *supra* note 8, at 138-39 (“To facilitate consequential regulation, the court of public opinion must be

However, this is an unworkable solution. First, although such application might work to curb extrajudicial statements made by lawyers, it is not clear that it would affect statements made by non-lawyer spokespeople that were assisted by attorneys behind the scenes.²²⁴ It would be difficult, if not impossible, to determine if the attorney was responsible for the statement.²²⁵ Second, such a regime may greatly restrict attorney and client speech—or worse yet, require the lawyer to withdraw.²²⁶ Third, while an analogy to the marketplace of ideas leaves the conduct at issue almost entirely unregulated, an analogy to the court of law would have the absurd result of requiring the stylized speech of the courtroom and adherence to all the rules that pertain to courtroom conduct in the court of public opinion without the benefit of discovery (necessary to determine relevance) and, more importantly, a judge to moderate and ensure the rules are being followed.²²⁷

The role attorneys play in managing legal PR spin for corporate clients appears to fall somewhere between the role the attorney plays as an advocate in a court of law and the role the attorney plays as a business partner and legal counselor in the economic marketplace.²²⁸ Further, the concerns justifying regulations in a court of law and the economic marketplace mirror those concerns in the court of public opinion. Fittingly, concern for the integrity of lawyers and information exists in both of those arenas. Moreover, lawyers have an obligation to consider more than

viewed as an extension of the actual courtroom . . . given the reality that lawyers are advocating in the alternative forum of public opinion, they should be subject to the same rules that apply in the actual decisionmaking forum—the courtroom.”). Brown recommends enacting a procedural rule that requires attorneys to file extrajudicial statements with the court and subject these filings to “all the ethical, procedural, or other rules, statutes, or inherent authority that pertain to any other official filing of record.” *Id.* at 93, 149-50.

224. Although this is not the subject of Brown’s article, he recognizes lawyers may be involved in the media relations even when not acting as the spokesperson and suggests that if the lawyer is responsible for the reported statement by a non-lawyer spokesperson, the attorney would need to make the filing and be subject to the same intrajudicial restrictions. *Id.* at 148. It is unclear, however, how this would work from a practical standpoint given the problems identified above.

225. Indeed, results from the PR Study indicate that this would be difficult to determine given the iterative process involved in developing PR tactics and strategies.

226. See *infra* discussion at Part IV.B.1.

227. Unlike a court of law, therefore, it is not “possible to entrust the parties with the presentation of issues, evidence, and arguments and with the challenges to them” in the court of public opinion without an arbiter to “see[] to it that the rules of the contest are followed.” Schwartz, *supra* note 145, at 677.

228. One might argue that as soon as litigation is filed, the attorney is justified (if not obligated) to act like an advocate in the court of public opinion because it is one of the legal means to mount a defense—especially in the criminal context. See Hodes, *supra* note 24, at 60 (explaining that defense attorneys “point to a lawyer’s obligation—rooted in both professional ethics and in the Sixth Amendment to the United States Constitution—to use all legal means to mount a defense”); *id.* at 78 (contending that “it ought to be open to lawyers to make misleading arguments during litigation so long as the underlying evidence presented in court is factual. But actively contaminating the proceedings with evidence that is known to be false has always been forbidden, and should always remain forbidden”). Although such an argument may have some weight, it does not successfully address 1) the fact that dealings within the court of public opinion are not monitored by a court of law; 2) the rules that apply to the advocate in court or before a judge do not apply; and, 3) the misleading or untruthful statements in the court of public opinion can determine success and whether litigation ensues.

just immediate clients' needs; they have an obligation to consider public interests—obligations consistent with the “lawyer-statesman”²²⁹ role that has been around since the mid-20th century.²³⁰ Lastly, continuing to rely on the marketplace of ideas to restrict what ethical obligations may be imposed on lawyers' advocacy in the court of public opinion creates externalities that negatively impact competing societal values, such as the integrity of information in the market, the fair administration of justice, and society's confidence in our justice system.²³¹ The most appropriate source of ethical obligations, therefore, appears to reside somewhere between the economic marketplace and the court of law. The point, however, remains the same: Once outside the marketplace of ideas, justification exists for heightened ethical obligations in the court of public opinion. If the court of public opinion is part of the legal process and if justice is administered there, then why should similar duties not be applied? Why should attorney-speech or client-assisted speech that is designed to force the other side to settle or prevent an adjudicative process (prevent “justice”) from occurring not be regulated to a higher degree than it is currently under the marketplace of ideas regime? In sum, because the court of public opinion in many ways acts like a court of law and carries with it some of the main concerns of a court of law and the economic marketplace, and because the public expects candor from lawyers and there are missing safeguards in the media-court, techniques that work to deceive are not justifiable.²³² Further, this Article posits that in addition to being held accountable for behaving with integrity in that alter-court, attorneys should attempt to convince their clients to behave ethically. It is to these contentions that the next part turns.

IV. IMPLICATIONS AND RECOMMENDATIONS

This next section identifies an aspiration for general counsels and attempts to define what is unconscionable behavior in the court of public opinion. Drawing on some of the principles behind the rules regulating a court of law and the economic marketplace, it also seeks to provide a theoretical and practical set of

229. This is a phrase coined by Anthony Kronman, *THE LOST LAWYER, FAILING IDEALS OF THE LEGAL PROFESSION* 3 (1993) (defining the term and arguing that it is an ideal that is dying); Ben W. Heineman, *The Ideal of the Lawyer-Statesman*, 22 *ACCA DOCKET* 59, 60-62 (2004).

230. Wilkins, *supra* note 24, at 680 (“Elite lawyers never conceived of themselves . . . as ‘deferential servants’ who merely carry out the client’s bidding. Instead, these early lawyers aspired to be wise counselors, or ‘lawyer-statesmen’ . . . who played a key role in shaping their clients goals and in mediating between these private ends and public purposes of the legal framework.”); *see also id.* at 680 (referring to the lawyer-statesman role as one similar to gatekeeping).

231. For further discussion, see Part I notes 134-143 and accompanying text.

232. Murray L. Schwartz makes a similar argument about lawyers when they act as non-advocates in compelled negotiations, voluntary negotiations, and counseling). *See generally* Schwartz, *Professionalism and Accountability*, *supra* note 145. *Cf.* Brown, *May it Please the Camera*, *supra* note 8, at 144 (arguing for similar reasons that an intermediate level of scrutiny should be applied to restrictions on lawyers' extrajudicial speech).

proposals that not only inhibits anti-social PR tactics but also inspires socially responsible behavior on the part of corporate attorneys.

A. ASPIRATIONS: GENERAL COUNSELS AS COUNSELORS TO CORPORATE CLIENTS AND GATEKEEPERS TO THE MEDIA

Some people have contended that the Chinese word for “crisis” is made up of one character that means “danger” and one that means “opportunity.”²³³ Whether this contention is true or not, this combination of words sums up the landscape pictured in this Article. Although there is the danger that lawyers’ increasing involvement in managing legal PR will result in a race to the bottom, it could equally represent an opportunity for corporate lawyers—particularly general counsels—to behave with greater social responsibility and to promote socially responsible behavior on the part of their corporate clients.²³⁴ Acting as the corporation’s gatekeeper to the media, general counsels are uniquely situated to help ensure that corporate statements disseminated to the public (especially those around legal controversies) are accurate and truthful.²³⁵ The corporate general counsel, in the role of counselor and media gatekeeper, acts as a sieve, helping the

233. Danger + Opportunity ≠ Crisis, <http://www.pinyin.info/chinese/crisis.html> (last visited June 26, 2010) (explaining why so many people believe this but arguing that it is not true).

234. Although outside attorneys can and likely should also play a gatekeeper role in this context, this Article focuses on general counsels because findings from the PR Study suggest that they are currently more involved with handling legal PR for corporate clients than outside attorneys. See Beardslee, *supra* note 1, at Part II.C. The legal profession, however, lacks consensus on whether inside or outside lawyers are better able to play a gatekeeping role. See *infra* note 246. Some scholars argue that inside counsel are well suited—even better suited than outside attorneys—to play a gatekeeper role. See Ben W. Heineman, *Caught in the Middle*, CORP. COUNS., April 2007, available at http://www.wilmerhale.com/files/Publication/92fd97ff-de9d-4501-9d29-90712709dd43/Presentation/PublicationAttachment/c49ca19c-86ca-41b8-a5bd-015eeb306339/Heineman_CaughtintheMiddle.pdf; Heineman, *supra* note 229, at 60–62; see also Kronman, *supra* note 229, at 284 (hypothesizing that inside lawyers may be better able to play the lawyer-statesman role than outside counsel given the current market incentives and relationship between outside counsel and their corporate clients). Other scholars contend that inside counsel are even less able to play the gatekeeping role than outside counsel. See Kim, *supra* note 203, at 415 (opining that while inside counsel are strategically positioned to be gatekeepers, there are many obstacles that inhibit their willingness to be gatekeepers and explaining that outside counsel, on the other hand, may be more willing to be gatekeepers but their ability to fulfill the role is compromised by lack of inside information). Still others argue that the “difference between the gatekeeping efficacy of inside and outside counsel is caricatured and exaggerated.” *Id.* at 415. Additionally, there are many members of the bar that do not believe that inside or outside lawyers play or should play the role of gatekeeper. Instead, they contend that lawyers should conduct “zealous advocacy” at all times. Letter from The Ass’n of the Bar of the City of N.Y. to Jonathan G. Katz, Sec’y, Sec. & Exch. Comm’n 34 (Dec. 16, 2002), available at <http://ftp.sec.gov/rules/proposed/s74502/elmilonas1.htm> [hereinafter ABCNY Letter]; see *id.* at 9 (arguing against SEC regulations that would require lawyers to play a gatekeeper role because they “assign a ‘watchdog’ function to attorneys”).

235. See *supra* note 21. Indeed, this is one of the reasons why section 307 of the Sarbanes-Oxley Act of 2002 targets inside counsel. See Kim, *supra* note 190, at 986 (2005) (explaining that the SEC was “convinced” that “inside counsel are in a superior position to interdict corporate fraud”). But see COFFEE, *supra* note 21, at 195 (explaining that although “inside counsel is uniquely positioned to specialize in preventive law,” there are many reasons to remain skeptical that they can or will); ROBERT L. NELSON, PARTNERS WITH POWER: SOCIAL TRANSFORMATIONS OF THE LARGE LAW FIRM 5, 247, 258 (1988) (explaining that corporate attorneys may not be able to adequately perform a gatekeeping role because they identify closely with their corporate clients views and objectives).

client separate the deceitful and misleading information from the desired (properly positioned) information in public communications about legal controversies. That is, instead of relying on the client or public pressure to limit behavior that is otherwise legally acceptable, lawyers, specifically, general counsels, could guide clients to exercise restraint.²³⁶ The next section presents five reasons why general counsels could and should play this role.

First, general counsels have insider information, corporate history, and the social capital to influence corporate clients' media tactics.²³⁷ According to the PR Study, they meet with external and internal PR consultants regularly and they incorporate public relations consequences into legal advice in order to convince management to avoid legally risky actions that may be consistent with the technicalities of the relevant laws but not their spirit. Sung Hui Kim points out, "As a formal matter, the senior corporate manager and lawyer are co-agents who share allegiance to their common principal (the corporation) rather than to each other."²³⁸ Like the senior corporate manager, the general counsel is generally part of the senior management team. Although this may, at times, create pressure to conform and make it difficult for the general counsel to play a gatekeeping role, because the general counsel represents the corporation (the entity) and not the managers or employees of the corporation, and, moreover, has duties that are separate and distinct from non-lawyer managers,²³⁹ the general counsel is in some ways both an organizational insider and outsider expert. Granted, this duality may create some tension and confusion. However, it also may increase the lawyer's legitimacy, sphere of influence, and ability to play the corporate

236. This conflicts, in part, with Stephen Pepper's vision of the lawyer's role. *See generally* Stephen Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613 (1986). Yet it is not entirely inconsistent. Pepper points out that without external pressure or internal pressure to restrain client choices, "lawyers may consistently guide clients away from moral conduct and restraint." *Id.* at 627. Moreover, he suggests responses that work to "ameliorate" this "dilemma," one of which includes counseling by the attorney. *Id.* at 630 (explaining that "the dialogue role is one possible source for rebuilding moral authority aside from law"). This Article argues that because lawyers are optimally situated to do so and because many clients want and need them to—general counsels should help guide clients toward more morally acceptable conduct in the court of public opinion. *See infra* notes 267-69 and accompanying text.

237. Indeed, scholars have argued that the reason why outside counsel have not been able to play the gatekeeping role is because partners in law firms did not have these type of intimate, long-term relationships with the client. Kronman, *supra* note 229, at 271-315; COFFEE, *supra* note 21, at 194-95 (explaining that the relationships between the corporate client and outside lawyers is "less intimate, ongoing, or fully informed than is the relationship between the same corporation and its outside auditor"). David B. Wilkins argues that a new longer-term "strategic alliance" relationship is developing between corporate clients and outside law firms that actually may make outside lawyers better positioned than they have been in the past to play a gatekeeper role. Wilkins, *supra* note 24, at 739-41. He explains that this "relationship is one of 'embeddedness' which emphasizes the importance of reciprocity and mutual trust for the production of joint gains." *Id.* at 674-75, 715-16.

238. Kim, *supra* note 21, at 112.

239. *See infra* notes 252-262 and accompanying text.

conscience.²⁴⁰ Thus, inside counsel may uniquely be able to help corporate clients find the right balance between furthering their immediate interests and protecting future reputational or public interests. The idea that inside counsel can and should play the role of the corporate conscience or gatekeeper, although contentious, is not new and has been furthered by scholars in many different contexts for years.

