Ethics for Media Lawyers:

Life After Ferguson

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Introduction

Ferguson, Missouri, has a population of roughly 21,000 people. Thirty cities in Missouri have larger populations. The Edward Jones Dome, where the St. Louis Rams play football, seats three times as many people. Most of us had never heard of Ferguson prior to August 9, 2014, when a police officer named Darren Wilson shot and killed an unarmed black teenager named Michael Brown. But, to paraphrase the grim observation of Ambrose Bierce, war is how Americans learn geography. So, as violence and vandalism erupted on its streets, the nation turned its attention toward Ferguson and labored to understand the place, its people, and its problems.

The events of Ferguson have a lot to teach us about many things although opinions differ about the precise lessons we should take from them. This much, however, seems clear: Ferguson gives us many complex issues writ large: racial alienation; community polarization; the militarization of civil police forces; the challenges faced by contemporary law enforcement;
and, of course, the role of the media (and social media) in shaping public opinion. I believe that Ferguson can also help us understand a number of ethical issues that deserve careful consideration by media lawyers.

In the days and weeks following Michael Brown’s death, reporters and photographers took to Ferguson’s streets to cover the unrest, the protests, and the law enforcement response. Tempers flared; looting broke out; cars and businesses were vandalized; crowds were gassed. Events unfolded quickly and sometimes unpredictably. This was not journalism for the faint of heart. These circumstances provide us with an opportunity to think about the special ethical challenges that media coverage of a domestic crisis can present to those who represent the fourth estate.

I.

As a threshold matter, lawyers in heated situations like this have to worry about foundational questions of competence. See ABA Model Rule of Professional Conduct 1.1. A variety of competence issues could arise here.

Before addressing those issues, though, it may be worth noting that comment [3] to rule 1.1 provides some allowances for lawyers who are called upon in an emergency to give advice or assistance in an area outside their field(s) of competency. But let’s be candid: this offers cold comfort. The defense it affords us may prove consoling in truly desperate
circumstances, but surely none of us relishes the prospect of explaining to a client, a judge, or a disciplinary body that we offered incompetent advice but it was the best we could do at the time. So let’s just assume that, if at all possible, we would vastly prefer to provide competent representation to our clients.

Circumstances like these send our journalists out into heavily patrolled streets, where there is a non-trivial likelihood that they will have an unfortunate encounter with law enforcement. Are we competent to advise them about what they should do if that happens? Let’s find out.

What should they do if they are in a crowd that police officers order to disperse? What should they do if a policeman stops them and wants to question them? What should they do if an officer orders them to cease photographing or filming? What should they do if they are in a public space but the police cordon it off or otherwise indicate that they’re restricting access to it? What should they do if the police demand their cell phone, their tape recorder, or their camera? What should they do if they are arrested?

The competency requirement of rule 1.1 arguably requires a media lawyer representing a client in these circumstances to know the answers to these questions—or at least to know someone who can answer them quickly if and as they arise. But perhaps an additional ethical obligation applies as
well. Rule 1.3 requires that a lawyer work diligently on behalf of her or his client. Does the duty of diligence require the media lawyer to anticipate these problems—which seem fairly easy to anticipate—and arrange for some advance emergency training in order to help avoid them in the first instance? It’s worth considering. Ironically, lots of us do newsroom seminars and media training around non-emergency issues like libel and privacy and freedom of information. Do we train around emergency issues as well? If not, then how does that make any sense?

There are other competence issues as well. Circumstances like these often tempt our clients to use their newest technologies—drones to take film and photographs of crowds; body cameras to get constant surveillance footage of events; hidden microphones to record conversations that would otherwise be lost. Comment [5] to rule 1.1 suggests that competent representation includes an understanding of the facts as well as the law. And the competency rules have increasingly demanded technological knowledge from attorneys as our world and clients have become increasingly technologically driven. See, e.g., comment [8] to rule 1.1. At the factual and technological level, do we have a sufficient understanding of how these devices operate? And what about the laws that regulate them? What federal and state laws govern the use of drones? Since a body camera records
everything wherever the reporter goes, at what point and in what spaces do privacy concerns arise? And, as for that hidden microphone, is the reporter working in a state that requires both parties to consent to the recording of a conversation? These sorts of questions often arise as the reporter is headed out of the door.

I am reminded of an exchange I had with a veteran newspaperman once. I had rushed over to help with an emergency and as I walked into the room I said: “I understand we need to do some brainstorming.” He said: “There’s no time for that. We just need storming.”

But there’s more on the competency front. What about intellectual property concerns? In these fast-paced circumstances, where a compelling photograph or a provocative bit of video is highly prized, what is fair game? Who owns those images we’re finding on the Internet? And if everyone is republishing them on their Facebook pages and in their Twitter feeds does that mean we can pop them up on the landing page of our publication’s website? In situations like this, clients will expect to get answers immediately and will be underwhelmed by assurances that an associate will start researching the issue as soon as they’re back from lunch. Maybe they’re right to feel that way. Maybe the duties of competent and diligent representation demand that media lawyers have answers to these non-exotic
questions at their fingertips. Maybe they need to have answers handy to some exotic ones, too.

