

*Pressing Engagements:*

*Courting Better Relationships Between Judges and Journalists*

When I agreed to leave my post as editor and publisher of the ABA Journal and move to Reno, Nevada, in 2000 to create the Reynolds National Center for Courts and Media, an observation by Judge Learned Hand, long filed away in the deep recesses of my mind, pushed its way back to the forefront of my consciousness.

Speaking at Memorial service for Justice Louis Brandeis, Judge Hand remarked, “The hand that rules the press, the radio, the screen and the far-spread magazine, rules the country.”<sup>1</sup> What I find remarkable about that perspective is not only that the conclusion was from one of America’s most esteemed jurists, but also when he said it -- December 21, 1942.

One can only imagine what he would say today with the explosion of cable television choices, the 24-hour news cycle, the consolidation of mainstream media corporate interests, and the ever-sprawling options on the Internet. Perhaps he would simply conclude today as he did then – that the media's power was an unchangeable fact of life and “whether we like it or not, we must learn to accept it.”

We aging baby-boomers can recall the eventful day in the 1950s when our family joined others on our block to make the transition from radio to television. Few, if any of us, were prescient to comprehend how enormous its effect on our lives would be from

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<sup>1</sup> Adrienne A. Berry, “*Meet the Press*,” *Federal Lawyer*, 46-APR Fed.Law., March/April 1999 at 2.

that day forward. We watched as television supplanted newspapers as the chief medium for obtaining news, much as airlines crushed passenger trains – and about as quickly.

We saw the media's role in ending our venture into Vietnam. And we hailed the combination of two hungry, enterprising reporters and a straight-arrow judge as they unraveled the mysteries of Watergate. And as the media – primarily television – became a de facto member of every family, a new category of “stars” emerged. Journalists no longer only covered celebrities; they became celebrities, rivaling athletes, musicians and actors in terms of national prominence. And in the process, they started signing autographs and collecting huge speaking fees, when all they started out to do was to be the public's eyes and ears for current events. Is this a great country, or what?

As I said, some of us can recall when life still played out at 33 1/3 rpm. Our children and grandchildren have known only 78 rpm (a metaphor that in this age of I-Pods is itself an anachronism).

And as the media became even more pervasive from the 1950s onward, the public got information on all kinds of stuff – from the Reagan administration illegally selling arms to fund the Contras in their fight against the Sandinista government in Nicaragua to President Kennedy's dalliances in the White House to financial scandals such as Enron to the reasons why the marriage of Brad and Jen didn't work out and how they are coping, to name but a few news items.

As comedian Lenny Bruce once observed, the great thing about America is that “everybody's ass is up for grabs.”<sup>2</sup> Which makes Judge Hand's conclusion about media power all the more appropriate at the memorial for Justice Brandeis, who with Samuel

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<sup>2</sup> Lenny Bruce, *The Essential Lenny Bruce*, Edited by John Cohen, Ballantine Books at 277 ( 1967 ).

Warren, collaborated on possibly the most important law review article ever written, “The Right of Privacy,” which virtually led to the creation of a whole new set of laws.<sup>3</sup>

But in the expansive, no-holds-barred drive by the media for transparency, there was a side effect. The basic trust in government took a big hit. For example, “The lack of esteem for public servants and political leaders is part of the decline of public confidence in government over the past 25 years, a decline confirmed by many public opinion surveys. A generation ago, close to 50 percent of Americans expressed confidence in the federal government. This year (1997), a national poll conducted by Peter Hart and Bob Teeter for the Council for Excellence in Government showed that figure at only 22 percent, with state and local governments scoring somewhat better, at 32 percent and 38 percent, respectively.”<sup>4</sup>

Whether there is a direct cause and effect between more detailed and highly personal coverage and this decline in public confidence in the government is open to speculation. However, one could draw the crude analogy to having less of an appetite for sausage once one sees how it is made.

Seemingly, however, there was one branch of government that for many years largely escaped the heightened national scrutiny of the media – the judicial system. True, there were the occasional trials such as Bruno Hauptmann and the Lindbergh baby kidnapping or the Scopes evolution versus the Bible in Tennessee. And the John Birch Society railed mightily to “Impeach Earl Warren” through their billboard and any other medium that would listen to the harangue.

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<sup>3</sup> See Warren and Brandeis, *The Right to Privacy*, 4 *Harvard Law Review* 193 (1890).

<sup>4</sup> Patricia McGinnis, “Restoring Public Trust in Government,” Partnership for Trust in Government, <http://www.trustingov.org/research/opeds1.htm> Nov. 1997.

As a young boy in Ohio in 1954, I recall my mother following closely the radio accounts, all trying to answer the question: Did Dr. Sam Shepard really kill his wife, Marilyn or was he telling the truth about struggling with a bushy-haired intruder?

But these were anomalies. For the most part, the courts were able to operate in a relative cocoon, free from those pesky, sensationalist reporters. Unlike other branches of the government or private corporations and most other entities, most courts did not have a designated media liaison or a plan to deal with the media simply because, in the view of most courts, there weren't enough requests for information to justify going to the trouble. While most of the rest of the world seemed to understand Judge Hand's admonition about the media being a force to be reckoned with, the courts, by and large, seemed to conclude that they were exempt. And more to the point, they saw no benefit to initiating contact with the media, especially given ethical restrictions on what judicial leaders could talk about.

