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Erwin Chemerinsky

Laurie Levenson

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THE ETHICS OF BEING A COMMENTATOR II

Erwin Chemerinsky* and Laurie Levenson**

I. INTRODUCTION

Although it will be many years before all of the effects of the Simpson legal proceedings are understood, it already is clear that the media has learned from the case that there is enormous public interest in trial proceedings. This lesson hardly should be surprising, as the drama of the courtroom has been obvious since the trial of Socrates and has been the foundation for countless classic movies and television programs, from “Inherit the Wind” to “Perry Mason.” Yet, the prosecution of O.J. Simpson1 for the murders of Ronald Goldman and Nicole Brown Simpson received far, far more media coverage than any case in American, and probably world, history. The media devoted enormous attention to the case for a single reason: people were interested in hearing about it.

The result is that more legal proceedings will receive much more media attention than prior to the Simpson case. In the year since the Simpson verdict, there has been substantial coverage of the retrial of the Menendez brothers for the murder of their parents, the murder trial of rapper Snoop Doggy Dog, the trial for the murder of model Linda Sobek, the rape trial of Alex Kelly, the pretrial and trial proceedings involving the Oklahoma City bombing and the “Unabomber,” and the Whitewater investigation. Also, of course, every detail of the continuing saga of O.J. Simpson, in both family court2 and in a civil trial,3 has been reported by the media.

* Legion Lex Professor of Law and Political Science, University of Southern California.
** Associate Dean and Professor of Law, Loyola Law School.
Media attention to judicial proceedings has not been limited to high profile criminal, and related civil, cases. A lawsuit challenging the constitutionality of Proposition 209, a voter approved initiative abolishing affirmative action in California, has garnered substantial media attention and, with that attention, a demand for commentary by legal observers.

One striking initial effect of the Simpson case is that virtually none of these proceedings has been broadcast. The lesson that judges appear to have taken from the Simpson criminal trial is to keep cameras out of the courtroom. Yet, the coverage of the above proceedings shows that the media will closely follow cases of interest to the public whether or not there is a live broadcast.

Such media coverage of legal proceedings inevitably involves the use of a commentator to help explain the events. Scarcely an article is written about any courtroom events or any judicial decision without quotations from law professors and lawyers. Virtually every story on the news about a legal proceeding has a sound bite from a commentator. Commentators are used to explain the substantive and procedural law, place particular events in a larger perspective, and to evaluate the conduct of witnesses, lawyers, and judges.

The absence of cameras in the courtroom has enhanced, not decreased, the role of the commentator. The pundit becomes, in part, the eyes and ears of the public in commenting on events that people have not seen for themselves. This makes the task for the commentator far more difficult. Without broadcasts, it is much harder for commentators to follow the events because being in the courtroom becomes the only way to hear the proceedings. Also, the absence of live radio and television coverage makes the commentator into a reporter as well as an analyst.


4. Although it is beyond the scope of this paper, this is a change we strongly criticize. Court proceedings are government proceedings and judges and prosecutors are government officials. The public should be able to observe and evaluate this important part of their government. A meaningful public trial in the 1990s requires that it be broadcast because few people realistically can attend court proceedings. Moreover, we reject the view that cameras inherently distort what occurs in a trial. Quite the contrary, cameras are likely to cause judges and even lawyers to be more careful and any ill effects can be cured by judicial control over the proceedings.
A year ago, following the completion of the criminal trial against O.J. Simpson, we wrote an article discussing the ethics of being a commentator. The events of the past year have reaffirmed our view that a voluntary code of ethics for commentators is essential. These recent developments also have revealed many problems that we did not consider in our earlier essay. For example, what are the ethical issues when an attorney who represented one side in a criminal trial then serves as a commentator in a subsequent civil action involving the same facts? What, if any, is the commentator's duty of neutrality? Should the ethical commentator participate in reenactments of a trial where actors recreate the court's events? If a trial is not being broadcast, must the commentator attend the proceedings in order to offer commentary on it? What is the commentator's duty with regard to trial participants who are covered by a court's gag order? What actions should a commentator take if he or she believes that a particular media outlet is acting improperly or unethically? This article builds on our earlier work and considers these additional issues.

As we explained in our earlier article, no current ethical codes apply to lawyers serving as commentators. Although attorneys always are obligated to comport with their state's code of professional responsibility, those rules concern conduct in representing clients and are silent about behavior as a commentator. Journalists' ethical codes are probably unknown to lawyers serving as commentators and besides are likely of little use to those serving as pundits rather than as reporters.

6. We believe that this code should be voluntary because any enforcement of such a code would raise serious free speech problems in that the code is directed at the content of the commentators' remarks. See id. at 1314-18. Our hope is that commentators will choose to follow such a code and that the media will ask their commentators to comply.
7. However, we suggest below that some of the basic duties contained in codes of professional responsibility, such as the obligation to protect client confidences, can conflict with lawyers serving as commentators. For example, as discussed below, we are deeply troubled by how attorneys in the Simpson criminal trial have become commentators in the civil proceedings. See infra text accompanying notes 22-29.
8. To the extent that journalists embrace a code of ethics, it is a voluntary one ordinarily imposed just by an individual employing media outlet. See BRUCE M. SWAIN, REPORTERS' ETHICS 111 (1978).
A voluntary code of ethics for commentators could serve many purposes. Ideally, it would offer guidance to those serving as commentators in the future. We have constantly been confronted with difficult ethical issues in our role as commentators. The shared wisdom of those who have been in this role might offer assistance to those who will serve as commentators in the future by helping them to recognize and resolve ethical issues. As is true for codes of ethics in all fields, such a code can help to raise the professional quality of behavior by helping individuals identify ethical issues and by setting minimum standards.

A code of ethics might also give guidance to the news media in using commentators and certainly can help the commentator in explaining to the media what is the appropriate and inappropriate role for the pundit. Such a code also can lead to more consistency among commentators as they can be guided by a common set of standards.

