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Law & the Media: Maintaining Your Integrity

Featuring special guest Rikki Klieman, Esq.

About Rikki Klieman

Ms. Klieman has earned a reputation as one of the nation's most celebrated lawyers and legal authorities. Klieman found success in multiple fields, including television journalism, the courtroom, academia and public speaking.

Rikki is now a Contributor/Legal Analyst for CBS News. She was an Anchor at the Courtroom Television Network from 1994-2010 and a Contributor for the CBS Early Show, the NBC Today Show as well as the E! Network. She has also appeared as a legal analyst on NBC's Nightly News, CBS Evening News, ABC, CNN, CNBC and MSNBC.

She remains Of Counsel to the Boston, Massachusetts law firm of Klieman & Lyons, where she specialized in criminal trial and appellate practice as well as civil litigation. She received her J.D. from Boston University School of Law. Prior to her legal career, she was a theater major at Northwestern University who became a professional actress. Following law school, she served as a law clerk for the Honorable Walter Jay Skinner of the United States District Court of Massachusetts, and as a prosecutor with both the Middlesex and Norfolk County District Attorney's offices.

Ms. Klieman was a member of the Adjunct Faculty at Columbia Law School, teaching a course on Trial Strategies in Major Current Cases. She was an Adjunct Professor at Boston University School of Law teaching trial practice. She lectures across the country on the legal system and taught trial advocacy at the Intensive Trial Advocacy Program at Harvard, the University of Virginia Trial Advocacy Institute, Northwestern University's Short Course for Criminal Defense Lawyers, the National Criminal Defense College, the Western Trial Advocacy Institute and Gerry Spence's Trial Lawyers College.

Ms. Klieman served on the Advisory Committee to the U.S. Supreme Court on the Federal Rules of Criminal Procedure, the Board of Directors of the National Association of Criminal Defense Lawyers and the Board of Visitors for Boston University School of Law. She was a member of the American Bar Association's National Conference of Lawyers and Representatives of the Media.

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Punishing Pundits: People v. Dyleski and the Gag Order as Prior Restraint in High-Profile Cases

Michael D. Seplow

Paul L. Hoffman

PUNISHING PUNDITS: *PEOPLE V. DYLESKI* AND THE GAG ORDER AS PRIOR RESTRAINT IN HIGH-PROFILE CASES

Michael D. Seplow & Paul L. Hoffman[*]

I. INTRODUCTION

A. Constitutionality of Gag Orders

This Article considers the constitutionality of gag orders that restrain all people who are associated, even peripherally, with a high-profile criminal trial from engaging in the public debate surrounding the case. In an effort to suppress the general level of media coverage, such orders may function as a type of prior restraint to those who may be seen as participants in the trial, and yet are not parties to it. This issue is considered in the context of *People v. Dyleski*, a high-profile murder case pending in Northern California.[1]

In *Dyleski*, a superior court judge issued a gag order against Gloria Allred, a nationally known legal commentator, because she represents a potential witness in the proceedings. Ostensibly to ensure the fairness of the legal process, the order prevents Ms. Allred from discussing a variety of subjects concerning the case, many that

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* Michael D. Seplow and Paul L. Hoffman are partners in Schonbrun, DeSimone, Seplow, Harris & Hoffman, LLP, in Venice, California. They are counsel of record for Gloria Allred in People v Dyleski. Michael D. Seplow has litigated numerous cases at the trial and appellate levels in the Federal and California courts on a variety of issues, including civil rights, employment law and the First Amendment. Paul L. Hoffman is the former Legal Director of the ACLU Foundation of Southern California. He has litigated numerous cases involving gag orders.

1. *People v. Dyleski* is pending in the Superior Court of Contra Costa County. Felony Complaint, People v. Dyleski, No. 03-219113-8 (Cal. Super. Ct. filed Oct. 21, 2005; renumbered No. 05-060254-0, Feb. 24, 2006).

have already been well-exposed in the media.[2]

This Article argues that courts cannot prevent commentators like Ms. Allred from expressing their views about pending cases, especially matters already in the public domain, that are unrelated to the protection of criminal defendants from the disclosure of prejudicial information.[3] Such broad gag orders go beyond protecting a defendant's right to a fair trial. And although many lament the intensity of media coverage in certain high-profile criminal cases, in our open society with its open courts, the First Amendment must be able to prevent the government from unduly restricting media coverage. In the authors' view, First Amendment protection should bar courts from issuing gag orders that act as blanket restraints intended to reduce the overall media coverage given to a particular case.

For better or worse, the amount of attention the media pays to any particular case will be regulated by the marketplace of ideas and not by judicial fiat. Gag orders directed at those associated with a trial must therefore be narrowly tailored and specifically limited to prevent only the disclosure of particularly prejudicial evidence.[4] Persons associated with a proceeding, especially those that are

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2. The authors represent Ms. Allred in proceedings challenging the gag order. A petition for review was filed before the California Supreme Court. Petition for Review, Allred v. Superior Court, No. S140816 (Cal. Sup. Ct. Jan. 23, 2006). The petition was denied. Order Denying Petition for Review, Allred v. Superior Court, No. S140816 (Cal. Sup. Ct. Mar. 15, 2006). The United States Supreme Court denied Ms. Allred's Petition for Certiorari on October 2, 2006. Allred v. Superior Court, 127 S. Ct. 80 (2006).

3. By "prejudicial" we mean information that would likely cause jurors to pre-judge the case instead of making their decision based solely on evidence introduced at trial. This would include the release of inadmissible evidence—for example, the defendant's refusal to take a lie detector test, or the premature release of information adverse to the defense or the prosecution prior to its presentation at trial. However, the Sixth Amendment guarantees that criminal trials be open to the public. U.S. CONST. amend. VI. The courts, therefore, may not restrict the disclosure of evidence—even if it is harmful to a particular party—when it is presented as part of a criminal proceeding. *Cf.* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573–74 & n.9 (1980) (noting a "presumption of openness" and the importance of keeping the public informed in criminal trials). Consequently, gag orders usually affect only the timing of the public disclosure of admissible, prejudicial information.

4. *See* Levine v. U.S. Dist. Court, 764 F.2d 590, 595 (9th Cir. 1985).

peripherally associated, ought not to lose their right to participate in free discussion simply because of their connection to the case.

B. Competing Interests

Granted, the balance between freedom of speech and the right to a fair trial can be difficult to achieve. Ever since the United States Supreme Court reversed the murder conviction of Dr. Sam Sheppard in *Sheppard v. Maxwell,*[5] courts have struggled to find appropriate means to protect criminal defendants from the prejudicial effects of pre-trial publicity while preserving the First Amendment's guarantee of freedom of speech.

In *Sheppard,* the Supreme Court recognized the authority of trial courts to proscribe:

> extrajudicial statements by any lawyer, party, witness, or court official which divulge[s] prejudicial matters, such as the refusal of [the defendant] to submit to interrogation or take any lie detector tests; any statement made by [the defendant] to officials; the identity of prospective witnesses or their probable testimony; any belief in guilt or innocence; or like statements concerning the merits of the case.[6]

Thus, *Sheppard* established that, under appropriate circumstances, courts have the constitutional authority to impose gag orders on the parties, their counsel and witnesses (including police investigators)in order to protect the fairness of the proceedings.[7] But it is equally settled that courts have only limited authority, constrained by the First Amendment, to proscribe public statements by the press or other persons not directly involved in the proceedings.[8] Any court order that forbids reporting by the press about a pending legal proceeding constitutes a prior restraint.[9] And prior restraints on

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5. 384 U.S. 333 (1966).

6. *Id.* at 361.

7. *See, e.g.*, United States v. Brown, 218 F.3d 415 (5th Cir. 2000), *cert denied*, 531 U.S. 1111 (2001); *see also* Dow Jones & Co. v. Simon, 842 F.2d 603 (2d Cir. 1988), *cert. denied*, 488 U.S. 946 (1988); United States v. Ford, 830 F.2d 596 (6th Cir. 1987); Levine v. Dist. Court, 764 F.2d 590 (9th Cir. 1985), *cert. denied*, 476 U.S. 1158 (1986).

8. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 570 (1976).

9. *Id.* at 556.

speech and publication are considered "the most serious and the least tolerable infringement on First Amendment rights."[10]

What is most notable, then, about Ms. Allred's relation to the *Dyleski* case is that she occupies the no-man's land somewhere between the role of journalist on one hand, and the role of advocate for one of the parties on the other. As she has done in numerous other cases, Ms. Allred represents a potential witness in the underlying criminal case and has acted on behalf of her client. But she also has regularly participated in the national media coverage of several high-profile criminal trials. Thus, the question posed by *Dyleski* is whether *Sheppard* and its progeny authorize trial judges to issue gag orders broad enough to prevent *all* those associated with a trial from taking part in the public debate about a pending case. This Article contends that the *Dyleski* court improperly issued a gag order to unconstitutionally restrain the general public debate and media coverage surrounding the case. Instead of functioning as a blanket reduction, gag orders should only protect a defendant from the prejudicial, premature disclosure of admissible evidence, or any disclosure of inadmissible evidence.

C. Roadmap

This Article first recounts the events leading up to the *Dyleski* gag order. It then discusses leading cases that lay out how far a court can go when it regulates speech in the interest of promoting fair criminal trials.

Next, the authors argue that gag orders aimed at curbing pre-trail publicity do little to promote the fairness of criminal trials, and yet place unwarranted restrictions on trial participants' freedom of expression. Often, gag orders stifle legitimate criticisms of government actions, expression considered core political speech at the heart of the First Amendment. Moreover, gag orders fail to recognize that even parties' attorneys may often have a duty to make extra-judicial statements to protect their clients' best interests.

Finally, the authors conclude that gag orders in criminal cases

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10. *Id.* at 559. In *Nebraska Press Ass'n*, the U.S. Supreme Court held that a gag order restricting public statements by the press about a pending case may only be entered where: (1) there is a clear or serious threat to the fairness of the trial; (2) less restrictive alternatives are not adequate to mitigate the harm; and (3) the order would effectively prevent the threatened danger. *See id.* at 562.

are often overly broad, vague, ineffective and unnecessary. In most instances, the integrity of criminal proceedings can be protected by alternative means, such as the court's use of probing voir dire, detailed jury instructions, and changes in venue. The integrity of the proceedings may be further safeguarded by adopting rules of professional conduct that bar attorneys from making statements prejudicial to the fairness of the proceedings.

II. THE GENESIS OF THE GAG ORDER IN *PEOPLE V. DYLESKI*

On October 15, 2005, Pamela Vitale, the wife of Daniel Horowitz, a prominent criminal defense attorney, was killed in her family home near the small town of Lafayette, California.[11] On October 21, 2005, the District Attorney for Contra Costa County (D.A.) filed a criminal complaint in superior court against 16 year old Scott Edward Dyleski for the murder.[12] Although he was only sixteen at the time of the alleged crime, Dyleski was charged as an adult.[13]

The criminal complaint did not allege a motive, but the media reported the murder occurred when Dyleski went to Ms. Vitale's home to retrieve marijuana growing equipment that he had ordered using a stolen credit card.[14] According to the pleading, Dyleski used a bludgeon to kill the victim.[15]

The victim's husband, Daniel Horowitz, had himself frequently appeared as a television commentator on criminal matters.[16] His prominence coupled with the circumstances of his wife's death ensured that the proceedings would be the subject of intense local and national media interest. The media, most notably cable television, widely reported the murder.[17] The fact that Mr. Horowitz

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11. *Police: Lawyer's Wife Beaten to Death*, CNN.COM, (Oct. 18, 2005), http://www.cnn.com/2005/US/10/17/attorney.wifeslain/index.html.

12. Felony Complaint, *supra* note 1, at 1.

13. Bruce Gerstman, *Mother of Murder Suspect Assisted After Fact, Police Say*, CONTRA COSTA TIMES, Oct. 28, 2005, at A1.

14. *Dyleski Mother Arrested As Accessory*, CONTRA COSTA TIMES, Oct. 27, 2005 at A1.

15. Felony Complaint, *supra* note 1, at 1.

16. *See Police: Lawyer's Wife Beaten to Death*, *supra* note 11.

17. *See* People's Exhibit A, submitted at Hearing, People v. Dyleski, No. 03-219113-8 (Cal. Super. Ct. Nov. 16, 2005; renumbered No. 05-060254-0,

was himself participating in another high-profile murder case at the time of his wife's death only increased the visibility of the *Dyleski* case.[18]

In late October 2005, Gloria Allred and her firm were retained by an unidentified potential witness in the *Dyleski* case[19]—the girlfriend of the defendant.[20] On October 24, 2005, Ms. Allred contacted the D.A.'s office on behalf of her client, a minor at the time, to alert the prosecution that her client was a potential witness in the case.[21] Neither the police nor the D.A.'s office had previously contacted Ms. Allred's client.[22] Ms. Allred and the prosecutor agreed to meet several days later, on October 27th, to discuss her client's potential testimony.[23]

The next morning, however, on October 25, 2005, Ms. Allred was informed that her client's residence was being searched by the police, and that the D.A. had subpoenaed the young woman to appear before a grand jury later that day.[24] Ms. Allred contacted the D.A.'s office and requested that her client's grand jury testimony be postponed to the following day, October 26, 2005, to give Ms. Allred the opportunity to consult with her client and to be present outside the grand jury room.[25] The D.A. refused the request.[26]

On October 26, 2005, defendant's counsel moved for a gag order to restrict public statements about actions taken by police and

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Feb. 24, 2006).

18. *See* Police: *Lawyer's Wife Beaten to Death*, *supra* note 11.

19. On numerous occasions, Ms. Allred and her law firm have represented potential witnesses in criminal actions, including several high-profile homicide cases. *See* Opposition to Proposed Imposition of a Gag Order Upon Gloria Allred and Allred, Maroko & Goldberg, Memorandum of Points and Authorities, Declaration of Gloria Allred at 10:26–27, People v. Dyleski, No. 03-219113-8 (Cal. Super. Ct. Oct. 27, 2005; renumbered No. 05-060254-0, Feb. 24, 2006) [hereinafter Declaration of Gloria Allred]. For example, Ms. Allred represented Amber Frey, a witness in the Scott Peterson murder trial. *See id.* at 11:1, 8:13–14.

20. *Id.* at 8:14–16.

21. *Id.* at 8:7–10.

22. *Id.* at 10:4–6.

23. *See id.* at 8:22–23.

24. *Id.* at 8:24–27.

25. *Id.* at 8:27 to 9:1–2.

26. *Id.* at 9:2–4.

prosecution on October 25, 2005.[27] The D.A. promptly joined the defendant's motion and also specifically requested that the protective order apply not only to defense counsel, but to Ms. Allred and her law firm as well.[28] In papers filed in support of his request for a gag order, the D.A. expressed concern that Ms. Allred's presence in the case could "act as a lightning rod for the national broadcast media."[29] He noted that Ms. Allred was already scheduled to appear on a cable television program concerning the *Dyleski* case.[30]

On October 27, 2005, the following day, the court issued a broad interim Protective Order.[31] When it failed to specifically mention Ms. Allred, the D.A. sought to have it amended so that the gag order applied expressly to Ms. Allred and her firm.[32] The D.A. objected to Ms. Allred's appearance on a cable television show in which Ms. Allred purportedly stated that her client was "doing the right thing,"

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27. Notice of Motion for Protective Order, People v. Dyleski, No. 03-219113-8 (Cal. Super. Ct. Oct. 26, 2005; renumbered No. 05-060254-0, Feb. 24, 2006).

28. People's Request for a Protective Order, People v. Dyleski, No. 03-219113-8, (Cal. Super. Ct. Oct. 26, 2005; renumbered No. 05-060254-0, Feb. 24, 2006).

Prior to the *Dyleski* case, Ms. Allred has never been subjected to a gag order, despite the fact that she has represented prominent witnesses in many criminal proceedings. Declaration of Gloria Allred, *supra* note 19, at 11:4–7. Moreover, she has no record of any disciplinary action before the California State Bar. *Id.* at 11:18–21.

29. People's Request for a Protective Order, Declaration of Harold W. Jewett in Support of People's Request for a Protective Order at 1:27–28, People v. Dyleski, No. 03-219113-8 (Cal. Super. Ct. Oct. 26, 2005; renumbered No. 05-060254-0, Feb. 24, 2006) [hereinafter Declaration of Harold W. Jewett]. The Prosecution in the *Dyleski* case also expressed disdain for the widespread media coverage of criminal cases. "Media intentions, particularly national broadcast media, have transcended the public's right to know, and entered the sordid realm of morbid curiosity seekers." People's Supplemental Request for a Protective Order at 2:15–16, People v. Dyleski, No. 03-219113-8 (Cal. Super. Ct. Nov. 14, 2005; renumbered No. 05-060254-0, Feb. 24, 2006).

30. Declaration of Harold W. Jewett, *supra* note 29, at 2:5–7.

31. *See* Protective Order, People v. Dyleski, No. 03-219113-8 (Cal. Super. Ct. Oct. 27, 2005; renumbered No. 05-060254-0, Feb. 24, 2006).

32. People's Supplemental Request for a Protective Order, *supra* note 29, at 2:19–3:22.

and "telling the truth."[33]

On October 28, 2005, the court issued an Amended Protective Order that specifically included Ms. Allred and her firm as counsel for a potential witness.[34] Extremely broad in scope, the trial court's Amended Protective Order prohibited Ms. Allred from making any statements whatsoever about the case.[35]

The court subsequently invited all interested parties to submit briefs regarding whether the broad protective order should be modified or rescinded. In supplemental papers filed with the court, the D.A. argued that "the media has, and most certainly will, seek out Gloria Allred so long as she represents Defendant's girlfriend."[36] The D.A. rejected the notion that Ms. Allred had the right to participate in the general public debate surrounding the case.[37] Moreover, the D.A. argued that the court should prohibit general statements by Ms. Allred that attested to her client's character and credibility.[38]

On November 16, 2005, the trial court heard arguments regarding issuance of the Protective Order[39] from counsel for the

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33. Declaration of Harold Jewett in Support of Application for Modification of a Protective Order at 2:18–28, People v. Dyleski, No. 03-219113-8 (Cal. Super. Ct. Oct. 28, 2005; renumbered No. 05-060254-0, Feb. 24, 2006).

34. Amended Protective Order at 2:2–10, People v. Dyleski, No. 03-219113-8 (Cal. Super. Ct. Oct. 28, 2005; renumbered No. 05-060254-0, Feb. 24, 2006). The Amended Protective Order provided that:

[U]ntil further order of this Court . . . attorneys of persons that might be potential witnesses, or other representatives of such witnesses, shall refrain from discussing this case, the evidence expected to be used in the case, or the issues in the case, the merits of the case, or trial tactics or strategy, with the media or in an otherwise public fashion.

Id.

35. *Id.* Since the initial gag order was put in place, Ms. Allred has not issued any public statements regarding her client or the Dyleski case.

36. People's Supplemental Request for a Protective Order, *supra* note 29, at 2:24–25.

37. *See id.* at 3:14–16.

38. *Id.* at 3:7–11.

