



1-1-1995

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Automated Citation

Gerald F. Uelmen, *Ethics, Media and the O.J. Trial*, 30 INT'L SOC'Y BARRISTERS Q. 395 (1995),

Available at: <http://digitalcommons.law.scu.edu/facpubs/701>

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ETHICS, MEDIA, AND THE O. J. TRIAL†

Gerald F. Uelmen*

My experience as dean of the law school at Santa Clara was excellent preparation to serve on the O. J. Simpson defense team. One of the attributes that is an absolute necessity for a dean is an ability to massage overblown egos, and I used to joke as dean that my faculty manual was the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*. This came in handy very early in the proceedings in the Simpson trial. On one of the pretrial motions, we had an expert witness on the stand, a doctor who was testifying with respect to Battered Woman's Syndrome, and he stated that most batterers have a personality disorder known as narcissistic personality disorder. I immediately recognized the disorder because half of my faculty had it, and I turned to F. Lee Bailey and said, "Narcissistic personality disorder—Lee, we have a lot of those in academia." Without missing a beat, Lee turned back to me and said, "Jerry, we have a lot of those on this team."

THE DEFENSE TEAM AND PREPARATION OF THE CASE

I got the call to join the Simpson defense team on June 16th, the day before the infamous Bronco chase, and the call came from Bob Shapiro. I had worked with Bob previously in the defense of Christian Brando, Marlon Brando's son. When Bob took the Simpson case, the first thing he did was reassemble a lot of the team that had worked on the Brando case, including Dr. Henry Lee, Dr. Michael Baden, Alan Dershowitz, F. Lee Bailey, and me. I think Bob's assumption in reassembling that team was that each of us would play the same role he had played in the Brando case. My role in that case was to prepare and argue the legal motions, and the role of F. Lee Bailey was to be a kind of rabbi in the background, giving very good practical advice but not actively participating in the courtroom. A source of the tension that developed was that Bailey did not understand that that was to be his role in the Simpson case. A wag once said that the most dangerous place to stand in the courtroom is between Alan Dershowitz and a television camera. I think we have to amend that now: The most dangerous place in the courtroom is between F. Lee Bailey and the podium. And that is precisely where Bob Shapiro was standing. The resulting tension was never resolved.

†Address delivered at the Annual Convention of the International Society of Barristers, Four Seasons Resort Wailea, Wailea, Maui, Hawaii, February 19, 1996.

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The size of the team allowed these two lawyers, who got to the point of not even speaking to each other, to continue to work on the case, because we divided up the case and each took particular portions. I know that goes against the conventional wisdom that you can't try a case with a huge team of lawyers and must have one person who's calling all the shots. But we did have one person calling the basic shots; and by bringing together a group of very experienced trial lawyers who could take pieces of the case and prepare them very quickly, we were able to get the case ready to go to trial within sixty days. That's really unheard of—to take a case of this nature and have it ready for trial within sixty days. I still think that of all of the tactical and strategic maneuvers that the defense employed in this case, the most important and the most significant in the long run was the decision not to waive the defendant's right to a speedy trial and to make the prosecution prepare its case as quickly as we were going to be prepared to defend the case.

ETHICAL ISSUES

I went to Los Angeles within a week after I got the call from Bob Shapiro, and my first assignment in the case presented me with the first ethical issue that I had to deal with in the case. It was an ethical issue that was not a new dilemma for me; I even used to teach students about it. The problem is this: What do you do when you discover evidence that may be of enormous interest and use to the prosecution, although you're not sure? What do you do when your client walks in and hands you evidence that you may have to turn over to the prosecution? I think the best version of this I've ever heard was a joke that Professor Monroe Freedman from Hofstra University used to tell. A lawyer gets a call in the middle of the night, and the person at the other end of the line says, "Harry Levine?" "Yes." "Mr. Levine, I need your advice. I just shot my wife and I'm standing here holding the gun in my hand. What should I do?" There's a long pause, and then Levine says, "Oh, I think you want Harry Levine, the lawyer," and hangs up the telephone. Unfortunately, when I confronted the dilemma in the Simpson case, I couldn't hang up the telephone, and here's the way it happened.