For example, even Stephen Pepper has argued that “the lawyer’s perception may engage or educate the client, or the client’s overall regard for the lawyer may be sufficient for the client to agree that [a certain immoral but legal tactic] should not be used.”²⁴¹ And, if it is true, as the ABA posits, that “almost all clients follow the [legal] advice given” by the lawyer, then arguably corporate attorneys may also be successful in dissuasion when it comes to immoral tactics in the court of public opinion.²⁴² As David B. Wilkins contends, “the attitudes that lawyers convey about the law are likely to rub off on their clients . . . [and] [e]ven nonclients are likely to pick up important messages about the appropriate moral standing of law from the conduct of lawyers.”²⁴³ Thus, the way lawyers behave in the court of public opinion and the way they assist their clients in crafting public disclosures cue clients and the public to the boundaries of acceptable conduct in that alternate-court.

Second, this vision is consistent with the lawyer-statesman and gatekeeper

240. Research shows that “ambivalent identities have often been viewed as . . . resulting in uncertainty and confusion” but also “such ambivalence can be a positive source of strength and distinctiveness” and “helpful for individuals in change agent roles as a way of providing greater insight and, where organizations are willing to entertain such roles, possibly greater status and legitimacy.” Christopher Wright, *Inside Out? Organizational Membership, Ambiguity and the Ambivalent Identity of the Internal Consultant*, 20 BRIT. J. MGMT. 309, 319 (2009); see also *id.* at 320 (explaining that in cases where individuals with “ambivalent identity” had developed “significant trust,” they could act “not only as ‘trusted advisors’ but, . . . also as the ‘jester’ or ‘organizational conscience’, i.e. challenging accepted wisdoms and raising taboos”). Although this research was based on interviews of internal consultants that “operate outside of conventional reporting lines and authority structures,” general counsels have a lot in common with internal consultants in that their management roles are ambiguous, “they operate in a contradictory space,” they have an “externally oriented knowledge base,” and “assist . . . other organizational employees in solving problems and implementing change through the provision of advice and expertise rather than direct authority.” *Id.* Interestingly, this research also indicates that benefits of the role duality deteriorate after too many years spent at an organization because time makes it difficult to “maintain . . . distinctiveness.” *Id.* Perhaps general counsels will not suffer from this problem, given that CLO turnover is on average every three years. See John C. Coates IV, *Causes and Consequences of CLO Turnover* (Working Paper 2009) (unpublished manuscript, on file with Georgetown Journal of Legal Ethics) (reporting that turnover among CLOs has exceeded that of CEOs by almost fifty percent).

241. Pepper, *supra* note 236, at 631 (making this point in the context of a cross-examination tactic designed to make a truthful witness look as though he/she is lying).

242. MODEL RULES R. 1.6 cmt 2. According to other scholars, there is also “professional consensus that lawyers are frequently successful in dissuading client perjury.” See also FREEDMAN & SMITH, *supra* note 1, at 170 (explaining this is only the case when “clients are willing to entrust them with their confidences and to accept their advice”).

243. David B. Wilkins, *In Defense of Law and Morality: Why Lawyers Should Have a Prima Facie Duty to Obey the Law*, 38 WM. & MARY L. REV. 269, 292 (1996).

roles that scholars often contend that lawyers should play,²⁴⁴ as well as the *Model Rules of Professional Conduct*, which attempt (although miserably fail) to define ethical boundaries based on the lawyers' role.²⁴⁵ And although attorneys have played prominent parts in several recent corporate scandals,²⁴⁶ preliminary results from the PR Study suggest that many corporate attorneys want to play a gatekeeping role or, at least, want to counsel clients to behave socially responsibly. As Ben Heineman has claimed, they want to "represent[] [their] client's interest 'with an eye to securing not only the client's immediate benefit, but [also its] long range social benefit.'"²⁴⁷ They want to show "a deep concern about both the private good and the public interest—and a deep concern about building durable institutions which achieve their aims in a fair and honest way even under stress."²⁴⁸ Other empirical evidence supports the contention that general counsels, supported by the new regulatory environment, are beginning to play a larger gatekeeping role than before.²⁴⁹ Additionally, there have been some

244. See Heineman, *supra* note 229, at 60-62; Wilkins, *supra* note 24, at 735-36 ("In addition to being zealous advocates for the interests of their clients, lawyers are also supposed to play a broader gatekeeping role in which they both counsel their clients to conform their conduct to legal standards and refuse to cooperate—and in extreme cases, even blow the whistle—when the client seeks to engage in conduct that undermines these standards."). This view is also consistent with the view held by some scholars that "lawyers not only can but also should counsel clients on nonlegal issues, particularly moral concerns." Larry O'Gantt, II, *More Than Lawyers: The Legal and Ethical Implications of Counseling Clients on Nonlegal Considerations*, 18 GEO. J. LEGAL ETHICS 365, 365 (2005). See also Gregory Sisk & Pamela J. Abbate, *The Dynamic Attorney-Client Privilege* 23 GEO. J. LEGAL ETHICS 201, 237 (2010) ("[A] lawyer who fails to engage in a moral discussion with the client, at least on matters of significance with obvious moral implications, simply is not doing his or her job."); *supra* note 230. This Article's conception of gatekeeper is a bit different than that of a gatekeeper that acts as a blockade to transactions or governmental approvals. See, e.g., Coffee, *supra* note 16, at 1298 (defining gatekeeper as such); see also *supra* note 21 (defining the term for this article).

245. For example, the preamble to the *Model Rules* states that "[a]s advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others." MODEL RULES pmbl. cmt. 2. Also the *Model Rules* themselves are, in some parts, segmented by role. For example, section 2 rules are under the heading "Counselor" and section 3 rules are under the heading "Advocate." See *supra* note 148.

246. Kim, *supra* note 203, at 413 (describing the consensus from the "catalogue of scandals in the past year" that "cast doubt about inside counsel's ability to fulfill their role as 'gatekeepers'").

247. Heineman, *supra* note 229, at 60-62 (quoting Gordon); see also Z. Jill Barclift, *Preventative Law: A Strategy for Internal Corporate Lawyers to Advise Managers of their Ethical Obligations*, 33 J. LEGAL PROF. 31, 45 (2008) ("In the wake of corporate management misconduct and the role of lawyers as enablers of corporate misconduct, internal corporate lawyers increasingly describe their responsibilities to include counsel on moral advice.").

248. *Id.* (quoting Kronman).

249. Tanina Rostain, *General Counsels in the Age of Compliance, Preliminary Findings and New Research Questions*, 21 GEO. J. L. ETHICS 465, 465-90 (2008) (explaining, however, that the findings are preliminary and "require confirmation through further larger scale investigation"). For example, in a 2003 survey by the American Corporate Counsel Association of 1,216 corporate counsel, 78% of the respondents desired an increased gatekeeping role. Chad R. Brown, *In-House Counsel Responsibilities in the Post-Enron Environment*, 21 ACCA DOCKET 92 (2003); see also Kim, *supra* note 203, at 445 (characterizing the findings as such); *id.* at 463 (explaining that gatekeepers "may already be embedded within the firm, in the form of inside counsel, awaiting the opportunity to activate the corporate conscience").

recent changes in the *Model Rules*²⁵⁰ and a variety of assorted “‘creeds,’ ‘pledges,’ ‘statements,’ and ‘codes’ of professionalism” have developed recently that scholars claim “reflect, at the very least, a genuine longing to recapture the pride of ‘professionalism.’”²⁵¹

Third, corporate lawyers are already expected to play a role similar to that of a gatekeeper in many contexts. As discussed above in Part III.B.2, lawyers, are to a degree, are obligated to play a gatekeeper role in the securities fraud context. They can be held liable by the SEC for aiding and abetting a corporate client’s primary violation of the securities regulations.²⁵² Additionally, Part 205 of the SEC’s rules and regulations²⁵³ requires lawyers to report up the ladder upon discovering “credible evidence” of a “material” disclosure violation,²⁵⁴ that is, when there is “substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available.”²⁵⁵ Moreover, others have contended that corporate lawyers are often expected to play a role “not as zealous advocates, but as careful factfinders, seeking to reduce the risk of liability by verifying the essential facts.”²⁵⁶ For example, corporate attorneys often focus on drafting and disclosure and what is known as “due diligence” work, which involves certifying the veracity of disclosure documents for public offerings.²⁵⁷ Similarly, corporate

250. For example, in 2009, Model Rule 1.6 was revised to include more situations in which lawyers may disclose client confidences in order to prevent or mitigate a crime or fraud including in some circumstances to prevent/mitigate financial harm. Model Rule 1.13 was revised to include a more onerous reporting up requirement. Additionally, a comment to Model Rule 4.1 has recently been revised to include the idea that “[m]isrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements.” MODEL RULES R. 1.6, 1.13, and R. 4.1 cmt. 1 (2009). See *supra* note 119; Humbach, *supra* note 123, at 1000 (“There are, however, signs that an evolution is occurring in the legal profession’s view of honesty and the lawyer’s role, as well as the Model Rules.”); Martin & Dees, *supra* note 119, at 779 (“The heightened standard [of MODEL RULE 4.1] may be a reflection of the desire for lawyers to be as strictly truthful as the common man. This desire may be a reflection of a desire to remedy the legal profession’s loss of a reputation for honesty in the public eye.”).

251. Moore, *Ethical Codes*, *supra* note 140, at 8, 11; see Jean Hellwege, *No Comment*, 34 TRIAL 16, 16 (1998) (explaining that legal professionals are recommending that criminal defense attorneys adopt a voluntary code of ethics to regulate lawyer commentary about legal controversies); see also GUIDELINES FOR CONDUCT pmbl. (ABA Section of Litigation 1998), available at <http://www.abanet.org/litigation/conductguidelines/preamble.html> (including a civility pledge and statements defining ethical, civil behavior). Some states have adopted courtesy and civility provisions that apply both to conduct towards a tribunal and third persons. See, e.g., MICHIGAN RULES OF PROFESSIONAL CONDUCT 3.5(c) and 6.5(a).

252. See *supra* note 204; Coffee, *supra* note 16, at 1303-04 (contending that “some obligation to play a gatekeeper role already exists” in this context but that requiring a noisy withdrawal would worsen the conflict of “subjecting the attorney to gatekeeping duties”).

253. This part was promulgated under Section 307 of Sarbanes Oxley Act of 2002 (15 U.S.C. §7245).

254. 17 C.F.R. § 205.2(e) (2004).

255. *Basic, Inc. v. Levinson*, 485 U.S. 224, 232 (1988).

256. See COFFEE, *supra* note 21, at 193.

257. *Id.* at 192-93; see also Kim, *supra* note 21, at 125 n.330 (explaining that “underwriters generally require both their own counsel as well as issuer’s counsel to release a certification”); *id.* at 125 (“For public offerings, corporate lawyers are regularly retained to conduct extensive factual investigations of the corporate issuer for

attorneys are often asked to write “true sales” opinions that in essence certify that the business transaction meets the requisite legal obligations.²⁵⁸ Although it appears that neither the SEC’s rules nor the *Model Rules of Professional Conduct* truly obligate lawyers to gatekeep,²⁵⁹ the role of corporate lawyers is arguably closer to that of a gatekeeper than an advocate.²⁶⁰ John C. Coffee points out that, as opposed to litigators who “generally are consulted on an *ex post* basis after trouble has arisen, in contrast, corporate lawyers tend to advise on an *ex ante* basis and accordingly envision themselves as ‘wise counselors,’ who gently guide their clients toward law compliance by pointing out the risks of alternative courses of action.”²⁶¹ As such, the SEC and the public depend on counsel to provide full and accurate disclosure.²⁶²

Fourth, many corporate clients want and need attorneys to play a gatekeeping role.²⁶³ According to David B. Wilkins, “[t]o survive and prosper . . . organiza-

the purpose of verifying the accuracy of the issuer’s registration statement filed with the SEC. This ‘due diligence’ has been operationalized into an elaborate set of standard verification procedures that law firms have developed over time.”).

258. *In re Enron Corp.*, 235 F. Supp.2d 549, 704-5 (S.D. Tex. 2002) (emphasizing the allegations that the attorneys issued fake true sales opinions “to effect many of the allegedly fraudulent transactions” as part of its decision to deny Enron’s motion to dismiss); *see also id.* at 658 n.91 (defining true sales opinions as “letters that law firms write vouching for the fact that the business transactions meet particular legal requirements”).

259. *See infra* Part II.D and Part III.B.2. *See also* COFFEE, *supra* note 21, at 230 (explaining that the SEC rules do not require the attorney to “make inquiry or diligently search for law violations” and that MR 1.13 “is triggered only by an ‘actual knowledge’ standard.”).

260. *See supra* note 190.

261. COFFEE, *supra* note 21, at 193 (referring to outside as opposed to inside counsel). Coffee, however, also questions whether outside counsel can play a gatekeeping role given today’s landscape. *See id.* at 194. Further, he states, although “inside counsel is uniquely positioned to specialize in preventative law,” the “organizational changes that have redefined legal practice” make it “difficult to be optimistic” that inside counsel can play the gatekeeping role. *Id.* at 195, 198. Therefore, he recommends what he calls an “intermediate position” wherein the lawyer would be “expected to insist upon accurate and full disclosure of material information.” *Id.* at 198 (recommending that “[t]he independent lawyer could be asked to monitor the corporation’s disclosures in a functionally similar fashion to the manner in which the independent auditor monitors the corporation’s financial compliance”); *see also id.* at 349.

262. As Kim points out, “depending on the context,” even “litigators often perform disinterested evaluations.” Kim, *supra* note 21, at 118 (explaining that this is true when litigators are retained to conduct internal investigations and in everyday litigation); *id.* (“Under the constraints of Rule 11 of the Federal Rules of Civil Procedure, the litigator certifies to the court that she has undertaken a disinterested evaluation of her client’s allegations when she signs a pleading or written motion.”).