39. At the time of the hearing, the D.A. filed numerous Internet news reports about the Dyleski case. Although some reports mentioned that Ms. Allred had been retained as counsel of a potential witness, none of the articles contained any quotations from Ms. Allred regarding the facts of the case. *See*

prosecution, the defense, the San Francisco Chronicle, and Ms. Allred.[40] Noting that Ms. Allred's counsel was "representing an attorney who represents a purported unidentified witness," the judge stated, "[I am] probably making judicial history here because I don't think anybody's had such an appearance in their court before."[41]

At the hearing, the D.A. argued for a broad protective order that specifically applied to Ms. Allred and her firm, to prohibit them from publicly discussing how their client had been treated by the police and the D.A. The prosecution stated: "[I]f Miss Allred wants to get on national television and talk about inflammatory things . . . about police officers putting guns to the head of people, that is, in fact, a comment on the evidence, and it's inflammatory."[42]

On November 21, 2005, the trial court issued a revised Protective Order that expressly prohibited various persons, including Ms. Allred and members of her law firm, from making out of court statements on various topics.[43] The topics included "any opinion or public comments as to the weight, value or effect of any evidence as tending to establish either guilt or innocence."[44]

The court also issued a Decision Granting In Part and Denying In Part Motions for Protective Order,[45] indicating that it did not want to give "an advisory opinion regarding . . . future communications."[46] Nonetheless, the trial court made it clear that Ms. Allred, as counsel for a potential witness, could not "preview evidence that might be provided by, or known to, the witness."[47]

On November 29, 2005, Ms. Allred filed a Request for

People's Exhibit A, *supra* note 17.

40. Reporter's Transcript of Proceedings at 3:8–17, People v. Dyleski, No. 03-219113-8 (Cal. Super. Ct. Nov. 16, 2005; renumbered No. 05-060254-0, Feb. 24, 2006).

41. *Id.* at 25:23–26.

42. *Id.* at 33:27–34:2.

43. *See* Protective Order, *supra* note 31 at 1:21–2:7.

44. *Id.* at 2:6–7.

45. Decision Granting In Part and Denying In Part Motions for Protective Order, People v. Dyleski, No. 03-219113-8 (Cal. Super. Ct. Nov. 21, 2005; renumbered No. 05-060254-0, Feb. 24, 2006) [hereinafter Decision]. The text of the November 21, 2005 Protective Order and the accompanying Decision are set forth in the Appendix to this Article.

46. *Id.* at 7:6.

47. *Id.* at 7:14–15.

Clarification of the Protective Order, in which she contended that the Protective Order and the Decision were ambiguous as to whether she was allowed to make certain public statements, including statements critical of government officials involved in the case.[48]

The D.A. filed a response to Ms. Allred's request for clarification, stating that the gag order was not ambiguous.[49] In court, he argued that the terms of the Protective Order restrict members of Ms. Allred's firm from making out of court statements critical of the actions of the prosecution or the police, including assertions that actions of the police were harmful to their client and her family. [50] The trial court denied Ms. Allred's Request for Clarification on December 5, 2005.[51]

At first blush, the court's gag order imposed on Ms. Allred appears reasonable. It prevents her from publicly discussing her client's potential testimony, a restriction consistent with the First Amendment in these circumstances and reasonably necessary to protect the parties' right to a fair trial. In a criminal trial, a court should clearly be allowed to restrict the disclosure of prejudicial evidence before it becomes public.[52] Indeed, certain evidence may be completely excluded as prejudicial.[53] Such orders will prevent

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48. *See* Request for Clarification of Nov. 21, 2005 Protective Order by Attorney Gloria Allred at 3:18–22, People v. Dyleski, No. 03-219113-8 (Cal. Super. Ct. Nov. 29, 2005; renumbered No. 05-060254-0, Feb. 24, 2006).

49. People's Response to Request for Clarification at 2:7–11, People v. Dyleski, No. 03-219113-8, (Cal. Super. Ct. Dec. 7, 2005; renumbered No. 05-060254-0, Feb. 24, 2006).

50. Reporter's Transcript of Proceedings, *supra* note 40, at 33:27–34:2.

51. Unreported Minute Order, People v. Dyleski, No. 03-219113-8 (Cal. Super. Ct. Dec. 5, 2005; renumbered No. 05-060254-0, Feb. 24, 2006). On January 11, 2006, Ms. Allred filed a Petition with the California Court of Appeal to compel clarification. Petition for Writ of Mandate and/or Prohibition or Other Appropriate Relief, Allred v. Superior Court, No. A112615 (Cal. Ct. App. Jan. 11, 2006). On January 12, 2006, the Court of Appeal summarily denied the petition without explanation. Order Denying Petition for Writ of Mandate/Prohibition, Allred v. Superior Court, No. A112615 (Cal. Ct. App. Jan. 12, 2006). On January 23, 2006, Ms. Allred and her firm filed a Petition for Review with the California Supreme Court. Petition for Review, *supra* note 2. The Petition was denied. Order Denying Petition for Review, *supra* note 2.

52. *See* Sheppard v. Maxwell, 384 U.S. 333, 360 (1966).

53. *See* CAL. EVID. CODE § 352 (Deering 2006).

such evidence from ever becoming public and reaching jurors.

However, instead of merely preventing Ms. Allred from discussing her client's potential testimony (a demand to which she had already agreed), the gag order effectively prevented her from engaging in *any* public debate regarding the *Dyleski* case. For example, Ms. Allred was prohibited from offering opinions about the case that were unrelated to her client's potential testimony,[54] even though no other commentators had been subjected to this restriction.

It is particularly troubling that the order has silenced Ms. Allred and her firm from making any comments critical of the police or the D.A. The D.A. has taken the position that the gag order has expressly prohibited such statements, and the trial court denied Ms. Allred's request for a clarification on this issue. Therefore, Ms. Allred could face contempt proceedings if the court accepts the D.A.'s position, in spite of the compelling argument that the gag order allows her to criticize the actions of the government with respect to her client. Thus, the order impedes her ability to make public statements that she deems necessary to protect her client.

III. GAG ORDERS AND RESTRICTIONS ON SPEECH BY ATTORNEYS AND TRIAL PARTICIPANTS: AN OVERVIEW

A. Sheppard v. Maxwell

In *Sheppard*, the Supreme Court reversed the murder conviction of Dr. Sam Sheppard. The Court held that Sheppard had been denied the right to a fair trial as a result of extensive prejudicial publicity and the "carnival" atmosphere in which the trial was conducted.[55] *Sheppard* is often cited as the leading authority for courts to impose gag orders restricting trial participants' out of court statements. But the facts of the case reveal that the Supreme Court based its reversal on more than excessive pre-trial publicity.[56]

True, the media bombarded jurors with prejudicial news reports about the case, including numerous inflammatory articles attacking

54. Protective Order, *supra* note 43, at 247.

55. *See Sheppard*, 384 U.S. at 358.

56. The Court considered the totality of the circumstances surrounding the trial. *Id.* at 352. For example, the Court noted that, despite the excessive publicity, the trial court denied Sheppard's request for a change of venue. *Id.* at 352–53.

Dr. Sheppard's character.[57] But the three major local newspapers also published the names and addresses of the members of the jury pool.[58] "As a consequence, anonymous letters and telephone calls, as well as calls from friends, regarding the impending prosecution were received by all of the prospective jurors."[59] And, unlike most trials today, the press at the *Sheppard* trial had the run of the courtroom.

> Approximately 20 representatives of newspapers and wire services were assigned seats . . . by the court. Behind the bar railing there were four rows of benches. These seats were likewise assigned by the court for the entire trial. The first row was occupied by representatives of television and radio stations, and the second and third rows by reporters from out-of-town newspapers and magazines. . . . Representatives of the news media also used all the rooms on the courtroom floor. . . . Private telephone lines and telegraphic equipment were installed in these rooms so that reports from the trial could be speeded to the papers. Station WSRS was permitted to set up broadcasting facilities on the third floor of the courthouse next door to the jury room, where the jury rested during recesses in the trial and deliberated. Newscasts were made from this room throughout the trial, and while the jury reached its verdict.[60]

Moreover, the media also dominated the scene outside the courtroom by photographing and televising trial participants, including jury members.[61]

> [I]n front of the courthouse, television and newsreel cameras were occasionally used to take motion pictures of the participants in the trial, including the jury and the judge. Indeed, one television broadcast carried a staged interview of the judge as he entered the courthouse. In the corridors outside the courtroom there was a host of photographers and television personnel with flash cameras, portable lights

57. *Id.* at 342.
58. *Id.*
59. *Id.*
60. *Id.* at 343.
61. *See id.* at 343–44.

> and motion picture cameras. This group photographed the prospective jurors during selection of the jury. After the trial opened, the witnesses, counsel, and jurors were photographed and televised whenever they entered or left the courtroom. Sheppard was brought to the courtroom about 10 minutes before each session began; he was surrounded by reporters and extensively photographed for the newspapers and television.[62]

The trial participants felt the overwhelming presence of the media throughout the entire trial, which clearly interfered with the proceedings.[63]

> All of these arrangements with the news media and their massive coverage of the trial continued during the entire nine weeks of the trial. . . . Their movement in and out of the courtroom often caused so much confusion that . . . it was difficult for the witnesses and counsel to be heard . . . [and] made confidential talk among Sheppard and his counsel almost impossible during the proceedings. . . . [W]hen counsel wished to raise a point with the judge out of the hearing of the jury it was necessary to move to the judge's chambers. Even then, news media representatives so packed the judge's anteroom . . . [that] often these matters later appeared in newspapers accessible to the jury.[64]

Moreover, contrary to the orders courts now give to jurors, the *Sheppard* trial judge did not instruct jurors to refrain from viewing press reports about the case or from discussing the case with others.[65] Rather, the judge abdicated his responsibility, merely suggesting that jurors disregard any newspaper, radio or television reports about the trial.[66]

The Supreme Court was highly critical of the trial court's failure to take steps to ensure the fairness of the proceedings, including its

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62. *Id.*

63. *See id.* at 344.

64. *Id.* at 344.

65. *Id.* at 353.

66. *Id.* ("I am sure that we shall all feel very much better if we do not indulge in any newspaper reading or listening to any comments whatever about the matter while the case is in progress.").

failure to control the spread of prejudicial publicity.[67] The trial judge believed that because he could not restrict press reports about the case, he was also powerless to control the spread of prejudicial materials outside the courtroom.[68] The Supreme Court noted, however, that while it may be unconstitutional to place a prior restraint on press reports about the case, the court did have the power to control statements by persons directly involved, and thereby control the type of information that could be reported about the case.[69]

> [T]he trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, such as the refusal of Sheppard to submit to interrogation or take any lie detector tests; any statement made by Sheppard to officials; the identity of prospective witnesses or their probable testimony; any belief in guilt or innocence; or like statements concerning the merits of the case.[70]

At the core of the *Sheppard* case is the principle "that no one be punished for a crime without 'a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power,'"[71] and that "the jury's verdict be based on evidence received in open court, not from outside sources."[72]

B. The Expanding Effect of Sheppard

Despite the unique circumstances surrounding the *Sheppard* trial, the case is often viewed as granting trial courts broad authority to control pre-trial publicity. For example, in *Nebraska Press Ass'n v. Stuart*,[73] the trial court took its concerns about pre-trial publicity and attempted to expand the scope of *Sheppard* to another level. Instead of merely restricting the ability of the parties, witnesses and

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67. *Id.* at 358–59.

68. *Id.* at 357.

69. *See id.* at 350, 359.

70. *Id.* at 361. The Court did not, however, endorse placing any restrictions on "reporting events that transpire in the courtroom," *id.* at 362–63, as such reports enjoy protection under the First Amendment.

71. *Id.* at 350 (quoting Chambers v. Florida, 309 U.S. 227, 236–37 (1940)).

72. *Id.* at 351.

73. 427 U.S. 539 (1976).

court personnel from making extra-judicial statements, the trial court issued an order that prevented the press from reporting any such statements.[74] Although the criminal trial had concluded by the time the case reached the U.S. Supreme Court,[75] the Court recognized that the issues raised in *Nebraska Press Ass'n* would likely be repeated,[76] and established constitutional parameters governing gag orders on criminal proceedings.[77]

Using traditional First Amendment analysis, the Supreme Court determined that the gag order on the press was an unconstitutional prior restraint. Prior restraint, the Court emphasized, is "the most serious and the least tolerable infringement on First Amendment rights,"[78] and is presumed unconstitutional.[79]

As the Supreme Court noted in *Nebraska Press Ass'n*, the imposition of a gag order involves the clash of two competing constitutional principles: the First Amendment's guarantee of freedom of expression and the Sixth and Fourteenth Amendments' due process guarantee of the right to a fair trial.[80]

In *Nebraska Press Ass'n*, the Court determined that courts may only issue a gag order on the press restricting public statements about a pending case where: (1) there is a clear or serious threat to the fairness of the trial; (2) less restrictive alternatives would not mitigate the harm; and (3) the order would effectively prevent the threatened danger.[81] Under this "clear and present danger" analysis, the court deemed the gag order on the press to be unconstitutional.[82]

The gag order at issue in *Nebraska Press Ass'n* specifically applied to parties that were not participants in the trial.[83] Accordingly, the Court applied the constitutional analysis for prior restraint. But that analysis may not answer the question raised by the *Dyleski* case, which is whether a gag order aimed solely at trial

74. *Id.* at 541, 542.
75. *Id.* at 546.
76. *Id.* at 546–47.
77. *Id.* at 570.
78. *Id.* at 559.
79. *Id.* at 558.
80. *See id.* at 556, 561.
81. *See id.* at 562.
82. *See id.* at 570.
83. *Id.* at 541, 542.

participants should be subjected to the same constitutional analysis applied to prior restraint on the press.

On one hand, such gag orders do not constitute a prior restraint on members of the press or the public; they do not prohibit publication of news stories about a pending case. Rather, the gag order restricts press *access* to information about the case by barring trial participants from speaking to the media.[84]

On the other hand, a gag order is a prior restraint on the freedom of expression of those persons who are subject to the order.[85] This raises the question of whether a gag order on trial participants, including attorneys, should be subject to the same "clear and present danger" analysis in determining its constitutionality. Or can gag orders on trial participants be justified under a lesser showing?

C. The "Substantial Likelihood" Standard

The Supreme Court answered this question in *Gentile v. State Bar of Nevada*,[86] when it addressed the constitutionality of speech restrictions placed on attorneys representing parties in criminal proceedings. In contrast to *Dyleski*, *Gentile* did not deal with a gag order imposed by a trial court. Instead, the case addressed the question of whether a criminal defense attorney should be subject to discipline by the Nevada State Bar for extra-judicial statements he made about a case he was trying.[87]

After his client was indicted, Mr. Gentile, an attorney for a defendant in a criminal proceeding, gave a press conference in which he discussed aspects of the case.[88] In particular, Mr. Gentile vouched

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84. *See* Dow Jones & Co. v. Simon, 842 F.2d 603, 608–09 (2d Cir. 1988) (holding that a gag order on trial participants is not a prior restraint with respect to the press).

85. *See* Levine v. U.S. Dist. Court, 764 F.2d 590, 595 (9th Cir. 1985) (holding that a gag order constitutes a "prior restraint" on the free speech rights of those subject to the order and is therefore subject to strict scrutiny to ensure its constitutionality); *see also* CBS Inc. v. Young, 522 F.2d 234, 239–41 (6th Cir. 1975) (holding that a broad protective order preventing parties and counsel from discussing civil litigation regarding the Kent State shooting was an unconstitutional prior restraint, even though the gag order was directed at the trial participants and not at the press itself).

86. 501 U.S. 1030 (1991).

87. *Id.* at 1033.

88. *Id.*

for his client's innocence and stated that his client was being made a scapegoat by the police and the prosecution to cover up their own misconduct.[89]

Several months later, after his client was acquitted, Mr. Gentile was disciplined by the Nevada Bar Association for violating the Bar's rules regulating speech by attorneys involved in pending matters.[90] In his defense, Mr. Gentile claimed that his public statements were necessary to protect his client against the prejudicial pre-trial publicity which resulted from leaks to the press by the police.[91]

The Supreme Court determined that the Nevada Bar rule, as applied, was an unconstitutional restriction on Mr. Gentile's free speech. The Court thus threw out the Nevada Bar's disciplinary charges against him.[92] Nonetheless, the Court determined that speech by attorneys in pending cases can be regulated under a *lower standard* than the clear and present danger standard of *Nebraska Press Ass'n*.[93] Because lawyers representing clients in pending cases are key participants in the criminal justice system, the state may demand some adherence to the precepts of that system by regulating their speech as well as their conduct.[94]

The test articulated in *Gentile* allows a court to curtail attorney speech that presents "a substantial likelihood of material prejudice" to the right to a fair trial.[95]

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89. *Id.* at 1059.

90. *See id.* at 1033.

91. *See id.* at 1064.

92. *See id.* at 1033. Gentile was decided by a divided court. In the part of the decision written by Justice Kennedy, who was joined by four other justices, the Court held that the Nevada rule as applied in the case was unconstitutionally vague in that it did not provide fair notice as to the type of speech that could be restricted. *Id.* at 1048, 1051–52. Nonetheless, a different majority determined that the speech of attorneys representing parties to a criminal proceeding can be regulated under the "substantial likelihood of material prejudice" standard, which is a lesser standard than that applied to restrictions on speech the press. *Id.* at 1074–75.

93. *Id.* at 1074.

94. *Id.*

95. *Id.* at 1075. "We agree . . . that the 'substantial likelihood of material prejudice' standard constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's

> The "substantial likelihood" test . . . is constitutional . . . for it is designed to protect the integrity and fairness of a State's judicial system, and it imposes only narrow and necessary limitations on lawyers' speech. The limitations are aimed at two principal evils: (1) comments that are likely to influence the actual outcome of the trial, and (2) comments that are likely to prejudice the jury venire, even if an untainted panel can ultimately be found. Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by "impartial" jurors, and an outcome affected by extrajudicial statements would violate that fundamental right.[96]

Although *Gentile* did not involve a judicially imposed gag order on trial participants, subsequent lower court decisions have routinely applied the "substantial likelihood of material prejudice" standard in analyzing the constitutionality of gag orders on parties' attorneys.[97]

Nonetheless, *Gentile* dealt with a state bar rule as opposed to a gag order that constitutes a prior restraint on the speech of trial participants. Thus, where a state has adopted regulations on attorney speech that are based on the *Gentile* standard, it seems unnecessary for a court to impose a gag order on counsel.

IV. THE OVERUSE OF GAG ORDERS AIMED AT CURBING PRE-TRIAL PUBLICITY THREATENS THE FIRST AMENDMENT RIGHTS OF TRIAL PARTICIPANTS

Dyleski illustrates several dangers that gag orders pose to the

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interest in fair trials." *Id.*

96. *Id.*

97. *See, e.g.*, United States v. Scarfo, 263 F.3d 80, 93-94 (3d Cir. 2001) (finding it reasonable to apply the substantial likelihood test to attorney's speech where attorney was in the same position as the attorney referred to in *Gentile*); United States v. Brown, 218 F.3d 415, 428–29 (5th Cir. 2000) (concluding that the district court identified a substantial likelihood that extrajudicial comments of trial participants would prejudice its ability to conduct fair trials). *But see* Hurvitz v. Hoefflin, 101 Cal. Rptr. 2d 558, 565 (Ct. App. 2000) (requiring "a clear and present danger or serious and imminent threat" for prior restraint of speech by trial participants). In *Hurvitz*, the Court also noted that Article I, Section 2 of the California Constitution provides even broader protection for freedom of speech than the First Amendment. *Id.* at 565.

freedom of expression of those subject to the order.[98] First, gag orders are often issued to suppress media coverage in general rather than focusing on specific threats to the fairness of the proceedings. As a result, gag orders are not narrowly tailored to address the specific threats to a fair trial from extra-judicial statements.

