American College of Trial Lawyers

REPORT ON FAIR TRIAL OF HIGH PROFILE CASES

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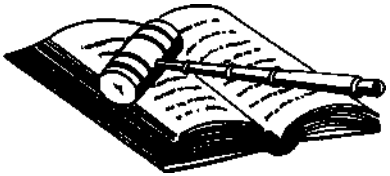

REPORT ON
FAIR TRIAL
OF
HIGH PROFILE
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Approved by the Board of Regents
March 18, 1998

American College Of Trial Lawyers

The American College of Trial Lawyers, founded in 1950, is one of the premier professional organizations in America. It is composed of the best of the trial bar from the United States and Canada. Fellowship in the College is extended by invitation only, after careful investigation, to those experienced trial lawyers who have demonstrated exceptional skill as advocates and whose professional careers have been marked by the highest standards of ethical conduct, professionalism and civility. Although there are currently more than 5,000 Fellows across the United States and Canada, membership can never be more than 1 % of the total lawyer population of any State or Province. Qualified lawyers are called to Fellowship in the College from all branches of trial practice. Fellows are carefully selected from among those who represent plaintiffs and those who represent defendants in civil cases; those who prosecute and those who defend persons accused of crime. The College is thus able to speak with a balanced voice on important issues affecting the administration of justice.

The College is dedicated to maintaining and improving the standards of trial practice, the administration of justice and the ethics of the profession. It brings together members of the profession who are qualified and who, by reason of probity and ability, will contribute to the accomplishments and good fellowship of the College.

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AMERICAN COLLEGE OF TRIAL LAWYERS
Report of Subcommittee on Fair Trial of the High Profile Case*

I. Introduction

For centuries the public has been interested in dramatic trials. In times past when trials attracted the public's attention, English courtrooms were full of newspapermen — although the English law now allows only very limited media coverage until after the trial has concluded. In America, where the media are largely unrestricted in covering trials, from the beginning of the Republic some trials have been media events, particularly where they have involved famous people, scandals or political controversy. The trial of Bruno Hauptman in 1934 for the kidnapping and murder of the Lindbergh baby attracted hundreds of reporters, live radio broadcasts, lawyers as commentators, press conferences by participating counsel and the appointment of a special American Bar Association committee to investigate excesses by the media. The same kind of media attention was given to the 1995 murder trial of Orenthal James Simpson in Los Angeles Superior Court and to the two contemporaneous trials of the Menendez brothers, also in California.

The American Bar Association issued a report in 1936 that proposed a variety of limits on counsel and the media, including the banning of photographs and radio in the courtroom. Notwithstanding the American Bar Association report of 1936, there continued to be trials that resulted in vast and intense media publicity. In the 1960's in the Sam Sheppard case, the Supreme Court held that Sheppard had been denied a fair trial, in part, because of excessive, unrestrained publicity. *Sheppard v. Maxwell,* 384 U.S. 333 (1966). In granting a new trial the Court held that the trial judge "did not fulfill his duty to protect [the defendant] from the inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom." *Id.* at 363. But the admonition by the Supreme Court to exercise some control over trial and pretrial publicity has not cured the problem.

The adoption of voluntary guidelines by the media has not proved feasible. From early days in America the newspapers and later, radio, television and other media, have been highly competitive and increasingly diverse, to the point that media agreement on rules for coverage of sensational trials is essentially impossible. Mandatory control of media publicity of courtroom proceedings raises serious First Amendment problems, *Nebraska Press Assoc. v. Stuart,* 427 U.S. 539 (1976). That case held that the Nebraska courts, in a shocking and sensational murder case, had no constitutional power to order the press to follow the standards set forth in the Nebraska Bar-Press Guidelines.[1] The Court held that "Prior restraints on speech and publication are the most serious and the least tolerable infringement on the First Amendment rights" and that "the protection against prior restraint should have particular force as applied to reporting of criminal proceedings..."[2]

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* This report represents primarily the work of the Legal Ethics Committee and others over a period of several years.

[1] 427 U.S. at 542-43.