263. *See In-House Counsel Report Card; What CEOs Really Think of Their Law Departments*, BUS. WEEK, May 15, 2001, available at <http://www.allbusiness.com/company-activities-management/operations-customer/6074118-1.html> (discussing an American Corporate Counsel Association study which found that corporate executives of corporations of 100+ employees want their lawyers to play the role of ethics advisor among other non-legal roles); Heineman, *supra* note 229, at 63-64 (explaining that corporations need general counsels to “be both an independent counselor and a business partner, to be both a lawyer and member of the management team,” and arguing for the lawyer-statesman ideal, but explaining that in order for general counsels to reach this ideal the company must have a “culture of integrity and compliance” like that of GE). Further, given the recent corporate scandals, a recent report developed by the Business Roundtable Institute for Corporate Ethics, found that corporations are more concerned about training and hiring “strong and ethical leaders.” *See, e.g.*, Dean Krehmeyer, *Teaching Business Ethics: A Critical Need*, BUS. WEEK, Oct. 25, 2007, available at <http://>

tions must also have legitimacy among all of their respective core constituencies both inside and outside the corporation. For companies, this means maintaining a strong culture of integrity that will allow the organization both to attract and retain top talent and to engender trust among consumers and regulators.”²⁶⁴ Despite—or perhaps because of—all of the recent corporate scandals, many corporate clients have—and want to uphold—core values when making decisions.²⁶⁵ That is, some corporate clients may not want to win by amoral tactics.²⁶⁶ Attorneys can and should tap into this value system to help guide corporate clients to the right media communications surrounding legal controversies. As Katherine R. Kruse has pointed out, “[w]hen a lawyer approaches legal representation as a problem-solving endeavor shaped around the client’s values, it helps to mitigate the distorting influence of legal interests and allow the client’s values to provide a natural check on legal interest maximization.”²⁶⁷ And when they don’t, “lawyers may actually encourage clients to press their legal interests further than the clients might otherwise be inclined to pursue them.”²⁶⁸

Admittedly, some clients will not want attorneys to play this counseling role. And it could be that corporate managers will be especially resistant to this type of counseling because they are guided by the goal of maximizing shareholder profit or worse, they may actually desire a lawyer that will help them violate the law under the radar.²⁶⁹ There is evidence, however, that not all corporate managers interpret their duty to shareholders in this way; even if they do, importantly, such loyalty in the context of disclosures to the media may be short-sighted given the

www.businessweek.com/bschools/content/oct2007/bs20071025_096141.htm (describing a report that urges business schools to focus on building ethics programs in order to meet corporations’ needs). The Business Roundtable Institute for Corporate Ethics is “an independent entity established in partnership with Business Roundtable, which is an association of CEOs of leading corporations and leading academics from America’s best business schools.” *Id.*

264. Wilkins, *supra* note 24, at 741.

265. *Id.* (paraphrasing Jim Collins as saying that “the more challenging the times the more important it is for a company to have a strong set of core values that it adheres to even in the face of economic uncertainty”); Richard Alan Nelson, *Business Ethics and Social Responsibility: Communicating in a Global Economy*, BUS. RES. YEARBOOK: GLOBAL BUS. PERSPECTIVES 621 (Jerry Biberman & Abbass F. Alkhafaji eds., 1999) (arguing that “integrity must be proactive. How an organization performs in a crisis as in good times is key to maintaining a reputation for quality”).

266. See Pepper, *supra* note 236, at 631 (explaining that the “lawyer may be wrong in assuming that winning by all lawfully available means is the task the client intended”); Simon, *supra* note 67, at 1130 (“[S]ome clients consider themselves bound by norms of legal merit and justice and are receptive to advice that it would be improper to pursue courses of action that, although arguably permissible, frustrate important legal ideals.”).

267. Katherine R. Kruse, *Beyond Cardboard Clients in Legal Ethics* 35 (Univ. Nev. Las Vegas William S. Boyd Sch. of Law Legal Studies Research Paper No. 09-02, 2008) available at <http://ssrn.com/abstract=1266342>.

268. *Id.* at 35; cf. Pepper, *supra* note 236, at 627 (explaining that the traditional rhetoric of the lawyer’s amoral role “minimizes the client’s moral input as well as the lawyer’s” moral input).

269. Cf. Pepper, *supra* note 236, at 628 (arguing that “if the client is a corporate manager, she may be bound by her own amoral professional role which perceives shareholder profit as its primary guide” and therefore may be influenced by a lawyer that helps them determine what violations of law will not be enforced).

long-term effects negative publicity can have on a corporation's financial well-being.²⁷⁰ Thus, the court of public opinion itself acts as an external limiting source even though the law, in this context, does not. This limitation along with the attorney's counsel may indeed be the right combination to ameliorate what Stephen Pepper calls the "moral vacuum of the 'amoral lawyer/realism' combination" that appears to be prolific in the court of public opinion.²⁷¹

And lastly, as mentioned earlier, investors, the SEC, and the general public should be able to expect accuracy and some level of candor from attorneys. If attorneys are going to continue to approve (albeit informally) all public disclosures around legal controversies (along with most other public disclosures), then third parties should be able to assume the information is accurate and communicated with integrity.²⁷² They should be able to assume that the attorney has, to some extent, certified the press release's veracity; that even without his or her signature, the silence equates to approval.²⁷³ As David B. Wilkins has pointed out, lawyers have made a "social bargain."²⁷⁴

[They] are given access to virtually every aspect of the legal framework. In addition, they receive special permission to engage in conduct (for example, keeping client confidences or helping known-to-be-guilty clients avoid punishment) that would subject ordinary citizens to sanction. In return, society has the right to expect that lawyers will not abuse their power so as to subvert and nullify the purposes of the rules.²⁷⁵

Although Wilkins makes this argument in the context of supporting his thesis that lawyers should obey the law, it is not inapposite here. Yes, the public expects lawyers, in certain contexts, to be adversarial and perhaps even to hide the truth.

270. See, Beardslee, *supra* note 1, at 1267-69.

271. Pepper, *supra* note 236, at 629.

272. People should be able to expect that when lawyers speak they are telling the truth. This presence of trust justifies to a degree an increased duty against misrepresentations in this arena. Scholars and judges have made similar arguments in other contexts. See, e.g., Donald C. Langevoort, *Half-Truths: Protecting Mistaken Inferences by Investors and Others*, 52 STAN. L. REV. 87, 98-99 (1999) (arguing that a broader half-truth doctrine should apply when there is a "high degree of trust" between the parties); Rubin, *supra* note 145, at 589 ("The lawyer must act honestly and in good faith. Another lawyer, or layman, who deals with a lawyer should not need to exercise the same degree of caution that he would if trading for reputedly antique copper jugs in an oriental bazaar. . . . [A]n ethic . . . is morally binding on the conscience of the professional and not merely a rule of the game adopted because other players observe (or fail to adopt) the same rule."); *In re Hiller*, 694 P.2d 540, 544 (Or. 1985) ("A person must be able to trust a lawyer's word as the lawyer should expect his word to be understood, without having to search for equivocation, hidden meanings, deliberate half-truths or camouflaged escape hatches. That trustworthiness is the essential principle embodied in [MODEL RULE 8.4(C)].")

273. SEC v. Nat'l Student Mktg. Corp., 457 F. Supp. 682, 713 (D.D.C. 1978) (explaining that the reason why the lawyer's silence constituted substantial assistance with securities violations is because the "silence . . . lent the appearance of legitimacy to the closing").

274. Wilkins, *supra* note 243, at 291.

275. *Id.* (internal quotations and citations omitted) (arguing that lawyers should have to obey the law).

But the legal profession, to some extent, has sold candor to the public at large.²⁷⁶ The ethics rules encourage lawyers to behave honestly and with integrity. And even if it is not a violation of the law or the narrow interpretation of the *Model Rules*, when lawyers help clients deceive the public about legal controversies, such behavior surely “subverts” and “nullifies” the spirit and purposes of the rules—especially if there is agreement that “advocacy” in the court of public opinion is a misnomer. That is, if a lawyer’s assistance in the court of public opinion is supposed to be something other than advocacy, something, perhaps, akin to counseling (as argued earlier in this paper), then the social bargain theory is even more persuasive.²⁷⁷ It is not surprising, therefore, that to some degree, courts are already expressing the sentiment with respect to public messages drafted or approved by attorneys. For example, the federal court handling the motion to dismiss in the Enron case emphasized that, in addition to drafting SEC filings (e.g., Form 10ks and Registration statements), Vinson and Elkins also “allegedly drafted and/or approved the adequacy of Enron’s press releases . . . that Vinson and Elkins knew were false and misleading,” statements upon which the public partly relied when making investment decisions.²⁷⁸

In sum, corporate attorneys—especially general counsels—can and should help corporate clients define the parameters of ethical advocacy in the court of public opinion.²⁷⁹ As Sarah Duggin has recently argued, “they can and should be held accountable for promoting integrity on the part of corporations and their constituencies and for fostering professional responsibility on the part of corporate lawyers.”²⁸⁰

276. Like the principal who is not as wary of the fiduciary as he would be of a stranger, the public, to a degree, trusts (or should be able to trust) that lawyers are not deceiving them. See Langevoort & Gulati, *supra* note 207, at 1656, n.56 (“The essence of a fiduciary relationship is that the fiduciary agrees to act as his principal’s alter ego rather than to assume the standard arm’s length stance of traders in a market. Hence the principal is not armed with the usual wariness that one has in dealing with strangers; he trusts the fiduciary to deal with him as frankly as he would deal with himself—he has bought candor.”). This argument is similar to one made in support of the duty to disclose. See, e.g., Langevoort & Gulati, *supra* note 207, at 1685 (“The duty [to disclose] is a function of factors such as the inequality in access to information between the parties and their initial expectations.”).

277. As mentioned earlier, the *Model Rules* themselves attempt to differentiate the lawyer’s responsibilities with respect to honesty and duties to third parties based on whether the lawyer is a zealous advocate or a negotiator or advisor. See *supra* notes 148, 245; MODEL RULES pmb. cmt 2. Although they do a poor job of delineating these roles and defining the responsibilities that attach, the *Model Rules* clearly envision a higher duty of candor and honesty to third parties in the non-advocate role. See *id.*

278. *In re Enron*, 235 F. Supp. 2d 549, 623, 656, 657 (S.D. Tex. 2002).

279. Although this Article defines gatekeeper slightly differently than does John C. Coffee, this section argues that the role of inside and outside corporate attorneys includes the primary elements that Coffee identifies as defining a gatekeeper, mainly, “(1) independence from the client; (2) professional skepticism of the client’s representations; (3) a duty to the public . . . and (4) a duty to resign when the attorney’s integrity would otherwise be compromised.” Coffee, *supra* note 16, at 1299. That said, Coffee, along with other scholars, might disagree with the contention that inside counsel can act independently. See *id.* at 1305-06.

280. Duggin, *The Pivotal Role*, *supra* note 60, at 992. Although outside the scope of this Article, these concerns and recommendations might also apply to negotiations and other direct communications by lawyers

B. OBLIGATIONS: HOW FAR IS TOO FAR?

As discussed above, norms and professional rules have not yet evolved in this area—at least not with respect to attorneys' conduct behind the scenes. Clear, aspirational standards are needed to guide attorneys both so that they can be aware of "how far is too far" and so that they can rein in a client that attempts to push the envelope too far.²⁸¹ For those corporate attorneys that want to do the right thing, clear, aspirational standards may help guide their decision-making and give them the "credibility and guts" Ben Heineman says they need "when they are playing the role of guardian of the company's integrity and reputation."²⁸² Such standards may enable corporate attorneys to advocate in the court of public opinion with a "professional conscience."²⁸³

with adverse parties containing material that is irrelevant to the merits of the case and is used to gain leverage. As a preliminary matter, however, it is not apparent that all the same justifications for trustworthiness exist in those other contexts. For example, a sham in the court of public opinion does not just fool the parties and work an individual injustice but it fools society as a whole. Moreover, in negotiations, there are times when statements that are false are allowed because they are not made as representations and the parties understand that the lawyer is not "vouching for an assertion." Hazard, *supra* note 194, at 182-83 (explaining that "a lawyer is allowed to say at certain stages of negotiations that his client will not offer or accept a specified sum, concession, or interest, when, in fact, the client is not intransigent"). In the court of public opinion, there is no way to "signal" when the attorney vouches for statements. *Id.* at 183. The attorney is likely assumed to have vouched for any statements made directly to the court of public opinion. Moreover, because lawyers approve all outgoing statements, the public may assume that all corporate client statements about a legal controversy are representations vouched for by the lawyer. Lastly, another key difference is that when private negotiations fail, the parties can proceed to trial and the misleading statements are not publicized. When the misleading statements are publicized, it may force the other parties' hand because a trial may no longer be a viable option.

281. Cf. Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197, 202 (1988) (arguing that without clearer guidelines prosecutorial overzealousness and misconduct will proliferate and that the remedy is "first, to define the prosecutor's role more precisely and second, to educate and support prosecutors in that role").

282. Heineman, *Caught in the Middle*, *supra* note 234.

283. *Rush v. Cavanaugh*, 2 Pa. 187, 1845 WL 5210 at *2 (1845) ("It is a popular but gross mistake to suppose that a lawyer owes no fidelity to any one except his client and that the latter is the keeper of his professional conscience."); see also Robert P. Lawry, *The Central Moral Tradition of Lawyering*, 19 HOFSTRA L. REV. 311 (1990) ("[I]nsofar as possible, lawyers should try to act in all of their professional dealings as a good person should act."). Such advocacy recognizes that lawyers have a duty to more than just the client; they should practice what has been referred to as "whole law" a standard going beyond "the minimally accepted conduct that avoids disbarment or other form[s] of bar discipline." Wilkins, *supra* note 82 (citing *Advice on How to Exploit Loopholes May Be Unethical*, OTS' Weinstein Says, 56 BANKING REP. (BNA) 616, 616 (1991)).