Second, courts imposing gag orders often fail to appreciate that attorneys sometimes have to engage in conduct and speech outside the realm of formal judicial proceedings in order to protect the interests of their clients. Certainly, even trial participants have a right to participate in the public debate surrounding criminal proceedings, especially where there are allegations of government misconduct.

Third, the terms of gag orders can be vague, causing those subjected to the order to refrain from making any statements—even permissible ones—for fear of being punished for their speech.

In *Dyleski*, the trial court justified its imposition of a gag order as necessary to avoid tainting the pool of potential jurors:

> The purpose of a protective order in the current environment is to assure a prospective jury panel, for jury selection, that has not been bombarded with either facts or concepts that make it reasonably unlikely that such can be "put aside" and the case determined solely on the trial evidence.[99]

The trial court's reasoning is consistent with a long line of cases that hold that the purpose of a gag order is to prevent the tainting of the jury pool with prejudicial information that could prevent the selection of an impartial jury.[100] The danger, however, with such a broadly stated rationale is that it may be applied to a broad range of comments that will not, in fact, taint the jury pool, but rather, will

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98. The gag order imposed on attorney Gloria Allred is unprecedented. The authors are unaware of any reported cases in California in which a trial court has imposed a gag order on an attorney for a non-party potential witness.

99. Decision, *supra* note 45, at 5:12–16.

100. *See, e.g.*, *Scarfo*, 263 F.3d at 93–94 (noting that gag order on former trial participant's speech is appropriate when material prejudice could otherwise result); *Brown*, 218 F.3d at 428–29 (affirming district court's gag order on trial participants as appropriate); *In re* Russell, 726 F.2d 1007, 1010–11 (4th Cir. 1984) (affirming gag order on witness as necessary to ensure a fair trial).

chill public discussions protected under the First Amendment.

Moreover, it appears that the *Dyleski* court went beyond what is reasonably necessary to ensure a fair trial for the parties. The court apparently believed that the best way to protect against prejudicial pre-trial publicity was to limit media coverage of the case in general. Such an approach is overbroad and unconstitutional, however, in that it restricts all types of public statements, regardless of whether they are likely to prejudice the fairness of the proceedings. As the Supreme Court noted in *Nebraska Press Ass'n v. Stuart*:

> [P]re-trial publicity, even if pervasive and concentrated, cannot be regarded as leading automatically and in every kind of criminal case to an unfair trial. The decided cases cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process.[101]

Indeed, our courts have routinely recognized that high-profile cases are likely to attract widespread media attention and that there is little that can be done about this in a free and open society.

> Media dissemination of the alleged facts of horrifying and threatening criminal activity . . . unfortunately is a fact of life in our society. The news reports may, and do, contain inadmissible hearsay, rank and unfounded opinions, incriminating statements, inaccurate sketches and more. But our criminal justice system is deemed to be hearty enough to withstand prejudicial publicity and still guarantee a given defendant the most basic right to receive a fair trial. In this regard, the cost to the criminal justice system to provide a fair trial is the price we pay for an open society, and a free press with access to criminal proceedings.[102]

Therefore, absent extraordinary circumstances, issuing a broad

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101. 427 U.S. 539, 565 (1976) (internal quotation omitted); *see also* Columbia Broad. Sys., Inc. v. U.S. Dist. Court., 729 F.2d 1174, 1180 (9th Cir. 1983) ("[I]t is not enough that publicity might prejudice one directly exposed to it. If it is to be restrained, the publicity must threaten to prejudice the entire community so that twelve unbiased jurors can not be found.").

102. Tribune Newspapers West, Inc. v. Superior Court, 218 Cal. Rptr. 505, 515 (Ct. App. 1985) (emphasis omitted).

gag order against an attorney-commentator such as Ms. Allred is unlikely to have any discernable effect on the press coverage of a particular case. Given this reality, all that a gag order will do is suppress some statements about a case, without having any overall effect on the amount of prejudicial information that could taint the jury pool.

In *Gentile,* the Supreme Court noted that the reason for allowing greater restraints on attorney speech is that attorneys "have special access to information through discovery and client communications, [and therefore] their extrajudicial statements pose a threat to the fairness of a pending proceeding since lawyers' statements are likely to be received as especially authoritative." [103] The strong counter argument, however, is that if knowledgeable attorneys, including prosecutors and defense counsel, are barred from commenting on pending matters, the vast majority of media coverage will come from disreputable sources that are only more likely to flood the media with prejudicial misinformation.

In any event, the aim of any gag order should not be to indiscriminately curtail pre-trial publicity in general. Rather, the aim should be to protect the fairness of the trial by taking reasonable measures to ensure that a fair and impartial jury decides the case based only upon the evidence admitted at trial.[104]

It is well established under the First Amendment that

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103. Gentile v. State Bar of Nev., 501 U.S. 1030, 1074 (1991) (citing *In re* Hinds, 449 A.2d 483, 496 (N.J. 1982)); *In re* Rachmiel, 449 A.2d 505, 511 (N.J. 1982)).

104. The standard for showing that pre-trial publicity has jeopardized the right to a fair trial is extremely high. For example, in Mu'Min v. Virginia, 500 U.S. 415, 418 (1991), the community had been subjected to a barrage of publicity prior to the defendant's capital murder trial. News stories appearing over a course of several months included details of the crime itself and numerous items of prejudicial information inadmissible at trial. *Id.* Eight of the twelve individuals seated on the jury admitted some exposure to pre-trial publicity. *Id.* at 421. Despite this, the U.S. Supreme Court held that the publicity did not rise even to a level requiring questioning of individual jurors about the content of publicity. *Id.* at 431–32.

The authors do not suggest that this standard should govern the issuance of gag orders. It does, however, suggest a large discrepancy between the definition of prejudice in terms of appellate review of criminal convictions and prejudice in terms of the issuance of gag orders.

governmental restrictions on speech, even when implemented for a legitimate purpose, "must be narrow and necessary, carefully aimed at comments likely to influence the trial or judicial determination."[105] Governmental restrictions on speech that are overly broad and stifle speech beyond the legitimate purpose are unconstitutional.[106] Accordingly, before entering a gag order, the court must make specific findings to support its issuance.[107]

Further, before a court imposes an order that unduly restricts the freedom of expression of those subject to its jurisdiction, it should consider alternative methods. These could include, for example, extensive and probing voir dire of jurors, and the "use of emphatic and clear instructions on the sworn duty of each juror to decide the issues only on evidence presented in open court."[108] A court's implementation of these methods must be genuine, and if a broad gag order still appears necessary, the court should be required to explain why such alternative measures are inadequate.

Moreover, when imposing gag orders, courts must also be cognizant of the rights of all citizens, including trial participants, to engage in public debate about pending criminal matters. It "would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted."[109] It is therefore vital that courts allow free speech to play its part in revealing that process. "The knowledge that every criminal trial is subject to contemporaneous review in the

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105. United States v. Scarfo, 263 F.3d 80, 93 (3d Cir. 2001). The gag order imposed by the trial court in *Scarfo* was purportedly aimed at preventing out of court statements from prejudicing the judge. *Id.* at 94. The Third Circuit held that such an order was unconstitutional as it was not narrowly tailored to address a specific harm:

[T]here was no risk of prejudice to the Judge because judges are experts at placing aside their personal biases and prejudices, however obtained, before making reasoned decisions. Judges are experts at closing their eyes and ears to extraneous or irrelevant matters and focusing only on the relevant in the proceedings before them. The District Court did not articulate any specific or general prejudice it would suffer, and we can see none.

Id.

106. Shelton v. Tucker, 346 U.S. 479, 488–90 (1960).

107. *See* Levine v. U.S. Dist. Court, 764 F.2d 590, 595 (9th Cir. 1985).

108. Neb. Press Ass'n v. Stuart, 427 U.S. 539, 564 (1976).

109. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575 (1980).

forum of public opinion is an effective restraint on possible abuse of judicial power. . . . Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account."[110]

Also, a gag order that does not provide "fair notice to those to whom [it] is directed" is unconstitutionally vague.[111] In *Dyleski*, the D.A. contended that the gag order prohibited Ms. Allred from making public statements critical of the manner in which the government treated her client. When Ms. Allred disputed this position and requested a clarification from the trial court, the court denied her request.[112] Given the language of the gag order and the D.A.'s stated interpretation of it, the court thus placed Ms. Allred in the untenable position of having to guess whether certain statements would violate the order's provisions. Ms. Allred was left with no clear idea as to what she could or could not say in public. If she guessed incorrectly, she could be subject to punishment by the court.[113] This, then, illustrates how a vague gag order chills the freedom of expression of those under its authority.[114] A proper gag order should be explicit as to which statements are allowed and which are proscribed.[115]

The *Dyleski* court recognized that it could not prevent other legal commentators from discussing the case.[116] Instead of treating Ms. Allred like any other commentator, however, the trial court

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110. *In re* Oliver, 333 U.S. 257, 270 (1948).

111. Gentile v. State Bar of Nev., 501 U.S. 1030, 1048 (1991) (quoting Grayned v. City of Rockford, 408 U.S. 104, 112 (1972)).

112. Unreported Minute Order, *supra* note 51.

113. *Cf. Gentile*, 501 U.S. at 1051 ("The prohibition against vague regulations of speech is based in part on the need to eliminate the impermissible risk of discriminatory enforcement . . . for history shows that speech is suppressed when either the speaker or the message is critical of those who enforce the law").

114. The D.A. has also taken the position that the gag order should prevent Ms. Allred from making general statements attesting to her client's integrity. *See* People's Supplemental Request for a Protective Order, *supra* note 29, at 3:8–10, 3:19–22. The authors fail to see how such general statements can present a substantial risk of materially prejudicing the fairness of the proceedings.

115. *See Gentile*, 501 U.S. at 1051.

116. *See* Decision, *supra* note 45, at 6:23-7:3.

determined that because of her status as counsel for a potential witness, she could be subjected to "the same constraints as any attorney representing a party."[117] But unlike the parties in *Dyleski*, Ms. Allred had no formal role in this case, nor did she have access to any inside information, other than information relating to her client. Further, the trial court failed to explain why Ms. Allred should be treated in the same manner as counsel for the parties, especially as she had already agreed not to comment on her client's potential testimony. She did not have access to pre-trial discovery and had not seen the files of either counsel for the prosecution or the defense.[118] Moreover, Ms. Allred had no standing to appear in court for her client, and could not proffer evidence or make arguments in court regarding the case. Thus, unlike the prosecution and defense counsel, Ms. Allred is not a participant in this trial.

One must therefore ask whether Ms. Allred should be lumped together with counsel for the prosecution and defense, or whether she belongs in a different category. The authors contend that a legal commentator like Ms. Allred, who also has a peripheral role in a pending criminal matter, should be subject only to the same restrictions that apply to the press generally, with one logical exception—that she be barred from making public statements concerning her client's potential testimony or other matters that are not readily known to persons unaffiliated with the pending criminal matter. Such an approach is narrowly tailored to address the specific potential danger to a fair trial, while still protecting the rights of commentators such as Ms. Allred to participate in the public debate.

Dyleski illustrates the dangers of using general gag orders as to all trial participants. Such unfocused breadth potentially gives party opponents, especially prosecutors, the power to transform gag orders into blanket prior restraints. A person in Ms. Allred's position could hardly risk engaging in public criticism of the D.A.'s conduct when she has been threatened with contempt proceedings in advance. A trial court may reasonably refuse to clarify its order, but without clarification an order may be transformed into a general prohibition

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117. *Id.* at 7:9–10.

118. *See* Supplemental Declaration of Gloria Allred in Support of Her Request to Modify or Set Aside Protective Order at 2:10–11, People v. Dyleski, No. 03-219113-8 (Cal. Super. Ct. Nov. 8, 2005; renumbered No. 05-060254-0, Feb. 24, 2006).

on what should be protected speech.

V. GAG ORDERS ON COUNSEL ARE NOT NECESSARY WHERE A STATE HAS ADOPTED RULES REGULATING ATTORNEYS THAT ARE CONSISTENT WITH THE CONSTITUTION

Dyleski also raises the question of whether gag orders on counsel are necessary where a state, consistent with the Constitution, has promulgated regulations setting forth the obligations of any attorney with respect to extra-judicial statements.[119]

Rule 5-120 of the California Rules of Professional Conduct,[120] which governs trial publicity, was adopted in 1995 in response to the *Gentile* decision. The rule follows the *Gentile* standard by proscribing extrajudicial statements by lawyers participating in litigation which would have "a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."[121] Moreover, the rule specifically allows attorneys to make certain statements reiterating matters contained in the public record, as well as statements necessary to protect clients from the prejudicial effects of pre-trial publicity.[122]

The threat of state bar disciplinary proceedings for improper statements is likely enough to police the conduct of attorneys. Such procedures are based on a full record of past events, a body of precedents consistently elaborated and enforced, and heard by decision-makers not involved in the underlying proceedings. Thus, the risk of idiosyncratic enforcement is minimized. Reliance on state bar proceedings also minimizes the ability of a party to use gag orders to achieve broad prior restraints on speech, inconsistent with the First Amendment.

VI. CONCLUSION

Intense media coverage of high-profile criminal trials is a reality of twenty-first century America. It is impossible to suppress such coverage and, for the most part, such coverage is beneficial in a free

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119. Clearly, rules regulating attorneys would not apply to non-attorney trial participants.

120. CAL. R. PROF'L CONDUCT 5-120(A) (2006). The text of Rule 5-120, as well as the official discussion, is set forth in the appendix.

121. *Id.*

122. R. 5-120(C).

society.

The *Dyleski* gag order exemplifies the danger to First Amendment values posed by judicial actions to control the media. Media coverage of high-profile criminal cases is a reality and cannot be suppressed by judicial action consistent with the First Amendment and our societal commitment to open trial proceedings.

Trial judges are no doubt confronted with extraordinarily difficult choices in such circumstances. It is essential, however, that restrictions on the use of gag orders remain in place so that they do not become an automatic response to the careful balancing that must be undertaken to ensure that both First Amendment and Sixth Amendment rights are protected.

THE ETHICS OF BEING A COMMENTATOR

ERWIN CHEMERINSKY* & LAURIE LEVENSON**

I. INTRODUCTION

For fifteen months, from June 13, 1994 until October 3, 1995, the nation raptly followed every development in the murder prosecution of O.J. Simpson.[1] Although there have been other highly publicized cases, none ever received the media coverage that existed for the Simpson trial.[2] Never before has a preliminary hearing in a case been televised by a national network, let alone by every network as occurred in the Simpson case.[3] Never before has every network televised the opening statements, closing arguments and verdict in a trial. Never before has an entire trial been broadcast nationally by three television channels (Cable News Network, Court TV, and E!) and two radio networks (CBS Radio and CNN Radio).[4]

Never before did so many local stations broadcast legal proceedings. During the preliminary hearing, the initial months of the trial, and the concluding phase of the trial, six local Los Angeles stations

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* Legion Lex Professor of Law, University of Southern California School of Law.

** Professor of Law, William M. Rains Fellow, Loyola Law School. I am grateful to my wonderful research assistant, Omar Lopez, for his work on this article and throughout my commentary on last year's "Trial of the Century."

1. People v. Simpson, No. BA097211, 1995 WL 704381 (Cal. Super. Ct. Oct. 3, 1995).

2. Perhaps the twentieth century trial that came closest to the level of media coverage in *Simpson* was the trial of Bruno Hauptmann for kidnapping and murdering the baby of world-famous aviator Charles Lindbergh. In the *Hauptmann* trial, there were 700 writers and broadcasters and 132 still and newsreel camera operators. The film from the *Hauptmann* trial played in 10,000 movie theaters nationwide. *See* PAUL THAYLER, THE WATCHFUL EYE 22-23 (1994) (chronicling and criticizing cameras in the courtroom).

3. An estimated 70 million Americans tuned in to watch the preliminary hearings, approximately the same level of viewers that watched live coverage of the Persian Gulf War. Daniel Cerone, *Nearly Two-Thirds of L.A. Homes Watched Hearing, Ratings Show*, L.A. TIMES, July 2, 1994, at A3; Charles L. Linder, *When the Airways Become Lousy with Lawyers*, HOUS. CHRON., July 2, 1994, at A17.

4. Michael Blowen, *Networks Fail to Find Drama*, BOSTON GLOBE, July 1, 1994, at 14.

televised the courtroom activities. One station broadcast the entire trial, as did a local radio station.[5]

Never before did newspapers devote so much attention to a single case for such a sustained period.[6] Newspapers throughout the country sent reporters to Los Angeles for the entire trial and local newspapers devoted a staff of writers to the case.

Never before were entire shows devoted to a case on a daily basis. *Rivera Live* on CNBC focused an hour of attention on the case every night. Other shows, such as *Larry King Live*, regularly featured the case. In Los Angeles, three stations (4, 9, and 13) devoted a half-hour show every evening to summarizing and analyzing that day's developments.[7]

All of these networks, stations, reporters, and programs constantly relied on law professors and lawyers to explain the law and the proceedings. Every live broadcast of the proceedings on each television or radio station featured one or more commentators. Every reporter—broadcast or print—regularly used commentators. Every show on the case featured commentators.

Why the constant use of commentators? The simple answer is to help viewers and listeners understand what was happening and what it meant for the overall case. Complicated legal issues arose on a daily basis: What is the standard for suppressing evidence from a warrantless search? Was the defense entitled to samples of the prosecution's evidence? Was the testimony of domestic violence admissible? Can a criminal defendant speak to the jury during opening statements? What is the standard for excusing jurors during a trial? Can a criminal defendant be present when jurors are questioned by a judge about potential misconduct? What is the standard for a mistrial and what are its double jeopardy consequences? What is the scope of a waiver of a challenge to scientific evidence? When can a witness be forced to come from another state? What is the scope of impeachment evidence? When can a witness invoke the Fifth Amendment and is it done in front of the jury?

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5. David Shaw, *The Simpson Legacy; Obsession: Did the Media Overfeed a Starving Public?; Chapter 3: Tabloid Tornado, Mainstream Mania; The Godzilla of Tabloid Stories*, L.A. TIMES, Oct. 9, 1995, at S1.

6. David Shaw, *The Simpson Legacy; Obsession: Did the Media Overfeed a Starving Public?; Chapter 2: A Shared Adventure; "A National, Real-Life, Cross-Channel Soap Opera,"* L.A. TIMES, Oct. 9, 1995, at S1.

7. Shaw, *supra* note 5, at S6.

These are only a small sample of the countless legal issues that arose. Most of the anchors and journalists covering the case were not lawyers. Even those who were lawyers wanted the assistance of law professors and experienced attorneys who had dealt with and researched these issues.

Moreover, commentators were used not only for the complex questions, but also for the basic ones. For example, questions repeatedly arose about the standard for relevance in the admission of evidence: that the probative value of the evidence outweighed its prejudicial impact. There was a constant need to have this and innumerable similar legal rules explained.

Procedures, too, required explanation. Commentators were used to inform viewers and listeners of what was happening and why it was occurring. What is the legal standard in a preliminary hearing and what function does the preliminary hearing play in an overall case? What is an arraignment? What is voir dire and how does it occur? What is a Kelly-Frye hearing? What occurs during opening statements? And so on, with every event requiring explanation.

Understandably, there also was a desire for analysis of the conduct of the judge, the lawyers and the witnesses. Why did the judge rule in a particular way on a motion and was it the correct ruling under the law? Why did a lawyer ask a particular series of questions or make certain objections? How is a specific witness' testimony relevant or useful? The commentator also was used to put these events in context and perspective.

