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Introduction

Maintaining and Improving the Public's Trust in the Judiciary

By Hon. Janet Berry

As judges we know instinctively that our authority rests on that fragile premise that the citizens we serve trust that we are maintaining the degree of fairness and impartiality required under the rule of law. Indeed, as Lord Gordon Hewart articulated in the 1923 English case of *Rex v. Sussex*, public confidence requires that "Justice should not only be done, but should manifestly and undoubtedly be seen to be done."

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In this age of instant communication via the Internet, expanding cable television options and other technological advances, courts must take into consideration—to a degree never before experienced—how they are represented and reported on in the media.

And dealing with reporters, editors, and news directors is not something we were trained for in law school.

That is why the Donald W. Reynolds National Center for Courts and Media was created in The National Judicial College. It is also the reason we are so pleased that the editorial board of The *Judge's Journal* invited our participation in this issue. Our goal is to focus on the important relationship between courts and the media.

The inherent tensions built into our Constitution through the First and Sixth Amendments present a variety of issues that fundamentally affect our democratic system today. Absent a strong mutual understanding between the courts and media, public confidence in the entire system erodes, and democracy, as we know it, is imperiled. In collaboration with the editors of *The Judge's Journal,* we have asked some of our expert faculty to share their observations and recommendations for judges on dealing with some of the key issues in the following pages of this issue.

It is an honor to join with the ABA's Judicial Division in advancing a mission we share—doing our best to maintain and improve the public's trust in the judiciary.

I commend this information to your attention. ■

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WHY GOOD MEDIA RELATIONS Are Increasingly Important to Courts Today

By Gary A. Hengstler

Thirty years ago, Paddy Chayefsky's biting, but prescient, *Network* gave us an angry newsman who captured the public's fancy by asking viewers to stick their heads out their windows and scream "I'm as mad as hell, and I'm not going to take this anymore."

Yes, in the Oscar-winning satire, an insane Howard Beale had become "a latter-day prophet denouncing the hypocrisies of our time."[1] His newscast had morphed into entertainment, because television's leadership had discovered rage and conflict sell.

Now thirty years later, when a childish spat between Rosie O'Donnell and Donald Trump elbows its way past the war in Iraq on the nightly news, perhaps fiction has become reality.

For many of us, that's the rub. The esteemed jurist Learned Hand once observed, "The hand that rules the press . . . rules the country; whether we like it or not, we must learn to accept it."[2] And he said that in 1942 *before* the advent of television or the Internet.

He recognized the pervasive power of the media. What the media say—and now show—about life has influence. This power gives pause to the judiciary because all judges have concerns about maintaining public trust and confidence in our system. Public confidence rests on public perception, something largely shaped these days by the media, as Judge Hand said, "whether we like it or not."

That being the case, logic would suggest that it is in the interest of the judiciary to establish a positive working relationship with the media. Indeed, that is one of the chief reasons why the Donald W. Reynolds National Center for Courts and Media was created—to promote improved relations between the courts and media.

But this goal presents some special problems, not the least of which is the fact that the landscape of journalism itself is currently experiencing seismic tremors of change. With readership and viewership of traditional mainstream news sources declining, the media are searching for ways to interact with and involve the public to a greater degree than ever before.

Newspaper Web sites are adding videos, and television Web sites are expanding their reporting beyond the limited minutes on air. We also are seeing expanded collaboration between print and electronic media these days. All mainstream media are apprehensive about the new kids on the block—Internet bloggers with their citizen reporters and commentators.

What do the swirling changes in both the courts and media today mean for public trust? Ironically, for both of them to perform their public service function in a democracy necessitates that the public possess a requisite degree of trust and confidence in them.

In this regard, there is cause for unease. A January 2002 survey commissioned by the Section of Litigation of the American Bar Association and released in April that same year finds that, among institutions and professions, lawyers, judges, and even the media, despite the de facto power and influence of the press, do not fare well in terms of public confidence.[3]

According to the survey, only 19 percent of U.S. citizens say they are "extremely or very confident in" lawyers and the legal profession.[4] The judiciary rated higher at 33 percent and the media came in last at 16 percent.[5] The medical profession led the list of possibilities at 50 percent.[6]

While this indicates an appallingly low level of public confidence in two elements of our society crucial to its successful functioning, there may be a glimmer of hope in the fact that the January 2002 findings are up slightly from the 1998 results—lawyers, 14 percent; judiciary, 32 percent; and media, 14 percent.[7]

Still, the findings demonstrate that both the courts and the media need to shore up the degree of trust citizens place in them because of the key role each plays in safeguarding our democratic system.

Fear of Government Overreaching

To understand how critical those roles are, we need to appreciate the frame of mind of the founders of this nation

when they drafted the Constitution. It was no accident that of the first ten amendments, nine are written in the negative—i.e., the emphasis was on what the government cannot do.

When you think about it, those who created the United States, generally speaking, were the rejects of other lands. Let's face it. If those who began the European exodus to the new land had power and influence in their native countries, they would have had no reason to leave. But they were dissatisfied with life there and chose to embark on a great adventure. One common trait they tended to share was a strong and deep distrust of the potential for abuse by individuals who held governmental power, a trait still present in U.S. citizens to this very day.

That is why in drafting the Constitution, the founders were so concerned about creating limits to the potentially oppressive powers of government. Two of the most important safeguards put in place were a fair and impartial judiciary—judges with the power to tell both the executive and legislative branches when they had gone too far—and an unfettered press, free to expose and criticize the activities of government.

In my view, no one has summed up how critical the roles of the courts and media are to the democratic form of government better than Judge Alexander Sanders, the former president of the College of Charleston, former chair of the National Judicial College Board of Trustees and a current member of our Center's National Advisory Council. Speaking at one of our Council meetings, Judge Sanders said:

> There is an infinite number of variables that determine the quality of democracy. We could list them for the rest of our lives, and we wouldn't list them all. But there are only two on which the survival of the democracy depends, and they are a free press and an independent judiciary. You can't have a democracy without those two things. There never has been one, and there never will be one. So it's critically important for those two elements to understand each other, and they do not always.
>
> People obey the orders and the decisions of courts because of one thing—the respect that the court has in the minds and hearts of the American people. And that respect doesn't come from the Constitution or any statutory authority. It comes from the understanding that the people have of the function of the judiciary. For most, there is but one place to get that understanding, and that is from the media. The media depends on the courts for obvious reasons. Courts also depend on the media for somewhat less obvious reasons, but nevertheless, reasons that need to be critically understood.

There is the irony in a nutshell: to be successful, the courts and media need each other to perform their respective roles.

Judicial and Journalistic Symbiosis

There is no freedom of the press unless a fair and impartial judge says so in individual cases. The First Amendment provides journalists only such latitude as the courts determine. "Journalists should heed the words of (Justice) Potter Stewart, himself once a reporter, who said at a Fred Friendly discussion group: 'Where do you journalists think you get your rights?'"[8]

Journalists are dependent upon judges to construe the Constitution in their favor when the press is challenged in a court action by those who do not like what the press has done or wish to prevent the press from reporting on some issue.

In a like manner, the independence of the judiciary is largely dependent upon the media. As has been pointed out many times, the judiciary has no mechanism of its own to enforce its rulings. The rule of law works only when the citizenry has the requisite degree of trust and confidence in the integrity and inherent fairness of the court system.

But because most people do not personally attend court regularly to check for themselves how the system is working, public trust and confidence, as stated earlier, are perceptions gained through reports in the media. As the First Amendment Center has stated in one of its publications, "How a judge's actions are reported by newspapers and on television is crucial to public attitudes about that judge and to public respect for and confidence in criminal justice."[9]

This is not a view held solely by the press. Justice Felix Frankfurter once said, "The public's confidence in the judiciary hinges on the public's perception of it, and that perception necessarily hinges on the media's portrayal of the legal system."[10] Thus, a symbiotic relationship naturally exists.

As Michael Gartner, a 1997 Pulitzer Prize-winning editor and publisher, said at a national conference at the National Judicial College, "You'd think we'd be best friends. After all, we're the two underpinnings of democracy . . . Neither of us can exist without the other, and the nation can't exist without both of us . . . And yet we usually don't understand each other. We often don't trust each other. We sometimes don't believe each other. That's why we need to talk."[11]

Which brings us back to the need for improvement between the courts and media. Talking to each other is the first step in building relationships. But that isn't something many judges are interested in doing with the media. I routinely run into judges whose basic attitude is: "I never talk to the media. They never get it right. They are just interested in making you look bad so they can sell newspapers."

These judges see the press as the enemy. But such views also raise the question: How are sincere journalists going to get it right unless somebody talks to them and helps them under-

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stand the intricacies of the legal system in order to make their reports accurate?

Nor is the view that judges and journalists are natural antagonists one-sided.

In an issue of *Editor & Publisher*, a national trade magazine for newspapers, a lead editorial was headlined "Bullies in Black Robes."[12] The editorial began

> Lately, we've seen an epidemic of unreasonable, and unreasoning, actions by judges who seem more motivated by personal pique than a quest for justice. Lawyers call this syndrome 'black robe-itis.' Reporters are apparently its latest favorite targets.

After commenting on rulings in three cases that went against the press, the editorial concluded that

> The notion that (the reporters and newspapers) should be punished for informing Americans is worrisome enough. What's truly frightening is the idea they were singled out because judges believe the people's courtroom is a personal fiefdom.

Roots of Tension

Much of the tension is rooted in who has control. Judge Samuel H. Monk II, of the Calhoun County Circuit Court in Anniston, Alabama, acknowledged as much when he wrote

> Judges, at least within their individual courts, are accustomed to being in control and enjoying the luxury of having a final say. They do not like interference from those outside the legal profession or public criticism of their decisions, least of all by the press.[13]

In essence, neither judges nor journalists like anyone outside their respective chains of command interfering with them or telling them what they have to do.

Journalists don't want judges blocking their access to sources and information through gag orders and the sealing of documents. Judges don't want their case tried in the media, and they fear the consequences of juries learning of evidence and information through the media that they have ruled inadmissible in the trial.

Again, it is the clash of wills over control. Journalists resent the judges' use of their official power to maintain the integrity and dignity of the trial when such usage hinders them from gathering the facts. Judges lament their inability to control a press free with their unofficial, but real, power to affect the dynamics of a trial through news coverage.

Although it is often risky to generalize, it probably is fair to say that judges place greater emphasis on process than journalists who are more results oriented. Journalists are focused on getting the story and less on how they get it. They know that, in some circumstances, the information can only come out unofficially through confidential sources and, occasionally, the secret document leaked to them surreptitiously.

Judges, on the other hand, are required to oversee an orderly unfolding of the information at trial through a series of well-developed procedural rules. When they see end-runs around the process by individuals not directly under their jurisdiction, the resentment builds.

The resentment appears for a variety of causes. Sometimes it is simply the inaccuracy of the story. Sometimes it is sensationalized coverage. Most journalists take pride in their work and want to know when they get it wrong. Particularly at the local level, if the reporter seems to be conscientious, there can be benefits if someone at the court can help reporters better understand the processes and terminology, which may help ensure accuracy.

More judges are taking the initiative to get to know the reporter and, staying within ethical restrictions, finding ways to help the reporter do the job better. With that rapport established, the judges can call the reporter when the story is wrong or, in a judge's view, appears to be sensationalized.

Of course, one key issue when complaining about erroneous reporting is whether to seek a correction. Often the mistake is relatively minor, so nothing is to be gained by resurrecting the issue in a correction. But if the error is serious enough to chip away at public confidence, then the correction should be sought.

In talking with the judges at the National Judicial College who have established press relationships at the local level, I have yet to meet a judge who has been burned by a local reporter.

Certainly, if a reporter doesn't have the requisite ethical approach to the job, a judge would want to minimize contact. In other words, establishing a relationship with a reporter or editor doesn't always mean it is a cozy one. It can be for a reporter that a judge respects, but the relationship is minimized when a judge has reason to be wary of a reporter who is simply out to build his or her resume.

Such journalists usually are fairly easy to spot. Prone to look for something to uncover, they tend to hype the negative and deemphasize the counter-information. In short, their work is palpably unbalanced.

More difficult situations for judges occur when commentators criticize individual decisions. It then becomes a question of whether to engage the criticism or ignore it. Usually, ethical rules prevent a judge from reacting publicly because the case is still pending.

And at their worst, television's talking heads, in their bid to make their "news" commentary entertaining, easily slide into distortions, smears, or bias. When their target is a judge, it can get ugly.

An example occurred last year when Bill O'Reilly, Fox Network's ultrashrill modern-day Howard Beale, repeatedly blistered an Ohio judge who granted probation in a sex case, a ruling with which O'Reilly took issue.

When the judge tried to explain to one of the show's producers that ethical rules prevented his commenting on the case, O'Reilly sneered on air: "This is what *they all* hide behind: 'The Supreme Court of the state told me that I can't

talk.' That's bull. That's a lie. The only thing he can't do is say something that would tilt the case one way or the other. The case is finished . . . he can comment on why he did it and he already has commented. So he's lying."

It's that kind of sweeping, all-encompassing attack on the judiciary that should be challenged. All people have a First Amendment right to criticize any judge's decision, including O'Reilly. No one is contesting that. Judges may not like it but it comes with the territory.

But to dismiss important ethical rules as something all judges "hide behind" is an irresponsible distortion and simply not true. Even in the case that O'Reilly was ripping, the case remains pending and could resurface before the judge if the probation is violated, so the judge really was obligated not to speak.

So a strident and smug journalist went overboard about the judiciary, why should we care?

Howard Beale said it best in explaining his newfound influence: "Because you're on television, dummy! You have 40 million Americans listening to you." Now, Howard was insane. O'Reilly is merely calculating for ratings.

The irony is that O'Reilly and the other would-be Howard Beales enjoy their right to be irresponsible because of the courts.

Chief Justice Warren Burger summed it up when he wrote, "A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues, it cannot be legislated."[14]

But is the fact that some of the media are irresponsible, sensational, and erroneous a valid reason for the judiciary to stay above the fray?

On one hand, another O'Reilly target, *Dayton (Ohio) Daily News* Editor Jeff Bruce, responded to O'Reilly's blast at him with: "They say only two things happen when you wrestle a pig. You get muddy and the pig enjoys it."

By this standard, judges would do well to avoid the fray and stay out of the mud.

On the other hand, if no one challenges the serious inaccuracies, distortions, and imbalance in the media, the field is left open to the critics to characterize the judiciary and legal developments as they see fit.

No one is in a better position to explain the role of judges and the importance of our judicial system than the judges themselves. Certainly, one has to pick his or her battles, be mindful of ethical considerations, and choose one's words carefully.

With the growing number of options as media outlets expand, a judicial response doesn't always have to be in the same medium in which the attack occurred. One of the by-products of the new rush for infotainment is that the media will attack each other.

For example, O'Reilly's tirade itself became the subject of MSNBC's *Countdown with Keith Olbermann.* In one part, Olbermann's guest, David Brock, says, "But I think it's fair to say in the past couple of years that Bill O'Reilly has gotten more scrutiny. More people are aware of the dishonesty, the serial lying that goes on on that show, and that he systematically is misinforming the public, and he doesn't have a lot of humor about that criticism."

In law school, we all learned of Justice Louis Brandeis's view that the antidote to bad speech isn't suppression, but more speech.[15] In today's rapidly evolving media that wields powerful influences on the public, courts no longer enjoy the luxury of relative isolation. Sooner or later, even at the local level, courts will need to determine what relationships with the media best serve the goal of maintaining the public's support for the judicial system. ■

Endnotes

1. See http://www.hollywoodvideo.com/movies/movie.aspx?MID=1026.
2. Adrienne A. Berry, *Meet the Press*, 46 FED. LAW., Mar./Apr. 1999, at 2.
3. SECTION OF LITIGATION, AMERICAN BAR ASSOCIATION, AND LEO J. SHAPIRO & ASSOCIATES, PUBLIC PERCEPTIONS OF LAWYERS—CONSUMER RESEARCH FINDINGS (2002).
4. *Id.* at 29.
5. *Id.*
6. *Id.*
7. Id.
8. John Seigenthaler & David L. Hudson, *Journalism and the Judiciary*, NJC ALUMNI MAGAZINE, Winter 1997, at 15.
9. Wallace Westfeldt & Tom Wicker, *Indictment: The News Media and the Criminal Justice System, Power in a Black Robe*, First Amendment Center, 1998, at 34.
10. *See* Seigenthaler & Hudson, *supra* note 8 .
11. Michael Gartner, *An Open Letter to the Judiciary from a Member of the Press,* NJC ALUMNI MAGAZINE, Winter 1997, at 15.
12. EDITOR & PUBLISHER, Nov. 26, 2001, at 12.
13. Samuel H. Monk II, *A Judge's Perspective*, NJC ALUMNI MAGAZINE, Spring 1994, at 12.
14. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 256 (1974).
15. Whitney v. California, 274 U.S. 357 (1927).

High Profile Trials—The Need for a Court to Have a Media Plan

By Ron Keefover

The high profile trial—coming to a court near you soon! These are chilling words for most judges, unless they have been through the experience at least once in their career. Indeed, the media-interest court proceeding can arise in any court at any time and frequently does so without warning. It can be as intense as a Kobe Bryant proceeding or as seemingly routine as a civil contract case. Although a high profile case may be as hard to define as obscenity, when one arrives at your court, you will know it.

Consider the judge who wound up with a simple contract dispute involving a $9,000 engagement ring. The issue was whether the prospective bride should be required to return the ring to the prospective groom after the wedding was called off. The judge's decision that the ring or its equivalent value should be returned to the would-be groom was not only reviewed by his state's supreme court, but also by numerous radio talk show hosts and a prominent national television talk show. The court of public opinion, as is often the case, did not focus on the legal issues involved. Rather, the radio and TV hosts wanted to know if it mattered who broke off the engagement, what troubles led to the break-up, if a love triangle of any sort was involved, and so on. The vociferous debate resulted in a swarm of national media descending on the appellate court at oral argument. (Our erstwhile trial judge was affirmed, with the Kansas Supreme Court holding that the ring was a conditional gift that must be returned. *Heiman v. Parrish*, 942 P2d 631, 262 Kan. 926).