[2] 427 U.S. at 559. Recognizing the tension between the First Amendment's guarantee of freedom of speech and the press, and the Sixth Amendment's fundamental guarantee of a fair trial, the Court stated at 427 U.S. 539, 561 "The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other."

During the two decades following the *Nebraska Press Association* decision, the news media have become even more diverse and competitive. The major broadcasting networks face stiff competition from new and alternative news distribution sources.[3] It must; be recognized that freedom of the press, and the ability of the press to report on trial proceedings in court, are of great importance in our society, even if (and especially if) the press exposes deficiencies and flaws in our justice system."[4]

Nevertheless, the litigants under our system have the right to a fair trial. The trial judge has the obligation to prevent excessive and prejudicial pretrial or trial publicity. The failure to do so may invalidate a conviction. *Sheppard v. Maxwell, supra.* That burden intensifies in a high profile case. "Gag orders," that is, orders directing the lawyers and parties not to comment on the case to the media, may be appropriate where circumstances justify them, but such orders must be carefully drafted. Ethical rules may bar counsel from making prejudicial out-of-court statements. Trial judges can take reasonable steps to regulate the conduct of attorneys and others involved in pretrial or trial proceedings so as to lessen the impact of publicity.

At the extreme, courts can sequester juries during trials in the hope of isolating jury members from prejudicial publicity. Whether sequestration accomplishes its purpose is questionable; it is virtually impossible to shut out all outside influences. Sequestration certainly can have adverse effects on jurors, is extremely costly, and the threat of sequestration will deter some qualified prospective jurors from being willing to serve. Sequestration, rarely used in any event, is not a workable solution to the problems of publicity in lengthy trials and it is necessary to look to other possible solutions.

II. Judicial Control of High Profile Litigation

Many problems in high profile cases can be ameliorated by the exercise of prompt and firm control of the proceedings by the trial judge. The fairness and accuracy of the fact-finding process and delivery of justice at trial can best be accomplished in a dignified environment in which the jury can focus all its attention on what is going on in the courtroom without undue or unnecessary distractions. Any case brings with it the competing interests of various parties, but in the high profile trial there is a nearly inevitable conflict of objectives among parties, counsel, spectators, jurors, witnesses and the media. Only the assigned judge has the independence and authority to strike the balance which will best accommodate all these interests. By setting and <u>enforcing</u> clear ground rules which balance these competing interests in a fair and reasonable manner, the judge can best insure the integrity of the proceedings. To assist the trial judge confronted with a high profile case, the following guidelines are respectfully suggested.[5]

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[3] Increased broadcast capacity through cable television and the use of computer networks typify the developments.

[4] See the interesting essay <u>Democracy and the Demystification of Courts</u> by Professor David A. Anderson, in 14 The Review of Litigation 627 (1995).

[6] We gratefully acknowledge the assistance of the National Center for State Courts, its Director G. Thomas Munsterman, and its publication, <u>Managing Notorious Cases</u>, from which much of the material in the Guidelines is derived, as well as Delaware Chief Justice E. Norman Veasey, the Conference of Chief Justices and the National Judicial College.

Guidelines for Trial Judge in the High Profile Case

1. The judge should make clear that the highest level of decorum, dignity and courtesy will be maintained in all court proceedings. The cooperation of all counsel, parties, the media and other spectators should be sought and the judge's expectations should be set out clearly before the beginning of trial.

Commentary: It is usually much easier to prevent problems than to correct them. If the trial judge carefully lays out the court's expectations and seeks cooperation in an open, mutual exchange, the court maximizes the chance to avoid problems and makes them easier to deal with if and when they occur. Formalizing the judge's expectations in the form of a written order reinforces the seriousness with which the court views those expectations and clarifies them to avoid later misunderstandings. Solicitation of suggestions from counsel and the media, to the extent the judge deems it appropriate, may promote *a* spirit of cooperation and may yield helpful ideas in the management of large numbers of spectators and of the media's access to information.

2. The judge should treat parties, counsel, jurors, witnesses, the media and the general public with courtesy and respect, but should deal firmly and decisively with any violation of the court's rules or with any breach of decorum which detracts from a fair and accurate fact-finding process.

