
The Defense of Un-Civil Behavior:
Client No. 9



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In the week since Elliott Spitzer's relationship with a prostitute became news, the story has captured the headlines in all of its sordid detail. It has been the story of a fall from grace and shocking misbehavior. It has also been a tale of the abuse of power and the sleazy underbelly of wealth. Finally, it is a case study in preparing (and failing to prepare) an effective defense when the public views the issues as betrayal of trust and moral turpitude.

Elliot Spitzer has been a star—crafting his public persona as the defender of social mores and family values. He took on the tobacco industry, prostitution, the financial services industry, and the sexual predators skulking on MySpace.com. The hero of virtue (to many) is suddenly uncovered as ‘immoral’, and replaces Paris Hilton as the self-destructive celebrity of the moment. He is caught, quite literally, with his pants down. Ongoing financial investigations will determine whether he simultaneously had his hand in the campaign cookie jar. Spitzer’s public persona as a moral crusader (‘one of the good guys’) is so at odds with his secret and repetitive use of high-priced prostitutes that Americans reacted with stinging criticism and saw him as hypocritical and blatantly deceitful. His public persona is now seen as a façade with his true character now disclosed. His having repeatedly paid a prostitutes for unprotected sex sets his conduct on a level far worse (in the minds of the public) than mere infidelity. He became sleazy.

The media coverage is huge, the spotlight is glaring, and public opinion is widely negative. Spitzer is branded as both a sleaze and a hypocrite. The public imagination and conversation are tilting toward whether he betrayed public trust in other ways. There is public anger over feeling deceived by an immoral moral crusader. Spitzer is the butt of jokes by late night comedians, makes widely televised public statements, and finally resigns in shame while pledging that he will “serve the public” yet again.

Legal representation of the powerful (i.e., politicians, business leaders, celebrities, and the wealthy) turns on issues that reflect this same sort of public pre-judgment. There is nothing new about the fury of the public reaction to the disclosures. This scenario is a central dynamic for defense attorneys representing powerful clients from coast to coast.

So, why does the public react so vehemently, and what can be done about it?

Do we love to hate our heroes?

Lawyers have hovered in the bottom third of ratings of honesty and ethics when the public is asked to compare the ethics of various professions. Gallup polls show that politicians [i.e., state officeholders] are also not held in favor.

“Ratings of state and local officeholders have also declined compared with 2004, when Gallup last asked the public about them. Twenty-four percent of Americans gave state officeholders high marks for honesty and ethics in 2004, but only 12% do so today” (Gallup Organization, 12/10/2007).

“As of December 2006, just 22% of Americans held state governors in high esteem for their moral character, saying their honesty and ethics were generally high or very high” (Gallup Organization, 3/12/2008).

Spitzer's relationship with the prostitution ring underscores this basic mistrust of lawyers and politicians and reinforces public assumptions that they are liars and hypocrites. In this way, Spitzer joins the ranks of Jim McGreevey, Gary Hart, Wilbur Mills, and Bill Clinton (among others)—all high profile figures whose reputations were severely damaged by sex scandals.

A political life is a set-up for disaster. In order to satisfy the public's wish to identify with the candidate ("He's my man" or "We need more people like her") the candidate has to be the embodiment of the most ideal values—not the actual conduct—of the people they are trying to woo. The public doesn't actually want someone who is truly like them, they want a candidate that is like who they *wish* they were. The public doesn't seem to ask the obvious: What sort of person would be attracted to an intensely public life? It doesn't occur to the public that there is no way their favorite candidate is actually much like them, as seen by the fact that most of the public would rather do almost anything than run for office. After all, 'everyone' wants to be famous, but not at the cost of our privacy.

Social science research repeatedly shows that we think we are better judges of character than those around us. We can tell whether the candidate or politician is virtuous or not, and whether the mud should stick or not. Discovering we have been deceived is disturbing and a betrayal of trust, and thus, the public reacts with predictably negative feelings.

A New York Times Letter to the Editor on March 14, 2008 illustrates this perspective,

"The soon to be ex-governor says that his immediate focus is on his family. It would have been nice, and far more humane, had Eliot Spitzer's focus been on his family while he was reportedly having unprotected sex with a prostitute" (Henry A. Lowenstein, New York, March 13, 2008).

Overall, the legacy of Elliot Spitzer's public service is strongly diminished by the public sense that he is not at all who he pretended to be. His defense will require a cooling-down period and the subsequent recollection of the reasons he was admired by so many for so long.

OPC: The crisis of 'Other People's Character'

The moral errors made by those in the limelight are an unending cautionary tale for the public. It allows the public to quickly judge the person as corrupt and to revel in the salacious details as "current events" instead of as a reflection of their fascination with another side of power. The bond they had been felt with the fallen hero is broken, and the line has been drawn. The public is virtuous, and this is about 'Other People's Character'. Social scientists call this judgment process the "fundamental attribution error".