This is not to imply that lawyers can be accountable for failing to go farther than the recommended revisions to the rules. See W. Bradley Wendel, *Informal Methods of Enhancing the Accountability of Lawyers*, 54 S. C. L. REV. 967, 968 (2003) (agreeing that we can ask lawyers to be "guided by ideals" but contending that it is "a contradiction to speak of holding lawyers accountable for failing to do something that is . . . above and beyond a 'mere' duty"). That said, this Article contends that lawyers should be motivated by the "internally generated allegiance to public aspects of legal practice." Wilkins, *supra* note 82, at 866. This motivation is why some students go to law school and seek jobs that allow them to "place public commitment at least on par with the pursuit of private profit." *Id.* at n.296. See also William H. Simon, *Babbitt v. Brandeis: The Decline of the Professional Ideal*, 37 STAN. L. REV. 565, 568 (1985) (explaining that for some "the most important determinants of the professional's behavior are not self-interest and coercively enforced rules but the goals of perfecting and applying her discipline and, through that discipline, serving clients and society").

Because the court of public opinion is similar to a court of law, when participating in messaging or positioning of legal controversies in the media, lawyers should be guided by some of the principles of conduct that apply to formal court proceedings and, therefore, exercise restraint.²⁸⁴ They should consider how they would advocate in a court of law and not simply how they would facilitate the best legal PR strategy in the moment. Attorneys should continue to help their clients' manage legal PR and position legal controversies in a positive way. Nevertheless, they should not deceive the public so that clients succeed for reasons other than on the merits.²⁸⁵

Corporate attorneys should assume this role not only for the public good and the dignity of the profession but also because a corporation can be tried in the court of public opinion and this "trial" proceeds with almost no procedural safeguards and may not administer a fair resolution. Accordingly, the attorney should assume some responsibility for and try to rectify (or at least not contribute to) the procedural failures inherent in the court of public opinion.²⁸⁶ For example, because the judge is absent from the court of public opinion, the lawyer should do that which the Supreme Court has urged judges to do: "ma[k]e some effort to control the release of leads, information, and gossip to the press by police officers, [and] witnesses . . . [that are] inaccurate [or] lead[] to groundless rumors and confusion."²⁸⁷

284. See Cole & Zacharias, *supra* note 5, at 1647 ("[U]nless lawyers take great care, any effort to carry a case to the public risks damaging the public's trust in the profession. The lawyer's duty to serve clients does not eliminate the moral imperative to consider this concern.").

285. Clients succeed for reasons other than the merits all the time, and this may not in itself be entirely objectionable. However, manipulation of the truth in order to win despite the merits is objectionable. See Simon, *Ethical Discretion*, *supra* note 67, at 1099-1101. As Thomas D. Morgan points out, attorneys should counsel their clients about the full "range of possible consequences of each decision" because "clients do not necessarily face high stakes only when they are enmeshed in civil or criminal litigation." Morgan, *supra* note 148, at 446. Moreover, they can and should do so with the client's individual interests in mind. See *id.* That said, "[t]here are limits to measures that they may undertake on a client's behalf." *Id.* at 453 (explaining that professional rules and cases law require a lawyer to behave with respect to the interests of third parties and arguing that lawyers should "do not more harm to third parties than serving the client's legitimate interests").

286. Although for slightly different reasons, William H. Simon argues for just this type of "self-restraint" when attorneys have opportunities to aid their clients in ways that "do not facilitate decisions on the merits by the adjudicator." Simon, *supra* note 67, at 1102. He contends that in situations where the procedure "cannot be relied on to produce a just resolution," that the attorney should assume direct responsibility and try to rectify the procedural failure or substantive resolution. *Id.* at 1099-1101. He argues that his "discretionary approach" requires "an inquiry into whether the tactic is likely to contribute to the adjudicator's ability to decide the case fairly." *Id.* at 1101. Admittedly, Simon argues for ethical *discretion*, not a blanket rule. It is unclear, however, that there would ever be a situation that misleading disclosures would help the fair adjudication of legal issues. Even if that is not correct, as discussed, misleading behavior by attorneys has other negative consequences, such as damage to the profession's reputation and faith in the justice system as a whole. Moreover, this Article's approach, like Simon's "discretionary ethics" approach, is "grounded in the lawyer's professional commitments to legal values" not in non-legal, personal morality. *Id.* at 1114-16. This is because the legal system recognizes and values truth and honesty by lawyers.

287. Sheppard v. Maxwell, 384 U.S. 333, 359 (1966); see also Simon, *supra* note 67, at 1102 ("[F]ar from collapsing the lawyer's role into the judge's, ethical discretion suggests a lawyer role that complements the

The examples of attorneys helping their clients mislead the public or corrupt legal proceedings (described in earlier parts of this Article) should be out of bounds. There should be rules prohibiting attorneys from knowingly making or substantially assisting their clients in making misleading, deceiving statements and half-truths about legal matters—whether it is to affect settlement negotiations or legal proceedings, prevent a law suit, or taint a jury. Attorneys should be penalized for knowingly aiding or abetting disclosures that have the power and “substantial likelihood to materially prejudice an adjudicative proceeding” regardless of whether they believe the controversy will make it that far.²⁸⁸

Specifically, under this Article’s proposed regime, the following disclosures would be barred (or subject the attorney to sanctions) if the attorney approved, made, or helped the client make the disclosure:²⁸⁹

- Statements that misrepresent the charges, facts, or law.²⁹⁰
- Statements that mischaracterize clients’ ability to defend themselves before a tribunal or claim an abuse of government power by state actors without support.²⁹¹
- Wholly unsupported propaganda that, for example, claims there are factual or legal errors in the opposing party’s case that do not contain any real allegations (let alone evidence) of errors.

None of this is to say that attorneys should refrain from managing legal PR for

generally accepted understanding of the judge’s role. The lawyer assumes substantial responsibility for vindicating substantive merits to the extent that the judge cannot . . . In other situations . . . [she] facilitate[s] the judicial role.”).

288. True, there is not consensus on what constitutes a statement that is substantially likely to materially prejudice an adjudicative proceeding. Yet this is the current standard in the rule and the point here is that this standard should not be limited to matters that will *actually* be adjudicated. For further specifics, see *infra* Part IV.C.1 presenting one possible re-drafting of Rule 3.6.

289. All of these acts mirror disclosures made by Arthur Andersen. See Brickley, *supra* note 7, at 938-44. Presumably, the attorneys approved, made, or counseled their client to make the disclosures.

290. For example, a statement “*there was no obstruction of justice because there is no proceeding to obstruct*,” which would be accurate if the client had been charged under one statute but is inaccurate under the statute actually charged, would be prohibited. Similar tactics were used to support Kaye Scholer. For example, the portion of Geoffrey C. Hazard Jr.’s statement that was released to the public asserted that “Kaye Scholer did not have a duty to disclose weaknesses in Lincoln’s position” when “not one of the many charges was based on failure to disclose.” Simon, *The Market For Bad Legal Advice: Academic Professional Responsibility Consulting As An Example*, 60 STAN. L. REV. 1555, 1573, 1574-75 (arguing that third-party opinions should be candid and accessible and that portions should not be distributed selectively). Similarly, some of the conduct by Kaye Scholer’s lawyers would be deemed in violation of this standard. For example, when lawyers argued that accounting figures showed “managerial skill” even though they were “fraudulently inflated,” they “impl[ied] that they have no strong reason unknown to the recipient to doubt that the figures are legitimate, and that’s the misrepresentation.” Simon, *supra* note 113, at 257.

291. For example, disclosures that state that “*the government did not give the client a chance to present its case to the grand jury*” would violate these provisions if the lawyers did not attempt to do so until the night before indictment, refused to give any supporting information to show why the government should use its discretion to allow it to present evidence, and then later admitted that the only evidence they had would actually be irrelevant.

their corporate clients. To the contrary, as contended in the first installment, attorneys should be helping clients manage legal PR in the court of public opinion both before and after litigation ensues, and the profession should support attorneys in this emerging, enlarged role. Nevertheless, handling PR around legal matters and approving general messaging can present a slippery slope, i.e., attorneys need not go *that* far before they have gone too far. Clearer, more aspirational guidelines will, hopefully, help halt the slide.

C. PRELIMINARY PRACTICAL PROPOSALS

This Article is mostly concerned with defining how attorneys should advocate ethically in the court of public opinion and less concerned with how ethical rules should be written or enforced. The *Model Rules of Professional Conduct*, as written, are not realistic for corporate practice with respect to public relations; they facilitate overzealous conduct that is inconsistent with professionalism (and the justifications for the rules themselves). Understanding that what lawyers *should* do is different than what could actually be enforced, this next part only attempts to sketch a *possible* reinforcement regime—one that regulates attorneys' conduct but, more importantly, nurtures the desired norms.²⁹² If the profession does not create clear guidelines and educate lawyers on how they should manage legal PR for corporate clients, even well-meaning lawyers may succumb to pressure to mislead the public. Thus, in addition to recommending some revisions to strengthen and clarify the *Model Rules of Professional Conduct* and the Federal Rules of Civil Procedure, this part recommends that judges and law professors educate and train students and lawyers in an effort to build consensus around the values that underscore the rules.²⁹³ Without such commitment, any regulatory model, even one that relies on both formal and informal mechanisms

292. See Moore, *supra* note 141, at 924 (“[A] professional code of ethics serves both ideological and regulative functions.”); Wilkins, *supra* note 24, at 749 (“Enforcement as well as aspiration, therefore, must be a part of any plausible regime of professional ethics.”) (citing Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1981)).

293. See Rostain, *supra* note 64, at 1340 (“For regulation to be effective, it needs to be undergirded by widespread commitments among lawyers to the values reflected in the regulatory enterprise.”); Wilkins, *supra* note 82, at 871 (“Because of the financial and other rewards of a cutting edge corporate legal practice, the fear of liability in this context is not sufficient to deter even clearly questionable conduct, let alone legit advice that might be made to appear questionable after the fact.”); *id.* at 878 (explaining that there is a “danger of inability to exert any moderate influence on a legally sophisticated client”). Further, the combination of formal and informal mechanisms helps enhance accountability. See Wilkins, *supra* note 82, at 801 (concluding that “a system of multiple controls” is optimal and “compatible with the proper understanding of professional independence”); Wendel, *supra* note 283, at 983 (“[L]egal and nonlegal sanctions are complementary methods of enhancing the accountability of lawyers, not exclusive means of regulation. Nonlegal sanctions are particularly effective where a violation of a norm would be costly to prove to a third-party decisionmaker—as in cases where judgment of a violation is highly contextual, fact-specific one, or depends on impressionistic information.”).

to deter lawyerly misconduct, will be inadequate.²⁹⁴ To that end, the following section sketches out some possible revisions to the current rules and practices.

1. MODEL RULE 3.6

Model Rule 3.6 should be re-titled and revised as follows:

RULE 3.6: Publicity About Legal Matters (changes are underlined)

(a) A lawyer who is participating or has participated in the investigation, litigation, or analysis of a legal matter shall not make an extrajudicial statement or substantially assist his client in making an extrajudicial statement²⁹⁵ that the lawyer knows or reasonably should know will be disseminated by means of public communication and

(1) knows or reasonably should know would have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter regardless of whether an adjudicative proceeding currently is or will be pending,²⁹⁶ OR

(2) knows or reasonably should know is groundless or would mislead or deceive others about the legal controversy.²⁹⁷

294. See Rostain, *supra* note 64, at 1276 (examining “the shortcoming of a regulatory model of professional responsibility that relies exclusively on the imposition of sanctions to control lawyers’ conduct. . . . dependence on formal mechanisms to detect and deter wrongful conduct by lawyers [and] . . . [d]isciplinary systems, supervised by state supreme courts”); *id.* at 1277 (“[A] regulatory approach is inadequate because it overlooks the centrality of internalized normative commitments in preserving the legal framework.”); Moore, *supra* note 140, at 18-20 (arguing for “effective ethical training in law schools” because “the format of an ethics code is no longer adequate to inspire, sensitize or even give useful guidance in the subtle, often controversial dilemmas now confronting the legal profession”).

295. This rule could be limited to “statements of law or fact.” For example, misleading advertising that is a statement of fact (i.e., specific) is prohibited but misleading general claims that are mere puffery (i.e., that are very general) are not. See *Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1053 (9th Cir. 2008) (“A statement is considered puffery if the claim is extremely unlikely to induce consumer reliance. . . . The difference . . . rests in the specificity or generality of the claim.”). If such a limitation were made, however, the prohibition would not apply to “evidence, indications, portents, opinions, possibilities, or even probabilities of which the lawyer is aware.” Hazard, *supra* note 194, at 189 (providing this definition). Moreover, it would allow puffery which some consider “lying.” Alfani, *supra* note 134, at 266-67 (explaining that puffery is allowed in negotiations and can equate to lying). This would, therefore, not deter many misleading messages.

296. The current rule states uses the word “will” instead of “would.” It implies an *ex post* approach. This language clarifies that an attorney can be disciplined even if the case settles.

