Dalhousie Law Journal

Volume 19 | Issue 2 Article 4

10-1-1996

Lights, Camera, Litigate: Lawyers and the Media in Canada and the United States

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Drawing on recent high profile cases in Canada and the United States, the author examines the different extent to which lawyers in those two countries comment to the media about ongoing litigation. He investigates various formal constraints upon lawyer comment, such as court-imposed publication bans and rules of professional responsibility. He also looks at the way in which lawyer behaviour is attributable to non-formal, cultural determinants.

À la lumière de certaines causes récentes largement couvertes par les médias au Canada et aux États-Unis, l'auteur examine dans quelle mesure les avocats Canadien, par rapport aux avocats Américain, offrent des commentaires aux médias portant sur un litige en cours. L'auteur examine certaines contraintes formelles qui limitent ce genre de commentaire telles que les règles de responsabilité professionelle et l'interdiction de publication imposée par la Cour. Il analyse aussi dans quelle mesure la prédisposition d'un avocat à faire certains commentaires aux médias est attribuable à des facteurs culturels plutôt que formels.

Introduction

There are various ways, I am sure, of describing the comparative law exercise that I want to pursue with you—you who are students, you who are scholars, and you who are practitioners of Canadian law in a Canadian legal culture. I want to compare and reflect upon the rather dramatic differences in the ways that Canadian and American lawyers approach the issue of lawyer media comment—the extent to which a lawyer may permissibly talk to the media when it is apparent that the media will publicize the lawyer's words. In brief, in Canada this is not regularly done, although its frequency may be increasing. By contrast, lawyers in America seem to pass by such opportunity only rarely.[2] As the current

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1. This is a revised version of the 1996 F.B. Wickwire Memorial Lecture, delivered at Dalhousie Law School on 14 November 1996.

2. No reliable empirical study exists of how widespread is the practice of lawyer comment to the media. Impressionistic accounts vary. Compare Greenhouse, "Justices to Rule on Outside Comments by Lawyers" *N.Y. Times* (8 Jan. 1991) A17, col. 3, at col. 4 (common for both defence lawyers and prosecutors to make public proclamations of defendant's guilt or innocence); "Be Open with Media but Think Before You Speak, Lawyers Told" *Lawyers Weekly* (21 June 1991), (various lawyer impressions that professional prohibition against

American lawyer witticism has it: "let's try this lawsuit in the old-fashioned way: in the newspapers."[3] Why this profound difference between our legal cultures?

In large part, as we will see, that difference could have been explained in years past as flowing from profound differences in legal doctrine. But, at least at some levels, those lines of doctrinal difference are now converging. That has occurred chiefly due to enactment of the *Canadian Charter of Rights and Freedoms*[4] almost fifteen years ago. Nonetheless, what continues to separate our law-practice systems, in my view, is our different legal and general cultures. In the end, I will conclude that those cultural differences will probably ensure that our different professional practices on media comment will endure.

We in the United States approach a Canadian-U.S. difference in law, often, with suspiciousness bordering on xenophobia. One can almost read the American mind muttering, "If the Canadian rule had any appeal, surely we would have adopted it as our own. It's different, and that makes it presumptively wrong." Some in the United States would describe that attitude as "in your face" confrontational. The Canadian approach to transborder differences is quite different. This was recently captured in a comment attributed by the United States press to Linda Torney, an organizer of the protest in Toronto in late October 1996 against cuts in the province's welfare safety net. According to the *New York Times*, Ms. Torney told a reporter that cuts in such mainstays of Canadian life as the CBC were wrong: "These are the marks of a caring society and—no

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expressing to media personal opinion on merits of client's case frequently flouted). Beyond frequency, there are no clear statistical indications that adverse media, much less lawyer media comment independently, is a significant factor leading to unfair court outcomes. See L. Snyder, "Rhetoric, Evidence, and Bar Agency Restrictions on Speech by Attorneys" (1995) 28 Creighton L. Rev. 357 at 390ff. But see P. Reardon, *Standards Relating to Fair Trial and Free Press* (Chicago: American Bar Association, 1966) at vii (assertion, without statistical support, that increasing numbers of defendants being prejudiced by excessive trial publicity); Special Comm. on Radio & Television of the Association of the B. of the City of N.Y., Radio, Television and the Administration of Justice (1965) (same).

3. The traditional stance, of course, is the reverse: "A lawyer should try his cases in court and not in the newspapers or through other news media. . . ." Am. Coll. Tr. Lawyers, *Code of Trial Conduct*, rule 23 (1987 rev.). The American College of Trial Lawyers is composed primarily of corporate defence litigators, who typically work with corporations that have both in-house and outside public relations staff, to whom, of course, the anti-comment rules do not apply. Their "Code of Trial Conduct" is merely hortatory and is very rarely mentioned in lawyer discipline decisions. Its rule on trial comment, if adopted officially, would clearly be unconstitutional. Its sentiment, nonetheless, is probably widely shared among judges. E.g. *Lawrence* v. *Evans*, 573 So.2d 695, 696 (Miss. 1990) (describing "the all-too-familiar but still most lamentable practice of trying [lawyer's] lawsuit in the press").

4. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

offence—what sets us apart from the United States."[5] "No offence," Ms. Torney? No pie-in-the-face arrogance about which culture is superior? How unusual it would be for a citizen in the United States to reply apologetically to a Canadian reporter when noting a difference between the two nations in a way suggesting the superiority of the approach taken in the United States. After reading Ms. Torney's words, I felt like replying, "I personally take no offence, Ms. Torney. But, with respect, I disagree. I think there is much more that sets us apart, and *politesse* is only one of those differences, if an important one that I hope you continue to treasure." For whatever the reasons may be for difference in history, geography, education, courts or other public institutions, climate, national origins, demographics—for whatever reason, the dominant legal cultures in Canada and the United States are growing increasingly different. I see that as neither necessarily good or bad—but merely as neutral—and as something that reflects the maturing of our respective senses of nationhood and separate place. One loses sight of that widening gulf in legal matters only at peril of profound misunderstanding.

I. *Advocates and the Media in Canada—Restraint in Speech and Press*

I begin with the Canadian scene, with unspeakably horrible crimes and a notorious defendant—the sex murders of two young women for which a jury has now convicted Paul Bernardo.[6] As I need remind only those few, either Canadian or American, who missed the extensive media coverage of the crime, Bernardo was a bookkeeper with a well-hidden past of extensive criminal sexual assaults. Equally incomprehensible as a human being was his wife, Karla Homolka, who was apparently ready to accommodate Bernardo's horrific sexual need to rape and then murder young women, all the while videotaping their ordeal. Among other gruesome facts, which would have been routinely and immediately

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5. *N.Y. Times* (26 Oct. 1996) 3, col. 1. The *Times* editors were so taken with Ms. Torney's simple and unusual politeness that it was displayed, alone among all the quotes of the day, as the highlight in the *Times*' "News Summary". See *ibid.* at 2, col. 6.

6. I gather much of the background facts, aside from bare-bones references in judicial opinions, from American news reports. See Davison, "Canada: Canadian Media Restrained After Gag Order Lifted," Reuters News Service (20 May 1995) (Nexis); Turner, "Courts Gag Media at Sensational Canada Trial," *L.A. Times* (15 May 1994) A4, col. 1. On the efforts that Canadian border authorities and broadcast officials were required to make in order to enforce the publication ban against imported American news sources, see Turner (blacking out of segments of American television news broadcasts and seizure of American newspapers at the border). Nonetheless, reportedly some news reached Canadians through computer bulletin boards and via fax. See Edmonds, "Canada: Grisly Murder Trial to Make Quiet Town Media Circus" Reuters News Serv. (3 May 1994) (Nexis).

reported in the American media, was that Homolka had earlier, before their marriage, participated in his sexual attack on her own fifteen-year-old sister, which resulted in the sister's death as well. In the United States, Bernardo's trial would have been flooded with media. None of the inhuman and gruesome details would have been spared in their reporting. Even the most gory would undoubtedly have found a wide outlet, at least in the American tabloid press.

What unfolded in Canada, however, was entirely different. Before Bernardo's trial, Homolka confessed in court to her participation in the crimes that had also been charged against him. But before she confessed, the judge excluded the general public from the courtroom. He permitted Canadian journalists to remain, but prohibited them from reporting what they heard until a later point. As he had no control over what American reporters would publish, he ordered them to leave along with the public. Homolka then gave her confession. No Canadian news outlet violated the court's publication ban.

Customarily, the publication ban would have ended once the proceedings against Homolka ended. But here there was a complication—Bernardo himself was yet to be tried and Homolka was to testify against him. The court continued the ban against reporting her confession until the conclusion of Bernardo's trial.[7] The logic of continuing the ban was fairly obvious—to protect Bernardo from public revulsion against him because of Homolka's disclosure of their crimes during her own trial. But the interesting development, for our purposes, is that Bernardo's lawyers did not want the ban continued permanently and as to all pretrial matters, evidently believing it preferable that the public know the defence response to certain matters that were already being publicized, particularly by the families of the young victims. In addition, of course, Homolka had—if I may revert to Americanese—"cut a deal" with prosecutors and obtained a comparatively light sentence in return for her cooperation in testifying against him. At least those members of the Canadian public interested in strict enforcement of the criminal laws might be quite concerned to know of such uses of the law of sentencing.[8] Because the ban was continued, the Canadian media could not provide sufficient detail to the Canadian public to portray that point.

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7. See *R.* v. *Bernardo* (1995), 38 C.R. (4th) 229 (Ont. Gen. Div.).

8. See e.g. Blatchford, "A Matter of New Justice" *Toronto Sun* (18 May 1995) 5 (account, necessarily incomplete because of pending publication ban, of efforts of Gordon Domm to overturn Bernardo ban because of objection to light sentence given Homolka); Turner, "Courts Gag Media at Sensational Canada Trial," *L.A. Times* (15 May 1994) A4, col. 1 (same).

Not all Canadians, of course, agree with publication bans against reporting trials.[9] In America, a publication ban in the equivalent circumstances would be unthinkable, and, were a judge so rash as to enter one, the ban would certainly be vacated by an appellate court as an unconstitutional prior restraint.[10]

But in Canada, publication bans can be perfectly lawful and, in appropriate circumstances, consistent with the *Canadian Charter of Rights and Freedoms*. The key decision, of course, is *Dagenais v. Canadian Broadcasting Corporation*.[11] Four men who were members of a Roman Catholic religious order were charged with physical and sexual abuse of young boys who had been placed in their care in a Catholic training school. Their trials were to be held before a jury. At that point the CBC began advertising a nation-wide broadcast of a four-installment miniseries entitled, "The Boys of St. Vincent," a fictional account of sexual and physical abuse of children by clerics in a Catholic institution. On application of defence counsel for the defendants, the trial court in Ontario granted an interlocutory injunction, prohibiting broadcast of "The Boys of St. Vincent" until completion of the trials. The Ontario Court of Appeal dismissed the appeal by the media, after modifying the order to apply only in Ontario and to one television station in Montreal—the actual sites of the four trials.[12]

In the Supreme Court of Canada, Chief Justice Lamer for the majority first noted that the common law rule recognizing discretion in the trial courts to impose publication bans was a common law power that predated the *Canadian Charter of Rights and Freedoms*. But, said the Chief Justice, the common law rule, since it favored the right of fair trial over the right of free expression, was inconsistent with the equal status that the *Charter* provided both to freedom of expression (guaranteed by s. 2(b)[13])

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9. For media criticism of the Bernardo publication ban, see e.g. Fotheringham, "Canada: Cameras Belong in Bernardo Courtroom—Canadians Are Pusillanimous About Their Rights" *Financial Post* (9 Feb. 1995) (Lexis). Turner, *supra* note 4, quotes Professor Michael Mandel of Osgoode Hall Law School as criticizing bans because they "take jurors for such morons that they can't tell the difference between evidence heard at trial and what appears in the newspaper." He then quotes Catherine Ford, associate editor of the *Calgary Herald*, as defending bans in some cases: "There's a hierarchy of rights, and the right of the accused to a fair trial has to come first over the public's right to know every detail of what happened whenever they want to hear it. . . ."

10. See *infra* text at note 92.

11. [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12 (1994) [hereinafter *Dagenais* cited to S.C.R.].

12. (1994), 12 O.R. (3d) 239, 99 D.L.R. (4th) 326.

13. Section 2(b) states that "[e]veryone has the following fundament freedoms:. . .(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication. . . ."

and to the right of an accused to a fair trial (guaranteed by s. 11(d)[14]).[15] In the United States, constitutional jurisprudence would have required a court either to accommodate in some way the basic meaning of both provisions—if possible, within the relatively narrow limitations of judicial doctrine, developed without textual support in the American Constitution—and, if not, to give predominance to one right or the other.[16] Because common law rules are by and large the province only of state courts, the United States Supreme Court would be required in such a case either to accept as constitutional the common law rule as announced by the state court being reviewed or to strike it down as unconstitutional under supreme federal law.