Fundamental Attribution Error is the assumption we make that misconduct of others is the result of character flaws, immorality, a lack of values, etc., and when those other people err, it is just their true selves finally being uncovered. Our own behavior is seen as a combination of our character (which is positive) and circumstances (which can lead us to imperfection). In other words, we condemn others as lacking character and morals and excuse ourselves by looking at the circumstances surrounding the behavior.

Novelist Richard Russo wrote a thoughtful piece in a recent Washington Post (3/16/2008) article in which he (perhaps unknowingly) describes the phenomena of the fundamental attribution error:

"One night recently, as I stayed up watching television coverage of Eliot Spitzer's disgrace, I found myself losing it all over again as the media turned a complex drama into a simple story line: Now that he's no longer their unsullied white knight, Spitzer must be a complete hypocrite. Later, I lay awake in the dark thinking about how a novel about Eliot Spitzer might go and what kind of novel it would be".

Elliot Spitzer's realities are inevitably more complex than the media and public opinion are

painting them. The gut tendency, however, is to paint him with a tar brush and cast him aside. It is easier, it simplifies the moral uncertainties, and it allows broken hearts to begin healing.

Defending ‘Other People’s Character’ OPC Bias cases: Mitigating the damage

When the circumstances of the conduct are irrefutable, the challenge is to mitigate the harm. It cannot be retracted but perhaps it can be minimized. Start by asking yourself a few key questions:

1. How great is the divide between this conduct and the conduct of the typical juror? Can it be reframed in a way that reduces the gulf?
2. Is it possible to make the flawed conduct more comprehensible?
3. How can the client reconnect with the public (the jury) in a way that allows the sense of betrayal to be reduced?

The following recommendations represent a number of strategies available to reposition a client whose behavior has resulted in high levels of publicity and a public rush to judgment.

1. Apologize correctly.

Spitzer’s initial (pre-resignation) apology can be viewed here:

<http://www.youtube.com/watch?v=NQ03HnrFHVE>.

This is not an example of a good apology. It is evasive—we do not know what he did, but we know it was bad. A polished politician is rattled. Spitzer needed to wait until he was ready to clearly describe what he did, and he needs to acknowledge and express regret for harm done to individuals (both directly and indirectly) by his actions. Spitzer’s apology didn’t do this. Instead it allowed him to frame his behavior as a private failing and one that was not the public’s business. For celebrities, politicians, and business leaders, this assertion of private versus public business is a false distinction.

As his resignation (a few days later) illustrates, Spitzer’s initial attempt to frame his behavior as a private matter failed. Intense media coverage and public outcry ultimately resulted in his resignation. The New York Times printed the text of Spitzer’s “resignation apology” (March 12, 2008; <http://cityroom.blogs.nytimes.com/2008/03/12/full-text-of-spitzer-resignation/>).

Relevant excerpts are printed below:

“In the past few days I have begun to atone for my private failings with my wife, Silda, my children, and my entire family. The remorse I feel will always be with me. [snip] From those to whom much is given, much is expected. I have been given much: the love of my family, the faith and trust of the people of New York, and the chance to lead this state. I am deeply sorry that I did not live up to what was expected of me. To every New Yorker, and to all those who believed in what I tried to stand for, I sincerely apologize.

[snip] Over the course of my public life, I have insisted, I believe correctly, that people, regardless of their position or power, take responsibility for their conduct. I can and will ask no less of myself. For this reason, I am resigning from the office of governor. [snip]

I go forward with the belief, as others have said, that as human beings, our greatest glory

consists not in never falling, but in rising every time we fall. As I leave public life, I will first do what I need to do to help and heal myself and my family. Then I will try once again, outside of politics, to serve the common good and to move toward the ideals and solutions which I believe can build a future of hope and opportunity for us and for our children.” [snip]

Multiple media outlets have been looking at Spitzer’s resignation apology and they mostly come to a shared conclusion: Spitzer’s apology was thin on substance and extremely lacking in terms of an expression of regret to those he had harmed through his behavior.

Here is a reminder of what a good apology consists of and why a good apology includes these elements:

- a. a detailed account of the situation (so others are sure what you are talking about).
- b. acknowledging the hurt or damage done (so others see that you have empathy for their pain as caused by your behavior).
- c. taking responsibility for the situation (so others know that you see yourself as the cause and not the victim).
- d. a statement of regret and often asking for forgiveness (so others know you truly are sorry and want to repair relationships if possible).
- e. a promise that it won't happen again and a form of restitution whenever possible (so others know that you are going to not only change your behavior but make amends for their damages if possible).

A good example of how this can work well is in the many instances of prominent people who have had widely known problems with drinking or drugs, who swear off substance use, discuss their past failings openly, and are subsequently seen as virtuous. Of course, the first question above (How great is the divide between this individuals’ conduct and the conduct of the typical juror?) is a critical factor, and when the clients’ conduct is seen as egregious, it is a more complicated task.

