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ACADEMIC TROS: HOW TO PREVAIL IN THE COURT OF PUBLIC OPINION

MICHAEL A. MOGILL*

I. INTRODUCTION

The process begins with the resounding alarm of the telephone, generally between 6:30 and 7:00 in the morning. My mind and body, having awoken earlier to the sound of my watch alarm at 6:00, having had the luxury of some calm to meditate and a chance to catch up on yesterday's events via *CNN Headline News*, are now gearing up for the day ahead. Time to do some stretches, go for a jog, have some cereal with the family, and then off to gather my final thoughts and lesson plan before the morning's classes.

But the ringing of our phone as day breaks can generally mean only a wrong number (at this hour?), a family emergency (please, no!), or talk radio calling to ask me to take part in this morning's 9:05 half-hour or hour segment. The show may address any number of topics then in the news: the ever present O.J. Simpson trial,[1] the Susan Smith case,[2] the Oklahoma City bombing investigation and trial,[3] the Cleveland Browns' prospective move to Baltimore,[4] litigation and

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1. In this highly publicized trial, Orenthal James (O.J.) Simpson was tried for the murder of his ex-wife, Nicole Brown Simpson, and her friend, Ronald Goldman. *See* People v. Simpson, No. BA 097-211 (Los Angeles County Super. Ct. 1994). O.J. Simpson was acquitted of the murders in the criminal trial, but was found liable for the murders in a subsequent civil trial. *See* Brown v. Simpson, No. SC 036876 (Los Angeles County Super. Ct. 1995); Goldman v. Simpson, No. SC 036340 (Los Angeles County Super. Ct. 1995). For information regarding the civil trial, see Adam Pertman, *Jury Hits Simpson for Another $25M*, BOSTON GLOBE, Feb. 11, 1997, at A1, *available in* WESTLAW, BOSTONG database, 1997 WL 6241805, at *1, *6.

2. Susan Smith drowned her two sons, ages three and fourteen months, by letting her car roll into a lake with the boys strapped inside. *See* Tom Morganthau, *Will They Kill Susan Smith?*, NEWSWEEK, July 31, 1995, at 65, *available in* WESTLAW, NEWSWEEK database, 1995 WL 14497189, at *2. Smith was found guilty on two counts of murder in her criminal trial. *See* South Carolina v. Smith, No. 94-GS-44-906, 94-GS-44-907 (S.C. Dist. Ct. 1994).

3. The bombing of the Alfred P. Murrah Federal Building in Oklahoma City on April 19, 1995, killed 168 people. *See* Brian Duffy, *Where is John Doe No. 2? The Oklahoma City Bombing Is a Tough Case for the Prosecution*, U.S. NEWS & WORLD REPORT, Apr. 22, 1996, at 33, *available in* WESTLAW, USNWR database, 1996 WL 7810575, at *1. Timothy McVeigh and Terry Lynn Nichols were accused of the bombing. *See* United States v. McVeigh, No. 96-CR-68-M (D. Colo. filed 1996). McVeigh has since been convicted on all 11 counts and sentenced to death. *See* Richard A. Serrano, *National Perspective Update Argument Rages Whether State Should Try McVeigh and Nichols*, LOS ANGELES TIMES, Jan. 20, 1998, at A3, *available in* WESTLAW, LATIMES database, 1998 WL 2390385, at *3. Nichols was convicted of conspiracy and of involuntary manslaughter and sentenced to a maximum penalty of life in prison. *See id.*

tort reform,[5] or some trials of current particular interest to residents of the Commonwealth. Ever since I was the faculty member "fortunate enough" to receive a media inquiry through our school's Communications Office about preliminary aspects of the *Simpson* case, I have continued to receive telephone calls from the media, morning, afternoon, and night, office and home, asking that I "profess" my views about these legally topical events. And as I profess for a living, I have continued to be available to the media—television, print, and radio—in an effort to hopefully add to the public dialogue on topics of interest.

Yet, the sounding of the media alarm signals the disruption of what was seemingly another normal day of academia, my door open to receive the inquiries of students, along with one or two class hours of "dialogue" with budding attorneys. For once I agree to be on the airways at 9:05 a.m., the events of yesterday and the predictions for today seize control of an otherwise peaceful life spent training legal minds.

It is now time to watch the national news to catch its spin on today's media topic and to play last evening's *Nightline* on the VCR to see if Ted or Cokie happened to discuss pertinent events. Then, time provided, I will finish stretching and go out for a brief run to clear my mind, quickly get ready to go to school (didn't I wear that tie the last two days?), and wake the family and alert them I need a ride to school (being a one-car family saves on insurance, but can add to my temporary feelings of disorder).

I inquire about my wife's thoughts on that day's media topic, while our children try to grasp how they will be able to hear Daddy's voice on the radio while he is presumably at school. And, once ensconced in my office, I alert the Communications Office to today's phone call and then there's time enough for a quick scan of *The New York Times*, *The Washington Post*, *The Philadelphia Inquirer*, and *PointCast* via the Internet which allows me to learn other views on the topic of the day. Finally, my notes in order, I await the 9:05 call from our talk show host, hoping in the back of my mind to complete today's tour of duty in a 25-minute segment, allowing precious little time to prepare my mind for the friendly onslaught of this morning's upcoming classes. And, of course, there is the thought that it is likely I will hear from other media as the day progresses, each in turn asking for my views.