Canada's *Charter* and its other constitutional arrangements provide yet a third option, which the court exercised in *Dagenais*.[17] The Supreme Court of Canada self-consciously modified the common law rule, as it has the power to do, in light of the two contending *Charter* rights and in view of the unique and express feature of the *Charter*—its s. 1. That provision in effect invites the Canadian courts to engage in deliberate balancing.[18]

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14. Section 11(d) provides that: "Any person charged with an offence has the right . . . (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal. . . ."

15. *Dagenias*, *supra* note 11 at 877.

16. The Chief Justice referred to this feature of American constitutional law as the "clash model" of constitutional adjudication. See *ibid.* at 882. By contrast, in Canadian jurisprudence, "[a] hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the *Charter* and when developing the common law. . . ." *Ibid.* at 877.

17. See generally P. Hogg, *Constitutional Law of Canada* §§ 40.2–40.13 3d ed. (Toronto: Carswell, 1992); W. Lederman, *Assessing Competing Values in the Definition of Charter Rights and Freedoms*, in G. Beaudoin & E. Ratushny, eds., *The Canadian Charter of Rights and Freedoms*, 2d ed. (Toronto: Carswell, 1989) at 127–63. On free-expression issues not involving publication bans, see A. Polak, "Free Legal Trade: American First Amendment Theory Fails to Persuade Canadian Courts" (1994) 8 Emory Int'l L. Rev. 579.

18. See *Dagenais*, *supra* note 11 at 877 ("When the protected rights of two individuals come into conflict, as can occur in the case of publication bans, *Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights.") See generally F. Liss, "A Mandate to Balance: Judicial Protection of Individual Rights Under the *Canadian Charter of Rights and Freedoms*" (1992) 41 Emory L.J. 1281.

The balancing approach of the Supreme Court of Canada in *Dagenais* had been generally anticipated in opinions of, for example, the New Brunswick Court of Appeal in *Re Canadian Broadcasting Corp.* (1994), 148 N.B.R. (2d) 161, 116 D.L.R. (4th) 506 (exclusion of media from sex-crime sentencing, necessary to protect victim, infringed guarantee of freedom of media under s. 2(b), but was justified under s. 1 of *Charter*) and the Ontario Court of Appeal in *R.* v. *Squires* (1992), 11 O.R. (3d) 385, 59 O.A.C. 281 (statutory prohibition against taking film of person leaving courtroom infringed media freedom under s. 2(b) of *Charter*, but was reasonable limit prescribed by law under s. 1). See also *Y.M.* v. *Children's Aid Society* (1989), 94 N.S.R. (2d) 143, 65 D.L.R. (4th) 427 at 432–33 (Co. Ct.) (in view of tension between right of open access to courts and statutory objective of protecting children involved in child-welfare proceeding, s. 1 analysis pursued in resolving to admit reporter but ban publication of details identifying child or family involved).

According to s. 1, "[t]he *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." From that perspective, the court in *Dagenais* concluded that the common law rule must be adapted so as to require a consideration of both the objectives of a publication ban, and the proportionality of the ban to its effects on protected *Charter* rights. The modified rule may be stated as follows:

> A public ban should be ordered only when:
>
> (a) Such a ban is *necessary* in order to prevent a real and substantial risk[19] to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
>
> (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban.[20]

Applying its own test, the court concluded that, while "the publication ban . . . was clearly directed towards preventing a real and substantial risk to the fairness of the trial of the four accused,"[21] reasonable alternative measures were available, and thus the court was not required to engage in the explicit balancing required by the second prong of its test. Those alternative measures included "adjourning trials, changing venues, sequestering jurors, allowing challenges for cause of *voir dires* during jury selection, and providing strong judicial direction to the jury. . . ."[22] The court concluded with some thoughts about the limited efficacy of some publication bans, given the general reliability of juries[23] and given technological advances that have made publication bans porous.[24] In the process, the court rephrased the "proportionality" branch of the *Oakes* test, which had formerly been based solely on the balance between the

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19. As the *Dagenais* court went on to say, the objective of preventing "real and substantial risk" of unfairness in the trial is limited: "publication bans are not available as protection against remote and speculative dangers." *Supra* note 11 at 880.

20. *Ibid.* at 878 (emphasis in original). The *Dagenais* court noted that its test reflects the substance of the so-called *Oakes* test developed to test the constitutionality of legislation under s. 1 of the *Charter*. See *R.* v. *Oakes*, [1986] 1 S.C.R. 103.

21. *Dagenais*, *supra* note 11 at 880.

22. [1994] 3 S.C.R. at 881. One court interpreting *Dagenais* has emphasized that jurors can be trusted, under proper judicial instructions, to decide the fate of a criminally accused only on the evidence admitted at trial. See *Edmonton (City)* v. *Kara* (1995), 164 A.R. 64 at 67, (Q.B.) (unsealing affidavits concerning theft of millions despite objection of criminally accused person subject to trial). Compare *R.* v. *Warren* (*In re Canadian Broadcasting Corp.*), [1995] N.W.T.R. 133, 122 D.L.R. (4th) 698 (S.C.) (under *Dagenais*, television corporation and newspaper allowed access to copy videotapes and similar evidence in now-concluded trial, but with non-disclosure of evidence relating to accused not yet tried).

23. *Dagenais*, *supra* note 11 at 884.

24. *Ibid.* at 886.

objective of the measure in question and its deleterious effects. Instead, said the *Dagenais* court, "there must be a proportionality between the deleterious effects of the measures which are responsible for limiting the rights of freedoms in question and the objective, *and there must be a proportionality between the deleterious and the salutary effects of the measures.*"[25]

Although I find the topics fascinating, let me forebear further reflection on the doctrinal differences between Canada and America on constitutional balancing generally, as well as on the specific topic of publication bans. Such bans, of course, concern the media, and our direct concern this afternoon is with lawyers. But one can quickly see why in Canada publication bans are closely linked to the topic of lawyers communicating with the media: when the media itself can be restrained, there is much less occasion to attempt independently to restrain lawyers.

Like a rising tide lifting all boats, imposition of a publication ban removes much of the incentive of the media to talk to lawyers about their pending cases.[26] The media—being concerned with the news and not very much at all with history—will not be terribly interested in the opinions of lawyers once a case is concluded. And, as I understand it, arrest is usually followed here in Canada rather promptly by the initiation of court

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25. *Ibid.* at 889 (emphasis in original). Justice LaForest dissented on jurisdictional grounds, adding comments generally agreeing with the Chief Justice on the common law publication ban rule. Justice LaForest would, however, have added another factor to be weighed: "the extent to which a ban could disrupt the trial, particularly by creating the risk that the trial would not take place within a reasonable time." *Ibid.* at 894. That factor seems entirely consistent with the approach of the Chief Justice. Justice L'Heureux-Dubé also dissented on jurisdictional grounds, and on the merits, largely agreeing with Justice Gonthier, would have found that the common law rule providing for publication bans already incorporated the kind of balancing that the majority required as a constitutional matter. *Ibid.* at 914–17. Justice Gonthier's dissent (although agreeing with the Chief Justice that the court had jurisdiction) also focused on the majority's test, particularly noting (*ibid.* at 924) that the discussion of the availability of alternative measures such as sequestering the jury should not be understood to mean that the bare existence of the alternative, regardless of its relative cost and other inconvenience, makes a ban inappropriate. In the final analysis, Justice Gonthier would have affirmed the intermediate appellate court. Finally, Justice McLachlin would have gone beyond the Chief Justice's analysis and found that the *Charter* applied (not through the common law) but directly to court orders (*ibid.* at 941). In other respects, she essentially agreed with the result and analysis of the Chief Justice.

The reaction of the Canadian media to the *Dagenais* decision was, by American standards, strangely celebratory, given that the decision clearly contemplates publication bans in some future cases. See "A Victory for Canada" *Maclean's* (19 Dec. 1994) 20.

26. Equally, although doubtless coincidentally, publication bans may also *protect* individual lawyers involved in litigation. For example, in *National Bank of Canada* v. *Melnitzer* (1991), 5 O.R. (3d) 234, 84 D.L.R. (4th) 315 (Gen. Div.), a prominent lawyer involved in numerous civil and criminal proceedings was entitled to protect the confidentiality of the transcript of a meeting with a receiver by having it filed under seal in court. For procedural reasons, the inquiring media publication was unable to raise any objection under the *Charter*.

proceedings, thus empowering a judge to consider the need for a publication ban early in a criminal proceeding. I also detect a strong and widely held professional disapprobation of lawyer comment to the media.[27] A medium aware of the potential exercise of a judge's discretion to impose a publication ban—and aware of the general sentiment against media comment by advocates—is understandably reluctant to break new journalistic ground.

In such a context, it is not surprising that one finds in Canadian jurisprudence, to date, only the most fleeting mention of a problem of overly-talkative advocates. When the point is raised in a rare judicial opinion, it is for the purpose of excoriating such lawyerly waywardness.[28] This is done in a way that leaves little doubt that Canadian lawyers—traditionally and perhaps now—would only invite judicial umbrage should they engage in elaborate comments to the media arguing the justice of their client's cause.

That view is confirmed in examining what Canadian lawyer codes have to say about media comment. The post-*Charter Code of Professional Conduct* of the Canadian Bar Association states as a general rule that:

> Where the lawyer, by reason of professional involvement or otherwise, is able to assist the media in conveying accurate information to the public, it is proper for the lawyer to do so, provided that there is no infringement of the lawyer's obligations to the client,[29] the profession, the courts or the administration of justice, and provided also that the lawyer's comments are made *bona fide* and without malice or ulterior motive.[30]

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27. See *infra* text at notes 29–33.

28. See e.g. *R.* v. *Basha* (1978), 23 Nfld. & P.E.I.R. 318 (Nfld. Prov. Ct.) ("I must say that I was appalled when it was brought to my attention that while the matter was *sub judice* there was editorial comment in the press and participation by Counsel in a media program on this matter. I have not read or viewed the editorials or program as a matter of deliberate policy, nor does it affect or influence my decision in any way. However, I intend to pursue the matter when sentencing is over and bring it to the attention of the Director of Public Prosecutions so that a decision can be made whether or not to institute contempt proceedings. Whether it is contempt or borders on contempt, lawyers are presumed to know better. As for the media, they are large organizations with access to legal advice and are in a position to act more responsibly.").

29. Earlier, the *Code* makes the important, if obvious, point that before making a public statement, the lawyer should be satisfied that any communication is in the best interests of the client, and not to let any personal interest or other cause conflict with the client's interest: Canadian Bar Association, *Code of Professional Conduct* (Ottawa: Canadian Bar Association, 1988) at ch. 18, commentary ¶ 2. A lawyer is also prohibited from expressing a personal opinion about the merits of the client's case. *Ibid.* at ¶ 3.

30. *Ibid.* at ch. 18, commentary ¶ 7. Other rules govern lawyer advertising. See *infra* text at notes 125–30. Other rules in Chapter 18 provide more leeway to a lawyer in a non-legal setting publicizing, for example, fund-raising efforts of a charitable organization (*ibid.* ¶ 8) or when the lawyer serves as advocate for a special-interest group (*ibid.* ¶ 10).

Very similar rules obtain in Nova Scotia under the *Handbook for Lawyers*.[31] While the professional rules evidence relaxation of the former strict anti-comment rule, effected by the enactment in 1982 of the *Canadian Charter of Rights and Freedoms*,[32] it can fairly be said that they are highly cautionary, obviously reflecting the professional belief that the less said the better, particularly on a matter of litigation in which the lawyer is involved as advocate.[33]

II. *Advocates and the Media in America—O.J. Simpson and Richard Jewell*

Quite by contrast, lawyers in the United States have relatively much less to restrain them in talking to the media than do lawyers in Canada. I want to try to portray what I see as those differences in action through the use of two short stories about lawyer comment to the media. I think these are largely true stories. Unfortunately, I know of them only through the media. Thus I must admit that my grasp may squeeze some fable and not only historical truth out of them.

1. *O.J. Simpson*

I start, not with a bookkeeper, but with an icon, O.J. Simpson, whose athletic exploits in American collegiate and professional football are, I am sure, at least somewhat familiar even to fans of Canadian football. To those South of the forty-ninth parallel, they are the stuff of sheer legend. After his retirement from professional football, Simpson became a thorough-going media celebrity—one of the highest-paid sports announcers and product endorsers. Fast forward to the present: in recent weeks, a sufficient number of people have been found in Los Angeles who profess to have no strong opinion of Simpson's guilt or innocence of the murders of his ex-wife Nicole Brown Simpson and her friend Ronald L. Goldman to populate a jury box for a second trial—this time dealing

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31. See *Legal Ethics and Professional Conduct—A Handbook for Lawyers in Nova Scotia* (1990), ch. 22. Among other things, the *Handbook* assumes greater latitude of a lawyer involved in a litigated matter after final determination and once the case report has become a matter of public record. See *ibid.* at commentary ¶ 22.11.