Perhaps above all, a code of ethics for commentators can demonstrate that commentators take their ethical obligations seriously. The public's general cynicism towards the legal profession certainly has carried over to commentators. Many of the attorneys in the Simpson criminal case have directed their greatest ire towards the pundits. Simpson defense attorney Barry Scheck, for example, declared: "If this case has fostered disrespect for the system, it's [because of] the TV coverage. . . . The whole new industry of commentators promotes cynicism, and I speak as one of the original commentators on Court TV. There's no presumption of innocence, there's snap judgments."9 A code of ethics is a way of addressing these criticisms and demonstrating that commentators are cognizant of their important role as public educators.

Rather than repeat what we said in our earlier article, this essay focuses on topics not previously addressed. Part II returns to the issue of competence of commentators. How, particularly now in this post-Simpson era when high profile trials are not being televised, can a commentator perform his or her role competently? Should there be a requirement that commentators attend proceedings or is there another way for commentators to stay abreast of developments in a case?

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What does it mean for a commentator to be competent to analyze a case?

Part III considers additional questions concerning conflicts of interest. Is there a danger in a lawyer on a case becoming a commentator for a related trial? How do a commentator's conflicts of interest implicate a lawyer's traditional duties of loyalty and confidentiality to a former client? Can a commentator serve two masters—the public and the client?

Finally, Part IV focuses on remedies available for a commentator's unethical behavior. What steps can and should commentators take to enforce a voluntary code of ethics? Is it incumbent on a commentator to report another commentator's violations? Is resignation the best solution for commentators embroiled in an ethical dilemma? How do a commentator's responsibilities as an officer of the court influence his or her actions?

At its heart, our effort is guided by one overriding principle—the belief that what commentators do matters. A commentator's words and opinions are often heard or read by millions of people. They thus shape how people understand and view the legal system. A commentator's words may also matter to the participants in a case. It is not unheard of for judges to follow legal commentary and tailor their rulings accordingly.\(^\text{10}\) Trial participants sometimes use commentary to guide what arguments or strategies they will present in court. While heard outside the courtroom, a commentator's voice can nonetheless have an impact inside the trial.

At its best, legal commentary educates the public, engenders respect for the legal profession and the judicial system,

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\(^{10}\) The most striking example of this occurred during the O.J. Simpson civil case. At least two times, Judge Fujisaki reversed himself or backtracked on controversial rulings shortly after they were made. This first occurred when the judge allowed plaintiff's counsel to examine Mr. Simpson on a polygraph test he allegedly failed. The general consensus of legal commentators was that the court's ruling was questionable at best. The court began the next court session with a cautionary instruction that the results of the polygraph should not be considered by the jury. Days later, the court admitted testimony from a counselor at a battered women's shelter regarding a call from a "Nicole" in which the caller describes stalking and threats from her former husband. Once again, after a night of commentators' criticisms, the court sought to limit the impact of this evidence with a cautionary instruction. While it could just be coincidence that the court reconsidered the same issues that commentators had questioned, it may also be that the media and commentators had an impact on court rulings.
and helps to facilitate needed reforms. At its worst, legal commentary misinforms the public and increases cynicism towards lawyers and courts. Because the potential effects are so great, it is imperative that there be a voluntary code of ethics to guide commentators and the media.

II. DUTY TO ACT COMPETENTLY

In our previous article, we recognized as foremost the commentator's duty to act competently. Unless a commentator knows and understands both the legal and factual issues in a case, that person cannot provide helpful or even fair commentary regarding a case.

During the O.J. Simpson criminal case, it was fairly simple for a legal commentator to stay abreast of the proceedings. All one needed to do was turn on the television or link into simultaneously transmitted transcripts and one could follow every word of the case. However, access to high-profile cases has been restricted considerably in response to the Simpson criminal case. Most courts in high-profile cases are not allowing the proceedings to be broadcast. As a result, the task of the commentator in staying informed has become much more difficult.

Even for those commentators who have the time and commitment to attend the court's proceeding, there is rarely open access. Typically, the court will allot seats for the public, family members, and the media. The commentator is left to beg. Excluded by court personnel from being considered members of the public, commentators must hope that members of the media will share media seats with the commentators. While many do, the commentator's access to the actual court proceedings, especially during the testimony of key witnesses, can be greatly limited.

12. Id.
13. Chemerinsky & Levenson, supra note 5, at 1319.
14. The court's media liaison has the power to designate who is considered a member of the press and who is eligible for a public seat. While in the past these individuals have allowed legal commentators to stand in line for public tickets, more recently commentators have been excluded from the public's ranks if they ever enter on a media pass. We believe that this discrimination against commentators in attending court proceedings raises serious First Amendment issues that are beyond the scope of this paper.
One alternative that has often been available to legal commentators is access to a media listening room. From a location outside of the courtroom, commentators and reporters sit and listen to the proceedings. While better than no access, listening rooms still leave commentators without the ability to comment on the demeanor of courtroom participants, including witnesses. Just because a commentator is competent to discuss the substance of questioning, it does not follow that the commentator is competent to answer questions regarding the tenor of the courtroom or the demeanor of participants inside of it.

It takes time, work and perseverance for a commentator to stay competent to comment regarding a case. With limited access to a proceeding, it may be important for a commentator to limit his or her subjects of commentary. On legal issues that can be researched, such as whether lie detector results are admissible in a civil proceeding, the commentator may still be able to provide helpful perspective. However, with regard to questions regarding witness demeanor or the effectiveness of a party's strategy, the commentator should abstain from commenting if he or she did not witness the proceedings. Moreover, even if the commentator did attend the proceedings, he or she must keep in mind that the jurors may focus on different things than the media or commentators attending the trial. Thus, the commentator should avoid speculating on the actual impact of the court proceedings on the jury.

There is also a dangerous tendency among legal commentators to believe that just because they witness a prior proceeding regarding a case, they are competent to comment on follow-up proceedings. While many of the same witnesses may testify in both proceedings, small differences in their testimony may affect the outcome of a case. In the Simpson civil case, there were repeatedly differences in witnesses' testimony from the criminal trial—some subtle and some not. If a commentator is operating from old information, that person is not necessarily competent to comment on the new case.