Then came the O.J. Simpson criminal trial. Any discussion of the modern day relationship between the courts and media has to begin with that trial. Whether the issue is cameras in the court, trying the case in the media, access to information, talk-show speculation on the trial or virtually any other aspect, the discussion, sooner rather than later, inevitably will revert back to the Simpson criminal trial.

Through OJ, the media discovered the mother lode of human drama and conflict. Hence, the media focused on Scott Peterson, Michael Jackson, Robert Blake, Martha Stewart, Kobe Bryant, the DC snipers, Gary Ridgeway ("Green River Prostitute murders in Seattle), Jayson Williams, all with a view to recapture the ratings and readership that was O.J.'s.

The message wasn't lost on the entertainment side either. "Law and Order" and its seemingly unending progeny, "CSI"(all three versions), "The Practice" and other law-based dramas fill an unabated public appetite for legal and criminal conflict. Of the top 10 broadcast dramas for the week of December 12, 2005, six were law-themed.<sup>5</sup>

And the Grisham and Tarrow novels are among the most successful out of a growing throng of would-be lawyer/novelists.

Yes, OJ changed the landscape. It was that trial that led to the creation of our Center to try to help judges and journalists grapple with the tensions and conflicts that surfaced between them. Funded by a grant from the Donald W. Reynolds Foundation, The National Judicial College collaborated with the Reynolds School of Journalism at the University of Nevada-Reno to hold a national court/media conference in 1996.

More than 100 of the nation's most prominent leaders from both the judiciary and the media met for two-and-one-half days, during which the breadth of the chasm between these two professions quickly became apparent through the blunt expression of deeply held animosities.

For example, one judge said, "The barriers are greater than I knew. Apparently, constructive and positive appraisal of democratic institutions is an unknown function of the press."<sup>6</sup>

And a journalist noted, "The Conference drove home the absolute lack of understanding judges have about the diversity of the media."<sup>7</sup>

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<sup>5</sup> Nielsen Media Research, TopTen TV Dramas for the week of December 12, 2005, <http://www.nielsenmedia.com/nc/portal/site/Public/menuitem.43afce2fac27e890311ba0a23>

<sup>6</sup> See The Donald W. Reynolds National Center for Courts and Media, History, [http://www.judges.org/nccm/about\\_nccm/history.htm](http://www.judges.org/nccm/about_nccm/history.htm)

<sup>7</sup> id

One area of agreement, however, was that OJ, in reality, was not an isolated circumstance – that the First Amendment rubs up against the Sixth more often than previously thought, and not only in the nationally prominent trials. Hence, the consensus was that an ongoing Center should be created to help foster the dialogue to enable both sides to minimize the friction.

Thus, through another grant from the Reynolds Foundation, the National Judicial College and the Reynolds School of Journalism created the Center as part of the National Judicial College, which began operations August 1, 2000. Over the past five years, we have held various courses at the NJC facilities in Reno. We also have conducted shorter workshops and seminars off site in collaboration with various state entities. And on four occasions, we have provided workshops overseas for judges and journalists, particularly in the emerging democracies in the former satellite nations of the Soviet Union. Tensions between judges and journalists are not uniquely an American problem.

Additionally, in 2005, we conducted three national conferences on key court/media issues:

-- “The National Symposium on Judicial Speech – post *White*”, a convening of the chief justices or their designated representatives at the National Judicial College to discuss pending changes in the ABA Model Code of Judicial Conduct in the wake of *Republican Party of Minnesota v White*, 546 US. 765 (2002), holding that candidates for judicial office have First Amendment rights to state their positions on issues, notwithstanding state judicial ethical restrictions on such commentary.

-- “From O.J. to Martha to Michael: What have we learned about the conduct and coverage of trials?” This conference in Reno followed up on the 1996 and 2000

conferences by bringing together most of the key judges, lawyers and journalists covering the recent nationally prominent trials listed earlier.

-- “Confidentiality in the Courts and Media – the Gathering Storm” was held in Washington, D.C., bringing together key judges, lawyers and journalists involved in the Valarie Plame CIA leak case and national security cases with the focus on the issue of a reporter’s need for confidentiality in some stories and the balance to be struck between the government’s demand for restrictions on information due to national security claims versus the public’s need for openness to have confidence in the integrity of the judicial process.

Out of the various programs conducted by the Center, a few key themes repeatedly emerged that bear highlighting in the context of the relationships between the courts and media.

### **Speak softly when you speak of law**

Canon 3 B (9) of the ABA Model Code of Judicial Conduct states: “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.”<sup>8</sup>

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<sup>8</sup>See American Bar Association, Center for Professional Responsibility, Model Code of Judicial Conduct, 2004 edition, <http://www.abanet.org/cpr/mcjc/toc.html> .

That is the judicial sledgehammer when a reporter comes calling. Although modified by the states in various slight fashions, the ABA rule pretty much sums up the official line.

It is fair to say, however, that many, if not most, judges only focus on the first part of the rule. Their interpretation is that with a pending or impending case, the judge can't even talk to a reporter. Reporters, on the other hand, see the judge as hiding behind the ethical rule simply because he or she doesn't want to deal with the media. And there are some judges for whom that view is apt. Many people, not just judges, approach reporters with the same uneasiness that they would in approaching Doberman Pinchers – unsure of whether they want to lick your face or rip your throat out.