Fortunately for that court, its staff was prepared for the onslaught because long before the matter arose, a thoughtful media plan for such an event had been prepared and needed only to be implemented for the hearing. The plan not only made for good relations with the media, many of whom had never been in that state supreme court before, but also allowed the justices to focus on the case before them rather than the myriad issues involving the news media (e.g. courtroom seating, broadcast feeds, video and audio streaming, access to court records, etc.).

You can bet that the media *will* be prepared *and* have a plan, so it is critical that we in the courts be prepared as well. By doing so, we are making that all-important first impression that we are organized, that we are professional, and that *we* are in control. Having a plan already in place should obviate the need for emergency meetings to decide issues that easily could have been decided long before the media crisis. Even more, external partners, such as law enforcement, courthouse officials, and others, will appreciate having had their input in the plan before being called upon to assist with any ensuing media frenzy.

The typical architects of a basic high profile media plan for a court generally include the judge, clerk of the court, district court administrator, and court public information officer. It is these people who arrive at an initial plan. Addendums to the plan usually are made in follow-up meetings with law enforcement, parking management, court facility representatives, and other potential representatives that, depending on the magnitude of the case, may be involved in its implementation.

Once the basic plan is developed, it is vital that it be communicated to co-workers so that their job duties can be explained, the person representing the trial judge can be identified as the source to respond to media inquiries, and other components of the plan are made clear. The time demands, emotional toll on affected employees, and disruption in their routines can be daunting. Indecision resulting from a lack of prior planning can have brutal consequences for those on the front line when the media arrive at the counter *en masse*. Whether it is a high profile celebrity case or something as simple as a diamond ring, being prepared ahead of time with a thoughtful media plan will reflect favorably on both the court and the judge.

Judges and Journalists

Defusing Tensions and Building Relationships

By Mark Curriden and Hon. Patrick Higginbotham

Hamilton County, Tennessee, Criminal Court Judge Samuel McReynolds awoke the morning of a major death penalty trial to find the evidence in the case splashed on the front page of the *Chattanooga Daily Times*. There were witness statements and a quote from the sheriff that the defendant's guilt was never in doubt. A defense attorney is quoted as saying "the fix is in" by the prosecutor and judge against his client.

The reporter even printed the name and address of the rape victim and, at the end of the article, listed the names, home addresses, and occupations of thirty-four of the thirty-six potential jurors who had been summonsed for the trial. Infuriated, the judge immediately called the sheriff demanding an explanation.

"I am very upset at this," Judge McReynolds said, slapping the newspaper. "I want you to find those two jurors and find out why they didn't show up and why they think they can ignore my call for jury service."

The year was 1906. There were no motions for a mistrial due to pretrial publicity. No complaints about tainting the jury pool. No one was upset that names and personal information about the jurors and rape victim were made public. No disciplinary proceedings were initiated by the bar.

Of course, the *State of Tennessee v. Ed Johnson* was far from a model case for judges or journalists. It was proven later that court officials had indeed railroaded an innocent man. Eventually, inflammatory newspaper coverage sparked a mob riot that ended in a lynching.

Thankfully, much has changed during the past century. Journalists today are considerably more conservative and thoughtful and professional. They would never print the names of jurors prior to a trial, and identifying a rape victim is extremely rare and frowned upon by most news organizations. In fact, most newspaper coverage of trials is so antisensational that it borders on boring.

At the same time, trial and appellate judges across the country have ruled overwhelmingly that court proceedings must be open to the public and that court records are presumed to be public records. Courts have been nearly uniform in turning back efforts of prior restraint. Even cameras in the courtroom have become commonplace in state courts across the country.

Yet, tensions between judges and journalists appear to be at an all-time high.

Judges complain that today's reporters, especially those on television, sensationalize their stories to sell newspapers or attract viewers and that the facts in their stories are usually wrong. They claim that few journalists understand legal proceedings and many have no respect for the Sixth Amendment.

By contrast, reporters contend that some judges try to control and limit information about their cases. They say that some judges improperly place their concerns about a fair trial over the rights of free speech, free press, and an open court process.

To gain a better understanding of what is happening and why, we turned to some of the leading experts and practitioners in the field:

"Over the past few years, we have seen a significant increase in the number of legal conflicts between journalists trying to cover courts and court officials trying to deny access to proceedings or information," Lucy Dalglish, executive director of the Washington, D.C.-based Reporters Committee for Freedom of the Press, told the Conference of Chief Justices meeting in Indianapolis in July 2006.

"We have witnessed an increase in the number of undocketed court hearings, secret case filings, cases that are sealed, and closed court hearings," says Dalglish. "And there is a dramatic increase in the number of cases where judges have ordered journalists to testify or turn over their notes or identify confidential sources of information."

Judge Terry Ruckreigle of Eagle, Colorado, agrees that confrontations between journalists and court officials seem to be on the rise. Judge Ruckreigle presided over the case of

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National Basketball Association star Kobe Bryant, who was charged with rape.

"Part of the problem is judges who simply don't trust reporters," he says. "Judges, and lawyers too, are used to being in control. When reporters are involved, the judges lose control of the information and that scares many judges. So the judges overreact and overreach."

"But there is a problem on the journalism side of things, too," according to Judge Ruckreigle. "The problem is that not all the journalists are from the *New York Times* or the local television or radio station. Some are tabloid journalists or bloggers who have no ethics and don't care to follow the rules."

"Part of the problem is that most judges have no idea about journalism or how journalists operate or what they need," says Gary Hengstler, director of the National Center for Courts and the Media (NCCM), and former editor/publisher of the *ABA Journal*. "At the same time, most journalists don't understand the law or court process. There is a major disconnect."

"To judges, process and procedure are of utmost importance," he says. "To journalists, outcome or results are what matters most."

Hengstler, who is a lawyer, made his comments to about seventy reporters and editors in August 2006 at a NCCM-sponsored conference designed to educate journalists about the nuts and bolts of covering courts. The NCCM is affiliated with the National Judicial College in Reno, Nevada.

Tom Leatherbury, a partner at Vinson & Elkins in Dallas, a nationally recognized expert in media litigation, believes that most of the conflicts between journalists and judges have arisen in the major media markets on the East and West Coasts, but less so in the middle of the country or in the South.

"In Texas, for example, most state judges are media friendly and just try to follow the law on access to courts and judicial proceedings," says Leatherbury, who has represented the *New York Times,* the *Dallas Morning News* and CBS's *60 Minutes* in high-profile media cases. "We do, of course, encounter some judges out there who simply ignore the law. But the appellate courts have been very good about stepping in and reversing."

Texas District Judge Steve Smith of College Station believes that while most journalists try to do the right thing, they are not properly equipped with the knowledge and resources to adequately cover courts and legal issues. He voices a sentiment echoed by many jurists.

"I have sat through a day of testimony in a trial, then watched the television news or read the newspaper in the morning, and wondered if I had missed something or if I was in the same courtroom as these reporters," Judge Smith told a group of journalists attending a three-day seminar conducted by the NCCM. "The stories only vaguely reminded me of the actual testimony. That is very bothersome."

To be sure, both sides deserve some blame.

Most journalists covering courts are not lawyers. In fact, the court beat at many newspapers and television stations is an entry level position filled by reporters straight out of journalism school. We are reminded of the cub reporter who approached prosecutors as jurors were deliberating.

"If the jury finds him not guilty," the television journalist asked, "will you appeal?"

The prosecutor then berated the reporter for not knowing the legal principle of double jeopardy. "It is basic civics class 101," the prosecutor responded.

That story was repeated again and again around the courthouse in Atlanta, undermining the credibility of all journalists who covered the courts.

The sad truth is that newspapers and television stations do not educate their reporters as to the intricacies of the legal system. Due to staffing reductions, there are fewer journalists who have to write more articles in a shorter period of time. In addition, budget cuts at most newspapers and television stations prevent the news organizations from sending their journalists to educational workshops or seminars.

However, that's not to say that all is hopeless. Judges can make a difference and improve the legal journalism in their communities.

Open Courts and Records

Judges must not forget that journalists have the right, even a responsibility, to cover courts and to turn the spotlight on the operations and actions of the courts. Courtrooms are public institutions and, absent special and limited circumstances, the courthouse should be open to the public at all times. Most of the time, the public cannot be in the courtroom to see what is happening, so the job rests with the news media.

Nearly every journalist who covers courts has a handful of stories about being locked out of voir dire and denied access to court files. In 2005 and 2006, the NCCM conducted a series of daylong workshops that brought together scores of judges and journalists in nearly every state. In state after state, journalists pointed to examples of judges who closed the courtroom for a proceeding or clerks who denied that the case file was available because it was being kept by the judge in chambers.

This is disappointing and troubling and involves an issue that was resolved two decades ago when the U.S. Supreme Court decided *Press Enterprise Co. v. Superior Court of California* (464 U.S. 501, 1984). Since then, a handful of state and federal trial courts have chosen to exclude the public and press from various hearings. But in nearly every case, the appellate courts

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reversed the trial judge.

For the record, we believe that most judges understand that all court proceedings, including jury selection, are open to the public, except under extreme circumstances, such as when there is a judicial finding that jurors have been threatened, jury tampering is suspected, or the cases involve trade secrets. In the sometimes difficult task of protecting the rights of media and the rights of the parties on trial, judges usually perform well.

Developing Relationships

Every judge should know the beat reporters who cover their courts. Introduce yourself and your clerk to them. A journalist's job is to get the news, and judges should help facilitate that goal when at all possible.

Unfortunately, many judges are hesitant when risk is involved. They don't want media coverage because they cannot control it. So, these judges ignore or even avoid the media at all costs, persuading themselves that doing so will protect the integrity of the court. While the goal is laudable, this is probably not a good way to achieve it. Judges need to recognize that the news media can actually be beneficial to the administration of justice. Journalists can achieve things that judges cannot simply by turning the spotlight on the problems.

A good example of this occurred recently in Texas. The state's judges and bar association had been trying for a decade to increase juror pay, which stood at $6 a day. The last juror pay increase was 1954. But each year, the Texas legislature failed to act, despite the lobbying by the judges.

In 2005, the news media in the state, led by the *Dallas Morning News*, published article after article about the difficulty of getting lower-income, hourly wage earners to jury service. The media quoted experts as saying one of the big problems was the low juror pay.

The newspapers then editorialized over and over about the need to increase the amount paid to jurors. The result: the state legislature increased juror pay from $6 a day to $40 a day.

"There is no doubt that the role of the news media in putting the spotlight on this issue was the reason it passed," says Texas Supreme Court Justice Nathan Hecht, who advocated for the juror pay increase.

Media Stories: Good and Bad

The bottom line is that judges should realize that the news media are not their enemy, but not their friend, either. However, there are numerous examples of the news media advocating for judges and the courts.

"The judges have no better ally in exposing attacks on the independence of the judiciary than the news media," says Hengstler. "The media is there to be a watchdog. Sometimes that means to expose corruption or problems within the courts. But sometimes, that means to show how the courts are being unfairly attacked."

A perfect example of this occurred in 1999. A Dallas judge faced a situation that undermined the ability of a citizen to attend jury duty. A woman had shown up for jury service in tears. She had just been fired by her employer, which was a Fortune 200 company, because she refused to ignore her jury summons.

The judge called the company lawyers but the officials refused to cooperate, telling the judge that there was nothing he (the judge) could do because it wasn't illegal in Texas to fire someone for going to jury duty.

Stunned, the judge agreed that the company's actions were not illegal. But he didn't let the issue drop either. The judge called the legal affairs writer for the *Dallas Morning News*, whom he had met at a local bench-bar conference, and told the reporter the story in an on-the-record interview.

The next morning, the newspaper ran a front page story about the company and its actions. The result: the woman was offered her job back, the company publicly apologized and required its corporate leaders to attend jury appreciation training, and the state legislature immediately passed a law making it a crime to fire someone for going to jury service.

Nevertheless, there are going to be media inquiries and stories that, to judges, seem wrongheaded or even improper. But this conflict is not new.

A good example of such tension surfaced three decades ago when the U.S. Marshals Service withdrew the 24-hour protection it had provided to U.S. District Judge Frank Johnson of Alabama for 15 years. The judge, who had courageously implemented *Brown v. Board of Education* and ruled against segregation in Alabama, and his family for many years had needed round-the-clock federal protection because of numerous death threats.

When the federal service decided in 1975 that there was no longer a threat to Judge Johnson or his family, the protection was quietly dropped. However, the *Montgomery Advertiser* learned of the development and published a front page story about it.

"Judge Johnson was furious and feared that the article would endanger his family again," says Peter Canfield, who clerked for Judge Johnson and is now a media lawyer in Atlanta, Georgia. "But the fact that Judge Johnson no longer needed marshals' protection was a newsworthy event because it told a lot about how attitudes had changed in the South."

Was the story unfair to Judge Johnson and his family? No doubt. But was it a legitimate news story? Absolutely.

What Can Judges Do?

State and federal judges have told the authors of this article repeatedly that there is nothing they can do to improve media coverage of the courts. In view of the need for good public relations and public confidence in our courts, this approach seems lacking. There are very basic things that judges in every jurisdiction—large and small—can do to improve the accuracy of the stories that are written about them and their courts.

OFF THE RECORD

Taking Time to Educate the Press

By Sylvan A. Sobel

On my first day as the county court beat reporter for a daily newspaper in a mid-size community, my predecessor introduced me to the prosecutors, defenders, court clerks, courthouse staff, and most importantly, to the county judge. We spent about five minutes in the judge's chambers, and he told me to come to him whenever I had questions about the law or court procedures. He said he could not discuss pending cases with me, but if I needed background information to help me write knowledgeably about the legal matters I was covering, he could give it to me.

That night, I wrote my first article as the court beat reporter, about a sentencing by the county judge. I said the judge had sentenced the defendant to such-and-such under a plea bargain, and I got it wrong.

The next day, when I made my rounds of the courthouse, the judge's secretary politely handed me a note. "Judge asked me to give this to you," she said. In the note that he had typed himself (so as not to embarrass me in front of his chambers staff), the judge advised me of my error, explaining to me the difference between a plea agreement as to the sentence and an agreement to plead guilty to reduced charges without an agreement on the sentence.

I was mortified. I asked to see the judge and apologized for my mistake. "That's all right," he told me once inside his chambers. He said he did not want the newspaper's readers to think that the District Attorney's office was making the sentencing decisions in his court. He also said he wanted to make a point to me: He wanted me to understand that I could—and should—come to him whenever I needed to clarify my understanding of the legal system before I tried to write about it.

Thus began an informal but intensive two-year education in the law largely at the hands of the county judge, but also from other judicial officers, prosecutors, and attorneys who worked in the courts I covered. This is not to say that I did not make mistakes. Looking back on some of the articles I wrote, I realize how dangerously shallow was my understanding of the legal system and how often my news judgment influenced me to highlight the most sensational, yet often legally insignificant, aspects of a case. Yet, I learned enough about the law to explain to my readers the context in which judicial decisions were made and their effect, and enough about ethical rules to know which questions I could ask a judge for background, and which matters I should not expect the judge to discuss.

True, the judges had as much to gain as I did by making sure my stories were well-informed: They served in jurisdictions in which judges were elected to office. Their reputations in their community were important to them, particularly if they wanted to be returned to the bench.

But I believe there were larger benefits to educating the reporter than simply the political benefits received by the judges. The readers of the newspaper benefited from reading reasonably accurate, balanced accounts of the administration of justice in their community. Individuals and businesses also benefited from accurate descriptions of their dealings with the legal system that were reported in the local news media. And the legal system as a whole benefited from a more informed citizenry that better understood how the courts worked and perhaps, just perhaps, realized that a system of laws, and not the individual whims of judges, governed judicial decision making.

Whether, and how, to talk with the news media is a decision that is decidedly up to the individual judge. My impression is that, if not for the necessity of maintaining a good public image in jurisdictions in which judges are elected, most judges would take the view that the best way to deal with the news media is not to deal with them. This is not necessarily because of malice toward the news media. Rather, many judges analyze the potential benefits of talking with the news media and weigh them against the potential risks and their obligations under judicial codes of conduct, and conclude that the risks outweigh the rewards.

I would like to try to tip the balance and make the argument for judges to maintain a cooperative working relationship with the press, particularly with reporters who cover the courts on a regular basis. The reasons for doing so run the gamut from inspirational and altruistic, to moderate self-interest, to complete self-interest. Perhaps by themselves not one of the reasons I will advance outweighs the potential risk of being misquoted, or perhaps worse, being quoted about something

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that you thought was "off the record." But together, they present a persuasive case for opening the door to your chambers for at least some background briefings for reporters, and letting reporters know that if they need an occasional primer on legal procedure or jurisprudence, you can give it to them.

Rules of Engagement

Before arguing for the benefits of working with the news media, it is important to discuss the ground rules for interacting with them. Specifically, when should a judge go "off the record," and what exactly does this phrase mean?

With respect to the second question, I have never learned a single, universally-accepted definition of what "off the record" means.[1] I have, however, heard several different definitions ranging from "Do not quote me by name," to "I will deny this conversation ever happened." How can such a simple phrase have so many definitions? Think of "off the record" as roughly the journalistic equivalent of the term "voir dire." Just as you can put five lawyers in a room and find five pronunciations of "voir dire," you could probably question a roomful of journalists and come up with almost as many definitions of "off the record." Part of the reason for the variety of meanings may have to do with a community's standards: "Off the record" in New York City may not mean the same thing as it does in Yazoo City.[2]

Instead of trying to define "off the record," you should clarify in advance how a reporter may use what you say. Can the reporter quote a statement of yours and attribute it to you by name? Can the reporter attribute your statement to "a court official"? Is the information you give the reporter strictly for background, to help the reporter write an informed story?

