THE ETHICS OF BEING A COMMENTATOR

ERWIN CHERERINSKY* & LAURIE LEVENSON**

I. INTRODUCTION

For fifteen months, from June 13, 1994 until October 3, 1995, the nation raply followed every development in the murder prosecution of O.J. Simpson.1 Although there have been other highly publicized cases, none ever received the media coverage that existed for the Simpson trial.2 Never before has a preliminary hearing in a case been televised by a national network, let alone by every network as occurred in the Simpson case.3 Never before has every network televised the opening statements, closing arguments and verdict in a trial. Never before has an entire trial been broadcast nationally by three television channels (Cable News Network, Court TV, and E!) and two radio networks (CBS Radio and CNN Radio).4

Never before did so many local stations broadcast legal proceedings. During the preliminary hearing, the initial months of the trial, and the concluding phase of the trial, six local Los Angeles stations

---

* Legion Lex Professor of Law, University of Southern California School of Law.

** Professor of Law, William M. Rains Fellow, Loyola Law School. I am grateful to my wonderful research assistant, Omar Lopez, for his work on this article and throughout my commentary on last year’s “Trial of the Century.”


2. Perhaps the twentieth century trial that came closest to the level of media coverage in Simpson was the trial of Bruno Hauptmann for kidnapping and murdering the baby of world-famous aviator Charles Lindbergh. In the Hauptmann trial, there were 700 writers and broadcasters and 132 still and newsreel camera operators. The film from the Hauptmann trial played in 10,000 movie theaters nationwide. See PAUL THAYLER, THE WATCHFUL EYE 22-23 (1994) (chronicling and criticizing cameras in the courtroom).


televisioned the courtroom activities. One station broadcast the entire trial, as did a local radio station.5

Never before did newspapers devote so much attention to a single case for such a sustained period.6 Newspapers throughout the country sent reporters to Los Angeles for the entire trial and local newspapers devoted a staff of writers to the case.

Never before were entire shows devoted to a case on a daily basis. Rivera Live on CNBC focused an hour of attention on the case every night. Other shows, such as Larry King Live, regularly featured the case. In Los Angeles, three stations (4, 9, and 13) devoted a half-hour show every evening to summarizing and analyzing that day's developments.7

All of these networks, stations, reporters, and programs constantly relied on law professors and lawyers to explain the law and the proceedings. Every live broadcast of the proceedings on each television or radio station featured one or more commentators. Every reporter—broadcast or print—regularly used commentators. Every show on the case featured commentators.

Why the constant use of commentators? The simple answer is to help viewers and listeners understand what was happening and what it meant for the overall case. Complicated legal issues arose on a daily basis: What is the standard for suppressing evidence from a warrantless search? Was the defense entitled to samples of the prosecution's evidence? Was the testimony of domestic violence admissible? Can a criminal defendant speak to the jury during opening statements? What is the standard for excusing jurors during a trial? Can a criminal defendant be present when jurors are questioned by a judge about potential misconduct? What is the standard for a mistrial and what are its double jeopardy consequences? What is the scope of a waiver of a challenge to scientific evidence? When can a witness be forced to come from another state? What is the scope of impeachment evidence? When can a witness invoke the Fifth Amendment and is it done in front of the jury?


7. Shaw, supra note 5, at S6.
These are only a small sample of the countless legal issues that arose. Most of the anchors and journalists covering the case were not lawyers. Even those who were lawyers wanted the assistance of law professors and experienced attorneys who had dealt with and researched these issues.

Moreover, commentators were used not only for the complex questions, but also for the basic ones. For example, questions repeatedly arose about the standard for relevance in the admission of evidence; that the probative value of the evidence outweighed its prejudicial impact. There was a constant need to have this and innumerable similar legal rules explained.

Procedures, too, required explanation. Commentators were used to inform viewers and listeners of what was happening and why it was occurring. What is the legal standard in a preliminary hearing and what function does the preliminary hearing play in an overall case? What is an arraignment? What is voir dire and how does it occur? What is a Kelly-Frye hearing? What occurs during opening statements? And so on, with every event requiring explanation.

Understandably, there also was a desire for analysis of the conduct of the judge, the lawyers and the witnesses. Why did the judge rule in a particular way on a motion and was it the correct ruling under the law? Why did a lawyer ask a particular series of questions or make certain objections? How is a specific witness’ testimony relevant or useful? The commentator also was used to put these events in context and perspective.

The media also undoubtedly used commentators to enhance the credibility of their coverage and even just to fill time. The coverage seemed more authoritative with a legal analyst there to explain and analyze the case. Also, during live proceedings there were innumerable sidebars and brief recesses. Commentators could fill that time during broadcasts by talking about what was occurring. Obviously, daily shows devoted to analyzing the trial needed experts to talk about it.

All of this created an unprecedented demand for lawyers and law professors to serve as commentators. Both of us served in that role, truly on a daily basis, from June 13, 1994 until October 3, 1995. We each regularly appeared on live broadcasts of proceedings and also on analysis shows. We did literally thousands of interviews with print and broadcast journalists over the course of the trial.
This was not our first experience at being commentators. Undoubtedly, we were initially sought out by the media because of our prior contacts with them during the two trials of the officers for beating Rodney King, the trial of the individuals for beating Reginald Denny, and the Menendez case. But neither of us had ever dealt with the media so intensively for such a long period of time.

Over the course of the Simpson case, each of us faced countless ethical issues that we never had confronted before. What questions from anchors and reporters were inappropriate to answer? What should we do when we learn nonpublic information from a lawyer involved in the case? What are conflicts of interest, such as involvement in another case with related issues or with a lawyer or witness, and how should we handle them? How should we handle the issue of being paid?

Neither the code of ethics for lawyers nor that for journalists provided assistance in dealing with these ethical problems. Commentators are not functioning as attorneys or as reporters. Codes of professional responsibility thus provided little guidance, even for issues such as confidentiality and conflicts of interest that are thoroughly covered in ethical codes. Moreover, many ethical issues arose that seemed unique to the role of the commentator.

This Article is an initial attempt to consider the ethical issues of being a commentator. Part II explores why a code of ethics for commentators is needed. Part III focuses on four specific areas of ethical issues: the duty of competence, handling confidences, the duty to avoid conflicts of interest, and dealing with the business of being a commentator. Finally, Part IV offers some suggestions for the future. Our hope is that this is a first step towards the development of a voluntary code of ethics for commentators. Perhaps a committee of the American Association of Law Schools or the American Bar Association or both might undertake such a drafting effort. Lawyers, judges, academics, and journalists ideally should participate in the process. Perhaps broadcasters and journalists would require commentators to adhere to it and even require that analysts pledge to follow such a code.

During and after the Simpson case, commentators were targeted for enormous criticism. On many occasions, Judge Ito spoke derisively of the "pundits." In their first media appearances after the trial, defense attorneys Johnnie Cochran and Barry Scheck singled out the commentators for their harshest criticism. Perhaps some of this is inevitable to the task of analyzing others' work. But some of it undoubtedly reflects the problems with being a commentator and the lack of guidance for handling this new, difficult, and very visible role.

II. THE NEED FOR A VOLUNTARY ETHICAL CODE

A. THE ROLE OF LEGAL COMMENTATORS

There is little time during a trial for the legal commentator to pause and examine his or her role in analyzing that case and how ethical standards might help in performing that role. The sheer pressure of providing daily coverage usually keeps the commentator distracted, putting off some of the most difficult questions one must face. Yet, it is essential that as a profession we critically evaluate the role of legal commentators, what problems arise and how, if at all, ethical guidelines might improve a commentator's performance.

1. Educate the Public

A legal commentator performs many roles, most of which can be grouped under the heading of "Educating the Public." A commentator's primary function is to decipher the law for both the media and

---


11. For more discussion on the role of media legal experts, see Levenson, supra note 8, at 651-57.

12. The key purpose of legal commentary is to assist the public in exercising its First Amendment right to know and understand the functioning of its justice system. See Nebraska Press Ass'n v. Stuart, 427 U.S. 599, 587 (1976) (Brennan, J., concurring):

Commentary and reporting on the criminal justice system is at the core of First Amendment values, for the operation and integrity of that system is of crucial import to citizens concerned with the administration of government. Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges; free and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability.

public who may not otherwise have the background to understand the intricacies of legal proceedings. Sometimes this role is performed simply by translating legal terms into everyday vocabulary. For example, what do the terms “probable cause” or “hearsay” mean? Other times, commentators must outline what processes the court and litigants use to decide a particular issue. The challenge is not simply to explain the law, but to explain it in language that is comprehensible to the listener. Along with reciting the law, it is also important for commentators to bring perspective to the reporting of a trial. As those experienced in courtroom proceedings know, not every evidentiary ruling is important. Not every word by a witness is crucial. Not every question by a judge portends the outcome of a case. Experienced legal commentators can help put an issue or event into perspective.

