

Daniel Webster-Batchelder American Inn of Court Presentation
Table 7 Presentation March 7, 2018

Shout - Trial Publicity and Transparency in the Courts
Fact Pattern: Harvey Jones & Northeast Media

Harvey Jones is a nationally recognized news media personality working for the New Hampshire outlet of a broadcaster called Northeast Media. Jones was recently accused by three of his assistants at Northeast Media (Employees 1, 2, and 3) of directing sexually suggestive remarks and lewd behavior toward Employees 1, 2, and 3 in the Northeast Media office on a regular basis over the past several years. A fourth employee at Northeast Media (Employee 4) has accused Jones of sexually assaulting Employee 4 after driving her home from the most recent office Christmas party.

Employees 1, 2, and 3 have filed a sexual harassment suit against Northeast Media. According to the facts alleged in the complaint, Northeast Media purportedly ignored several complaints lodged by Employees 1, 2, and 3 against Jones for sexual harassment, because of Jones's high profile with the company.

Jones has also been charged by the County Attorney's Office with aggravated felonious sexual assault stemming from his actions after the office Christmas party with Employee 4. Assume for our purposes here that his conduct meets the elements for felony sexual assault.

Part 1: Practical Aspects of Speaking with the Media

I.A

Plaintiff's Lawyer has filed a civil action against Northeast Media on behalf of Employees 1, 2, and 3, and reasonably believes the allegations to be true. Before any discovery has been conducted, Plaintiff's Lawyer calls a press conference in which he asserts as fact the allegations of Jones' and Northeast Media's misconduct, adding that he "has never seen anything so despicable."

Following discovery, Plaintiff's Lawyer wishes to hold another press conference to discuss the content of internal e-mails produced by Northeast Media, in which company executives discussed the harassment complaints and the need to avoid "ruffling Harvey Jones's feathers and maybe driving him to a competing broadcaster."

FIRST STOP: What are the ethical considerations for these decisions?

I.B

Civil Defense Lawyer has been retained to represent Northeast Media. Based on her own investigation, Defense Lawyer has learned that there is evidence to support the allegations of misconduct and failure to act relating to Employees 1 and 2, but that there are substantial grounds to question the credibility of Employees 3 and 4. Civil Defense Lawyer has been contacted by a local reporter who is requesting information about the case. The reporter is also requesting comment on a separate allegation of misconduct by a fifth employee, and Northeast media's reaction to it, which the reporter has learned about from an unnamed source. When Civil Defense Lawyer declines to respond, the reporter offers to treat the interview as "off the record." Civil Defense Lawyer advises Northeast Media to hire a public relations firm to contact the local news media in order to publicly dispute or downplay the allegations in the civil action.

SECOND STOP: What are the practical considerations of talking to the reporters?

- **Why talk to a reporter at all?**
- **Differences between press conferences and private conversations**
- **Differences between "on the record," "off the record," "not for attribution," "on background" and other ways of communicating with reports**
- **Other consideration?**

I.C

On the eve of a pretrial hearing, the local reporter calls Employee 3 for comment about the upcoming court proceeding. Employee 3 makes detailed factual assertions that are inconsistent with some of the formal allegations in the complaint, and also inconsistent with some of the statements Employee 3 had made in statements to the local police. The local reporter publishes a story with some, but not all, of Employee 3's comments appearing in print. Civil Defense Lawyer wishes to introduce Employee 3's statements at trial, both as substantive evidence and to impeach the testimony of Employee 3.

THIRD STOP: What are the implications of these extrajudicial statements to the press for use in court?

- **Can you call a reporter as an impeachment witness?**
- **Is it as simple as subpoenaing the reporter?**
- **Can you subpoena the reporter's raw notes of her conversation with Employee 3?**
- **Is Civil Defense Lawyer limited to the statements that appeared in print or can he ask the reporter about the comments that were not included in the story?**

I.D

An indictment has been returned against Harvey Jones by a grand jury for felony assault of Employee 4. After the indictment has been obtained, but prior to any formal proceedings in the criminal case, the investigating police department holds a press conference announcing the indictment. At the press conference, the Chief of the Police Department describes Jones as the “kind of sexual predator who needs to be aggressively prosecuted.” Criminal Defense Counsel makes a public statement to the press, asserting his client’s innocence and revealing that his client has passed a polygraph test.

FOURTH STOP: What are the ethical considerations associated with this course of action?

- **Mark Attorri/Lisa Rick/Sarah Warecki to address Rule 3.6 and 3.8.**
 - **Special ethical obligations on prosecutors and prosecutor’s duty to control law enforcement.**
 - **Differences between NH Rule 3.6 and other states that have a “right to respond” to counter damaging publicity**

Part 2: Sealing/Access to the Court Records

II.A

During discovery in the criminal case, the Court allows access to Employee 4’s confidential counseling records. The State has filed a motion *in limine* to keep records out and filed the motion under seal. Criminal Defense Lawyer objects and seeks a public hearing. Local News Reporter seeks to intervene and obtain copies of all motions and records.

FIFTH STOP: What are the legal, practical and strategic considerations for filing motions under seal or opposing a motion to seal?