Consider, for example, a press account of sentencing in a high profile case under a guideline sentencing system. An uninformed story might simply report that the judge sentenced the defendant to a certain penalty, creating the impression that the judge's sentence was purely arbitrary. At a minimum, you may think it important for the news media to understand, and to report, that a guideline sentencing system exists that guides the judge's determination of sentence. Going one step further, you may want the media to understand how the guidelines worked in your case, and to report what factors you could and, perhaps more importantly, could not consider in the case. But if you were to educate the news media about these sentencing nuances, would you want your rationale to be quoted, or would you prefer to see an unattributed, neutral explanation of the sentencing process appear in the story? It is therefore critical that you and the reporter clearly understand how the reporter will use the information you provide.

Just as you should be clear up front about your ground rules, you should also make the reporter aware of the rules that govern your contact with the media. Show the reporter the applicable provisions in the code of conduct governing your contact with the news media. Let the reporter know that you are not being obstinate or evasive when you say that you cannot discuss a pending case, but that ethical rules prohibit it. Maybe an informed reporter will some day write that "Ethical rules prohibit the judge from commenting" rather than "The judge refused to comment."

Educating the Public

So now let's try to answer the question, why should you speak with the press? The first reason, pure and simple, is that it is your civic duty. You are a public official charged with the administration of justice in your community. You therefore have an obligation to help inform the public about the work of the courts. The press will cite "the public's right to know." Whatever that right is and whatever its source, I would argue that it is not satisfied simply by giving the press and public access to the public record, but that it also entails providing sufficient insight into the legal system and court procedures so that news media accounts can describe the significance of legal decisions and what they say about the quality of justice in the community.

In her thoughtful essay on press coverage of the Supreme Court,[3] *New York Times* reporter Linda Greenhouse presents the argument for informed press coverage of court business in general, and of the Supreme Court in particular.

> Especially in an era when the political system has ceded to the courts many of society's most difficult questions, it is sobering to acknowledge the extent to which the courts and the country depend on the press for the public understanding that is necessary for the health and, ultimately, the legitimacy of any institution in a democratic society.[4]

Ms. Greenhouse cites many examples of Supreme Court decisions implicating important public policy issues,[5] all of which demonstrate the need for a knowledgeable press that can inform the public not only of the meaning but also of the background, context, and significance of the Court's actions.

Even decisions of less national importance than those of the Supreme Court deserve informed coverage. Every court case involves individuals, institutions, and businesses. Their standing in their community and, indeed, their very well-being, can hinge on accurate and balanced coverage of legal proceedings in which they are involved.

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For example, I spent several days covering a medical malpractice trial in our community involving a venerable local practitioner and the largest public hospital. It was a high profile case involving allegations of misdiagnosis leading to unnecessary surgery on a teenage girl that left her deformed. Several days into the proceedings, the judge, counsel, and parties adjourned to the judge's chambers and spent hours in discussions. My courthouse sources—none of them judges in this instance—told me that settlement discussions were taking place. That seemed reasonable to me. After all, with my limited knowledge of legal proceedings at that time, I wondered what else they could be talking about. So my article in the next morning's paper reported that the parties were talking settlement.

Defense counsel for the hospital was livid when he saw me that morning. "How could you write that we're talking settlement?" he lamented. "If anything will poison the jury, that will." I confess that, at the time, the possibility of influencing the jury had not occurred to me. He told me that as a result of my article, hospital officials and he had decided they had no choice but to settle, which they did later that day.

Even taking the attorney's complaint with a grain of salt, I have still wondered whether my reporting did a disservice to the doctor and hospital, which now had a hefty malpractice settlement to deal with, and to the community, whose opinion of these prominent health care providers no doubt suffered. Should I have simply not reported the settlement speculation? Should I have asked the judge to explain to me, without commenting on the case pending before him, what lawyers, parties, and a judge would spend hours talking about in the middle of a trial, if not settlement (e.g., admissibility of expert testimony)? Should I have framed a question for him such as: "I am going to report that the parties are talking settlement. Would I be wrong?" In response, he might have replied: "Even if you are right, consider the effect of that story on the jury if they should happen to hear about it."

I believe that the more knowledgeable the press is about the legal system, the more accurate and evenhanded will be its coverage of court business and the more informed the public will be about what is happening in the courts and why. While ensuring justice in a case may be your first duty, enhancing the public's understanding of the legal system should not be far behind.

Good of the Institution

Perhaps you do not agree that educating the public about the judicial system is part of your judicial duty. But certainly you can appreciate that the courts' interests would be served by correcting misimpressions the public holds about the courts, particularly those that have helped to fuel anticourt sentiment and challenges to judicial independence.

People learn about the courts in several ways: through their own experiences with the legal system, which may be biased; through printed decisions and other written documentation, which most people do not read; through fictionalized accounts in books, movies, television, and other forms of popular entertainment, which may not be accurate; and through the news media. How much does the press know about the courts? Ms. Greenhouse writes about the diminution of media coverage of the Supreme Court, in the sense that fewer reporters cover the Court on a full-time basis now than when she began reporting on the Court, and that reporters who cover the Court often do so in tandem with another beat.[6] But even if the number of reporters covering the Court is declining, the reporters who cover such a prestigious beat are undoubtedly among the most able and accomplished in the profession, often attorneys or otherwise informed about the workings of the legal system, and capable of interpreting the Court's actions and the consequences.

The quality of the reporters who cover local courthouses is less consistent. Many, like I was, are a year or two out of college or journalism school, with no particular background in the law other than what they may have learned in college-level courses. While covering the courts was at one time a prestigious, specialized beat, it is apparently less so as newspapers and other media outlets cut back on staffing; reporters who cover the courts often cover county government, the police department, and other matters as well.

Perhaps some of the public's misperceptions about the courts stem from uninformed reporting about them. I once returned from a hearing on a summary judgment motion and summarized the lawyers' arguments to my city editor. The editor asked me what the witnesses said. I tried to explain to him that there were no witnesses and that this was a summary judgment motion; however, I had a hard time making my editor understand how a court could decide a case without having a trial. Shortly thereafter I spoke with the judge and learned enough to be able to explain later that in some cases, if the judge determines that no factual disputes exist between the parties, the judge can decide the case simply by interpreting the law.

Similar misperceptions exist about how courts get involved in public policy issues. I was once asked to write a story on local reaction to a Supreme Court abortion decision. One woman said to me: "Why is the Supreme Court sticking its nose into the abortion business anyway? Who asked them?" At the time, that seemed to be a fairly typical response, and I did not think much of it. It was only after I went to law school and heard a similar line that I realized how, on one level, such statements reflect complete ignorance of how the judicial system operates. It suggests that some people believe courts roam around unfettered looking for issues to take on, and inter-

ject themselves simply to exert their will over the public. More informed reporting—which could at least provide sufficient background of a controversial case's history and educate the public that courts do not decide cases unless someone asks them to—may help alleviate some of this ignorance.

Many popular myths about the courts' unimpeded discretion in areas such as sentencing, application of the exclusionary rule, and bail also could be debunked if news media accounts provided enough background for the public to know that there is a method, if not always a statutory framework, that sets boundaries for judicial decision making. At a time when courts and judicial independence are under attack by politicians and pundits, a better-informed public may be the institution's best ally for self-preservation.

Self-Interest

If promoting the good of the public and the good of the courts are not sufficient reasons for you, think about your own good and that of your family. Certainly one of the hazards of judicial office is the need to take the heat for unpopular decisions, but who wants to bear the injury to reputation that uniformed and inaccurate reporting could cause? Obviously, it is easier to convince elected judges of the need to promote accurate reporting. But even appointed judges, no matter how thick-skinned, should appreciate that the job is difficult and stressful enough without ignorant reporting making it worse.

About a year into my courthouse beat, our investigative writer exposed a suspect land deal involving the county's development authority. A grand jury was convened and its report was issued, citing but not indicting county officials and other prominent pillars of the community for their conduct. The county judge, however, placed the report under seal.

Our paper somehow obtained a copy of the report, and in its initial coverage of the story implied that the judge was trying to bury the report, that is, prevent it from ever going public. The judge called me in the next day and explained that he did not intend to keep the report secret, but stated that, "I am required to put it under seal." Sure enough, he showed me a provision in state law that required grand jury reports to be placed under seal for thirty days so that persons named in the report could have an opportunity to respond. I went back to the paper and made sure that all of our subsequent coverage of the story, at least until the thirty days was up, included the fact that the judge was required by state law not to release the report.

A small favor? Sure. But because of it the judge and the judicial system were no longer implicated as part of a cover-up, and the public better understood how the legal system balanced the need for prompt investigation and action with individual rights and the public's right to know. I think that was worth the time the county judge spent trying to educate me, and my guess is that he did, too. ■

Endnotes

1. Perhaps one reason that I am so ignorant of the definition of "off the record" is that I took only one formal journalism course in college, yet still worked as a journalist over parts of six years. My point is that my experience—or actually, lack of experience—is not atypical among many young reporters on small and midsize newspapers, and thus may explain why there is such a variation in the meaning of "off the record," as well as such variation in understanding of the legal system.

2. The story is told of a civic affairs luncheon in the community I worked in. Apparently, it was not unusual at affairs of this type for local public officials to tell tales that they did not want generally publicized, on the understanding that they were "off the record." One elected official was about to tell such a story, and prefaced it with the customary, "Of course, this is off the record." Our paper's newly appointed publisher, with loads of big-city newspaper experience under his belt, growled from the back of the room: "There are fifty people in this room. You can't go off the record." And that's how our community was suddenly introduced to a new standard for going "off the record."

3. Linda Greenhouse, *Telling the Court's Story: Justice and Journalism at the Supreme Court*, 105 YALE L.J. 1537 (1996).

4. *Id.* at 1538.

5. *E.g.*, Adarand Constructors v. Pena, 115 S. Ct. 2097 (1995) (affirmative action); Miller v. Johnson, 115 S. Ct. 2475 (1995) (race-based congressional districting); McIntyre v. Ohio Elections Commission, 115 S. Ct. 1511 (1995) (First Amendment right to distribute anonymous campaign literature); Lee v. Weisman, 505 U.S. 577 (1992) (school prayer); Planned Parenthood v. Casey, 505 U.S. 833 (1992) (abortion).

6. Greenhouse, *supra*, at 1541.

Courthouse Reporters

Are They Really the Enemy?

By Hon. Steven Smith

The trial has been difficult and contentious. It has generated quite a bit of publicity in your community. It is now time for you to render your decision. You carefully consider all of the evidence and craft what you believe is the appropriate decision in the case. You deliver your opinion to a packed courtroom, noticing a reporter sitting in the back. You leave the bench confident in your ruling. The next morning you pick up your local paper and read the story written by the reporter, and you come unglued. She got it wrong. There are errors in the story.

Most judges have had this experience at one time or another. Despite what you believe are clear rulings and cogently delivered statements made by you throughout the trial, the media gets it wrong. You are probably not alone in feeling some level of anger that the story has not been reported accurately.

I have had the opportunity to team-teach media issues in a course entitled "General Jurisdiction" at the National Judicial College with Gary Hengstler, Director of the Donald W. Reynolds Center for the Courts and Media. During these sessions, he begins by asking judges what their primary complaints were with media coverage in their courts. Almost always the overwhelming response is, "They are not accurate in their reporting."

In a discussion during "Justice and Journalism: A Conference on the Federal Courts and the News Media," co-sponsored by the Freedom Forum's First Amendment Center and the Judicial Branch of the U.S. Judicial Conference, U.S. Court of Appeals, Judge Harry T. Edwards expressed the feelings of many judges when he said that judges' mistrust of the press is fueled by the belief that "the media makes as much news as it reports." What, then, is our response? Many judges are convinced that the reporter has an agenda or an ulterior motive—that the reporter is purposefully inaccurate in an attempt to discredit the judge or simply make the judge look bad. Other judges report that there have been occasions where reporters have apparently let their bias with a judge creep into the story. For those journalists, it may well be that no amount of media training or attempts by judges to provide accurate information will be successful. But I would argue that the malevolent reporter (who often engages in what is euphemistically referred to as "gotcha" journalism) is the exception to the rule, and that most inaccuracies in the reporting of legal affairs are due to one simple reason—reporters have a serious lack of knowledge about the legal system and how it works.

Impediments to Accurate Reporting

At this juncture a judge might ask, "What responsibility do I have for making sure the reporters get it right?" This is a legitimate question. Shouldn't journalism schools teach students how to cover courts in their undergraduate courses? In 1986, Professor Don Tomlinson, who teaches media law at the University of Houston Law Center, studied the faculties of hundreds of journalism programs in the country to see how many persons teaching media law also had a background in the legal profession. Of all faculty members listed in the records of the Association for Education in Journalism and Mass Communication (AEJMC) at that time, only six professors possessed a Juris Doctorate degree. In the late 1990s he reviewed the records again and found that the number of law-trained individuals teaching media law in journalism programs had grown tenfold.

According to Tomlinson, most schools do not offer specific courses about reporting on the legal system. Instead, covering legal cases is often just a small component of a larger course in reporting, and will often be taught by journalism professors with no legal background themselves. Thus, it should not be surprising that many journalism graduates do not have a significant understanding of our legal system when they enter the world of court reporting. In most areas of the country, the individuals reporting on the courts are some of the newest and most inexperienced reporters. Because of their general lack of understanding of how courts operate the chances for inaccurate reporting are heightened.

> Another impediment to accurate reporting on the courts is that the media are limited in the time (electronic) and space (print) they afford to coverage. Merely providing access to the courtroom or copies of documents may not be enough to ensure fair and accurate reporting of the legal issues at hand.

Ethical Guidelines and Canons of Conduct

When I discuss the possibility of being proactive with the media, many judges instinctively default to their state's judicial conduct rules, believing that they can never comment on anything (and even if they can, they may cite these rules as a way to avoid having to respond). Most states have adopted a version of the American Bar Association's Model Code Canon 3 (9):

> A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This Section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This Section does not apply to proceedings in which the judge is a litigant in a personal capacity.

Clearly, the authors of the Model Code were concerned with judges making public pronouncements that could affect the public's perception of the integrity of any particular proceeding. Although Canon 3 (9) permits a judge to publicly explain procedures of the court, even while a trial is in progress, some judges choose not to speak to any media member for any reason during a trial (or any other time, for that matter). Others take a different approach. One example is Judge Hiller Zobel of Massachusetts. While presiding over the trial of Louise Woodward (the British *au pair* accused of killing the baby in her care), he met with reporters following each day of the trial to explain procedures in general, without getting into specifics about the case.

In another high profile case, Judge Patricia Gifford had her law clerk meet with reporters at day's end to answer procedural questions during the Mike Tyson sexual assault trial. In the event the clerk was in doubt as to the propriety of a question, she checked with Judge Gifford before answering. While I have never spoken to the reporters covering these two trials, I am confident that they appreciated the information that they were given and that it enhanced the accuracy of their reporting.

When discussing the relationship between the judiciary and the media, another Model Code Canon might apply as well. Canon 4 permits a judge to:

> … speak, write, lecture, teach and participate in other extra-judicial activities concerning the law, the legal system, the administration of justice and non-legal subjects, subject to the requirements of this Code.

Establishing a Relationship with the Media

What good results if our default position is to let the media report on us, and then complain when they get it wrong? Perhaps there is a better way to educate the media about what we do: instead of waiting until the trial is either imminent or in progress, why not establish a relationship with reporters when they first begin to cover your court activities? While you may object to this strategy, perhaps after witnessing what investigative journalists have done to members of the judiciary in different states, I still believe that the vast majority of judges in our country can establish a professional working relationship with the media that inures to the benefit of both.

This is the approach I have taken. For informational purposes, I live in a community of about 175,000 people that is host to the seventh largest university campus in the United States. We have one daily town paper, one university paper, two television stations, and several radio stations.

Whenever I learn that a new reporter will be covering our courts, I invite the reporter to come to the courthouse, to talk. Because most news stories involving trials tend to be criminal, I inquire about the reporter's understanding of how our legal system works. Usually, that understanding is rudimentary at best. To help educate the reporter, I begin with the concepts of reasonable suspicion and probable cause and explain the legal requirements imposed on officers before they can stop or arrest. After explaining *Miranda*, I then clarify that the absence of warnings does not always mean we will not hear what a defendant had to say. I will also discuss how the indictment process works, and will cover pretrial matters such as bail setting and writs of *habeas corpus.* I also explain to the reporter that judges sometimes have no alternative but to lower an unreasonable bond that has been set by a magistrate. We will also discuss motions to suppress testimony or evidence, and what can happen when they are granted or denied. We will chat about the trial process, from *voir dire* to verdict, including the Rules of Evidence that pop up frequently and how they are handled. I have also found that post-verdict matters such as motions for new trials and appeals are matters about which many reporters have never given serious thought.

Generally, I spend about forty-five minutes with a reporter. I always end our session by encouraging the reporter to call me if he or she ever has any questions, even during a trial. I explain that while I may not be able to answer the question, I will try to ensure that the reporter gets the help he or she needs if I cannot comment at the time.

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During my time as an elected judge, I have had the opportunity to have these kinds of sessions with about a half dozen reporters from all areas of the media. The first reporter I counseled later decided to attend law school and now clerks for a federal judge. She has mentioned on several occasions that the time we spent together made her a better and more accurate reporter of legal matters. I have had similar comments from others with whom I have spoken, and one of the local TV stations even asked me to come to the station to speak with all of their reporters and anchors in an effort to improve their coverage of the courts.

Has it made a difference? You bet. Both the print and electronic media coverage of our courts (not just mine) has improved since I undertook my efforts. Now, when reporters have a question, instead of taking a shot in the dark they will either call the trial judge handling the case or another judge or knowledgeable attorney for information. Do they still make mistakes? Yes. More often than not, do they get it right? Yes. One thing should be understood, however. When the headline is dead wrong, do not blame the writer of the story. It is very likely that the writer will be even more incensed than you that the headline writer got it wrong.