Journalists don’t always have the experience or luxury to step back from a case and see how a piece fits into the big puzzle. The pressures of everyday deadlines, especially when media outlets are fighting for viewership, make it unlikely that journalists will downplay a development in court. Never does the media present a story as relatively unimportant. The relatively trivial often gets presented as significant and the significant gets portrayed as decisive. One of the greatest services a legal commentator can provide is to put the brakes on a story run amok and offer some perspective to a recent development in a case. Moreover, in providing that perspective, it is crucial that a commentator always view an issue from both sides. The role of a commentator is not to be an advocate. It is to be, as much as is humanly possible, an objective viewer of the proceedings.

Legal commentators can also serve the public by alerting the media and the public to a diversity of opinions that may exist on an issue. It is unrealistic to believe that one individual will be able to provide all possible perspectives on any given issue. A legal commentator may, however, be able to direct the media to other individuals in the community who have differing opinions on the issue.

13. The ultimate goal of providing such commentary is to demystify the law so that members of the public can understand and critically analyze for themselves issues in our legal system. See Gary L. Bostwick, Heroes and Villains: The O.J. Trial and Our Profession, L.A. Law., July-Aug. 1995, at 76.

As part of one's educational role, a legal commentator should be prepared to direct the news media to sources of information for their stories. Whether those sources be legal texts, pleadings filed in the case, other professionals with expertise in an area, or even the participants in the case, a legal commentator can often serve best by giving the media a head start with the research necessary to cover a high-visibility case.

Finally, legal commentators can suggest to reporters questions that they and the public might want to ask regarding the ongoing proceedings. Essentially, legal commentators can direct the dialogue regarding a case by anticipating issues that may arise and suggesting what questions may be important in discussing those issues.

2. No Predictions, Please

As important as it is to understand the role of a legal commentator, it is perhaps more important to understand what the commentator's role should not include. Perhaps a legal commentator's greatest disservice to the public is to try to read the crystal ball and predict the outcome of a case. First, the commentator is bound to be wrong. Juries are historically unpredictable. Moreover, those trained in the legal profession may be particularly ill-equipped to guess at the jurors' thinking. Legal training and experience undoubtedly influence what we focus on, what we think is important and what we perceive. A juror not trained in the law is likely to focus on different things as he or she perceives things through the eyes of a layperson. Also, a jury's decision is often the result of its own dynamics and a commentator is unlikely to know these dynamics until after the case is concluded. It is both presumptuous and misleading to suggest to the public that the commentator can read the minds of the jurors.

Second, predictions tend to skew a commentator's perspective on a case. If a commentator predicts how the jury will vote, the commentator is inevitably projecting on the jurors his or her own bias as to what decision should be made.

Finally, some predictions can wreak unnecessary havoc on the proceedings and the public. For example, in People v. Simpson,
predictions of a hung jury sent waves of panic through both the courtroom and the community.\textsuperscript{15}

3. \textit{Be Fair, Be Honest}

As stated, a crucial part of a commentator's role is to try to remain objective.\textsuperscript{16} This is not always easy. One may know some or all of the participants and have a personal opinion regarding the case. Yet, those opinions must remain subservient to the commentator's duty to comment accurately and dispassionately. A commentator must resist the temptation to assist either side, or even the court, on a legal issue. Such help may naturally occur once reports of a legal opinion are broadcast, but the commentator's role is not to become an advocate or decisionmaker in the case. The commentator, like the press, must comment from the outside and evaluate the proceedings from the perspective of one who has no stake in the outcome of the case.

It should go without saying that a commentator must be scrupulously honest in commenting on a proceeding. Nonetheless, there are everyday pressures that may lead a commentator to compromise this sacred obligation. For example, a commentator may be asked to comment regarding the techniques used by a lawyer in the proceeding. If the commentator knows and has a friendly relationship with a particular lawyer, there will be the natural temptation to soften one's remarks. However, the public expects and is entitled to an honest assessment. One can be careful in choosing one's words, but the substance of the evaluation must not change because of a commentator's personal feelings toward the litigant. Likewise, if a commentator does not know the answer to a question, he or she must be honest and admit as much. Even as an educator, a commentator cannot be expected to know the answer to all questions. It is both painful and aggravating to watch a legal expert fake the response to a question when a simple "I don't know" would have been a far more accurate response.


\textsuperscript{16} Of course, we realize that no person is truly completely objective; everyone has views. But the goal is for the commentator to try to set aside any subjective opinions and view the case as objectively as humanly possible.
The reality, of course, is that television is in the entertainment business and stations may prefer commentators who are entertaining as well as informative. There is no inherent problem with this. Good teachers often are entertaining as well as educational. Obviously, there is a problem if entertaining comments or metaphors substitute for accurate explanation and in-depth analysis.

4. **Remember the Right to a Fair Trial**

Finally, the commentator must realize that his or her role may at times be circumscribed by the overriding societal interest in providing both sides in a case with a fair trial. Thus, especially before trial, the commentator must be cautious about anticipating developments in a case and prejudging the outcome of those developments. Especially before trial, the commentator must always be aware of the possibility that potential jurors could be influenced by his or her observations.

**B. The Need for a Voluntary Code of Ethics**

We are now in the "Age of Legal Commentary." Almost yearly there is another "Trial of the Century" that draws on the services of lawyers and professors to provide legal expertise. As the number of legal commentators increases, as well as our visibility, there is also an increase in concern over the effectiveness and value of legal commentators. This concern demands that we honestly assess the commentators' role in reporting cases and consider how we can improve our effectiveness and the public's confidence in the work of legal experts.

---

17. See Great American Trials (Edward W. Knappman ed., 1994); Elizabeth Wasser- man, Trial of the Century, Portland Oregonian, June 11, 1995, at E1. The trend toward high-profile trials seems to be, if anything, increasing. In the first two months of 1996, at least six high-profile cases were covered regularly by both the print and electronic press. These include the Oklahoma City bombing case, the murder retrial of Erik and Lyle Menendez, the murder trial of rapper Snoop Doggy Dogg, the Whitewater prosecution, the murder case of model Linda Sobek, and the civil wrongful death suit against O.J. Simpson. Even the mere announcement of a civil deposition in the Simpson case was enough to command front page stories in major newspapers. See, e.g., Paul Pringle, Simpson's Tone in Interview Puzzles Experts, Dallas Morning News, Feb. 19, 1996, at A1; Civil Trial Finally Puts Simpson Under Oath, Detroit News, Jan. 22, 1996, at A1; Tim Rutten & Henry Weinstein, Simpson Set to Give Deposition, L.A. Times, Jan. 20, 1996, at A1; Simpson Begins Giving Deposition in Civil Suit, Portland Oregonian, Jan. 22, 1996, at A1. As the amount of media coverage of court cases increases, so will the demand for legal commentators guided by ethical standards.

18. It is not simply the number of high-profile cases that generates the need for an ethical code. Rather, it is the fact that there is often an influx of new commentators as the subject matter and location of these developing cases differ. Thus, while a few veteran commentators can learn how to handle themselves from the experience of prior cases, there are constantly new participants who should not be forced to learn the hard way about the pitfalls and dangers of
One traditional way to improve the performance of lawyers has been by adopting a code of ethics. A code of ethics for commentators would serve many purposes. First, it serves notice that commentators take their ethical obligations seriously.\textsuperscript{19} A code is a recognition by those who serve as commentators that we face ethical issues and that we aspire to handle them correctly. A code imprints on commentators' minds the need to strive for the highest standards in commenting on cases. It can serve as a blueprint for how to best serve the public in our role as the eyes, ears, and interpreters of legal proceedings.

A code of ethics also serves a very practical function. It gives commentators and would-be commentators a guide for dealing with difficult issues that may arise. There is no need for all of us to make the same mistakes over and over again. A code of ethics both warns the commentator of problems that can arise and gives direction for handling them.\textsuperscript{20}

A code of ethics may also instill more confidence on the part of the public, the courts, and the media in the work of legal commentators. Oftentimes, legal experts are viewed with suspicion and cynicism.\textsuperscript{21} A code of ethics may give the outside world greater appreciation of and confidence in our work. Moreover, a voluntarily adopted code of ethics would continue the tradition of self-governance by the legal profession. If commentators were to adopt a code, the public would be less likely to impose outside regulations on those serving as legal experts.