Within a week after Mr. Simpson's arrest, all of the newspapers were reporting that he had gone into a cutlery store in Los Angeles and bought a big stiletto knife. The owner and a clerk who worked in that store were given a lot of money by the *National Enquirer* to tell their story. The police were so sure that that knife was the murder weapon that they went to the same cutlery store, bought an identical knife, and took it to the coroner, who very complacently said the wounds could have been inflicted by a knife just like it. The police

then got a search warrant and went back to search Mr. Simpson's home a second time, ten days after his arrest, looking primarily for the knife.

We, of course, asked Mr. Simpson whether he had purchased such a knife, and he said, "Yes, and I believe it's still right where I left it." As my first assignment on the case, I was given the task of going to see whether the knife was still there. I walked into Mr. Simpson's bedroom at the Rockingham premises and went directly to a mirror over the dressing table. Although the mirror was flush with the wall, you could see the hinges along the side, and I opened it. Lo and behold, there it was, sitting in an open box—the knife that I had seen in all of the pictures. When I opened that mirror, I remembered Monroe Freedman's joke and I thought, "What the hell do I do now?" I had the presence of mind to remember the California Supreme Court decision holding that if the defense takes possession of evidence and in any way interferes with the ability of the prosecution to locate that evidence, the evidence has to be turned over to the prosecution. But that case dealt with evidence that was obviously incriminating, and it was our belief that this evidence would actually be exculpatory, that an examination of this knife would prove that it was pristine and had never been used. This would rebut any inferences from the testimony of the clerks who sold the knife, testimony that was being presented at the preliminary hearing.

I just closed the mirror and went back to the office to talk to my colleagues. We decided we would go to the presiding judge of the Superior Court and ask to have a special master appointed to go to the premises and take possession of the knife and bring it back to the court so that it could be examined by a defense expert. If it turned out that it was incriminating evidence, it would be turned over to the prosecution, but if it was not, we intended to maintain the secrecy of this discovery and save it for possible use as rebuttal evidence.

The presiding judge to whom we presented this request happened to be Judge Lance Ito. This, of course, was long before Judge Ito was assigned to be the trial judge. He appointed a master; the master went out, put the knife into a sealed envelope, and brought it back to court; and that's where we thought it would stay until our expert had an opportunity to examine it. But in the midst of the preliminary hearing, Judge Ito went on vacation and his order appointing the special master got to the desk of the presiding judge of the Superior Court, who decided to take the envelope to the judge holding the preliminary hearing and say, "This may be of interest to the case. You may want to open this in court." When that envelope appeared in the middle of the preliminary hearing, the members of the press talked about what a brilliant tactical ploy this was by the defense—but the two most surprised people in the courtroom were Bob Shapiro and myself. It was through an error by the court that the existence of that envelope was exposed.

We were able to convince the judge not to open the envelope and not to let the prosecution know what was in it, although they didn't have to be rocket scientists to start guessing. Ultimately, the knife was examined by our expert, Dr. Henry Lee, and, as we expected, it was absolutely pristine; there was not a scratch on it, nor a trace of any blood or tissue or anything else. It was a brand new knife.

After Dr. Lee returned his report to the court, the judge—by this time Judge Ito had been assigned to the trial—raised the question of whether this would have to be turned over anyway under the reciprocal discovery law in California. We briefed that point and made what I thought was a very persuasive argument that because the prosecution doesn't have to turn over rebuttal evidence to the defense, neither does the defense have to turn over rebuttal evidence to the prosecution. The reciprocal discovery law is supposed to be just that, requiring the defense to turn over only the types of evidence they have a right to get from the prosecution. Judge Ito overruled us and gave the prosecution the report on the examination of the knife, and that is why the knife disappeared from the case.