15. For example, when O.J. Simpson took the witness stand during his civil trial, the audio trailer looked like a convention of legal commentators. At least twenty legal commentators converged on the trailer for an opportunity to hear, if not see, Simpson testify.
Another trap we have seen is a commentator's reliance on the parties to "fill in" the commentator on interesting developments in a case. It is doubtful that a lawyer zealously representing a client is going to provide balanced, objective information to a commentator who can help shape public opinion on a case. A commentator who seeks to perform competently should not rely on a party to educate him or her on a case. The commentator must conduct a separate review of the proceedings.

One particular issue that has arisen recently is whether commentators who comment on reenactments of a trial provide competent, useful commentary or are instead engaged in an activity that is inherently misleading to the public. During the Simpson civil trial, the E! Entertainment Network has provided daily delayed reenactments of the civil trial. Actors resembling the participants in the trial, including the judge, lawyers, witnesses and parties, recite portions of the trial taken from the daily trial transcript. A lawyer who attends the trial regularly guides the director in selecting excerpts for presentation on the show. He also assists the actors in deciding how to play their parts during the recreation.

While there has been some criticism by the news industry of E!'s recreation of the trial proceedings,\textsuperscript{16} we do not believe that a commentator automatically acts improperly by commenting on such recreations. We see no problems with reenactments so long as the passages are read verbatim, in proper context, and in a manner that reflects the tenor of the actual events. Rather, the same standards for competence would seem to apply to recreations as apply when the commentator is asked to speak generally regarding a proceeding. The commentator should know from either personal observation of the proceedings or a personal review of the transcripts what occurred in the case. Then, the commentator can address candidly whether the recreations are informative to the public or misleading. The commentator can only help the viewing audience put matters into context if the commentator is operating from direct firsthand knowledge of the trial and not through recreations.

Finally, we have come to learn that being a competent commentator often involves knowing information that occurs outside the four walls of the courtroom. For example, a key issue in the Simpson civil trial was how that case would be affected by a custody ruling in another court. Similarly, the question arose as to how information in the many books written on the trial might impact the trial strategy or behavior of potential witnesses. The competent commentator must study a case from many perspectives if, for no other reasons, to understand the many prisms through which the media and public are interpreting the developments in a case. Because a commentator's life experiences may influence how he or she views a case, it is also important for a commentator to be sensitive to the perspective of those from different backgrounds—ethnic, economic and professional. Likewise, the media would be well-served to recruit commentators with diverse backgrounds so that the public can receive differing perspectives regarding a case.

Competency is still the number one priority for all commentators. As we have stated before, there is no set formula for a commentator to act competently. However, familiarity with a case, a willingness to research exhaustively, and prior experience with the courts all are essential to being a competent commentator. Also crucial is care in answering questions. There are some questions that can be answered solely from legal research and some that require attendance in the courtroom.

III. CONFLICTS OF INTEREST

In our earlier essay we discussed several conflicts of interest that might arise while serving in the role of commentator. For example, we considered conflicts created by a commentator's personal relationship with lawyers in a case. At a minimum, we concluded that an individual should not serve as a commentator if he or she has done any work on the case and that any personal relationship with the participants be fully disclosed.17

We also expressed concern about conflicts created by a commentator's stake in the outcome of the proceedings or by a ruling on a legal issue. For instance, the issue might arise

as to whether the prosecution should seek death penalty in a particular case. If the legal commentator is currently working on a case in which the district attorney is being asked to compare facts and decide whether the death penalty is appropriate, there is a clear conflict of interest for the commentator. We believe that in such an instance the lawyer should not serve as a commentator.\(^1\)

Additionally, we considered conflicts created by a commentator’s political or organizational affiliation, conflicts created when speaking to more than one media outlet, conflicts created by contacting a represented party, and conflicts created by assisting the court. In each instance we stressed that the commentator has the duty to identify the conflict, to refuse to serve (or not be used) as a commentator if the conflict would prevent him or her from being a neutral analyst, and to disclose all conflicts to the media and ideally to the public.\(^1\)

The assumption throughout our earlier discussion was that commentators have a duty of neutrality. Recent events, especially the commentary on Proposition 209 and the large number of attorneys from the Simpson criminal case serving as commentators in the civil case, have caused us to reexamine the idea of neutrality. Additionally, the experience in the Simpson civil case raises issues of loyalty and protection of client confidences when an attorney in a case becomes a commentator in a subsequent related proceeding. A third set of new conflicts issues concerns how commentators should deal with trial participants who are covered by a gag order. These events also again raise the question of how much, if at all, commentators should interact with the parties, attorneys, and witnesses in the case. Each of these issues is discussed in turn.

A. *Is There a Duty of Neutrality?*

The media and the public generally look to the commentator to provide a neutral opinion as to the law and an unbiased assessment of the events in a case. Neutrality in this context means that the commentator should not act, or be perceived as acting, as an advocate for either side in a pro-

\(^{18}\) *Id.* at 1330.

\(^{19}\) *Id.* at 1330-33.
ceeding. Absent gag orders on the attorneys, the media can turn to the lawyers for each side to explain their actions and their assessments. The commentator's contribution is as an independent party without ties to either side in the proceedings. Indeed, it is likely that commentators are used by the media, in part, to enhance the credibility of coverage.

Yet, recent events have challenged whether this assumption of neutrality is warranted or appropriate. Many of the attorneys from the Simpson criminal case, such as Christopher Darden, Alan Dershowitz, Barry Scheck, and Robert Shapiro, appeared as commentators during the civil trial. Surely they cannot be neutral or be perceived as acting in a neutral fashion. A lawyer has a continuing duty of loyalty to former clients. It would be a breach of this duty of loyalty if a criminal defense attorney who helped to secure an acquittal later expressed the view that his or her client was guilty.

Moreover, the problems with commentators being neutral can arise even where the individual was not an attorney in the earlier proceedings. What if the commentator has strong views on the issues presented in a case? To again use the Simpson case as an example, virtually everyone has an opinion as to whether O.J. Simpson killed Ronald Goldman and Nicole Brown Simpson. It would seem inevitable that commentary would be influenced by these views. Does this impermissibly conflict with the commentators duty of neutrality?