\textsuperscript{19} A similar message was sent when the ABA adopted the Model Code of Professional Responsibility. The Preamble states: "Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system. A consequent obligation of lawyers is to maintain the highest standards of ethical conduct." \textsc{Model Code of Professional Responsibility} pmb. (1980).

\textsuperscript{20} In adopting a code of ethics, commentators also have several models from which to choose. As demonstrated by the history of the ABA's codes of ethics, one can construct a code based upon basic canons, one with ethical considerations and disciplinary violations, or a model rule approach.

Additionally, a code of ethics can lead to more consistency in the work of legal commentators and the manner in which we handle difficult issues. Without a code, it is up to each commentator to set his or her limits. Whereas one commentator may be reluctant to "score" legal proceedings, another may approach legal commentary as a type of sporting event. A code of ethics would at least give some consistency to how commentators approach their work.

One of the greatest advantages of adopting a code of ethics for legal commentators is to provide those who serve in that role with the support they may need when attempting to get the media to exercise restraint. For example, repeatedly during Simpson we were asked to predict the outcome of the case or assign a grade to each side's performance that day. When we declined to participate in this type of commentary, media personnel would promptly point out that such practices were acceptable to other commentators. Although we still declined the media's request to become scorekeepers of the trial, it would have been easier to respond to the media's request if we had a code of ethics that supported our position that scoring or grading a trial is outside of our role.

There are two final functions that a legal code could serve. First, it would be a recognition by legal commentators that the public views us as representatives of our legal profession, and, thus, we must act in a manner that brings respect to that profession. If we act in an unethical or embarrassing manner, we do a disservice not only to ourselves but to others in the profession. A code of ethics can instill more pride in our work and those who work daily in the legal profession.22

Finally, a code of ethics is likely to enhance the image of legal commentators. Rather than be seen as publicity-seeking individuals, it is hoped that we will be seen as professionals dedicated to the service of the community. With a code of ethics, commentators are more than hired guns. We are the means by which the public can learn about the workings of the justice system.23

22. As the drafters of the initial canons of professional ethics stated in 1908: "[A]bove all a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest [person] and as a patriotic and loyal citizen." CANONS OF PROFESSIONAL ETHICS CANON 32 (1908).

23. A similar thought is expressed in the Preamble of the Model Code of Professional Responsibility:

The Model Code of Professional Responsibility points the way to the aspiring and provides standards by which to judge the transgressor. Each lawyer must find within his own conscience the touchstone against which to test the extent to which his actions should rise above minimum standards. But in the last analysis it is the desire for the
C. Why the Code of Ethics Must Be Voluntary

Attorneys are regulated under ethical codes that are mandatory and professional discipline is imposed for violating provisions of the applicable code of professional responsibility. Each state licenses attorneys, adopts a code of professional responsibility, and disciplines attorneys for violations. In contrast, journalists operate under a voluntary code of ethics that is not enforced by any disciplinary authority.\(^{24}\) Unlike lawyers, the government has no involvement in promulgating or enforcing the journalists’ code of ethics. We believe the latter model is most appropriate for commentators.

From a practical perspective, a voluntary code of ethics is far easier to implement than a mandatory set of rules. An elaborate machinery exists for admitting lawyers to practice and for disciplining their wrongdoing. Creating a government apparatus for reviewing and disciplining the performance of commentators would be an enormous cost for relatively little gain.

More important, from a constitutional perspective a government-imposed code of ethics for commentators would surely violate the First Amendment since many provisions of an ethical code would concern the speech of the commentators. Indeed, the regulations would be based on the content of the commentators’ speech: Discipline would be imposed only if the speech was about the case and violative of the rules. The courts have clearly established that such content-based restrictions on speech will be allowed only if they are proven to be necessary to achieve a compelling government interest.\(^{25}\) Yet, it is difficult to identify any such compelling interest to justify an obligatory code or to explain why such a government-enforced code is essential. Although a well-educated public is a crucial goal, there is no apparent reason why this objective necessitates that commentators be government-regulated.

\(^{24}\) See American Society of Newspaper Editors, Statement of Principles art. IV (1975), reprinted in Bruce M. Swain, Reporters’ Ethics 111, 112 (1978) (“Good Faith with the reader is the foundation of good journalism. Every effort must be made to assure that the news content is accurate, free from bias and in context, and that all sides are presented fairly.”).

It might be argued that government regulation of commentators’ speech is necessary in order to assure a fair trial and protect the integrity of the proceedings. An analogy might be drawn to provisions in the American Bar Association Model Rules of Professional Conduct and various state laws that regulate attorney speech. For example, Model Rule 3.6 provides that a lawyer who is participating in the investigation or litigation of a matter “shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicatory proceeding in the matter.” 26 California recently adopted Rule 5-120 which is almost identical to Model Rule 3.6 and prohibits attorney speech that has a substantial likelihood of materially prejudicing an adjudicatory proceeding. 27

In Gentile v. State Bar of Nevada, 28 the Supreme Court upheld the constitutionality of this standard for regulating attorney speech. The Court emphasized that extrajudicial comments by attorneys about facts or evidence risk undermining the “basic tenet” that “the outcome of a criminal trial is to be decided by impartial jurors.” 29 The Court approved the “substantial likelihood of material prejudice standard” as an appropriate balance of the First Amendment rights of lawyers and of a state’s interest in protecting the “integrity and fairness” of its judicial system. 30

It might be argued that this same rationale—ensuring fair adjudicatory proceedings—justifies regulating the speech of commentators via a mandatory code. However, we believe there are many reasons why Gentile is distinguishable and why government restrictions on commentators’ speech would violate the First Amendment.

First, the Court in Gentile relied heavily on the fact that attorneys in a proceeding are officers of the court and that there are many restrictions on lawyer speech in pending cases. The Court noted, for example, the restrictions on attorney speech in the courtroom and in discovery. 31 Chief Justice Rehnquist, writing for the majority, said that the prior cases “rather plainly indicate that the speech of lawyers

29. Id. at 1070.
30. Id. at 1075.
representing clients in pending cases may be regulated under a less demanding standard than that for regulation of the press . . . . 32

No such tradition exists for regulating the speech of commentators. Although the commentators usually are lawyers, they are not functioning as "officers of the court" in the case. Quite the contrary, they are a part of the press much more than a part of the legal system. With rare exceptions, the commentators have no contact with the judge and never appear in the courtroom in the case except as spectators.

Second, there is no showing of a need for regulating the speech of commentators in order to assure fair proceedings. There is no evidence that remarks by commentators have prejudiced anyone's right to a fair trial. Indeed, it is difficult to imagine situations where statements by commentators could "materially prejudice an adjudicatory proceeding." 33

Third, a mandatory code of ethics for commentators would be unconstitutionally overbroad. A law is impermissibly overbroad if it regulates substantially more speech than the Constitution allows to be regulated. 34 At most, the government could regulate commentators with regard to comments that risk undermining a fair trial. But the code of ethics for commentators that we propose would cover many other topics including confidentiality, conflicts of interest, competency and remuneration. None of these restrictions—many of which concern what commentators should say—have anything to do with protecting the integrity of the trial proceedings. Therefore, the code of ethics would be vulnerable to an overbreadth challenge because it regulates substantially more speech than the First Amendment allows to be regulated.

A mandatory code of ethics for commentators would be overbroad in another sense as well: Conceivably the code would apply to all who speak to the press and perhaps even to the press itself. Attorneys are a distinct and easily defined class. But there is no precise definition for "commentators."

33. Stephen Gillers & Roy D. Simon, Jr., Regulation of Lawyers: Statutes and Standards, 1996, at 790 (1996). We also have this view with regard to speech of attorneys and question the Court's conclusion in Gentile. We agree with the view expressed by the California Bar President, Donald Fischbach, that there is no evidence that out-of-court remarks by attorneys have prejudiced anyone's right to a fair trial.
Functionally, by "commentators," we are referring to lawyers and law professors who are speaking to the press about cases in which they are not a party, an attorney, or a witness. But, logically, there is no reason why commentators about legal proceedings must always be lawyers. Scientists might be commentators speaking about scientific evidence, such as DNA analysis. Jury consultants were frequent commentators during the Simpson case. Political scientists and sociologists often are experts on aspects of court systems and judicial proceedings. The range of commentators is truly limitless. There is no inherent reason why attorney commentators should be regulated and the other types of commentators about a case should be unregulated.