This was an object lesson for us, in terms of the risks and pitfalls that the reciprocal discovery law could possibly hold in store for us in forcing us to be the source of evidence that would bolster the prosecution's case. And, of course, the last thing a defense lawyer wants to do is to deliver to the prosecution evidence that will actually strengthen the case against the defendant. That explains and puts in context a lot of the conflict that arose later in the case over the application of the reciprocal discovery law. We decided we were going to play it very cautiously and turn over only what the law absolutely required us to turn over. And we followed that course at some risk, in view of the later sanctions that were imposed with respect to reciprocal discovery.

A second ethical issue that arose very early in the case related to the appropriateness of statements to the press about the position of the defense. I know that a lot of the criticism directed at the defense team has focused on this—the extent to which press conferences were held and the press was informed of various aspects of the evidence and the strategy. Of course, there are two schools of thought about this, and I think both schools are well represented in the U.S. Supreme Court decision in *Gentile v. State Bar of Nevada*,¹ involving an application of the ABA's model rule to pretrial statements by lawyers. Dominick Gentile was a Las Vegas lawyer who held a press conference right after his client was arrested, asserting his client's innocence and asserting that his client in fact was the victim of a police frame-up. Gentile was disciplined for violating the ABA rule, as applied by the Nevada Bar. When the case got to the U.S. Supreme Court, the Court, by a 5-4 margin, declared the ABA

¹501 U.S. 1030 (1991).

rule unconstitutional because it was too vague and didn't give lawyers enough guidance on what they could and could not say. The rule included an exception allowing a lawyer to offer a general description of the claim or defense, and it was unclear whether Dominick Gentile's statement came within that exception. As a result of the case, the ABA amended the rule. (I'm not sure that the amended rule really corrected the problem of vagueness, but I'll get to that in a moment.)

In California, we had not adopted the ABA rule, so there was no rule of professional conduct governing what the lawyers could or could not say. That was left up to the judge. Of course, we were strongly opposed to the judge's entering any sort of gag rule attempting to control the statements of the lawyers because our experience was that such gag rules benefit the prosecution and are a disadvantage to the defense because the court cannot control the release of information by the police, the source of most of the disclosures in most cases. That certainly was true in the Simpson case.

From the beginning, we were faced with a situation in which a lot of information was being leaked by the police in an attempt to turn around public opinion. They were very concerned that they had a defendant with a great reservoir of public support and favorable public feeling. Even after the Bronco chase, the polls revealed that about sixty-five percent of the people believed that O. J. Simpson was probably innocent. That public support was turned around almost overnight by the release of the 9-1-1 tapes of the emergency calls by Mr. Simpson's wife. As soon as those tapes hit the airwaves, the polls shifted from sixty-five percent thinking he was probably innocent to the same proportion thinking he was probably guilty. We saw that reflected in our jury pool as well.

Later we had a problem with disclosure of the results of DNA tests. The results were appearing in the newspapers before they were even delivered to counsel. That stopped the day Judge Ito ordered that all of the testing results be delivered directly to him without being delivered to the police first. The judge then gave the results to the prosecution and to the defense. Because all of the DNA leaks stopped immediately, there was no question in anybody's mind that the source of those leaks was the Los Angeles Police Department.

In recognition of the problem of release of information by others, the new ABA rule has a provision allowing lawyers to make public statements where necessary to "mitigate" prejudicial publicity that has been released from another source. This rule now is in effect in California, directly as a result of the Simpson case; the state legislature passed a law mandating that our state bar adopt a rule governing pretrial statements by lawyers, and our supreme court approved as the rule for our state bar the new ABA rule. But the new

ABA rule does not define mitigation or make clear what lawyers can or cannot say. If you interpret mitigation as the right to undo the damage done by publicity released from other sources, that would mean we could have kept talking until we got the polls back up to sixty-five percent. To me, the lack of guidance on what you can say raises a serious question about the constitutionality of the new rule.

MEDIA COVERAGE

The journalism and television coverage of the trial created problems for everyone from the outset. When I got into the case, I had a clear vision in my own mind of the difference between the tabloid press and the legitimate press. As the case went on, the line between them became blurrier and blurrier, and I think we saw an application of the rule that bad journalism drives out the good. Bad journalism included checkbook journalism, where sources of information were paid enormous amounts of money. In some cases, this even resulted in the prosecution not calling some of these people as witnesses because their credibility had been tarnished by their contact with tabloid journalists.