Commentary: It is a fundamental principle of judicial behavior that parties, counsel, and others should be treated courteously. This principle takes on added significance in the high profile case. We begin with the notion that a fair trial can best be obtained in an orderly, focused proceeding. Civilized behavior is a *sine qua non* of such a proceeding and the example is set by the court. In addition, the high profile case is more likely to cause the public to observe the legal system, so an orderly proceeding not only enhances the actual quality of justice, but also the public perception of justice and respect for the legal system.

Prompt corrective action when rules are broken is indispensable. Every tolerance of a breach of decorum encourages further disregard of the rules. If the trial judge waits until his or her patience is pushed to the edge, draconian sanctions may be required which could have been avoided with a more prompt response.

3. The judge should insure, to the extent reasonably possible under the circumstances, that members of the media have prompt and equal access to all admitted evidence and publicly filed documents, and to information concerning court procedures and scheduling.

Commentary; In dealing with the media, several principles should be kept in mind. First, media representatives are in daily, intense competition with one another to produce the fastest and most attention-capturing news story. The court should avoid creating an impression of partiality toward some members of the media over others. Second, problems also arise where the media is frustrated in its attempt to obtain legitimately newsworthy information regarding the trial. For example, if the media's access to information of public record is impeded, the media will be encouraged to seek news from outside sources such as attempting to interview witnesses, or friends or relatives of witnesses. While it would be unrealistic to imagine that such contacts can be avoided

entirely, the more actual evidence available for the media to report, the less time and resources will be devoted to generating stories out of speculation and non-evidence. Finally, making clear to the media the nature of particular proceedings and the court's intentions regarding scheduling will frequently avoid misunderstandings and misreporting.

4. The judge should insure that adequate security measures are in place to protect the privacy and safety of jurors, parties, witnesses, counsel and spectators.

Commentary: Although a judge may consider it outside the judicial function, careful planning for mechanical details, such as allocation of limited seating, entry and departure from the courtroom during testimony, security measures and means of access to admitted documents, greatly enhances orderliness of proceedings, decorum, and security.

Protection of the privacy and safety of jurors, parties, counsel, spectators, and witnesses would assist those individuals in maintaining their focus on the trial at hand rather than on personal concerns. A judge cannot simply assume that law enforcement personnel will take care of security, but should give careful pretrial attention to these matters so that, once the trial begins, it can run smoothly. The judge does not have to plan such details personally, but should at least review the final plans to make certain they fully satisfy all of the court's requirements and expectations.

5. The judge should set guidelines for conduct of the media in and around the courtroom and other areas of the courthouse, communicate these expectations well In advance of the first day of trial, and deal promptly and firmly with any violation of the rules.

Commentary: In addition to providing for behavior inside the courtroom, the judge should set clear guidelines for behavior in courtroom corridors and areas immediately surrounding the courthouse. Again, the particular rules will vary depending upon the circumstances of the case and the physical layout of the courthouse, but the need for imposing reasonable standards does not stop at the courtroom door. It is virtually impossible to maintain decorum during court sessions if bedlam ensues as soon as the court is in recess. Parties, counsel, witnesses and spectators should not be subject to unreasonable and offensive conduct as they seek to enter or leave the courtroom.

6. The judge should not allow television in the courtroom during the trial of high profile cases. If any such case is televised, the court should be satisfied that: (a) all reasonable measures have been taken to minimize detractions from the fairness, accuracy and dignity of the fact-finding process caused by the presence of cameras, and to minimize any threat to intimidate or to alter the behavior of the court, witnesses, parties or counsel, or unnecessarily to invade their privacy caused by the presence of cameras; and (b) the parties consent to coverage. Furthermore, coverage should be limited to trial proceedings observed by the jury or trier-of-fact, and should not include pre-trial proceedings, side-bar conferences and other trial proceedings outside the jury's presence.