The media also undoubtedly used commentators to enhance the credibility of their coverage and even just to fill time. The coverage seemed more authoritative with a legal analyst there to explain and analyze the case. Also, during live proceedings there were innumerable sidebars and brief recesses. Commentators could fill that time during broadcasts by talking about what was occurring. Obviously, daily shows devoted to analyzing the trial needed experts to talk about it.

All of this created an unprecedented demand for lawyers and law professors to serve as commentators. Both of us served in that role, truly on a daily basis, from June 13, 1994 until October 3, 1995. We each regularly appeared on live broadcasts of proceedings and also on analysis shows. We did literally thousands of interviews with print and broadcast journalists over the course of the trial.

This was not our first experience at being commentators. Undoubtedly, we were initially sought out by the media because of our prior contacts with them during the two trials of the officers for beating Rodney King,[8] the trial of the individuals for beating Reginald Denny, and the Menendez case. But neither of us had ever dealt with the media so intensively for such a long period of time.

Over the course of the *Simpson* case, each of us faced countless ethical issues that we never had confronted before. What questions from anchors and reporters were inappropriate to answer? What should we do when we learn nonpublic information from a lawyer involved in the case? What are conflicts of interest, such as involvement in another case with related issues or with a lawyer or witness, and how should we handle them? How should we handle the issue of being paid?

Neither the code of ethics for lawyers nor that for journalists provided assistance in dealing with these ethical problems. Commentators are not functioning as attorneys or as reporters. Codes of professional responsibility thus provided little guidance, even for issues such as confidentiality and conflicts of interest that are thoroughly covered in ethical codes. Moreover, many ethical issues arose that seemed unique to the role of the commentator.

This Article is an initial attempt to consider the ethical issues of being a commentator. Part II explores why a code of ethics for commentators is needed. Part III focuses on four specific areas of ethical issues: the duty of competence, handling confidences, the duty to avoid conflicts of interest, and dealing with the business of being a commentator. Finally, Part IV offers some suggestions for the future. Our hope is that this is a first step towards the development of a voluntary code of ethics for commentators. Perhaps a committee of the American Association of Law Schools or the American Bar Association or both might undertake such a drafting effort. Lawyers, judges, academics, and journalists ideally should participate in the process. Perhaps broadcasters and journalists would require commentators to adhere to it and even require that analysts pledge to follow such a code.

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8. *See* Laurie L. Levenson, *Reporting the Rodney King Trial: The Role of Legal Experts*, 27 LOY. L.A. L. REV. 649, 651-57 (1994).

During and after the *Simpson* case, commentators were targeted for enormous criticism. On many occasions, Judge Ito spoke derisively of the "pundits."[9] In their first media appearances after the trial, defense attorneys Johnnie Cochran and Barry Scheck singled out the commentators for their harshest criticism.[10] Perhaps some of this is inevitable to the task of analyzing others' work. But some of it undoubtedly reflects the problems with being a commentator and the lack of guidance for handling this new, difficult, and very visible role.

II. THE NEED FOR A VOLUNTARY ETHICAL CODE

A. The Role of Legal Commentators

There is little time during a trial for the legal commentator to pause and examine his or her role in analyzing that case and how ethical standards might help in performing that role. The sheer pressure of providing daily coverage usually keeps the commentator distracted, putting off some of the most difficult questions one must face. Yet, it is essential that as a profession we critically evaluate the role of legal commentators, what problems arise and how, if at all, ethical guidelines might improve a commentator's performance.

1. *Educate the Public*[11]

A legal commentator performs many roles, most of which can be grouped under the heading of "Educating the Public."[12] A commentator's primary function is to decipher the law for both the media and

9. People v. Simpson, No. BA097211, 1995 WL 493507, at *2 (Cal. Super. Ct. Aug. 10, 1995).

10. *See, e.g.*, Marc Fisher & Bill Miller, *Did Emotion Overcome Evidence?*, Wash. Post, Oct. 4, 1995, at A34; Jim Newton, *Simpson Not Guilty*, L.A. Times, Oct. 4, 1995, at A1, A10.

11. For more discussion on the role of media legal experts, see Levenson, *supra* note 8, at 651-57.

12. The key purpose of legal commentary is to assist the public in exercising its First Amendment right to know and understand the functioning of its justice system. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 587 (1976) (Brennan, J., concurring):

> Commentary and reporting on the criminal justice system is at the core of First Amendment values, for the operation and integrity of that system is of crucial import to citizens concerned with the administration of government. Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges; free and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability.

See also Erwin Chemerinsky, *A Pundit's Lessons: Commenting on O.J. Was an Education—And, at Times, a Trial*, L.A. Daily J., Oct. 12, 1995, at 6; Erwin Chemerinsky, *Are Commentators Useful to the Public?*, L.A. Times, Feb. 24, 1995, at B7.

public who may not otherwise have the background to understand the intricacies of legal proceedings. Sometimes this role is performed simply by translating legal terms into everyday vocabulary. For example, what do the terms "probable cause" or "hearsay" mean? Other times, commentators must outline what processes the court and litigants use to decide a particular issue. The challenge is not simply to explain the law, but to explain it in language that is comprehensible to the listener.[13] Along with reciting the law, it is also important for commentators to bring perspective to the reporting of a trial. As those experienced in courtroom proceedings know, not every evidentiary ruling is important. Not every word by a witness is crucial. Not every question by a judge portends the outcome of a case. Experienced legal commentators can help put an issue or event into perspective.[14]

Journalists don't always have the experience or luxury to step back from a case and see how a piece fits into the big puzzle. The pressures of everyday deadlines, especially when media outlets are fighting for viewership, make it unlikely that journalists will downplay a development in court. Never does the media present a story as relatively unimportant. The relatively trivial often gets presented as significant and the significant gets portrayed as decisive. One of the greatest services a legal commentator can provide is to put the brakes on a story run amok and offer some perspective to a recent development in a case. Moreover, in providing that perspective, it is crucial that a commentator always view an issue from both sides. The role of a commentator is *not* to be an advocate. It is to be, as much as is humanly possible, an objective viewer of the proceedings.

Legal commentators can also serve the public by alerting the media and the public to a diversity of opinions that may exist on an issue. It is unrealistic to believe that one individual will be able to provide all possible perspectives on any given issue. A legal commentator may, however, be able to direct the media to other individuals in the community who have differing opinions on the issue.

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13. The ultimate goal of providing such commentary is to demystify the law so that members of the public can understand and critically analyze for themselves issues in our legal system. *See* Gary L. Bostwick, *Heroes and Villains: The O.J. Trial and Our Profession*, L.A. LAW., July-Aug. 1995, at 76.

14. In fact, in our experience, one of the most frequently stated frustrations about legal reporting is the "hit-and-run nature of the commentary, the lack of time and opportunity to explore the broader picture." *See* B.J. Palermo, *Life After O.J.: The Trial's Legal Analysts Get Back to Reality*, L.A. DAILY J., Oct. 27, 1995, at 1 (quoting Professor Myrna Raeder).

As part of one's educational role, a legal commentator should be prepared to direct the news media to sources of information for their stories. Whether those sources be legal texts, pleadings filed in the case, other professionals with expertise in an area, or even the participants in the case, a legal commentator can often serve best by giving the media a head start with the research necessary to cover a high-visibility case.

Finally, legal commentators can suggest to reporters questions that they and the public might want to ask regarding the ongoing proceedings. Essentially, legal commentators can direct the dialogue regarding a case by anticipating issues that may arise and suggesting what questions may be important in discussing those issues.

2. *No Predictions, Please*

As important as it is to understand the role of a legal commentator, it is perhaps more important to understand what the commentator's role should *not* include. Perhaps a legal commentator's greatest disservice to the public is to try to read the crystal ball and predict the outcome of a case. First, the commentator is bound to be wrong. Juries are historically unpredictable. Moreover, those trained in the legal profession may be particularly ill-equipped to guess at the jurors' thinking. Legal training and experience undoubtedly influence what we focus on, what we think is important and what we perceive. A juror not trained in the law is likely to focus on different things as he or she perceives things through the eyes of a layperson. Also, a jury's decision is often the result of its own dynamics and a commentator is unlikely to know these dynamics until after the case is concluded. It is both presumptuous and misleading to suggest to the public that the commentator can read the minds of the jurors.

Second, predictions tend to skew a commentator's perspective on a case. If a commentator predicts how the jury will vote, the commentator is inevitably projecting on the jurors his or her own bias as to what decision should be made.

Finally, some predictions can wreak unnecessary havoc on the proceedings and the public. For example, in *People v. Simpson*,

predictions of a hung jury sent waves of panic through both the courtroom and the community.[15]

3. *Be Fair, Be Honest*

As stated, a crucial part of a commentator's role is to try to remain objective.[16] This is not always easy. One may know some or all of the participants and have a personal opinion regarding the case. Yet, those opinions must remain subservient to the commentator's duty to comment accurately and dispassionately. A commentator must resist the temptation to assist either side, or even the court, on a legal issue. Such help may naturally occur once reports of a legal opinion are broadcast, but the commentator's role is not to become an advocate or decisionmaker in the case. The commentator, like the press, must comment from the outside and evaluate the proceedings from the perspective of one who has no stake in the outcome of the case.

It should go without saying that a commentator must be scrupulously honest in commenting on a proceeding. Nonetheless, there are everyday pressures that may lead a commentator to compromise this sacred obligation. For example, a commentator may be asked to comment regarding the techniques used by a lawyer in the proceeding. If the commentator knows and has a friendly relationship with a particular lawyer, there will be the natural temptation to soften one's remarks. However, the public expects and is entitled to an honest assessment. One can be careful in choosing one's words, but the substance of the evaluation must not change because of a commentator's personal feelings toward the litigant. Likewise, if a commentator does not know the answer to a question, he or she must be honest and admit as much. Even as an educator, a commentator cannot be expected to know the answer to all questions. It is both painful and aggravating to watch a legal expert fake the response to a question when a simple "I don't know" would have been a far more accurate response.

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15. Paul Pringle, *O.J. Mistrial? Retrial and Tribulation*, SAN DIEGO UNION-TRIB., Aug. 20, 1995, at A1; Saundra Torry, *TV Analysts Give Own Verdict: Deadlocked Simpson Jury*, WASH. POST, Sept. 25, 1995, at 7.

16. Of course, we realize that no person is truly completely objective; everyone has views. But the goal is for the commentator to try to set aside any subjective opinions and view the case as objectively as humanly possible.

The reality, of course, is that television is in the entertainment business and stations may prefer commentators who are entertaining as well as informative. There is no inherent problem with this. Good teachers often are entertaining as well as educational. Obviously, there is a problem if entertaining comments or metaphors substitute for accurate explanation and in-depth analysis.

4. *Remember the Right to a Fair Trial*

Finally, the commentator must realize that his or her role may at times be circumscribed by the overriding societal interest in providing both sides in a case with a fair trial. Thus, especially before trial, the commentator must be cautious about anticipating developments in a case and prejudging the outcome of those developments. Especially before trial, the commentator must always be aware of the possibility that potential jurors could be influenced by his or her observations.

B. The Need for a Voluntary Code of Ethics

We are now in the "Age of Legal Commentary." Almost yearly there is another "Trial of the Century" that draws on the services of lawyers and professors to provide legal expertise.[17] As the number of legal commentators increases, as well as our visibility, there is also an increase in concern over the effectiveness and value of legal commentators.[18] This concern demands that we honestly assess the commentators' role in reporting cases and consider how we can improve our effectiveness and the public's confidence in the work of legal experts.

17. *See* Great American Trials (Edward W. Knappman ed., 1994); Elizabeth Wasserman, *Trial of the Century*, Portland Oregonian, June 11, 1995, at E1. The trend toward high-publicity trials seems to be, if anything, increasing. In the first two months of 1996, at least six high-profile cases were covered regularly by both the print and electronic press. These include the Oklahoma City bombing case, the murder retrial of Erik and Lyle Menendez, the murder trial of rapper Snoop Doggy Dogg, the Whitewater prosecution, the murder case of model Linda Sobek, and the civil wrongful death suit against O.J. Simpson. Even the mere announcement of a civil deposition in the *Simpson* case was enough to command front page stories in major newspapers. *See, e.g.*, Paul Pringle, *Simpson's Tone in Interview Puzzles Experts*, Dallas Morning News, Feb. 19, 1996, at A1; *Civil Trial Finally Puts Simpson Under Oath*, Detroit News, Jan. 22, 1996, at A1; Tim Rutten & Henry Weinstein, *Simpson Set to Give Deposition*, L.A. Times, Jan. 20, 1996, at A1; *Simpson Begins Giving Deposition in Civil Suit*, Portland Oregonian, Jan. 22, 1996, at A1. As the amount of media coverage of court cases increases, so will the demand for legal commentators guided by ethical standards.

18. It is not simply the number of high-profile cases that generates the need for an ethical code. Rather, it is the fact that there is often an influx of new commentators as the subject matter and location of these developing cases differ. Thus, while a few veteran commentators can learn how to handle themselves from the experience of prior cases, there are constantly new participants who should not be forced to learn the hard way about the pitfalls and dangers of

One traditional way to improve the performance of lawyers has been by adopting a code of ethics. A code of ethics for commentators would serve many purposes. First, it serves notice that commentators take their ethical obligations seriously.[19] A code is a recognition by those who serve as commentators that we face ethical issues and that we aspire to handle them correctly. A code imprints on commentators' minds the need to strive for the highest standards in commentating on cases. It can serve as a blueprint for how to best serve the public in our role as the eyes, ears, and interpreters of legal proceedings.

A code of ethics also serves a very practical function. It gives commentators and would-be commentators a guide for dealing with difficult issues that may arise. There is no need for all of us to make the same mistakes over and over again. A code of ethics both warns the commentator of problems that can arise and gives direction for handling them.[20]

A code of ethics may also instill more confidence on the part of the public, the courts, and the media in the work of legal commentators. Oftentimes, legal experts are viewed with suspicion and cynicism.[21] A code of ethics may give the outside world greater appreciation of and confidence in our work. Moreover, a voluntarily adopted code of ethics would continue the tradition of self-governance by the legal profession. If commentators were to adopt a code, the public would be less likely to impose outside regulations on those serving as legal experts.

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legal commentary. Similarly, the public and the press should have some confidence that there are basic standards of ethical performance subscribed to by those who join the commentators' ranks.

19. A similar message was sent when the ABA adopted the Model Code of Professional Responsibility. The Preamble states: "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." MODEL CODE OF PROFESSIONAL RESPONSIBILITY pmbl. (1980).

20. In adopting a code of ethics, commentators also have several models from which to choose. As demonstrated by the history of the ABA's codes of ethics, one can construct a code based upon basic canons, one with ethical considerations and disciplinary violations, or a model rule approach.

21. *See e.g.*, Maura Dolan, *Simpson Case Creates TV Job Openings for Lawyers*, L.A. TIMES, July 5, 1994, at A1; Dennis Schatzman, *The O.J. Simpson Trial Breeds New Profession: Pro-Gov't Spin Doctors*, L.A SENTINEL, Aug. 9, 1995, at A10.

Additionally, a code of ethics can lead to more consistency in the work of legal commentators and the manner in which we handle difficult issues. Without a code, it is up to each commentator to set his or her limits. Whereas one commentator may be reluctant to "score" legal proceedings, another may approach legal commentary as a type of sporting event. A code of ethics would at least give some consistency to how commentators approach their work.

One of the greatest advantages of adopting a code of ethics for legal commentators is to provide those who serve in that role with the support they may need when attempting to get the media to exercise restraint. For example, repeatedly during *Simpson* we were asked to predict the outcome of the case or assign a grade to each side's performance that day. When we declined to participate in this type of commentary, media personnel would promptly point out that such practices were acceptable to other commentators. Although we still declined the media's request to become scorekeepers of the trial, it would have been easier to respond to the media's request if we had a code of ethics that supported our position that scoring or grading a trial is outside of our role.

There are two final functions that a legal code could serve. First, it would be a recognition by legal commentators that the public views us as representatives of our legal profession, and, thus, we must act in a manner that brings respect to that profession. If we act in an unethical or embarrassing manner, we do a disservice not only to ourselves but to others in the profession. A code of ethics can instill more pride in our work and those who work daily in the legal profession.[22]

Finally, a code of ethics is likely to enhance the image of legal commentators. Rather than be seen as publicity-seeking individuals, it is hoped that we will be seen as professionals dedicated to the service of the community. With a code of ethics, commentators are more than hired guns. We are the means by which the public can learn about the workings of the justice system.[23]

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22. As the drafters of the initial canons of professional ethics stated in 1908: "[A]bove all a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest [person] and as a patriotic and loyal citizen." CANONS OF PROFESSIONAL ETHICS Canon 32 (1908).

23. A similar thought is expressed in the Preamble of the Model Code of Professional Responsibility:

> The Model Code of Professional Responsibility points the way to the aspiring and provides standards by which to judge the transgressor. Each lawyer must find within his own conscience the touchstone against which to test the extent to which his actions should rise above minimum standards. But in the last analysis it is the desire for the

C. Why the Code of Ethics Must Be Voluntary

Attorneys are regulated under ethical codes that are mandatory and professional discipline is imposed for violating provisions of the applicable code of professional responsibility. Each state licenses attorneys, adopts a code of professional responsibility, and disciplines attorneys for violations. In contrast, journalists operate under a voluntary code of ethics that is not enforced by any disciplinary authority.[24] Unlike lawyers, the government has no involvement in promulgating or enforcing the journalists' code of ethics. We believe the latter model is most appropriate for commentators.

From a practical perspective, a voluntary code of ethics is far easier to implement than a mandatory set of rules. An elaborate machinery exists for admitting lawyers to practice and for disciplining their wrongdoing. Creating a government apparatus for reviewing and disciplining the performance of commentators would be an enormous cost for relatively little gain.

More important, from a constitutional perspective a government-imposed code of ethics for commentators would surely violate the First Amendment since many provisions of an ethical code would concern the speech of the commentators. Indeed, the regulations would be based on the content of the commentators' speech: Discipline would be imposed only if the speech was about the case and violative of the rules. The courts have clearly established that such content-based restrictions on speech will be allowed only if they are proven to be necessary to achieve a compelling government interest.[25] Yet, it is difficult to identify any such compelling interest to justify an obligatory code or to explain why such a government-enforced code is essential. Although a well-educated public is a crucial goal, there is no apparent reason why this objective necessitates that commentators be government-regulated.

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respect and confidence of the members of his profession and of the society which he serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction.

Model Code of Professional Responsibility pmbl. (1980).

24. *See* American Society of Newspaper Editors, Statement of Principles art. IV (1975), *reprinted in* Bruce M. Swain, Reporters' Ethics 111, 112 (1978) ("Good Faith with the reader is the foundation of good journalism. Every effort must be made to assure that the news content is accurate, free from bias and in context, and that all sides are presented fairly.").

25. Turner Broadcasting System, Inc. v. FCC, 114 S. Ct. 2445 (1994); Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board, 502 U.S. 105 (1991) (content-based discrimination must meet strict scrutiny).