Other Strategies for Improving Media Accuracy

Having a conversation like the one I outlined above can be educational and helpful, but there are many other things a judge can do to improve the accuracy of media coverage. One is letting the media know of events that they would likely wish to cover. Many courts now have public access to dockets, but we know that the case style does not always tell the true story of a case's interest. For example, if I am aware of a case that might merit media attention, I notify the media with a simple phone call regarding the time the case will be heard. Most courthouse reporters are also general beat reporters, meaning they cover a variety of stories and do not always have the time to know what is coming up at the courthouse.

Recently, my usual practice of notifying reporters about upcoming events was reaffirmed by a reporter. I had called him the day prior to a hearing that I knew he might wish to cover. He thanked me for calling and was there at 8:30 AM for the quick five-minute matter. Later that day, I received an e-mail thanking me for having given him a "heads-up." He said "I could have gotten the information from others, but it is not the same as being there." Exactly! Anything we can do within the boundaries of the Code to provide for more accurate coverage of our work can only enhance the public's trust and confidence in what we do.

In addition to notifying news media of cases of interest, I permit television and photo coverage in my court. Because both television and newspapers like to have a visual to go along with their story, I allow them to have access to the courtroom, albeit under strict guidelines. The news director or editor is given a copy of the guidelines, and must sign a document indicating he or she has received and read them. Both the guidelines and the receipt make it clear that any violation of the rules will result in permanent banishment of cameras from the court for as long as I hold office. Not surprisingly, I have never even come close to having a problem. The media want access, and I find them more than willing to do anything I ask in return for that access. To be sure, that access is not unfettered. I have strict rules prohibiting the photographing of jurors, victims of sexual assault, any witness under the age of eighteen, and anyone who indicates their desire not to be photographed. Television cameras may be placed in one location only and may only be brought in or taken out when court is not in session. In addition, still photographers must use noise-deadening devices to surround their cameras.

Finally, I try to anticipate what the media might want to know. I am sure every judge has been asked at one time or another, "Why did you make the decision you did?" Clearly that is an area where you can run afoul of the Code very quickly by commenting. But if you are sure the public wants to know your reasoning and you feel comfortable in doing so, commit your decision and its reasoning to a written opinion. Then, either deliver the opinion in open court on the record or file your decision with the clerk, which makes it a public record. Many judges will not want to tread into this area (I have done so only once), but it can be an effective way of presenting "your side" of the issues without running afoul of ethical guidelines.

What if reporters get the legal issues wrong despite your best efforts to educate them? Do not be afraid to pick up the phone and call the reporter. Be courteous. You do not need to unduly criticize them. Instead, say something like: "I think the story may have given an incorrect impression and I would appreciate if you would issue a clarification." Give the station or paper a day to respond. If they do not, then call the station's news director or the newspaper's editor-in-chief. You still may not get the answer you desire, but I have found most journalists to be reasonable when calmly and courteously approached about a mistake. Never fail to remember that all media contacts, even ones asking for corrections, should be presumed to be "on the record." Do not expect the correction to be in the same location or same font size—just be thankful if it is printed or broadcast.

The Need to Be Proactive

By this point, you may now completely disagree with my approach and recommendations. There are many judges who refuse to ever deal with the media for a variety of reasons. Some may have been burned and never wish to be burned again. Some may say, "If I never talk with them in the first place,

I will never get in any trouble." To those individuals, may I offer one piece of advice? At least take the time to return the media phone call and tell them you will not (or cannot) talk with them. It has been my experience that those who totally ignore the media often become targets of overzealous investigative reporters.

To those of you who see merit in becoming more proactive with the media, do not think that doing so comes with no peril. I am reminded of President Reagan's admonition on dealing with the former Soviet Union: "Trust, but verify." I have never and will never harbor the illusion that something bad cannot happen. I fully realize that if I stand between a reporter and a Pulitzer Prize, I am likely to be a casualty. On the other hand human nature makes it more difficult for a reporter to "get" somebody if he or she has an established relationship with them.

I am an advocate of proactive media relations for many reasons. One reason, however, is overriding. The public has developed a voracious appetite for things legal. I feel that we have left it to others to define who we are, what we do, and how we do it. While the judges on television shows may provide great entertainment, they do little to give the public faith in what we do. If we do not use the opportunities we have to educate the public about what justice really is we will continue to reap a harvest of public distrust. ■

What Reporters Want

By Gene Policinski

When journalists sit in a courtroom, they are there as observers, representatives, and protectors—roles seen by the nation's founders as a necessary safeguard under the Constitution. In fact, journalists in courtrooms serve as an outside check on judicial and prosecutorial abuse, as observers on behalf of fellow citizens who cannot be in court on a given day, and as the most effective mechanism for the general public to learn about how and why its court system works.

In considering the question of "What do reporters want from the courts?" it is important to first step back and analyze whether the public and press should be provided a constitutionally implied (if not expressly guaranteed) seat in most courtrooms, an issue that has recently been the subject of much debate.

This question was first addressed years ago when then-Massachusetts high court Justice Oliver Wendell Holmes suggested in the 1884 case of *Cowley v. Pulsifer*[1] that the public had a right of access to civil trials. Holmes noted that it was not so much that such trials were a matter of public concern but that "… every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed."[2] Continuing this line of reasoning over a century later, the U.S. Supreme Court held for the first time in 1980 that the public enjoyed a First Amendment right of access to criminal proceedings in *Richmond Newspapers, Inc. v. Virginia*[3]—a right to be overcome only by a finding of certain specific threats to a fair trial that cannot otherwise be overcome. In *Richmond*, Chief Justice Warren Burger noted:

> The First Amendment, in conjunction with the Fourteenth, prohibits government from 'abridging the freedom of speech, or of the press, or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.' These expressly guaranteed freedoms share a common core purpose of assuring freedom of communication on matters relating to the functioning of government. Plainly it would be difficult to single out any aspect of government of higher concern or importance to the people than the manner in which criminal trials are conducted …"[4]

In 1984 and again in 1986, the Court similarly extended public access to pre-trial proceedings and jury selection, thereby continuing the rationale that access bolstered public confidence through reports by its surrogate in the seats, the news media in the courtroom. As the Court stated in *Richmond*, "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." [5] (In which 1984 and 1986 cases did the Court extend public access to pretrial proceedings and jury selection? I'm assuming, too, that the author is referring to Supreme Court decisions in these cases.)

The Court has therefore recognized that citizens expect their courtrooms to be open, that trials and hearings will not be conducted in secret (save for juvenile criminal proceedings and other limited instances), and that journalists will be able to attend and report on those proceedings on behalf of fellow citizens—before, during, and after trial.

Notice that none of these expectations concerns the quality of the reporting, the nature of the medium doing the reporting, or the ultimate impact of the report on the public. I am fond of reminding both the public and journalists that there is no mention of fairness, accuracy, or responsibility in the forty-five words of the First Amendment, although it is my profound hope such notions will color the work of everyone in the news profession.

But the nation now faces a new and increasing trend toward closed courtrooms, hidden cases, sealed documents, and secret jurisprudence—most notably in high profile cases often touching on national security concerns, but also in cases to protect divorce settlements, hide product liability damage settlements, and even to protect the identity of jurors on highly-reported or sensitive cases. Justifications for these closed-courtroom proceedings range from ensuring the safety of the country to guaranteeing the alleged privacy of individuals. Other rationales include protecting the corporate health of

investor-owned businesses and preventing retaliatory gang or terrorist attacks.

Standing athwart this trend are journalists insisting on access, information, and accountability. The Reporters Committee for Freedom of the Press and most major news organizations have in recent years challenged decisions to close trials, a practice that the Committee maintains has also led to maintaining secret dockets, sealed documents, and nondisclosures related to jury selection and composition.

Reporters' Wish Lists: Nationwide Findings

What do reporters want from the courts? The question may perhaps be better framed as: "What do reporters want and need from the courts in order to do a proper job of keeping the public informed?"

Since 1999, the First Amendment Center and the Judicial Branch Committee of the Judicial Conference have conducted regional and national seminars entitled "Justice and Journalism" that involve meetings between print and broadcast journalists and federal judges at all levels. Regardless of the medium, location, and composition of the attendees, similar requests from journalists arise.

Most common on the media wish list has been timely access to a court official for explanation and information. Reporters, editors, and broadcasters seem quite aware of the restraints on judicial speech regarding pending cases or matters on appeal. Their requests, however, are more basic. Reporters new to the courts acknowledge that a lack of legal training may require follow-up conversations about legal tactics and rulings. Experienced reporters may want to probe a nuance that they see as bringing meaning or context to the case. A possible solution suggested during the conferences is to have a judge not involved in the particular case or an experienced member of the local Bar periodically serve as a "resource person" for the court to respond to inquiries—either on or off the record—on matters of procedure and basic legal information.

Other suggestions for dealing with court-media needs include developing a local or state "Reporter's Guide to Covering the Courts" to assist journalists, particularly new reporters, in correctly reporting court happenings and rules, and in using accurate legal terminology. Conducting regular—annual or more frequent—meetings between court staff, judges, and journalists from all media to talk about the philosophy and pragmatic needs of news coverage helps to avoid (for all sides) having to make hasty decisions about potentially complex matters when a deadline is looming.

Naming one courthouse official—hopefully, a technically oriented person—to become familiar with the detailed needs of broadcasters can also provide a solid contact with journalists as needed. Preparing an action plan so that a court will be ready to handle high profile cases involving major media coverage can also head off stressful moments—and asking local journalists to join in preparing such a plan provides expertise and may promote better understanding of mutual concerns.

Judicial participants often were surprised to learn that journalists also wanted to hear criticism and complaints from the courts—from court clerks, circuit executives, and occasionally from judges themselves. Time and again, reporters, editors, and broadcasters told judges that such constructive advice and comments were useful and welcome.

In one instance, a bankruptcy court judge at one of the seminars told colleagues and journalists of a report that incorrectly stated that she and her husband had themselves filed a bankruptcy petition. The story, the judge related, quickly went global as news services noted the irony—incorrectly, as it happened. Neither the judge nor her spouse sought correction of the story, or even contacted the legal journal reporter regarding the error. Even participating judges not inclined to talk with media representatives responded to the story with the admonition that, if no other time, this demanded direct and specific action to seek correction.

At the ongoing series of meetings and seminars, news organizations also reported that newsroom staffing is being reduced due to declines in circulation and profits and changing audience habits. One consequence is that experienced reporters with a courthouse "beat" are often replaced by new or less-experienced print and broadcast staff who "parachute in" when a major story breaks. Very often, these newer, younger staffers lack training or experience in reporting on legal matters.

Two Viewpoints on Reporters' Needs

Dick Carelli, a law-trained journalist, joined the Administrative Office of the U.S. Court's Office of Public Affairs in 2000 after spending more than thirty years as a professional journalist, reporting mostly on the U.S. Supreme Court for The Associated Press. According to Carelli, reporters' needs at any level of court coverage must focus first on access—timely access to documents and records throughout the course of the trial. He also believes that it is necessary to have a court representative who can provide information, context, and occasionally explain procedure or calendar issues. He also sees a need, on a basic pragmatic level, for a computer in the courthouse where reporters can find and read electronic documents, and for a place—a desk, a

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room—where journalists can spend time reading briefs, for example.

Acknowledging that in today's media it is increasingly rare to have a court specialist—a "beat" reporter—Carelli says that courts need to provide methods that will help reporters keep up-to-date on upcoming matters in a case as well as what has already happened.

Tony Mauro is a Supreme Court correspondent for *Legal Times, American Lawyer Media* (ALM), and law.com. He joined ALM in January 2000 after covering the Supreme Court for *USA Today* and Gannett News Service for twenty years. Mauro is also a legal correspondent for the First Amendment Center.

According to Mauro, "greater transparency" about the courts is a basic need. He also cited other needs, including the following:

1. Allowing as much electronic access as possible. This involves permitting coverage by television, radio, and the Internet. He noted that some courts at various levels now routinely post the audio of arguments online. The Supreme Court is taking some steps along this path, but needs to do more, he said.

2. Making greater efforts to make court opinions and rulings more understandable and accessible to the public and to the press. Mauro cited a practice in which judges may provide copies of opinions to the press ahead of time under an embargo arrangement, to aid reporters in reading and understanding opinions before they have to write deadline stories.

3. Creating more dialogue between judges, court personnel, and the media to increase mutual understanding. When a high profile case hits, it is extremely helpful for the judges and journalists to already know each other and to have considered each other's needs beforehand.

Cameras in the Courtroom

A long-standing area of contention involving the needs of some reporters—broadcasters and news photographers, to be specific—involves the issue of whether cameras should be allowed in the courtroom. In 1981, the U.S. Supreme Court held in *Chandler v. Florida*[6] that the Due Process Clause does not inevitably entitle the defendant, as a matter of right to a fair trial, to compel exclusion of television cameras from courtrooms. As analysts have noted, another way of interpreting the decision is that the U.S. Constitution does not prohibit states from adopting policies that allow news outlets to record and cover court proceedings electronically.

Currently all fifty states and the District of Columbia have rules regarding news coverage of court proceedings. Regulations among the states vary as do the access limits placed on the press. The District of Columbia is the only jurisdiction that prohibits both appellate and trial electronic news coverage. News organization outlets throughout the country continue to challenge the restrictions. At present, only the Second and Ninth U.S. Circuit Courts of Appeals allow electronic news coverage.[7]

The rationale cited by pro-camera advocates is that the public is better served by seeing actual courtroom proceedings, as immediate access to proceedings and procedure provides the public with knowledge "now." Over the long-term, having this type of access also creates credibility in the justice system irrespective of individual cases and decisions.

Opponents argue that cameras are inherently obtrusive, even as lighting needs, noise, and size have diminished through the years, and may encourage grand-standing by lawyers, judges, jurors, and witnesses. They also say access issues are settled by allowing broadcast reporters (without cameras) into courtrooms on the same basis as print writers.

The U.S. Supreme Court is not considered likely to anytime soon switch from its ban on photography of any kind. In 1996, Justice David Souter told a congressional panel, "The day you see a camera come into our courtroom it's going to roll over my dead body." Chief Justice John Roberts recently said that the Justices appear to be agreed on continuing to operate as the Court has done in the past—without cameras.

On February 14, in testifying before the Senate Judiciary Committee, the Associated Press (AP) reported that Justice Anthony Kennedy said cameras would damage the way justices relate to each other and lawyers during oral arguments: "Please don't introduce into the dynamics I have with my colleagues the insidious temptation that one of my colleagues is trying to get a sound bite for the cameras. We don't want that," Kennedy said.[8]

Still, there is some movement toward the kind of televised coverage that broadcast reporters have sought: At a February meeting of the American Bar Association in Miami, the AP reported that U.S. District Judge John E. Jones, who barred television cameras from covering a lawsuit over the teaching of "intelligent design" in Dover, Pennsylvania, said, "I might have gotten it wrong. The lawyering was so good. We might have benefited from the public seeing the witnesses and the process."[9]

The same AP report also noted that "U.S. District Judge Myron Thompson said he wished cameras could have recorded the trial in his courtroom over the presence of a Ten Commandments monument that former Alabama Chief Justice Roy Moore installed in the state's judicial building." According to Thompson, "The public could have heard it and decided for themselves whether they agreed with my decision" ordering the monument removed. He added that "[h]aving the camera in the courtroom allows the public to get both sides of the argument." At the same session, the AP report said that several federal appellate judges also remarked that they

favored televising their proceedings that do not involve juries.

Electronic Access to the Courtroom

A new area of conflict over access involves "electronic media" in the form of bloggers, who can transmit trial accounts directly from laptop computers to the Web. While no definitive national policy has emerged, some courts have taken action on their own. For example, in the U.S. District Court criminal trial of former White House official Lewis "Scooter" Libby, two seats were credentialed for "bloggers" on a rotating basis in the media area.

"Bloggers can bring a depth of reporting that some traditional media organizations aren't able to achieve because of space and time limitations," Sheldon Snook, administrative assistant to Chief Judge Thomas F. Hogan, said, in a January 11, 2007, article in *The Washington Post.* Snook added that some bloggers also bring expertise that is welcome in court, the report said.[10]

Technology of all kinds raises new questions for courts and journalists to contemplate. Reporters have long implored courts to consider print and broadcast deadlines when setting up access to and from major trials, and in providing auxiliary vantage points from which to hear and report on testimony, for example.

The presence of hand-held communication devices and wireless laptop computer connections to the Internet—and the expectation of immediacy from Web readers and a twenty-four-hour-a-day television news world—will press judges to permit "real-time" news reports from journalists sitting in the courtroom.

Increased Court Coverage and the Resulting Benefits

Geneva Overholser, a professor for the University of Missouri School of Journalism in its Washington bureau, sees reporters' needs vis-à-vis the courts in a different, and succinct, light: Reporters want to be "left alone" to do their work.

Overholser, who formerly was a syndicated columnist, editor of *Des Moines Register*, and ombudsman at *The Washington Post*, said reporters want the courts to have "a strong awareness of the disservice to society when reporters cannot operate free of an expectation that their work might well be used in the service of government; that is, that they might be turned into an investigative arm of the government."

"Reporters feel that society needs them to be a brake on power, not an accessory to it," she said. "Judges must balance all kinds of principles, from the right to a fair trial to the right to privacy. Reporters want to make sure that the rock-bottom democratic need for a free and independent press gets due consideration as well."

The series of meetings that have taken place since 1999 between reporters, judges, and court administrators under the "Justice and Journalism" banner most often produce an acknowledgement of the needs of each profession—and a sense that regular contact, discussion before dispute, and mutual respect are cornerstones of creating a media-aware judiciary.