We also observed and experienced the same problem in providing commentary on the legal proceedings surrounding Proposition 209, the California initiative that abolished affirmative action. Each of us frequently spoke against Proposition 209 prior to the November 1996 election. The day after it was approved by the voters, the American Civil Liberties Union led a coalition of civil rights groups in filing a legal challenge to the constitutionality of Proposition 209. Immediately, we began to receive media calls to explain and assess the basis for the constitutional challenge. We were not serving as attorneys in the case, but we were not neutral either. We were thus troubled by whether we could fulfill the duty of neutrality that our earlier article advocated.

20. See, e.g., Trone v. Smith, 621 F.2d 994, 998-99 (9th Cir. 1980) (describing duty of loyalty to former clients); see also Model Rules of Professional Conduct Rule 1.9 (1996) ("Conflict of Interest: Former Client").
On reflection, the problem of neutrality seems far more difficult than we previously recognized. It is simply unrealistic to expect commentators to approach a matter without views or to pretend that such opinions will not influence the commentary provided. Everyone has an opinion as to whether Simpson committed the murders and everyone has an opinion as to whether Proposition 209 is desirable. If neutrality requires the absence of views, no one could serve as a commentator.

But the conclusion should not be that neutrality is irrelevant simply because it is impossible. If the media and the public are looking at a commentator as a neutral expert, that trust is breached when the commentator is serving as an advocate for a particular position. Reporters are expected to adopt a neutral posture even though they too undoubtedly have views and opinions about what they are covering.

The initial solution to the problem would seem to be disclosure. The commentator could be required to disclose any prior involvements or views that would preclude neutrality. Indeed, disclosure is required in the practice of law when there is a potential conflict of interest. For instance, the California Rule of Professional Conduct, 3-310(B), concerning neutrality is specific and might be a model in dealing with disclosure by commentators:

A member shall not accept or continue representation of a client without providing written disclosure to the client where:
(1) The member has a legal, business, financial, professional or personal relationship with a party or witness in the same matter; or (2) The member knows or reasonably should know that:
   (a) the member previously had a legal, business, financial, professional or personal relationship with a party or witness in the same matter; and
   (b) the previous relationship would substantially affect the member's representation; or
(3) The member has or had a legal, business, financial, professional, or personal relationship with another person or entity the member knows or reasonably should know would be affected substantially by resolution of the matter; or
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(4) The member has or had a legal, business, financial, or professional interest in the subject matter of the representation.\(^{21}\)

This provision conceivably could be applied, almost verbatim, to commentators. If commentators have disclosed such biases, they will not be perceived as neutral experts and the public thus will not be misled. With disclosure, the public can better understand and appraise the commentator’s remarks.

However, there are many problems with disclosure in the context of serving as a commentator. First and most importantly, the commentator’s disclosure likely will not be communicated to the public. The commentator certainly can disclose these matters to the reporter conducting the interview, but it is highly unlikely that any of it will be conveyed to public. There is simply not space in a newspaper story or time on a news broadcast for the media to make such disclosures about its commentators. This does not mean that disclosure to the media is unimportant. The media should know of a commentator’s potential conflicts in deciding whether to use the individual as an analyst. But even if the commentator urges disclosure to the public, usually the realities of space and time constraints will make this unlikely.

Second, even if disclosures occur, it is still unclear as to what must be communicated. Does every commentator in every interview have the duty to say whether he believes that Simpson committed the murders? Although such a view may influence the commentary, the usual reaction to such expression of opinion would be that the commentator should stick to answering the particular question posed.

Third, reporters do not make such disclosures, so why should commentators? Reporters undoubtedly also have opinions as to Simpson’s guilt or about Proposition 209. They do not disclose these views, even though they certainly affect reporting. It is unclear why commentators should be held to a higher standard.

Finally, such disclosures may be unnecessary in some instances, such as where every one knows of the commentator’s prior involvement. For instance, on some shows it is highly likely that the audience knows that Christopher Darden and

Alan Dershowitz were attorneys in the criminal trial and are not neutral experts in the civil case. Nor, of course, is the media turning to such lawyers as neutral experts. The former trial participants are used because of the personal knowledge they have of the case and the hope that their fame will attract additional viewers.

Ultimately, there is no perfect solution to the problem of commentator neutrality. Certain minimum steps can be taken, however, to enhance neutrality and the public perception of neutrality.

1. Commentators should disclose to the media and to the reporter any current or prior legal, business, financial, professional or personal relationship with a party or witness in the case.

2. The media should disclose to the public such a relationship when using the commentator. For instance, those who previously were attorneys in a case should be identified as such.

3. The commentator should identify, in his or her own mind, whether he or she is being used by the media as an advocate or as a neutral expert. If the commentator is being used as a neutral expert, the commentator should strive to be fair and balanced. If the commentator is unable to do this, then he or she should not be used in the role of neutral expert. In other words, if the commentator sees himself or herself being used in the role of neutral analyst, then the commentator should strive to fulfill this role. The task of the reporter generally includes a duty of neutrality and reporters are asked to set aside their own feelings and opinions to the greatest extent possible. Commentators performing the role of neutral experts should be asked to do the same.

4. If a commentator is to serve in a neutral role, he or she should avoid seeking special favors from the parties which would give the appearance that the lawyer is aligned with one side or another. For example, the commentator should not attend the trial as the “guest” of one side or the other, but rather as a member of the media or the public.

B. Attorneys Transformed Into Commentators: The Problem of Confidentiality

There is, however, an even more significant problem when an attorney on a case becomes a commentator in a re-
lated proceeding: the difficulty in preserving client confidences. Attorneys must forever keep secret what they learn in the course of the attorney-client relationship. The California Business and Professional Code, for example, says that "It is the duty of the attorney . . . [t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."\(^2\) The Model Rules of Professional Conduct command that "[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation."\(^3\)

There is no doubt that an attorney's duty to protect client confidences continues even after the representation ends.\(^4\) Many problems therefore arise when an attorney in a case becomes a commentator in a related proceeding, such as when the lawyers from the Simpson criminal case became commentators in the civil proceedings. At the very least, there is the danger that confidential information will be inadvertently disclosed. Consider, for example, if a former lawyer is asked how his former client will fare during cross-examination or what the best technique would be for opposing counsel to question him? Live television requires instantaneous answers with little or no time for reflection. The human mind does not neatly separate information by its sources. The commentator will not have the luxury of carefully reflecting on the source of the information and deciding whether the disclosure will breach a duty to protect confidences. As a result, the commentator will have a difficult choice: say very little so as to stay clear from areas that might lead to inadvertent disclosures of confidential information or make remarks that create a serious risk of breaching confidentiality.\(^5\)