32. See G. MacKenzie, *Lawyers & Ethics: Professional Responsibility and Discipline* (Scarborough: Carswell, 1993) 31-1.

33. A report of the Nova Scotia Barristers' Society, "Giving Legal Advice on Radio and T.V." is similarly cautionary about a lawyer's media appearances for the purpose of discussing general legal issues. Among other things, the report recommends that before publicly commenting on a matter in which the lawyer is professionally involved, the lawyer should have the express permission of the lawyer's client. *Ibid.* at 277. Moreover, any comment on a pending matter should not extend to "a likely outcome of any matters pending before the courts or tribunals" or that "would have the effect of interfering with a fair hearing." *Ibid.*

with accusations of wrongful death in a civil action for damages. That proceeding, of course, follows the galvanizing[34] and racially divisive moment of Simpson's acquittal a year ago of the murder charges in the notorious criminal trial before Judge Lance Ito. I have no wish here to rehash the evidence; that process is already well underway in books and articles.[35] It has been repeated interminably on television and in the daily press, often by trial participants—many of whom, it seems, are rushing into print with books describing the case and its significance from their own perspective.[36]

Instead, the single fascinating aspect of the O.J. Simpson trial on which I now focus is the media role of his defence lawyers—and that of the prosecutors. Even for Hollywood, the amount of attention paid to the media by the lawyers was probably unparalleled in United States jurisprudence. The motives of the immediate lawyer participants were, I suspect, mixed. Surely much of the media leaks and camera posturing was intended to advance the interests of the client—whether defendant or the public—of the advocate in the media lights. But there seems to have been more. It might be ungenerous, but my enduring impression is that much of the publicity was driven by self-aggrandizement—attempts to project the lawyer personally into the media world as heroic, clever, famous, skilled. Interests of a specifically mercenary kind may also have played

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34. One measure of the riveting attraction of the O.J. Simpson criminal trial is that at the moment when the verdict was announced, 96 per cent of all American television sets that were on were tuned to the trial. See R. Cossack, "What You See Is Not Always What You Get: Thoughts on the O.J. Trial and the Camera" (1996) 14 J. Marshall J. Computer & Info. L. 555 at 556.

35. E.g. M.L. Rantala, *O.J. Unmasked: The Trial, the Truth, and the Media* (Chicago: Open Court, 1996) (attempted demonstration of strength of case against Simpson); L. Schiller & J. Willwerth, *American Tragedy: The Uncensored Story of the Simpson Defense* (New York: Random House, 1996) (story of defence efforts from perspective of journalists given extensive access to defence efforts); J. Toobin, *The Run of His Life: The People v. O.J. Simpson* (New York: Random House, 1996). Simpson himself, of course, was one of the first to publish. O. Simpson, *I Want to Tell You* (New York: Little, Brown, 1995).

36. A. Cooley, M. Ribin-Jackson & C. Bess, *Madam Foreman: A Rush to Judgment?* (Washington: Dove, 1996) (group of jurors); J. Cochrane, Jr., *Journey to Justice* (Westminister, MD: Ballantine Books, 1996) (co-lead defence counsel); R. Shapiro, *The Search for Justice: A Defense Attorney's Brief on the O.J. Simpson Case* (1996) (defence counsel); C. Darden, *In Contempt* (San Francisco, Harper Collins 1996) (assistant prosecutor); A Dershowitz, *Reasonable Doubts* (New York: Simon & Schuster, 1996) (law school professor and long-distance defence consultant); M. Eliot & K. Kaelin, *Kato Kaelin: The Whole Truth—The Real Story of O.J., Nicole & Kato* (New York: Harper Paperbacks, 1995) (trial witness). The chief prosecutor, Marcia Clark, negotiated an advance of $4.2 million for a book that reportedly will be published soon. See Tabor, "The Media Business: Viking to Pay $4.2 Million for Book by Marcia Clark" *N.Y. Times* (10 Nov. 1995) D6, col. 5. On the extensive media commentary engaged in by both prosecution and defense in the Simpson case, see K. Cole and F. Zacharias, *The Agony of Victory and the Ethics of Lawyer Speech*, (1996) 69 S. Cal. L. Rev. 1627.

a part—including that of generating publicity in order to gain clients, either directly or through referrals from other lawyers.

The result in the O.J. Simpson case was the most persistent courting of the media that I can recall in thirty-five years of observing the American lawyering scene. A trip by Johnnie Cochrane, F. Lee Bailey, Robert Shapiro and their colleagues to the courthouse was a parade of smiling, photogenic lawyers volubly talking their way through a receptive gauntlet of television cameras and microphones. Few questions went unanswered. Few topics seemed off limits. The lawyers freely commented on evidence, on the motives of prosecution lawyers, on witnesses who may or may not testify and what they would say, and on whether or not they were to be believed. The police and prosecutors had opened the proceedings with the notorious "chase"—several hours of live television coverage of O.J. Simpson's slow-speed wanderings amidst the freeways of Los Angeles, threatening to kill himself with a loaded revolver. The prosecutor followed this up with periodic press conferences, which were characterized by only slightly more restraint than the media efforts of the defence lawyers. The Los Angeles District Attorney Gil Garcetti became a fixture on the nightly television news almost as familiar as Marcia Clark and Christopher Darden became due to gavel-to-gavel televising of the trial itself. Perhaps the low point of this trough of publicity was reached when defence lawyers Shapiro and Bailey went toe to toe in attributed and leaked media announcements attacking each other's professional abilities—apparently as part of a squabble about which lawyer was going to "control" Simpson's defence.

The media attention paid to the Simpson charges was so intense that by the time, at last, a jury was to be chosen, the only prospective juror who professed not to have heard about the case was immediately suspected of perjury in order to secure a seat on the jury. All other prospective jurors had heard something about the case. Many had heard a great deal and professed that their minds were made up, securing their absence from the jury. The jury eventually chosen ended up being sequestered, because of the threat of even more intensive media attention once the trial began.

2. *Richard A. Jewell*

The next story concerns a man whose most noted trait, quite unlike Simpson, was his singular lack of distinction and, unlike Bernardo, his innocence.[37] Dick Jewell's only claim to fame is that he was for a moment

37. See K. Sack, "A Man's Life Turned Inside Out by Government and the Media" *New York Times* (28 Oct. 1996) A1, col. 1.

a hero, and then for three months publicly accused of being a villain. He was first noticed by the media as the result of a violent tragedy this 27 July 1996, when a pipe bomb left in a knapsack exploded in Centennial Olympic Park in Atlanta during an evening of outdoor entertainment. The bomb killed a woman and injured 111 others who were attending a late-night rock and roll concert in a stadium-like structure. It was widely reported that the toll of injury would have been much greater except for Jewell's actions in warning people away from the abandoned bag.

Jewell's three-day career as hero was short-lived. On July 30, the *Atlanta Journal* newspaper reported that the Federal Bureau of Investigation had focused on him as a suspect in the bombing and that the FBI had sufficient evidence to obtain a search warrant. Within minutes, television reporters (in their lemming-like way) were reading the *Atlanta Journal* article about Jewell, verbatim and live, on national and international news programs. In the days and months that followed, ever-ready "experts" on criminal investigations were quoted in the media speculating about Jewell's past as a loner who lived with his mother and as a wannabe police officer who had lost several security guard jobs because of over-zealousness. They speculated that Jewell fit the profile of a man with a hero complex who might create a deadly crisis in order to be hailed later as a hero. The American media, like sharks to blood in the sea, went into a feeding frenzy of coverage. Jewell could not leave his house without a crush of media. A neighbor who lived immediately across the street sub-leased his apartment to a consortium of television stations that kept their cameras trained on Jewell's front door twenty-four hours a day. Thereafter, periodic "unidentified investigators with the FBI" announced new indications that Jewell was their man. As to why Jewell himself wasn't being arrested, the media experts replied confidently and smugly that a common investigative tactic was to apply psychological pressure on a suspect by letting him know the police had him in their cross-hairs but then waiting to close in on him until after he had made a fatal mistake. Jewell, apparently, didn't blink. Eventually, after three months of leaving Jewell to live in the intrusive eye of the media, the FBI announced that he was no longer a suspect. He was free again, presumably, to resume his role as hero, but now one with an irreparably tarnished reputation.

Notable also in the media attention paid to Dick Jewell were his lawyers—a criminal-defence lawyer retained to defend him against the FBI's clumsy and highly questionable investigative tactics and two civil lawyers who are preparing what the media has already concluded are civil suits for substantial damages against the FBI and several media

organizations.[38] The part of the media campaign—for surely it was that—that Jewell's lawyers mounted seemed, in comparison to the O.J. Simpson lawyer publicity, more single-mindedly focused on the needs of the client and not so much at all on the possible hope of the lawyers for personal and professional fame. While one will never know for sure, it also seems that their campaign was in part responsible for the action of the FBI in dropping its investigation. Their steady resort to the media focused media attention on the FBI's "public relations" problem: it had over-sold the strength of its case against Jewell. In the end, it could be seen that there was simply no evidence of his guilt, other than the kind of vague suspicion that might attach in some minds to loners and other losers who find themselves in the harsh and unaccustomed glare of unsought attention. It seems that the FBI was driven, not by concrete evidence of Jewell's guilt, but by the need to produce quick and dramatic results in their investigation of a very notorious crime.

Are the cases of O.J. Simpson and Richard Jewell typical of how the criminal-defence bar handles representation of an accused in the United States? Of course not. Newspapers and magazines in the United States have become famously selective in the stories to which they will devote any attention. Most criminal stories are of little media interest. Some are, however, and those tend to be given media attention entirely out of proportion to their importance in anything but, arguably, symbolic terms. Of those on which the media pounces, most never get beyond local attention, although locally notorious crimes can generate intense local media coverage.[39] Some few of those become the Simpson-Jewell of their day.[40] For the rest, the criminal-justice system operates in almost total obscurity, with little or no media attention or other indication—beyond the presence of the immediate participants—that the proceeding is "public" in nature.

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38. Jewell's lawyers are reportedly preparing actions for libel against several of the media. The *Atlanta Journal* has defended its report of the FBI investigation as accurate, lawful, and moral. See Wittes, "Can Richard Jewell Make His Case?" *Legal Times* (4 Nov. 1996) 1, col. 3.

39. As I was preparing these remarks, two high-school aged women—invariably and suggestively described in the media as "cheerleaders," based on their very part-time extra-curricular activities—disappeared from a hamlet very near Ithaca. Only parts of their bodies have been found. While only of momentary interest to the national media, the story of the victims, the suspect, what had occurred, and possible evidence against him engrossed the local newspaper and television media, until the suspect hanged himself in his cell. See e.g. Clairborne and Tokasz, "Late Night Arrest Reported in Deaths of Two Dryden Teens" *Ithaca Journal* (8 Oct. 1996) 1A; Tokasz, "Andrews' Suicide Leaves Shock, Pain" *Ithaca Journal* (4 Nov. 1996) 1A.

40. E.g. (1) The criminal charges against Jeff Gillooly, the husband of Tonya Harding, concerning the assault on her skating rival, Nancy Kerrigan. See Jarvis, "An Overview of the Hoevet Case" *The Professional Lawyer* (18 Nov. 1994) (account of defence of Gillooly's lawyer, Ron Hoevet, against charges of violation of trial-comment rule). (2) The recurring

Are the activities of the Simpson and Jewell lawyers permissible under American codes of lawyer conduct? The answers vary, in interesting ways, in the two cases. The exorbitant publicity-seeking of the Simpson lawyers, it turns out, was perfectly permissible. The more modest and client-focused efforts of Jewell's lawyers, ironically, may be more problematical.

At the time of the Simpson trial, California—alone among the fifty states and the District of Columbia—lacked a rule that in any way regulated lawyer comment to the media. Every other jurisdiction had rules limiting media comment, at least nominally. But even as the Simpson case was beginning to unfold, some California lawyers and many public officials bemoaned California's unique place. The California legislature quickly passed a measure requiring the state bar to prepare a rule on lawyer comment.[41] The bar drafted such a rule, although reluctantly.[42] The rule that the bar ultimately recommended would have been one of the least restrictive in the United States. (It would have applied only in jury-tried cases and would have required a stringent showing of "clear and present danger" of trial disruption.[43]) Perhaps more tuned to popular and legislative clamor, the California Supreme Court rejected the bar's proposal as too soft. Instead, the court turned to the type of media-comment rule now in effect in the other American jurisdictions, precluding any statement that "will have a substantial likelihood of materially prejudicing an adjudicative proceeding."[44]

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criminal charges against Michigan pathologist, Dr. Jack Kevorkian, for assisting suicides. See Dubin, "A Chilling Ethics Rule" *National L. J.* (6 Feb. 1995) A23, col. 1 (report of bar proceedings against Geoffrey Fieger, lawyer for Kevorkian). See generally Hoffman, "May It Please the Public—Lawyers Exploit Media Attention as a Defense Tactic" *N.Y. Times* (22 April 1994) B1, col. 2 (recording several historical incidents of lawyer use of publicity in defence of client).