As part of an often-quoted set of articles about "Covering the Courts" in a 1998 edition of *Media Studies Journal*, federal judges Gilbert S. Merritt and Richard S. Arnold discussed why, in their view, increased coverage of the courts is as good for the judiciary as it is for the press and public.[11]

"Judges need to understand better that we operate only by the consent of the governed. And the press is a major part of the consent of the governed," Merritt said, in asking courts to take into account the need to better educate the press and public about court activities. Noting that he was a former newspaper reporter, Arnold said judges would do well to cultivate a good relationship with the press: "We can't control them. We can't manipulate them. But we can at least give them the tools that they can use, if they're well-disposed, to explain the subject better to the public." ■

Endnotes

1. Cowley v. Pulsifer, 137 Mass. 392 (1884).
2. *Id.* at 394.
3. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).
4. *Id.* at 575.
5. *Id.* at 572.
6. Chandler v. Florida, 449 U.S. 560 (1981).
7. Beth Chesterman, *Restrictions on Courtroom News Coverage*, First Amendment Center (Nov. 8, 2006), *available at* http://www.firstamendmentcenter.org/analysis.aspx?id=17283.
8. Mark Sherman, *Justice Kennedy Says Best Judges Leaving Because of Inadequate Pay*, Associated Press, (Feb. 14, 2007).
9. Mark Sherman, *Some Judges Open to Cameras in Courtroom*, Associated Press, (Feb. 13, 2007).
10. Alan Sipress, *Too Casual to Sit on Press Row?*, THE WASHINGTON POST, Jan. 11, 2007, at D01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/01/11.
11. Richard S. Arnold and Gilbert S. Merritt, Justice by Consent of the Governed, Interview Transcript *in* MEDIA STUD. J., Winter 1998, at 80-91.

The Bar's Role in Public Education about the Courts

By Keith Roberts

> "Political reasons have not the requisite certainty to afford rules of [judicial] interpretation. They are different in different men. They are different in the same men at different times. And when a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean."
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> *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 620-21 (1857) (Curtis, J., dissenting).

A fair and impartial judiciary and the rule of law are core values of American society and the legal community. This article, inspired by a panel discussion about judges and the media, reviews the American Bar Association's recent and current efforts to advance these values.

The ABA's efforts to explain the role of judges have been substantial and sophisticated, and through the Least Understood Branch project, the Coalition for Justice, staff efforts, and the work of various ABA sections they are intensifying.[1] This article suggests further efforts toward training bar leaders as public spokespeople, recruiting other spokespeople, and formulating more strategic responses to controversy.

The Problem and Responses to Date

In 1535 England's highest judge, Sir Thomas More, displeased King Henry VIII by ruling against his divorce and lost his head for it.[2] In 2005 U.S. District Court Judge Joan Lefkow, who had ruled in favor of a white supremacist's legal position, displeased him by obeying a Court of Appeals reversal on remand, and lost her husband and mother for it.[3] And in May 2006, five Turkish judges displeased an Islamic fundamentalist by enforcing a ban on head scarves and were shot in open court for it.[4]

Such actions, plus increasingly frequent threats,[5] public denunciations, and calls for the impeachment or personal liability of judges,[6] as well as efforts to exempt legislative or executive actions from judicial scrutiny[7] constitute a growing challenge to our fundamental concepts of the law and how American society should work. One of these fundamental legal concepts is that judges should be fair and impartial, unswayed by preconceptions or popular sentiment, so that litigants receive just treatment. The other, which legal historian Morton Horwitz calls our "civil religion,"[8] is the rule of law, the idea that anyone within our legal jurisdiction may have a fair and impartial judiciary to determine his or her rights, and to invoke the might of the state to enforce them.[9] As President Eisenhower explained when he sent federal troops to Little Rock to enforce the Supreme Court's integration decision against protesting mobs, "The alternative to supporting the law in such a situation is to acquiesce in anarchy, mob rule, and incipient rebellion. Ultimately, of course, such a course would destroy the Nation."[10]

The protection and advancement of these fundamental concepts are core goals of the American Bar Association,[11] and along with others it has a long history of fighting for them. ABA presidents have made many eloquent speeches in their support, and in recent years, blue ribbon ABA commissions have produced two major reports describing threats to these goals and suggesting how to alleviate them.[12] Despite all the ABA's efforts, both reports discern a decline in public understanding and respect for the judiciary, and call for measures to improve

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its standing. As the 1997 report on the federal judiciary, *An Independent Judiciary,* states, quoting the American Judicature Society:

> It is the obligation of judges to educate the public about important concepts of the rule of law and the independence of the judiciary. The media will not do so, and the public schools and colleges are apparently failing to do so. Therefore, judges are encouraged to reach out and educate the public. This does not mean giving speeches to attorney audiences, but to civic organizations, schools and colleges, and religious institutions.[13]

The Commission recommended that the ABA join with other organizations to support what has become Justice at Stake**,** an advocacy organization to safeguard "fair, impartial and independent courts." It promotes a legislative agenda and sponsors projects to promote public education about the role of judges and the judiciary.[14]

The second major report, *Justice in Jeopardy* (2003)*,* concerns state courts, where elections loom large. It recommends that "courts take steps to promote public understanding of and confidence in the courts among jurors, witnesses, and litigants," host field trips to courthouses, and have judges and court administrators speak in schools and community settings.[15]

Public Education

In March 2006, the ABA's Judicial Division and Section on Individual Rights and Responsibilities[16] joined with the First Amendment Center of the Freedom Forum[17] to convene a distinguished panel on the topic "Defining the Judge: How the Media, Elected Officials and the Public Perceive Judges and the Judiciary."[18] It focused on how the media defines judges and the judicial process.

Panelists and audience members mentioned various ways to reach the public: using the secondary schools;[19] televising Supreme Court hearings; creating a public affairs network for the federal judiciary;[20] and having judges speak more often and more effectively to students and civic groups, provided they focus on the legal process rather than specific legal issues.[21] In addition, several panelists and guests noted that controversial decisions present excellent educational opportunities if surrogates like the bar associations and individual lawyers respond quickly,[22] and along with judges speak out more freely to explain such decisions.[23]

A surprising number of these ideas are controversial. While many believe that broadcasting Supreme Court or other judicial proceedings would educate the public, some panelists observed that only snippets would receive wide attention, while judges would lose their valuable anonymity.[24] The public affairs network idea would probably attract a very limited audience and would have similar drawbacks.

The suggestion that judges should speak out more frequently, also made in earlier ABA reports, turned out to generate the most heated discussion.[25] Joseph diGenova insisted that judges should speak less often, not more. His basic point was that familiarity breeds contempt. By appearing in the public eye too often, judges erode respect for the judiciary and blur the boundary between law and politics.[26] Too frequently, he added, their public speeches actually politicize the judiciary by discussing controversial legal issues instead of sticking safely to matters of process, as all the panelists agreed they should do.

But Tony Mauro observed that judges in the spotlight usually come out looking good and responsible, and can sometimes explain the decision in a very helpful way.[27] Polling by Justice at Stake, added Executive Director Bert Brandenberg, shows that the public wants to hear from judges. In any event, he noted, their silence would not prevent public attacks.

The least well-received idea of all was that of using the press to educate the public. The ABA annually presents its Silver Gavel award for exemplary presentations that foster public understanding of the law, but as several people noted, the press is now an entertainment medium and devotes few resources to the courts.[28] Although the Internet allows reporters to quickly learn about cases,[29] many don't read the decisions, and they have neither print space nor broadcast time to elucidate the judicial process.[30] Editors may even be indifferent to correcting factual errors.[31]

The panel discussion made no attempt, of course, to canvass all the possibilities for public education. The House of Delegates has repeatedly urged judges and lawyers to engage in public education efforts,[32] and the ABA has long advocated and pursued public education activities that cover a far broader range than those mentioned in the panel discussion. Perhaps most familiar is Law Day, May 1, when the ABA reaches millions of Americans through educational programs. For Law Day and on a continuing basis, the ABA's Division of Public Education, and both its Media Relations Group and Government Affairs office in Washington, D.C., provide an array of materials to legislators, administrators, judges, lawyers, schools, and the public about the role of the courts and the importance of the rule of law.[33] The Division of Public Education carries out an aggressive program of education aimed at high schools and colleges, consistent with the recommendation of the 1997 report on federal courts.[34] It collaborates with textbook publishers to include information about the role of judges and the courts in their history and civics books, publishes newsletters and magazines for high school and collegiate teachers, and works with such ABA groups as the Special Commission on the Jury to educate the public, in that case jurors,

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about the role of the courts.[35] It provides staff support to ABA projects like the Special Commission on Civic Education and Separation of Powers, which in May 2006 held a public "Conversation on Judicial Independence and Civic Education."[36] Several other ABA sections and groups, including prominently the Coalition for Justice[37] and the Least Understood Branch project, also generate materials and programs designed for public education.[38]

The ABA and other bar associations have also implemented another public education suggestion from the 1997 report; namely, that "state and local bar associations should develop effective mechanisms for evaluating and, when appropriate, promptly responding to misleading criticism of federal judges and judicial decisions in each federal judicial district."[39] The mechanism widely adopted has been a rapid response team or committee.[40] Unfortunately, experience has shown that members can be difficult to mobilize at the right time, and may not be acceptable spokespeople; as the president of one major local bar association noted, the press ignored his rapid response committee, and only wanted to hear from him, if anyone.[41] Of course, a bar president supported by a committee that has quickly mobilized the relevant facts and appropriate legal analyses stands a far greater chance of success than one who lacks such support.

Various other bar organizations have also developed positions and arguments advocating the rule of law and a fair and impartial judiciary. They have produced many publications, films, and programs. A financially serious and professional commitment to public communication clearly exists. The executive director of the ABA's Division of Public Education estimates that its various efforts reach some 20 to 25 million people a year.[42] And yet, as the "Defining the Judge" discussion shows, there remains a sense that the public understanding of the role of the judge and the importance of the rule of law is slipping. What more, then, should be done?

Public Representation

Business corporations are represented in public by their leaders. Virtually all large businesses, and many middle market companies as well, provide their CEOs with extensive coaching in preparation for such moments. Like business leaders, bar association leaders represent the bar to the public. Just as coaching, seminars, and retained public relations professionals help business leaders, so can bar leaders use this kind of help. Although the ABA's Media Relations Group tries to provide such assistance to ABA leaders, local and state bar leaders probably need more help than they currently receive. One important goal of the Least Understood Branch project, which works primarily with state and local bar associations, is to train judges and bar leaders in responding to controversies. It may be, however, that additional resources and training efforts are needed.

In addition to bar leaders, the public relations effort might make use of the enormous reservoir of understanding and goodwill for the law's noble cause that exists among popular and credible public figures. The rule of law and keeping the judiciary fair and impartial appeal to widely held values. Justice Sandra Day O'Connor has taken up these causes with great effectiveness since her retirement; others of comparable persuasiveness, perhaps not even lawyers, can also be asked to speak up.

Public Education Opportunities

The ABA and sister organizations devote great effort to reaching the press—television, radio, newspapers, magazines, Internet blogs, and whatever other media affect peoples' views. But the Defining the Judge Conference made clear how extremely difficult this job now is. While such efforts must certainly continue, perhaps in emulation of business practices, it would help to actually create educational opportunities, rather than just respond to them. The widely publicized Law Day is such an effort, but far more can be done in the context of an effective long-term campaign of public education. The appropriate professionals for such an effort are not lawyers or judges, but public relations specialists.

Responding to Controversy

As noted above, controversies present excellent public education opportunities.[43] Controversy arises for several different reasons, and the response must be shaped to the issues involved. Recent controversies fall into four main categories:

(1) Legitimate Criticism

Sometimes a decision or a court process comes to public attention because the court has mishandled the case or violated established norms of conduct. Public controversy may require a response before appeals to rectify such wrongs can be decided. These controversies need rapid response teams to determine the facts quickly and authoritatively. The defense of the indefensible must be avoided.

If the facts call for legal and judicial discipline, self-disciplining mechanisms must work promptly and properly, both to ensure fairness for the individuals involved and to assure the public that the indefensible is not being covertly defended.[44] If the bar is perceived as failing to do this, far more onerous approaches may well receive public support.[45]

(2) Ignorant Criticism

Often, critics have misunderstood or misrepresented the facts or law of the case in question, the constraints binding the judge, or the role of the court.[46] Attacks based on such ignorance, although commonplace, are perennially worrisome because their success would indeed subvert the rule of law, as happens in authoritarian countries.[47] As distressing as these occurrences are to the judges and other people involved, however, they also provide an excellent

opportunity for public education. The controversy attracts media attention, and a timely and apt response from an appropriate spokesperson gets attention. Even better, the demonstrable error of such attacks casts a sympathetic light on the values being defended.

A special opportunity arises when either legitimate or ignorant criticism of the judiciary leads to punitive legislation.[48] The most flagrant contemporary instance may be the failed 2006 ballot initiative in South Dakota, the Judicial Accountability Initiative Law, which its sponsors described as addressing "ignored laws, ignored evidence, eminent domain abuse, confiscation of property without due process, probate fraud, secret dockets, falsifications of court records, misapplication of law, and other abuses."[49] While the sponsors could depict isolated judicial abuses, their nightmarish remedy, vigorously opposed by the state bar of South Dakota and other legal organizations, was soundly defeated.[50]

Whatever the motives behind them, punitive legislative proposals provide yet another splendid occasion for public education. The fear they strike in those who depend on impartial judges and the rule of law calls forth extraordinary resources and efforts, while the specific nature of the threat makes the issue highly newsworthy.

(3) Outcome Criticism

In many instances, the critics' goal is not legal reform, but a different outcome. They want the judges or the processes changed to ensure their preferred results. These critics include professionals and businesses that decry the destructive costs of tort litigation on their operations, and individuals and groups focused on sexual, religious, racial, ethnic, or other personal issues. They may claim that the judiciary is refusing to reach conclusions that the law demands, as Majority Leader Tom Delay did after the courts refused to apply his newly passed legislation to the Terry Schiavo case.[51] Or they may use a controversial case as an opportunity to publicize their view that the law is wrong. Such controversies provide the bar with an opportunity to distinguish between the judicial functions of interpreting and applying the law, and the legislative function of changing the law.

It is important, however, for the ABA not to become embroiled in disputes about what the outcome should be. While the bar speaks legitimately for all its members in seeking to protect core legal values, many members may well disagree with any particular outcome preference. In any event, to engage in an argument about outcomes implicitly concedes that the way to change the outcome is to change the judge or the system. Instead, responses to such criticisms might emphasize how the critic is attacking the wrong forum and asking the courts to impose legislative solutions.[52]

(4) Institutional Critics

In recent years, as political partisanship has increased, some legal scholars have formulated academic critiques of the judicial process, and sometimes proposed remedies that threaten the bar's core values. Owing to the respectability of these institutional critics, which greatly improves their chance of gaining legislative and public support, their proposals can present a more serious threat to the rule of law and the fairness and impartiality of the judiciary than those of other critics. Three somewhat contradictory criticisms are made:

Judicial activism. The accusation of "judicial activism" is a claim that courts trespass on legislative or executive functions.[53] It now comes primarily from those who dislike the liberal agenda that they think courts favor in such Supreme Court decisions as *Roe v. Wade* or *Kelo v. City of New London*.[54] But liberals make similar accusations against conservatives. President Franklin D. Roosevelt's court-packing scheme arose from that perspective.[55]

The charge of "judicial activism," which sophisticated commentators view as little more than an epithet,[56] has gained popular force in part, at least, because of widespread agreement with the principle it professes to protect, one perhaps most pithily expressed by a liberal icon, Justice Louis Brandeis. He warned that "we must be ever on our guard, lest we erect our prejudices into legal principles."[57] The Federalist Society, which speaks for many of the current *critics*, emblazons Alexander Hamilton's words on the home page of its Web site to express the same idea: "The Courts must declare the sense of the law; and if they should be disposed to exercise *will* instead of *judgment,* the consequences would be the substitution of their pleasure for that of the legislative body."[58]

There is obviously a fine line between criticizing a judge for misusing legitimate discretion, and criticizing the judge for using illegitimate discretion. When the Federalist Society and its allies seek the nomination of judges with a philosophical commitment to literal or narrow readings of constitutional rights and governmental powers,[59] their efforts do not constitute attacks on the bar's core values. Claims that such efforts threaten the rule of law have no more content than many accusations of "judicial activism."[60] On the contrary, the Federalist Society has expressed strong support for the bar's values. For instance, a Federalist Society White Paper on the popular election of judges says

> We want judges to be independent in the sense that they are not dependent on any individual or group that might exert some influence on their decisions, in the sense that they will apply the law fairly and without favoritism . . . We also want judges to be accountable to the public in the sense that they do not exercise their power arbitrarily, or in ways that undermine the judicial and political systems they have sworn to uphold.[61]

It is one thing to seek judges who have partisan ideological sentiments but would apply the law according to certain standards consistent with the core legal values, and another to strip citizens of their ability to seek justice. Since the ABA represents lawyers of

all political views, taking a position on the partisan struggle over the ideological requirements for judicial candidates is probably beyond its legitimate authority. But very direct threats to those core values arise from proposals that seek to prevent decisions the critic dislikes by altering the prevailing institutional "architecture,"[62] supposedly increasing the accountability of judges, binding them to certain legal interpretations, or limiting the scope of judicial activity.[63] Opposition to such proposals is a matter of protecting the ability of the courts to defend the people's rights.

Judicial passivity. Some who criticize the courts for judicial activism also criticize them for excess passivity. They believe that the Supreme Court allows governments too much power, as when it upholds federal programs and agency actions under an expansive reading of the Commerce Clause, or affirms a city's right to condemn property for private uses.[64] They want the Supreme Court to limit the scope of government.[65] But these critiques, whatever their merit, seem purely ideological and represent no threat to the core values.

Unitary executive. Within the last two decades, Professor John Yoo and other conservative lawyers have argued that in delegating military authority and executive powers to the president, the Constitution confers unlimited discretion to act without legislative authorization or restriction. Since "all three branches of the federal government have the power and duty to interpret the Constitution," it follows that "the meaning of the Constitution is determined through the dynamic interaction of all three branches."[66] In other words, each branch may interpret the Constitution for itself, and the courts have no power or authority to review the president's determinations.