To regulate all who comment about a case is to make the regulations truly sweeping in their reach. Indeed, journalists—both print and broadcast—often offer their own analysis and commentary. The danger is that a mandatory code of ethics would create an unprecedented degree of government regulation of the press.

Therefore, although we advocate the development of an ethical code for commentators, we strongly believe that it should be voluntary in that it should be neither promulgated nor enforced by the government. Certainly, the media, on its own, can require that commentators adhere to the code, but there should be no government-imposed sanctions for violations.

35. We are, therefore, troubled by the proposal by Steven Brill, President of Court TV, advocating new court rules and procedures that would mandate particular practices by commentators as a precondition for permitting electronic coverage of courtroom proceedings. For example, Mr. Brill proposes that California Rules of Court, Media Standard 980-6-4 be amended to prohibit expert commentators from providing opinions about who “won” or who “lost” the day's proceedings and to require commentators “to explain the speculative nature of other comments.” See Steven Brill, A Proposal for Open, Dignified Justice in California (Dec. 5, 1995) (copy on file with the authors). While we do not disagree with the principle that commentators should refrain from speculating on the outcome of a case, see infra part III.A, embedding such a rule in the court rules and procedures is fraught with dangers and is constitutionally suspect. See Response by California First Amendment Coalition (Dec. 22, 1995) (copy on file with the authors). Consider, for example, a commentator's statement that the loss of a particular motion was a "crippling blow" for one side or another. Under the proposed standard, such a "speculative remark" could result in sanctions, including the termination of electronic coverage of a trial.

36. Under the voluntary code of ethics we propose, there would be at least two important incentives for commentators to follow such a code: (1) the media's insistence, even contractually, on the commentator's compliance with ethical standards; and (2) principles of self-imposed responsibility and accountability. See Louis W. Hodges, Defining Press Responsibility: A Functional Approach, reprinted in DENI ELLIOTT, RESPONSIBLE JOURNALISM 18 (1986) ("self-imposed responsibilities are no less real or binding as a result of the absence of compelling external authority or of an enforceable contract").
There is, of course, the possibility that some commentators would abide by a voluntary code of ethics while others would not. It is even conceivable that some media outlets of the more "tabloid" sort will prefer commentators who are not constrained by ethical standards. There is no reason to fear, however, that this will place pressure on other commentators to adopt less ethical standards. There will likely be many media outlets that pride themselves on the professionalism of their coverage and their commentators. Moreover, it is our perception that most commentators want to adhere to high ethical standards and that a voluntary code would aid them by providing guidance and support for their actions.

Ultimately, as with all aspects of media coverage, there probably will be a range of styles and approaches from which viewers and readers can choose. The public always has had the "low" end of coverage available; our hope is that ethical codes will enhance the overall quality of analysis.

III. ETHICAL DUTIES OF COMMENTATORS

There are several models of codes that one can suggest for legal commentators. In 1908 the American Bar Association ("ABA") adopted Canons of Professional Ethics that set forth basic principles for the ethical practice of law. In 1970 the ABA replaced the Canons with the Model Code of Professional Responsibility. The Model Code offered a more detailed format for dealing with ethical issues. Its approach was to set forth three levels of standards for the lawyer. The first, "canons of ethics," outlined the basic principles for ethical lawyering. The second, "ethical considerations," represented a level of ethical practice to which the lawyer should aspire. The third, "disciplinary rules," set forth minimum standards for those practicing law.

Most recently, in 1977 the ABA appointed a commission to draft a new set of rules for lawyers' ethics that was approved in 1983. The Model Rules of Professional Conduct set forth a lawyer's obligations in rule format with comments and comparison notes to help the attorney apply these rules.

38. Id.
39. As working groups meet to discuss the development of a Commentator's Ethical Code, see infra part IV, they can further discuss and agree on the most appropriate format for such a code.
For the purposes of this Article, it is not critical that we agree on the particular format for a proposed ethical code. Both the model rules and model code have their advantages. We only hope to suggest the regulations that any such code should include, the standard that a commentator should aspire to and the minimum conduct permissible for one serving in that role. These ethical obligations can best be organized under the duties that a legal commentator must perform when acting in that role.

A. Duty of Competence

The first and foremost requirement for a legal commentator is to act competently. A commentator does harm if he or she misstates

40. The Restatement format of the Model Rules allows for quick reference to a concise statement of the required standard of conduct. By contrast, the Model Code format emphasizes the goals behind the rules by placing the canons and ethical considerations before the list of related disciplinary rules. Compare MODEL RULES OF PROFESSIONAL CONDUCT (1983) with MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1971).

41. Not surprisingly, the Simpson trial also renewed calls for a code of ethics for journalists. This code of ethics has provisions remarkably similar to canons one might consider adopting for legal commentators. They include:

1. A journalist should never lie or mislead a reader in any way, either by commission or omission.
2. A journalist should always use language and information that is as exact as possible and as first-hand as possible and never make it seem more exact or first-hand than it is.
3. A journalist should take care that materials associated with stories it is publishing or broadcasting do not overstate or distort what is reported in the story.
4. A journalist should always be candid about the quality and certainty of his or her information.
5. To ensure accuracy and fairness, a journalist should make sure that no one who is the subject of a story is surprised to have been written about in the way they were written about when the story is published or broadcast.
6. Journalists should always avoid conflicts or appearances of conflicts when possible and disclose all conflicts or potential conflicts that are not avoidable and not totally obvious.
7. Journalists should always give credit to the work of other journalists whose reporting they are using for their own stories.
8. It is completely appropriate that journalists be concerned with the long-term profitability of their work; and, with that in mind it is not inappropriate for journalists to try to be interesting and even entertaining as well as informative. Nonetheless their first priority, if they are to assert they are engaged in journalism, is not to entertain or otherwise attract an audience or please advertisers but to give people information they think is important for them to know.
9. Under the banner of "the public's right to know," journalists should not fail to balance the importance of what they want to report with the negative consequences of reporting it.
10. Journalists should make themselves as accountable as those they seek to cover [by candidly admitting any mistakes].


42. Of course, a commentator's duties may differ when he or she is acting as an attorney for a client. In such situations, the applicable codes of ethics for the jurisdiction would apply.

43. The duty to be competent is also the first requirement of a lawyer under the Model Rules of Professional Conduct. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1983).
the law or misstates the facts of what occurred. Several painful examples of this occurred during *People v. Simpson*. For example, some commentators mistakenly stated that if jurors had discussed the case in violation of Judge Ito's admonition, a mistrial was mandated.\(^4^4\) Others incorrectly asserted that Judge Ito could not give a second-degree murder instruction over the defendant's objection.\(^4^5\) Although everyone may make a mistake, commentators must be competent to perform in the role of a commentator and must be competent when they perform that role.

For lawyers representing clients, "competent representation" is defined as possessing the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."\(^4^6\) The same definition may apply to legal commentators. A legal commentator should have both the substantive knowledge and practical experience to comment accurately regarding a proceeding. Because no lawyer can be expected to be an expert in every field, one option available to the legal commentator, just as it is to lawyers representing clients, is to gain the necessary expertise by additional study or association with lawyers who have expertise in that field.\(^4^7\)

One criticism frequently made of legal commentators is that they do not have extensive trial practice in the same type of case for which they are providing commentary. While more familiarity with an area of practice will certainly make commentary easier, it is not imperative that a commentator have tried cases identical to the one at issue. As long as a commentator has worked on the inside of the courtroom and is willing to do the research necessary to comment on a particular case, that commentator should be able to meet the level of competence necessary for a legal commentator.

There are four key requirements to being a successful and competent commentator: substantive knowledge of the law, practical experience in the courtroom, familiarity with the proceedings at bar, and a

\(^{4^4}\) Juror misconduct may be remedied in a variety of ways, including admonishing the juror, *People v. Harper*, 231 Cal. Rptr. 414, 420 (Ct. App. 1986), or removing him or her from the case, *People v. Daniels*, 802 P.2d 906, 929 (Cal. 1991). A mistrial is not mandated.

\(^{4^5}\) See *People v. Daya*, 34 Cal. Rptr. 2d 884 (Ct. App. 1994) (trial court properly instructed the jury, over the defendant's objections, on second-degree murder as a lesser-included offense of first-degree murder).