But assuming a basic good faith on the part of the reporter, there are two key phrases that bear emphasizing in this context. First, the rule doesn't say the judge can't talk, but only needs to be careful to avoid any statement that might “reasonably be expected to affect (the trial's) outcome or impair its fairness.” Second, the rule does create an exception, granting judges the ability to make “public statements in the course of their official duties” or to explain “for public information the procedures of the court.”

So it depends on the question. For example, let's assume the reporter has never covered the court before – not an unusual circumstance, particularly in smaller markets – and approaches the judge after the day's session. Suppose the question is: “How do you think the trial is going?” or “What did you think of the prosecutor's opening statement?” Clearly, alarm bells go off, and the ethical rule banning a response is triggered. Suppose, however, that the question is: “Your honor, I think I understand why hearsay evidence is not permitted, but I didn't know there were exceptions. How does that work?”



In this case, as I understand the rule, the judge could, without any reference to what happened in court that day, explain the generic procedures and rules of evidence, perhaps in a hypothetical or in referring the reporter to the specific rules regarding exceptions, and such would not violate the rule, but would be in keeping with the latitude to explain “for public information the procedures of the court.”

And that is precisely how Judge Hiller Zobel<sup>9</sup> handled the issue in the trial of Louise Woodward, the British au pair convicted in the death of baby Matthew Eappen. He met with reporters in an effort to help them get their stories right, but without getting into any specifics about the trial itself.

Similarly, Judge Patricia Gifford,<sup>10</sup> in the Mike Tyson rape trial, at the end of each day’s session, had her law clerk meet with reporters to answer generic procedural questions. If the clerk was in doubt as to whether the question crossed the line, she checked with the judge before responding.

The reason why these distinctions are important is that the overwhelming complaint among judges about journalists is inaccuracy. Hands down, in every session where I have posed the question, judges universally say that what they read in the paper or see on TV, bears little relationship to what transpired in court.

Granted, as noted above, a lot of reporters aren’t going to be savvy. The same reporter who the night before covered the 4-H awards banquet could walk into the newsroom the next morning and be told to go cover a trial. Suddenly thrown into an arena where the terminology, procedures and players are foreign to him or her, the

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<sup>9</sup> Note: Judge Zobel is a member of the Reynolds Center National Advisory Council and, as a faculty member, has explained his handling of the Woodward case in various sessions.

<sup>10</sup> Note: Judge Gifford explained her dealing with the media during the Tyson trial at the 1996 national conference and in subsequent court/media workshops.

reporter runs a high degree of risk of getting things wrong, especially if there is no one to turn to for clarification.

Nevertheless, in the many workshops and seminars I have conducted, I quite frequently encounter a judge who says, “I never talk to the press; they never get it right.” Usually such comments come in the form of posturing before colleagues, verbally strutting to show his disdain for the media.

And my tactful answer generally is, “well, the First Amendment right to speak includes the right not to comment and the ethical rules don’t obligate you.” But I also admit that in the back of my mind, my real answer is: “Well, duh, did it ever occur to you that maybe the reason they don’t get it right is that you wouldn’t talk to them and help them understand the basics?”

To me, the judicial complaint about inaccuracy is weakened greatly if the court doesn’t even try to help ensure the reporter understands what transpired. Okay, so maybe the judge doesn’t feel comfortable to talk to the reporter. There is nothing unethical about referring the reporter to another legal source who can help the reporter get it right.

The goal, after all, isn’t to one-up the reporter. It’s all about increasing the public’s comprehension of what happened in court and how the court operate so the public trust and confidence is at the level required for the system to be effective.

In that regard, the ethical rule specifically permits judges to publicly comment “in the course of their official duties.” That is why Presiding District Court Judge Steven Smith<sup>11</sup> in Bryan, Texas, who is handling the civil suits arising from the Texas A&M bonfire deaths, makes a point of calling every new reporter assigned to cover his court

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<sup>11</sup> Note: Judge Smith is a regular faculty member for the Center who explains who dealing with the media to every judge enrolled in National Judicial College’s General Jurisdiction course.

and inviting him or her over for an overview of the process. He says he sits the reporter in the jury box and, because most of the court news the reporter will be seeking involves criminal trials, he explains the procedure step-by-step from the arrest to the appeal. He also explains that during the trial there may be questions he can't answer because of the ethical prohibitions, but invites the reporter to contact him if he or she is in doubt. As a result, he notes, he has never been burned by a reporter, and most of the stories have been accurate.

Granted, Judge Smith probably is in the minority of judges. He is, however, part of a growing cadre of jurists who believe that the judiciary needs to take the initiative in establishing the appropriate rapport with the media if concerns over public trust and confidence are to be addressed constructively. As he has stated at numerous programs conducted by our Center, "if we don't engage the media and present our side, we are letting our critics define who we are, how we are doing and what we are about. I think we are in the best position to tell our story, and I think we should use every opportunity to tell it."

Research tends to bear him out. One thing the legal system and the media have in common is that they both depend on public trust and confidence for them to fulfill their missions. Both have lots of room for improvement.