I don't believe the television cameras themselves were the real culprits in the case, at least initially. I think it was the tabloid journalists who created the sensationalism that seemed to surround the case. Nevertheless, the television cameras have become the focus of a good deal of controversy since the conclusion of the case. In California, a committee now is reexamining our rule giving to the trial judge discretion whether to allow television cameras, and consideration is being given to replacing that rule with a flat prohibition that would keep television cameras out altogether.

I see arguments on both sides of this issue. I began as a proponent of televised coverage of the case but later realized that the cameras really were affecting the behavior of everyone involved. They affected the behavior of the lawyers, they affected the behavior of the judge, and most regrettably they affected the behavior of witnesses. We had witnesses who testified as though they were performing on stage, and we had other witnesses who wouldn't come near the courtroom because they didn't want the fifteen minutes of fame that would result from testifying in the case. On the other hand, the presence of the television cameras led to the discovery of valuable evidence for both sides. The prosecution, for example, found a parade of witnesses to testify that they had taken photographs of Mr. Simpson wearing gloves similar to those found at the scene when he was broadcasting football games. And the defense found Kathleen Bell, who was one of the key witnesses challenging the credibility of Detective Fuhrman; she saw him on television, recognized him as the

guy she had run into at the Marine recruiting station six years before, stepped forward, and agreed to testify.

On balance, I now believe that there is a limited category of cases, sometimes described as trials of the century, in which the television cameras should be kept out because their presence is like throwing gasoline on a flash fire. In other trials, the presence of television cameras is not going to do any greater harm than the presence of any other media, and discriminating against television may be unwarranted.

The problem is obvious: How do you know in advance that you've got a "trial of the century"? I actually did a little research to determine how many cases during this century—that is since 1900—have been called a trial of the century or have prosecuted what was called a crime of the century, and I came up with thirty-two cases. That means we actually have a trial of the century about every three years in this country, so there's still time for one more, maybe even two more, before the century is over.

QUESTIONS AND ANSWERS

In the time remaining, I'd like to talk about things that are bothering you about the case or questions that have occurred to you.

Q: A popular speculation in Los Angeles is that Howard Weitzman, one of the first attorneys on the case, withdrew because O. J. had said to him, "Yes, I did it, but I want to put on an alibi defense." Can you comment on that?

A: Yes, I can respond without hesitation. O. J. Simpson never admitted to any lawyer, Howard Weitzman included, that he participated in this murder. He asserted his innocence right from the beginning. In fact, the twenty-page statement that he gave to the police on the day he came back from Chicago was given in Howard Weitzman's absence because Mr. Weitzman apparently was confident that Mr. Simpson would be able to clear things up quickly. That statement was never offered in evidence. We could not offer it, and the prosecution chose not to, apparently believing it would hurt their case more than it would help it.

Q: Would you comment on the wisdom of Mr. Kardashian's reading the statement attributed to Mr. Simpson during or preceding the Bronco chase?

A: I think at that point in time the only concern was Mr. Simpson's safety; I don't think anyone was thinking about what influence the statement might have on the case. Ultimately, of course, the prosecution decided not to use the statement or the chase itself as evidence at the trial.

Q: There was testimony offered by the prosecution about a dream that Mr. Simpson had. Is there some California law that allows dreams to come in as evidence?

A: I think it was error to admit that evidence. In fact, I thought the admission of the dream was one of four very strong arguments we would have had on appeal if the case had come out the other way. Judge Ito did a good deal of back-pedaling on the issue by giving the jury a limiting instruction on the weight they could give to the dream evidence, but I'm not sure that would have corrected all of the prejudice of admitting that evidence.

Q: Was the prosecution's move in having O.J. try on the glove in open court as much of a turning point as it seemed to outsiders?

A: Yes and no. It certainly was dramatic visually, but frankly I think the prosecution overreacted. They seemed to spend the rest of their case trying to undo what had been done and made it more of a focal point than it actually might have been.