41. See "News Notes: Trial Conduct—Trial Publicity" (1994) 10 *ABA/BNA Lawyers' Manual on Professional Conduct* 280; Ainsworth, "Court Issues Tough Rule on Lawyers' Media Statements" *[San Francisco] Recorder* (15 Sept. 1995) 1, col. 4.

42. See Jacobius, "Taming Talkative Attorneys: California Bar Proposes—But Dislikes—Trial Publicity Rule" (Mar. 1995) 81 A.B.A.J. 22 (reporting 18-1 vote of bar board of governors to send proposed rule to state supreme court, but with letter indicating that majority would prefer not to have a rule).

43. See "News Notes: Ethics Rules—Trial Publicity," (1995) 11 *ABA/BNA Lawyers' Manual on Professional Conduct* 39; Cox, "California Bar Proposes Curbs on Out-of-Court Speech" *National L.J.* (26 Dec. 1994) A11, col. 1. In proposing a clear-and-present-danger test, the bar reportedly would have California join only Virginia and, arguably, the District of Columbia and four other states that follow a related "serious and imminent threat" test. *Ibid.*

44. Calif. R. Prof. Conduct, Rule 5-120 (added 1995). See Ainsworth, *supra* note 41. The original California bill that impelled the bar to act had proposed adoption of ABA Model Rule 3.6. See "News Notes: Trial Conduct—Trial Publicity" (1994) 10 *ABA/BNA Lawyers' Manual on Professional Conduct* 280.

Which brings us to Richard Jewell's lawyers. They practice in Georgia, a state that does have in force a rule restricting lawyer media comment. How, then, could they engage in the intensive media campaign that they in fact launched and successfully maintained? The answer is that the media-comment rule in most American jurisdictions is a sieve with very large holes. Some of the holes are there because of considerations of fairness. The most important of them are there because of decisions of the United States Supreme Court, which have substantially restricted the ability of the bar and courts to suppress lawyer media comment.

It was not always like this. In the 1908 ABA Canons of Ethics, lawyers were strongly discouraged from talking to the press about pending cases.[45] Lawyer wryness aside, then, the traditional rule has been that cases are *not* to be tried in the press. At that, however, the stricture of the ABA Canons was primarily hortatory. The next occasion on which the ABA attempted—this time much more successfully—to propound national standards for lawyers was in 1969, when the ABA promulgated the Model Code of Professional Responsibility.[46] The American professional world in immediately preceding years had been convulsed by what for that time was an instance, thought then to be unprecedented,[47] of savage and intrusive media attack upon an accused in a criminal trial who was probably innocent of the charged offence.[48] Dr. Sam Sheppard's wife was

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45. "Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any *ex parte* statement." ABA *Canons of Professional Ethics* (1908) Canon 20.

46. Events surrounding the origins of the ABA *Model Code* language on trial comments were part of the building sense that lawyer regulation under the terribly dated 1908 Canons was seriously deficient. On those events, see C. Wolfram, *Modern Legal Ethics* § 2.6.3 (St. Paul, Minn.: West, 1986).

47. It probably was not. The history of American law is checkered with periodic instances of trials taking place under unrelenting glare of media publicity. The trial of Bruno Hauptmann in 1935 for kidnaping the Lindberghs' child, for example, was captured on talkie moving-picture film. The film clearly shows the bustle of other photo-journalists in the courtroom, their flashbulbs popping as Hauptmann was grilled on cross-examination. Hauptmann was convicted and executed for a crime that many still believe he did not commit. N. Behn, *Lindbergh: The Crime* (New York: NAL-Dutton, 1994).

48. Sheppard was acquitted at his subsequent retrial. In a book co-authored by his son, who spent years investigating the death of Mrs. Sheppard, it is concluded that a known suspect, who later confessed to the crime, was ignored by police investigators. See C. Cooper & S. Sheppard, *Mockery of Justice: The True Story of the Sheppard Murder Case* (Boston: N.E.U. Press, 1995). The lawyer who was chiefly responsible for obtaining reversal of Sheppard's murder conviction and obtaining his acquittal on retrial was F. Lee Bailey, who also served as defence counsel for O.J. Simpson.

murdered under mysterious circumstances. Dr. Sheppard had both motive and opportunity to kill her. There was also some evidence, of dubious quality, connecting him to commission of the offence. The Cleveland-area newspapers quickly launched what can only be described as a concerted and relentless campaign to pressure the elected coroner to hold a public inquest and the elected prosecuting attorney to file murder charges against Dr. Sheppard. They succeeded, and in a continuing "carnival atmosphere" of media attention that was pressed right into the courtroom to within three feet of the jury box,[49] Dr. Sheppard was tried and convicted of murder despite his protestations of innocence.

Sheppard's conviction was subsequently reversed in one of several periodic attempts by the United States Supreme Court to deal with the problem of media freedom under the First Amendment to the federal Constitution in light of the rights of the accused to a fair trial guaranteed by the due process clause of the Fifth and Fourteenth Amendments.[50] The court insisted that trial courts must take stern measures to correct for prejudicial pretrial publicity—such as postponing the trial until the threat to fair trial posed by adverse publicity abates or transferring the case to another venue untainted by publicity.[51] Beyond such measures, said the Court, "[n]either prosecutors, counsel for defence, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its functions. Collaboration between counsel and the media as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures."[52] Although its sweep is broad and general, note, of course, that the "collaboration" to which the Court is plainly referring in *Sheppard* is that between the prosecution and the media, of which there was ample and undisputed evidence.

The *Sheppard* case led to appointment by the ABA leadership of a Fair Trial and Free Press Advisory Committee.[53] The recommendations of the Committee were quickly approved and incorporated into Disciplinary

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49. With the trial judge's permission, a table was set up within the area usually reserved for lawyers and the jury box for the use of the media. It was between the jury box and the defence table, preventing most confidential communication between Sheppard and his lawyer. *Sheppard* v. *Maxwell*, 384 U.S. 333, 342–43 (1966). The names and addresses of prospective jurors were published, leading to their receiving numerous phone calls and letters about the case. *Ibid.* at 353.

50. *Ibid.*

51. *Ibid.* at 362.

52. *Ibid.* at 363.

53. The committee's report became one of the original "minimum standards" of the ABA on criminal justice. See ABA Advisory Committee on Fair Trial and Free Press, Standards Relating to Fair Trial and Free Press (1966).

Rule 7-107 of the ABA's 1969 Model Code.[54] In summary, the ABA Code now made the no-comment rule mandatory, not hortatory, and the Code purported to regulate what lawyers could state to the media. At least under one reading, the only exceptions were for "tombstone"-like statements to the media. Those could be only bare statements, "without elaboration," of such dull items as information already contained in a public record. Curiously, one exception permitted a lawyer to reply to charges of misconduct against the lawyer, but did not extend to replies to charges against the lawyer's client.[55]

The ABA Disciplinary Rule was widely adopted in the states, but it appears to have done little while it was in effect to stem a growing proclivity of lawyers in notorious cases to comment to the media in ways that could be justified under the rule only with considerable difficulty.[56] The judicial response was tepid in general, with limited exceptions. In a few cases, excessive media-statement-mongering by a prosecutor led to reversal of a criminal conviction on the ground of an unfair trial[57] or, very rarely, to professional discipline.[58] In general, the 1969 rule was soon found to suffer from two serious defects (and several minor ones). First, lower courts did not read the *Sheppard* v. *Maxwell* decision as giving carte blanche to bar regulators to regulate lawyer media comments in the generous way reflected in the ABA's disciplinary rule. Although the

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54. See ABA *Model Code of Professional Responsibility*, DR 7-107 note 85 (1969).

55. *ABA Model Code*, DR 7-107(I). The 1983 *ABA Model Rules* also did not admit the client-defence exception until its amendment in 1994. See *infra* text at notes 82–84.

56. Such out-of-court media statements hold other hazards. In some jurisdictions, a lawyer's remarks at a press conference would not fall within the otherwise absolute privilege against suit for defamation damages for statements made in the course of a judicial proceeding. E.g. *Asay* v. *Hallmark Cards, Inc.*, 594 F.2d 692, 697 (8th Cir. 1979), and authority cited (publication of defamation to news media not ordinarily sufficiently related to judicial proceeding to constitute privileged occasion); *Green Acres Trust* v. *London*, 688 P.2d 617 (Ariz. 1984) (statements to media not privileged); *Lawrence* v. *Evans*, 573 So.2d 695, 699 (Miss. 1990) (same).

57. E.g. *United States* v. *Coast of Maine Lobster Co.*, 538 F.2d 899 (1st Cir. 1976) (published comment by supervising prosecutor during pendency of much-publicized white-collar criminal proceeding being tried by jury urging stern punishment of such crimes); *Hughes* v. *State*, 437 A.2d 559 (Del. 1981) (prosecutor gave media interview referring to defendant's lie detector test, published while jury was discharged over weekend).

58. E.g. *In re Hansen*, 584 P.2d 805 (Utah 1978) (discipline of deputy attorney general—since elected to office of state attorney general—for television comments on merits of pending criminal case); compare, e.g. *In re Lasswell*, 673 P.2d 855 (Ore. 1983) (in banc) (prosecutor commits violation only where evidence establishes that prosecutor intended remarks to create seriously prejudicial beliefs in potential jurors); see also, e.g. *Buckley* v. *Fitzsimmons*, 509 U.S. 259 (1993) (only conditional, not absolute, privilege attaches to prosecutors' alleged act of making defamatory statements at press conference announcing indictment of criminal defendant); *Rodrigues* v. *City of New York*, 602 N.Y.S.2d 337 (N.Y. App. Div. 1993) (claim that prosecutor released false information to media states cause of action for breach of civil rights statute).

lower court decisions were not entirely consistent, several respected courts held that the First Amendment rights of lawyers would be infringed by enforcement of the rule as written.[59] Second, under whatever cloud of doubtful constitutionality the disciplinary rule itself might sit, it was subject to being tugged and pulled in various directions. Its language was hardly a model of precision and clarity. Varying judicial interpretations and reluctance of bar-disciplinary bodies to proceed against apparently-offending lawyers contributed to a sense among lawyers and informed nonlawyers that the rule was largely hortatory, if not public eyewash, and was not intended for serious, routine enforcement.

Within only ten years after the ABA had grappled with drafting the 1969 Model Code, another, different ABA commission was charged with responsibility for revisiting their work, and, ultimately, replacing the old Code root and branch with what became the 1983 ABA Model Rules of Professional Conduct.[60] In the process the drafting commission threw out much of the 1969 Code, including the text of the Disciplinary Rule on media comment. In replacing it, the drafters of the new rules attempted to accomplish two objectives. First, they cleared out some of the underbrush of vague language from the old Code formulation in an attempt to assure that the resulting rule would withstand constitutional challenge. Second, however—and somewhat inconsistently—, they still attempted to emerge with a relatively broad media-comment rule that would permit as little comment by advocates as was constitutionally permissible.

In the final analysis, the ABA's resulting Model Rule 3.6 seemed to provide a standard for lawyer free expression more permissive than the standard under the 1969 Model Code. To be sure, one still encounters

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59. E.g. *Chicago Council of Lawyers* v. *Bauer*, 522 F.2d 242 (7th Cir.), cert. denied, 427 U.S. 912 (1975); *Wachsman* v. *Disciplinary Counsel*, 1991 U.S. Dist. Lexis 20899 (S.D. Ohio 1991) (DR 7-107(G), prohibiting extrajudicial comment in civil cases, unconstitutional for vagueness and overbreadth); *In re Keller*, 693 P.2d 1211 (Mont. 1984) (DR 7-102 unconstitutional on free-speech grounds); *Markfield* v. *Ass'n of Bar of City of N.Y.*, 370 N.Y.S.2d 82 (N.Y. App. Div.), appeal dism'd, 337 N.E.2d 612 (N.Y. 1975) (discipline under DR 7-107 constitutionally permissible only when extrajudicial comment poses "clear and present danger" to administration of justice). But see e.g. *State* v. *Hinds*, 449 A.2d 483 (N.J. 1982) ("reasonable likelihood" standard of DR 7-107 can be applied, consistent with First Amendment, to lawyer's extrajudicial comments harshly criticizing judge in political criminal trial).