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22. CAL. BUS. & PROF. CODE § 6068(e) (West 1996).
23. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1996).
24. We are thus very troubled by the instances in which attorneys for O.J. Simpson spoke to reporters and authors and disclosed information that seems clearly protected as confidential. See, e.g., LAURENCE SCHILLER & JAMES WILLWERTH, AMERICAN TRAGEDY: THE UNCENSORED STORY OF THE SIMPSON DEFENSE (1996). Unless Simpson executed a waiver, statements by his lawyers that were detrimental to Simpson were a breach of loyalty and any disclosure of confidential information would appear to be a violation of the attorney's obligation to protect such material even after the completion of the trial. This issue, however, is beyond the scope of this paper because the lawyers were not serving as commentators in their remarks to authors or reporters.
25. It must be remembered that a lawyer is barred not only from revealing information protected by the attorney-client privilege (i.e., "confidential" information), but also information gained in the professional relationship that the
One solution to this problem might be to remind the commentator of the fundamental duty to protect client confidences and then trust the individual to observe this command. However, such trust is not regarded as adequate protection for confidentiality in other contexts. For instance, the strict rules concerning imputed disqualification are based on an unwillingness to leave protection of client confidences to trust in attorneys' good judgment. The Model Rules, and every code of ethics, provide that “[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so.”\textsuperscript{26} Underlying the rule of imputed disqualification is the concern that attorneys might inadvertently disclose confidential information to others in their offices. The solution is a strict prohibition on situations where such disclosure might occur.

Moreover, as alluded to above, such trust seems especially misplaced where the setting will allow no time for reflection and care in protecting client confidences. Inadvertent disclosure seems an inherent and substantial risk.

Therefore, our recommendation is that an attorney not serve as a commentator where he or she served as a lawyer in a substantially related proceeding unless the client expressly consents in writing. “Substantial relationship” should be defined as it is in the current rules and cases dealing with when an attorney is disqualified from successive representation.\textsuperscript{27} The classic statement of the substantial relationship test was

\begin{itemize}
  \item client has either requested be held inviolate or the disclosure of which would be embarrassing or would be likely be detrimental to the client (“secrets”). \textit{See Model Code of Professional Responsibility DR 4-101(A) (1996).} The strategy in cross-examining an individual would undoubtedly consider, consciously or subconsciously, a focus on the client’s weaknesses as known by confidential or secret information.
  \item 27. \textit{See, e.g.,} Analytica, Inc. v. NPD Research, Inc., 708 F.2d 1263 (7th Cir. 1983) (“[A] lawyer may not represent an adversary of his former client if the subject matter of the two representations is ‘substantially related,’ which means if the lawyer could have obtained confidential information in the first representation that could have been relevant in the second. It is irrelevant whether he actually obtained such information and used it against his former client, or whether—if the lawyer in a firm rather than an individual practitioner—different people in the firm handled the matter and scrupulously avoided discussing them.”); \textit{see also Model Rules of Professional Conduct Rule 1.9 (1996) (disqualifying subsequent representation when there is a substantial relationship).}
\end{itemize}
Judge Weinfeld’s statement in *T.C. Theatre v. Warner Bros. Pictures*:

[W]here any substantial relationship can be shown between the subject matter of a former representation and that of a subsequent adverse representation, the latter will be prohibited . . . . [T]he former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him, the former client. The Court will assume that during the course of the former representation confidences were disclosed to the attorney bearing on the subject matter of the representation.\(^{28}\)

Under this standard, we believe that the lawyers from the Simpson criminal case should be disqualified from serving as commentators in the civil proceedings unless they receive express written consent from their former client.

Yet, we recognize that some lawyers and members of the media are unlikely to observe this recommendation. For attorneys, the chance to serve as commentators likely has appeal in terms of exposure, possibly income, and enjoyment. For the media, it is the opportunity to present a “name” that might attract viewers or readers, perhaps with the possibility that inside information might be disclosed.

Therefore, although we advocate a provision that prohibits individuals from serving as commentators on matters substantially related to those where they served as attorneys, we also think that there must be a reaffirmation of the duty to protect client confidences if such attorneys become commentators. Even when a lawyer from a substantially related case ill-advisedly chooses to act as a legal commentator, the safeguards for confidences still can be strictly enforced by bar disciplinary proceedings or suits for breach of fiduciary duty if a breach occurs.

Additionally, we strongly advocate that a lawyer not serve as a commentator when it appears that he or she could be a witness in a proceeding. The ABA Model Rules of Professional Conduct have a prohibition against a person serving as both a lawyer and witness in the same proceeding, unless the testimony relates to an uncontested issue, relates to the na-

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ture and value of services or disqualification of the lawyer would work a hardship on the client.\textsuperscript{29} The same type of rule should apply to legal commentators. Practically, it will be impossible for a commentator to have even an appearance of neutrality when he or she is a participant in a trial. How, for example, would the commentator respond when asked what type of impact his or her testimony will have on the proceedings or whether the testimony was credible? A lawyer who was a percipient witness to events relating to a case, including events in a prior, related case, should ordinarily forego the role as an objective legal commentator. A legal commentator should discuss the news, not be the news.

C. Dealing with Participants Covered by Gag Orders

Increasingly judges in high profile cases are imposing gag orders on attorneys and parties. For example, the attorneys and the parties in the O.J. Simpson civil case and the pending Oklahoma City bombing prosecution are covered by broad court orders preventing public statements about the litigation. Although the United States Supreme Court has not yet ruled on the constitutionality of such prior restraints,\textsuperscript{30} several lower courts have upheld them as a way of balancing the right to a fair trial with the rights of the press.\textsuperscript{31} Elsewhere we have argued against such gag orders.\textsuperscript{32} Our focus here, though, is not on the desirability of

\textsuperscript{29.} \textit{MODEL RULES OF PROFESSIONAL CONDUCT} Rule 3.7 (1996).