A January 2002 survey commissioned by the Section of Litigation of the American Bar Association found, among institutions and professions, lawyers, judges and the media did not fare well in terms of public confidence.<sup>12</sup>

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<sup>12</sup> "Public Perceptions of Lawyers – Consumer Research Findings," April 2002, Section of Litigation, American Bar Association, Leo J. Shapiro & Associates.

According to the survey, only 19 percent of U.S. citizens said they were “extremely or very confident in” lawyers and the legal profession.<sup>13</sup> The judiciary rated higher at 33 percent and the media came in last at 16 percent.<sup>14</sup> The medical profession led the list of possibilities at 50 percent.<sup>15</sup>

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.<sup>16</sup>

### **Call me irre-press-able**

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.”<sup>17</sup>

Every judge has a horror story, which they are all too willing to share when the topic is dealing with the media. The broad latitude given journalists by the U.S. Supreme Court in their interpretations of the First Amendment truly galls many judges. Yes, there should be freedom of the press, but there ought to be accountability as well. Or so goes the typical argument.

It is especially disturbing to the judiciary because if judges violate the canons, they can be disciplined, even up to losing their position. The media, on the other hand, seemingly are only accountable to themselves. When judges see *Hustler Magazine* and supermarket tabloid gossip rags given the same First Amendment protection as the *Wall*

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<sup>13</sup> Id

<sup>14</sup> Id

<sup>15</sup> Id

<sup>16</sup> Id

<sup>17</sup> *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974)

*Street Journal* or the other mainstream publications, they simply shake their head and wonder how the courts let this happen.

Course, judges understand why distinguishing between the two legally may be impossible intellectually, but there is a visceral, emotional reaction that also kicks in. They may understand why CNN's Nancy Grace can offer provocative commentary on pending legal cases, but they don't like it any more than they like Judge Judy presenting a portrayal of the judiciary that is out of step with what happens in most of America's courtrooms. It's like a scene from the old "Our Gang" films where Spanky is told that he will eat his oatmeal and like it. To which, Spanky replied, "I'll eat it, but I won't like it."

Similarly, judges are quick to remind us that a violation of an ethical rule can have serious repercussions for a judge or lawyer, but no such sanctions awaits the offending journalist because the existing ethical rules for journalists<sup>18</sup> are only aspirational, and therefore, unenforceable.

Right off the bat, we run into a basic question: Who is a journalist. Especially in this Internet age of bloggers, we don't even have a consensus over that definition, even among mainstream journalists themselves.

Of course, it has to be that way under the Constitution because there is no a way to create a monitor group to mete out discipline for violations without running afoul of the First Amendment. Put another way, what government entity would we trust to determine when a violation has occurred and to set the punishment? After all, the power to discipline includes the power to censor.

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<sup>18</sup> See Code of Ethics, Society of Professional Journalists, [http://spj.org/ethics\\_code.asp](http://spj.org/ethics_code.asp) and Code of Ethics, Radio and Television News Directors Association, <http://www.rtnda.org/ethics/coe.shtml> .

. As Justice Byron White said, “The press would be unlicensed because in Jefferson’s words '(w)here the press is free, and every man able to read, all is safe.’ Any other accommodation – any other system that would supplant private control of the press with the heavy hand of government intrusion – would make the government the censor of what the people may read and know.”<sup>19</sup>

And though many judges chafe at the outrageousness demonstrated by some of the media extremes, few are ready to turn over control of content to the government. In many respects, the issue of control is at the heart of the wariness with which journalists and the judiciary view each other. Simply stated, both professions are control freaks. From the judiciary’s point of view, 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.”<sup>20</sup>

Likewise, teeth start grinding among journalists when they perceive they’re being maneuvered or blocked by – their view – arbitrary or unnecessary court restrictions. Neither judges nor journalists like anyone outside their respective chains of command interfering with them or telling them what they have to do.

An observation I shared at the 2002 international conference of the chief justices of all the nations of the western hemisphere bears repeating here:

“Journalists don’t want judges blocking their access to sources and information through gag orders and the sealing of documents. Judges don’t want

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<sup>19</sup> *Miami Herald Publishing Co. v. Tornillo*, supra, Justice White concurring at 260.

<sup>20</sup> “A Judge’s Perspective,” NJC Alumni Magazine, Spring 1994, at 12.

their case tried in the media and fear the consequences of juries learning of evidence and information through the media that they have ruled in admissible 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 the reporters from gathering the facts. Judges lament their inability to control a press free with their unofficial, but real power, to affect the dynamics of the 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.”<sup>21</sup>

### **Transparency sealed with access**

If judges universally decry inaccuracies as their chief complaint, the media are equally united in focusing on access. Whether they be protective orders (as judges call them) or gag orders (the preferred epithet of journalists), sealed documents closed

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<sup>21</sup> Gary A. Hengstler, *Symbiosis, Suspicion and (Sometimes) Synergy*, a paper presented at the Judicial Summit: Justice and Freedom of the Press in the Americas, Inter-American Press Association, Washington, D.C., June 20, 2002.

hearings or the court file conveniently in the judge's chambers with no copy available at the clerk's office, all are cut out of the same access cloth from a journalist's perspective.