It might be argued that government regulation of commentators' speech is necessary in order to assure a fair trial and protect the integrity of the proceedings. An analogy might be drawn to provisions in the American Bar Association Model Rules of Professional Conduct and various state laws that regulate attorney speech. For example, Model Rule 3.6 provides that a lawyer who is participating in the investigation or litigation of a matter "shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicatory proceeding in the matter."[26] California recently adopted Rule 5-120 which is almost identical to Model Rule 3.6 and prohibits attorney speech that has a substantial likelihood of materially prejudicing an adjudicatory proceeding.[27]

In *Gentile v. State Bar of Nevada*,[28] the Supreme Court upheld the constitutionality of this standard for regulating attorney speech. The Court emphasized that extrajudicial comments by attorneys about facts or evidence risk undermining the "basic tenet" that "the outcome of a criminal trial is to be decided by impartial jurors."[29] The Court approved the "substantial likelihood of material prejudice standard" as an appropriate balance of the First Amendment rights of lawyers and of a state's interest in protecting the "integrity and fairness" of its judicial system.[30]

It might be argued that this same rationale—ensuring fair adjudicatory proceedings—justifies regulating the speech of commentators via a mandatory code. However, we believe there are many reasons why *Gentile* is distinguishable and why government restrictions on commentators' speech would violate the First Amendment.

First, the Court in *Gentile* relied heavily on the fact that attorneys in a proceeding are officers of the court and that there are many restrictions on lawyer speech in pending cases. The Court noted, for example, the restrictions on attorney speech in the courtroom and in discovery.[31] Chief Justice Rehnquist, writing for the majority, said that the prior cases "rather plainly indicate that the speech of lawyers

26. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1983).
27. CALIFORNIA RULES OF PROFESSIONAL CONDUCT 5-120 (1992).
28. 501 U.S. 1030 (1991).
29. *Id.* at 1070.
30. *Id.* at 1075.
31. *Id.* at 1073. *See* Seattle Times Co. v. Reinhart, 467 U.S. 20 (1984) (upholding restrictions on public disclosure of information secured in the course of discovery).

representing clients in pending cases may be regulated under a less demanding standard than that for regulation of the press . . . ."[32]

No such tradition exists for regulating the speech of commentators. Although the commentators usually are lawyers, they are not functioning as "officers of the court" in the case. Quite the contrary, they are a part of the press much more than a part of the legal system. With rare exceptions, the commentators have no contact with the judge and never appear in the courtroom in the case except as spectators.

Second, there is no showing of a need for regulating the speech of commentators in order to assure fair proceedings. There is no evidence that remarks by commentators have prejudiced anyone's right to a fair trial. Indeed, it is difficult to imagine situations where statements by commentators could "materially prejudice an adjudicatory proceeding."[33]

Third, a mandatory code of ethics for commentators would be unconstitutionally overbroad. A law is impermissibly overbroad if it regulates substantially more speech than the Constitution allows to be regulated.[34] At most, the government could regulate commentators with regard to comments that risk undermining a fair trial. But the code of ethics for commentators that we propose would cover many other topics including confidentiality, conflicts of interest, competency and remuneration. None of these restrictions—many of which concern what commentators should say—have anything to do with protecting the integrity of the trial proceedings. Therefore, the code of ethics would be vulnerable to an overbreadth challenge because it regulates substantially more speech than the First Amendment allows to be regulated.

A mandatory code of ethics for commentators would be overbroad in another sense as well: Conceivably the code would apply to all who speak to the press and perhaps even to the press itself. Attorneys are a distinct and easily defined class. But there is no precise definition for "commentators."

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32. *Gentile*, 501 U.S. at 1074 (Rehnquist, C.J., dissenting in part).

33. STEPHEN GILLERS & ROY D. SIMON, JR., REGULATION OF LAWYERS: STATUTES AND STANDARDS, 1996, at 790 (1996). We also have this view with regard to speech of attorneys and question the Court's conclusion in *Gentile*. We agree with the view expressed by the California Bar President, Donald Fischbach, that there is no evidence that out-of-court remarks by attorneys have prejudiced anyone's right to a fair trial.

34. *See, e.g.*, City of Houston v. Hill, 482 U.S. 451 (1987); Board of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569 (1987) (declaring laws unconstitutional based on overbreadth).

Functionally, by "commentators," we are referring to lawyers and law professors who are speaking to the press about cases in which they are not a party, an attorney, or a witness. But, logically, there is no reason why commentators about legal proceedings must always be lawyers. Scientists might be commentators speaking about scientific evidence, such as DNA analysis. Jury consultants were frequent commentators during the *Simpson* case. Political scientists and sociologists often are experts on aspects of court systems and judicial proceedings. The range of commentators is truly limitless. There is no inherent reason why attorney commentators should be regulated and the other types of commentators about a case should be unregulated.

To regulate all who comment about a case is to make the regulations truly sweeping in their reach. Indeed, journalists— both print and broadcast—often offer their own analysis and commentary. The danger is that a mandatory code of ethics would create an unprecedented degree of government regulation of the press.

Therefore, although we advocate the development of an ethical code for commentators, we strongly believe that it should be voluntary in that it should be neither promulgated nor enforced by the government.[35] Certainly, the media, on its own, can require that commentators adhere to the code, but there should be no government-imposed sanctions for violations.[36]

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35. We are, therefore, troubled by the proposal by Steven Brill, President of Court TV, advocating new court rules and procedures that would mandate particular practices by commentators as a precondition for permitting electronic coverage of courtroom proceedings. For example, Mr. Brill proposes that California Rules of Court, Media Standard 980-6-4 be amended to prohibit expert commentators from providing opinions about who "won" or who "lost" the day's proceedings and to require commentators "to explain the speculative nature of other comments." *See* Steven Brill, *A Proposal for Open, Dignified Justice in California* (Dec. 5, 1995) (copy on file with the authors). While we do not disagree with the principle that commentators should refrain from speculating on the outcome of a case, *see infra* part III.A, embedding such a rule in the court rules and procedures is fraught with dangers and is constitutionally suspect. *See* Response by California First Amendment Coalition (Dec. 22, 1995) (copy on file with the authors). Consider, for example, a commentator's statement that the loss of a particular motion was a "crippling blow" for one side or another. Under the proposed standard, such a "speculative remark" could result in sanctions, including the termination of electronic coverage of a trial.

36. Under the voluntary code of ethics we propose, there would be at least two important incentives for commentators to follow such a code: (1) the media's insistence, even contractually, on the commentator's compliance with ethical standards; and (2) principles of self-imposed responsibility and accountability. *See* Louis W. Hodges, *Defining Press Responsibility: A Functional Approach*, *reprinted in* DENI ELLIOTT, RESPONSIBLE JOURNALISM 18 (1986) ("self-imposed responsibilities are no less real or binding as a result of the absence of compelling external authority or of an enforceable contract").

There is, of course, the possibility that some commentators would abide by a voluntary code of ethics while others would not. It is even conceivable that some media outlets of the more "tabloid" sort will prefer commentators who are not constrained by ethical standards. There is no reason to fear, however, that this will place pressure on other commentators to adopt less ethical standards. There will likely be many media outlets that pride themselves on the professionalism of their coverage and their commentators. Moreover, it is our perception that most commentators want to adhere to high ethical standards and that a voluntary code would aid them by providing guidance and support for their actions.

Ultimately, as with all aspects of media coverage, there probably will be a range of styles and approaches from which viewers and readers can choose. The public always has had the "low" end of coverage available; our hope is that ethical codes will enhance the overall quality of analysis.

III. ETHICAL DUTIES OF COMMENTATORS

There are several models of codes that one can suggest for legal commentators. In 1908 the American Bar Association ("ABA") adopted Canons of Professional Ethics that set forth basic principles for the ethical practice of law. In 1970 the ABA replaced the Canons with the Model Code of Professional Responsibility. The Model Code offered a more detailed format for dealing with ethical issues. Its approach was to set forth three levels of standards for the lawyer. The first, "canons of ethics," outlined the basic principles for ethical lawyering.[37] The second, "ethical considerations," represented a level of ethical practice to which the lawyer should aspire.[38] The third, "disciplinary rules," set forth minimum standards for those practicing law.[39]

Most recently, in 1977 the ABA appointed a commission to draft a new set of rules for lawyers' ethics that was approved in 1983. The Model Rules of Professional Conduct set forth a lawyer's obligations in rule format with comments and comparison notes to help the attorney apply these rules.

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37. MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Preliminary Statement (1971).

38. *Id.*

39. As working groups meet to discuss the development of a Commentator's Ethical Code, *see infra* part IV, they can further discuss and agree on the most appropriate format for such a code.

For the purposes of this Article, it is not critical that we agree on the particular format for a proposed ethical code.[40] Both the model rules and model code have their advantages.[41] We only hope to suggest the regulations that any such code should include, the standard that a commentator should aspire to and the minimum conduct permissible for one serving in that role. These ethical obligations can best be organized under the duties that a legal commentator must perform when acting in that role.[42]

A. Duty of Competence

The first and foremost requirement for a legal commentator is to act competently.[43] A commentator does harm if he or she misstates

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40. The Restatement format of the Model Rules allows for quick reference to a concise statement of the required standard of conduct. By contrast, the Model Code format emphasizes the goals behind the rules by placing the canons and ethical considerations before the list of related disciplinary rules. *Compare* Model Rules of Professional Conduct (1983) *with* Model Code of Professional Responsibility (1971).

41. Not surprisingly, the *Simpson* trial also renewed calls for a code of ethics for journalists. This code of ethics has provisions remarkably similar to canons one might consider adopting for legal commentators. They include:

> 1. A journalist should never lie or mislead a reader in any way, either by commission or omission.
> 2. A journalist should always use language and information that is as exact as possible and as first-hand as possible and never make it seem more exact or first-hand than it is.
> 3. A journalist . . . should take care that [materials] associated with stories it is publishing or broadcasting do not overstate or distort what is reported in the story.
> 4. A journalist should always be candid about the quality and certainty of his or her information.
> 5. To ensure accuracy and fairness, a journalist should make sure that no one who is the subject of a story . . . is surprised to have been written about in the way they were written about when the story is published or broadcast.
> 6. Journalists . . . should always avoid conflicts or appearances of conflicts when possible and disclose all conflicts or potential conflicts that are not avoidable and not totally obvious.
> 7. Journalists should always give credit to the work of other journalists whose reporting they are using for their own stories.
> 8. It is completely appropriate that journalists . . . be concerned with the long-term profitability of their work; and, with that in mind it is not inappropriate for journalists to try to be interesting and even entertaining as well as informative. Nonetheless their first priority, if they are to assert they are engaged in journalism, is not to entertain or otherwise attract an audience or please advertisers but to give people information they think is important for them to know.
> 9. Under the banner of "the public's right to know," journalists should not fail to balance the importance of what they want to report with the negative consequences of reporting it.
> 10. Journalists . . . should make themselves as accountable as those they seek to cover [by candidly admitting any mistakes].

Steven Brill, *The New Code for Journalists*, Am. Law., Dec. 1994, at 5.

42. Of course, a commentator's duties may differ when he or she is acting as an attorney for a client. In such situations, the applicable codes of ethics for the jurisdiction would apply.

43. The duty to be competent is also the first requirement of a lawyer under the Model Rules of Professional Conduct. *See* Model Rules of Professional Conduct Rule 1.1 (1983).

the law or misstates the facts of what occurred. Several painful examples of this occurred during *People v. Simpson*. For example, some commentators mistakenly stated that if jurors had discussed the case in violation of Judge Ito's admonition, a mistrial was mandated.[44] Others incorrectly asserted that Judge Ito could not give a second-degree murder instruction over the defendant's objection.[45] Although everyone may make a mistake, commentators must be competent to perform in the role of a commentator and must be competent when they perform that role.

For lawyers representing clients, "competent representation" is defined as possessing the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[46] The same definition may apply to legal commentators. A legal commentator should have both the substantive knowledge and practical experience to comment accurately regarding a proceeding. Because no lawyer can be expected to be an expert in every field, one option available to the legal commentator, just as it is to lawyers representing clients, is to gain the necessary expertise by additional study or association with lawyers who have expertise in that field.[47]

One criticism frequently made of legal commentators is that they do not have extensive trial practice in the same type of case for which they are providing commentary. While more familiarity with an area of practice will certainly make commentary easier, it is not imperative that a commentator have tried cases identical to the one at issue. As long as a commentator has worked on the inside of the courtroom and is willing to do the research necessary to comment on a particular case, that commentator should be able to meet the level of competence necessary for a legal commentator.

There are four key requirements to being a successful and competent commentator: substantive knowledge of the law, practical experience in the courtroom, familiarity with the proceedings at bar, and a

44. Juror misconduct may be remedied in a variety of ways, including admonishing the juror, People v. Harper, 231 Cal. Rptr. 414, 420 (Ct. App. 1986), or removing him or her from the case, People v. Daniels, 802 P.2d 906, 929 (Cal. 1991). A mistrial is not mandated.

45. *See* People v. Daya, 34 Cal. Rptr. 2d 884 (Ct. App. 1994) (trial court properly instructed the jury, over the defendant's objections, on second-degree murder as a lesser-included offense of first-degree murder).

46. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1983).

47. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1, cmt. 2 (1983) ("A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.").

willingness to do the research necessary to answer the many questions that arise in a case.[48] Research may mean anticipating what issues are likely to arise in a case and examining the law on those issues before rendering an opinion to the press or the public. It may also include consulting with practicing attorneys who have an expertise in those issues and soliciting their opinions on what strategies may be employed by each side. Finally, it may mean using all these avenues to information in combination with the commentator's experience and common sense.[49]

There are several ways that a legal commentator may help himself or herself in providing competent commentary. First, the commentator must be honest with the media from the start as to his or her areas of expertise and what questions are outside the commentator's ken. For example, if a commentator is a criminal law specialist, commenting on an issue of family law or corporate controversy would likely be inappropriate. A legal commentator should be prepared to decline an offer to provide legal commentary when a matter is outside his or her expertise.[50]

Second, the commentator must tell the media, and if possible the public as well, the commentator's background and what sources of information the commentator draws upon to reach his or her opinion. Not only will such disclosure address any issues of bias,[51] but it will allow the listener or reader to evaluate critically how valid the commentator's opinion is.

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48. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1, cmt. 5 (1983) ("Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners."); *see also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1, cmt. 6 (1983) ("To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education.").

49. *See* Arthur J. Levy & W.D. Sprague, *Accounting and Law: Is Dual Practice in the Public Interest?*, 52 A.B.A. J. 1110, 1112 (1966):

> To be sure, no client has a right to expect that his lawyer will have all of the answers at the end of his tongue or even in the back of his head at all times. But the client does have the right to expect that the lawyer will have devoted his time and energies to maintaining and improving his competence to know where to look for the answers, to know how to deal with the problems, and to know how to advise to the best of his legal talents and abilities.

50. *Cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 6-3 (1971) ("A lawyer offered employment in a matter in which he is not and does not expect to become so qualified should either decline the employment or, with the consent of his client, accept the employment and associate a lawyer who is competent in the matter.").

51. *See infra* part III.B.

Third, a commentator can greatly help himself or herself by offering only those services that legitimately fall within the role of a legal analyst. Once one ventures into the realm of soothsayer/gamekeeper by predicting or "scoring" a proceeding, one will almost by definition be acting without the appropriate competency.[52] "Legal journalism that borders on sports reporting is bad news for the profession and a disservice to the public."[53]

Fourth, commentators who practice outside the relevant jurisdiction should be cautious about venturing opinions on laws not used in their jurisdiction. Nationwide expertise is rare, yet television networks often use commentators from one end of the country to discuss a case occurring on the other side of the nation. If one is going to provide such commentary, it is crucial to research the law of that other jurisdiction. Both trial practices and substantive laws differ greatly across the country.

Fifth, the commentator must follow the proceedings religiously. In order to comment competently on a case, it will ordinarily be necessary for the commentator to watch, listen to, or read all of the transcripts of a entire trial. Yes, that means following every word. It does not work to observe a case sporadically. A passing phrase by a witness or the court could be critical to an issue. A commentator must dedicate himself or herself to following every part of a proceeding. Moreover, it may not be enough for a commentator simply to watch a proceeding through the television lens. As much as possible, a commentator should venture inside the courtroom to experience the same environment in which the jury experiences the case. Witnesses and trials become distorted through the camera lens. Although it may be logistically difficult to obtain access, a commentator should strive to spend an ample amount of time in the courtroom.[54]

Finally, in order to maintain one's competency, a legal commentator must be willing and ready to answer "I don't know" to a question beyond his or her expertise. Not only will this response prevent a commentator from straying from his or her area of expertise, but it will enhance the commentator's credibility when he or she does answer appropriate questions.

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52. *See* Lincoln Caplan, *Why Play-by-Play Coverage Strikes Out for Lawyers*, 82 A.B.A. J. 62, 65 (1996) (discussing the general problem in legal journalism with "scoring" proceedings).

53. *Id.*

54. During the *Simpson* trial, commentators were severely criticized for being out of touch with the actual feel of the courtroom and the tenor of the case. *See* Schatzman, *supra* note 21, at A10.

The public and the media are entitled to competent legal commentary. Although fame and fortune may make it tempting for those seeking the limelight to offer legal expertise in a wide range of areas,[55] ethical duty should caution restraint. At a minimum, legal commentators must know the substantive law in an area, be willing to research individual issues that arise, understand the rules of that court and jurisdiction, and seek assistance on strategy issues if the commentator does not have extensive, relevant experience in the courtroom. Moreover, in providing competent commentary, commentators should strive to give the public a broader picture of what is occurring in the proceedings and avoid misleading the public by scoring the legal proceedings in a way that distorts the decisionmaking process.[56]

A code of ethics can upgrade the quality of commentary without stifling individual opinions. There is typically such a wide range of views on legal issues that even with an ethical code, commentators can offer differing perspectives. A code of ethics will not require that all commentators have the same view of a matter or express their opinions in the same way. Rather, it will only require that commentators have a basis for their individual opinions and express those opinions in a way that is not misleading to the public.[57] Bold opinions are welcome as long as there is a basis for them.

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55. Frankly, for those who are motivated by selfish goals there is bound to be disappointment. There is relatively little fame and fortune in providing legal commentary, but rather a great deal of hard work and tension.

56. We believe Professor Samuel Pillsbury provided sage advice when he stated:

> The expert has a powerful defense against all forms of media trivialization: refusing to play the game. The expert can resist the temptation to assume total intellectual authority and admit to limitations of knowledge and insight. When the media insists on a simplistic question, the expert may respond by emphasizing the complexities involved. When conflict is sought, the expert may emphasize points of agreement as well as points of disagreement. When the law is presented as a game, the expert may remind viewers of the real stakes involved. Sometimes, the expert must be willing to take more drastic action. The expert must be willing to walk—ready to walk off the network set, away from the talk show appearance, or to decline to answer the reporter's inquiry.

Samuel H. Pillsbury, *Why Are We Ignored? The Peculiar Place of Experts in the Current Debate About Crime and Justice*, CRIM. L. BULL., July-Aug. 1995, at 305, 335.

57. In fact, there may be ways to keep the public apprised as to which side is prevailing in court without scoring the case in a deceptive way. For example, in the pretrial stage of a case, a chart that lists what specific motions have been won or lost by each side is far more informative than a scorecard that simply states which side has won or lost more motions. Similarly, during trial, a chart listing the evidence that has been precluded by each side's objections offers better information to the public than a chart simply stating which side has had more objections sustained. A code of ethics permits creative reporting, but it must be competent and not misleading.

B. The Duty With Regard to Confidences

As we served as commentators, we realized that there were many ways in which we might come to possess information that was not generally available to the public. Commentators might speak to lawyers involved in the case and be told things—facts or legal strategies—that are not publicly known. There might be instances where commentators speak to a judge who is handling a particular proceeding and learn information that is not generally available. Also, journalists from one newspaper or station might inform the commentator of information that has been learned through a confidential source and that has not yet been published. There might be instances where commentators are contacted by the parties or witnesses.

These situations are not hypothetical. We encountered some version of each of these situations during the *Simpson* case. Some arose relatively often.