297. This recommendation lies somewhere in between the “substantial participation standard” and the “creator standard” used by courts to hold secondary actors (such as attorneys) primarily liable for SEC violations. See *supra* note 204 describing standards. The key difference between this and the substantial participation standard is that it is not necessary that the “statements rightfully could be attributed to [the attorney].” *Cosenza*, *supra* note 190, at 21; see also *In re Software Toolworks Inc.*, 50 F.3d 615, 628 (9th Cir. 1994); *In re Enron Corp.*, 235 F. Supp. 2d at 584-85 (citing *Howard v. Everex Systems, Inc.*, 228 F.3d 1057, 1061 n.5 (9th Cir. 2000)); *In re ZZZZ Best Securities Litigation*, 864 F. Supp. 960, 967-68 (C.D. Cal. 1994). Instead, as with the creator standard, it is sufficient that the lawyer “could be fairly said to be the author or co-author of the statement and the other requirements of primary liability are satisfied” even when “the attorney did not sign the documents and was never known to the investor as a participant in the document’s creation.” *In re Enron Corp.*, 235 F. Supp. 2d at 588 (quoting the SEC’s proposal). This recommendation is different than the “creator” standard because it does not require “scienter.” *In re Enron Corp.*, 235 F. Supp. 2d at 588, *Klein v. Boyd*, 1998 U.S. App. LEXIS 4121 at ¶ 90, 136, at ¶ 90, 318. It is a violation even if the lawyer does not know

New Comment: If the client seeks to develop disclosures that would be incongruent with the spirit of this rule, the attorney must counsel the client against this course of action.

This revision more aptly and specifically addresses typical attorney conduct (which is usually behind the scenes) and it makes the application of Rule 8.4(a) in this context clearer.²⁹⁸ It clarifies that the attorney must treat as prohibited any speech, or *client assisted* speech, that *would* inflame a jury—even if the purpose of the communication were to avoid adjudication in the court system—or reach a plea bargain. Importantly, it more specifically defines “misleading” than both Rules 8.4(c) and 4.1 do, and, moreover, does not restrict the prohibition to “material” facts, as do the current *Model Rules* and 10b-5. If the statement about a legal controversy or issue is a misleading insinuation or half-truth that is technically true but misleading or deceiving, it is barred. Thus, it enables the attorney to look to one rule when making a decision about public disclosures. Furthermore, it does not require an inquiry into knowledge or “knowing” assistance. That is, if a reasonable person in the lawyers’ shoes would recognize the statement’s potential to mislead, the lawyer could then be disciplined.²⁹⁹

but “reasonably *should* know” that the statements are deceitful. Other authors have made similar contentions about the *Model Rules*. Marvin Frankel argued that the *Model Rules* should not merely proscribe fraud. *See* Frankel, *supra* note 156, at 1057 (making a somewhat analogous rule recommendation with respect to litigation: “In his representation of a client, unless prevented from doing so by a privilege . . . a lawyer shall: . . . (b) Prevent, or when prevention has proved unsuccessful, report to the court and opposing counsel the making of any untrue statement by client or witness or any omission to state a material fact necessary in order to make statements made, in the light of the circumstances under which they were made, not misleading”).

298. Admittedly, these rules do not differentiate between the lawyer who assists the client’s speech and the lawyer who speaks directly to the public, despite the fact that the latter may be more egregious and have an even greater impact on the reputation of the legal profession. It does not do so because (1) corporate attorneys typically work behind the scenes; (2) the proposed rule is easier to prove when the attorney is the direct speaker; and (3) additional sanctions already exist to punish lawyers who ruthlessly manipulate the media directly, e.g., through public and peer disdain. *See* Cole & Zacharias, *supra* note 5, at 1627-28 (commenting on the negative perception of the attorneys’ public statements in the OJ Simpson case); Wolfram *supra* note 82; Wendel, *supra* note 283, at 875 (contending that “an active trade press” that highlights inappropriate lawyer or law firm conduct can be more effective than court imposed sanctions); Moore, *supra* note 141, at 924 (the regulatory function of codes is not limited to the use of coercive sanctions like attorney discipline, but also includes “both the ‘internal sanction of professional conscience’ and the ‘informal external sanction of peer criticism’ to promote compliance with professional norms” as part of the socialization of lawyers and other professionals); *see also* Moore, *supra* note 140, at 16 (questioning whether the content of “the recently enacted ethics codes are the most appropriate means of pointing lawyers in the right moral direction”).

299. This is akin to the intermediate standard of liability defined in William H. Simon’s article on Kaye Scholer. Simon, *supra* note 113, at 257 (explaining that lawyers, under the intermediate standard, would not be excused from liability for misrepresentation simply because “some statements might be true in light of some interpretation . . . if the lawyers knew—or under some authority, were simply indifferent to the possibility—that the regulators would understand the statements in a misleading way, the statements were misrepresentations”). Having an objective standard is important because, as it has been pointed out, “claims against lawyers most often fail for want of proof that the defendants understood that the statements were misleading. Nonclient claimants have little access to relevant evidence, most of which is shielded by confidentiality commitments.” *Id.* at 252. Note, the level of scienter required is lower than that of 10(b)(5). *See* Sundstrand Corp v. Sun Chem.

Lastly, the proposed rule makes clear in the new comment that silence or inaction can equate to assistance (like 10b-5). The lawyer, although not forced to withdraw if unsuccessful, must at least attempt to dissuade clients from issuing public statements that thwart the rule.³⁰⁰ These proposals fit nicely with those made in the first installment that recommend revising Rules 2.1 and 5.7 to raise awareness of the importance of managing legal PR for corporate clients and the application of the rules to this type of service.³⁰¹ Furthermore, they address the different potential contexts: a) when no legal action yet has been taken; b) when a legal matter is under investigation; and c) when a case has been filed or charges brought. The next two recommendations, although not as comprehensive, focus only on the last context: when a case has been filed or charges brought.

2. FEDERAL RULE OF CIVIL PROCEDURE 11

Rule 11 of the Federal Rules of Civil Procedure should be utilized to greater constrain attorneys' advocacy in the court of public opinion around matters that have been filed in a court of law.³⁰² True, many courts resist application of Rule 11 standards and, therefore, suggest using this rule in a very limited fashion. Rule 11, however, could be revised to instill the spirit behind Rules 3.3 and 3.4. For example, the definition of "improper purpose" could be more specifically explicated to include use of pleadings to mislead, confound, or dissuade the court of public opinion.³⁰³ That is, if a litigant does not have a good reason to believe a fact is true or relevant, or has not "stopped and thought" before making unsubstantiated (or unsubstantiatable) contentions in pleadings, this may demon-

Corp., 533 F.2d 1033, 1045 (7th Cir. 1977) (defining necessary conduct as "[h]ighly unreasonable conduct involving not merely negligence but an extreme departure from the standards of ordinary care and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it").

300. This is consistent with securities violation cases that have found lawyers' culpable in assisting securities violations by remaining silent. *See, e.g.*, SEC v. Nat'l Student Mktg. Corp., 457 F. Supp. 682, 687, 713 (D.D.C. 1978) (contending that "at the very least" the lawyers should have spoken to their clients to attempt to prevent them from closing an illegitimate deal).

301. Beardslee, *supra* note 1, at Part IV.

302. Other scholars have demonstrated that when federal courts define appropriate attorney conduct under a federal rule of procedure or evidence, they "exert . . . a form of persuasive federalism" that influences state courts. *See, e.g.*, Judith A. McMorrow, *Rule 11 and Federalizing Lawyer Ethics*, 1991 BYU L. REV. 959, 970-84 (1991) (providing examples and identifying risks from federalizing ethics); McMorrow, *supra* note 76, at 48 (explaining that a rule of civil procedure may be a better avenue for regulation because courts apply professional conduct rules with discretion). However, this recommendation may also be applied to the equivalent rule of different states.

303. Arguably, Rule 11 already prohibits this because it allows sanctions for pleadings that are "presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." FED. R. CIV. P. 11(b)(1).

strate improper purpose.³⁰⁴ Additionally, Rule 11 could include a remedial measure like that in Rules 3.3 and 3.4.³⁰⁵ It could require a lawyer to make a formal “publicized” amendment to pleadings for which evidentiary support is not later obtained or for facts asserted that are later ruled irrelevant.³⁰⁶ Currently, a lawyer need only not pursue the unsubstantiated contention. Forcing the attorney to publicly amend the pleadings would deter attorneys from the practice of leaking otherwise unsubstantiated or even prohibited information to the public by incorporating it into preliminary pleadings. If pleadings simply sat in the courtroom, such a requirement would be unnecessary since they would be tossed out under the new, more stringent guidelines of Federal Rule of Civil Procedure 12(b)(6).³⁰⁷ Yet attorneys use these complaints to justify public disclosures, which often wind up posted on the Internet moments after filing. Admittedly, these changes may not remediate the problem fully,³⁰⁸ but revisions that must be made public (to the world and the lawyer’s peers), combined with judicial sanctions, may have a deterrent effect because they negatively affect the lawyer’s reputation.³⁰⁹

According to the advisory committee to the Federal Rules of Civil Procedure, Rule 11 was designed to “discourage dilatory or abusive tactics,”³¹⁰ to give judges more power over attorney conduct,³¹¹ and to “retain[] the principal that attorneys . . . have an obligation to the court to refrain from conduct that frustrates”³¹² Rule 1 of the Federal Rules of Civil Procedure—the “just, speedy, and inexpensive determination of every action.”³¹³ If the preliminary results of

304. FED. R. CIV. P. 11 advisory committee’s note (1993) (“The rule continues to require litigants to ‘stop-and-think’ before initially making legal or factual contentions.”). Rule 11 is concerned with attorneys insisting on a position before the court.

305. Rule 3.3 requires the attorney take a remedial measure, such as withdrawal, if a lawyer “offer[s] material evidence in the belief that it was true” but “subsequently come[s] to know that the evidence is false.” MODEL RULES R. 3.3 cmt. 10. The remedial measure must “undo the effect of the false evidence.” *Id.*

306. Attorneys would have to amend the pleadings and publish this amendment. This requirement is not inconsistent with the new rules around the more specific pleading requirements for 12(b)(6) motions. *See Bell Atlantic v. Twombly*, 550 U.S. 554, 559 (2007) (ruling that 12(b)(6) alleged misconduct must not be “merely conceivable” but “plausible” and taking into account the “enormous expense of discovery” that will cause “costs-conscious defendants to settle even anemic cases before reaching summary judgment”).

307. *Id.*

308. Impact from legal PR, however, happens instantly and ceasing the pursuit of a certain position is not ameliorative.

309. McMorrow, *supra* note 302, at 973 (“Rule 11 sanctions also affect an attorney’s reputation.”); *see also supra* note 299. This revision has limited reach since Rule 11 only applies to attorneys working on filed cases, but it can be used retrospectively. Rule 11 could also be used against an attorney who does not manage legal PR for his client when he should. Wilkins, *supra* note 82, at n.171 (“In theory, therefore, nothing prevents a court from using Rule 11 to warn clients about lawyer underinvestment.”).

310. FED. R. CIV. P. 11 advisory committee’s note (1983).

311. McMorrow, *supra* note 302, at 959-60 (explaining that the Supreme Court amended Fed. R. Civ. P. 11 in 1983 to give federal district courts “express authority to take greater control over the conduct of attorneys in federal court”).

312. FED. R. CIV. P. 11 advisory committee’s note (1993).

313. FED. R. CIV. P. 11.

the PR Study are accurate and the court of public opinion is an alternate-court, then utilization of Rule 11 in this manner is consistent with its purposes.³¹⁴

3. FEDERAL RULE OF CIVIL PROCEDURE 12F—MOTIONS TO STRIKE³¹⁵

Although F.R.C.P. 12(f) motions to strike are often reserved to make a substantive law challenge to a part of a pleading, they are also appropriately used to attempt to remove irrelevant or prejudicial allegations from pleadings.³¹⁶ Courts have granted such motions when allegations are nasty, “unnecessary, [or] argumentative,” and when they are likely to prejudice a jury.³¹⁷ Although 12(f) motions can be made *sua sponte* by a court,³¹⁸ this is not often done and, as mentioned earlier, 12(f) motions appear to be generally disfavored.³¹⁹ Since attorneys purposefully put unnecessary, misleading, or derogatory information into pleadings because they can repeat what is in the public record, increasing the use of 12(f) could help close that loophole. Given that what is said publicly affects settlement negotiations and whether a legal controversy ever makes it to a jury, the court should apply the standard recommended in this Article to pleadings. That is, a court should strike as prejudicial any communication in the pleadings that a lawyer knows or reasonably should know *would* have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter, regardless of whether an adjudicative proceeding currently is or will be pending.³²⁰

4. EDUCATION

Even with clearer rules, it is important that law schools educate law students about the importance of managing legal PR for clients,³²¹ the ethical rules that

314. *But see* Wendel, *supra* note 283, at 967 (discussing the flaws of formal legal sanctions, i.e., that they can be over or under inclusive, easily manipulated, expensive, time-consuming, and “create substantial administrative burdens Judges dislike being bogged down in satellite litigation over sanctions motions and are rightly suspicious of the tactical misuse of procedural rules, such as Rule 11”).

315. The author would like to thank Kate Webber, Visiting Associate Professor of Law at Stetson Law School, for planting the seed for this recommendation.

316. FED. R. CIV. P. 12(f) (“The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.”).

317. *See, e.g.,* Hughes v. Kaiser Jeep Corp., 40 F.R.D. 89, 93 (D.S.C. 1966) (striking parties’ allegations that car was a “death trap”).

318. FED. R. CIV. P. 12 f (1).

319. *See, e.g.,* Fuchs Sugars & Syrups, Inc. v. Amstar Corp., 402 F. Supp. 636, 637 (S.D.N.Y. 1975) (“Motions to strike are not favored and are granted only if the challenged matter clearly has no bearing upon the issues of the action.”). *See also supra* note 97 and accompanying text.

320. *See supra* recommended revisions to Rule 3.6, Part IV.C.1.