This position would appear to contradict the fundamental concept of checks and balances, and is therefore the most radical challenge to the rule of law that has yet been presented. Unlike other challenges to the core legal values, the claim of presidential hegemony derives from a conceptualization of the Constitution. It is perhaps the most dangerous challenge to the rule of law that now exists. As Professor Yoo takes great pains to demonstrate, presidents of all political stripes have sought to expand executive powers and gained the acquiescence of Congress at certain times, due to tactical political considerations.[67] The current president has arguably shown such a propensity more flamboyantly than most others,[68] but despite the Supreme Court rulings in *Hamdan v. Rumsfeld*, and *Hamdi v. Rumsfeld*,[69] Congress has supported some of these expansions in the 2006 Military Commissions Act.[70]

The threat to the rule of law is therefore clear and powerful. But the battleground is an intellectual one. If the expansive view of the president's powers achieves legitimacy, the tactical political acquiescence of Congress and the courts to particular exercises of that view will cement it into place. If the expansive view does not achieve legitimacy, then these will be mere inconsistencies, with no lasting effect.

The best way to meet an intellectual challenge of this sort is through scholarship and publication. In such matters the ABA can play little role. But when and if scholarship demonstrates that Yoo's position is fallacious, the bar can play a significant role in publicizing the scholarship and ensuring that it plays a prominent role in the ongoing debates about the allocation of power under the U.S. Constitution.

Conclusion

The ABA does a great deal in public education. Through the Least Understood Branch project it is now focusing on the important task of supporting state and local bar leaders in their role as spokespeople. Celebrities like Justice Sandra Day O'Connor seem particularly effective spokespeople. The ABA might consider seeking out more spokespeople of comparable stature and effectiveness as part of a long-term public relations strategy for attracting media attention to the core concepts and what threatens them. Another element in such a strategy would be to create newsworthy occasions for making its case.

In responding to controversy, the bar presently provides excellent materials, but rapid response committees need more support. The bar also needs to recognize that well-functioning disciplinary mechanisms are critical defenses against those who would undermine the judiciary's fairness and impartiality, and as such need scrutiny and maintenance.

This review has discussed certain specific types of controversy and the responses that would probably be most effective. When it is the outcome that is controversial, the bar's response should focus attention on the difference between legislation and judicial decisions. When the controversy concerns constitutional interpretations or legislative proposals to limit jurisdiction or discretion, the response should focus on how the proposals would strip away individual rights or distort the constitutional framework of checks and balances. The promotion and publicizing of relevant scholarship would often be helpful, but the bar should carefully avoid ideological partisanship, except for defending the core legal concepts. ■

The author wishes to thank Judge Jodi Levine and Judicial Division chair-designate Jack Brown for their great help and consistent encouragement in the creation of this article. They are not, however, responsible for any mistakes or infelicities that appear.

Endnotes

1. A joint project of the ABA's Standing Committee on Judicial Independence and the Judicial Division. The project has developed materials in the form of sample editorials, op-ed pieces, and letters to the editor on the subject, produced a soon-to-be-released DVD, Protecting Our Rights, Protecting Our Courts, and prepared a pamphlet titled COUNTERING THE CRITICS. It works primarily with state and local bar associations.

2. Henry, then His Catholic Majesty, declared his marriage to Catherine of Aragon annulled

after the Pope refused and married Ann Boleyn. For insisting that the Pope's authority took priority, More was executed for treason.

3. Jody Wilgoren, *Haunted by Threats, US Judge Finds New Horror*, N.Y. TIMES, Mar. 1, 2005.

4. Sebnem Arsu, *Islamic Head Scarves at Issue in Killing of Judge in Turkey*," N.Y. TIMES, May 18, 2006.

5. Deborah Sontag, *In Courts, Threats Become Alarming Fact of Life*, N.Y. TIMES, Mar. 20, 2005.

6. *See* examples cited in REPORT of the ABA COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE, AN INDEPENDENT JUDICIARY, Ch. 4, *Federal Judicial Independence: A Review of Recent Issues and Arguments*, http://www.abanet.org/govaffairs/judiciary/rdecind.html (1997). For liability, *see* the 2006 ballot initiative in South Dakota entitled the "Judicial Accountability Initiative Law," at www.jail4judges.org. *See also* Letter from James Sample, Brennan Center for Justice, to Mr. Thomas Barnett of the state bar of South Dakota (Dec. 15, 2005) (on file with the ABA).

7. In prepared remarks at the Defining the Judge Conference, on file with the ABA Judicial Division, panelist Mark David Agrast, Senior Fellow at the Center for American Progress, described various types of attacks that have recently been launched against judges and the judiciary. While no federal judges have been impeached because of their decisions, they have provoked recent laws reducing the scope of review in habeas corpus, immigration, and civil cases. Dissatisfaction with federal court decisions has also led to limits on judicial discretion, as in the Patriot Act's requirement that Foreign Intelligence Surveillance Act judges approve orders for business documents whenever the application contains the required representations. *See* http://www.abanet.org/jd.

Congressmen have also threatened to reduce the authority of the federal courts to determine the constitutionality of the laws Congress enacts. These "Constitution-stripping statutes," as Agrast calls them, would exempt legislation like the Defense of Marriage Act from constitutional oversight; another approach would be to forbid the enforcement of rulings, such as prohibitions against the display of the Ten Commandments on public property. One bill introduced last year, the Congressional Accountability for Judicial Activism Act, would allow Congress to override Supreme Court rulings against legislation by a two-thirds vote.

8. MORTON J. HORWITZ, THE TRANS-FORMATION OF AMERICAN LAW, 1870-1960, at 193 (Oxford University Press, 1991).

9. A recent meta-study of rule-of law-literature finds four basic components to the rule of law: a government whose actions are made to conform to properly enacted laws; equality before the law; law and order; and predictable and efficient rulings. *See* Rachel Kleinfeld, *Competing Definitions of the Rule of Law: Implications for Practitioners*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, RULE OF LAW SERIES NO. 55 (2005). Another critical element is that judicial decisions will be enforced. As Justice Steven Breyer colorfully put it in a recent talk, "When they see a decision they think is the stupidest decision they ever saw, and probably the worst and the most immoral, they'll still follow it. That's a blessing." Remarks at the ABA Panel Discussion, "Is the Independence of the Judiciary at Risk?," Aug. 2005, www.abanet.org/media/youraba/200509/article07.html.

10. Letter to Sen. John Stennis (Oct. 7, 1957), www.abanet.org/jd/judgesnetwork/activities.html.

11. Of the 11 goals of the ABA, #8 is "to advance the rule of law in the world," and #11 is "to preserve the independence of the legal profession and the judiciary as fundamental to a free society." *Profile of the American Bar Association*, www.abanet.org/media/profile.pdf.

12. COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE, AN INDEPENDENT JUDICIARY (1997), http://www.abanet.org/govaffairs/judiciary/rdecind.html; COMMISSION ON THE 21ST CENTURY JUDICIARY, JUSTICE IN JEOPARDY (2003), http://www.abanet.org/judind/jeopardy/information.html.

13. The Commission's recommendations are at http://www.abanet.org/govaffairs/judiciary/r6a.html.

14. Public education efforts include rapid responses to intimidation and impeachment threats against judges, voter guides in state judicial elections, educating political leaders, speaking out against attacks on court jurisdiction and discretion, building a network of judges to speak out, and developing message and issue papers. http://www.justiceatstake.org/contentViewer.asp?breadCrumb=8.

15. JUSTICE IN JEOPARDY, "Conclusions and Recommendations."

16. The Section on Administrative Law and Regulatory Practice and the Section on Criminal Law cosponsored the forum.

17. The Freedom Forum's First Amendment Center is an advocacy organization dedicated to protection of the First Amendment, diversity in the news media, and the creation of a $600 million Museum of News and Information in Washington.

18. John Siegenthaler, a founder of *USA Today*, former editor of the *Nashville Tennessean*, and assistant to Robert F. Kennedy at the Justice Dept., moderated four panelists. Mark David Agrast, a Senior Fellow at the Center for American Progress, oversees the Center's programs relating to civil and constitutional rights and the rule of law. He is a former chair of the ABA's Section of Individual Rights and Responsibilities. Joseph diGenova is a former U.S. Attorney for the District of Columbia, a litigator in private practice, and a television legal affairs commentator. He served as Independent Counsel in the Clinton Passport File Search matter, and Special Counsel to the House of Representatives investigating the election of Ron Carey as president of the International Brotherhood of Teamsters. Tony Mauro is the Supreme Court correspondent for the *Legal Times* and other legal media, and formerly held that position for *USA Today* and Gannett News Service. Deanell Reece Tacha is a judge on the U.S. Court of Appeals for the 10th Circuit, appointed in 1985, and is a former chair of the ABA's Judicial Division.

19. Comment by Judge Leslie Miller.

20. The "Sunshine for the Judiciary" bill sponsored by Sen. Schumer and Sen. Grassley would do this. Comment by panelist Mark David Agrast.

21. Comment by panelist Judge Deanell Reece Tacha, who emphasized that they should address legal processes, not legal issues.

22. Question by audience member Judge Herbert Dixon and response by panelist Joseph diGenova; comment by panelist Mark Agrast.

23. Panelist Tony Mauro.

24. Daniel Henninger, *Supreme Court Is Better Heard Than Seen*, WALL ST. J., May 10, 2006, editorial page. *See also* remarks on Feb. 14, 2007, by Justice Anthony Kennedy. judiciary.senate.gov/print_testimony.cfm?id=2526&wit_id=6070.

25. *See supra* note 12.

26. The conservative *Wall Street Journal* columnist Daniel Henninger makes the same point about the Supreme Court, opposing TV broadcasts of its hearings: "TV of its nature would surely diminish the Court. . . . to enter the Supreme Court and encounter the place, the people and its essential purpose is to feel carbondated to 1789. Though often maddening, its majesty remains intact." WALL ST. J., Apr. 28, 2006, at A14.

27. Citing Justice John Paul Stevens's speech explaining that while he strongly disagreed with the policy that his decision in the *Kelo* case upheld (Kelo v. City of New London, 125 Sup. Ct. 2655 (2005)), present law requires this result, so that any change in the policy must come from the legislature.

28. Comments by panelist Judge Deanell Reece Tacha, moderator John Siegenthaler.

29. Comment by panelist Joseph diGenova.

30. Comment by panelist Judge Deanell Reece Tacha.

31. Audience member Herbert Dixon told an anecdote about an editorial that falsely accused a judge of releasing an offender. Even after the chief judge called the editor, and then went on television to explain the decision, the newspaper refused to correct the editorial or respond in any way.

32. For instance, in the following resolutions:

February 1992: RESOLVED, that the American Bar Association reaffirms its support for citizenship education in elementary and second-

ary schools, including, as essential components, study of the Constitution, the extended Bill of Rights and law generally . . .

August 1992: RESOLVED, that the American Bar Association urges judges, courts, and judicial organizations to support and participate actively in public education programs about the law and justice system, and further, that judges be allotted reasonable time away from their primary responsibilities on the bench to participate . . .

February 1995: RESOLVED, that the American Bar Association (1) commits its support for public education to foster understanding of the Constitution . . . and advance this goal of civil literacy as fundamental to the continued functioning of the United States as a constitutional democracy and a nation under the rule of law; and (2) urges the legal profession and the organized bar to engage the support of policy makers, educators, the media and the general public to further this goal through implementation of the national education goals and voluntary standards for civics education at the elementary and secondary school level.

33. Current materials relating especially to a public understanding of the role of judges and the legal system include LAW AND THE COURTS, vol. I: *The Role of Courts* (2000); vol. II: *Court Procedures* (1998); and vol. III: *Juries* (2001). Another pamphlet is PUBLIC EDUCATION AND THE COURTS (2003). And a series of Dialogue pamphlets (DIALOGUE ON *BROWN V. BOARD OF EDUCATION* (2003), DIALOGUE ON THE AMERICAN JURY (2005), and DIALOGUE ON THE SEPARATION OF POWERS (2006)) instructs lawyers and judges on how to address these topics with community groups or schools. The Division estimates that a million students and members of the public have participated in Dialogue programs since 2002.

34. *See* AN INDEPENDENT JUDICIARY, http://www.abanet.org/govaffairs/judiciary/r6b.html.

35. Personal communication from Executive Director Mabel McKinney-Browning (June 8, 2006). The cosponsor of "Conversation," Court TV, will air a show about it.

36. Letter from the Division's Associate Director Howard Kaplan to Keith Roberts (June 13, 2006).

37. The Coalition for Justice coordinates various ABA programs for improving the justice system on a state and federal level and sponsors numerous public programs in partnership with civic groups. *See* http://www.abanet.org/justice/description.html.

38. *E.g.*, the ABA's Coalition for Justice and Ad Hoc Committee on State and Local Justice Initiatives have jointly produced a pamphlet in the ABA's Roadmap series, INDEPENDENCE OF THE JUDICIARY (1998). The Judicial Division Lawyers Conference and the Special Committee on Judicial Independence produced another 1998 pamphlet, RESPONSE TO CRITICISM OF JUDGES, a model plan for responding to criticism that specifies when to respond, and how bar association response programs should operate. The ABA House of Delegates adopted this plan as its policy in 1998.

39. *See* AN INDEPENDENT JUDICIARY, "Recommendation," http://www.abanet.org/govaffairs/judiciary/r6b.html.

40. The American Judicature Society, for instance, has created a Task Force on Judicial Independence and Accountability, consisting of prominent judges, attorneys, and business leaders, to "monitor and respond to attacks on the judiciary. It will focus on the need for judges to be able to make decisions and rulings independent of outside influence. At the same time, the task force will reiterate the need for judges to be held accountable for their actions, and will consider the current mechanisms in place to handle such a review." http://www.ajs.org/cji/cji_task_force.asp.

41. Michael Hyman, president of the Chicago Bar Association, personal communication.

42. *See supra* text accompanying note 33.

43. Apart from the discussion of whether or not judges should defend or explain their decisions, the Defining the Judge Conference devoted relatively little attention to this aspect of public education.

44. The Judicial Conference on Sept. 19, 2006, issued new rules on federal judicial conduct, pursuant to the Sept. 2006 report by what is known as the Breyer Committee, *Implementation of the Judicial Conduct and Disability Act of 1980: A Report to the Chief Justice*, www.supremecourtus.gov/publicinfo/breyercommitteereport.pdf. In addition, the ABA's House of Delegates adopted revisions to the Code of Judicial Ethics at its Feb. 2007 meeting.

45. *E.g.*, the call for creating an Inspector General, H.R. 5219, the Judicial Transparency and Ethics Enhancement Act of 2006, introduced by Rep. F. James Sensenbrenner Jr. (R-WI) and introduced as S.2678 in the Senate by Sen. Charles E. Grassley.

46. In the case of Judge Joan Lefkow, the murder of her family was apparently carried out under the mistaken belief that she was exercising discretion when she reversed an earlier ruling pursuant to an order from the Court of Appeals. *See* Wilgoren, *supra* note 3. This horrible act was purely personal in nature, however, and based as it was on misunderstanding, it is difficult to see how it would affect judicial decision making in other cases.

47. For a graphic recent encounter with such a system, consider the experience of Judge Deanell Reece Tacha in Albania in 1992. She and Judge Patrick Higginbotham of the 5th Circuit were asked what U.S. judges would do with a ban on ethnic political parties that conflicted with a constitutional guarantee of freedom of assembly. The ban, they said, would be ruled unconstitutional. But if the President didn't agree? "Yet again we cavalierly responded 'tough.'" Then someone asked, "'But what if the military came after you?' Judge Higginbotham and I looked at each other. . . . In that moment, both of us experienced a new appreciation for the history and tradition of a judiciary where judges need not fret over the personal physical repercussions of a particular decision." Deanell Reece Tacha, *Federal Judicial Independence Symposium: Independence of the Judiciary for the Third Century*, 46 MERCER L. REV. 645, 658 (1995).

48. California's Chief Justice Ronald George describes how his court's upholding an initiative that limited legislators' terms and ordered a 38 percent reduction in the legislative budget led to legislation to reduce the California court budget by 38 percent, *Brennan Lecture: Challenges Facing an Independent Judiciary, 80 N.Y.U. L. Rev. 1345, 1348 (2005)* As Justice O'Connor remarked about another threat, "Given the political climate, and the tenuous grip many people have on the concept of judicial independence, when I hear a threat to cut judicial budgets, even when it is only about cameras, I get really worried." *See infra* note 51, at 6.

49. Quoting the initiative's sponsor, Jail4Judges, at www.jail4judges.org.

50. *See* materials on file with the Judicial Division, American Bar Association.

51. Sandra Day O'Connor, *Remarks on Judicial Independence*, 58 FLA. L. REV. 1, 4 (2006). Justice O'Connor noted that the courts applied the legislation as written, although not as Mr. Delay thought it should be read.

52. I suggest this notwithstanding Judge Richard Posner's powerful argument that the Supreme Court (as distinct from lower federal courts) is fundamentally engaged in political decision making. *See* Posner, THE SUPREME COURT, 2004 TERM: FOREWORD: A POLITICAL COURT, 119 HARV. L. REV. 31 (2005). In most if not all instances, even Supreme Court rulings can be changed legislatively, as Posner notes with respect to *Kelo*, p. 98. As he also notes, unpopular rulings can be overcome through limitations and work-arounds. Hence, even *Roe v. Wade* has become something of a dead letter, p. 78 and note 131.

53. As Judge Richard Posner claimed recently, "viewed realistically, the Supreme Court, at least most of the time, when it is deciding constitutional cases is a political organ . . .." *See id.* at 35. Judge Posner dislikes the term "activist," preferring "aggressive," *see id.* n.28.

54. Roe v. Wade, 410 US 113 (1973); Kelo v. City of New London, 125 Sup. Ct. 2655 (2005). *See generally* MAX BOOT, OUT OF ORDER (1998). *See, e.g.*, the letter to the *Wall Street Journal*, Oct. 10, 2006, at A15, from Edward H. Stewart Jr. in response to an op-ed article by Sandra Day O'Connor, *The Threat to Judicial Independence*, WALL ST. J., Sept. 27, 2006.