Q: You spoke of the conflict between Shapiro and Bailey. Could you comment on the conflict between Shapiro and Cochran regarding the role of race in the case?

A: Frankly, I was disappointed with Bob's remarks directed at Cochran because I would not characterize what was done by Cochran as playing a race card. I honestly believe the card that was being played was not a race card as much as it was a credibility card, and the law is quite clear that the racial attitudes of a witness may be relevant in assessing that witness's credibility. The credibility of Detective Fuhrman was a key issue in the case, and I think if there was any error made on this point, it was in keeping out the evidence of how virulent that racism actually was. Judge Ito's ruling on the Fuhrman tapes deprived us of showing the jury that Detective Fuhrman's racism was such that it actually could have motivated him to plant evidence or to create evidence; in those tapes he described incidents where he had actually done so, based on his racism.

If race cards were played in this case, I think they were played fast and furiously in the process of jury selection. It's fascinating that there has not been much comment on the degree to which the prosecution was using race as a basis for excluding jurors during the process of jury selection. They used ten peremptory challenges and nine of those peremptories were used to exclude black jurors.

The fact that we ended up with a jury as diverse as it was resulted from a combination of factors, including the prosecution's decision not to make this a death penalty case. If this had been a death penalty case, I think we would have

ended up with a jury of remarkably different composition because everyone opposed to the death penalty would have been excused and, as we all know, opposition to the death penalty is much more widespread among minorities than it is among whites. I think the Rodney King case also had an enormous impact because it affected where the case was tried. I think the district attorney was afraid to move the case to West Los Angeles or to the Valley because all of the criticism the prosecution got for doing that in the Rodney King case, so they left the case downtown, which contributed enormously to the diversity of our jury pool.

Although I found much fault with some of Judge Ito's evidentiary rulings, I would give the judge an A+ on how he conducted the jury selection process: He let the lawyers conduct voir dire, even though under California law that was discretionary; he could have done all the questioning himself. Also, he applied a standard of challenge for cause that led to the excusing of many jurors who had been exposed to pretrial publicity. All of those factors worked in our favor in terms of generating a diverse jury panel.

The biggest disappointment to me since the verdict has been the tendency of people to look at the race of the jurors and assume that what they were doing in delivering that verdict was sending some sort of message to "White America" that this was payback. Certainly nothing the jurors said or did gave any reason to read that into their verdict. I personally think that people looked at the reactions to the verdict and then attributed their interpretations of the reactions to the motivation of the jurors. When the verdict was announced, the television cameras showed black audiences cheering while white audiences appeared stunned by the verdict, and people immediately assumed that what the black audiences were cheering was that O. J. had beaten the system. I guess it didn't occur to many people that what they might have been celebrating was that the system worked—and knowing how rarely it works for a black man, they had reason to be jubilant.

I don't think the verdict was an example of jury nullification. Jury nullification was not argued to this jury, and there's no reason to believe that they were doing anything other than following the judge's instructions—like those in any criminal case—that they had to be convinced beyond a reasonable doubt of the guilt of the defendant. One of the jurors interviewed after the verdict said, "You know, I thought he was probably guilty, but they just didn't prove it to me beyond a reasonable doubt." When I heard that, I wanted to stand up and cheer that a juror could understand the jury's responsibility so clearly and follow it so faithfully. That's what we want jurors to do.

Q: I'd like you to comment on the aftermath of the trial in terms of the criticism of the judicial system, criticism of the jury system, the criticism of Judge

Ito's management of the trial, and the calls for reforms, including restrictions on the jury. This case would have been tried in a few weeks in federal court.

A: If the Simpson case was typical of anything, it was typical of a "trial of the century." As I looked at those thirty-two trials that have been called trials of the century, I realized that the only element that recurs is how aberrant they really are. For that very reason, I don't think this type of case should be the basis for any reform.

I do think, too, that many of Judge Ito's problems were created by the presence of the television cameras. A lot of time was wasted dealing with issues about what the television cameras were broadcasting and when they should be excluded and so on. I think the trial would have been a lot shorter if it had not been televised.