Commentary: It is recognized that, particularly where authorized by applicable statutes or court rules, television cameras may be allowed in the courtroom, even in the high profile case. In such cases, among the rules and guidelines the court should consider and impose to minimize effects of television coverage that may adversely affect the trial process are:

(a) No photography of the jurors;
(b) No close-up photography of communications between counsel and client or between co-counsel;
(c) Only one or two cameras in the courtroom with the feeds from those cameras being pooled and made available to all who are authorized;
(d) No changing of the position of the cameras while court is in session;
(e) Video cameras to be located and remain in a particular location designated by the judge;
(f) No changing of the video lenses while court is in session;
(g) No video camera operator may enter or leave the courtroom while court is in session;
(h) No modification or addition of lighting equipment without permission of the judge;
(i) No movie lights or sudden lighting changes during the court sessions;
(j) No visible or audible light or signal (Tally Light) on any equipment;
(k) No identifying marks, call letters, logos, symbols and legends on equipment. Persons operating such equipment shall wear no clothing bearing any identifying information;
(I) A video distribution center shall be maintained outside the courtroom where feeds or videotape from the television cameras may be received;
(m) A separate media room fed by the cameras available for all reporters. In this event, the court may consider prohibiting reporters from entering or leaving the courtroom during judicial proceedings where they choose not to take advantage of the separate media room.

Where television cameras are permitted, the court may consider as a *quid pro quo* prohibiting the use of television cameras in the courthouse building or within some limited distance of the entrances to the courthouse in order to eliminate the use of cameras in the pursuit of trial participants down the hall or out the door and to prevent a — "media circus."

7. The judge should advise counsel that strict compliance with the applicable professional rules concerning extra-judicial statements, i.e., American Bar Association Model Rule 3.6 and/or its local state rule counterpart, is expected. In all high profile cases the judge should give serious consideration early in the case to entering a "gag order" prohibiting counsel and the parties from commenting about the case to the media or limiting the scope of their comments. Any violation of the Rule or of the court's order should be dealt with immediately and firmly.

Commentary: The need to prohibit prejudicial and inflammatory out-of-court statements requires no elaboration here. As indicated in part IV of this report, in accordance with the circumstances of the case, any gag order should be carefully drafted and no broader than necessary to avoid prejudicial publicity.

8. The judge should make clear that the same standard of behavior called for by applicable professional rules such as American Bar Association Model Rule 3.6 is expected of parties, and in criminal cases, law enforcement personnel as well.

Commentary: Imposing the standard of Model Rule 3.6 upon non-lawyers will necessarily be more difficult than upon lawyers, who are already bound by the professional rules. However, the standard is not unreasonable and the court

can and should enforce it vigorously after first making the court's expectations clear.

9. Except for conferences with counsel, or with court staff, the judge should speak about the case only from the bench during recorded media proceedings.

Commentary: Extra-judicial statements by the judge are a breeding ground for misunderstandings and misquotes. The judge's ability to control the courtroom and the trial is potentially compromised every time he or she steps out of the judicial role and engages in informal discussions of any sort with members of the public.

10. The court administrator or a member of the court's staff should be designated to communicate with the media concerning scheduling, courthouse facilities, access to public documents, court procedures and the like. Otherwise, no member of the court's or judge's staff should make any statement concerning the case except to other staff members in the course of their regular duties.

Commentary: If one person with discretion and authority is put in charge of these matters, inconsistent applications will be avoided and responsibility for implementation of the court's procedures will be clear.

Public or private comments by court staff to persons outside the court have the same inherent pitfalls as extra-judicial statements by the judge, but are more potentially dangerous because members of the court staff will necessarily have varying amounts of information and varying degrees of sophistication, maturity, and discretion. A court employee with no prior experience in dealing with the media or with high profile matters may fail to understand how reporters can use unguarded comments or the mischief which can arise from innocent discussion of court matters with friends and family. Giving staff clear notice of a rule prohibiting such comments serves not only to advise them of the behavior which is expected, but also makes it easier for them to decline to engage in such discussions without being made to feel guilty or rude.

11. The judge should keep the proceedings moving expeditiously and avoid unnecessary delays during trial. Anticipated legal issues should be dealt with prior to the time set for jury involvement. Other than brief side-bar conferences on evidentiary objections, matters which must be heard outside the presence of the jury should be taken up before or after the court day or during the luncheon recess. Counsel should not be permitted to indulge in lengthy, repetitive examination of witnesses and unduly long oral arguments.