II.

Of course, in some of these circumstances the answers will be less than clear, time will be of the essence, and clear leadership around decision-making will be sorely needed. At this point, good lawyers may step beyond the role of “risk-assessor” and into the role of full-fledged participant. The client may welcome the clarity that this affords. But this can give rise to a variety of additional ethical issues and, ironically, the more responsible and more dedicated the lawyer is the more likely he or she will be to cross this line and wander into troubling territory.

Assume, for example, that a reporter is entertaining the idea of using a mild subterfuge to gain access to a space that law enforcement authorities have restricted. The lawyer is uncertain about the legality of the strategy, but gets caught up in helping to plot its best execution. Or assume that the client is eager to get a fast-breaking story up on the web but is struggling to find a headline that will grab the attention of readers without too much legal risk. The lawyer comes up with one and the client immediately inserts it, verbatim. Ethical decision-making often requires deliberation, which requires time, which lawyers functioning in these high-octane settings do not
have (or, at least, do not believe they have). Unfortunately, quick decisions made by well-intentioned lawyers can lead to serious problems.

Take the first example. If the reporter's conduct rises to the level of a crime or fraud, then the lawyer has allowed his or her services to be used in furtherance of it. Outside of the world of legal ethics, we often call this aiding and abetting; inside the world of legal ethics, we call it a train wreck. Rule 1.2 forbids it. And the use of the attorney's services in the commission of a crime or fraud typically destroys the duty of confidentiality (rule 1.6) and the attorney-client privilege. Of course, most good lawyers do not set out to help their client commit a crime or fraud—they just get there before they know it. It may be helpful to remember the lament of the character in the Hemingway novel who, when asked how he went bankrupt, replied "gradually and then suddenly."

Now take the second example. Let's assume that, despite the attorney's best judgment, a lawsuit over the story results and it turns out that one of the issues relates to the headline that the attorney wrote. If the editor is asked at his deposition about the authorship of the headline and he responds by identifying the lawyer, then the lawyer has in all likelihood become a witness in the case—raising ethical issues under rule 3.7, the so-called "lawyer as witness" rule. Furthermore, identifying the attorney as the
author may waive the lawyer-client privilege. That might seem harmless enough if it extends no further than the fact of the lawyer writing the headline, but courts generally apply a "subject matter" test to waiver. What’s the subject matter here—the authorship of the headline or everything about the headline or everything about the story? Aye, there’s the rub. Courts vary—dramatically—in how they think about subject matter waiver.

In high-pressure fast-paced situations, good lawyers often try extra hard to help. The impulse is commendable. But, with respect to the demands of legal ethics, it is indeed possible to try too hard.

III.

Even when things are simple and unhurried lawyers manage to get themselves into conflicts of interest. When things are very complicated and moving at the speed of light the probability of such an error occurring increases exponentially. This can happen a variety of different ways.

In the heat of the moment, a lawyer may forget whom she or he actually represents. A reporter or a photographer has an idea that is promising but dicey and, in trying to help them mitigate the risk, the lawyer loses track of the fact that under rule 1.13 the entity is the client and someone at a higher level should make the decision. Lawyers generally find it easier to spot conflicts between different clients than to spot conflicts that
may exist within the client or as among client representatives. Rules 1.7 and 1.13 offer some guidance to help attorneys navigate these waters, but, of course, they cannot do so if they do not recognize that they are afloat—and about to be dragged away by the current.

Circumstances like this also lend themselves to so-called “positional conflicts,” where a lawyer takes a legal position with respect to one client that is adverse to the legal position favored by another client. So, for example, a lawyer who in these circumstances argues on behalf of one client, a newspaper, for a very expansive approach to the “fair use” exception to copyright law might discover that another client, an association of professional photographers, has grown deeply unhappy with her. Comment [24] to rule 1.7 suggests that these tensions do not ordinarily rise to the level of “conflicts” as technically defined the rule. But there are obvious business and relationship consequences to these sorts of stumbles and you wouldn’t want to try to explain this mistake to a room full of angry guys armed with big, heavy tripods.

IV.

If there is any good news in this, it is that under these tumultuous circumstances the media lawyers aren’t the only attorneys likely to commit ethical violations. Rules 3.6 and 3.8 place limitations on the public
statements prosecutors can make about a case. In high profile investigations and trials, they often forget. Rule 3.6 also limits what defense lawyers can say, although 3.6(c) allows them to go beyond those restrictions if the prosecutor has done so. And, of course, in high profile matters judges sometimes place restrictions (wholly apart from the ethics rules) on what the lawyers can say, and compliance with those orders is imperfect. All these violations turn on a reliable phenomenon: a lawyer talks too much.

Conclusion

Part of the excitement of practicing media law is the speed with which things can arise, unfold, and change. Unfortunately, that pace does not allow for the sort of calm and careful deliberation that we often associate with ethical decision-making. The tragic and dramatic events of Ferguson give us new insights into just how quickly an important story can come out of nowhere and race off in countless different directions. We should take the lesson and understand what it may mean for the ethical practice of media law.

Fasten your seatbelts.

We may be in for a wild ride.