Caveat: Crafting an apology is both art and science. Each situation is different, requires different emphases, contextual framing, and levels of understanding. Make sure the apology your client gives truly speaks to the situation that will be unfolding in the future *as the story continues to evolve*, and that the apology directly speaks to the public values and moral issues that will become enflamed.

2. Rebut the OPC Bias

Special attention must be paid to creating more complex explanations than “he is a bad person” for the misconduct. Challenge that ‘he is bad, and I am good but merely human’ over-simplification. Richard Russo’s article in the Washington Post provides a nice example of how to imbue your client with complexity as he imagines a novel written about a “complex Elliot”:

“I cannot speak for the real Eliot, but some part of my Eliot has known all along that he's no saint, that he's not anybody's best hope, not even his own. He knows this even as some other part of him believes what people are telling him because, of course, he wants to. This has been his true conflict all along, and finally, explosively, it has been resolved”.

Drawing attention to the complexity in the failings of your client and how they are due to both internal (character) and external (situational) factors will be make it easier for the public (and perhaps jurors) to see your client as more three dimensional, and therefore, as more like them. The art of it relates to the need to do this without self-forgiveness or rationalization of the behavior (i.e., “excuses”).

Caveat: Men and women react differently when asked to reconsider their reactions to wrongdoing. Men respond more empathically when asked to consider their own past failings as they assess your clients’ failings. Women are less empathic when asked to consider their own past failings (Exline, et al, 2008). These findings, which summarize a series of studies with similar outcomes, must be considered carefully in planning public statements or crafting courtroom narrative.

3. Humanize: Focus on positives and weigh them against this fall from grace

Elliot Spitzer has a long string of accomplishments that can be acknowledged. If the same is true for your client, quietly address them. If it is a moral failing (such as Spitzer’s), a surrogate who has high moral standing, such as a religious leader, can help heal the sense of betrayal. Conversely, being supported by someone whose own conduct is not trusted (such as Darryl Strawberry’s support of Roger Clemens) will only add new layers of skepticism. This component helps your client be seen as flawed and complex but human, and gathers data for those more sympathetic to your case and client.

Caveat: Do not directly draw the line between past good deeds and a softer attitude toward your client. Allow your listeners to do that for themselves. You are simply articulating a more realistic and complex picture of your client.

4. Focus on what has been lost and how your client has been affected

In Elliot Spitzer’s case, he has lost his credibility, a career, the trust of his spouse, the unsullied regard of his daughters, the support of his colleagues, the faith of his political party, and his reputation as a “good guy” crusader. The unspoken message: He has violated the public trust, he has suffered materially and personally, and he will continue to suffer (thus, he has suffered enough).

Caveat: This approach again shows your clients’ complexity but must be handled carefully as it has a potential for backfiring. The worst thing you can do is to articulate the conclusion you want a jury to reach. You lead them up to it and stop—allowing them to take the inevitable last step. Articulating the “he has suffered enough” message usually ends up sounding like a rationalization, and smacks of insincerity.

5. Avoid surprise

When dealing with any high-profile client, of course you want to avoid surprises. Talk to your client about any other skeletons lurking in the now-open closet. Use the new information, if any, to plan your strategy should additional bad facts come to light. Consider the impact of disclosing other misconduct as a sign of voluntarily ‘coming clean’.

Caveat: Manage your emotional response to any disclosures from your client. Your client has

been caught in a very public deception that, in many cases, has been carried on for years. You want to present a curious and non-judgmental exterior while also being very clear with your client that you need to know everything that might find its way into the story.

6. Who is willing to understand your message?

We all view facts through a filter of personal experiences, attitudes and beliefs. In a case that jurors *think* they understand, it becomes even more complicated. Trial lawyers must assess how individual jurors will experience the pressure of rendering a verdict not only on the facts but also on social issues. In Spitzer's case they might see their verdict as rendering judgment on ethics, adultery, deception, immorality, and other social issues. How will jurors explain to their family and friends that they went easy on a person who is seen in the public mind as having done wrong? How will they be seen if they find against a popular figure?

The only way to know how people are going to respond is to ask them. Focus groups, mock trials, pre-trial research, and community attitude surveys are all crucial tools to help shape an effective trial story. While judicial remedies (such as the ever-ineffective admonition to be unbiased) will be offered, you need to advocate strongly for a supplemental juror questionnaire. Take the temperature of the venue. Understand what obstacles you will need to overcome for your case to achieve credibility.

Caveat: Demographics are more often misleading than helpful. Far more valuable are attitudes, values, and life experiences (not race, age, religion, or gender). Avoid the pitfall of common demographic assumptions ("women will be good for this client", "minority clients will be bad", "poor people will not understand these pressures"). Do your research. Have a factual basis for your assumptions and strategy going into trial.

Ultimately, successful defense of high profile cases involves humanizing the client, making the conduct understandable (even if misguided), reconstructing the connection between the client and the jury, and sincerely apologizing for whatever is being admitted. If the jury (or public) concludes that the defendant is guilty of things for which he has not confessed or sufficiently suffered, they will make the point in their verdict.

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