Commentary: This guideline is applicable in all trials. It is acutely appropriate in the high profile case. Extended conferences in chambers or otherwise outside the hearing of the jury when court is in session unnecessarily prolong the trial and promote improper speculation by the jury concerning the nature of those discussions. Repetitious argument and witness examination lead to jury irritation and boredom, inducing jurors to divert their attention from the case. This is a particularly important problem in trials where the jury is sequestered.

12. Sequestration of jurors should be considered only where other alternatives, such as change of venue or venire, are inadequate to insure that the jury will not be affected by extra judicial Information or influence. Where sequestration is unavoidable, every effort should be made to minimize the inconvenience to jurors, including extending the court day and/or week to shorten the trial.

Commentary: Sequestration, particularly extended sequestration, not only deprives the jurors of important personal rights and freedom, it can promote impatience with detailed presentations of evidence, an inclination to prejudge, and anger and frustration which may impair a fair and impartial verdict.

III. Out-of-Court Statements by Counsel and Related Rules of Ethics

Some of the most prejudicial media material in high profile cases comes from out-of-court statements by counsel and others involved in the litigation. Almost all states have rules that forbid prejudicial out-of-court statements by trial counsel or characterize such statements as unprofessional. The American Bar Association has such rules in its *Model Rules of Professional Conduct* as does the American College of Trial Lawyers in its *Code of Trial Conduct.* There is little doubt that properly drafted rules of that sort can survive attack under the First and Fourteenth Amendments, See *Gentile v. State Bar of Nevada,* 501 U.S. 1030 (1991) and *Sheppard v. Maxwell,* 384 U.S. 333, 361 (1966). The current American Bar Association Model Rule applies only to attorneys and those working with them on the particular case.[6] Consideration should be given to broadening its scope. Prompt and effective enforcement of the rules should be a high priority item in the high profile case.

As amended in March, 1994, the American College of Trial Lawyers' *Code of Trial Conduct* provides in Paragraph 23:

> Because a lawyer should try the case in court and not in the newspaper or through other media, a lawyer should not make an extra judicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it would have a substantial likelihood of materially prejudicing an adjudicative proceeding.

The language "substantial likelihood of materially prejudicing an adjudicative proceeding" was drawn from the standard approved in *Gentile v. The State Bar of Nevada, supra,* The American College of Trial Lawyers' Code is intended to be advisory and not binding in the same sense as ethics rules or statutes in particular states. However, the College believes that the Code furnishes a reasonable and workable standard of behavior.[7]

American Bar Association Rule 3.6 of the *Model Rules of Professional Conduct* formerly contained language substantially the same as the present Paragraph 23 of the College's *Code of Trial Conduct.* However, in August, 1994, the American Bar Association House of Delegates amended Rule 3.6 to provide a "right of response" allowing a lawyer to "make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent

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[6] The limitation in the rule to lawyers engaged in the case and other associates was added to the model rule in 1994.

[7] The College's Code *of Trial Conduct* in fact has been cited in decisions, and Chief Justice Rehnquist in the Introduction to the Code expresses the hope that the Code "will receive careful and conscientious consideration by every lawyer who engages in trial work."

adverse publicity." While this amendment has an element of fair play about it, it adds the additional problem that the response may provoke a back and forth colloquy between counsel on both sides that may make the matter worse.

An additional change adopted by the American Bar Association in August, 1994 was to add a Rule 3.8 which in part addresses the problem that not only the prosecutor but also investigators and law enforcement people commonly are interviewed by the press and are potential sources of prejudicial publicity. New Rule 3.8 requires the prosecutor to exercise reasonable care to prevent this kind of publicity from occurring. Again, at least the substance of these various rules is enforceable, and where the rules are speedily and vigorously enforced, the problem of prejudicial trial publicity might be substantially lessened. Of course, the threat of enforcement and the usual desire of counsel to avoid being accused of unethical behavior are helpful in themselves.