60. On the drafting process in general, see T. Schneyer, "Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct" (1989) 14 L. & Soc. Inquiry 677. The 1983 *Model Code* rule on extrajudicial comment was itself preceded by still another, and more stringent, ABA standard. See *ABA Standards Relating to Fair Trial and Free Press* section 8-1.1 (amended 1978). On the influence of the 1978 standards on the Model Rules, see *ABA Model Rules of Professional Conduct* at 144 (proposed final draft, 30 May 1981). The final version of the Model Rules explicitly acknowledge their provenance in the ABA Standards. See *ABA Model Rules*, Rule 3.6, comment para. [2].

instances in which lawyers are found to have violated the new rule.[61] But those are primarily cases of firebrands burning out of control, rather than careful—or crafty—lawyers. The Code's old laundry list of permissible items of public comment became instead a general rule prohibiting media comment "if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding."[62] A standard at least that permissive is minimally required by the First Amendment.[63] But what little scope for regulation that Rule 3.6 seemed to give bar regulators, other subsections of the rule took away. An immediately following subsection of the Rule listed seven items that, even if they would have the otherwise forbidden prejudicial effect on the proceeding, were nonetheless permitted topics of media comment by an advocate.[64] Among the items on the permissible-comment list were public statements about "information in a public record;"[65] "a request for assistance in obtaining evidence and information"[66] necessary in the litigation; "a warning of danger concerning the behavior of a person involved;"[67] and, in a criminal case, "if the accused has not been apprehended, information necessary to aid in apprehension".[68] Fairly obviously, a prosecuting lawyer could hold a press conference early in the proceedings, particularly before an arrest, even if the arrest was inevitable, and release damning information. While a defence lawyer was not so obviously benefitted, both defence and prosecution lawyers rather quickly grew to appreciate the flexibility of the permission to talk publicly about "information contained in a public record."[69] A pattern

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61. E.g. *Kramer* v. *Tribe*, 156 F.R.D. 96 (D.N.J. 1994) (lawyer who sent copy of complaint against law professor in fee-splitting dispute to newspaper at professor's law school subjected to fee sanction, dismissal of complaint with prejudice, and referral to state disciplinary and criminal authorities).

62. *ABA Model Rules of Professional Conduct*, Rule 3.6(a).

63. At least the standard was found minimally constitutional in *Gentile* v. *Nevada State Bar*, 501 U.S. 1030 (1991). The lesser standard of the former DR 7-107 of the ABA Model Code of Professional Responsibility, requiring only a finding of a "reasonable likelihood" of material prejudice to the proceeding (derived from a statement in *Sheppard* v. *Maxwell*, 384 U.S. 333, 363 (1966)), was held constitutionally insufficient in *Chicago Council of Lawyers* v. *Bauer*, 522 F.2d 242, 249 (7th Cir.), cert. denied, 427 U.S.912 (1975), although it was upheld as constitutionally sufficient in general in *Hirschkop* v. *Snead*, 594 F.2d 356, 365–70 (4th Cir. 1979) (en banc).

64. Model Rule 3.6(b).

65. Model Rule 3.6(b)(2).

66. Model Rule 3.6(b)(5).

67. Model Rule 3.6(b)(6).

68. Model Rule 3.6(b)(7)(iii).

69. See Snyder, *supra* note 2 at 405. For both defence lawyers and prosecutors, placing something in the public record before commenting on it has the additional advantage of gaining the protection of a privilege from liability for defamatory wrongs. Compare *McNally* v.

developed in sensational trials[70] of both prosecution and defence filing numerous and quite voluminous motions prior to trial, often containing information that under no stretch of the imagination would be admissible in evidence. Once the dirt thus qualified as "information contained in a public record," there was no prohibition against providing the information to the media.

The ABA's 1983 trial-comment rule has led its own uneasy life. From the beginning, doubts were expressed whether its enforcement would survive constitutional challenge. Those prognostications proved accurate when in 1991, the United States Supreme Court decided *Gentile* v. *State Bar of Nevada*.[71] Lawyer Gentile was defending a business person indicted for the alleged offence of stealing drugs and cash worth $300,000 from a safe-deposit box that undercover police had surreptitiously rented in the client's commercial storage facility for the purpose of running a sting operation. The theft had been widely discussed in the media for the better part of a year before the police at last arrested Gentile's client, the facility owner. The day after his client's arrest, defence lawyer Gentile called the first press conference of his career. There, he publicly stated—naming names—that certain members of the police force, rather than his client, had stolen the drugs and cash.[72] (Pointing the finger at an alternative

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Yarnall, 764 F.Supp. 853, 856 (S.D.N.Y. 1991) (under New York law, absolute privilege), with *Doe* v. *Kohn Nast & Graf*, P.C., 866 F.Supp. 190, 194 (E.D. Pa. 1994) (under Pennsylvania law, conditional privilege to make out-of-court statements if they constitute fair and accurate report of statements made or documents filed in court, so long as person does not make statement for sole purpose of causing harm to person defamed), citing authority.

70. Using public filings of inadmissible evidence, knowing that the media would quickly publicize the information, was employed by the prosecution in the William Kennedy Smith rape trial in Florida. See K. Jost, "Judges Should Gag the Gag Order" *Christian Science Monitor* (5 Aug. 1991) 19; D. Kaplan, "In Florida, Trial by Media Fire" *Newsweek* (5 Aug. 1991) (prosecutor's unsealed filing of inadmissible statements by three other women claiming assault by Kennedy).

71. 501 U.S. 1030 (1991) [hereinafter *Gentile*]. It is a staple fixture of American constitutional jurisprudence that decisions of the Supreme Court on vexing constitutional issues are decided by a closely divided court. *Gentile* was no exception. The majority decision of Justice Kennedy was fully concurred in by three other justices. Chief Justice Rehnquist, with three other justices, dissented. Justice O'Connor concurred in Justice Kennedy's opinion in part (sufficiently to overturn the Nevada rule, and thus the disciplinary sanctions against Gentile), but also concurred in Chief Justice Rehnquist's opinion in part. For a close analysis of the opinions see J. Daly, "What Can the Defense Attorney Say at a 'Pre-formal Charge' Press Conference?" (1991) 15 Am. J. Tr. Advocacy 269 at 278–88.

72. The claim is not, of course, implausible. In numerous instances reported in the media, police have been implicated in similar crimes. "Merced Police Officer Gets 10-Year Prison Sentence" *Fresno (Cal.) Bee* (7 Nov. 1995) B3 (federal-court conviction of 20-year police officer for theft of sixty-six pounds of cocaine from evidence locker); S. Ladd, "Bad Deeds Haunting Bad Cop" *(Long Island) Newsday* (10 Nov. 1993) 4 (sentencing of detective on elite anti-drug force for theft of drug money and arranging sale of heroin stolen by other officers

suspect is common defence strategy, and has been found in many of the most famous cases of trial publicity.[73]) Gentile's client was acquitted by a jury. But lawyer Gentile was then prosecuted by the Nevada bar disciplinary authorities for violation of Nevada's anti-comment rule, which was almost identical[74] to the ABA's Model Rule 3.6.

Gentile received a private reprimand, which became public when he appealed to the Nevada Supreme Court, which affirmed. The United States Supreme Court reversed. The Supreme Court found two defects in the Nevada rule, although only one justice agreed with both determinations, and the two rulings must be teased out of what are otherwise dissenting opinions (on minority propositions). In an opinion written by Chief Justice Rehnquist, five members of the court held that the standard employed in the Nevada/ABA rule to describe impermissible public statements by lawyers—those posing a substantial likelihood of material prejudice to the proceeding—was constitutional as a general matter.[75] But a different five-justice majority, in an opinion by Justice Kennedy, held that the "safe harbour" portion of the Nevada/ABA rule was unconstitutional because its terms were impermissibly vague.[76] That 5-4 ruling on

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from evidence locker); U.P.I., "Two Ex-cops Charged in Shore Drug Rings" (13 Feb. 1991) (charges against police officers for, among other drug activities, theft of marijuana from evidence locker at police headquarters).

73. Sam Sheppard's lawyers went public with a story about a "bushy-haired intruder" who allegedly knocked Dr. Sheppard unconscious after murdering his wife. See *supra* note 48 at 25. O.J. Simpson's attorneys spun a vague and highly conjectural story about possible involvement of drug dealers supplying a friend of Simpson's murdered ex-wife. In the paradigm murder case, *Regina* v. *Courvoisier*, defence counsel for a valet-butler accused of murdering his noble English master attempted to create the impression at trial that the real perpetrator was a maid (who was not charged). See D. Mellinkoff, *The Conscience of a Lawyer* (St. Paul, Minn.: West, 1973) at 185–86. Perhaps their strongest argument was that the police had botched the investigation of Lord Russell's death, and were subject to impeachment for bias (there because of their interest in earning a reward for obtaining Courvoisier's conviction). Courvoisier's trial was, interestingly, also preceded by sensational publicity, *ibid.* at 25–32, including some counter-publicity generated by the defence lawyers, *ibid.* at 69.

74. *Gentile*, *supra* note 71 at 1033 (concurring opinion).

75. *Ibid.* at 1063–76. See also *ibid.* at 1081–82 (concurring opinion of O'Connor J.). With concurrence of only four justices, the dissenting portion of the Rehnquist opinion also would have found that the safe harbour provisions were not unconstitutionally broad or vague. *Ibid.* at 1076–81.

76. *Ibid.* at 1048–51 and 1058; see also *ibid.* at 1082 (concurring opinion of O'Connor J.). In the dissenting portion of his opinion, Justice Kennedy and three other justices would also have found that the "substantial likelihood" test of Model Rule 3.6 was minimally constitutional, despite operating as a prior restraint on lawyers, on their assumption that it "approximated" the "clear and present danger" test. *Ibid.* at 1037. That test involves self-conscious balancing of the imminence and magnitude of the danger claimed to flow from the utterance and the likelihood that it will occur against the need for free and unfettered expression, weighing as well the possibility that other measures will serve the state's interests. *Ibid.* at 1036. At least in cases with similar facts involving punishment of pure speech in the public forum and directed at

vagueness was enough to defeat the attempt to discipline Gentile.[77] But clearly the opinion of Chief Justice Rehnquist establishes the general constitutionality of the "substantial likelihood of material prejudice" standard as an appropriate test for lawyer media comment (as opposed to media comment by others).[78]

Gentile has not meant the end of attempts to discipline perceived violations of the anti-comment rule. Occasional decisions can be found in which courts find violations.[79] Nonetheless, discipline appears to be quite rare, with several courts, faithful to the Supreme Court majority, requiring a demonstration of each of the rule's elements, including the required demonstration that the lawyer's remark in fact had a substantial likelihood of materially prejudicing the trial.[80] There seems to be widespread professional belief—at least among many segments of the American legal profession—that there is no effective prohibition against improper media comments by lawyers involved in cases.

It was not until August 1994 that the ABA finally responded to the need to repair the professional rules in light of *Gentile*.[81] The ABA House of Delegates voted to amend ABA Model Rule 3.6 in several respects:

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public officials, see *ibid.* 1034, lawyers would thus have been more nearly on the same footing as journalists with respect to the power of courts to restrain their out-of-court media comments.

With respect to the Kennedy majority's rulings on vagueness, the defective words were those in the safe-harbour provision stating that a lawyer "may state without elaboration . . . the general nature of the . . . defense" (see *ibid.* at 1048). The majority focused particularly on the words "elaboration" and "general," finding that, as the provision was applied by the Nevada court, the rule was so imprecise that discriminatory enforcement was a real possibility. *Ibid.* at 1051.

77. Left, unfortunately, unresolved by the opinions (due to the limited concurrence of Justice O'Connor) was the question whether the evidence supported the Nevada court's finding that Gentile's statements presented a substantial likelihood of causing material prejudice. Compare *Gentile*, *ibid.* at 1038–48 (opinion of Kennedy J. and three other justices) with *ibid.* at 1079–81 (opinion of Rehnquist C.J. and three other justices).

78. The reaction of law review writers to the *Gentile* (Rehnquist) majority has been, predictably, mixed. Among the critical reviews, see e.g. Cooper, "*Gentile* v. *State Bar* and Model Rule 3.6: Overly Broad Restrictions on Attorney Speech and Pretrial Publicity" (1993) 6 Geo. J. Legal Ethics 583.

79. E.g. *United States* v. *Bingham*, 769 F.Supp. 1039 (N.D. Ill. 1991) (on eve of jury selection, criticizing judge's order that names of jurors in prosecution of gang members were to remain anonymous, intimating that prosecutor's motive in obtaining anonymity order was to convey to jury sense that defendants were dangerous people).

80. E.g. *Re Sullivan*, 586 N.Y.S. 2d 322 (N.Y. App. Div. 1992) (statements of defence lawyer in highly publicized multiple-murder trial did not create sufficient risk of prejudice because gist of information came to jury in another fashion and jury was strenuously admonished to ignore media accounts of trial).