321. *See* Beardslee, *supra* note 1, at Part IV.B (detailing how revisions to the *Model Rules* can educate and support lawyers in this new role).

apply, and the ethical issues (and risks) around doing so.³²² Such education helps nurture the norms and entrench the commitment to the spirit behind the rules. More than that, law schools should attempt to teach students how to play (and balance) the roles of counselor, gatekeeper, and strategic partner for corporate clients.³²³ This could be done in the traditional Professional Responsibility class but, ideally, should include use of real-world hypotheticals that enable the students to role-play situations between lawyers *and* non-lawyer corporate executives.³²⁴ Moreover, although it is contentious, this Article maintains that law schools should at least present the view that lawyers have the opportunity to counsel their clients and advocate with a “professional conscience” and that this view may vary by context.³²⁵

Education on the duties lawyers owe to constituencies other than clients should not be limited to law school. Thus, this Article recommends involving judges in educating and establishing norms of attorney conduct in this area.³²⁶ This is consistent with some judges’ view of their role as it relates to regulating attorney professionalism. Although some commentators treat the “officer of the court”

322. Susanne A. Roschwalb & Richard A. Stack, *Introduction*, LITIGATION PUBLIC RELATIONS: COURTING PUBLIC OPINION vii, xvi (Susanne A. Roschwalb & Richard A. Stack eds., 1995) (arguing that PR specialists and lawyers need to learn to work more collaboratively and that courses in law school can communicate legal restraints and appropriate codes of conduct).

323. The legal profession’s rules of conduct and education focus on the lawyer as litigator or advocate (or even negotiator). Arguably, however, more emphasis should be placed on the other roles lawyers play in the real world for their clients like counselors and gatekeepers. See Rutledge R. Liles, *Lawyers as Counselors: The Conflict Between Ordinary Morality and Practical Reality*, 42 FLA. L. REV. 429, 479 (1990) (explaining that lawyers spend “substantial time” counseling clients on legal issues and “business and personal matters” yet “lawyers generally lack any formal education in the art of counseling”).

324. Some schools include courses that do this. For example, Harvard Law School has just initiated a new Problem Solving course for one-Ls during the winter term. The author of this Article incorporates such exercises into her Legal Profession course.

325. Other scholars have argued that law schools should present similar principles “as an aspiration to which all members are expected to adhere.” See, e.g., Simon, *Bad Legal Advice*, *supra* note 290, at 1574 (“[L]aw schools in particular, should elaborate their principles of candor and openness to apply to quasi-third party opinion practice.”). Nancy Moore argues that “an intense educational effort” is needed “to ensur[e] that lawyers understand their legal obligations” and “develop awareness of the importance of ethical principles and moral reasoning in resolving the myriad of problems that arise in the daily practice of law.” Moore, *supra* note 140, at 19-20. She contends that this effort should “begin in the law schools” but “extend not only to continuing legal education programs” but also to “the law firms themselves.” *Id.*

326. See Judith A. McMorow, *supra* note 76, at 6-7 (“The strengthening of sanctions available through the Federal Rules of Civil Procedure has reinforced the understanding of federal courts as an appropriate body to establish norms of attorney conduct.”); *id.* at 24 (“Judges create norms both through their interpretation of the various rules (procedures and ethics) and through informal actions”). But see Fred C. Zacharias & Bruce A. Green, *Federal Court Authority to Regulate Lawyers: A Practice in Search of a Theory*, 56 VAND. L. REV. 1303, 1345 (2003) (arguing that federal power to regulate lawyers is “a practice in search of a theory”). Even Zacharias and Green accept, however, that there is an historic notion among lawyers and judges “that identifiable standards for professional conduct exist and that these are to be determined by the judicial branch.” Zacharias & Green, *supra* note 141, at 12.

concept as "tautological," some courts still emphasize it today.³²⁷ They "at times view . . . the role as an independent source of lawyer obligations"³²⁸ and emphasize the lawyers' role in "maintaining the image of the profession as a whole."³²⁹ This Article urges judges to do more of this, to utilize informal mechanisms to mold attorneys' management of legal PR. In court or in a case opinion, a judge can critique attorney behavior that is borderline or impermissible.³³⁰ A judge can also consider prior misconduct in other cases.³³¹ As scholars have contended in other contexts, such involvement by judges may create "a new era of court guidance" that begins to build "idealist corporate practice."³³²

D. POTENTIAL CONCERNS

Briefly discussed below are some of the concerns that might be raised by this recommendation.

1. THE FIRST AMENDMENT

The most obvious objection to the theoretical and practical recommendations of this Article is that they violate the First Amendment. Because legal

327. See *supra* note 159. Arguably, given all the recent corporate scandals involving lawyers, emphasis on the appearance of impropriety should increase and perhaps even be re-incorporated back into the *Model Rules*.

328. Zacharias & Green, *supra* note 141, at 50-51 (providing examples of when courts have required lawyers "to volunteer information helpful to the adversary or ensure fair settlements even when doing so might require the revelation of client confidences").

329. *Id.* at 12.

330. Scholars generally concur that judicial reprimands are a viable informal mechanism to control attorney misconduct. See, e.g., McMorow, *supra* note 76, at 9, 39, 42 (referring to courts' informal mechanisms and suggesting that courts do sanction attorneys this way, but that "judges have ample reasons not to comment on a lawyer's conduct in written opinions"); Wendel, *supra* note 283, at 976 ("In the appropriate case, though, a good judicial spanking may be more effective than all the professionalism and conferences in the world at educating lawyers about the consequences of unprofessional conduct."); *id.* at 975-76 (urging judges to "be more aware of the importance of reputation" to "identify unethical conduct in opinions"); WOLFRAM, *supra* note 82, at 22 ("The most widely effective form of regulation of lawyers . . . [is] the network of informal sanctions that are brought to bear against lawyers who offend accepted norms of professional behavior Those include sanctions such as negative publicity and other expressions of peer disapproval, the cutoff of valuable practice opportunities . . . , denial of access to centers of power and prestige . . . , and preclusion from judicial posts."). Although empirical research should be done to determine the efficacy of such tactics, much has been written about the importance of an attorney's reputation. See, e.g., Wendel, *supra* note 283, at 970-79 (discussing the importance of reputation to social capital for lawyers that work repeatedly in one city and explaining how even large towns like Boston and Chicago seem small when it comes to reputation among lawyers and judges). Scholars, in other contexts, have argued that "shaming" is an alternative to discipline to enforce integrity and candor. See, e.g., Simon, *Bad Legal Advice*, *supra* note 290, at 1574.

331. In one case, a court approved using a lawyer's past misconduct with respect to discovery abuse to determine whether to impose sanctions. *Thibeault v. Square D Co.*, 960 F.2d 239, 246 (1st Cir. 1992) ("We rule, therefore, that a trial court may properly give some consideration to a lawyer's behavior in previous cases when determining whether to accept the attorney's explanation of why he failed to comply with Rule 26(e) in a current case.").

332. Frankel, *supra* note 61, at 368.

proceedings involve matters of public and political policy,³³³ the current assumption is that the ethical obligations of attorneys should be grounded in the ethos of the marketplace of ideas.³³⁴ That is, any restrictions on attorneys' speech (like those in the *Model Rules*) should be analyzed by balancing the First Amendment right to free speech against the parties' right to a fair trial and the state's interest in the administration of justice.³³⁵ For example, with respect to Model Rule 3.6, the Supreme Court in *Gentile v. State Bar of Nevada*³³⁶ determined that "lawyers in 'pending cases' may be subject to ethical restrictions on speech which an ordinary citizen or the press could not be, because membership in the bar is a privilege burdened with conditions, and because such a restriction may be necessary to ensure a fair trial."³³⁷ Some scholars contend that the Supreme Court did not apply strict scrutiny in *Gentile* and that, if it had, the prohibitions would not have survived.³³⁸ These arguments, however, are outside the scope of this Article. Instead, the main contention here is that the assumption that regulation of attorneys' speech in the court of public opinion should be analyzed relevant to the principles underlying the marketplace of ideas may not be appropriate. That is, First Amendment jurisprudence should not *unequivocally* bar heightened restrictions on attorneys' advocacy in the court of public opinion in light of the competing societal values at stake.³³⁹

Importantly, the statements this Article is concerned with are those statements made or assisted by attorneys about legal controversies—not statements made by journalists, bloggers, or corporate clients without attorney assistance (although

333. MODEL RULES R. 3.6 cmt. 1 (2009) ("[T]he subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy").

334. See Bernabe, *supra* note 150, at 448 n.6; *supra* note 156 and accompanying text.

335. See, e.g., Moses, *supra* note 5, at 1815 (explaining that the rules "are geared to jury trials and view the problem of extrajudicial publicity almost solely as a balancing act between attorney First Amendment rights to fair speech and litigant Sixth Amendment rights to a fair trial"). But see Cassidy, *supra* note 25, at 7-8 (intimating that the Supreme Court did not apply strict scrutiny to regulations of lawyers speech in *Gentile* and that Model Rules 3.6 and 3.8 may not survive strict scrutiny in some contexts); Monroe H. Freedman & Janet Starwood, 29 STAN. L. REV. 607, 618 (1977) (arguing that "the sixth amendment guarantees a fair trial to the defendant, not to the state, and the defendant's exercise of first amendment rights poses no threat to that guarantee"). Cf. Judith L. Maute, "In Pursuit of Justice" In *High Profile Criminal Matters*, 70 FORDHAM L. REV. 1745, 1756 (2002) ("Wish as we might for a way to avoid intense media coverage of high profile criminal cases, the First Amendment broadly protects public access to information and limits government efforts to restrict what can be said."). Courts may be more apt to allow restrictions on speech in criminal as opposed to civil cases. See, e.g., *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 258 (7th Cir. 1975).

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

337. Cassidy, *supra* note 25, at 7-8 (paraphrasing the Supreme Court's opinion).

338. See *Gentile*, 501 U.S. at 1030.

339. Susan Henley Duncan makes a similar argument in support of her recommendation to adopt a modified English contempt statute to regulate destructive pretrial publicity by journalists and bloggers. Duncan, *supra* note 25, at 790-91. The societal interests that she argues are not adequately accounted for include the individual's right to a fair trial and the right to privacy. *Id.* at 756.

they may also be problematic in their own right).³⁴⁰ As will be explained below, lawyers play a special role in society and, therefore, statements developed by lawyers are a cause for more concern. Misconceptions around legal controversies that are planted by or aided by attorneys in the court of public opinion lead to the following consequences: a) they may not be counteracted by the free exchange of ideas; and b) they may threaten key societal values that are often used to justify restrictions on speech in the marketplace of ideas. The next sections address each potential consequence.

a. Entrenchment of Misleading Perceptions

Obviously, there are some concerns around imposing additional restrictions on attorneys' speech in the court of public opinion beyond what is already prohibited by the *Model Rules*.³⁴¹ As Sunstein points out, "if there is a 'marketplace of ideas,' we should be especially concerned about the risk of chilling effect, because it will undermine processes that will ultimately produce the truth."³⁴² Yet the Supreme Court's premise that there is a "societal interest in the fullest possible dissemination of information" assumes that accurate information will prevail when this is not the case.³⁴³ As discussed earlier, the First Amendment protections afforded in this marketplace may not meet their objectives to uncover

340. Scholars have recommended imposing ethical rules and/or enacting legislation to restrain members of the media directly. *See generally, e.g.,* Mark J. Geragos, *The Thirteenth Juror: Media Coverage of Supersized Trials*, 39 LOY. L.A. L. REV. 1167 (2006) (recommending that the United States adopt legislation modeled after the British Contempt of Court Act of 1981 to sanction media sensationalism that obstructs justice). A recommendation along these lines is outside the scope of this Article and may pose even more difficult First Amendment hurdles than the recommendations suggested here. *See* Alberto Bernabe-Riefkohl, *Prior Restraints on the Media and the Right to a Fair Trial: A Proposal for a New Standard*, 84 KY. L.J. 259, 315 (1996) (claiming that restraints on the media have lead to a "dangerous system of abuse and overuse of censorship by courts" and prevent the media from fulfilling its "watchdog role"); *cf.* Brickey, *supra* note 7, at 652-53 ("[I]f the press is to effectively perform its watchdog role, it should be mindful of the occasional need to watch itself."). That being said, this Article's recommendation does help control journalism antics at least indirectly. As Supreme Court Justice Clark explained, if a "judge, the other officers of the court, and the police place the interest of justice first, the news media would . . . soon learn . . . to be content with the task of reporting the case as it unfolded in the courtroom—not pieced together from extrajudicial statements." *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966).

341. *See, e.g.,* Cassidy, *supra* note 25, at 9 (arguing that current restrictions may pose First Amendment problems as they relate to attorneys running for office); *see also* Cole & Zacharias, *supra* note 5, at 1678 (declining to propose new regulation because it is unclear that "any new rule could at once be practical, meaningful, and constitutional"). Nevertheless, some scholars have claimed that the Supreme Court does not apply strict scrutiny to regulations of lawyers' speech. Cassidy, *supra* note 25, at 10. If that is the case, then these concerns are even less alarming.

342. Sunstein, *supra* note 157, at 22.

343. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561-62 (1980); *cf.* Bernabe-Riefkohl, *supra* note 157, at 455 (arguing that "the advent of commercial media" has changed the way ideas are exchanged and "call[s] into question the validity of the marketplace analogy as a principle of First Amendment jurisprudence").

the truth, protect justice, and enable self-governance.³⁴⁴ This is because misperceptions are often sticky.³⁴⁵ Therefore, as Sunstein suggests, chilling statements that impede the truth “may be desirable insofar as [such chilling] reduces damaging and destructive falsehoods, including falsehoods about individuals famous or not famous, and institutions, public or private.”³⁴⁶

b. Deception Detracts from Key Societal Values

Deception aided by lawyers in the court of public opinion directly affects prime societal interests that have been used to justify restrictions on speech, such as the fair outcome of legal controversies, the reputation of the legal profession, and the confidence people have in the justice system.³⁴⁷ Each one will be addressed in turn.