IV. "Gag Orders" Imposed on Attorneys and Parties

More frequently than many lawyers realize, courts utilize so-called "gag orders" limiting out-of-court statements to the media by parties and counsel. The most effective orders are worked out between court and counsel at the outset of the case. For the benefit of their clients, counsel often agree to such orders. But even where the judge acts on his or her own initiative in imposing a gag order, it likely will be upheld by appellate courts if it is carefully drafted, not overly broad and justified by the circumstances of the case. E.g., *In re Application of Dow Jones & Co.,* 842 F.2d 603 (2nd Cir. 1988), *cert. denied* 488 U.S. 946 (1988). See also *Levine v. United States District Court,* 764 F.2d 590 (9th Cir. 1985), *cert. Denied 476* U.S. 1158 (1986). In some cases trial courts specifically have ordered counsel to comply with ethical rules such as American Bar Association Rule 3.6. This has the merit of allowing the ethical rules to be enforceable immediately by contempt, rather than by lengthy state or federal ethics proceedings.

V. Television in the Courtroom in High Profile Cases

Publicity of trial and pretrial proceedings occurs in many forms. In its most direct form this publicity includes live television coverage of the proceedings. In the *Simpson* case for example, virtually the entire trial, including proceedings outside the jury's presence, was carried live on radio and television.[8]

The College has consistently opposed cameras in courtrooms. In 1979, the Board of Regents adopted the following resolution:

> The American College of Trial Lawyers expresses strong opposition to the use of television in trial or appellate proceedings as being wholly inconsistent with the right of parties to a fair trial or a fair appellate hearing and as being incompatible with the interests of justice.

In 1984, the College approved, as its official position, a report prepared by a committee consisting of John C. Elam, chair, Erwin N. Griswold and Simon H. Rifkind, which reaffirmed the College's 1979 position and urged a committee of the Judicial Conference of the United States to oppose cameras in federal courtrooms. Consistent with that position, the College reaffirms its opposition to courtroom cameras in the trial of high-profile cases.

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[8] In the civil wrongful death suit against Simpson the judge prohibited in-court television coverage and imposed a gag order on the parties and attorneys.

We recognize that the question of courtroom television is not without controversy. In particular, representatives of the media and others have vigorously advocated courtroom television, citing studies that purport to show minimal impact of television on courtroom procedures.[9]

A large majority of states (at last count, 47) permit some form of courtroom television of trials or appellate proceedings or both, with a variety of limits on the scope of coverage. Some states require the consent of the parties while others do not (although consent or lack of it usually may be pertinent to the court's exercise of discretion). It is risky to generalize about these state rules except to say that ordinarily the decision on courtroom television is left to the discretion of the court. These states commonly have criteria for the court to use in exercising its discretion, including preserving the fairness and dignity of the proceeding, maintaining orderly conduct and considering whether the parties consent to television. Thus, in a number of high profile trials, notwithstanding pressure from the media, state courts have prohibited courtroom television.

From July 1, 1991 through December 31, 1994, the Judicial Conference of the United States sponsored a pilot program in six federal district courts and two courts of appeal permitting courtroom television coverage. The program limited cameras to one or two per trial courtroom, prohibited coverage of jurors, and left the question of coverage (and the extent of it) to the discretion of the trial judge. Criminal cases were not included in the program.

The Federal Judicial Center conducted a poll of judges who participated in the pilot program. Fifty-six percent of the judges polled believe that, "to some extent," electronic media coverage violates witnesses' privacy, forty-one percent believe that, "to some extent," it distracts witnesses, sixty-four percent believe that "to some extent" it makes witnesses more nervous, sixty-four percent believe that, "to some extent," it causes attorneys to be more theatrical in their presentation. These responses raise serious concerns, despite the fact that there were perceived benefits from television coverage (for example, sixty-four percent believe that "to some extent," lawyers are motivated to come to court better prepared). These negative aspects are quite significant, even though only seventeen percent believe that, "to some extent," the more egregious damage in the form of courtroom disruption results from camera coverage.[10]

Despite these mixed feelings, the 1994 report on the pilot program by the Federal Judicial Center recommended among other things that the Judicial Conference[11] authorize federal courts of appeal and district courts to provide camera access to civil proceedings where appropriate.[12] The Center's report was included in a report and recommendation to the Judicial Conference by its Court Administration and Case Management Committee. Despite the Committee's recommendation, the Judicial Conference has

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[9] These studies appear to be based on a variety of interviews and observations in cases most of which appear to have been less than newsworthy, much less "high profile."