81. Early drafts of a proposed amendment circulated by the ethics committee would have attempted only to rework vague language that the *Gentile* majority found objectionable. Those efforts provided unsuccessful when the ABA's Criminal Justice Section referred the draft to consultants, who could not agree on the meaning of the new language. The section then urged the ethics committee to rework Model Rule 3.6 more extensively. See "News and Background:

(1) eliminating the old subsection (b) list of particular statements covered by the general rule of subsection (a); (2) modifying the set of "safe harbour" statements in what is now Rule 3.6(b) by eliminating the "without elaboration" qualification; (3) modifying the safe harbour list by removing the former rule's limitation of statements to "general" statements about the nature of the claim or defence and moving the list from its former position as part of the disciplinary rule itself to explanatory commentary; and (4) explicitly providing, in a new Subsection (c) a right of reply, or, perhaps more descriptively, a right of fair retaliation.[82] The fair-retaliation rule had been first and continuously urged by the ABA's Criminal Justice Section,[83] which was in a position to secure its viewpoint as co-sponsor of the proposed language along with the ABA's ethics committee.[84] It remains to be seen whether the new ABA provisions will be adopted in many states and, if adopted, whether they will withstand renewed constitutional challenge.[85]

Gentile, it bears repeating, involved media comment about a criminal case. Suppose the underlying matter had been a civil dispute. Can the state suppress lawyer speech as readily in non-criminal matters? What American authority there is suggests that here regulation is particularly suspect and difficult to sustain.[86] There is also some indication that sanctions are

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Model Rule Changes Suggested on Trial Publicity, Misconduct" (1993) 9 *ABA/BNA Lawyers' Manual on Professional Conduct* 222 at 223.

82. ABA Model Rule 3.6(c) (as amended, August 1994): "(c) Notwithstanding paragraph (a), a lawyer may 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 adverse publicity." The last sentence seems merely to reiterate the point already made about statements "required to protect a client" in the first sentence. Obviously, the rule bristles with unanswered questions about how "recent" adverse publicity must be, concerning linkages between a client's earlier statements and more recent adverse publicity, and whether and to what extent attacks on an opposing party or its witnesses or position is encompassed within permissible retaliation.

83. See D. DeBenedictis, "Gentile's Unanswered Questions: Drafters Struggle to Rewrite Ethics Rules on Lawyers' Out-of-Court Statements" (April 1993) 79 A.B.A.J. 28.

84. See "Trial Publicity, Certification Face Proposed Rule Changes" (1994) 10 *ABA/BNA Lawyers' Manual on Professional Conduct* 126 at 127.

85. For a review of remaining constitutional problems in the post-1994 ABA Model Rule 3.6, see G. Gregg, "ABA Rule 3.6 and California Rule 5-120: A Flawed Approach to the Problem of Trial Publicity" (1996) 43 UCLA L. Rev. 1321.

86. See *Wachsman* v. *Disciplinary Council*, 1991 U.S. Dist. Lexis 20899 (S.D. Ohio 1991), citing *Hirschkop* v. *Snead*, 594 F.2d 356 (4th Cir. 1979) (en banc) (DR 7-107(G) prohibition against media comment in civil matter unconstitutional); *Chicago Council of Lawyers* v. *Bauer*, 522 F.2d 242 (7th Cir.) (same), cert. denied, 427 U.S. 912 (1975); *Shadid* v. *Jackson*, 521 F.Supp. 85 (E.D. Tex. 1981). The "overbreadth" basis for the finding of unconstitutionality in *Wachsman* (at p. 12) does not foreclose the possibility that a more narrowly drawn rule, such as the ABA's Model Rule 3.6, would be found sufficiently narrow.

much more appropriate when the case is being tried by a jury, rather than by a judge or, in the case of an administrative proceeding, by a professional hearing officer or similar functionary. In fact the American Law Institute's draft Restatement of the Law Governing Lawyers would limit the rule to adverse impacts on lay fact finders or on witnesses (as where the trial publicity would have the effect of intimidating a witness).[87] Finally, there seems to be broad, but hardly universal, agreement that the prohibition may and should be imposed more strenuously to limit media comment by a prosecutor (as compared to a criminal-defence lawyer or to lawyers involved in civil proceedings).[88] In the case of prosecutors, there is hardly the same strength to an argument of free-expression rights and no great need for access to the media, given the availability of the police to comment.[89]

3. *Gag Orders—Travails of Bruce Cutler*[90]

There is one more piece of the American picture that deserves comment. To this point we have encountered little effective regulation of American lawyers who engage in extensive media comment. Even in situations in which public comment might otherwise be objectionable under the "substantial prejudice" standard, a lawyer of even modest professional ability who bothers to look at the professional rule can rather readily conduct a press conference under it and thus effectively evade or ignore the spirit of the rule at will. If that is correct, those lawyers who remain subject to the rule will be only those rash or unknowing lawyers who speak at length to the media without structuring the situation to comply with the rule.

But enter at this point a much more effective, although rarely-employed, tool. Courts around the United States have held that they are empowered to enter so-called "gag orders"—judicial restraining orders prohibiting a lawyer (or another trial participant, such as a party or witness) from publicly speaking. To date, the United States Supreme Court has not yet passed on the constitutionality of lawyer gag orders, at

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87. See *ALI Restatement of the Law Governing Lawyers* § 169 (council draft no. 12, 1996).
88. See *ibid.* § 169(2) ("A prosecutor shall, except for statements necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused."). The Restatement draft closely follows the text of the ABA's version of Model Rule 3.8(g) (as amended 1994).
89. *United States* v. *Simon*, 664 F. Supp. 780, 795–96 (S.D.N.Y. 1987), and authority cited. See generally S. Matheson, "The Prosecutor, the Press, and Free Speech" (1990) 58 Fordham L. Rev. 865 (extensive survey of cases and theories).
90. *United States* v. *Cutler*, 58 F.3d 825 (2d Cir. 1995) [hereinafter *Cutler*].

least in the context of a gag imposed against statements to the media.[91] In one view, they are suspect, perhaps highly suspect. In a series of cases the Court has explicitly ruled that gag orders issued by trial judges against the media will be upheld only in extreme and clearly demonstrated circumstances of unavoidable need to prevent an unfair trial.[92] Nonetheless, gag orders against lawyers are, in comparison with media gag orders, much more common. A lawyer complaining about the constitutionality of a gag order would have to overcome the powerful argument, accepted in one sense or another by most if not all the justices in the *Gentile* case, that lawyers are subject to special regulation of their speech in cases in which they appear as advocate.[93]

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91. The Supreme Court in *Gulf Oil* v. *Bernard*, 452 U.S. 89 (1981), did hold that it was impermissible for a lower federal court to enter a gag order prohibiting a lawyer who purported to be representing a class in a class action from communicating with members of the class who were not already the lawyer's clients. The court did so, however, on the ground that such an order was inconsistent with the general federal rule on class actions, rather than on any free-expression or other broad ground that would extend to media gag orders.

92. In a series of cases, the Court has struck down media gag orders, indicating either that the statute, rule or order in question was overbroad or that the situation did not present a sufficiently dire need for suppression. See *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539 (1976) (broad order of trial judge, in multiple-murder trial that had attracted widespread news coverage, restraining many media organizations from publicizing described facets of case; such orders presumptively invalid and party seeking to sustain bears heavy burden of justifying need for restraint). Other decisions have held that a trial judge has the power to close a courtroom, on the joint application of the defendant and the prosecutor, with respect to a pretrial hearing on matters whose publicizing could prejudice the accused. See *Gannett Inc.* v. *DePasquale*, 443 U.S. 368 (1979). On the other hand, even with concurrence of the parties, it would be impermissible to exclude the public and the media from the trial itself, *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980), or even from a preliminary hearing, at least in the absence of a showing of a compelling need to do so because of a substantial probability of prejudice to the fair-trial rights of the accused, *Press-Enterprise Co.* v. *Superior Court*, 478 U.S. 1 (1986).

93. The opinion of Chief Justice Rehnquist in *Gentile* rests solidly on the extensive and traditional power of courts to regulate lawyers in proceedings before them. See *supra* note 71 at 1066–76 (Rehnquist C.J.). Justice O'Connor seems to join those positions. See *ibid.* at 1081–82 ("I agree with much of the Chief Justice's opinion. In particular, I agree that a State may regulate speech by lawyers representing clients in pending cases more readily than it may regulate the media. Lawyers are officers of the court and, as such, may legitimately be subject to ethical precepts that keep them from engaging in what otherwise might be constitutionally protected speech. . . .").

Although he does not endorse the special-regulation notion, Justice Kennedy's minority opinion stresses at various points that the closer a lawyer's statements to the time at which a jury is to be chosen, the stronger the case for regulation. See *ibid.* at 1036 (". . . Interpreted in a proper and narrow manner, for instance, to prevent an attorney of record from releasing information of grave prejudice on the eve of jury selection, the phrase substantial likelihood of material prejudice might punish only speech that creates a danger of imminent and substantial harm. . . ."); *ibid.* at 1044 (relevance that Gentile's statements were known by him to precede jury selection by at least six months).

A useful illustration of the possible use of a lawyer gag order is New York City lawyer Bruce Cutler, who fought a losing[94] media campaign in support of his criminal-defence client, Mafia boss John Gotti. At a press conference announcing Gotti's indictment, the United States attorney called Gotti a "murderer, not a folk hero" and boasted that, unlike past unsuccessful efforts to imprison Gotti, this time the government had evidence, including extensive wiretap evidence,[95] that was much stronger. Not to let his client be outdone, lawyer Cutler began an intensive media campaign that he described as designed to reach the jury in the eventual trial.[96] The prosecutor then began to complain, and would do so on several other occasions, about Cutler's media statements—which must initially have struck the court as coming with ill grace after the prosecutor's inaugural press conference.[97] In any event, the trial judge eventually entered "in essence, a kind of gag order."[98] Notwithstanding the court's order, Cutler forged ahead with his media campaign, culminating in a one-hour appearance on a live local television program. All this occurred in the weeks immediately before jury selection was to begin. The trial court's conviction of Cutler for contempt of the court's order was upheld on appeal.

Cutler's attempt to argue that the gag order was in violation of the United States Constitution was unsuccessful. He was faced with insur-

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Both the State of Nevada and the United States Solicitor General as amicus curiae had contended as a central proposition that lawyers occupy a special status in the judicial system that permits greater restriction on their comments consistently with the Constitution. See Tuite, "A Slip of the Lip" (April 1991) A.B.A.J. 120.

94. Despite Cutler's media efforts, Gotti was ultimately convicted and sentenced to life in prison for a number of racketeering charges, including murder of a gang rival. See *United States* v. *Locascio*, 6 F.3d 924 (2d Cir. 1993), cert. denied, 114 S.Ct. 1646 (1994).

95. Those interested can read extensive excerpts in *The Gotti Tapes* (New York: Random House, 1992) rushed to book stores, although apparently only after Gotti's conviction, perhaps because they were not released by the court until then. Presumably unknown to the faithful lawyer Cutler was the now-public taped comment of his apparently ungrateful client Gotti, "I'd like to kill all the lawyers" *(The Gotti Tapes* at 111), echoing Shakespeare's Dick the butcher in *Henry VI, Part II*, IV, ii ("The first thing we do, let's kill all the lawyers.").

96. Normally, whatever one's private doubts, one would hesitate to ascribe such motives to a lawyer. However, in a recorded law school symposium before the trial began, lawyer Cutler plainly admitted as much. See *Cutler*, *supra* note 90 at 837 (quoting excerpt). In this respect, the case was similar to *Gentile*, in which the lawyer had also candidly admitted that his press conference was designed, in part, to deal with his concern that a potential jure venire would be poisoned by adverse media based on press releases from the police and prosecutors. See *Gentile*, *supra* note 71 at 1042 (opinion of Kennedy J.).

97. Perhaps because of the prosecutor's own unclean hands, the prosecutor had to complain about Cutler in four separate letters before the court acted. See *Cutler*, *ibid.* at 830. On the other hand, the trial court might have felt that he needed an extensive record of Cutler's violations before he could enter a gag order.

98. *Ibid.* The lower court opinion, *United States* v. *Cutler*, 840 F.Supp. 959 (E.D.N.Y. 1994), is clearer on the specific orders violated.

mountable procedural problems of his own devising.[99] The state of the law on gag orders was also adverse.[100] The court found that the trial court's order possessed the required qualities of reasonable definiteness and specificity,[101] that Cutler's comments were reasonably likely to prejudice the proceedings,[102] and that Cutler had acted with specific intent consciously to disregard an order of the court.[103]

The American media has nothing but antipathy for gag orders, and undoubtedly part of that antipathy extends to gag orders against lawyers. Any gag order threatens the media generally, as do all instances of prior restraint.[104] More specifically, a lawyer gag order can have serious secondary effects involving the media, such as exposing the media to extensive discovery by the lawyer when accused of violating it.[105] A lawyer gag order has operational significance for the media, because it silences a source that is knowledgeable, and who, as professionals who make their living with words, can often be counted on to provide punchy and quotable statements.[106]

Are lawyer gag orders as vulnerable to constitutional attack as are gag orders addressed to the media itself?[107] In an important sense, Cutler's case is not adequately illustrative of American law on lawyer gag orders. Cutler foreclosed himself from making the strongest possible argument,[108] and in fact the appellate court did not directly consider possible

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99. Foremost among them was that Cutler had failed to challenge the trial court's gag order when it was entered. See *supra* note 90 at 832–33; see also *United States* v. *Cutler*, 815 F.Supp. 599 (E.D.N.Y. 1993) (rejecting Cutler's post-citation constitutional attack on the trial court's order on the ground that he neglected to attempt to narrow or challenge the order when it was made, but waited until it was enforced against him).