\(^{4^7}\) See *Model Rules of Professional Conduct* Rule 1.1, cmt. 2 (1983) ("A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.").
willingness to do the research necessary to answer the many questions that arise in a case. Research may mean anticipating what issues are likely to arise in a case and examining the law on those issues before rendering an opinion to the press or the public. It may also include consulting with practicing attorneys who have an expertise in those issues and soliciting their opinions on what strategies may be employed by each side. Finally, it may mean using all these avenues to information in combination with the commentator’s experience and common sense.

There are several ways that a legal commentator may help himself or herself in providing competent commentary. First, the commentator must be honest with the media from the start as to his or her areas of expertise and what questions are outside the commentator’s ken. For example, if a commentator is a criminal law specialist, commenting on an issue of family law or corporate controversy would likely be inappropriate. A legal commentator should be prepared to decline an offer to provide legal commentary when a matter is outside his or her expertise.

Second, the commentator must tell the media, and if possible the public as well, the commentator’s background and what sources of information the commentator draws upon to reach his or her opinion. Not only will such disclosure address any issues of bias, but it will allow the listener or reader to evaluate critically how valid the commentator’s opinion is.

48. See Model Rules of Professional Conduct Rule 1.1, cmt. 5 (1983) (“Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners.”); see also Model Rules of Professional Conduct Rule 1.1, cmt. 6 (1983) (“To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education.”).


To be sure, no client has a right to expect that his lawyer will have all of the answers at the end of his tongue or even in the back of his head at all times. But the client does have the right to expect that the lawyer will have devoted his time and energies to maintaining and improving his competence to know where to look for the answers, to know how to deal with the problems, and to know how to advise to the best of his legal talents and abilities.

50. Cf. Model Code of Professional Responsibility EC 6-3 (1971) (“A lawyer offered employment in a matter in which he is not and does not expect to become so qualified should either decline the employment or, with the consent of his client, accept the employment and associate a lawyer who is competent in the matter.”).

51. See infra part III.B.
Third, a commentator can greatly help himself or herself by offering only those services that legitimately fall within the role of a legal analyst. Once one ventures into the realm of soothsayer/gamekeeper by predicting or “scoring” a proceeding, one will almost by definition be acting without the appropriate competency.52 “Legal journalism that borders on sports reporting is bad news for the profession and a disservice to the public.”53

Fourth, commentators who practice outside the relevant jurisdiction should be cautious about venturing opinions on laws not used in their jurisdiction. Nationwide expertise is rare, yet television networks often use commentators from one end of the country to discuss a case occurring on the other side of the nation. If one is going to provide such commentary, it is crucial to research the law of that other jurisdiction. Both trial practices and substantive laws differ greatly across the country.

Fifth, the commentator must follow the proceedings religiously. In order to comment competently on a case, it will ordinarily be necessary for the commentator to watch, listen to, or read all of the transcripts of a entire trial. Yes, that means following every word. It does not work to observe a case sporadically. A passing phrase by a witness or the court could be critical to an issue. A commentator must dedicate himself or herself to following every part of a proceeding. Moreover, it may not be enough for a commentator simply to watch a proceeding through the television lens. As much as possible, a commentator should venture inside the courtroom to experience the same environment in which the jury experiences the case. Witnesses and trials become distorted through the camera lens. Although it may be logistically difficult to obtain access, a commentator should strive to spend an ample amount of time in the courtroom.54

Finally, in order to maintain one’s competency, a legal commentator must be willing and ready to answer “I don’t know” to a question beyond his or her expertise. Not only will this response prevent a commentator from straying from his or her area of expertise, but it will enhance the commentator’s credibility when he or she does answer appropriate questions.

53. Id.
54. During the Simpson trial, commentators were severely criticized for being out of touch with the actual feel of the courtroom and the tenor of the case. See Schatzman, supra note 21, at A10.
The public and the media are entitled to competent legal commentary. Although fame and fortune may make it tempting for those seeking the limelight to offer legal expertise in a wide range of areas, ethical duty should caution restraint. At a minimum, legal commentators must know the substantive law in an area, be willing to research individual issues that arise, understand the rules of that court and jurisdiction, and seek assistance on strategy issues if the commentator does not have extensive, relevant experience in the courtroom. Moreover, in providing competent commentary, commentators should strive to give the public a broader picture of what is occurring in the proceedings and avoid misleading the public by scoring the legal proceedings in a way that distorts the decisionmaking process.

A code of ethics can upgrade the quality of commentary without stifling individual opinions. There is typically such a wide range of views on legal issues that even with an ethical code, commentators can offer differing perspectives. A code of ethics will not require that all commentators have the same view of a matter or express their opinions in the same way. Rather, it will only require that commentators have a basis for their individual opinions and express those opinions in a way that is not misleading to the public. Bold opinions are welcome as long as there is a basis for them.

55. Frankly, for those who are motivated by selfish goals there is bound to be disappointment. There is relatively little fame and fortune in providing legal commentary, but rather a great deal of hard work and tension.

56. We believe Professor Samuel Pillsbury provided sage advice when he stated:

The expert has a powerful defense against all forms of media trivialization: refusing to play the game. The expert can resist the temptation to assume total intellectual authority and admit to limitations of knowledge and insight. When the media insists on a simplistic question, the expert may respond by emphasizing the complexities involved. When conflict is sought, the expert may emphasize points of agreement as well as points of disagreement. When the law is presented as a game, the expert may remind viewers of the real stakes involved. Sometimes, the expert must be willing to take more drastic action. The expert must be willing to walk—ready to walk off the network set, away from the talk show appearance, or to decline to answer the reporter's inquiry. Samuel H. Pillsbury, Why Are We Ignored? The Peculiar Place of Experts in the Current Debate About Crime and Justice, CRIM. L. BULL., July-Aug. 1995, at 305, 335.

57. In fact, there may be ways to keep the public apprised as to which side is prevailing in court without scoring the case in a deceptive way. For example, in the pretrial stage of a case, a chart that lists what specific motions have been won or lost by each side is far more informative than a scorecard that simply states which side has won or lost more motions. Similarly, during trial, a chart listing the evidence that has been precluded by each side's objections offers better information to the public than a chart simply stating which side has had more objections sustained. A code of ethics permits creative reporting, but it must be competent and not misleading.
B. The Duty With Regard to Confidences

As we served as commentators, we realized that there were many ways in which we might come to possess information that was not generally available to the public. Commentators might speak to lawyers involved in the case and be told things—facts or legal strategies—that are not publicly known. There might be instances where commentators speak to a judge who is handling a particular proceeding and learn information that is not generally available. Also, journalists from one newspaper or station might inform the commentator of information that has been learned through a confidential source and that has not yet been published. There might be instances where commentators are contacted by the parties or witnesses.

These situations are not hypothetical. We encountered some version of each of these situations during the Simpson case. Some arose relatively often.

By "confidences" we simply mean information that is not publicly known that is learned by a commentator with an express or implied understanding of confidentiality. In many situations, it is unclear whether such an expectation of confidentiality exists when the commentator learns of nonpublic information in one of these ways.

The situation for the commentator is inherently uncomfortable. On the one hand, the intense public interest in a case such as the Simpson trial makes the information extremely valuable. The commentator has an ongoing relationship with the press and frequently the nonpublic information would be highly prized by the media. But at the same time, the information often was told to the commentator with the understanding, explicit or implicit, that it would be kept confidential. At the very least, the information might have been provided without the thought that the commentator would publicly reveal it. Also, there is the opposite danger: that the information was given to the commentator precisely because the lawyer wanted the analyst to be a conduit to transmit the information to the press.

Rules in existing codes of professional conduct are not useful in dealing with this problem. The provisions in lawyers' codes of ethics are inapplicable because they are based on the fiduciary duty that attorneys owe to clients and the need to protect client confidences to ensure effective representation.58 Provisions in the journalists' code

58. See, e.g., Developments in the Law—Privileged Communications, 98 Harv. L. Rev. 1450 (1985); Geoffrey C. Hazard, Jr., An Historical Perspective on the Attorney-Client Privilege,
of ethics are ultimately about protecting confidential sources for stories in order to enhance the ability of the reporter to gather information. 59

Although both lawyers and journalists have duties of confidentiality, they are based on quite different interests. The primary concern for lawyers is protecting confidential information so as to safeguard the client’s interests. The primary concern for journalists is disseminating information; confidences are protected as a way of safeguarding the availability of sources. The key difference is that anything said by a client to a lawyer in the course of representation is deemed confidential, but what a reporter is told is only treated as confidential if there is a clear promise of secrecy.