[10] Electronic Media Coverage of Federal Civil Proceedings, Federal Judicial Center, 1994, pp. 43 et seq

[11] The Judicial Conference is comprised of, among others, the Chief Judge of each of the Circuit Courts of Appeal,

[12] Ibid. pp. 14-15.

refused to do so, although it recently has permitted television coverage of courts of appeal proceedings in the courts' discretion. The Conference decided that:

> [b]ased upon the data presented, a majority of the Conference concluded that the intimidating effect of cameras on some witnesses and the jurors was cause for concern, and the Conference declined to approve the Committee's recommendation to expand camera coverage in civil proceedings.[13]

The official position of the College, although it does not represent a unanimous view of all Fellows of the College, or even the Committee, opposes courtroom television based on the long and collective experience of trial lawyers representing both plaintiffs and defendants in the courtroom across a wide spectrum of civil and criminal proceedings. The College position represents no special interest. The College's opposition to cameras in court in high profile cases is founded on one overriding consideration: the significant risk that television will impair the integrity of the trial process, which broadly embraces fact-finding, legal determinations and, in general, decision-making on a wide variety of issues.

Of course there is no Constitutional right of the media to provide courtroom television. Proponents of courtroom television argue that it leads to public understanding, acceptance and support of the judicial system. Reports of trial procedures serve a great value and the need of the public to understand the judicial system cannot be ignored. But trials are to provide justice, not to entertain or to educate. The extent to which television in court actually serves as a constructive educational function may be debated. Newscasts typically show only brief excerpts of the proceedings, the ones deemed most newsworthy, the few sensational or emotional seconds of a trial. Even so-called "gavel to gavel" coverage may omit important parts of the trial or show highly confidential parts of the trial that even the jury does not see or hear.

It is unrealistic to assume that trial participants' knowledge that they are on television has no effect on their behavior in the courtroom. It is true that in its evaluation of the pilot program the Federal Judicial Center report stated that judges and lawyers who participated "generally reported observing small or no effects of camera presence" on trial participants, courtroom decorum, or the administration of justice. The Center recommended that the Judicial Conference of the United States authorize federal trial and appellate courts nationwide to provide camera access to civil proceedings, subject to guidelines. However, as mentioned above, poll responses of judges who participated in the program show that a significant number believed the use of cameras affected trials in ways that could undermine the fair administration of justice (e.g., witnesses' privacy violated, witnesses distracted, witnesses made more nervous, attorneys made more theatrical, disruption to court proceedings, signals to jurors regarding arguments and testimony, people caused to attempt juror influence). And, most importantly, the Judicial Conference refused to adopt the recommendation of the Center that camera coverage be allowed in federal courts.

These perceived effects on trials are enough to show an unacceptable risk of distortion of the trial process by the presence of cameras in the courtroom. A prophylactic rule barring cameras is the only means of insuring that the integrity of the trial process will not be undermined. Hence, the College reaffirms its historic opposition to cameras

[13] Judicial Conference of the United States, Committee on Court Administration and Case Management, p 47, September 20, 1994.

in the trial courtroom. State laws permitting courts to allow trial courtroom television in the court's discretion should be reconsidered and modified. Where such legal authorization persists, the courts should exercise their discretion with great care and caution and deny courtroom television in all high profile trials.

VI. Standards Applicable to Attorneys Acting as Commentators

Gag orders and presently existing ethical rules customarily apply to the attorneys in the case or people associated with them, and to a limited extent to the investigators and law enforcement personnel involved in the case. However, as we have seen, a veritable army of law professors and attorneys with no official role in the case may give (or sell) views or comments to the media as to how each side is doing, how well the judge is handling the case, what particular rulings of the court may mean and more. The greatest concern is that the comments of such lawyers, if made known to the jury, could unfairly affect the outcome of the case.