100. *Cutler*, *ibid.*

101. *Ibid.* at 834–35.

102. *Ibid.* at 835–37.

103. *Ibid.* at 837–38. Among other considerations, the appellate court held that Cutler was held to a higher standard than would be a nonlawyer, and that his wilfulness could be inferred from his reckless disregard for his professional duty. *Ibid.* at 837.

104. The media were reportedly distressed by the discovery ruling in *Cutler*, see note 105, *infra*, believing that it stripped away protection it had previously enjoyed and thus raising free-expression concerns. See Geyelin, "Court Limits Shield of Reporters' Notes in Criminal Trials" *Wall St. J.* (28 Sept. 1993) B5, col. 1 (news report of reactions by media sources).

105. See *United States* v. *Cutler*, 6 F.3d 67 (2d Cir. 1993) (in decision before main *Cutler* decision, appeals court holds that lawyer accused of violating gag order entitled to discover reporters' notes of statements allegedly made by lawyer as well as outtakes from televised interviews, although not to notes or outtakes of interviews with prosecution).

106. Lawyer gag orders also implicate much broader questions of policy and constitutionality with respect to sealing or protective orders prohibiting public disclosure of information learned in civil lawsuits, typically through discovery. E.g. *Grove Fresh Distributors, Inc.* v. *John Labatt Ltd.*, 888 F. Supp. 1427 (N.D. Ill. 1995) (lawyer held in civil and criminal contempt for disclosure to newspaper reporter of confidential information learned in discovery).

107. See *supra* text at note 92.

108. See *supra* text at note 99.

constitutional challenges that he might have had to the trial court's order. Suffice it to say, however, that in another jurisdiction,[109] with a more modern, post-*Gentile*[110] local rule and specific and supportable findings by the trial court of a substantial likelihood of prejudice to the proceedings, a similar gag order would probably be upheld.[111] In fact, such gag orders are now relatively common in sensational cases that attract vast media coverage—such as the Oklahoma City bombing case[112] and the

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109. Cutler was convicted of violating several court orders directing him to comply with the standing rule of the Eastern District trial court on trial comment. See the lower court opinion in *United States* v. *Cutler*, *supra* note 98 at 961. If Cutler had not waived the point, an argument by the prosecution in support of the constitutionality of the trial court's order would have suffered from at least two major problems. First, the trial court simply "incorporated by reference" the local rule on lawyer media comment, without any attempt to tailor it to the particular case before him. Second, and more importantly, the incorporated rule, as with the New York state rule, N.Y. Code of Professional Responsibility, DR 7-107(b), was (and is now) based on the outdated 1969 ABA Model Code. Both rules list six types of prohibited statements. But, in *Hirschkop* v. *Snead*, 594 F.2d 356, 365–68 (4th Cir. 1979) (en banc), the court had held that a substantially similar per se prohibition against certain types of speech, regardless of the circumstances, was overbroad in violation of the First Amendment. The Second Circuit, apparently accepting that analysis, was able to save the New York rule by interpreting it as merely creating a rebuttable presumption that the six categories of speech created a reasonable likelihood of prejudicing the proceedings. See *supra* note 90 at 835–36.

110. See *supra* text at notes 81–85.

111. See e.g. *In re Dow Jones & Co.*, 842 F.2d 603 (2d Cir. 1988) (upholding gag order in Wedtech investigation into alleged fraud in contractor qualification for federal program for minority-owned businesses); *Radio & Television News Ass'n* v. *United States Dist. Ct.*, 781 F.2d 1443 (9th Cir. 1986) (gag order on lawyer in espionage case); *In re Russell*, 726 F.2d 1007 (4th Cir.), cert. denied, 469 U.S. 837 (1984); *In re San Juan* Star Co., 662 F.2d 108, 113–18 (1st Cir. 1981); *United States* v. *Tijerina*, 412 F.2d 661 (10th Cir), cert. denied, 396 U.S. 990 (1969); *United States* v. *Bingham*, 769 F.Supp. 1039 (N.D. Ill. 1991); *In re T.R.*, 556 N.E.2d 439 (Ohio 1990) (child custody suit prone to media attention); *contra Levine* v. *United States District Court*, 764 F.2d 590 (9th Cir. 1985) (gag order can be entered against lawyers, but only on finding of either clear and present danger or serious and imminent threat to right to fair trial, order must be narrowly drawn, and less-restrictive alternatives must be absent), cert. denied, 476 U.S. 1158 (1986); *Breiner* v. *Takao*, 835 P.2d 637 (Hawaii, 1992); see also *Sheppard* v. *Maxwell*, 384 U.S. 333, 360–63 (1966) (dicta); *Nebraska Press Ass'n* v. *Stuart*, *supra* note 92 at 564 (dicta). One of the most liberal members of the Warren Court spoke approvingly of the possibility of gag orders against counsel:

> As officers of the court personnel and attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice. It is very doubtful that the court would not have the power to control release of information by these individuals in appropriate cases and to impose suitable limitations whose transgression could result in disciplinary proceedings.

Ibid. at 601, note 27 (Brennan J. concurring) (citations omitted).

112. See e.g. "Judge Gags Attorneys in Oklahoma City Bomb Case" Reuters North America Wire, (13 June 1996) (Nexis); Romano, "McVeigh Can't Talk to Media: Bombing Trial Judge Rules Out Interviews," *Washington Post* (5 Oct. 1996) A4. On the order, see *United States* v. *McVeigh*, 931 F.Supp. 756 (D. Colo. 1996).

O.J. Simpson civil trial,[113] both of which are now ongoing. In fact, gag orders may become the most-relied-upon device for dealing with threatened pretrial publicity by American lawyers.[114]

What, then, is the presently-prevailing American rule on lawyer media comment? One thumbnail description that has been offered is that the traditional norm of "no comment" has been changed to one of "fair comment."[115] That may be descriptive of what one might gather from reading the lawyer codes, but it hardly reflects what is going on under the glare of television cameras on courthouse steps in many notorious trials. Fairness is, obviously, a highly elastic concept. In addition, fairness takes on a much sharper edge because of the "public record" exception to the comment rule[116] and due to the August 1994 amendment to the ABA's rule, explicitly adding the notion of fair retaliation against adverse publicity.[117] If retaliation is allowed, fairness must now be assessed, not on its own terms, but on what is reasonably appropriate in light of what has already been said or written in court filings or by way of responding to whatever nonsense or venom might have already been published in any segment of the media and against the legal, reputational, economic, or other interests of one's client. Rather obviously, American lawyers with a disposition to do so have proceeded, and will continue to proceed—even in California with its new rule—unrestrained by general rules and subject to effective muzzling only by narrowly drawn and case-specific gag orders.

Aside from such specific threats, all that is left to instil fear in publicity-hungry advocates is the possibility that a judge will not appreciate the broad scope of permissible media comment, and accordingly will enter a disciplinary order against a lawyer under a too-loose standard. Many American judges are obviously unhappy with the current *Gentile* state of the anti-comment jurisprudence. Lawyers are fully aware of this, sometimes because a trial judge will indicate concern with early attempts by lawyers in a case to engage in media comment. Lawyers are then threatened with two things. First, they fear arousing the judge sufficiently to enter a gag order that will unequivocally prevent further statements

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113. See *infra* text at notes 133–42.

114. For an argument that states should repeal their anti-comment rule in their lawyer codes and rely entirely on gag orders in individual cases in which a need exists, see L. Weisberg, "On a Constitutional Collision Course: Attorney No-Comment Rules and the Right of Access to Information" (1992) 83 J. Crim. L. & Criminology 644 at 670–82.

115. W. Fortune, R. Underwood & E. Imwinkelried, *Modern Litigation and Professional Responsibility Handbook* (New York: Little, Brown, 1996) at 279.

116. See *supra* text at notes 65 and 69–70.

117. See *supra* text at notes 82–85.

entirely. Second, they fear being held in contempt or being disciplined, leaving themselves the expensive and uncertain option of appellate review in which they might raise their constitutional objections.

Nonetheless, the course of Supreme Court and lower court decisions on lawyer free speech stands in contrast to the free-speech jurisprudence applicable to most other United States citizens and certainly to the media itself.[118] In fact, a pundit has noted[119] that the limited free-speech protection for lawyers in *Gentile* was announced in the same term of court in which the Supreme Court also refused to accede to the free-speech claims of nude dancers.[120] Those decisions stand in strange contrast to a later claim by the U.S. Supreme Court that *Gentile* accorded "speech by attorneys on public issues and matters of legal representation the strongest protection the American Constitution has to offer. . . ."[121]

What is it, then, that explains the half-baked free-speech rights of lawyers with respect to trial comment? The answer is hinted at in various opinions of the federal courts and trumpeted more loudly in occasional state-court opinions. Lawyers have traditionally been subject to extensive regulation by the states, particularly with respect to litigation activities.[122] Moreover, as an opinion in *Gentile* stated, "lawyers' statements are likely to be received as especially authoritative" because "lawyer have special access to information through discovery and client communications."[123] The statement is puzzling. One would think it an argument in support of lawyer free speech, not supporting its suppression (unless the speech were knowingly false, which is another matter altogether—since none of the media-comment rules has ever been concerned that much of the speech it suppresses is accurate speech). In a more limited way, however, the comment is telling, because it indicates why lawyer speech is likely to have a particularly powerful effect on prospective jurors, if the fairness of the proceedings is indeed given primary emphasis.[124]

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118. See *supra* text at note 92.
119. See D. Stewart, "Skeptical About Speech" (April 1991) 77 A.B.A.J. 50.
120. See *Barnes* v. *Glen Theatre, Inc.*, 501 U.S. 560 (1991) (state statute requiring at least pasties and g-strings does not impermissibly infringe free-expression rights of dancing establishment or individual dancers).
121. *Florida Bar* v. *Went For It, Inc.*, 115 S.Ct. 2371, 2381 (1995).
122. *Ibid.*
123. *Gentile*, *supra* note 71 at 1074 (majority opinion).
124. *Cutler*, *supra* note 90 at 836.

III. *Comparisons Between Canada and America*

What does one extract from this as a comparative matter, comparing Canada and the United States? First, will Canada become California? On that, I would say, there is the chance of a snowball not melting in downtown Los Angeles—or, pointing metaphor in the opposite direction, the chance of L.A.-style Santa Anna winds sweeping in from the East to roast Halifax. Beyond climate, the professional setting and general cultural environment that produced the kind of lawyer commentary found in the O.J. Simpson case is both perfectly predictable in California and hardly thinkable in Canada.

To be sure, there are some indications that the Canadian legal profession has cast off some of its familiar moorings and is being carried by powerful tides to destinations that it might not otherwise choose for itself. A prominent example of such signs is the current state of lawyer advertising in Canada—an arguably analogous area of free expression. As I understand it, the Supreme Court of Canada has yet to pass directly on the constitutionality of professional restrictions on lawyer advertising. Nevertheless, the Canadian Bar Association has read rather obvious tea leaves from the Court suggesting that section 2(b) of the *Charter* imposes significant limits on such advertising restrictions.[125] Accordingly, the Canadian Bar Association's current Code now recognizes that lawyer advertising must be allowed in the interest of improving access to legal services on the part of the mass of citizens unsophisticated in finding individual lawyers through personal contacts or general reputation.[126] The Provinces have fallen into obedient line, whipped, if by nothing else, by the realization that resistance would only mean a possibly exuberant decision very broadly upholding the constitutional right of lawyers to advertise. By dint of anticipated applications of section 1 of the *Charter*, however, the permission comes with conditions—particularly conditions, found in very few American lawyer codes, that exhort lawyers either not to advertise or to do so only in a dignified and restrained manner.[127] For example, advertising that is done must, according to the Ontario code, be "in good taste and not such as to bring the profession or the administration of justice into disrepute," and must not compare the advertising lawyers' services or charges with those of other lawyers.[128] In

125. E.g. *Rocket* v. *Royal College of Dental Surgeons (Ontario)*, [1990] 2 S.C.R. 232 (regulations limiting dentists' advertising to only name, address, telephone number and, on business cards only, office hours struck down under s. 2(b)).

126. C.B. Ass'n Code, ch. XIV, commentaries 1 & 2 (1987).

127. E.g. Law Society of Upper Canada, *Professional Conduct Handbook* (Toronto: Law Society of Upper Canada, 1996) Rule 12, commentary 4.

128. *Ibid.*, commentary 2(b) & 2(c).