By "confidences" we simply mean information that is not publicly known that is learned by a commentator with an express or implied understanding of confidentiality. In many situations, it is unclear whether such an expectation of confidentiality exists when the commentator learns of nonpublic information in one of these ways.

The situation for the commentator is inherently uncomfortable. On the one hand, the intense public interest in a case such as the *Simpson* trial makes the information extremely valuable. The commentator has an ongoing relationship with the press and frequently the nonpublic information would be highly prized by the media. But at the same time, the information often was told to the commentator with the understanding, explicit or implicit, that it would be kept confidential. At the very least, the information might have been provided without the thought that the commentator would publicly reveal it. Also, there is the opposite danger: that the information was given to the commentator precisely because the lawyer wanted the analyst to be a conduit to transmit the information to the press.

Rules in existing codes of professional conduct are not useful in dealing with this problem. The provisions in lawyers' codes of ethics are inapplicable because they are based on the fiduciary duty that attorneys owe to clients and the need to protect client confidences to ensure effective representation.[58] Provisions in the journalists' code

58. *See, e.g., Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450 (1985); Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*,

of ethics are ultimately about protecting confidential sources for stories in order to enhance the ability of the reporter to gather information.[59]

Although both lawyers and journalists have duties of confidentiality, they are based on quite different interests. The primary concern for lawyers is protecting confidential information so as to safeguard the client's interests. The primary concern for journalists is disseminating information; confidences are protected as a way of safeguarding the availability of sources. The key difference is that anything said by a client to a lawyer in the course of representation is deemed confidential, but what a reporter is told is only treated as confidential if there is a clear promise of secrecy.

Neither of these models is applicable to the commentator who learns information with an express or implied promise of confidentiality. There is neither the need to presume confidentiality to protect clients nor the need to presume against confidentiality to fulfill the reporter's function.

Our conclusion, therefore, is that confidentiality should be based on an express agreement between the commentator and the source. Commentators should abide by and honor promises of confidentiality that they make. It is the responsibility of the commentator to clarify issues of confidentiality both with "sources" and with the press. If it is unclear whether particular information is confidential, it is the responsibility of the commentator to clarify and reach an understanding as to whether the commentator is being told in confidence and agrees to this arrangement.

We thus would recommend a provision in a code of ethics that would say: "A commentator shall keep confidential information learned with an express promise of secrecy. If it is unclear whether information is learned in confidence, it is the responsibility of the commentator to clarify the expectations."

In addition to such a provision, we would encourage commentators to consider some related issues concerning confidentiality. First, commentators need to decide whether they wish to talk with lawyers and/or the judge about the case while it is pending. Undoubtedly,

66 CAL. L. REV. 1061 (1978); Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351 (1989).

59. *See supra* note 37; *see also* JAMES C. THOMSON JR., JOURNALISTIC ETHICS: SOME PROBINGS BY A MEDIA KEEPER 8 (1978).

some commentators will know some of the participants from prior contacts; some might be close friends. Also, some commentators might want to cultivate contacts with participants. There are advantages and disadvantages to conversations with participants about the case.

Speaking with the participants can help the commentator understand what is occurring and better perform the role of informing and analyzing. On the other hand, there is the danger that the commentator could be used by the participants to transmit selected information and even to transmit inaccurate information. Also, some commentators may feel inherently uncomfortable dealing with the issues of confidentiality and thus might prefer to avoid contacts with the participants.

We see no inherent reason to prefer one approach over the other in all circumstances. We believe, though, that it is important that commentators think carefully about their contacts with participants and recognize that it is the responsibility of the commentator to clarify uncertainties concerning confidentiality.

Second, commentators should only agree to confidentiality if they are prepared to honor the promise. Commentators often talk to many different reporters in a day. Often a reporter will reveal information to the commentator that the journalist does not want publicly disclosed until his or her story appears. The difficulty then occurs when the commentator speaks to other reporters. Again, the situation is inherently uncomfortable for the commentator. The answer for the commentator must be in disclosure and honesty: The commentator should agree to confidentiality only if the commentator can and will abide by that agreement.

Third, commentators should exercise great care in speaking to parties and witnesses. Codes of professional responsibility for lawyers always have included provisions preventing attorneys from speaking to clients who are represented by counsel. The Model Rules of Professional Conduct Rule 4.2 states: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so."[60] Paragraph 3 of the commentary gives the rule a broad scope: "The Rule applies to communications with any person,

60. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1983).

whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates."[61]

Although the rule technically applies only when a lawyer is "representing a client," a commentator may have similar confidentiality concerns in speaking to a party, witness, or other third person who is represented by counsel. The represented person may not understand the role of the commentator and mistakenly believe that the expert, because he or she is a lawyer, is bound by the same rules of confidentiality as counsel. If the commentator later divulges information a represented individual believes was confidential, the commentator is likely to become embroiled in a dispute over whether the legal commentator had taken on the role of "counsel" for that person. In order to avoid claims that the commentator violated any duty of confidentiality to the represented person, it is imperative that the commentator refrain from conduct that might be construed as providing representation or that would violate the Model Rules of Professional Conduct.[62]

Additionally, commentators should avoid being placed in the role of investigator. During the *Simpson* case, when jurors were excused, some of the commentators were asked to speak with them and gather information. There are many problems with this for the commentator. Once the commentator speaks with a juror, the commentator then risks being asked to comment on the information that he or she unearthed. Commentators are transformed into reporters and not analysts. Indeed, if the commentator is successful in gathering information, the commentator will be the news and not just a reporter or analyst of it.

Commentators face difficult issues of confidentiality while serving in their unique role. Any code of ethics must address these issues to ensure that the commentator has appropriate access to information without jeopardizing his or her objectivity and ability to analyze a case accurately.

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61. *See id.*; MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2, cmt. (1995). The Rule and the Comment were amended in 1995 to change the word "party" to "person." *See* GILLERS & SIMON, *supra* note 33, at 263.

62. The problem of speaking with a represented person also raises conflicts of interest concerns. *See infra* part III.C.5.

C. Duty to Avoid Conflicts

Just like in the practice of law, one of the crucial duties for a legal commentator is to avoid conflicts of interest while providing one's services. Conflicts of interest may take several forms. Once again, a very helpful guide to those conflicts and how to approach them is set forth in the traditional codes of responsibility governing lawyers' conduct.

In the practice of law, the rules on conflict of interest are largely governed by a lawyer's paramount duty to the "client." The "client" of a legal commentator is different from that of the practicing lawyer. By and large, the legal commentator's "client" is the public to whom that expert is providing commentary. There are times, however, that the client also includes a particular media organization with whom the commentator is regularly working. Finally, there are times that a commentator may also feel a duty to third parties who have an affiliation with the case and a prior or ongoing relationship with the commentator. Balancing one's duties of loyalty and confidentiality to all these groups makes it particularly important and challenging for the legal commentator to spot and properly handle any conflicts of interest.

1. *Conflicts Created by a Lawyer's Personal Relationship with Lawyers in a Case*

One type of conflict that frequently arises for legal commentators is a conflict between the commentator's objective role as a legal expert and the temptation to assist one side of the proceedings. Sometimes it is hard for legal commentators to stay out of the action. Because commentators are also involved in researching the law and reaching conclusions based on that research, there is frequently the urge to contact one side of the proceeding or another and advise the party of possible successful strategies. That temptation increases when the commentator has a preexisting or developing relationship with attorneys on either side of the proceeding.

No matter how great the temptation may be to enter the contest, a commentator must remain neutral. If a commentator starts to provide information to one side or another, he or she will undoubtedly lose this crucial objectivity. There are enormous downsides for the commentator who becomes personally involved in a case. First, on a practical level, how does that person dispassionately and accurately comment on the legal development? If it involves a suggestion made

by the commentator, then the commentator is being asked to comment on his or her own work. Second, the commentator will lose his or her reputation for being fair and objective. Losing this reputation is as close as a commentator can come to losing an official credential to provide legal commentary.

Certainly, a legal commentator can let it be known publicly what information he or she has discovered that is relevant to a case and how that information might impact on the proceedings. Once the information is in the public realm, the lawyers or judge in a case may take notice of it. But providing general legal commentary is a far cry from helping the lawyers in a case strategize or do research.[63]

Additionally, in avoiding a conflict of interest while providing commentary, it is crucial that a commentator disclose any personal relationship he or she may have with any of the participants in the case. It may not be an automatically disqualifying factor that one knows or is related to a litigant, but it is certainly a fact that should be disclosed to the public and the media.[64]

Disclosure and consent is the traditional approach for lawyers to handle conflict issues.[65] For legal commentators it may also be an appropriate approach, although it comes with an added difficulty. When a lawyer discloses to a client a conflict of interest, the lawyer can be sure that all necessary information regarding that conflict is communicated to the client. There is not the same guarantee for the legal commentator. Although the commentator may disclose to the press that a potential conflict exists, the media, through its editorial powers, controls whether such information is ever heard by the public. When the media is looking for a fifteen-second soundbite, it is unlikely that the reporter will include in it a commentator's caveat that he or she has a conflict. Nonetheless, legal commentators should do everything in their power to ensure both the media and the public are aware of any potential conflicts.

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63. If contacted by one of the parties in a case for advice, the commentator should explain the conflict created and decline to provide such advice. However, under traditional ethical rules, it would not be inappropriate to refer the parties to other experts who might be helpful on the issue. *Cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104(A)(2) (1971) (it is proper to give advice to represented party to seek the advice of counsel).

64. For example, it should not be a per se rule that a legal commentator cannot comment on a friend or spouse who is involved in the litigation. Rather, the commentator should have a duty to disclose any relationship that could bias the expert's commentary. Disclosure and consent is the approach currently used when husbands and wives oppose each other in litigation. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 340 (1975).

65. *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1983).

2. *Conflicts Created by a Commentator's Stake in the Outcome of the Proceedings or a Ruling on a Legal Issue*

Another type of conflict that may arise is when a commentator is asked to give an opinion on an issue that affects a matter for which the commentator is currently providing legal services. This problem can arise because commentators for trials are often drawn from those lawyers who practice in the same area and thus may confront similar issues. For example, the question may arise as to whether it is appropriate for the prosecution to seek the death penalty in a particular case. If the legal commentator is currently working on a case where the District Attorney is being asked to compare facts and decide whether the death penalty should be imposed, a clear conflict of interest is created for the commentator. Even if the commentator's honest opinion might be that it would be appropriate for the prosecutor to seek the death penalty, the commentator's duty to the client who may face the same penalty dictates that the lawyer's public statements be skewed in a particular direction. It is preferable, if such a situation arises, for the commentator to either recuse himself or herself from the legal commentary or, at minimum, disclose the conflict and allow the media and public to evaluate the commentary accordingly.

3. *Conflicts Created by a Commentator's Political or Organizational Affiliations*

Even a commentator's political or social affiliations can create a conflict when providing commentary. For example, a commentator may belong to an organization that becomes involved in the litigation. One of the most likely scenarios is a civil rights organization or a free press organization that becomes interjected in a proceeding when right of access questions arise.[66] A legal commentator's allegiance to the organization has the potential to skew his or her legal commentary. On the other hand, if the commentator remains neutral on the issue or asserts a position contrary to that of the organization, he or she might be seen as being disloyal to the organization.

Traditionally, lawyers are entitled to participate in organization work and law reform activities even if the organization's interests are

66. For example, in *Simpson* the ACLU repeatedly intervened to encourage Judge Ito to release sealed transcripts in the case and to continue television coverage. However, a split in the position of ACLU members occurred when the ACLU took the position that the defendant should have a veto over whether cameras will be allowed in the courtroom.

contrary to those of a client.[67] For legal commentators, the same may be true. A commentator may be able to provide legal commentary on a case even if the organization has an interest in the proceeding, as long as that commentator honestly and reasonably believes his or her affiliation will not affect the commentary and the commentator discloses any conflict to the public and the media. If the commentator does not believe that he or she can remain objective, the best course of action would be, as it is for any conflict situation, to recuse oneself from speaking on that issue.[68]

4. *Conflicts Created When Speaking to More Than One Media Outlet*

A special type of conflict exists for the commentator who, while on retainer to one media outlet, is asked to speak to a competitor. In the practice of law, covenants not to compete are disfavored.[69] The rationale for this traditional rule is that clients should have access to the lawyers of their choice. A similar rationale would seem to apply to legal commentators. Why shouldn't all the public, instead of just a particular readership or viewership, have access to the legal commentator's opinions?

On the other hand, legal commentators are often hired on an "exclusive" basis and thus contractually owe a special duty of loyalty and confidentiality to a particular media outlet. For those commentators who have contractually agreed to remain loyal to a particular media outlet, that contractual obligation must be honored.[70] Overall, it would be a better practice if legal commentators did not bind themselves by exclusivity agreements so that they can always remain in a position to educate as much of the public as possible.

Finally, even if a legal commentator does not have a contractual obligation to remain loyal and not disclose the "scoops" of one media organization to another, a promise of confidentiality must always be honored.[71] Commentators should realize, however, that expressed or implied promises to keep information confidential may also cause a

67. MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.4 (1983).

68. We recognize that recusal is not always possible, especially for the in-studio, on-set commentator who has no advance notice that the issue in conflict will be discussed. In such a situation, the only practical option may be for the commentator to disclose the basis for any possible conflict while addressing the issue in his or her commentary.

69. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-108 (1971).

70. *See infra* part III.D.

71. *See supra* part III.B.

conflict when another media organization calls and asks for commentary which, in order to be complete and accurate, would require an improper disclosure. When that situation arises, the commentator will be forced to decline to answer the question or reveal that a conflict of interest prevents the commentator from answering.

5. *Conflict Created by Contacting Represented Party*

An odd type of conflict may also arise between the commentator's role as a pseudo-journalist covering a case and the commentator's continuing duties as a member of the legal profession. The conflict arises in the following manner: In trying to ascertain the facts regarding an issue in the case, the commentator is asked to contact the party or witness who has first-hand knowledge. More often than not, these individuals will be represented by counsel. If the lawyer was acting under the traditional constraints of the ethical code, the lawyer would be barred from making such contact.[72] But the commentator is not acting in the traditional role of a lawyer and the question arises as to whether such contact should be prohibited.

Although no code bars contact directly with a represented party when one is acting as a legal commentator and not as a lawyer in a proceeding, commentators should be extremely cautious in undertaking such an endeavor. A commentator's primary role is to evaluate facts and law for the public, not to investigate them. When called upon to be an investigator, legal commentators must be scrupulous in protecting the rights and interests of parties and witnesses in a case. Although the media may be willing to push a represented party to jeopardize his or her interests with a few choice remarks for the press, a lawyer's role, even while serving as a legal commentator, is to ensure that people's rights are respected, not compromised.

Also, there is a real danger that the parties or witnesses will ask the commentator for legal advice. They may perceive the commentator as a lawyer and try to use the commentator in that capacity. There are enormous problems with the commentator providing legal advice

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72. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY 7-104(A)(1) (1971):

> (A) During the course of his representation of a client a lawyer shall not:
> (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

See also supra part III.B.

to these individuals, including risking interfering with the client's relationship with his or her attorney.

6. *Conflicts Created by Assisting the Court*

The final type of conflict that may arise for the legal commentator is the one created when the court seeks assistance from a legal expert who is also providing commentary on a case. Under the ABA Model Code of Judicial Conduct, a judge may obtain the advice of disinterested experts on the law.[73] It is not unheard of for judges in high-visibility cases to seek the counsel of an expert who has been following the case. While the judge should disclose to the parties that such an expert has been consulted, not all judges follow this practice.

The problem for the legal commentator is similar to that of assisting a party to the action. If the commentator provides advice to the judge, and then provides commentary in general on that issue, the expert is essentially critiquing his or her own work. In such situations, the legal commentator may need to make a decision—advise the court and stay away from legal commentary on that issue or advise the court to seek advice elsewhere.

7. *Summary of Commentators' Conflicts*

As in the practice of law, it is not always evident when one is facing a conflict of interest or how to resolve that conflict. However, if one uses the model of ethical responsibilities generally applied to lawyers, the most successful approach may be to draft rules providing:

(1) Commentators should anticipate areas of conflict and determine initially whether the potential conflict would jeopardize the commentator's ability to do his or her job of presenting objective commentary to the public.
(2) If there is a potential conflict and the commentator believes he or she can remain impartial, the commentator must, at minimum, disclose those facts creating the conflict.
(3) If the commentator does not reasonably believe he or she may remain impartial, he or she should be disqualified from providing legal commentary on the case.

Many conflicts will not require the complete disqualification of a legal commentator from covering a case. Some will only require the commentator to refrain from commenting on certain issues. However,

73. MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(7)(b) (1990).

there are some types of conflicts that could lead to complete disqualification. For example, per se disqualification should be imposed when the lawyer has been counsel on the case or is currently serving as counsel for any party or witness related to the case. The term "objective commentator" loses all meaning when it is an interested party providing commentary. Lawyers in that situation may still speak to the press, but their role will be very different from that of the objective, expert analyst.[74]

D. The Business of Being a Commentator

Although legal commentators were used before the *Simpson* trial, it was relatively rare for media outlets to enter into contracts for the sole purpose of having a legal commentator for one particular case. During *Simpson*, it seemed like every network, every show, every form of media needed to have its own retained expert. Several issues arose from this practice.

First, should commentators enter into exclusive agreements with particular media outlets? Apart from any issues of conflict of interest,[75] there is the general question of whether exclusivity offers the best professional environment for the commentator to perform his or her role. In the *Simpson* case, several networks entered into contracts with commentators that precluded their appearing on other networks. Likewise, several local stations and commentators had similar exclusivity agreements. On the other hand, other networks and stations did not require exclusivity and some commentators expressly refused such agreements.

There are advantages and disadvantages to exclusivity agreements for both the media and the commentator. The media benefits from an exclusivity agreement because it is assured the availability of a commentator. At crucial moments in the *Simpson* case, there was an enormous demand for commentators; an exclusivity arrangement let the media know that the commentator was available to them at such times. Also, some media outlets perceived that they benefited by having the public identify particular commentators with them. Indeed, some stations literally advertised their commentators and thus wanted exclusivity.

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74. The extrajudicial speech of lawyers in a case is governed by California Rule of Professional Conduct 5-120 (1992) and the Supreme Court's decision in Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991).

75. *See supra* part III.C.4.

There usually is a financial benefit for the commentator who engages in an exclusivity agreement. Generally, commentators are paid a retainer when they sign a contract with an exclusivity clause. Also, a person who wants to be a commentator is assured such work if there is an exclusivity clause. Exclusivity agreements also can help the commentator by limiting the number of requests for interviews; it is a way of lessening what, at times, is an overwhelming number of calls.

But exclusivity also has its costs. As described in Part II, the primary function of the commentator is to educate the public. An exclusivity agreement limits the ability of the commentator to perform this service. Also, there is inherent discomfort for the commentator in turning down requests based on exclusivity agreements.

Ultimately, we believe that exclusivity is a personal choice. For the purposes of an ethical code, we would recommend a relatively simple provision: "Commentators may enter into exclusive agreements with particular media outlets. It is the responsibility of the commentator to clarify the scope of any exclusivity agreement. If there is an exclusivity agreement, it is the duty of the commentator to adhere to its terms."

A second major issue concerns compensation. The availability and receipt of compensation varied widely among commentators and among media outlets during the *Simpson* case. To our knowledge, the print media never paid for interviews with commentators, although op-ed pieces in newspapers do pay a small honorarium. Nor does the broadcast media generally pay for interviews that appear as "soundbites" on the news.