(1) The Fair Outcome of Legal Controversies

As discussed in more detail in the first installment of this project, the court of public opinion is often the first, only, or last court in which corporate controversies are “tried.”³⁴⁸ Arguably, therefore, the court of public opinion administers a type of “justice” similar to that rendered by a court of law. Some argue that the power of the verdict rendered by the public supersedes that of any court of law.³⁴⁹ The court of public opinion issues verdicts that have as much, if not more, weight than a court of law.³⁵⁰ The Supreme Court in *Gentile* decided that lawyers’ speech, unlike that of ordinary people or the press, may be restricted to ensure fairness in administering justice. This is because: a) states have a substantial interest in ensuring the fair administration of justice;³⁵¹ b) lawyers “have a ‘dut[y] to avoid conduct that undermines the integrity of the adjudicative

344. See *supra* note 157.

345. See *supra* notes 181-184 and accompanying text.

346. Sunstein, *supra* note 182, at 23: Admittedly, this Article targets publicly disseminated information that is misleading—not just that which is actually false which is the focus of Sunstein’s piece. *Id.* at 24 (explaining that “[i]t is difficult to ‘chill’ reports on particular events that provide a deceptive understanding; [and] the law itself cannot and should not become involved here”). However, misleading statements create false impressions just like false rumors do.

347. Peter Margulies states that “one could argue that lawyers should not misrepresent matters with the public” because: (1) “professional status as an intermediary between public and private interests implicitly warrants some level of candor and fair dealing;” (2) “a lack of candor undermines the capacity for reflection” by lawyers; and (3) “lack of candor may be sound strategy in the short-term, but, like excessive pretrial publicity, it may unduly discount long-term costs to clients.” Margulies, *supra* note 57, at 42-43.

348. See Beardslee, *supra* note 1, at 1266-78.

349. See *supra* notes 151-158 and accompanying text.

350. *Id.*

351. Alberto Bernabe-Riefkohl, *Silence is Golden: The New Illinois Rules on Attorney Extrajudicial Speech*, 33 Loy. U. Chi. L.J. 323, 359 (2002).

process;³⁵² and, c) lawyers have “an obligation to treat with consideration all persons involved in the legal *process* and to avoid the infliction of needless harm”³⁵³ in the court where justice is administered. To that end, despite its emphasis on the court system, the underlying purpose of Rule 3.6 is to prevent “sufficiently serious and imminent threat(s) to the fair administration of justice.”³⁵⁴ However, under the current marketplace-of-ideas rubric, lawyers can and do purposefully manipulate information in the court of public opinion—not just to help their corporate client’s reputation but to affect the outcome of legal cases and controversies.³⁵⁵

(2) Reputation of the Profession and Confidence in the Justice System

Justice and accuracy, however, are not the only justifications for rules that regulate attorneys’ speech. The *Model Rules of Professional Conduct* around honesty (e.g., Rules 4.1 and 8.4(c)) are intended to protect the reputation of the legal profession and build trust in attorneys and the profession.³⁵⁶ That trust, in turn, builds trust in the justice system as a whole.³⁵⁷ Restrictions on lawyer advertising are justified for these reasons.³⁵⁸ The Supreme Court has recognized that “the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for

352. MODEL RULES R.3.3 cmt. 2; *see also* MODEL RULES R. 3.8 pmb.; *cf.* Brown, *supra* note 8, at 133-34 (“Recognition that the practice of law is a public trust suggests that lawyers, as trustees thereof, should be subject to heightened responsibilities with regard to what they say extrajudicial about a particular matter.”). This argument may have less weight if legal PR is not considered a *legal* service because then the lawyer is not necessarily acting as a lawyer when providing the service. Nevertheless, it is at least a law-related service and Rule 5.7 requires attorneys to act as attorneys when conducting such law-related services. *See supra* note 106.

353. MODEL CODE OF PROF’L RESPONSIBILITY EC 7-10 (1980) (emphasis added); *see also* Warren E. Burger, *The Decline of Professionalism*, 63 FORDHAM L. REV. 949, 953 (1995) (“Lawyers [as officers of the court] should be problem-solvers, harmonizers, peacemakers—the healers, not the promoters, of conflict.”).

354. Hazard & Hodes, *supra* note 100, at § 23.3; Cassidy, *supra* note, 25, at 3 (“Rule 3.6 applies to all attorneys and it is designed to safeguard adjudicatory proceedings.”).

355. *See supra* Part I and II.

356. The spirit and intention of Rules 4.1 and 8.4(c) is to “keep lawyers honest and their conduct above board.” Jarvis and Tellam, *supra* note 73, at 695 (communicating that many ABA ethics opinions do not cite Rule 8.4 in support when they should); *see also* Cole & Zacharias, *supra* note 5, at 1644 (“If, as a result of misstatements, observers of the newscasts came away with the sense that the Simpson lawyers’ words could not be trusted and that these lawyers were representative of the bar as a whole, then the spirit of the rules was frustrated The key in applying provisions like Model Rule 4.1 . . . is the image of trustworthiness.”); *In re Hiller*, 694 P.2d 540, 544 (Or. 1985) (describing that the main principal of Rule 8.4 (c) is trustworthiness).

357. Hazard, *supra* note 194, at 184 (“The benefits of trustworthiness may be put in loftier terms by noting that the quality bestows honor upon lawyers in whom it is embodied. Yet trustworthiness is . . . both esteemed and useful in all social transactions. . . .”).

358. In addition to the *Model Rules* that restrict lawyers’ speech and conduct related to legal controversies, Rules 7.1 and 7.2 restrict lawyers’ advertising in order to protect the image of the legal profession. *See* MODEL RULES R. 7.1, 7.2 (2009); *see also* Elizabeth D. Whitaker & David S. Coale, *Professional Image and Lawyer Advertising*, 28 TEX. TECH L. REV. 801, 802 (1997) (contending that lawyer advertising restrictions are imposed, in part, to protect the image of the legal profession).

licensing practitioners and regulating the practice of professions.”³⁵⁹ Lawyers have historically been charged with the duty to behave more ethically than lay-people.³⁶⁰ They are considered “guardians of the law,”³⁶¹ “officers of the courts,”³⁶² and “essential to the primary governmental function of administering justice.”³⁶³ Therefore, the image of the legal profession matters.³⁶⁴ It is intimately tied to the reputation of the justice system—which, of course, impacts the public’s acceptance of legal decisions.³⁶⁵

As one author explains, “states also have an interest in protecting public confidence in the judicial system, protecting the integrity of the process, [and] making sure decisions are based on the arguments and facts at trial.”³⁶⁶ Attorney speech (or attorney-assisted client speech) that hovers close to lying or would materially prejudice a trial (if it were to occur) can frustrate the fair administration of justice and the purpose of the rules, as well as detract from the legal profession’s image and the judicial system’s effectiveness.³⁶⁷

In light of current practice in the court of public opinion, competing public values, and the fact that the subjects involved are lawyers, it is not clear that First Amendment Jurisprudence should automatically prevent heightened restrictions on attorneys. Moreover, it appears that reliance on the marketplace of ideas as the source of ethical obligations for attorney management of legal PR for corporate

359. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975) (addressing claim by county bar that fee scheduling violated the Sherman Act).

360. See MODEL CODE OF PROF’L RESPONSIBILITY pmbl. (1969) (“Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system. A consequent obligation of lawyers is to maintain the highest standards of ethical conduct.”). The current set of *Model Rules* also emphasizes this role in the preamble and comments to the *Rules*. See *supra* notes 159, 245, and 352.

361. See MODEL CODE OF PROF’L RESPONSIBILITY pmbl. (1969).

362. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1074 (1991) (quoting *Cohen v. Hurley*, 366 U.S. 117, 126 (1961)).

363. See *Goldfarb*, 421 U.S. at 792.

364. See *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 625 (1995) (accrediting the Bar’s contention that states have a substantial interest in “protect[ing] the flagging reputations of Florida lawyers by preventing them from engaging in conduct that the Bar maintains, ‘is universally regarded as deplorable and beneath common decency’”).

365. Judith L. Maute, “In Pursuit of Justice” In *High Profile Criminal Matters*, 70 *FORDHAM L. REV.* 1745, 1756 (2002) (“[E]xtrajudicial communications about a pending criminal matter by the lawyers on either side, or nonlawyers working on the case, can seriously jeopardize the right to fair trial, distract attention from the matters properly at hand, and create a carnival atmosphere that undermines confidence in the legal system, furthering public distrust in the legal profession.”).

366. Bernabe-Riefkohl, *supra* note 351, at 359-60 (questioning whether these interests weigh in favor of allowing restrictions on attorney speech).

367. See *Cole & Zacharias*, *supra* note 5, at 1646 (“Even attorneys who are careful to state their claims and rebuttals with restraint may find the public incapable of hearing in such refined terms.”). *Cole & Zacharias* argue that the image of lawyers is impacted even “when the public wrongly believes that one of the attorneys has made misstatements.” *Id.* Arguably, this is true even when attorneys are merely helping the clients make the statements. As discussed, it is apparent that lawyers are behind many of the allegations made in the press.

clients may be misplaced.

2. EXCLUSION OF LAWYERS AND EROSION OF THE ATTORNEY-CLIENT RELATIONSHIP

Two concerns with this vision are that lawyers will be excluded from the legal PR process if they are cast in the role of media gatekeeper, or that lawyers will purposefully insulate themselves from the discussions and process of drafting press releases on legal controversies. Since one of the main purposes of legal consultation around press releases is compliance with government regulations, this does not seem likely. Lawyers cannot help the corporation comply with any legal or ethical standard if they are not involved. And corporations need lawyers to determine whether their disclosures to the public are in line with the law.³⁶⁸ Admittedly, this rule may, to a degree, prevent a lawyer from assisting the client in reaching a legal objective. It is not clear, however, that lawyers would opt out or that corporate managers would ostracize the lawyer because the lawyer was required to promote socially responsible behavior and, in some cases, behavior above the legal floor. First, as discussed in the first installment, corporations need lawyers to manage legal PR. According to the PR Study, lawyers are avidly working with internal and external PR consultants to help manage legal PR for corporate clients. This is, in part, because how a legal issue is spun has enormous legal and financial consequences and non-lawyers cannot negotiate this space aptly on their own.³⁶⁹ There are legal implications that a layperson simply cannot foresee or handle.³⁷⁰ Second, as discussed in Part IV(A), despite the recent publicity about corporations "gone bad," many corporate executives want their corporate attorneys (especially their general counsels) to play a dual role: business partner and guardian.³⁷¹ The recommendations in this Article do not impose on lawyers an affirmative obligation to disclose misrepresentations or omissions made by their clients,³⁷² unless the act constitutes one of those barred by Rule 1.13 (e.g., fraud, violation of a legal obligation to the organization, or violation of law). Nor do they require that the attorney withdraw if a corporate

368. See Coffee, *supra* note 16, at 1307 (making a similar point with respect to his argument that desirable attorney-client communications will not be chilled if the securities attorney is required to be a gatekeeper).

369. See *supra* Parts II.A.3-II.A.4.

370. Corporations likely realize the value of corporate attorneys and the risks of cutting them out. This is one of the main arguments mentioned by those in opposition to a corporate attorney-client privilege. See, e.g., Vincent Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 ST. JOHN'S L. REV. 191, 222-26 (explaining that those in opposition claim that "the benefits of communicating with counsel outweigh the risks"); DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 218 (1988) ("Large organizations have no alternative to cycling all of their legally relevant information through the general counsel's office . . . They do it because they must, and they spend millions on lawyers because they need them.").

371. See *infra* note 263 and accompanying text.

372. Indeed, Rule 1.6 may prohibit it. MODEL RULES R. 1.6 (2007).

client will not revise a misleading statement.³⁷³ Instead, the rules mandate that the lawyer simply 1) abstain from knowingly,³⁷⁴ substantially assisting the drafting of a false, misleading, or deceptive press release or disclosure, and 2) try to convince the client to take the socially desirable route.³⁷⁵ Arguably, if the lawyer tells the corporate client that its statement is misleading and suggests revisions, but the statement remains misleading in part, the lawyer has fulfilled his or her duty.³⁷⁶ As Schwartz pointed out in his article arguing for higher ethical standards for non-advocate lawyers, “while it may be wrong to urge lawyers to reveal to the investing public confidences obtained from the client which might disclose the inaccuracy of a financial statement, it is a different question whether the securities lawyer should continue to assist the client as if the information were accurate.”³⁷⁷ Since the current *Model Rules* already encourage lawyers to counsel clients on the moral and social ramifications of decisions³⁷⁸ and prevent lawyers from aiding clients in fraud and deception,³⁷⁹ this requirement (that lawyers abstain from conduct that, although factually accurate, misleads the court of public opinion) is not likely to greatly impact the relationship between the lawyer and client.³⁸⁰ As long as general counsels are not forced to withdraw and do not behave as “inveterate naysayer[s],” the risk of being excluded from this core activity is slight.³⁸¹

373. Under Rule 1.16, a lawyer *may* withdraw or terminate representation for any “action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.” MODEL RULES 1.16(a)(4) (2007).