“Secrecy has become common in A-list court proceedings. When a headline lands in the dock, the government is increasingly restricting access to legal documents and hearing and imposing gag orders to silence lawyers and investigators. Open Courts and public scrutiny of the justice system are cornerstones of American democracy. But judges say the hush-hush measure are sometimes necessary to prevent news coverage from influencing the jury and thus damaging the prospects of a fair trial.”<sup>22</sup>

That's it in a nutshell -- the clash between the First and Sixth Amendments. Virtually everyone will agree on the desirability, indeed the necessity, of transparency for our democratic republic to function properly. If the old “Star Chamber” of England served no other purpose, it deeply etched into our values the requirement of assuring the public that all is on the up and up when liberty and property are at stake. “Justice should not only be done, but should manifestly and undoubtedly be seen to be done.”<sup>23</sup>

Ah, but to what degree? That is where judges and journalists sometimes draw different lines in the sand. If interest is that, as often as not, the trial courts aren't in harmony with the appellate courts on access issues. Take Martha Stewart's case, for example, where U.S. District Judge Miriam Goldman Cedarbaum, at the request of the prosecution, closed the jury selection, citing the 1998 fraud trial of boxing promoter Don

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<sup>22</sup> Paul Pringle, “Judges Dim the Media Spotlight,” Los Angeles Times, March 22, 2004, at r

<sup>23</sup> Lord Hewart (1870-1943), British judge, Ruling on the quashing of a conviction on technical grounds, 9 Nov. 1923, in Rex v. Sussex Justices. Quoted in: *King's Bench Reports*, 1924, vol. 1.



King as precedent. The 2nd U.S. Circuit Court of Appeals in Manhattan set aside her order, noting that “openness acts to protect, rather than threaten, the right to a fair trial.”<sup>24</sup>

Although the media won its point, it was a Pyrrhic victory. By the time the appellate court ruled, the jury had been impaneled and the trial was underway.

That circumstance illustrates the conundrum for trials courts and journalists, not only in closed proceedings, but also similarly with respect to issuing protective orders, sealing documents and taking other steps that the media regard as unduly hampering their quest for information and access. Focusing on protecting a defendant’s Sixth Amendment right to a fair trial, judges fear the specter being viewed as having lost control of the trial by letting saturated media coverage overwhelm the fairness of the process, evoking memories of the U.S. Supreme Court’s castigation of the judge in *Sheppard v. Maxwell*.<sup>25</sup>

Clearly most trial judges correctly read *Sheppard* as placing the burden on them, and not on the media, to ensure the integrity of a given trial. Some have read the Court’s list of suggestions – change of venue, protective orders, continuances, jury sequestration, new trial – not as options they may employ in newsworthy cases, but as directives that must be used, if only for self preservation.

In so doing, however, such judges tend to de-emphasize, if not ignore altogether, another point stressed by the Court: “The principle that justice cannot survive behind walls of silence has long been reflected in the ‘Anglo-American distrust for secret trials.’ A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented

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<sup>24</sup> *ABC, Inc. v Martha Stewart*, Docket No. 04-0220-cr, U.S. Court of Appeals for the Second Circuit (Feb. 18, 2004)

<sup>25</sup> *Sheppard v Maxwell*, 384 U.S. 333, (1966)

by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism. This Court has, therefore, been unwilling to place any direct limitations on the freedom traditionally exercised by the news media for ‘what transpires in the court room is public property.’ The ‘unqualified prohibitions laid down by the framers were intended to give to liberty of the press . . . the broadest scope that could be countenanced in an orderly society.’ And where there was ‘no threat or menace to the integrity of the trial,’ we have consistently required that the press have a free hand, even though we sometimes deplored its sensationalism.”<sup>26</sup>

Moreover, “[I]n *Nebraska Press Association v. Stuart*, Chief Justice Warren Burger concluded that the cases alleging pretrial publicity that the court had previously decided ‘taken together . . . demonstrate that pretrial publicity – even pervasive, adverse publicity—does not inevitably lead to an unfair trial.’ ”<sup>27</sup>

So from a journalist’s point of view, many of the routine gag orders and other restrictions not only are unnecessary, but even harmful to the overall interest in promoting public confidence in the proceedings. “While a gag order cannot prohibit the media from reporting on the case, it can hamper accuracy, said Kelli Sager, a First Amendment attorney from Los Angeles. Gag orders, she said, are harmful because they result in ‘rumors and speculation instead of factual information because the people with

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<sup>26</sup> id at ??

<sup>27</sup> Free Press & Fair Trial, American Society of Newspaper Editors, 1982, at introduction, Page 2.

the facts aren't allowed to talk...It tends to feed inaccuracies and give the public less information than they should have in what's going on with court proceedings.' ”<sup>28</sup>

It's one thing to speak abstractly about the benefits and desirability of a high degree of overall transparency for the public good. I am pretty sure, however, that for the judge who is assigned the next Scott Peterson or Michael Jackson case, the concern hovering prominently overhead is whether this case might end up on appeal and whether the reviewing court will conclude a failure to clamp down on the publicity means the judge blew it. No judge wants to be the topic of subsequent judicial education seminars as having lost control of the trial.

The multi-faceted access question will only grow more complicated before any kind of resolution surfaces, if ever. The exacerbating factor is technology. With virtually all courts embracing the benefits of computerized court records, the question is at hand: How much of the court's record should be accessible by the public via the Internet? Journalists naturally want it all, save of course personal information such as Social Security numbers, financial account numbers and other key information that facilitates identity theft.