55. *See* George, *supra* note 48 at 1389 **.** In 1938, frustrated by the Supreme Court's repeated rulings against his New Deal legislation, he

proposed to add a new justice to the Supreme Court for every sitting justice over the age of 70. Historian William Leuchtenburg recently wrote that this "touched off the greatest struggle in our history among the three branches of government. It also triggered the most intense debate about constitutional issues since the earliest weeks of the Republic." William E. Leuchtenburg, *Showdown on the Court*, SMITHSONIAN MAGAZINE (May 2005). http://www.smithsonianmag.com/issues/2005/may/showdown.php.

56. Judge Posner notes that "judicial activism" has become "a portmanteau term of abuse for a decision the abuser does not like." *See supra* note 52 at 54 n.74.

57. Quoted by Stephen Breyer, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 19 (Alfred A. Knopf, 2005).

58. THE FEDERALIST NO. 78 (Alexander Hamilton), quoted at http://www.fed-soc.org.

59. "In recent years, however, it has been shown that legislation alone will not accomplish civil justice reform, because partisan judges will reject such laws. Legislatures and governors ought to settle for nothing less than changing the means of judicial selection to lessen the risk of such pernicious judicial partisanship." FEDERALIST SOCIETY, JUDICIAL WHITE PAPERS, THE CASE FOR JUDICIAL APPOINTMENTS (2003).

60. Judith Shklar caustically notes that "rule of law" is so often and variously used that it "may well have become just another one of those self-congratulatory rhetorical devices that grace the public utterances of Anglo-American politicians." Judith N. Shklar, *Political Theory and the Rule of Law*, *in* THE RULE OF LAW: IDEAL OR IDEOLOGY? (Allan C. Hutchinson & Patrick Monahan eds., 1987), quoted in Kleinfeld, *supra* note 9. Its corollary, judicial independence, seems to fall into the same category.

61. FEDERALIST SOCIETY, JUDICIAL WHITE PAPERS, THE CASE FOR PARTISAN JUDICIAL ELECTIONS (2003).

62. *See* D. Arthur Kelsey, *The Architecture of Judicial Power: Appellate Review and State Decisis*, JUDGES' JOURNAL, forthcoming; also, VIRGINIA LAWYER (Oct. 2004). Note also the President's use of "signing statements" to evade the prevailing architecture. *See* ABA Task Force on Presidential Signing Statements and the Separation of Powers Doctrine, *Report*, http://www.abanet.org/op/signingstatements/aba_final_signing_statements_recommendtion-report_7-24-06.pdf.

63. These positions may be seen in the proposed legislation described by Agrast, *supra* note 7.

64. Kelo, n. 27 supra.

65. This would follow from the "originalist" approach to constitutional interpretation associated with Justice Scalia. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Princeton University Press, 1997).

66. Christopher S. Yoo, Steven G. Calabresi, & Anthony Colangelo, *The Unitary Executive in the Modern Era, 1945-2001*," http://law.vanderbilt.edu/faculty/pubs/yoo-unitaryexecinmodern-era.pdf, p. 7. The cited article references much of Yoo's writing on this subject. On the war powers, *see* Yoo, *War, Responsibility, and the Age of Terror*, STANFORD L. REV. 2004, http://ssrn.com/abstract=616062.

67. Among other examples, Yoo points to the Korean and Vietnamese Wars as examples of presidents making war without a congressional declaration of war. In both instances, Democratic presidents were supported by Democratic majorities in the House and Senate. *See* Yoo, *War, Responsibility, and the Age of Terrorism*, *supra*.

68. A series of Justice Department memoranda based on Yoo's position have advised President George W. Bush that he may construe the Geneva Convention, so as to disregard it; he may authorize the CIA to torture prisoners or "render" them to countries that do so; he may detain and hold citizens indefinitely, without habeas corpus or counsel; he may pursue surveillance on what he unilaterally determines to be foreign subjects without obtaining warrants from the Foreign Intelligence Surveillance Act (FISA) court; and he may, through signing statements or otherwise, interpret, enforce, or refuse to enforce the laws, such as those prohibiting torture, as he prefers. *See*, *e.g.*, Memorandum Opinion for the Deputy Counsel to the President, dated Sept. 25, 2001, http://www.usdoj.gov/olc/warpowers925.htm. For a discussion of Yoo and the Justice Department memoranda generally, *see* Louis Fisher, *Lost Constitutional Moorings: Recovering the War Power*, 81 IND. L.J. 1199 (2006), 1234-44.

69. *Hamdan*, 126 S. Ct. 2749 (2006), ruling that the military tribunals established by President Bush violated the Constitution; *Hamdi*, 542 US 507 (2004), ruling that a U.S. citizen cannot be denied habeas corpus by the president's claim that he is an enemy combatant.

70. United States Military Commissions Act of 2006, Chapter 47A, Title 10, US Code.

Embracing Public Access in the Age of Internet-Inspired Privacy Concerns

By Bruce W. Sanford

If the tension between free speech and privacy is as old as the republic, then the concern that new technology will tip the balance at the expense of privacy is only a few years behind. First came cheap printing presses, then the telegraph, then radio, then television. Back in 1928, Justice Louis Brandeis warned in his famous dissent in *Olmstead v. United States* that "subtler and more far-reaching means of invading privacy" were becoming available. Justice Brandeis, meet the Internet.

So it should come as no surprise, even with a blackberry vibrating on your hip, that free speech and privacy are not as compatible as, say, your Macintosh and your i-Pod.

As we assess the effects of the Internet on access to courtrooms and court files, it is helpful to recall the historical nature of this tension and to keep our discussion rooted in fundamental principles, not techno-fears.

Just as technology can invade—who hasn't been jarred by googling his own name and seeing what turns up?—it can also enlighten. This February, I brushed up against webcasting, ironically, in the oldest appellate court in the western hemisphere, the Massachusetts Supreme Judicial Court. The occasion was the appeal in a libel suit brought by a state trial judge against the *Boston Herald*—a newspaper, I may mention, that was read by Justice Brandeis. It was standing room only at the John Adams Courthouse, and yet my colleagues back in Washington and reporters in the *Herald* newsroom could follow the proceedings live on the Internet. What a gas!

Such technological windfalls deserve mention because I worry that the explosion of online databases, sophisticated search engines, and instant posting of news and video content may be souring public opinion on access to that mother's milk of democracy: information. Indeed, in my representation of media companies all across the country, I have detected a perceptible shift toward restricting access in the name of privacy.

Back when a reporter—or a concerned citizen—had to haul herself down to the courthouse to look at a filing or view a hearing, it seemed less difficult to sell judges and court administrators on the benefits of access. But now that the same information can be attained with the click of a mouse, by a reporter—or, shock, a blogger!—in her pajamas, our fealty to public access seems less absolute.

But what, really, has changed? If we believe that court documents and court proceedings belong in the public domain, we cannot plausibly attach a series of conditions to their release. We cannot argue that they should be public, but only, ahem, if they aren't searchable, downloadable or otherwise really accessible with the modern tools of journalism.

Over the years, courts have achieved a delicate balance between privacy and freedom of information, but it has been anchored to a principle. And that principle is fairly straightforward. It cannot be altered by emerging technologies or a shifting political climate. If we are willing to permit access to court documents and legal proceedings, we cannot get trapped in an endless debate about what kind of access we will permit. If courts, under proper judicial standards, make certain records and hearings public, they should take advantage of new technology to make this access as simple, immediate, and meaningful as possible. ■

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Protective Orders—A First Amendment Lawyer's Perspective

By Kelli L. Sager

In virtually every case where there has been a significant amount of media coverage, the court is faced at some point with the question of whether to issue a protective order. Sometimes, such an order intends only to limit the public dissemination of very specific, confidential information obtained in discovery. An order preventing parties from revealing bank account numbers obtained through discovery, for example, is unlikely to raise eyebrows, or to be the subject of any media challenge. But much more troubling, and unfortunately all too common, are orders that broadly restrict the parties' ability to share or discuss information about an underlying case.

These kind of broad orders raise serious constitutional concerns, not only because they directly affect the rights of those who are prevented from speaking, but because they also affect the First Amendment rights of the public and press to receive information about court proceedings and records. Consequently, it is not surprising that courts have held on numerous occasions that broad gag orders and protective orders are improper, unless there has been a clear showing that the order is necessary to protect a party's rights.

Parties who have an interest in secrecy often misstate both the need for and benefit of broad-based protective orders. The justification offered for such orders often arises from the fallacy that one side or the other will be prejudiced by pretrial publicity—even though the Supreme Court, federal courts of appeals, and state appellate courts repeatedly have rejected the notion that jurors are likely to be unduly influenced by even intense media scrutiny. The assumption that all publicity is prejudicial also represents a significant change from the historical roots of the trial-by-jury system, which was intended to provide a mechanism for review by people who at least arguably were knowledgeable about the underlying circumstances and the people involved in a particular dispute. Somehow, "impartiality" has become synonymous for "ignorance," in the minds of these proponents, even though there is no historical or empirical basis supporting such a concept. And the demand for broad protective orders to protect against publicity ignores the many other mechanisms, including voir dire and careful instructions to the jury that exist to ensure a fair trial.

An even more practical reason for courts to be skeptical about a party's request for a broad protective order is that such orders typically have very little effect on the media's interest in or coverage of a high-profile case. Someone involved with the case—whether it is the prosecutor or defense lawyer, corporate spokesperson or individual plaintiff, witness or family member—is likely to have an interest in getting information out, so leaks inevitably occur. In one infamous example in the O.J. Simpson case, Judge Lance Ito's discussion in chambers with the parties about a possible protective order became known to the media almost instantly, and a challenge was mounted by the press before the ink had barely dried on the "confidential" proposed order. The information that ultimately is provided to the public may be less accurate, however, since it is more difficult to verify "leaked" information that cannot be checked against publicly available records, and an opposing party may feel constrained from responding. Moreover, once a "leak" happens, attempts to find out who violated the order simply distract from the proceedings at hand and can consume untold amounts of judicial time and resources, usually to no productive end.

A carefully crafted, limited protective order may serve a purpose in a given case. But such examples are the exception, not the rule. In the ordinary case, the spectrum of options available to a trial judge are more than enough to protect the parties' interests without resorting to draconian restrictions on competing constitutional rights. ■

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Irreverent for a TV Producer to Admit but TV Is Irrelevant

By Peter Shaplen

In the second half of the twentieth century television was a constant in our lives, documenting benchmarks, and often determining what was real and important.

But television's Achilles' heel is that it is, pound for pound, just about the dumbest piece of furniture we own. A box with tubes, a console with transistors and now a plasma screen, it remains totally dependent on someone sending it a signal and programming its content.

I believe that we have entered a transformative digital age where audiences reject what other's program for them and where watching passively has been replaced by vitality.

Whether it is a cell phone picture of Saddam's last moment on the gallows, the inappropriate outburst by a stand-up comic, or pictures from the front lines in Iraq—each was taken by a private individual, not a newsperson, and disseminated quickly, virally, and worldwide in an instant.

Welcome to the ubiquity of the digital age where content is streamed or downloaded and played on devices from screens to iPods to PCs.

Courts are not immune. I recall a visitor at the Scott Peterson trial who snapped a cell phone picture in court prompting allegations of a media violation of the court's order. However, it wasn't taken by the press but by a guest of the court! The presence of available, easy-to-use technology and a commonplace, almost second nature reaction to snap and capture every component of daily life made the opportunity irresistible for the individual.

In this transformative era, we live amidst images on a daily basis, and some of it from surveillance cameras to cell phones and PDAs is being proffered as legal evidence. One recent posting on YouTube purported to capture an alleged crime even before the paperwork was filed at the court!

Many jurists assert 'their ruling speaks for itself,' but in an environment where increasingly many individuals have already seen the images, it is reasonable to expect they will demand transparency from the court as well.

Indeed, video already has a toehold *inside* the courtroom thanks to Telepresence that displays life-sized images in high definition on video screens.

Video in this digital age is available live, on demand, archived, catalogued, sliced and diced in every way and language. Video streamed and downloaded, viewed on computers, Blackberries, iPods and cell phones is making contemporary television seem as arcane as sepia colored rotogravure prints.

Admittedly video is raw—often unedited, unprocessed but certainly revelatory and real. Video isn't about what some one else produces or edits but what our contemporaries think is worth seeing, capturing, and sharing.

The audiences today are myriad and niched, but as video connoisseurs they cannot, indeed will not, be denied personal and total access to their world. Unless they can see, assess, and consider it for themselves, they will find institutions that resist irrelevant and outdated, viewed with skepticism and denigrated in importance. Courts may be resistant, admittedly many will be uncomfortable, but it seems inevitable and irresistible. The discussion of whether courts will embrace TV has been upended by this question: will courts choose to be accessible as citizens demand and expect from all their institutions, or will the courts simply be deemed Jurassic? ■

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Florida Judge Shouldn't Be Courtroom Cameras' Poster Child

By Jerrianne Hayslett

Broward County, Florida, Circuit Judge Larry Seidlin is considered a judicial embarrassment by many other judges. They want to retreat behind the closed doors of their courtrooms from Seidlin's week-long Anna Nicole Smith hearing, replete with digressions, philosophical waxings and weeping, and make Seidlin the poster child for why court proceedings shouldn't be televised.

They shouldn't though.

Rather than ban cameras, judges should welcome them. As retired San Diego Superior Court Judge William Mudd said in the wake of the 1995 O.J. Simpson verdict and who permitted camera coverage of the 2002 Danielle van Dam murder trial of David Westerfield, if judges are competent, they shouldn't fear cameras.

Were cameras the norm, they would lose their voyeuristic appeal and novelty. Californians Aware General Counsel and open-government expert Terry Francke, says that "... to the extent you deliberately make camera access rare, it will ... have a greater impact on all in the room than if courts were to say, 'Cameras. They're here. They're staying; get used to it.'"

Los Angeles Superior Court Judge Larry Paul Fidler, in ruling that cameras could cover the murder trial of music producer Phil Spector, said it's time to get over the "fear of cameras" that has gripped judges since the Simpson trial made an unwilling celebrity of his fellow judge, Lance Ito.

Rather than Seidlin, the courtroom camera coverage poster child should be a Wisconsin high-profile trial of the horrific torture and murder of a young female photographer.

"The Steven Avery trial at the Calumet County Courthouse in Chilton is a good lesson in how the criminal justice system handles high-profile cases," editorialized the Manitowoc Herald Times Reporter in February 2007. "It is in sharp contrast to the image most television viewers have of what goes on in courtrooms. ... We have been broadcasting live video from the courtroom on our Web site (http://www.htrnews.com). There is no narration or talking heads to tell you what you just saw. Just cameras set up in the courtroom to capture the sights and sounds of the trial as they happen."

Court TV Managing Editor Fred Graham says Court TV streams its coverage of many trials onto the Internet every day without incident.

And in New York state, where televising court proceedings is banned, a Poughkeepsie newspaper quoted a county prosecutor in Indiana where cameras were recently permitted as saying, "The more the public knows about how we do our jobs, the better off we all are in government. We have nothing to hide."

Neither do most judges. And cameras, appropriately installed and operated—preferably by the court—would enable the public to see that. Or would they rather that Seidlin remain the indelible—and only—image the public has of a judge presiding over a courtroom?

And as for Seidlin, shouldn't people be allowed to see him and decide for themselves if he's the kind of judge they want presiding in their courts? ■

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How Your Court Benefits from a Public Information Officer

By David Sellers

The governor will not visit a school without her public information officer (PIO) by her side. The director of public safety is always certain his PIO is at a crime scene before the media arrives. The secretary of transportation depends on his PIO to shape and manage the agency's message. How about the chief judge of your court?

While it is important for judges to maintain an appropriate relationship with local reporters, most do not have the time, training, or inclination to work with the media on an ongoing basis. That's where the PIO can help. The best PIOs have one ear turned to the court and its inner working and the other turned to the press so as to stay on top of what is on its radar screen. Many PIOs are former journalists, including some who have covered the very court in which they now work.

Being a PIO is time-consuming, and the work is demanding. The work should be performed by individuals with top-shelf oral and written communication skills. PIOs are trained professionals and not simply misplaced employees from the clerk's office who need a place to land while they await retirement.

While court PIOs perform different duties, most handle media relations as their primary responsibility. The duties range from fielding routine inquiries about caseload and dockets to managing all the logistics related to a high-profile proceeding. A PIO may track media coverage, prepare judges and court executives for speaking with the media, and write press releases. Some PIOs manage publications, oversee Web site content, handle internal communications, and develop educational outreach programs.

Most importantly, a PIO can promote good relations between the court and the media. This is an invaluable bridge to build, and one that every court should desire. Justice Felix Frankfurter said, "The public's confidence in the judiciary hinges on the public's perception of it, and that perception necessarily hinges on the media portrayal of the legal system." (from Liva Baker's biography *Felix Frankfurter*, p. 218 (1969).

While PIOs are an essential component of an effective court management and communication team, they occupy very different positions than their counterparts in the executive and legislative branches. This is an important factor, particularly for those judges who may not initially be comfortable with the idea of working with a PIO. Court PIOs do not "spin" the news, interpret or expand on judges' opinions, or engage in campaign activities. Court PIOs need to be a good fit for the unique culture that permeates courts at all levels. They also need to understand the parameters of their jobs. Not all communications professionals will be happy working as a court PIO. And, of course, a court needs to let its PIO into the inner sanctum and trust her as part of the management team.

In the end, the work can be uniquely rewarding. Court PIOs typically are present when decisions are made that impact their communities. It is the PIO's job to assist the press in getting it right. Judges, court staff, media, lawyers, and the public all benefit when this occurs. ■

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Commenting on Pending or Impending Matters

By Marla N. Greenstein

Ethics do not merely proscribe, they also prescribe. When faced with a phone call from a news reporter, too often judges rely on the proscriptions of the Code of Judicial Conduct and not its underlying prescriptions. While it is true that judges should not comment on pending proceedings, especially those pending in their own courts, judges have an affirmative obligation to educate the public about court process and the role of the courts in our society. A call from a news reporter is often an opportunity to fulfill that ethical obligation to teach, to educate, and to reach out to the community. It is one of those instances where many judges tend to hide behind the Code of Judicial Conduct rather than to fully embrace the larger obligations implied in the Code.