\textsuperscript{30.} In \textit{Nebraska Press Ass'n v. Stuart}, 427 U.S. 539 (1976), the Supreme Court considered gag orders on the press and disapproved them except in extraordinary circumstances. In \textit{Gentile v. State Bar}, 501 U.S. 1030 (1991), the Court considered the constitutional standard for when attorneys may be disciplined for their speech about a pending case. Neither case, however, considered the constitutionality of a court order limiting attorney speech.


such orders, but rather on the ethical problems that they pose for the commentator.

An argument can be made that lawyers who serve as commentators remain officers of the court. Accordingly, they should be respectful of court orders and not participate in any activity that would violate such an order. From this perspective, commentators should refrain from conversations with trial participants about the case or that might yield comments that are inconsistent with the gag order. Furthermore, if the commentator obtains such remarks from the attorneys or parties, the analyst is transformed into more of a reporter than a member of the legal profession commenting on the gathered information.

We have grave concerns about the dangers to commentators in gathering information and thus serving more as reporters than independent analysts. There is always the danger that the attorneys or parties will use the commentator by providing information, even potentially inaccurate statements, that they wish to reach the media and the public. There is also the danger that the analyst’s comments will be tempered or influenced by the desire to maintain the relationship with the source. This is obviously a constant risk for reporters, but it is an even greater danger for commentators who are asked to analyze and appraise.

But a blanket prohibition on commentator contact with attorneys and parties, even when they are covered by gag orders, seems undesirable. The commentator is not covered by the court’s prior restraint and does not violate it by speaking to the attorneys and parties. The burden is on the attorneys and parties under the court’s order to comply with it.

Whether to speak with attorneys and parties is a judgment call for the commentator. Commentators should not knowingly encourage others to violate the law, including a court order. However, that does not mean a commentator is barred from all conversation with a party or attorney under a gag order. If a party to a gag order is willing to provide information to a person affiliated with the press, and the commentator has identified himself or herself as such, then the commentator is entitled to listen to that information. When doing so, however, the commentator must always remember that the parties may be using the commentator to disseminate prejudicial information. Additionally, by cozying up to a
party to gain forbidden access, the commentator may be sac-
rificing his or her appearance as a neutral analyst.33

IV. Remedies

The last challenge remaining for those of us committed to
a voluntary code of ethics is to develop avenues of enforce-
ment outside of a formal system of discipline.34 What
2remedies are available when there appears to be a breach of
ethics by a legal commentator? What should a commentator
do when he or she perceives that the media is acting
unethically?

A. Media Commitment

Unless the media is committed to using ethical commen-
tators, the effort to improve standards for commentators is
unlikely to succeed. Sensational reports by big name lawyers
may draw strong television ratings even if the public is being
cheated in the information it receives. The best way to en-
sure that legal commentators will act in a responsible and
ethical manner is to encourage media outlets to adopt ethical
standards for their legal commentators.

As of yet, there seems to be no formal movement in this
direction. Because of the media's belief that it should be able
to do all that the First Amendment allows, the media has re-
frained from adopting for itself a formal code of ethics.
Rather, the preservation of ethical standards seems to be in
the hands of individual journalists who are themselves sub-
ject to the commercial pressures of the media business. We
have met many fine journalists who, as individuals, would
love to elevate the ethical standards for their reporting of
high-profile cases. But, as part of the front line team, they

33. The commentator should always consider how it will appear if the com-
mentator is called as a witness in a contempt hearing before the court for a
violation of a gag order. Although the commentator may also be covered by the
shield laws, the neutrality of the commentator is sure to be challenged and the
court is likely to publicly criticize the commentator for encouraging a violation
of a court order.

34. It must always be remembered, however, that a legal commentator may
be subject to discipline to the extent that his or her remarks violate professional
codes of ethics for attorneys. For example, even though the Code of Ethics for
Legal Commentators may be a voluntary one, every attorney is bound by duties
of confidentiality and loyalty that are the subject of mandatory and enforceable
codes. See CAL. BUS. & PROF. CODE § 6068 et seq. (West 1996).
COMMENTATOR ETHICS

rarely have the final say in what will be reported by their agency. Rather, a team of editors or producers, less familiar with the proceedings and participants, ends up making the final editorial decisions.

Interestingly, if the media were to follow the ethical model of lawyers, those with supervisory authority would have primary responsibility to ensure that those reporters on the front line use all reasonable efforts to conform to standards of professional conduct. This supervisory responsibility does not discharge line reporters and commentators from acting in an ethical manner. Rather, it is an additional means of enforcement.

We strongly encourage the media, whether it be the individual reporter assigned to a case or the supervisors behind the scene, to insist on the highest ethical standards for their legal commentators. The public will be better served by these requirements and so will the media. One of the most effective remedies for unethical behavior by a commentator is the media declining to give that commentator an avenue to express his or her views.

B. Pressure from Above?

Assuming, however, that the media is unable or unwilling to monitor the ethical behavior of lawyers, what are the responsibilities of the individual commentator if he or she is being asked to participate in unethical behavior by a media organization? At their essence, even mandatory codes of eth-

35. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.1(a) provides:

(a) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the rules of professional conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the rules of professional conduct.

(c) A lawyer shall be responsible for another lawyer’s violation of the rules of professional conduct if:

(1) the lawyer orders, or with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Id.
ics rely heavily on the personal commitment of its professionals to comply with the code's ethical standards. Some codes even require self-reporting of violations.36

If a legal commentator is under immediate pressure to act in an unethical manner, it is the personal responsibility of that commentator to uphold the ethics of the profession. It does not matter that the commentator is acting in great part at the direction of another person. There is no "Nuremberg Defense" for legal commentators. A legal commentator should not be able to argue, "I was just doing what the reporter asked me to do." Rather, we should embrace a standard similar to that set forth in ABA Model Rule of Professional Conduct 5.2(a): "[a] lawyer is bound by the rules of professional conduct notwithstanding that the lawyer acted at the direction of another person."37

If a voluntary code of ethics for legal commentators is going to work, it will depend on the personal commitment of those who serve in that role. Commentators must not abdicate their ethics to others with whom they work. Ultimately, it is the commentator's individual reputation, as well as other legal professionals in the same position, that is at stake. To give a simple example: we strongly believe that commentators should refuse to give predictions as to a jury's likely verdict. Even when asked or pressured for such an opinion, it is the commentator's duty to refuse and explain the inappropriateness and impossibility of such forecasts.