The public, on the other hand, already fears a loss of ground for their privacy interests through computerized data collection and seems ready to have the government restrict more information electronically than is currently available in paper form. An example of the divergent perspectives can be seen in the split between two traditional allies – The Reporter's Committee for Freedom of the Press and the American Civil Liberties Union, both ardent First Amendment supporters. The RCFP essentially holds the

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<sup>28</sup>Gina Lubrano, Gar orders don't limit media reporting, San Diego Union-Tribune, March 18, 2002, [http://www.signonsandiego.com/news/op-ed/lubrano/20020318-9999\\_1e18lubrano.html](http://www.signonsandiego.com/news/op-ed/lubrano/20020318-9999_1e18lubrano.html).

view that if it is available at the clerk's office in paper form, the same information should be available online. The ACLU has opted for the individual's privacy, reasoning that there is a qualitative difference between having an individual trek to the court to look at the file versus a seemingly endless array of browser sifting through government documents for any number of reasons.

It would seem that with respect to media access interests in this electronic age, the concerns raised in the law review article by Justice Brandeis and Mr. Warren potentially rekindled.

### **Lights, camera, access?**

Although relegated to the back burner of key court/media issues in recent years, the merits or demerits of courts allowing televised coverage of trials still festers particularly, and obviously enough, among broadcast journalists. As an educational center for other both judges and journalists, our Center takes no advocacy position on the issue, but trying to advance the latest information available to aid the discussion.

One of the key points of disagreement between judges and journalists is the seemingly haphazard approach courts have taken with respect to cameras in the courtroom. Tony Mauro succinctly raised the question in an essay: "So why are cameras good enough for the state courts but not good enough for federal courts. Why do the winds of technological change blow differently, or not at all, in the federal courts?"<sup>29</sup>

One thing I have observed over the past five years in discussing the question with judges – and journalists too for that matter --is that it is impossible to have the discussion without a reference to the O.J. Simpson criminal trial. Not once in any conversation did O.J. fail to surface.

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<sup>29</sup> Mauro, Tony, "The Camera-Shy Federal Courts," *Media Studies Journal*, Winter 1998. at 61.

For the most part, with some notable exceptions, I found the actual coverage of the trial pretty straightforward, even plodding. What I noticed that was different in the surreal legal environment was the proliferation of nightly post-trial talk shows that brought in legal scholars to analyze the day's events and predict what would happen tomorrow. In some cases, it was like a legal ESPN with lawyers, by analogy, mirroring the sports analysts as if they were rehashing a football game, dissecting what plays worked and who fumbled. That is an O.J. legacy that lingers and promises to be with us from here on out. In fairness, the public must share in the blame on that score. At the time, there were news stories about how ratings for any given talk show plummeted if they deviated from discussing the "trial of the century."

Judicial proponents of cameras in the courtroom, notably from states like Florida where they have been in use for some time point to the various studies and their own successes as evidence that the presence of the TV camera in the courtroom has no adverse effect on the fundamental fairness or alters the behavior of the trial participants.

Critics invariably cite O.J. as evidence that it can happen. As a lawyer, I find the debate interesting because most law and most rules are based on what the norm is. In those jurisdiction that forbid television in the courtroom, I find it interesting that, again because of O.J., the rule has been fashioned from the exception, not the norm. It is one of the few areas of rule-making where I have encountered that reasoning. Of course, it is up to each jurisdiction to determine whether the potential television undercutting the fundamental fairness of the trial justifies its exclusion from the courtroom.

And even though I have no empirical research to support my contention, I think there may be another reason why television did not gain acceptance in all levels and in all

jurisdictions. It is not a reason widely discussed, but I think it may have relevance. That is the personal anonymity factor.

I recall attending the ABA Annual Meeting in New York in 1986 and, leaving the hotel one evening, I saw Justice William Brennan and his wife walking arm in arm slowly down the street. Several people passed them, but not one person stopped them to offer greeting, shake his hand or otherwise interrupt them. It dawned on me that none of the passersby had a clue as to his identity.

And my guess is that Justice Brennan liked just that way. Which leads me to my hypothesis. Given that television makes celebrities, how many judges fear that loss of personal privacy if they were to become household faces due to a prominent trial?

While I have never talked with Judge Lance Ito about this, my guess is that he no longer can go out to dinner or shop without encountering someone who wants a bit of his time simply because the O.J. Simpson case made him nationally famous.

Simply put, I have wondered how much of the opposition to cameras in the courtroom is rooted in the notion that TV comes with too much personal baggage – that many judges like their relative obscurity and being able to enjoy outings with the family without having to cope with members of the public who want to rub up against somebody famous. If I were a judge, I think that would factor into my views, at least in part.

Notwithstanding the current climate, I do think that in time the remaining opposition to television in the courtroom setting will likely dissipate, if only because the comfort level will increase. As I indicated early on, for my children and now grandchildren, television is a fact of life taken for granted. Their generations will be the judges of tomorrow. That plus the proliferation of cable and satellite stations eventually

will create a virtual local Court TV for that segment of the intrigued by the human dramas each trial presents.