Neither of these models is applicable to the commentator who learns information with an express or implied promise of confidentiality. There is neither the need to presume confidentiality to protect clients nor the need to presume against confidentiality to fulfill the reporter’s function.

Our conclusion, therefore, is that confidentiality should be based on an express agreement between the commentator and the source. Commentators should abide by and honor promises of confidentiality that they make. It is the responsibility of the commentator to clarify issues of confidentiality both with “sources” and with the press. If it is unclear whether particular information is confidential, it is the responsibility of the commentator to clarify and reach an understanding as to whether the commentator is being told in confidence and agrees to this arrangement.

We thus would recommend a provision in a code of ethics that would say: “A commentator shall keep confidential information learned with an express promise of secrecy. If it is unclear whether information is learned in confidence, it is the responsibility of the commentator to clarify the expectations.”

In addition to such a provision, we would encourage commentators to consider some related issues concerning confidentiality. First, commentators need to decide whether they wish to talk with lawyers and/or the judge about the case while it is pending. Undoubtedly,


59. See supra note 37; see also James C. Thomson Jr., Journalistic Ethics: Some Prob- ings by a Media Keeper 8 (1978).
some commentators will know some of the participants from prior contacts; some might be close friends. Also, some commentators might want to cultivate contacts with participants. There are advantages and disadvantages to conversations with participants about the case.

Speaking with the participants can help the commentator understand what is occurring and better perform the role of informing and analyzing. On the other hand, there is the danger that the commentator could be used by the participants to transmit selected information and even to transmit inaccurate information. Also, some commentators may feel inherently uncomfortable dealing with the issues of confidentiality and thus might prefer to avoid contacts with the participants.

We see no inherent reason to prefer one approach over the other in all circumstances. We believe, though, that it is important that commentators think carefully about their contacts with participants and recognize that it is the responsibility of the commentator to clarify uncertainties concerning confidentiality.

Second, commentators should only agree to confidentiality if they are prepared to honor the promise. Commentators often talk to many different reporters in a day. Often a reporter will reveal information to the commentator that the journalist does not want publicly disclosed until his or her story appears. The difficulty then occurs when the commentator speaks to other reporters. Again, the situation is inherently uncomfortable for the commentator. The answer for the commentator must be in disclosure and honesty: The commentator should agree to confidentiality only if the commentator can and will abide by that agreement.

Third, commentators should exercise great care in speaking to parties and witnesses. Codes of professional responsibility for lawyers always have included provisions preventing attorneys from speaking to clients who are represented by counsel. The Model Rules of Professional Conduct Rule 4.2 states: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so."60 Paragraph 3 of the commentary gives the rule a broad scope: "The Rule applies to communications with any person,

whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates."

Although the rule technically applies only when a lawyer is "representing a client," a commentator may have similar confidentiality concerns in speaking to a party, witness, or other third person who is represented by counsel. The represented person may not understand the role of the commentator and mistakenly believe that the expert, because he or she is a lawyer, is bound by the same rules of confidentiality as counsel. If the commentator later divulges information a represented individual believes was confidential, the commentator is likely to become embroiled in a dispute over whether the legal commentator had taken on the role of "counsel" for that person. In order to avoid claims that the commentator violated any duty of confidentiality to the represented person, it is imperative that the commentator refrain from conduct that might be construed as providing representation or that would violate the Model Rules of Professional Conduct.\(^{62}\)

Additionally, commentators should avoid being placed in the role of investigator. During the Simpson case, when jurors were excused, some of the commentators were asked to speak with them and gather information. There are many problems with this for the commentator. Once the commentator speaks with a juror, the commentator then risks being asked to comment on the information that he or she unearthed. Commentators are transformed into reporters and not analysts. Indeed, if the commentator is successful in gathering information, the commentator will be the news and not just a reporter or analyst of it.

Commentators face difficult issues of confidentiality while serving in their unique role. Any code of ethics must address these issues to ensure that the commentator has appropriate access to information without jeopardizing his or her objectivity and ability to analyze a case accurately.

---

61. See id.; Model Rules of Professional Conduct Rule 4.2, cmt. (1995). The Rule and the Comment were amended in 1995 to change the word "party" to "person." See GILLERS & SIMON, supra note 33, at 263.

62. The problem of speaking with a represented person also raises conflicts of interest concerns. See infra part III.C.5.
C. Duty to Avoid Conflicts

Just like in the practice of law, one of the crucial duties for a legal commentator is to avoid conflicts of interest while providing one’s services. Conflicts of interest may take several forms. Once again, a very helpful guide to those conflicts and how to approach them is set forth in the traditional codes of responsibility governing lawyers’ conduct.

In the practice of law, the rules on conflict of interest are largely governed by a lawyer’s paramount duty to the “client.” The “client” of a legal commentator is different from that of the practicing lawyer. By and large, the legal commentator’s “client” is the public to whom that expert is providing commentary. There are times, however, that the client also includes a particular media organization with whom the commentator is regularly working. Finally, there are times that a commentator may also feel a duty to third parties who have an affiliation with the case and a prior or ongoing relationship with the commentator. Balancing one’s duties of loyalty and confidentiality to all these groups makes it particularly important and challenging for the legal commentator to spot and properly handle any conflicts of interest.

1. Conflicts Created by a Lawyer’s Personal Relationship with Lawyers in a Case

One type of conflict that frequently arises for legal commentators is a conflict between the commentator’s objective role as a legal expert and the temptation to assist one side of the proceedings. Sometimes it is hard for legal commentators to stay out of the action. Because commentators are also involved in researching the law and reaching conclusions based on that research, there is frequently the urge to contact one side of the proceeding or another and advise the party of possible successful strategies. That temptation increases when the commentator has a preexisting or developing relationship with attorneys on either side of the proceeding.

No matter how great the temptation may be to enter the contest, a commentator must remain neutral. If a commentator starts to provide information to one side or another, he or she will undoubtedly lose this crucial objectivity. There are enormous downsides for the commentator who becomes personally involved in a case. First, on a practical level, how does that person dispassionately and accurately comment on the legal development? If it involves a suggestion made
by the commentator, then the commentator is being asked to comment on his or her own work. Second, the commentator will lose his or her reputation for being fair and objective. Losing this reputation is as close as a commentator can come to losing an official credential to provide legal commentary.

Certainly, a legal commentator can let it be known publicly what information he or she has discovered that is relevant to a case and how that information might impact on the proceedings. Once the information is in the public realm, the lawyers or judge in a case may take notice of it. But providing general legal commentary is a far cry from helping the lawyers in a case strategize or do research.63

Additionally, in avoiding a conflict of interest while providing commentary, it is crucial that a commentator disclose any personal relationship he or she may have with any of the participants in the case. It may not be an automatically disqualifying factor that one knows or is related to a litigant, but it is certainly a fact that should be disclosed to the public and the media.64

Disclosure and consent is the traditional approach for lawyers to handle conflict issues.65 For legal commentators it may also be an appropriate approach, although it comes with an added difficulty. When a lawyer discloses to a client a conflict of interest, the lawyer can be sure that all necessary information regarding that conflict is communicated to the client. There is not the same guarantee for the legal commentator. Although the commentator may disclose to the press that a potential conflict exists, the media, through its editorial powers, controls whether such information is ever heard by the public. When the media is looking for a fifteen-second soundbite, it is unlikely that the reporter will include in it a commentator’s caveat that he or she has a conflict. Nonetheless, legal commentators should do everything in their power to ensure both the media and the public are aware of any potential conflicts.

63. If contacted by one of the parties in a case for advice, the commentator should explain the conflict created and decline to provide such advice. However, under traditional ethical rules, it would not be inappropriate to refer the parties to other experts who might be helpful on the issue. Cf MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104(A)(2) (1971) (it is proper to give advice to represented party to seek the advice of counsel).

64. For example, it should not be a per se rule that a legal commentator cannot comment on a friend or spouse who is involved in the litigation. Rather, the commentator should have a duty to disclose any relationship that could bias the expert’s commentary. Disclosure and consent is the approach currently used when husbands and wives oppose each other in litigation. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 340 (1975).

65. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1983).
2. *Conflicts Created by a Commentator's Stake in the Outcome of the Proceedings or a Ruling on a Legal Issue*

Another type of conflict that may arise is when a commentator is asked to give an opinion on an issue that affects a matter for which the commentator is currently providing legal services. This problem can arise because commentators for trials are often drawn from those lawyers who practice in the same area and thus may confront similar issues. For example, the question may arise as to whether it is appropriate for the prosecution to seek the death penalty in a particular case. If the legal commentator is currently working on a case where the District Attorney is being asked to compare facts and decide whether the death penalty should be imposed, a clear conflict of interest is created for the commentator. Even if the commentator's honest opinion might be that it would be appropriate for the prosecutor to seek the death penalty, the commentator's duty to the client who may face the same penalty dictates that the lawyer's public statements be skewed in a particular direction. It is preferable, if such a situation arises, for the commentator to either recuse himself or herself from the legal commentary or, at minimum, disclose the conflict and allow the media and public to evaluate the commentary accordingly.

3. *Conflicts Created by a Commentator's Political or Organizational Affiliations*

Even a commentator's political or social affiliations can create a conflict when providing commentary. For example, a commentator may belong to an organization that becomes involved in the litigation. One of the most likely scenarios is a civil rights organization or a free press organization that becomes interjected in a proceeding when right of access questions arise. A legal commentator's allegiance to the organization has the potential to skew his or her legal commentary. On the other hand, if the commentator remains neutral on the issue or asserts a position contrary to that of the organization, he or she might be seen as being disloyal to the organization.

Traditionally, lawyers are entitled to participate in organization work and law reform activities even if the organization's interests are

---

66. For example, in *Simpson* the ACLU repeatedly intervened to encourage Judge Ito to release sealed transcripts in the case and to continue television coverage. However, a split in the position of ACLU members occurred when the ACLU took the position that the defendant should have a veto over whether cameras will be allowed in the courtroom.
contrary to those of a client. For legal commentators, the same may be true. A commentator may be able to provide legal commentary on a case even if the organization has an interest in the proceeding, as long as that commentator honestly and reasonably believes his or her affiliation will not affect the commentary and the commentator discloses any conflict to the public and the media. If the commentator does not believe that he or she can remain objective, the best course of action would be, as it is for any conflict situation, to recuse oneself from speaking on that issue.

4. **Conflicts Created When Speaking to More Than One Media Outlet**

A special type of conflict exists for the commentator who, while on retainer to one media outlet, is asked to speak to a competitor. In the practice of law, covenants not to compete are disfavored. The rationale for this traditional rule is that clients should have access to the lawyers of their choice. A similar rationale would seem to apply to legal commentators. Why shouldn't all the public, instead of just a particular readership or viewership, have access to the legal commentator's opinions?

On the other hand, legal commentators are often hired on an "exclusive" basis and thus contractually owe a special duty of loyalty and confidentiality to a particular media outlet. For those commentators who have contractually agreed to remain loyal to a particular media outlet, that contractual obligation must be honored. Overall, it would be a better practice if legal commentators did not bind themselves by exclusivity agreements so that they can always remain in a position to educate as much of the public as possible.

Finally, even if a legal commentator does not have a contractual obligation to remain loyal and not disclose the "scoops" of one media organization to another, a promise of confidentiality must always be honored. Commentators should realize, however, that expressed or implied promises to keep information confidential may also cause a

---

68. We recognize that recusal is not always possible, especially for the in-studio, on-set commentator who has no advance notice that the issue in conflict will be discussed. In such a situation, the only practical option may be for the commentator to disclose the basis for any possible conflict while addressing the issue in his or her commentary.
70. **See infra** part III.D.
71. **See supra** part III.B.
conflict when another media organization calls and asks for commentary which, in order to be complete and accurate, would require an improper disclosure. When that situation arises, the commentator will be forced to decline to answer the question or reveal that a conflict of interest prevents the commentator from answering.

5. *Conflict Created by Contacting Represented Party*

An odd type of conflict may also arise between the commentator's role as a pseudo-journalist covering a case and the commentator's continuing duties as a member of the legal profession. The conflict arises in the following manner: In trying to ascertain the facts regarding an issue in the case, the commentator is asked to contact the party or witness who has first-hand knowledge. More often than not, these individuals will be represented by counsel. If the lawyer was acting under the traditional constraints of the ethical code, the lawyer would be barred from making such contact. But the commentator is not acting in the traditional role of a lawyer and the question arises as to whether such contact should be prohibited.

Although no code bars contact directly with a represented party when one is acting as a legal commentator and not as a lawyer in a proceeding, commentators should be extremely cautious in undertaking such an endeavor. A commentator's primary role is to evaluate facts and law for the public, not to investigate them. When called upon to be an investigator, legal commentators must be scrupulous in protecting the rights and interests of parties and witnesses in a case. Although the media may be willing to push a represented party to jeopardize his or her interests with a few choice remarks for the press, a lawyer's role, even while serving as a legal commentator, is to ensure that people's rights are respected, not compromised.

Also, there is a real danger that the parties or witnesses will ask the commentator for legal advice. They may perceive the commentator as a lawyer and try to use the commentator in that capacity. There are enormous problems with the commentator providing legal advice

---


(A) During the course of his representation of a client a lawyer shall not:
(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

See also supra part III.B.
to these individuals, including risking interfering with the client's relationship with his or her attorney.

6. **Conflicts Created by Assisting the Court**

The final type of conflict that may arise for the legal commentator is the one created when the court seeks assistance from a legal expert who is also providing commentary on a case. Under the ABA Model Code of Judicial Conduct, a judge may obtain the advice of disinterested experts on the law.\(^{73}\) It is not unheard of for judges in high-visibility cases to seek the counsel of an expert who has been following the case. While the judge should disclose to the parties that such an expert has been consulted, not all judges follow this practice.

The problem for the legal commentator is similar to that of assisting a party to the action. If the commentator provides advice to the judge, and then provides commentary in general on that issue, the expert is essentially critiquing his or her own work. In such situations, the legal commentator may need to make a decision—advise the court and stay away from legal commentary on that issue or advise the court to seek advice elsewhere.

7. **Summary of Commentators' Conflicts**

As in the practice of law, it is not always evident when one is facing a conflict of interest or how to resolve that conflict. However, if one uses the model of ethical responsibilities generally applied to lawyers, the most successful approach may be to draft rules providing:

1. Commentators should anticipate areas of conflict and determine initially whether the potential conflict would jeopardize the commentator's ability to do his or her job of presenting objective commentary to the public.

2. If there is a potential conflict and the commentator believes he or she can remain impartial, the commentator must, at minimum, disclose those facts creating the conflict.

3. If the commentator does not reasonably believe he or she may remain impartial, he or she should be disqualified from providing legal commentary on the case.

Many conflicts will not require the complete disqualification of a legal commentator from covering a case. Some will only require the commentator to refrain from commenting on certain issues. However,

---

\(^{73}\) **Model Code of Judicial Conduct** Canon 3(B)(7)(b) (1990).
there are some types of conflicts that could lead to complete disqualification. For example, per se disqualification should be imposed when the lawyer has been counsel on the case or is currently serving as counsel for any party or witness related to the case. The term "objective commentator" loses all meaning when it is an interested party providing commentary. Lawyers in that situation may still speak to the press, but their role will be very different from that of the objective, expert analyst.\textsuperscript{74}

D. THE BUSINESS OF BEING A COMMENTATOR

Although legal commentators were used before the \textit{Simpson} trial, it was relatively rare for media outlets to enter into contracts for the sole purpose of having a legal commentator for one particular case. During \textit{Simpson}, it seemed like every network, every show, every form of media needed to have its own retained expert. Several issues arose from this practice.

First, should commentators enter into exclusive agreements with particular media outlets? Apart from any issues of conflict of interest,\textsuperscript{75} there is the general question of whether exclusivity offers the best professional environment for the commentator to perform his or her role. In the \textit{Simpson} case, several networks entered into contracts with commentators that precluded their appearing on other networks. Likewise, several local stations and commentators had similar exclusivity agreements. On the other hand, other networks and stations did not require exclusivity and some commentators expressly refused such agreements.

There are advantages and disadvantages to exclusivity agreements for both the media and the commentator. The media benefits from an exclusivity agreement because it is assured the availability of a commentator. At crucial moments in the \textit{Simpson} case, there was an enormous demand for commentators; an exclusivity arrangement let the media know that the commentator was available to them at such times. Also, some media outlets perceived that they benefited by having the public identify particular commentators with them. Indeed, some stations literally advertised their commentators and thus wanted exclusivity.

\textsuperscript{74} The extrajudicial speech of lawyers in a case is governed by \textsc{California Rule of Professional Conduct} 5-120 (1992) and the Supreme Court's decision in \textit{Gentile v. State Bar of Nevada}, 501 U.S. 1030 (1991).