374. As mentioned earlier, there is no need to prove actual knowledge if a reasonable person would or should know.

375. As mentioned, *supra* note 299, the proposed rule is closer to what William H. Simon refers to as “an intermediate standard that would prohibit the lawyer from both directly and indirectly misleading conduct and from providing any . . . assistance to client wrongdoing.” Simon, *supra* note 113, at 252 (discussing maximum, minimum and intermediate standards). Similarly, it is consistent with the view that lawyers should counsel clients to consider how its actions might impact third parties and “draw on [the client’s] own sources of moral values” but not impose the lawyers’ values on the client. Robert F. Cochran, Jr., *Introduction: Three Approaches to Moral Issues in Law Office Counseling*, 30 PEPP. L. REV. 591, 599 (2003). It is also consistent with Schwartz’s recommendation for non-advocate lawyers, which requires that “the lawyer tell the client that although the proposal is not unlawful, professional standards prohibit the lawyer from assisting the client in pursuing that course of action.” Schwartz, *supra* note 145, at 690; *see also id.* at 691 (explaining the benefits of optional withdrawal).

376. Obviously, there will be problems proving that the attorney counseled the client to behave socially responsibly. The purpose is not, however, to catch lawyers and punish them but to promote their ethical behavior and to support them in trying to promote their clients’ ethical behavior. *See infra* part IV.D.5.

377. Schwartz, *supra* note 145, at 684 (“[A] privilege that excuses lawyers from revealing what a client has told them need not oblige lawyers to behave as if they never heard the client’s story.”).

378. *See* MODEL RULES R. 2.1.

379. *See, e.g.*, MODEL RULES R. 1.6, 1.16, 8.4, 4.1.

380. Schwartz, *supra* note 145, at 692 (making similar point with respect to his recommendation that non-advocates be held to higher ethical standards).

381. *See generally* Heineman, *supra* note 246.

3. INCONSISTENCIES WITH THE ADVERSARY SYSTEM

Importantly, this vision is not wholly inconsistent with the ideology of the traditional adversary system. Although some scholars have posited that “the quality of ‘hired gun’ is close to the heart and substance of the litigating lawyer’s role,”³⁸² others have explained “[i]n that tradition, the lawyer has been both an advocate and an ‘officer of the court’ with responsibilities to third parties, the public, and the law.”³⁸³ This Article’s approach does not preclude advocacy in the court of public opinion but instead requires “advocacy be undertaken in good faith as a reasonable means of vindicating the relevant legal merits.”³⁸⁴ As John Humbach points out, “an adversary system does not necessarily require calculated nondisclosure of unfavorable evidence or the urging of inferences known to be dubious or outright false.”³⁸⁵ Admittedly, there is a fine line between helping clients craft helpful PR messaging around legal controversies and misleading the public with PR spin. Just as lawyers may have a different conception of fairness,³⁸⁶ they may also have a different conception of what is “misleading” or what constitutes “deception.” Therefore, to a degree, an argument could be made that the recommended rules are too vague. The terms used, however, are not unfamiliar; they have been used in the *Model Rules of Professional Conduct*, in contracts law, and in external regulations like 10b-5.³⁸⁷ Just as 10b-5 is limited to prohibiting misleading statements in connection with a

382. Frankel, *supra* note 156, at 1055.

383. Simon, *supra* note 67, at 1133 (explaining that “[t]here has never been a consensus about where to draw the line between these two aspects of the lawyer’s role, and the two have always been in tension within the professional culture”).

384. *Id.* at 1134. Although defining the particular scope of the fair reply provision is outside the scope of this Article, the fair reply provision in Rule 3.6(C) may cause some difficulty in application. That is, if one lawyer makes a statement that violates the new provisions, can another lawyer reply in kind? Moreover, how do you prove that the lawyer believed the statement was necessary and intended to protect the client from the potential affect of adverse publicity? See Cole & Zacharias, *supra* note 5, at 1627-28 (arguing that discipline under California’s rule would require query into attorneys’ motives). That said, at first blush it seems that this recommendation does not detract from the fair reply provision in Rule 3.6. Attorneys, therefore, can still level the playing field; they just cannot do so in unethical manner. Additionally, according to some of the General Counsel interviewees, within some industries, like pharmaceuticals, what the company can say (even in reply) is highly regulated by the FDA yet lawyers representing plaintiffs have more freedom. If this is accurate, this recommendation might help level the playing field between defense and plaintiff’s lawyers.

385. Humbach, *supra* note 123, at 997-98 (explaining that “[i]t is only in an exaggerated or extreme version of the adversary system that efforts to game the process, caginess about the evidence, the undermining of truthful testimony, and other such tactics would be considered normal and legitimate parts of the lawyer’s task”).

386. See Hazard, *supra* note 194, at 193 (explaining that one of the reasons why the Kutak Commission’s original proposal to require lawyers to behave with fairness to other participants in negotiations did not survive was because “lawyers, at least nationally, do not share a common conception of fairness in the process of negotiation”).

387. See Schwartz, *supra* note 145, at 681 (making a similar argument with respect to his recommendation that lawyers should not behave in a way that is “unfair,” “unconscionable,” or “unjust” when acting in non-advocate capacity).

purchase or sale of securities, these recommendations are limited to prohibiting misleading statements that relate to a legal controversy or legal issue.³⁸⁸ They do not target press releases around non-legal matters. Instead, they focus on misleading statements about a controversy because they may induce reliance and deceive. If a lawyer should reasonably know that a statement related to a legal controversy is groundless or would mislead or deceive, then he/she should abstain from making or aiding the client in making it. Moreover, in keeping with the lawyer-statesman ideal, the point is to encourage lawyers, as Ben Heinemann does, to “try, in gray cases, to be well inside the line between right and wrong and to consider the legal issues [they] are being asked to address in a much broader reputational, ethical, and governance context.”³⁸⁹ The hope is that, when faced with the choice between behaving as a gatekeeper/counselor or advocate/partner, attorneys will choose gatekeeper and *attempt* to persuade their corporate clients to undertake activities in a way that comports with the rules and high ethical standards. The idea is similar to that underlying the un-adopted proposal to infuse fairness in negotiations; “the lawyer, as the instrument of [the legal PR], should be the guardian of its integrity.”³⁹⁰

4. POTENTIAL REDUNDANCY WITH CURRENT *MODEL RULES*

Some might argue that under a more robust interpretation of the current *Model Rules* the conduct at issue in this Article is already prohibited.³⁹¹ As previously discussed, though, the way the rules are written (and interpreted) enables manipulation. Thus, even if they do already prohibit this conduct, there is a need to better (and more specifically) define what Rule 8.4(c) prohibits and how rules around honesty relate to rules that address advocacy in the court of public opinion.³⁹² Revisions to rules and increased specificity aids in the development of desirable norms and practices as well as the education of lawyers so that they do not cross the line that is so easy to cross. Moreover, this Article’s recommendations go further than the current rules because they incorporate an aspirational component. They urge lawyers to behave in a socially desirable way and attempt to convince clients to do the same. This leads to the next concern:

388. Unlike 10b-5, these statements do not need to be “material” nor are they only limited to statements of fact. *See also supra* note 295.

389. Heineman, *supra* note 229, at 66.

390. Hazard, *supra* note 194, at 192 (explaining that the Commission was surprised by the “vehemence of the objections” to the proposal since it “seemed appropriate to the lawyer’s role and appeared to reflect on interpretation of the lawyer’s duty as established in the decisional law”); *see also supra* note 173.

391. If this is the case, it supports the contention that the First Amendment should not bar heightened restrictions like those recommended here. *See supra* Part IV.D.1.

392. As was discussed in Part IV.C.1, this Article recommends revising the *Model Rules* to more specifically define ethical advocacy in the court of public opinion. This is consistent with “the modern trend toward specificity in code drafting” when “clarity and notice to lawyers” is more important than “flexibility” and “case-by-case interpretation by ethics committees or courts.” Moore, *supra* note 141, at 931-32.

These rules may be difficult to enforce.

5. ENFORCEABILITY

The major purpose behind the *Model Rules of Professional Conduct* historically has been to provide a model of professional conduct to reinforce norms and deter misconduct.³⁹³ Similarly, the recommendations in this Article are designed to help inform lawyers about the type of behavior that is acceptable in the court of public opinion, deter misbehavior, and reinforce socially beneficial behavior. Admittedly, there appears to be a trend towards less lawyer independence in the corporate arena including the legal PR context, and it is not clear that as a profession we can come up with solutions (let alone rule language) to alter the trend. Also, these recommendations do not include a “hammer” or a “stick” aside from the vague threat of professional discipline that exists with respect to breaking any of the *Model Rules of Professional Conduct*, e.g., verbal or monetary sanctions or disbarment.³⁹⁴ Further, because the recommendations do not, at this point, require an attorney to blow the whistle, disengage, or sign all press releases for their veracity³⁹⁵ and compliance with the *Model Rules*, misconduct will be hard to uncover. Thus, the Holmesian “bad man,” who asks what are his chances of being caught and what penalty he will have to pay if he fails to follow revised Model Rule 3.6, may not be wholly deterred.³⁹⁶ Nevertheless, there are three responses that make this fact less disconcerting than it might otherwise be. First, as discussed earlier, many attorneys can and do respond to the ideals underlying the *Model Rules of Professional Conduct*.³⁹⁷

393. See Schwartz, *supra* note 145, at 682 (explaining that these are the functions the professional codes of ethics are designed to perform); see also MODEL CODE OF PROF'L RESPONSIBILITY pmbl. (1976) (explaining that the rules are “aspirational in character and represent the objectives toward which every member of the profession should strive”).

394. Indeed, an important future project might be to attempt to research enforcement mechanisms to define one that might have some weight in this context. Additionally, it would be interesting to study what lawyers believe is a “misrepresentation” and/or to send lawyers a copy of these revisions to gauge their interpretation.

395. For example, the recommendation could require that attorneys—confidentially—sign the statements for which they are vouching trustworthiness. This is a somewhat akin to Lonnie T. Brown's recommendation that lawyers file statements for which they are responsible with the court. See *supra* notes 223-227 and accompanying text; cf. Coffee, *supra* note 16, at 1313 (arguing that “attorneys principally responsible for preparing a disclosure document or report filed with the SEC” could be required “to certify” (1) that such attorney believes the statements made in the document or report to be true and correct in all material respects; and (2) that such attorney “is not aware of any additional material information whose disclosure is necessary in order to make the statements made, . . . not misleading”). Although this idea is much less public and time consuming than Brown's proposal, it, too, suffers from similar problems.

396. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 457-58 (1897). Additionally, one might argue that a less restrictive rule (even if it enables lies) may be better than a rule that might require judges to determine the accuracy of public statements.

397. Other legal scholars have argued in the past that not just attorneys but clients also attempt to respond to and conform to the norms and ideals underlying laws. See, e.g., Kruse, *supra* note 267, at 24 (“Clients, it might be argued, come to lawyers with the capacity and desire to be moral; it is lawyers, with the analytical precision of their professional training, who slough off clients' non-legal concerns and focus only on the legally relevant

Second, the recommendations outlined in this Article, despite their increased specificity, still are standards as opposed to hard and fast rules. Arguably, a standard may actually have more deterrence power than a rule because it is harder for the Holmesian bad man to determine definitely at what point he will have actually crossed the line. Third, there is an undeniable power connected to words—and that is the point, in part, of the *Model Rules of Professional Conduct*, or of any type of guideline or mantra that a group of people adopts.³⁹⁸ The acts of writing, reading, and speaking aspirations are a first and valuable step towards reinforcing the commitment and achieving the desired behavior.

V. CONCLUSION

One of the goals of this Article is to draw a clearer line between permissible and prohibited behavior for corporate lawyers' management of legal PR whether they are acting as spokespeople or advising clients behind the scenes. Although such clarity may not solve the identified issues, without it, advocacy in the court of public opinion is almost destined to become a race to the bottom without means to ferret out anything but obvious misconduct. In addition to arguing that attorneys should, to some degree, practice legal PR for their corporate clients, this Article defines how far corporate attorneys should go in advocating for their corporate clients in the court of public opinion. More importantly, it raises awareness of the importance of managing legal PR and encouraging lawyers to do so in a way that is socially desirable.³⁹⁹

The preliminary recommendations sketched out in this Article suffer from some familiar flaws like problems of proof, costs of ensuring compliance, and potential disproportionate impact, not to mention the issues posed by current First Amendment jurisprudence. Moreover, they do not prevent the media or clients

aspects of the case."); *id.* at 52 ("[T]he argument that organizational clients are nothing more than the sum of their legal interests is both too facile and somewhat suspect. It is too facile because organizations may well have objectives beyond the crude maximization of their freedom, wealth and power over others. Organizations are complex entities with reputations, organizational cultures, relationships with outsiders, and ties with the community that create interests beyond the maximization of their profit."); David Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454, 473 (1981) (explaining that values are at the center of a client's personality and that a lawyer should not attempt to convince a client to act against those values).

398. Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1258 (1982) (arguing for "clearer mandates to class counsel than those provided by existing procedural and ethical rules" and contending that "[e]xplicit professional obligations, even those unlikely to trigger any formal sanction, often affect behavioral norms simply by sensitizing individuals to the full implications of their conduct").

399. See Wilkins, *supra* note 82, at 866 (explaining that disciplinary systems fail to "encourage lawyers to resist market pressure when relevant norms are ambiguous or in conflict"); *id.* at 852 (urging lawyers to "[n]urture motivations that encourage lawyers to act in socially beneficial ways in cases beyond the reach of any conceivable enforcement system").

from manipulating the truth and misleading the public.⁴⁰⁰ They are an attempt, however, to develop a standard for advocacy in the court of public opinion that comports with professionalism and to develop ethics rules that are inspirational, norm nurturing, and relevant to the way corporate lawyers manage legal PR. Even if this attempt fails, the hope is this Article will raise interest among legal professionals to come up with a solution that succeeds.

400. The hope is that the corporate attorney will be able to convince the client not to resort to unethical conduct in the court of public opinion. *See Wilkins, supra* note 82, at 878 (denoting the “danger of the inability to exert any moderate influence on legally sophisticated client”).