### **Don't tell, don't ask**

Certainly the indictment of Vice President Richard Cheney's Chief of Staff Lewis "Scooter" Libby and the jailing of former New York Times reporter Judy Miller in the wake of the investigation into the leak of Valerie Plame's name as a CIA agent as once again brought to the surface the issue of reporter's protecting their confidential sources from disclosure in the court setting. Another attempt is being made to legislate a federal shield law.<sup>30</sup>

Some journalists argue that the legislation should be unnecessary because the First Amendment's sweeping protections should encompass their right to keep sources secret – a view narrowly rejected (5-4) by the U.S. Supreme Court in *Branzburg v Hayes*.<sup>31</sup>

Others maintain that the shield law is necessary because the work of the journalist, as the de facto watchdog over the government, is just as vital to the public's interest as is the confidentially privilege is to lawyers, doctors and the clergy.

Opponents of the reporter's shield legislation point out the fact that, unlike doctors and lawyers who must be licensed by the state and are subject to discipline for violations, virtually anyone can be a journalist.

Actually, I think the argument for a privilege can better be equated to the clergy than to licensed professionals. There are two reasons. First, religion and the press are specifically listed in the First Amendment, thus signaling the Framers' view that these areas are of special significance in our democratic system.

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<sup>30</sup> Free Flow of Information Act of 2005 – S. 1419

<sup>31</sup> *Branzburg v Hayes*, 408 U.S. 665 (1972)

And, as with journalists, anyone can be a member of the clergy. In 2005, I joined the clergy ranks. I did so because the daughter of one of my closest friends in Chicago was to be married. She is Jewish and her fiancé is Roman Catholic. So she asked me to go online and become ordained as a minister of the Universal Life Church so I could perform the nondenominational wedding ceremony.

So I went to the church's web site -- <http://www.ulc.net/> -- filled out the form and clicked the "Ordain Me" button. Shortly thereafter I received an e-mail confirmation that I was ordained. There was no charge. (Actually being new to this and needing some guidance as to how to construct a wedding ceremony, I did voluntarily purchase the basic clergy package for \$39.95, which provided all the technical guidance I needed and a laminated card for my wallet identifying me as a minister.)

Under Illinois law, I was recognized to perform the ceremony so it all went according to the plan. (I would have attended anyhow; this development just made it tax deductible.)

The point is that just as anyone can be a journalist, anyone can be a minister. The First Amendment is pretty broad in its protections.

Now, having given a justification for the reporter's shield law, let's look at the other side. The one thing all such existing privileges have in common is that the source of the information is generally known. It is the information itself that must be kept secret.

A journalist's privilege would stand that equation on its head. Here the information is known (generally having been published, but not in all cases) but is the source that is kept secret. The law has carved out certain circumstances where it was



deemed necessary to preclude revealing the information to serve a higher priority. Pro-shield journalists want the law to carve out another exception but in this case, we know what was said, just not who said it. Congress still may not be ready to make that kind of leap.

Virtually all states have enacted some kind of shield law for reporters. Certainly, the impetus of Watergate and Bob Woodward's and Carl Bernstein's "Deep Throat" helped demonstrate the value of confidential sources to the public. But that was 30-plus years ago.

In the wake of the revelations that Jayson Blair passed off fiction as fact at the New York Times as did Jack Kelley at USA Today, one wonders if the public will support the notion of federal protection for reporters to keep sources confidential.

According to Gene Policinski, executive director of the First Amendment Center, "use of confidential sources nationwide is relatively rare – other than perhaps in a few highly visible areas such as reporting from the White House or Capital Hill."<sup>32</sup>

His conclusions were based on a 2005 survey of journalists that found"

-- 86 percent of the journalists responding said the use of confidential sources was essential their ability to report some news stories.

-- 59 percent said confidential sources were the basis for just 10 percent or less of he stories they had written in their careers.

-- 10 percent said they had never used a confidential source.

--95 percent said journalists should keep secret the identity of the source even when facing a formal request from law enforcement officials.

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<sup>32</sup> First Amendment Center

-- 84 percent said they were willing to go to jail rather than comply with a court order to identify the source.

. As Policinski noted, “[T]he responses also suggest that even as journalists across the country use such sources sparingly, they see the method as vital when pursuing certain kinds of stories.”<sup>33</sup> It is fair, then, to say that journalists themselves aren’t big fans of anonymous sources because they know a skeptical public then has to gauge how much trust to place in the information. Essentially, the position of the journalist is that ordinarily we will do our best to get the source openly on the record and only use confidential sources when the information is critical and there is no other way to obtain it.

The irony is that such rationale mirrors that of prosecutors – and the law –when it comes to subpoenaing reporters. They will only do so under extraordinary circumstances when there is no alternative and the evidence is critical.

Thus, since both sides are in the position of saying “trust me on this,” the public will weigh the equities in each case. Or, rather, it will be the judges who will have to sort them out on a case-by-case basis. As it always has been.

### **You need me on that wall**

Certainly, as the issues above illustrate, there is no dearth of Constitutional or professional landmines for journalists and judges to be careful of as they proceed to carry out their public service responsibilities. Despite the periodic conflicts, however, we would do well to remind ourselves that despite the inherent tensions, both are uniquely vital to maintaining our free society.