There are also some practical steps a commentator may take to ensure that comments are not taken out of context or used in an improper manner. First, a commentator should be sensitive to whether his or her remarks will be subject to editing. Taped interviews pose more risk to commentators than live interviews because the ultimate editorial judgment is left with the media, not the commentator. Second, if a commentator's opinion is subject to qualifications, any such qualifications should be emphasized throughout the commentator's

36. See, e.g., CAL. BUS. & PROF. CODE § 6068(o) (West 1996) (requiring an attorney to report possible ethical violations to the agency charged with attorney discipline).

37. We also believe, as does Rule 5.2(b), that on arguable questions of professional duty, there is more leeway in the commentator's action and the commentator may seek input and guidance from others, including those in the journalism field.
remarks so that they are less likely to be deleted during the editing process.

C. Withdrawal: Resigning from the Role of Commentator

Having worked in the field, we recognize that it is not always easy for a commentator to take an ethical stance. The pressures to compromise can be tremendous. If a commentator is being faced with a situation where he or she is being asked to compromise ethical standards, the only practical remedy may be withdrawal from his or her role as a commentator. Once again, the ethical standards for lawyers provide a helpful guide for commentators who must decide whether they should withdraw from commenting on a case because of an ethical concern.

The ABA Model Code of Professional Responsibility sets forth conditions for mandatory and permissive withdrawal. Mandatory withdrawal is required when the lawyer: (1) knows that she is taking steps merely for the purpose of harassing or maliciously injuring another person; (2) knows that her continued employment will result in a violation of an ethical rule; (3) has a mental or physical condition that makes it unreasonably difficult for the lawyer to carry out the employment effectively; or (4) is discharged by the client. Similar rules may exist for legal commentators. If a commentator is asked to comment in a way that is libelous, to comment when he or she is not competent to do so, or to comment when the conditions of the commentary, including a conflict of interest, will require a commentator to act contrary to an ethical rule, the commentator should withdraw, at least until that matter is resolved.

However, in less extreme situations, there are other circumstances under which the commentator will want to consider permissive withdrawal. In the ABA Model Code of Professional Responsibility, permissive withdrawal is allowed when the client: (1) insists upon presenting a claim that is not supported by the law; (2) personally seeks to pursue an illegal course of conduct; (3) insists that the lawyer pursue a course of conduct that is illegal or prohibited under the Disciplinary Rules; (4) otherwise makes it unreasonably difficult

for the lawyer to carry out her employment effectively; (5) insists on taking positions that are contrary to the advice of the lawyer; or (6) deliberately disregards an obligation to pay the lawyer's fees. A commentator may be faced with similar situations and, as suggested by the Code, withdrawal may be the best answer to the commentator's dilemma.

We recognize, though, the difficulty with withdrawal. Being a commentator on a high profile case likely is perceived as enjoyable, perhaps profitable, and of relatively short duration. It asks a great deal of a person to give this up. Yet, withdrawal as a lawyer often is required where the loss means even more, such as when a law firm must withdraw from representing its most lucrative client or where an in-house counsel must literally quit in order to effectuate withdrawal.

D. Guide the Media

Another alternative that should not be lightly dismissed is the commentator's opportunity to convince the media outlet to do a more responsible job reporting the case. A legal commentator need not be a proverbial potted plant. In our experience, news organizations will listen and respect a commentator more who flags ethical concerns before they occur. Staying with the organization and trying to guide their coverage can have clear advantages for both the commentator and the media. If a commentator leaves, there is the danger that the news organization could fill the void with someone who is not as concerned with ethical reporting. Thus, while the commentator may have a clear conscience, the public will still not be well served. Convincing a news organization to do the right thing has greater benefits to all involved. Before a commentator withdraws, he or she should first try to correct the ethical problem at issue.

E. Whistleblowing

In an egregious case, a commentator may also need to consider whether outside sources should be informed about
ethical problems in news coverage. Two particular situations come to mind.\textsuperscript{40}

First, consider a case in which a commentator learns that the press organization for which he comments has illegally obtained information regarding a case. For example, what should a commentator do if he learns that his media organization is offering to pay sitting jurors for inside information\textsuperscript{41} As an officer of the court, the commentator cannot participate or assist another in conduct he knows to be illegal or fraudulent.\textsuperscript{42} If the commentator continues to comment after he knows the information has been improperly obtained, he may be implicated in the illegal scheme. But, should the commentator go as far as reporting the illegal activity to the court or law enforcement?

An attorney's freedom to report illegal activity by a client is greatly restricted by an attorney's duty of confidentiality.\textsuperscript{43} A commentator is not similarly burdened. The "client" for the commentator is both the media and the public. Thus, there is no direct restriction on a commentator reporting illegal behavior. Moreover, even under the ABA Model Code of Professional Responsibility, a client's plans to commit a future crime or fraud may be revealed by a lawyer. The decision whether to report improper behavior will surely be a difficult one. But, as an officer of the court, a commentator may choose to make the revelations rather than face the possibility that he will be viewed as participating in a fraud or illegal activity.

The second "whistleblowing" situation that may arise is when a commentator observes unethical conduct by another commentator. For example, what if a commentator works for the same news organization as a commentator who is either incompetent or has a clear conflict of interest? Should the commentator resign, continue to provide his own coverage, \textsuperscript{40} We do not mean to suggest, however, by the use of these hypotheticals that the organizations with which we have worked have ever engaged in these or any other improper activities.

\textsuperscript{41} Such conduct would violate CAL. PENAL CODE § 116.5 (West. Supp. 1997).

\textsuperscript{42} MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(7) (1996).

\textsuperscript{43} CAL. BUS. & PROF. CODE § 6068(e) (West 1996); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(B) (1996); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1996).
report his concerns to the news organization, or make public disclosure of the ethical problems?