To this end there are several good resources for judges seeking guidance. Many appear in articles in this issue of the Judges' Journal. Specific ethical guidance in this area is available from state advisory opinions. Whether speaking to civic groups or responding to questions from the press, these diverse opinions guide judges on a steady course. Rule 2.10 (A) of the newly adopted 2007 ABA Model Code of Judicial Conduct retains the 1990 Code language (Canon 3B(9)) that prohibits any public statement that might "reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court" and continues to prohibit nonpublic statements that might "substantially interfere with a fair trial or hearing." The new Code also importantly retains the positive statement that allows judges to "explain court procedures." (Rule 2.10 (D))

The cautions for a typical judge handling a high-profile case are straightforward. Discussions with the media about pending cases should be confined to where the proceeding is in the course of a legal matter's procedural life. Questions about process can be answered; questions about witness credibility, likely outcomes, and comparisons with other cases are to be avoided. And what about commenting on cases pending before another judge? The same standards apply. Public confidence in the judicial process reasonably requires judges to withhold comment on their colleagues' decisions outside of the normal court process while a matter is pending.

Advisory opinions from various states agree that judges can and should discuss procedures in the current matter but not tactics or trial strategies. A judge can explain basic legal concepts but should not predict the application in the pending matter. A judge can outline the issues that will be presented in court that day as described by the lawyers, but should not indicate the strength or weaknesses of either side's positions. And finally, a judge should not explain what the judge's decision really meant outside of the written decision itself. Rarely do explanations not add to or reinterpret the original writing.[1]

But what is a matter that is not "pending" but "impending"? The Codes of Judicial Conduct continue the restrictions for "impending" matters as well. "Impending" is not meant to include every possible social or community issue that could come before the courts. Rather, impending matters are those that if they continue on their regular course will end up in a court. Examples of impending matters include criminal arrests, indictments, or official investigations. In short, judges should not comment any differently about an ongoing criminal investigation than a criminal case pending in a courtroom. In each situation, judges may and should describe the criminal process, the normal path of a case, and the role of the judge should the matter end up in a court.

Confidence in the impartiality of our courts is a hallmark of the American justice system, and maintaining that confidence is an important goal of the Code of Judicial Conduct. But public confidence also requires communication with the public. Our vehicle for that communication is largely through the media. It is only through responsible communication with the media in a consistent and ethical way that public confidence will be enhanced. A greater understanding of how our courts work is an important component of that enhanced confidence. ■

Endnotes

1. See, for example, Tennessee Advisory Opinion 89-13; Georgia Advisory Opinion 60 (1984); and a comprehensive look at the topic in "Extrajudicial Speech: Charting the Boundaries of Propriety," 2 *Georgetown Journal of Legal Ethics* 589 (1989) by William G. Ross.

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Court Transparency in the Former Yugoslavia

By Jerrianne Hayslett

A common perception in the United States about a number of Central and Eastern European countries in general and their courts in particular is of closed and secretive systems emerging from the communist and totalitarian influences of years ago. Some of those systems are becoming more open, thanks in part to U.S. A.I.D.-funded programs and individuals in those regions who realize the importance of public access to and the understanding of their countries' legal systems. This may be occurring in Serbia, in small part, as a result of recommendations I made in 2003 as court media advisor to the Belgrade District Court to include a public information function in its newly created War Crimes and Organized Crime departments, and my association with the War Crimes Chamber's first spokesperson, Sonja Prostran.

Prostran, now a judge with the Second Municipal Court of Belgrade, has become a champion of court transparency in all courts in the former Yugoslavia, rather than simply in war crimes proceedings. Her advocacy on this issue has helped to significantly improve court-media and court-public relations. Following is an account of Prostran's evolution as an advocate for court openness along with highlights from a report on the subject that she co-authored with Serbian broadcast journalist Milos Milić and subsequently presented at forums in Serbia and in the United States.

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Prostran's Epiphany

Serbian Municipal Court Judge Sonja Prostran's epiphany about the need for the public to be able to witness court proceedings came early in her legal career as a twenty-two-year-old University of Belgrade law student observing a five-defendant murder trial. The country, she recalls, was in turmoil over whether to abolish a seldom-imposed death penalty.

The first defendant, the ringleader of the group standing trial, was condemned to death. The year was 1996 and it was only the second time since 1971 that a death sentence had been imposed. The other case was in 1992.

According to Prostran, "There was a public debate over the death penalty many years earlier. Twenty-one years went by without its imposition when all of a sudden just four years later someone was sentenced to death again." Recalling the defendant's lack of remorse and callous, cold-hearted demeanor, she said, "If the public could have seen his behavior in the courtroom, there would have been no doubt about whether he deserved to be put to death."

But that was not possible; except for the few relatives and other observers who squeezed into the Belgrade courtroom, Serbian courts did not—and still do not—allow camera coverage or audio recording of court proceedings. Neither did courts make verbatim records or allow public access to court files, policies that have since changed to some degree.

"That was the first time it occurred to me that it would be good to show pictures—moving pictures—from the courtroom," Prostran says.

The War Crimes Department

It was not until several years later, after she had graduated from law school, passed the bar, and held various staff positions in Belgrade's municipal and district courts, that a door opened that would give her a voice about the situation. The opportunity arose just a few months after she began serving as secretary general of the Belgrade District Court in 2003. In October, the District Court's presiding judge designated her to be the official spokesperson for the new War Crimes Department, created to handle cases related to the early and mid-1990s war in Bosnia-Herzegovina. The designation resulted after a media-relations report recommended creating a public information function for the War Crimes and Organized Crime departments, both of which were established within months of the March 2003 assassination of Serbian Prime Minister Zoran Djinić.

"I'm not happy about this appointment," Prostran announced at an orientation with her newly designated fellow spokespersons for the War Crimes prosecutor's office and the Organized Crime department and prosecutor's office. "But since I have been given this responsibility, I will do the best job I can."

The task was daunting. Not only was she already putting in long, arduous hours as the District Court's secretary general, she had to learn who the media covering the courts were and

establish contact with them. An additional challenge was location. Prostran was headquartered at the Belgrade Palace of Justice while the War Crimes cases were to be heard some six kilometers away at the newly renovated Military Courthouse (now called the Special Courthouse), and her only means of transportation was taxis or walking.

The Internet became her ally. She used it to make and maintain contact with journalists covering war crimes proceedings via e-mails and news releases. She also created a Web site and developed informational brochures. Prostran also made a number of trips to the International Crime Tribunal for the Former Yugoslavia (ICTY) in The Hague. On one of those trips, only seven months after assuming her new duties, she collaborated with War Crimes Prosecutor spokesperson Bruno Vekarić and a contingent of journalists who covered war crime cases.

Advocating for Courtroom Openness

Upon returning to Belgrade from her latest trip to The Hague, she made a presentation to a large contingent of officials from Serbian courts, the United Nations, the U.S. Embassy, and a number of nongovernmental organizations (NGOs) with interests related to former Yugoslavia war crimes. In her presentation, she advocated for camera coverage, not just of war crimes trials, but of all Serbian court proceedings. She followed her presentation with a press conference in which she reiterated her recommendation.

With the recent history of regional conflicts still fresh in people's minds and their mistrust of the Serbian courts, she said, it was imperative that they be able to observe proceedings and judge the fairness for themselves. And, given the universal constraints of distance, work schedules and inadequate courtroom seating that face large numbers of people who would like to attend the trials, Prostran thought that the best way to provide access to court proceedings was through the media's cameras.

Less than two years later, though, Prostran was appointed to the Second Municipal Court of Belgrade. Although she presided over criminal cases, they were not war-crimes related and she no longer spoke for the District Court's War Crimes Department in an official capacity.

She had, however, become a recognized expert on war-crimes courts and human-rights issues. As a result, the media and officials in Serbia's legal community, various nongovernmental agencies, the United Nations, and the U.S. State Department continued to seek her counsel. That led Prostran to collaborate with veteran Serbian broadcast journalist Milos Milić, who had covered war crimes cases in The Hague, including the trial of former Serbian President Slobodan Milosević. Their work led to an investigation of and report on the state of court transparency in the former Yugoslavia. The report, entitled "Transparency of Trials for Breaches of International Humanitarian Law in the Region of Former Yugoslavia," was commissioned by the Youth Initiative for Human Rights, a Belgrade, Serbia-based regional nongovernmental organization founded in 2003 by young activists in the countries and territories of the former Yugoslavia.

The Report on Court Transparency

Based on interviews with representatives of local legislative bodies, NGOs monitoring war crimes proceedings, the media and media associations, and judges and parties to the proceedings, Prostran and Milić examined the openness of war-crimes court proceedings in Serbia, Kosovo, Croatia, and Bosnia-Herzegovina, and analyzed these countries' and territory's general criminal procedure codes and the measures their courts have taken to improve public access.

After publishing their paper on the former Yugoslavia, Prostran and Milić presented their findings at legal, media, and international relations forums in the United States (notably, at the National Judicial College's Donald W. Reynolds Center for the Courts and the Media at the University of Nevada, Reno; the Nevada Council for International Relations in Reno and Las Vegas; and at Pepperdine University Law School in Malibu, California).

They found that Croatia has by far the most open and publicly accessible legal system, one that permits camera coverage of proceedings. Trial monitors said the presence of electronic media did not negatively affect proceedings, and victims' representatives stated that they believed cameras had a positive impact. In fact, one representative was quoted as saying, "Judges are more professional and tend to respect the rights of all parties involved while cameras are in the courtroom."

Unlike the United States where high profile trials have tended to become a form of entertainment, Prostran told a gathering of the Nevada Council on Foreign Relations in Las Vegas that lawyers do not grandstand before courtroom cameras. "They would lose credibility if they did," she says. "They would not be believed."

Although Slobodan Milosević's trial at the International Criminal Tribunal for the Former Yugoslavia in The Hague was televised, Prostran says, "Other than Milosević (delivering lengthy speeches, grandstanding, and using delay tactics), proceedings were quite routine. No one tried to act out or play to the cameras."

Milić, whose Serbia-based broadcast network, B92, aired Milosević 's trial between five and six hours every day the trial was in session, says the decision was made to do so, "so people could see that the tribunal did not eat him alive, and they could know what crimes occurred."

The biggest mistake of that trial, he says, was allowing Milosević to defend himself. Despite his antics,

"That did not stop us from showing a fair representation of Milosević and of the crimes he committed in the former Yugoslavia." "But," says Prostran, "There is still a great state of denial in all countries of the former Yugoslavia. People deny that any such atrocities occurred."

"The shock of seeing that trial completely changed the minds of the people who saw it," says Milić . "More than 70 percent of the people [in Serbia] were in denial about Srebrenica [site of the July 1995 massacre of more than 8,300 Bosnian Muslim males], and that was reduced to 40 percent in just a matter of days."

Not only is the visual impact of watching war crime trial proceedings more compelling, Prostran says that trial testimony often becomes the only historical record of the crimes because, unlike war crimes committed during World War II, no written records were kept, so no paper trails exist. According to Prostran, "There is no evidence in hard copy, so they must rely on testimony."

Prostran also believes that the public deserves to see the defendant and victims and to hear their testimony. "But until they come before the court, they have spoken only to the police, the prosecutor, NGOs, and the Red Cross."

Croatian courts, which permit camera coverage and unrestricted access to proceedings and case files, lead courts in other areas of the former Yugoslavia in openness both by law and in practice, according to Prostran and Milić's findings. "Because of that transparency," Milić says, "public perception is changing. Initially, nine out of ten people said no Croats committed war crimes. Now, many acknowledge that, yes, they did."

The next most open court system is Bosnia, which does not allow media cameras in its courtrooms but makes and disseminates its own audio/visual recordings and has open courtroom files. "They have large, proactive public information officers who went to every village and explained war crimes court proceedings to the people," Prostran says. "In the early days, witnesses were considered traitors and would not testify. The defense always violated the law, which was also true in Serbia, by leaking classified documents and exposing protected witnesses. As a result, the decision was made to open the courts and let the public view the proceedings."

Kosovo is the least open, they found.

"Judges are afraid," Prostran says. "They would not talk to the media. Recording is allowed by law, but judges will not allow it, except under the most restricted conditions. And there are security issues. Judges are afraid for their safety and have bodyguards, yet there have been no incidents of judges being attacked."

Public access to court files in Kosovo is not required by law, Prostran adds. They are open to NGOs, such as United Nations officials, but not to the media.

While Serbian courts technically allow camera coverage, none has occurred so far, she says. "In order to broadcast a proceeding or to make recordings available, the media has to get the approval of the president of the Supreme Court. By law, the president of the Supreme Court also must obtain consent from all participants in the proceeding—the prosecutor, the defense and the council of judges (three judges who preside over the proceeding), and that has never happened."

The greatest concern about televising cases, she says, is the safety of witnesses. "That is very sensitive." For instance, she explains, "We (Serbia) had to sit down with officials in Bosnia and Croatia—people we, figuratively, were fighting with just a few years ago—and work out or establish how to handle defendants in courts, no matter which country they were from. They all have to be treated the same."

Interestingly, even though the war crimes trials in Belgrade are recorded in several formats, and although the war crimes courthouse there contains a large media center where journalists can view a closed video feed from the courtrooms, they cannot get copies of the video for broadcast.

But even though no trials held in Serbia have been televised thus far, Milić says no correlation was found that trials in Serbia are not well or properly conducted.

"On the contrary," he says. "International observers say they are very well conducted." But he believes when people can see the actual proceedings, it contributes to the public's trust and confidence in the courts and judges, and enhances their credibility.

With the ultimate goal to move all of the war crimes trials from The Hague to the countries where the crimes occurred and close down the ICTY, Prostran says that, "It is important to convince the public so they know that moving the trials to individual countries is not being imposed by international law, but is being done because it is the right thing to do."

What is being lost in the transfer of those cases to the countries where the crimes occurred, Milić says, is the ability in all of the new venues to broadcast the trials. Because of the distrust left over from the war, Prostran adds, it is even more important for cases involving crimes committed during the war to be televised. But transparency is not confined to just cameras and televising trials, she says. "It also requires access to court files, communicating with the media, and developing informational brochures to educate the public."

"Terrible things happened during the war," Prostran says. "Our goal is for the vast majority of the people to know what is going on in the trials so those kinds of things never happen again. We do not want to have what happened to us happen to our children."

Life after the War Crimes Department

Even though she is no longer with the War Crimes Department, Prostran's advocacy continues. She considers

herself an expert not only in various aspects of war crimes cases and in promoting the need for transparency and outreach but in media relations as well, and is routinely engaged by various media and groups such as the Organization for Security and Cooperation in Europe and United Nations agencies to speak at and moderate conferences. She also maintains contact with the Belgrade District Court judge who was her supervisor during her tenure as a spokesperson at the War Crimes Department. In addition, she has gotten generally positive feedback to the report from her Serbian judicial colleagues, she says, which she finds encouraging.

At the urging of associates, she has enrolled in a post-graduate program in human relations and humanitarian law. "They said, 'You know so many things about human relations and humanitarian [issues], you should get a degree because you have been practicing [in those areas] for a very long time.'"

Beyond her studies, though, she is not sure what she will do.

"Right now, I feel like I have reached my limit—not of my ability, but of my capacity as a judge. There are probably many things I can do if I were not a judge. I can still push my ideas through NGOs and other organizations, and I can share them with the War Crimes Chamber, but I cannot impose myself too much because I'm no longer with that court anymore."

As far as becoming a war crimes judge herself, she says, "I would like to, but that's too far away to think about." She would need ten years of judicial experience either trying regular criminal cases or as a legal assistant to a war crimes court judge. "And who knows what's going to happen," she speculates, "there may no longer be a War Crimes Department because we no longer have any war crimes cases." No matter what, though, she will continue to advocate for court transparency: "Justice will not be served until all the people have a chance to see what is going on in the courtroom." ■

As stated earlier, introduce yourself to the journalists. Tell them how your court operates, how to best access court records, and the basic rules you have in place.

Several states have bench-bar-media conferences, where reporters are invited to a daylong program with judges and lawyers to discuss how to better work together. These are wonderful opportunities to forge relationships and develop a dialogue.

Judges also should be aware of the media-related programs offered by the National Judicial College (NJC) and the NCCM. Together, the organizations, thanks to funding from the Reynolds Foundation, offer full scholarships for reporters and editors to attend an annual three-day program that educates journalists about the role of judges, the legal process, the strains between the First and Sixth Amendments, and the rights and responsibilities of journalists. The programs are taught by judges, lawyers, and seasoned legal journalists. Every judge should provide a brochure about the program to local journalists and encourage them to attend.

The NJC and NCCM also offer two-day seminars to judges on how to deal with the news media, especially in high-profile matters.

New York Times legal affairs writer and former media lawyer Adam Liptak says there are small things that judges can do to improve media coverage, including issuing written opinions earlier in the day.

"By waiting until 5 p.m. to issue a decision, reporters face a very difficult time trying to read and understand the opinion and get outside experts, such as the lawyers in the case or law professors, to give their interpretation and insight," says Liptak. "Better written and better organized opinions would be greatly helpful, too."

As a good example of how to handle a high-profile court opinion, Liptak points to the New Jersey Supreme Court's decision to inform reporters a day in advance that it would be issuing its opinion in a gay rights case. "There's no ethical prohibition against judges giving reporters (and the lawyers) the heads-up that a major opinion is about to be released," he says. "This allows the journalists to set aside the time he or she will need to report and write about the case, and allow time for the journalists to read the briefs in the case in order to gain a better understanding of the facts and arguments."

We conclude and agree with Liptak's final comment: "Helping the public better understand court decisions is never a bad thing." ■