Many networks and stations that were carrying live coverage of the proceedings paid commentators for their services.[76] Some did not. For example, Court TV and the E! Network did not pay commentators who spent entire morning or afternoon sessions as in-studio commentators.

It certainly is reasonable for commentators to be paid for in-studio work. Being in a studio for half or all of a day is a major time commitment. Media companies are profit-making enterprises and are accustomed to paying their on-air performers.

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76. For discussions on compensation to commentators, see Maura Dolan, *Case Creates TV Job Openings for Lawyers*, L.A. TIMES, July 5, 1994, at A1; David Zeman, *Lawyers Flock to TV in* Simpson *Case*, CHI. TRIB., July 14, 1994, at 3; Gail Diane Cox, *What's After O.J.?*, NAT. L. J., Dec. 4, 1995, at A1.

On the other hand, newspapers generally do not pay people for interviews. There was an unfortunate incident at the beginning of the *Simpson* case, in the few days before the preliminary hearing, where several commentators told some print media reporters that they would not do interviews unless they were paid a retainer fee.[77] Ultimately, the problem solved itself as there were a sufficient number of commentators who were willing to do such interviews without a fee so as to eliminate any pressure on the newspapers to make such payments.

An ethical provision could quite simply say: "Commentators may be paid a reasonable fee for their work." This is language drawn directly from Rule 1.5 of the Model Rules of Professional Conduct. Rule 1.5 enumerates many criteria to be considered in evaluating the reasonableness of a fee, such as the time and labor required, the likelihood that employment will preclude other employment, the fee customarily charged in the locality for similar services, the amount involved and the experience, reputation and ability of the lawyer or lawyers performing the service. All of these are also relevant in assessing the reasonableness of fees for commentators. In reality, for commentators, reasonableness is determined by the market system.

Third, we believe that it is important that commentators perform pro bono work. Many media outlets simply cannot afford to pay fees to legal experts. Among the most valuable services performed by commentators is educating reporters and anchors about the law, a task for which there is generally not compensation or recognition. We strongly believe that commentators should be encouraged to perform this valuable service.

Finally, in discussing the business aspects of being a commentator, there is the concern that serving as a commentator is a form of advertising for lawyers; attorneys who appear as legal experts are gaining exposure that can attract additional clients. From a practical perspective, such appearances are the ideal form of advertising for a lawyer: It is free (or even pays the attorney) and it reaches a potentially large audience. Moreover, a public that is inherently skeptical of advertising is learning of the lawyer in a context that is much more likely to breed respect and trust.

77. Several print journalists from many different newspapers told us of the request for compensation for interviews from some commentators.

Yet, we believe that it is a mistake to characterize the lawyer's appearance as a commentator as a form of solicitation or advertising, however much it seems like it. First, a lawyer appearing as a commentator fits neither the definition of solicitation nor of advertising.[78] Solicitation occurs when there is direct contact with a particular prospective client, either in person or by phone or by letter.[79] No such communication occurs when a lawyer appears as a commentator.

Nor can the lawyer's appearance be considered advertising, even if it has that effect. Advertising is not precisely defined, but it concerns offering a particular service to the public. It is possible that a commentator might do this expressly, but that would be highly unusual. The advertising aspect of appearing as a commentator is likely to be implicit rather than express.

Second, it would be impossible to formulate criteria to separate when a commentator is engaged in advertising and when not. The distinction is important because if the lawyer is deemed to be advertising, then he or she can be punished for false statements. Otherwise, of course, false statements cannot be punished. In one sense, everything the commentator does is a form of self-promotion and advertising. On the other hand, it would be undesirable to have commentators' comments and actions monitored for false or deceptive statements.

The concern, then, with commentators engaged in self-promotion is that it is unseemly. Yet, there is no realistic way to define the permissible degree of self-promotion or the point at which an appearance should be treated as an advertisement. Besides, speech cannot be restricted just because it might be in bad taste. Therefore, as distasteful as some of the conduct might be at times, media appearances should not be treated as advertisements. At most, there could be a provision encouraging commentators to refrain from intentionally promoting his or her business.

E. Being a Commentator, Staying a Lawyer

Finally, a commentator must remember that as a member of the legal profession, he or she has continuing duties under the ethical codes applicable to all lawyers. Accordingly, a commentator must

78. *See, e.g.*, California Rules of Professional Conduct 1-400 (1992).

79. *See, e.g.*, Ohralik v. Ohio State Bar, 436 U.S. 447 (1978) (face-to-face solicitation); Shapero v. Kentucky State Bar, 486 U.S. 466 (1988) (letter solicitation).

comply with all laws and refrain from conduct "prejudicial to the administration of justice."[80] A commentator also should not knowingly advise or assist another in a violation of the law.[81]

Members of the media, even honest and good-intentioned ones, can become overzealous in their efforts to cover a case. For example, when the grand jury in the *Simpson* case was discharged, some members of the media wanted to contact dismissed grand jury members to interview them regarding what occurred in the grand jury. The only problem with such a request is that it very likely violates California law which prohibits such disclosures by grand jurors.[82] Because the legal commentator is the legal counsel most accessible to reporters, his or her advice might be sought on such a request. The commentator should avoid any conflict of interest caused by serving as both an adviser for the media and an expert analyst for the proceeding being covered. Moreover, a commentator should beware of providing any opinions that could be interpreted as approving of suspect investigative techniques by the media or anyone else.

Legal commentators are under the constant scrutiny of the public and the courts. Operating in the limelight requires that the commentator be particularly vigilant in complying with all laws and applicable rules of court.

IV. CONCLUSION

In today's "Age of Legal Commentators" we have a golden opportunity to set standards that will make us proud to engage in such work and will make the public and legal community pleased to receive us. Before the next "Trial of the Century" hits, we should take the opportunity to draft and adopt a set of ethical standards that can guide those lawyers and professors who become legal commentators.[83]

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80. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4 (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102 (1971).

81. *Cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(7) (1971).

82. CAL. PENAL CODE § 924.1 (West Supp. 1996).

83. One area of commentator conduct that we have hesitated to discuss is a commentator's relationship to his or her fellow commentators; in other words, "The Duty of Civility." Traditionally, legal ethical codes have shied away from regulating the personal relationships between attorneys. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1971). *Cf.* MODEL RULES OF PROFESSIONAL CONDUCT Rules 5.1, 5.3 (1983) (discussing rules of conduct for supervising attorneys and those under their charge). Rather, the lawyer's workplace environment has been governed by the same laws as comparable workplaces. *See, e.g.*, Hishon v. King & Spalding, 467 U.S. 69 (1984) (Title VII prohibits discrimination in law firms); Lucido v. Cravath, Swaine &

Because the work of legal commentators affects so many groups and is affected, in turn, by them, it would be best to form an interdisciplinary group to address the ethical issues facing legal commentators. Such a group would naturally be composed of representatives from the legal profession, the media, the courts, bar associations, community groups, and those who have served as legal commentators. Working together, such a team could establish guidelines that would ensure that the legal commentators of the twenty-first century can most effectively do their job and that the public, the ultimate client for their work, is well served.

In some cities, coalitions already exist to examine news coverage of major community events. For example, in Los Angeles, the Media Image Coalition ("MIC") was formed under the auspices of the Los Angeles County Commission on Human Relations. After the 1992 riots in Los Angeles, that coalition brought together representatives of the media, law enforcement, courts, and community to address the issue of how news coverage of civil unrest should be responsibly handled.[84] A similar working forum would be helpful for discussing and fashioning the role of legal commentators and ethical standards for guiding the commentator in that role.

The choice is ours. We can either drift along with ongoing criticism of legal commentators and the role we perform, or we can take the initiative to improve the standards of our profession. We believe most commentators want to do the right thing. A code would help us in doing so.

Moore, 425 F. Supp. 123 (S.D.N.Y. 1977) (Title VII of the Civil Rights Act of 1964 applies to law firms).

Although we propose no specific rules, we strongly believe that commentators should be as congenial, helpful, and supportive of their fellow commentators as possible. Media outlets may be in competition, but we are not. Our goal is the same—to provide our best legal insights to the public. Fellow commentators should be treated with courtesy and respect, even if one disagrees with another commentator's views. A healthy debate on issues is appropriate; personal attacks are not.

84. On Sept. 21, 1993, the coalition sponsored a working forum for the media and community on "Cooperative Responses to Civil Unrest: A Model for Change."

The New York Times https://nyti.ms/29j2KUF

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May It Please the Public; Lawyers Exploit Media Attention as a Defense Tactic

By JAN HOFFMAN APRIL 22, 1994

Almost as soon as William M. Kunstler and Ronald L. Kuby took over the defense of Colin Ferguson, the man charged with murdering six Long Island Rail Road commuters, they got on the horn. In short order they held a news conference, appeared on talk shows and wrote an op-ed article in The Daily News, telling anyone who would listen that they would introduce a "black rage" insanity defense for their client.

This month, Nassau County prosecutors, complaining that the lawyers had violated a state ethics rule, asked a judge to order both sides to stop speaking about the case to the news media. Judge Donald E. Belfi granted the request temporarily, while he considers Mr. Kunstler's challenge to it.

But Mr. Kunstler and Mr. Kuby's race to the microphones has become almost common practice among defense lawyers in high-profile cases. And almost as common has become the effort by prosecutors and judges to shut them up.

"Lawyers now feel it is the essence of their function to try the case in the public media," said Acting Justice Harold J. Rothwax of State Supreme Court in Manhattan, who tried and failed to silence lawyers at the outset of the sensational murder trial of Joel Steinberg in 1988. "It's no longer courtroom-based, and that's astonishing. It's a whole new ethic that needs to be looked at carefully."

Though legal experts are dismayed by the increasing number of lawyers who consider a news conference part of the job -- good for the client, great for the lawyer -- they question whether the remedy, court-ordered silence, can be fairly enforced or is even necessary. While restraining lawyers may erode the news media's First Amendment rights and, by extension, the public's, experts say, such orders do not necessarily stop others from leaking lurid details. And opinions remain divided over whether pretrial publicity does influence a jury verdict.

Certainly the era of the lawyer as press agent is in full swing, with some defense lawyers seeking book and movie deals for clients as vigorously as they do material witnesses. In a recent tour de force that has left members of the legal community gasping in either horror or admiration, the New York lawyer Michael Kennedy arranged for a client to give his version of why he killed four women to the ABC-TV news program "Prime Time Live" -- before the client surrendered to police.

The harm, say legal experts, is that an unbiased jury will be extremely difficult to select. Defense lawyers, while duty-bound not to lie, do throw fistfuls of dust in the public eye. And prosecutors now stand behind tables of confiscated guns and drugs reading indictments into a thicket of microphones.

To curb the trend and avoid the expense of moving a trial, judges are increasingly issuing sharp admonitions and orders against lawyers, most notably those with omnipresent clients like Joey Buttafuoco, Amy Fisher and the World Trade Center defendants. In a case this January that has alarmed many lawyers, Bruce Cutler was found in criminal contempt for ignoring a judge's order to stop talking to the news media about his client, John Gotti. Mr. Cutler, whose sentencing date has not been set, faces up to six months in prison. Most Likely to Be Silenced

An order to silence lawyers, said Jane Kirtley of the Reporters Committee for Freedom of the Press, "seems to be happening much more automatically than it did even three to five years ago."

If there is a prototypical lawyer likely to be sanctioned, Mr. Kunstler or Mr. Cutler would qualify: both have a klaxon style of advocacy, an affinity for notorious

clients, and a flair for infuriating judges.

And both have the same response to judicial efforts to restrain them: the other guy did it first and worst. In other words, when a prosecutor holds a news conference to announce an indictment and when the police leak details, a defense lawyer must fight back. In kind.

Mr. Kunstler, whose client, Mr. Ferguson, had been called "an animal" by Thomas S. Gulotta, the Nassau County Executive, said that speaking out "enables you to humanize instead of demonize the defendant."

Peter A. Weinstein, the appeals chief for the Nassau County District Attorney who filed the motion against Mr. Kunstler, disagreed. "Two wrongs don't make a right," he said. "The defense should go to court and seek a gag order."

But Mr. Kunstler said that by appealing to the court of public opinion, he had often reaped benefits in a court of law: "The press sometimes gets you interesting witnesses," he said. "Our comments have gotten psychiatrists to write to us, created symposia. We love television."

Small wonder. Even as defense lawyers rush to the news media for the high-minded purpose of salvaging their client's reputation, they also know their next client could be watching the evening news. Blaming the Victim

Even as they are protecting their client's tarnished name, defense lawyers can also inflict their share of damage. One strategy used by Jack T. Litman, the lawyer for Robert Chambers, who was tried for the Central Park murder of Jennifer Levin in 1988, was to castigate the dead woman.

"It was a successful blame-the-victim defense," said Linda A. Fairstein, who prosecuted the case. "The public opinion about her was that she asked for it. The defense bar gets away with that sort of thing a lot, and we don't."

Though the state and Federal rules invoked against Mr. Kunstler and Mr. Cutler apply only to lawyers, some legal observers say that by silencing a lawyer, the defendant, too, is in effect silenced.

"The client does not speak to the press -- any good lawyer will forbid it," said Frederick P. Hafetz, who spoke for his client, Mr. Cutler. Statements made by a defendant may be admissible at trial. "So the lawyer really is the spokesperson for the defendant who has been pilloried."

While a lawyer may be forbidden to speak with the news media, news coverage would not necessarily shut down; courts have ruled that reporters' First Amendment

rights deserve greater protection than a lawyer's.Surrogates for the prosecutor -- the police, agents for the Federal Bureau of Investigation -- may continue to contact journalists.

That is why, say criminal defense lawyers, silencing orders are inherently lopsided. And increasingly, they say, efforts to quiet them have sprung not from judges, but from prosecutors.

Before the recent trial for the murder of the journalist Manuel de Dios Unanue, a Federal prosecutor asked that the defense lawyer be admonished for speaking with reporters, and he mentioned the Cutler ruling. But the lawyer, Susan G. Kellman, successfully responded that prosecutors also violated the rule.

"Prosecutors want to put a sock in my mouth," said Ms. Kellman. "But the more they harass me on issues I think go to the heart of our system, the more obnoxious I get."

The silencing orders are often overturned by appellate courts, as was the one by Federal Judge Kevin T. Duffy in the World Trade Center case. Appellate courts challenge the orders for many reasons, including that they are too broad and, by extension, impinge on the news media's First Amendment rights.

An issue central to Mr. Cutler's appeal will be the standard of proof demanded by the Federal court rule that Federal Judge I. Leo Glasser had ordered him to follow. The rule says that a lawyer's remarks to the news media must be curtailed if there is "a reasonable likelihood" that the fairness of a trial will be prejudiced. By contrast, the state disciplinary rule that prosecutors invoked against Mr. Kunstler has a higher hurdle: that likelihood must be "substantial."

The Supreme Court addressed the issue of a lawyer's out-of-court speech in a 1991 case, Gentile v. Nevada, which resulted in a ruling that legal experts invariably cite but about whose meaning they invariably disagree. While the Court upheld the "substantial likelihood" standard, it also said that the defense lawyer could not be sanctioned for holding a news conference, because other parts of the rule were vague.

The American Bar Association is drafting a model rule to address the Supreme Court's concerns about out-of-court speech. But lawyers still wonder about the practical application of current and future guidelines: how does one prove the likelihood that publicity will prejudice a trial? Mr. Cutler proclaimed that John Gotti was the best-loved man in the city. But at jury selection, many people confessed to

being biased against Mr. Gotti, who was subsequently convicted of murder and racketeering. A Question of Risk

Opinions on whether publicity has an effect on verdicts are conflicting. "There is a reasonable body of research literature that suggests strongly that pretrial publicity can have a biasing effect on jurors," said Norbert L. Kerr, a professor of psychology at Michigan State University. The remedy that Mr. Kerr advocates, in certain circumstances, is to delay the trial until publicity has faded.

But a report last spring by a committee for the City Bar Association concluded that pretrial statements by lawyers were unlikely to pose a risk, and suggested that any regulation of the speech of lawyers be limited to within a month of the trial.

Albert Alschuler, a professor of criminal law at the University of Chicago, found that concerns about jurors were overblown. "Jurors are the freshest, most independent people in the criminal justice system," he said. Instead, he added, the impact of publicity on other participants should be examined. "When a story gets press, prosecutors become a lot tougher about plea bargains. And that's also true of judges, especially elected ones, at sentencing."

Jurors themselves feel insulted by suggestions that they could be swayed by publicity, said Colleen McMahon, who oversaw a recent report on jury reform in New York State. "One juror said, 'Some of us even watched TV during the trial, but it didn't make a difference -- we just considered the evidence.' " Supreme Court v. the Media Circus

In one of its most important rulings on the news media and fair trials, the Supreme Court in 1966 overturned the murder conviction of a Cleveland doctor because, ti said, virulent pretrial publicity had tainted a jury.

Dr. Sam Sheppard had told investigators he had awakened to his wife's cries to see a stranger standing over her. The man, he said, knocked him unconscious. Dr. Sheppard was charged with his wife's murder. (The television series "The Fugitive" was loosely based on the case.)

The Supreme Court reviewed five volumes of press clippings. Quotes from the prosecutor were ubiquitous. Editorials thundered against the doctor. Prospective jurors were photographed.

In such carnivalesque circumstances, the court ruled, a judge must act; options include curtailing lawyers' speech, postponing the trial and sequestering juries.

F. Lee Bailey, the lawyer who won the acquittal for Dr. Sheppard in his retrial,

said he was generally skeptical that pretiral publicity was a danger. "I'm supportive of reasonable gag orders," he said, "but it's rare that the press influences a verdict."

Of his 20 most famous cases, he added, "I won 16 acquittals, two got what they deserved, and bad press influenced only two others. One was Patty Hearst."

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The New York Times

Michael Cohen Seeks Gag Order on Lawyer for Stormy Daniels

By Alan Feuer and Benjamin Weiser

June 15, 2018

Calling for an end to the "media circus" that has engulfed his numerous legal cases, Michael D. Cohen, President Trump's longtime personal fixer, has asked a judge in California to keep his adversary, the lawyer Michael Avenatti, from speaking about him in the news media.

In a motion filed on Thursday night in Federal District Court in Los Angeles, Mr. Cohen requested that a restraining order be placed on Mr. Avenatti, a lawyer for the pornographic actress Stephanie Clifford, barring him from publicly discussing almost anything about a breach-of-contract lawsuit he had filed against Mr. Cohen.

For nearly four months, Mr. Avenatti has been waging both a multifront legal effort and a guerrilla-style publicity campaign against Mr. Cohen, saying he had "zero credibility" and repeatedly predicting his indictment. The request for the gag order, which legal experts said Mr. Cohen was unlikely to win, came in a suit in which Mr. Avenatti has accused Mr. Cohen and Mr. Trump of breaking a $130,000 nondisclosure deal to keep Ms. Clifford, who is better known as Stormy Daniels, quiet about an affair she claims she had with Mr. Trump.

"Mr. Avenatti's actions are mainly driven by his seemingly unquenchable thirst for publicity," Mr. Cohen's lawyer in California, Brent Blakely, wrote in the motion to Judge S. James Otero. "Mr. Avenatti's publicity tour, wherein he routinely denigrates Mr. Cohen with claims of alleged criminal conduct, is contrary to the California Rules of Professional Conduct, likely to result in Mr. Cohen being

deprived of his right to a fair trial, and threatens to turn what should be a solemn federal court proceeding into a media circus."