Broadly speaking, the First Amendment allows freedom both to the wise and the ignorant to speak their views, unless there is the equivalent of shouting "fire" in a crowded theater, or talking about bombs while boarding an airliner. However, the question has been raised as to whether there ought to be specific ethical rules or guidelines that would apply to lawyers — because they are lawyers — who appear on television or radio or address the media and opine on ongoing court proceedings.

In appropriate circumstances, legal commentators can play an important role in the reporting of court proceedings. They can assist the public by explaining the significance of events occurring in and out of court, and by "demystifying" the judicial process. However, even commentators who seek to fill this role may have serious limitations, such as lack of knowledge with respect to particular issues, or bias and motivation to exploit the role for personal advantage, that pose dangers to the public and to the administration of justice. In some instances the comments by a lawyer commentator conceivably could impact the outcome of the trial.

There currently appear to be no specific ethical standards governing conduct as a legal commentator. Substantial additional study would be needed before adopting comprehensive and enforceable ethical standards. No doubt the American Bar Association and the bar associations of individual states would participate in such a study. In anticipation of such a study, the American College of Trial Lawyers proposes the following guidelines for serious consideration. [14]

Suggested Guidelines for Legal Commentators

1. The lawyer-commentator should restrict comments to procedure and process and refrain from comments which could be interpreted as opinions or predictions or evaluations regarding the performance of participants, or the effect of testimony or rulings on the outcome of the proceeding.

2. Without limiting paragraph 1, a lawyer should not perform the role of a legal

[14] See the Essay by Laurie L. Levenson, Associate Dean for Academic Affairs of Loyola Law School, entitled, "Reporting the Rodney King Trial: The Role of Legal Experts," that appeared in the January 1994 issue of Loyola of Los Angeles Law Review. Dean Levenson, and Professor Erwin Chemerinsky of the University of Southern California Law Center, are the co-authors of an article entitled, "The Ethics of Being a Commentator," 69 Southern California Law Review, May 1996, No. 4.

commentator, or comment publicly on a pending case, unless the following guidelines are followed:

a. The commentator has an understanding of the background of the case so as to be competent to perform as a commentator;

b. The commentator does not have an interest in the proceeding about which he or she is commenting, or represent a client who may be affected by the proceeding, unless the commentator makes a reasonable effort to insure that such interest or representation is clearly and publicly revealed; and

c. The commentator provides to the news organization(s) to whom comment is made a full disclosure of his or her legal background and potential for bias, if any.

VII. Conclusion

High profile trial court proceedings almost inevitably are accompanied by media-related problems. But there are tools at hand that can be used effectively to lessen, if not avoid, the problems.

The most effective problem solver in high profile cases is an experienced and able trial judge not intimidated by the media, the prosecution or lawyers, or overcome by his or her own desire to become a media star. The judge should take control of the case from the outset, treat the parties, attorneys, witnesses, jurors, spectators and court staff — and the media — fairly but firmly, assure that the lawyers try the case in the courtroom and not in the media, require compliance with ethical rules and keep the case moving briskly. This report suggests guidelines that might help the trial judge keep the proceedings under control.

Use of carefully drafted gag orders and enforcement of ethical rules prohibiting prejudicial out-of-court statements by the parties, attorneys and their staff are also helpful in minimizing prejudicial publicity in high profile cases.

Prohibition of courtroom television of trial court proceedings in high profile cases is an important helpful step. Even though many states permit courtroom television of trials in the courts' discretion, courts should apply discretionary criteria appropriate to high profile cases to deny courtroom television in such cases or at least, to minimize any impact on the proceedings.

Finally, there is the matter of legal commentators appearing on the media to critique and explain what is happening at the trial. Legal commentators can serve a useful purpose in educating the public. However, careless or inappropriate comments by the commentator pose the risk of infecting the jury and affecting the outcome of the case. This report proposes guidelines for further consideration and study which would require a commentator to have an understanding of the background of the case, to disclose any interest he or she may have in the proceeding and to limit the scope of the comments.

The American College of Trial Lawyers is an organization of trial lawyers experienced in all phases of trial law, devoted to the improvement of justice. As such, it has recognized a compelling need to speak to the questions raised by highly publicized courtroom cases.