\textsuperscript{75} \textit{See supra} part III.C.4.
There usually is a financial benefit for the commentator who engages in an exclusivity agreement. Generally, commentators are paid a retainer when they sign a contract with an exclusivity clause. Also, a person who wants to be a commentator is assured such work if there is an exclusivity clause. Exclusivity agreements also can help the commentator by limiting the number of requests for interviews; it is a way of lessening what, at times, is an overwhelming number of calls.

But exclusivity also has its costs. As described in Part II, the primary function of the commentator is to educate the public. An exclusivity agreement limits the ability of the commentator to perform this service. Also, there is inherent discomfort for the commentator in turning down requests based on exclusivity agreements.

Ultimately, we believe that exclusivity is a personal choice. For the purposes of an ethical code, we would recommend a relatively simple provision: "Commentators may enter into exclusive agreements with particular media outlets. It is the responsibility of the commentator to clarify the scope of any exclusivity agreement. If there is an exclusivity agreement, it is the duty of the commentator to adhere to its terms."

A second major issue concerns compensation. The availability and receipt of compensation varied widely among commentators and among media outlets during the Simpson case. To our knowledge, the print media never paid for interviews with commentators, although op-ed pieces in newspapers do pay a small honorarium. Nor does the broadcast media generally pay for interviews that appear as "soundbites" on the news.

Many networks and stations that were carrying live coverage of the proceedings paid commentators for their services. Some did not. For example, Court TV and the E! Network did not pay commentators who spent entire morning or afternoon sessions as in-studio commentators.

It certainly is reasonable for commentators to be paid for in-studio work. Being in a studio for half or all of a day is a major time commitment. Media companies are profit-making enterprises and are accustomed to paying their on-air performers.

On the other hand, newspapers generally do not pay people for interviews. There was an unfortunate incident at the beginning of the Simpson case, in the few days before the preliminary hearing, where several commentators told some print media reporters that they would not do interviews unless they were paid a retainer fee. Ultimately, the problem solved itself as there were a sufficient number of commentators who were willing to do such interviews without a fee so as to eliminate any pressure on the newspapers to make such payments.

An ethical provision could quite simply say: "Commentators may be paid a reasonable fee for their work." This is language drawn directly from Rule 1.5 of the Model Rules of Professional Conduct. Rule 1.5 enumerates many criteria to be considered in evaluating the reasonableness of a fee, such as the time and labor required, the likelihood that employment will preclude other employment, the fee customarily charged in the locality for similar services, the amount involved and the experience, reputation and ability of the lawyer or lawyers performing the service. All of these are also relevant in assessing the reasonableness of fees for commentators. In reality, for commentators, reasonableness is determined by the market system.

Third, we believe that it is important that commentators perform pro bono work. Many media outlets simply cannot afford to pay fees to legal experts. Among the most valuable services performed by commentators is educating reporters and anchors about the law, a task for which there is generally not compensation or recognition. We strongly believe that commentators should be encouraged to perform this valuable service.

Finally, in discussing the business aspects of being a commentator, there is the concern that serving as a commentator is a form of advertising for lawyers; attorneys who appear as legal experts are gaining exposure that can attract additional clients. From a practical perspective, such appearances are the ideal form of advertising for a lawyer: It is free (or even pays the attorney) and it reaches a potentially large audience. Moreover, a public that is inherently skeptical of advertising is learning of the lawyer in a context that is much more likely to breed respect and trust.

---

77. Several print journalists from many different newspapers told us of the request for compensation for interviews from some commentators.
Yet, we believe that it is a mistake to characterize the lawyer's appearance as a commentator as a form of solicitation or advertising, however much it seems like it. First, a lawyer appearing as a commentator fits neither the definition of solicitation nor of advertising. Solicitation occurs when there is direct contact with a particular prospective client, either in person or by phone or by letter. No such communication occurs when a lawyer appears as a commentator.

Nor can the lawyer's appearance be considered advertising, even if it has that effect. Advertising is not precisely defined, but it concerns offering a particular service to the public. It is possible that a commentator might do this expressly, but that would be highly unusual. The advertising aspect of appearing as a commentator is likely to be implicit rather than express.

Second, it would be impossible to formulate criteria to separate when a commentator is engaged in advertising and when not. The distinction is important because if the lawyer is deemed to be advertising, then he or she can be punished for false statements. Otherwise, of course, false statements cannot be punished. In one sense, everything the commentator does is a form of self-promotion and advertising. On the other hand, it would be undesirable to have commentators' comments and actions monitored for false or deceptive statements.

The concern, then, with commentators engaged in self-promotion is that it is unseemly. Yet, there is no realistic way to define the permissible degree of self-promotion or the point at which an appearance should be treated as an advertisement. Besides, speech cannot be restricted just because it might be in bad taste. Therefore, as distasteful as some of the conduct might be at times, media appearances should not be treated as advertisements. At most, there could be a provision encouraging commentators to refrain from intentionally promoting his or her business.

E. Being a Commentator, Staying a Lawyer

Finally, a commentator must remember that as a member of the legal profession, he or she has continuing duties under the ethical codes applicable to all lawyers. Accordingly, a commentator must

comply with all laws and refrain from conduct "prejudicial to the administration of justice."  A commentator also should not knowingly advise or assist another in a violation of the law.

Members of the media, even honest and good-intentioned ones, can become overzealous in their efforts to cover a case. For example, when the grand jury in the Simpson case was discharged, some members of the media wanted to contact dismissed grand jury members to interview them regarding what occurred in the grand jury. The only problem with such a request is that it very likely violates California law which prohibits such disclosures by grand jurors. Because the legal commentator is the legal counsel most accessible to reporters, his or her advice might be sought on such a request. The commentator should avoid any conflict of interest caused by serving as both an adviser for the media and an expert analyst for the proceeding being covered. Moreover, a commentator should beware of providing any opinions that could be interpreted as approving of suspect investigative techniques by the media or anyone else.

Legal commentators are under the constant scrutiny of the public and the courts. Operating in the limelight requires that the commentator be particularly vigilant in complying with all laws and applicable rules of court.

IV. CONCLUSION

In today's "Age of Legal Commentators" we have a golden opportunity to set standards that will make us proud to engage in such work and will make the public and legal community pleased to receive us. Before the next "Trial of the Century" hits, we should take the opportunity to draft and adopt a set of ethical standards that can guide those lawyers and professors who become legal commentators.

83.  One area of commentator conduct that we have hesitated to discuss is a commentator’s relationship to his or her fellow commentators; in other words, "The Duty of Civility." Traditionally, legal ethical codes have shied away from regulating the personal relationships between attorneys. See Model Code of Professional Responsibility (1971). Cf. Model Rules of Professional Conduct Rules 5.1, 5.3 (1983) (discussing rules of conduct for supervising attorneys and those under their charge). Rather, the lawyer’s workplace environment has been governed by the same laws as comparable workplaces. See, e.g., Hishon v. King & Spalding, 467 U.S. 69 (1984) (Title VII prohibits discrimination in law firms); Lucido v. Cravath, Swaine &
Because the work of legal commentators affects so many groups and is affected, in turn, by them, it would be best to form an interdisciplinary group to address the ethical issues facing legal commentators. Such a group would naturally be composed of representatives from the legal profession, the media, the courts, bar associations, community groups, and those who have served as legal commentators. Working together, such a team could establish guidelines that would ensure that the legal commentators of the twenty-first century can most effectively do their job and that the public, the ultimate client for their work, is well served.

In some cities, coalitions already exist to examine news coverage of major community events. For example, in Los Angeles, the Media Image Coalition ("MIC") was formed under the auspices of the Los Angeles County Commission on Human Relations. After the 1992 riots in Los Angeles, that coalition brought together representatives of the media, law enforcement, courts, and community to address the issue of how news coverage of civil unrest should be responsibly handled. A similar working forum would be helpful for discussing and fashioning the role of legal commentators and ethical standards for guiding the commentator in that role.

The choice is ours. We can either drift along with ongoing criticism of legal commentators and the role we perform, or we can take the initiative to improve the standards of our profession. We believe most commentators want to do the right thing. A code would help us in doing so.


Although we propose no specific rules, we strongly believe that commentators should be as congenial, helpful, and supportive of their fellow commentators as possible. Media outlets may be in competition, but we are not. Our goal is the same—to provide our best legal insights to the public. 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.

84. On Sept. 21, 1993, the coalition sponsored a working forum for the media and community on "Cooperative Responses to Civil Unrest: A Model for Change."