Mr. Cohen's mounting courthouse woes — two different civil lawsuits and a separate criminal investigation — have, of course, already devolved into a media circus, as even his own lawyers in New York have noted. Aside from the breach-of-contract suit, Mr. Avenatti has sued Mr. Cohen in another California case, claiming he conspired with Ms. Clifford's former lawyer, Keith Davidson, to quash the story of her alleged affair with Mr. Trump. And Mr. Cohen is under investigation by federal prosecutors in Manhattan, who are looking into whether he broke the law in any of various business dealings, including the hush-money payment to Ms. Clifford.

Mr. Cohen's request for a judicial order to silence Mr. Avenatti was extraordinary, not the least because he himself has long had a reputation for employing hardball tactics, especially when it comes to the media. The gag-order motion followed a series of TV appearances that Mr. Avenatti made on Wednesday night predicting that Mr. Cohen would turn on Mr. Trump and cooperate with the New York prosecutors who are leading the criminal inquiry.

Those appearances were themselves prompted by news reports earlier on Wednesday that Mr. Cohen was planning to split with his criminal defense team in part because of a dispute about his legal bills, some of which the Trump family has been paying. The disagreement over money — how much of the bills should be paid and for how long — could serve to further isolate Mr. Cohen from Mr. Trump, a risky move for the president that could intensify the pressure on Mr. Cohen to cooperate.

Mr. Avenatti responded to the gag-order request on Twitter on Thursday night, calling Mr. Cohen's motion "a complete joke and baseless." On Friday, Judge Otero refused to issue an immediate emergency ruling on Mr. Cohen's request, asking for additional papers to be filed in the next two weeks by both sides.

In a federal court hearing last month in Manhattan stemming from the criminal investigation, a lawyer for Mr. Cohen complained about statements by Mr. Avenatti, who had sought to appear formally in New York in order to protect any records related to Ms. Clifford that the authorities may have seized when they raided Mr. Cohen's office, apartment and hotel room in April.

In the hearing on May 30, the New York judge, Kimba M. Wood, told Mr. Avenatti that while she could not stop him from speaking in public, he would have to tone down his "publicity tour" if he wanted to take part in the case.

Mr. Avenatti immediately withdrew his application to appear and continued his attacks on Mr. Cohen, calling him a "moron" in an interview this week with Stephen Colbert.

For the last two months, the criminal case in Manhattan has been bogged down in a review of the nearly four million files seized from Mr. Cohen, as his lawyers and lawyers for Mr. Trump work with a court-appointed special master to determine which among them are protected by the attorney-client privilege. On Friday, prosecutors told Judge Wood that Mr. Trump and Mr. Cohen's legal teams would finish their review by June 25. That included some new materials they had only just received — among them about 700 pages of Mr. Cohen's encrypted messages, and 16 pages that were pieced together from strips of paper found in one of his shredders.

Two legal experts said the odds were heavily against Mr. Cohen's prevailing in his request to silence Mr. Avenatti.

"I think what Cohen's lawyer is trying to do is to get a second shot at the gag order which Judge Wood was unwilling to grant in the criminal case," Rebecca Roiphe, a professor of legal ethics and criminal law at New York Law School, said.

While Mr. Avenatti's so-called publicity tour may be good for him, she added, "it's also good for his client." She noted that part of what Ms. Clifford is seeking is

vindication of her reputation.

Stephen Gillers, who teaches legal ethics at New York University School of Law, said, "Cohen's problem is that he has cited no case in which a court has imposed any kind of gag order on a lawyer in a civil matter."

Professor Gillers speculated Mr. Cohen might be hoping that even if Judge Otero denies the motion, he will caution Mr. Avenatti with strong language that could encourage California lawyer disciplinary authorities to examine Mr. Avenatti's conduct.

"So Cohen will lose, but Avenatti might be chastised, and that might be an acceptable second place prize for Cohen," Professor Gillers said.

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Navigating the media in high-profile cases

By Joshua Hamilton
Partner, Litigation & Trial Practice, Latham & Watkins

Throughout history, high-profile court cases have captivated the public. Historians still discuss the significance of the trials of Socrates and Galileo that occurred over 2,000 and 1,000 years ago, respectively. And it seems that every few years the news hits for the next "trial of the century." When a company or individual is faced with a case that is likely to generate significant media attention, it is absolutely critical to engage counsel who is both a skilled litigator and adept at recognizing the significance that public opinion will play on his or her clients. As Supreme Court Justice Felix Frankfurter recognized in 1954, "[c]ases are too often tried in newspapers before they are tried in court, and the cast of characters in the newspaper trial too often differs greatly from the real persons who appear at the trial in court and who may have to suffer its distorted consequences." *Pennekamp v. State of Fla.*, 328 U.S. 331, 362-63 (1946).

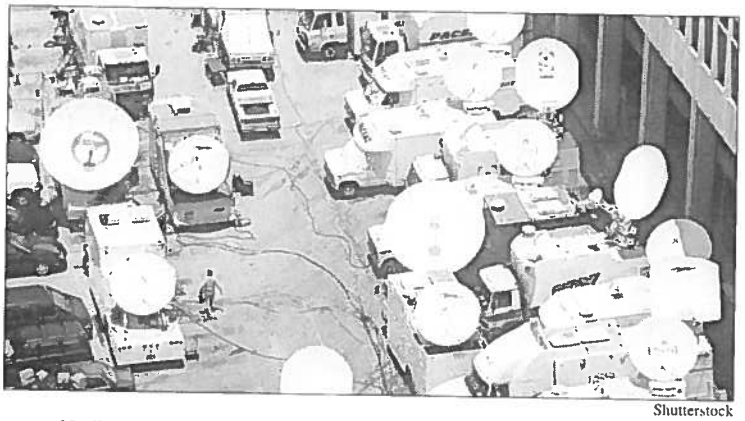
Today, these same concerns identified by Justice Frankfurter have intensified. With a 24 hour news cycle, the ubiquity of social media, and the immediate access to lawsuits as soon as they are filed, there are no longer any truly "local" stories. While a lawyer's goal in dealing with the media will depend on whether the lawyer is trying to utilize the media to garner attention or, alternatively, to manage any negative consequences from a lawsuit, a lawyer who handles high-profile cases must always keep the public relations issue in mind in order to fully represent his or her client's best interest in a high-profile case.

JOSHUA HAMILTON

The lawyer is in the best position to determine the legal ramifications that a public statement will have on the case, and the lawyer must often remind the client that there are legal consequences to any statements.

A Lawyer Must Be Prepared for the Media Attention

The moment a complaint is filed, it becomes fodder for the consuming public. Therefore, anticipating the public relations issues prior to the filing of a complaint is critical. In many cases, a dispute has been brewing and the parties can have a public relations plan in place prior to any public filing. A lawyer should anticipate that the media will have the story as soon as the complaint is filed, whether through a reporter's own channels or by receiving a copy of the complaint directly from plaintiff's counsel. Further, many high-profile cases are initiated by the state and local government. Accordingly, these cases will receive media attention because the government will often put out a press release at the same time the complaint is filed.



Shutterstock

Media trucks in Los Angeles during the O.J. Simpson trial, circa, 1995.

Often, the opening paragraphs of a complaint will summarize the case, and will include sensationalized allegations in order to generate the most media interest. With this in mind, a defendant's attorney must immediately develop a comprehensive media plan to manage negative publicity after a lawsuit is filed. An attorney should keep in mind that, while there have been recognized circumstances in which an attorney's communications with a public relations firm engaged as a litigation consultant are covered by the attorney-client privilege, not all communication with public relations consultants are protected. See, e.g., *Behunin v. Superior Court* (Charles R. Schwab), 9 Cal. App. 5th 833, 853 (Ct. App. 2017).

Manage the Message

To the extent possible, the attorney should review every public statement made in connection with the lawsuit. Cases that command significant media coverage often involve multiple public statements about the pending litigation. Often a client will react to inflammatory statements by the opposing party and want to make a public response. The lawyer is in the best position to determine the legal ramifications that a public statement will have on the case, and the lawyer must often remind the client that there are legal consequences to any statements. Indeed, a rogue public statement made by the client may be admissible as a party admission in the pending litigation, which

could have a significant impact on the outcome of the case.

Moreover, the legal team needs to remind its clients of the importance of managing its social media accounts. Reporters, opposing lawyers, and other interested parties will closely monitor your client's social media accounts during highly publicized legal disputes as they search for the next soundbite or competitive advantage. Therefore, it is crucial that your client manage its social media with a critical eye on the impacts it will have on the pending litigation, and work closely with the legal team in doing so. The client should not delete or alter any social media accounts without speaking with counsel to avoid any issues with evidence spoliation.

Balance the Interests

A lawyer needs to understand how the pending litigation is affecting the client in areas beyond the lawsuit. While many lawsuits are based on solid legal grounds, some are opportunistic or tag-along cases with little legal merit, but still garner public attention because they involve a celebrity and/or address an important social issue. In these situations, the lawsuit can have immediate financial or personal ramifications for the client if the public determines to boycott a company or individual, or take on a negative media campaign against the defendant. Therefore, it is necessary to work closely with your client to balance the potential legal exposure of making a public statement versus the potential fallout from bad publicity by repeatedly stating "no comment." It is important to remember that not all public statements are harmful. In fact, there are times where your client's interests will be better served by engaging with the media regarding the pending litigation.

Another question is whether the media should be permitted to use recording equipment or broadcast a court proceeding or trial. Under the Rule 1.150(e) of the California Rules of Court, the media may only do so upon a written order from the judge based on a multi-factored test. In deciding whether to support or oppose a request by the media to broadcast the proceeding, a critical component of the analysis should be that the public's image of the client will be shaped by what they see on television. Therefore, the lawyer should carefully consider whether it will benefit the client's public image for the proceedings to be on display for everyone to see.

Remain Vigilant

Given the ubiquity of social media, anyone can capture anything and share it with the public at any time. During trials and court appearances that garner significant media attention, reporters are typically filling the gallery. Moreover, now everyone with a phone can post something seen or heard in the courtroom. Although the court may go off the record, the reporters do not. It is crucial to be cognizant of your surroundings when talking with your client during breaks. A lawyer does not want an outburst or unintentional soundbite to appear as a headline of next day's news.

Understand the Optics of Any Resolution

In high-stakes litigation and trials, it is important that the press understand the nuances of a verdict. Of course, a complete defense verdict in a civil trial or an acquittal in a criminal cases is not complicated to message. But sometimes there may a verdict that, while technically in one-side's favor, is actually a victory for the other side. For example, if a plaintiff seeks $100 million dollars in damages in a lawsuit, a verdict in the plaintiff's favor that guts the damages claim may be a victory for the defense. Therefore, a lawyer working on a high-profile case should try to ensure that the media receives the complete story of any result.

In connection with settlements, attorneys and sophisticated clients understand that settlements of non-meritorious lawsuits are, at times, a sound business decision. In the world of public opinion, however, there can be a tendency for the public to believe that if the client did nothing wrong, the client should not have paid any money for settlement. Under these circumstances, the client is left with a difficult decision of spending the money and resources to litigate the case until victory is determined, or to settle and deal with any potential innuendo that the client did something wrong. Another benefit of a settlement, however, is that the case is then taken out of the news cycle, and the public's attention will shift to the next big story.

Conclusion

In handling high-profile, crisis-related litigation, an attorney must recognize the holistic nature of the representation. A successful litigation result and managing the public relations components must be considered as important factors. Litigating a case that has significant media attention creates a number of unique challenges, but pitfalls can be avoided by implementing a strategy to address the media issues from the outset.

Joshua Hamilton *is a litigation and trial partner in the Los Angeles and Century City offices of Latham & Watkins LLP.*

The High-Profile Case: Where the Courts & The Media Meet

A Guide to prepare courts, media, prosecutors, defense attorneys, and the community for high-profile cases

Prepared by:

Police, Community Relations and Media Perceptions Committee

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The High-Profile Case: Where the Courts & The Media Meet

High-profile cases can create or heighten tensions within and between communities, the police, government officials, and the courts. While much of the drama plays out in the media, the courts have great powers and responsibilities to ensure that the process and outcome not only meet the demands of justice, but also gain the understanding and acceptance of all concerned.

The media seek to investigate and report on these cases. How they report or editorialize on the cases can raise or lower tension levels. Often, there are community expectations on case outcomes, and such cases can place courts under great scrutiny.

But often neither the media nor the public truly knows much about how courts work; perhaps even worse, their perceptions derive from inaccurate portrayals of our justice system in movies, television shows and secondhand stories. Courts, media, government officials, prosecutors, attorneys, police, and community leaders together can, however, do much to explain court procedures, practices, constraints, and outcomes.

This guide, drawing upon the experience of many high-profile cases, seeks to prepare courts, media, prosecutors, defense attorneys, and the community for these high-profile cases.

Goal

The American Bar Association (ABA) recognizes that high-profile cases are challenging for the judicial system, the media and the public: Judges do not always appreciate how the media operates and may not always be clear on what information the media wants or can use, and the media often do not understand how the judicial system operates or the constraints on judges and court personnel, including the ethical restrictions on commenting on civil and criminal cases before them.

We offer two sets of materials aimed at overcoming those challenges:

(1) A presentation for members of the judicial branch, including court personnel (such as clerks, interpreters and bailiffs), to make to members of the public, the legal community, and the media regarding the unique challenges that judges face in dealing with high-profile cases; and

(2) A checklist of issues for judges to consider when assigned a high-profile case.

These are works-in-progress, and are meant to evolve as judges and members of the media learn from future interactions with one another and the public.

Presentation

Whom to Invite:

The court hosting the presentation should be sure to invite:

(1) Judges of the Court, and their law clerks;

(2) Staff members of the Court who are impacted in a high-profile case, including the Court's chief information officer, bailiffs, court clerks and others;

(3) Lawyers representing the parties and witnesses;

(4) The leadership of local bar associations;

(5) Community stakeholders likely to be concerned in the case (e.g., the local chapters of the American Civil Liberties Union (ACLU), the National Association for the Advancement of Colored Persons (NAACP), the Urban League, organizations representing the Hispanic, Asian, LGBT and other communities, state and local government officials and police unions);

(6) Other community stakeholders (such as the Chamber of Commerce, Kiwanis Club, the Rotary Club);

(7) The law enforcement community; and

(8) Members of the media, including:

(a) Print media;

(b) Visual media; and

(c) Online media, focusing on the blogging communities that are most likely to cover high-profile cases.

Where to Hold the Presentation:

Possible places to hold the presentation include:

(1) The local courthouse;

(2) A public school; or

(3) Facilities run by community stakeholders (such as a Kiwanis or Rotary Clubs).

How to Promote:

Enlist the support of the local media community, local bar organizations, community stakeholders, churches, schools and others to advertise the event more widely.

Network with community stakeholders (see above) to encourage them to assist in educating and informing the public.

The Nature of the Presentation:

In addressing issues related to high-profile cases, it is vital to have a conversation with those in attendance. Therefore, the presentations should be designed to support as much civil discussion of the important issues at stake as possible. The presentations should seek to be "two way streets," with the presenter or panel members willing to listen (rather than hear), to learn (rather than purely lecture), and to appreciate the benefits from interacting in a pleasant and non-stressful manner. The presentations should also provide an opportunity for those in attendance to interact "socially" before and after the presentation and during breaks.

Although there are many other approaches one might take, two presentation formats are most accessible:

(1) A panel presentation; or

(2) A single-speaker presentation.

The panel format is more likely to result in an engaged, interactive conversation—as long as the panel's moderator encourages the panelists to interact with one another and the audience. Avoid any format that calls for speakers to give "canned" 20 minute speeches on a topic. Even a single-speaker presentation can facilitate a good conversation if there is opportunity for lots of questions and feedback.

Panel Presentation

The keys to a successful panel presentation are the appropriate speakers and the relevant discussion topics.

Speakers. The aim is to find speakers who are knowledgeable, well-spoken, and well-respected in the community. The speakers should come from (1) the judicial branch, (2) the media, and, if appropriate, (3) the two or three community stakeholders with the most involvement in high-profile cases. "Well-respected" should not be defined as aligning with a specific political, economic or age perspective. Rather, in determining who is "well-respected" on the subject matter, consider whether the potential speaker has the substantive credentials, through education, experience, publication or journalistic integrity.

Moderator. The moderator should be someone who has credibility in the community, and who understands that the goal is to foster a conversation among the speakers and the audience. Avoid selecting a moderator who will be there to advance their own agenda rather than to facilitate community understanding of the important issues you will be presenting.

Topics for conversation. The moderator should, as explained below, have a pre-presentation call with the speakers to decide which questions to ask. The following questions may serve as a starting point:

- To the judicial branch members:

  - At what point in the life of a case do you get the sense that it may become high profile?

  - What should the media and the public know about the constraints of the judicial system?

  - What are the reasons judges are constrained in commenting publicly?

  - What *are* the limits judges have to abide by when considering what information they may share with pending cases with the media?

  - Why are some judges able to serve as public commentators and regularly seen on mainstream networks commenting on ongoing cases?

  - Are there any dangers in the day-to-day commentary on testimony in ongoing high-profile cases, particularly by lawyers and other judges?

  - What is the legal status of juror information and why would the court try to keep data on juror questionnaires from being made available to the media?

  - Does the status of the dialogue change depend on the stage the case is in and if so, why?

- To the media:

  - What information do you most need?

- What should the court know about the constraints of reporting on high-profile cases (deadlines, media requirements for reliability of information, fact sheets, understanding of the court process, etc.)?

- To the community stakeholders:

- Is it important that the community understand the limitations and reasons for the limitations on the media and the judiciary in high-profile cases? (Is reliable information important in ensuring fair trials, and do fair trials matter?)

- What is the impact on today's community stakeholders of media reporting, and its reliability?

- Does media reporting help or hurt in advancing confidence that our judicial system delivers fair and impartial justice, and does that matter to a community facing a high-profile case? If so, why? If not, why not?

- How can relations between the media and the judicial branch be improved?

- How can your organizations help the public understand the court proceedings?

Preparation. The best path to a productive panel presentation is for the moderator and speaker to have at least one conference call in advance to discuss the topics, who will cover them, and how the moderator should facilitate and control the discussion.

Single-speaker presentation.

A sample PowerPoint presentation is attached to this memorandum and may be tailored for the particular audience members who attend the presentation.

Checklist of Considerations When Assigned a High-Profile Case

A bench officer assigned a matter that is likely to be high profile should consider taking the following steps:

√ Immediately involve the Court's chief information officer in the case. Predict likely media questions and how the court can respond to them;

√ Alert Court security and help them plan for possible security needs, if any, that will attend the various proceedings (e.g., pre-trial hearings, preliminary hearings (if criminal), trial, and post-trial motions);

√ Consult the Court's policies for public attendance, "cameras in the courtroom," and discuss the likely scenarios with the pertinent supervisory structure within the Court;

√ Consider whether overflow seating may be required to accommodate spectators;

√ Develop a plan for how the public and media will be:

√ Allowed access to in-court proceedings (or, if access is limited, in what manner it will be limited and on what basis it will be limited);

√ Allowed access to the court's written rulings;

√ Consider issues relating to access to the jury questionnaires of potential jurors and review most recent case law on this issue;

√ Share these plans with the Court's chief information officer or public relations staff, as described above.

√ Should there be an unfair and direct attack on the judge presiding over the matter, see the advice contained in ABA's *Rapid Response to Unfair and Unjust Criticism of Judges*, which is available at

www.americanbar.org/content/dam/aba/administrative/judicial_independence/rapid_response_pamphlet.pdf (last viewed June 29, 2018).