Manitoba, the appellate court, soon after the *Charter* came into effect, upheld mandatory pre-screening of proposed advertising after subjecting the requirement to the *Charter*'s section 1 analysis.[129] By report, discipline of lawyers in Canada for wayward advertising is rare to non-existent despite some flowering of self-promotional announcements that does little to promote either professionalism or informed client choice.[130]

If I accurately understand the situation of growing lawyer advertising across this vast land, does this hold promise of radical departure from the tradition of lawyer self-effacement and public reserve that, to my eye, typifies the practice of law in Canada? I doubt it. Constitutional amendments and court decisions vigorously enforcing them arise in the context of the dominant cultural norms of the nation's society—not in defiance of them. Your *Charter* is written in a unique way, at least by comparison with the American Bill of Rights, in that s. 1 expressly admits of exceptions to it. That provision occurs, of course, neither by accident nor merely because of any peculiar analytical bent of its drafters. The drafters knew Canada well enough to know that, while freedoms are important, the interests of the wider community have competing claims that should sometimes be given precedence. That is the searing simplicity of s. 1 of the *Charter*.

For purposes of predicting the future of lawyer comment to the media in Canada, my guess, for what it is worth, is that Canada will largely stay its course. Any civil libertarian in Canada who formerly was interested in relaxing the rules on media reporting of sensational trials and those regulating lawyer comments to the media must have been given serious pause by public and professional reactions in Canada to the O.J. Simpson media extravaganza in America. While not universal, the reactions that I have heard from Canadians range from horror and disgust to a somewhat bemused low expectation. On the policy level, that reaction reportedly means that efforts in Canada to provide televised trials has become much more controversial.[131] (Similar reactions of upset were widely heard in the

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129. *Law Society (Manitoba)* v. *Savino*, [1983] 6 W.W.R. 538 (Man. C.A.). The advertising rules of Manitoba no longer require pre-filing. See Law Soc. Manitoba, *Code of Professional Conduct* (1992) ch. 14, at 54–55.

130. See MacKenzie, *supra* note 32 at 10-3. See also D. Stager and H. Arthurs, *Lawyers in Canada* (Toronto: U. of T. Press, 1990) at 191–96.

131. See Blinch, "Canada: Simpson Trial May Deter Cameras in Canadian Courts," Reuter News Serv. (4 Oct. 1995) (Nexis). As the Simpson case was just beginning, one Canadian journalist had claimed that, if nothing else, the Simpson trial would make it more likely that Canada's courts would also be opened to television. Fotheringham, "Canada: Cameras Belong in Bernardo Courtroom—Canadians Are Pusillanimous About Their Rights" *Financial Post* (9 Feb. 1995).

United States, including among many lawyers.) In Canada, s. 1 of the *Charter* is available to the courts as explicit authorization (and requirement) to assess in particular cases whether the threat posed to an orderly and fair trial—one fair to the defendant, to the state as prosecutor, and to members of the public as interested consumers of justice—is so clear and direct, and the workability of less restrictive alternatives so problematic that censoring of either the media or of lawyers involved is required. If so, Canadian courts are empowered to act, and apparently are willing to do so to protect Canada's own sense of individual and community justice.

How about the United States—will it turn toward Canada in dealing with lawyer media comment? Here, I think, there is a greater possibility of profound legal change. There is a widely shared sense in the United States—brought on primarily by the O.J. Simpson case and its aftermath, but by much else that preceded it—that lawyers and the media are conducting themselves badly, primarily in sensational criminal cases. Of course, it might be that the media is once again distorting reality—this time to its own disadvantage. In the mass of run-of-the-mill cases, the lesser interest of the media in the matter, together with the perhaps greater threat of disciplinary sanctions, precisely because of the low profile of the case, may induce a (more normal) lawyer reticence in speaking to the media. It thus might be that extensive lawyer comment to the media occurs only rarely, and then only in sensational cases.[132] Ironically, it thus might be that the media itself, by sensationalizing only certain cases, constructs the appearance that American lawyers routinely flout the professional rule.

The O.J. Simpson case, of course, continues. Two months ago, the trial began in Los Angeles (Santa Monica) in the wrongful-death claims of the families of Nicole Brown Simpson and Ronald L. Goldman. This time different and perhaps more skilled lawyers present the case against Simpson for the claimants. With civil claims rather than criminal charges, they do not face some of the procedural disadvantages that confined Mr. Simpson's original prosecutors. The racial composition of the jury is different, perhaps significantly so, with a whiter jury possibly harbouring less suspicion of the police. In California a verdict for the plaintiff in a civil action is possible even if only nine of the twelve jurors concur. No longer protected by his constitutional privilege against self-incrimination due to his acquittal in the criminal case, Mr. Simpson can now be

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132. See ABA Conference Examines Future, Fees, Commentary, *ABA/BNA Lawyers' Man. on Professional Conduct* (1995) 179 at 182 (report of panel discussion at ABA National Conference on Professional Responsibility, concluding that O.J. Simpson-type trial commentary is unique).

compelled to testify. Judge Hiroshi Fujisaki is not Judge Lance A. Ito: a much firmer hand is at the judicial helm.[133]

Perhaps most importantly, the media circus that accompanied the Simpson criminal trial is under greater control this time around. Although cameras, as the world knows, are allowed in the courtroom in California,[134] they can be banned for specific cases—and Judge Fujisaki has banned both video and still photographers. Even sketch artists are being allowed to sketch only from memory; they may not lug their drawing boards into the courtroom. Perhaps most important of all, the lawyers are not talking to the media—they cannot. Noting that "[h]istory will repeat itself unless the court acts to prevent it,"[135] the judge has imposed a gag order on the lawyers and witnesses. Despite the greater judicial effort at control, L.A. is L.A. Anti- and pro-Simpson protesters gather daily on the street outside the courthouse, with signs and t-shirts advertising their sentiments, and themselves, with some justified assurance that they will appear on the nightly television news.[136] No doubt the American popular and legal media, yet to hear the news, will still attempt to sensationalize the case, and others like it. Large headlines and big pictures—along with "muckraking, celebrating, predicting the future"[137]—still typifies too much of the legal press, much less the popular media. The American media probably still believes that there is more money to be made appealing to the worst instincts of Americans rather than to their better selves.[138]

Many lawyers are unhappy with the news blackouts when they occur. Leo Terrell, described in the press as a civil-rights lawyer and friend of Mr. Simpson, was recently quoted as saying that the verdict in the Simpson civil case will resolve nothing—specifically because the courtroom is closed to the media. The difficulty of knowing exactly what is happening there, according to Terrell, will mean that "[y]ou're going to

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133. See e.g. Harper, "Firm hand on Gavel in Simpson Case: This Judge Allows 'No Shenanigans'" *Washington Times* (19 Sept. 1996) A1; Goldberg, "New, Likely Tauter, Simpson Trial Opens" *N.Y. Times* (18 Sept. 1996) A14, col. 4; "Judge Bans Cameras, Video from Simpson Courtroom" *Washington Post* (24 Aug. 1996) A24. Among other things, Judge Fujisaki has ruled that Simpson's lawyers may not waft intimations of other killers into the jury box unless they offer specific evidence in support. Goldberg, *ibid.* col. 4.

134. Cal. Rules Ct., rule 980 (1996).

135. Goldberg, *supra* note 133 at col. 5.

136. T-shirt sales, however, are not as brisk as some entrepreneurs had hoped. See Goldberg, "Simpson-Case Weariness Mixes with Fascination" *N.Y. Times* (20 Sept. 1996) A18, col. 1.

137. See L. Caplan, "Why Play-by-Play Coverage Strikes Out for Lawyers" (1996) 82 A.B.A.J. 62 at 63.

138. For example, during the press-induced frenzy that attended the Sheppard murder case, see supra text at note 49, local newspapers all experienced extraordinary circulation gains. See *supra* note 48 at 344, note 93.

find stories being generated from rumors and hearsay."[139] Terrell either has an unusually low opinion of the print media or a higher opinion of the educational value of live telecast of trials than some lawyers and most lay observers were left with after the criminal trial. Even Steven Brill, the founder and president of Court TV, which became commercially successful in telecasting the Simpson criminal trial, concedes that most viewers of criminal trials feel like rubber-neckers at a car accident: "You watch it . . . but you don't feel great about yourself after watching it."[140] My personal regret is that Judge Fujisaki deserves much more than Judge Ito to become a household name, but he isn't nearly as likely to make the ten-best-dressed list (as did Marcia Clark, Simpson's unsuccessful prosecutor[141]) or otherwise to gain the ill-deserved fame of the characters in the original drama.[142]

But relative media calm does not necessarily equate to a fair trial. It is widely believed that the enforcement of fair-comment rules against prosecutors has caused them to "go Deep Throat"[143]—to harken back to journalism's most famous anonymous source. In the publicity after the arrest in Montana of Theodore Kaczynski, prosecutors leaked to the media that the original version of the Unabomber "manifesto" was found in his cabin, along with the nine-digit secret code he used to identify his messages to investigators, a typewriter used to write the manifesto, and a partially completed bomb.[144] The ABA has recently acted against such prosecutorial excesses, amending the ABA Model Code to add a prohibition against a prosecutor's "making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused."[145] Effectively dealing with leaks presents vast problems—of detection, of proof, and of distraction in the ongoing proceeding.

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139. Goldberg, *supra* note 133 at col. 6.

140. *Ibid.*

141. Marcia Clark, who is widely blamed in other Simpson-trial books of having bumbled the prosecution, had a kind of last laugh—earning the largest publisher's advance ($4 million) of all the dozens of Simpson authors. *Ibid.* at A18, col. 3.

142. It has been reported that over fifty books and audiotapes have so far been produced about the original Simpson trial. See *ibid.*

143. I refer, of course, to the still-unknown White House source who provided inside information heavily damaging to then-President Richard M. Nixon at the time of the Watergate imbroglio, and which was one of the most significant forces that eventually drove him to resign as president. See C. Bernstein and R. Woodward, *All the President's Men* (New York: Simon & Schuster, 1974) at 71–72.

144. See "Prosecutorial Leaks: Are We Compromising Defendants' Rights in the Name of the First Amendment?" (1996) 82 A.B.A.J. 78 at 79.

145. See ABA Model Rule 3.8(g) (as amended, 10 Aug. 1994).

In the end, what most profoundly separates the Canadian and American situations on lawyer media publicity is not lawyers, but the media. The problem of lawyer media publicity is primarily a demand-side problem; it is created by the media, not by lawyers. If one had subtracted all of the lawyer media comments in the *Sheppard* case, for example, the circus would have proceeded fairly much as it did. The O.J. Simpson media carnival was caused by the media's fascination with O.J. Simpson, with his unsuccessful interracial marriage, with issues of spousal abuse, and generally with the titillation of tragedy afflicting the rich and famous. O.J. Simpson's lawyers certainly could have been more discreet, but even their total silence would probably not have otherwise changed dramatically the extent and kind of media coverage that the trial generated. And that probably typifies most criminal trials that attract media attention. If the Bernardo case had been tried in the United States, it doubtless would have been given headline importance in all of American media. Would even constant comments dropped by an American defence lawyer, or an American prosecutor, have made the case any more lurid, any more attention-grabbing, any more "newsworthy"?

To generalize perhaps beyond any permissible bounds for a legal academic, let me offer a few thoughts on the differences between the Canadian and American media—differences that strongly influence, if they do not determine, the place and role of lawyer media comment. The Canadian media, from my vantage point, seem much more attuned to official (including judicial) views of an orderly society. The American media seem far more cynical, distrusting of power, delighted with any small or large opportunity to suggest official corruption, pettiness, stupidity. For this purpose, petty falls from grace are accorded almost equal value as scandal as are major defaults. The Canadian media seem more interested in events; the American media are preoccupied with persons. The Canadian media focus more sharply on right or wrong outcomes and seem more committed to a conception of moral and immoral behavior;[146] the American media is preoccupied with process and portrays—quite inconsistently and sometimes in the same piece—either moral hypocrisy or an unwillingness to impose a moral view.

Our increasingly different cultures have given rise to increasingly different media treatment of sensational events, particularly of sensational crime. By some unmeasurable degree, our trials—at least our sensational trials—are also profoundly different. My own sense is that

146. Even after the Bernardo media ban was lifted, not even tabloid publications in Toronto carried detail of, for example, the videotapes of the young rape victims. Davison, *supra* note 6.

Canadian trials are fairer to the accused and to witnesses, but that the American media is more robust and inquisitive.[147] Lawyers in our different cultures have, understandably, had to deal with different media—and different media consumers. In this and other respects, I strongly suspect, we will continue on our largely separate ways. I trust and hope that they will be civilized, decent, and strongly democratic ways, for us both—for us all.

147. I echo here the reported thought of Canadian-born Harvard Law School Professor Paul Weiler, who has been quoted in the Canadian press as having said that "The difference between the United States and Canada . . . is the difference between a country that makes freedom of speech a priority and a country that makes due process and fair trial a priority." See Corelli, "North Versus South" *Maclean's* (29 May 1995) 18 (report on differences between O.J. Simpson and Paul Bernardo trials).