Resignation is always a viable option and may, as we have discussed, sometimes be the right decision. The more difficult question, however, is whether, with or without resignation, a commentator should report another commentator’s misconduct. It is naive to believe that a commentator who withdraws from regular commentary will not be asked why he or she is resigning. Thus, both commentators who withdraw and those who stay will likely have to face the difficult issue of whether to comment openly on another commentator’s ethics.

Over the decades, jurisdictions have debated whether to impose on lawyers a duty to report another lawyer’s misconduct. The ABA Model Rules of Professional Conduct and Model Code of Professional Responsibility both have recognized a duty to report substantial ethical violations by lawyers in order to ensure enforcement of the code of ethics. In commenting on such a rule, the drafters stated: “Self-regulation of the legal professional requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct.” The theory of a duty to report is that lawyers are in a better position than clients or the public to know when an ethical violation is occurring and that it is therefore professionally and morally incumbent upon them to report each other’s violations.

Many states, including California, have rejected a duty to report others’ ethical violations. Not only can such duties create animosity among members of the Bar, but they can also be used as harassment by one lawyer against another. A lawyer who wishes for personal or competitive reasons to sabotage another lawyer’s career would be encouraged to file disciplinary complaints against the other lawyer. Also, the only way a duty to report works is to hold the lawyer who does not report a violation also responsible for a violation of the rules.

45. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103 (1996); MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3(a) (1996).
46. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3(a) (1996).
Those who oppose duties to report fear that lawyers who tend to give others the benefit of the doubt, or do not feel that they have sufficient firsthand information to assert a violation, will be unfairly punished because they are reluctant to report on another member of the profession.

We do not advocate a mandatory duty to report when one legal commentator believes another legal commentator is performing in an unethical manner. The choice should be up to the legal commentator. Feelings of loyalty to both a news operation and the public may, at times, support a commentator's choice to speak openly about problems in another's reporting of a case. On the other hand, it is very difficult to criticize another member of your profession.

In the end, it is a personal choice. But, a commentator need not stand idly by while another commentator conducts himself or herself in a manner that casts disrepute on the role of commentators. A need to preserve one's own reputation may require a commentator to openly criticize another commentator's conduct so that the public does not misinterpret his or her affiliation with the suspect commentator as an endorsement of that person's improper conduct.

Finally and perhaps ironically, it may be the commentator's role as a commentator that ultimately leads to a commentator reporting another's misconduct. Traditionally, the role of a legal commentator has been not only to comment on court proceedings, but also to evaluate how well or poorly the press is covering a case. If candid in these comments, the commentator may be required to speak in unflattering terms about the work of others.

F. Summary of Remedies

Depending on the ethical problem raised, there are a host of remedies that a legal commentator may use to ensure ethical commenting on cases. The first remedy available for a commentator is to act in an unimpeachably ethical manner while providing commentary, thus giving the public an untainted source of analysis. Second, a commentator may bring to the attention of news organizations problems encountered by the commentator or others in news gathering or the reporting of a case. Third, a commentator may withdraw from commenting in a case, openly disassociating from any improper activities. Fourth, a commentator may publicly com-
ment on why he or she is withdrawing from providing coverage of a case. Finally, a commentator, in an egregious case, can report to proper enforcement agencies, including the court or law enforcement, any ethical violations that rise to the level of illegal conduct.

The one thing we have learned from being commentators is that it is not an easy or a passive job. The tumultuous nature of reporting high-profile cases requires a commentator to be extra diligent in upholding the standards of the profession. We therefore encourage commentators to consider ahead of time how they will react to ethical dilemmas before they inevitably arise.

V. Conclusion

In our initial article on the ethics of legal commentators we emphasized that our goal in writing these articles is to spark discussion that will lead to the best, most ethical legal commentary by members of our profession. In writing these articles, we feared sounding sanctimonious or expressing a "holier than thou" attitude. In reality, much of what we have written about is a result of mistakes that we have made.

We also stated, and still strongly believe, that commentators should support each other in this challenging task and should not, as much as possible, view each other as the competition. It is worth repeating, "Fellow commentators should be treated with courtesy and respect, even if one disagrees with another commentator's views. A healthy debate on issues is appropriate; personal attacks are not."47

We are pleased to see that the healthy debate on the role of legal commentators continues. It would be unrealistic to believe that guidelines for providing commentary could be developed overnight. History teaches us differently. It took the legal profession 75 years48 to propose the ABA Model Rules of Professional Conduct and many of those rules still have not

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47. Chemerinsky & Levenson, supra note 5, at 1339 n. 84.
48. The ABA Canons of Professional Ethics were first adopted in 1908. Then, in 1969, the ABA proposed the Model of Code of Professional Responsibility. It was not until 1983 that the ABA adopted the Model Rules of Professional Conduct and, even then, debate continued among members of the drafting commission as to whether the new rules should be adopted. See Theodore I. Koskoff, Preface, The American Lawyer's Code of Conduct, Revised Draft - May 1982, Commission on Professional Responsibility, The Roscoe Pound-American Trial Lawyers Foundation (May 1982).
been adopted by states and their governing bodies. Thus, we recognize that we are just starting the long and difficult journey toward drafting a voluntary code of ethics for legal commentators. It is good, however, to get a start.

In this second article, we have raised questions regarding some specific issues we have seen arise for legal commentators. We recognize that there are many issues that are still waiting to be confronted. As our predecessors have warned us, "When you write a new code, you have to be careful not just about what you are putting in, but also about what you are leaving out." By omitting the discussion of a particular issue, we do not mean to suggest that we do not recognize it as a problem or endorse that particular behavior. Rather, we have tried to bring to the forefront of discussion those ethical issues facing legal commentators that are the most pressing today.

As evidenced from the title of his book, Dean Gerald F. Uelmen has noted that there are many lessons to be learned from the latest "Trial of the Century." We believe that one of the most important lessons, and one that continues with the sequel to that case and the advent of others, is that there is a need for legal commentators to recognize and embrace a voluntary code of ethics. Even with the courts' animosity toward television cameras in the courtroom, the coverage of high-publicity cases is not disappearing. Legal commentators are playing as important, if not a more important, role in interpreting these cases. We should do so in the most competent, ethical manner possible.

49. Koskoff, supra note 48.