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<sup>33</sup> First Amendment Center, 2004 confidential-sources survey, (News release) October 14, 2004, [http://www.firstamendmentcenter.org/about.aspx?item=2004\\_confidential\\_sources&SearchString=survey](http://www.firstamendmentcenter.org/about.aspx?item=2004_confidential_sources&SearchString=survey)

In my view, no one has summed up how critical 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 the meeting of our Council, 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 to 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 not but one place to get that understanding, and that is from the media. The media depends on the courts for obvious reasons. Courts also depending on the media for somewhat less obvious reasons, but nevertheless, reasons that need to be critically understood.”

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The founders apparently seemed to have understood that basic reality when they drafted the Constitution. They were super cautious about the potential for government

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<sup>34</sup> Hon. Alexander Sanders, comment included in introductory letter by Gary Hengstler for “Confidentiality in the Courts and Media – The Gathering Storm,” National Conference on Courts and Media, Washington, D.C. Dec. 5-6, 2005

abuse and overreaching and sought to build in the right checks and balances as a hedge. Why else, in enacting the Bill of Rights, did they write nine of the first ten amendments in the negative – what the government cannot do?

No doubt, the abuses of the monarchs from their former nations loomed large in their minds. After all, our nation was started by the rejects of other lands. Let's face it. If they had had power and influence to begin with, they would have had no reason to leave. Dissatisfaction with the way things were prompted the exodus to the new land. One overarching value they brought with them was a strong and deep distrust of the potential for abuse by individuals who hold governmental power. It is a legacy that Americans today still have their arms wrapped around.

So the drafters incorporated into our system two vital protections – the two most important. They are an independent judiciary – judges with the power to tell both the executive and legislative branches when they have gone too far – and an unfettered press, free to expose and criticize the activities of government.

It is a concept that, after a couple of hundred years, too many Americans have taken for granted. Frankly, I did too until I was part of a delegation to Bosnia, covering the initial training of the new Constitutional Court in 1995 in Sarajevo. In trying to explain the concept of an independent judiciary, one of the judges literally asked: “Di you mean that after we hear a case, we don't have to call the party chairman to determine who wins?”

It is that basic. I am reminded of the refrain from “Big Yellow Taxi:” “Don't it always seem to go, that you don't know what you got 'til it's gone.”<sup>35</sup> Let us hope that in

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<sup>35</sup> Big Yellow Taxi, Joni Mitchell, published by Siquomb Music, 1970

our complacency, we never reach the stage where, with respect to both our courts and media, we pave paradise and put up a parking lot.

Both the courts and media exist to serve the public interest, each in their respective ways. Both are checks on the use of power. And both require the public trust and confidence for the system to work. The irony is that the courts and media need each other to perform for each to be successful. It is truly a symbiotic relationship.

There is no freedom of the press unless an independent 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?’”<sup>36</sup>

Therefore, 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.

And the independence of the judiciary largely is 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.

Because most people do not personally attend court regularly to check for themselves on how the system is working, public trust and confidence is a perception 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

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<sup>36</sup> Seigenthaler, John and Hudson, David L., “Journalism and the Judiciary,” *NJC Alumni Magazine*, Winter 1997, at 15

crucial to public attitudes about that judge and to public respect for and confidence in criminal justice.”<sup>37</sup>

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.”<sup>38</sup> Thus, as indicated earlier, a symbiotic relationship naturally exists.

Michael Gartner, a 1997 Pulitzer Prize winning editor and publisher, once observed: “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.”<sup>39</sup>

In one respect the relationship between some judges and some journalists can be likened to the old story of the man who went to a psychiatrist for diagnosis. To check him out, the psychiatrist gave the man a Rorschach Test. Asking the man what the first inkblot made him think of, the man replied, “sex.” The same thing happened with the second inkblot...and the third...and the four etc. Finally, the psychiatrist said, “I know what your problem is. You have a one-track mind. All you think about it sex.” To which the man replied, “what do you mean, my problem? You’re the one with all the dirty pictures.”

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<sup>37</sup> Wallace Westfeldt and Tom Wicker. “Power in a Black Robe,” *Indictment: The News Media & the Criminal Justice System*, First Amendment Center, 1998, at 34

<sup>38</sup> Seigenthaler, John and Hudson, David L., “Journalism and the Judiciary,” *NJC Alumni Magazine*, Winter 1997, at 15.

<sup>39</sup> Gartner, Michael, “An open letter to the judiciary from a member of the press” *NJC Alumni Magazine*, Winter 1997, at 15

Many judges see journalists as the ones with dirty pictures – always focusing on the negative in the reporting. And many journalists see judges see judges as having a one-track mind – seeing only their role as guarding the fairness of the trial and disregarding, or at least minimizing, the journalist’s role in keeping the public informed.

Which is why Michael Gartner is absolutely right. Judges and journalists need to talk. Each needs to break out of the tunnel vision of their own duties and gain a better understanding and appreciation for the process and values of the other side.

Which brings me full circle. Given the media’s pervasive influence on virtually every facet of life today, the question becomes how best for the courts to adapt themselves to that reality. Through our courses, workshops, seminars and other programs, our Reynolds National Center for Courts and Media exists to be the catalyst for an ongoing dialogue between these two important professions. It will take time, and progress will not be measured in a straight line, onward and upward. There will be some issues and some circumstances where the competing interests and values afford no compromise. But there are many areas where the courts and media can find ways to allow each to serve America without adversely impacting each other. To the extent we can find those ways, all of us are better off.

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