All this while, I am reminded of days gone by, although not all that distant, when an indigent client entered my Legal Services office, distraught because her landlord had padlocked her trailer or cut off her electricity or a finance company had seized her car or household goods. The weather is cold. The client has nowhere to go, or she needs her car to transport her to her below-minimum wage job or take her children to the doctor.

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4. *See generally* Ken Myers, *Browns Case a Lesson in NFL "Teamwork"*, NAT'L L.J., Feb. 19, 1996, at A1, *available in* WESTLAW, NLJ database (describing the City of Cleveland's case against the Cleveland Browns in which the City sought to enjoin the team from leaving Cleveland).

5. *See generally* Aric Press, *Are Lawyers Burning America?*, NEWSWEEK, Mar. 20, 1995, at 32, *available in* WESTLAW, NEWSWEEK database, 1995 WL 14496936 (describing possible legal reforms, including tort reform).

In such instances, the day suddenly became more turbulent as my colleagues and I, having been convinced of the legalities of the client's case, scurried about preparing and assembling the necessary paper work to hurry to court and find a judge willing to hear our presentation and hopefully afford the client the Temporary Restraining Order (TRO) we sought—to unlock the trailer, to reconnect the electricity, or to return the car to our client. We would strive to convince the judge, in the familiar vernacular of the legal profession: (1) that there was a substantial likelihood we would ultimately prevail on the merits; (2) that our client would suffer irreparable harm if the TRO was not entered; (3) that the balancing of the hardships outweighed whatever damage may be caused to the opposition; and (4) that the granting of injunction would not be adverse to the public interest.[6]

The hustle and bustle that results from the practitioner's attempt to get immediate injunctive relief is similar to the commentator's effort to instantly prepare himself for his imminent engagement with the media. Both require unhesitating attention to the details of the request at hand, whether it be that of the client or the media. Moreover, both lead to the advocate, whether as trial attorney or commentator, being placed in the unsettling position of going before an unknown forum. In the former instance, the tribunal is a somewhat sheltered setting consisting of a limited number of known persons and, in the latter, the advocate must brave a vast and faceless public. In both settings, one must provide enough information in an abbreviated time period to convince the listener of the merits of his position. And, finally, both of these efforts jumble one's day in an unforeseen manner; the practicing attorney must set aside otherwise clear-cut plans to work on discovery requests and trial preparation, while the academic reschedules student conferences, class preparation time, committee work, or time to read up on new developments before heading off to the classroom.

This Article represents an effort to share media experiences and to construct a pedagogy which will prove useful for those who aspire to be "talking heads." Accordingly, I have divided my recommendations into the four "P"s, which should prove useful to those anxious, willing, or otherwise involved in servicing

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6. *See, e.g.*, Narragansett Indian Tribe v. Guilbert, 934 F.2d 4 (1st Cir. 1991) (plaintiff failed to show other likelihood of success on the merits or irreparable harm in realty dispute).

An alternative test, termed the sliding scale test, requires a lesser showing on the merits if the movant exhibits greater potential harm and a clear balancing of the hardships in her favor. *See, e.g.*, Caribbean Marine Svcs. Co. v. Baldrige, 844 F.2d 668 (9th Cir. 1988) (preliminary injunction reversed because movant had not demonstrated irreparable harm or that the balance of hardship favored its position in instance where female observers accompanied all-male crew fishing for tuna in effort to enforce Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1406 (1972)).

A third test, introduced by Judge Posner, adopts an arithmetic formula for the standard in determining if a preliminary instruction should be granted. Essentially, if [PxHp]>(1-P)xHd, then the relief should be granted; in this formula, P represents the probability that denial is an error because plaintiff will prevail on the merits, Hp indicates the harm to plaintiff if relief is deemed, and Hd connotes the harm to defendant if the preliminary relief is granted. *See* American Hosp. Supply Corp. v. Hospital Products Ltd., 780 F.2d 589 (7th Cir. 1985). This attempt to mathematically formulize the process for granting preliminary injunctive relief has its genesis in Judge Learned Hand's algebraic endeavor to categorize the element of breach in a negligence cause of action. *See* United States v. Carroll Towing Co., 159 F.2d 169 (2nd Cir. 1947).

the needs of the media. Section II will discuss *Preparation*, the "behind-the-scenes" view of what it takes to ready oneself for the media. Section III explores aspects of *Performance*, whereby one becomes proficient in communicating her message. Next, Section IV suggests methods for *Perseverance*, in order to remain steadfast in light of the many inquiries which can come to the commentator's attention. Finally, Section V addresses *Posterity*, suggesting ways in which our work as commentators can benefit our students, the public, and ourselves. By design, and by way of personal experience, many of the ideas related in these sections will contrast the lives of the practitioner or academic, when serving as a commentator, in focusing on the urgent needs of his tribunal.

II. PREPARATION

A. *To Serve or Not to Serve*

Given the nature of the preparation, which by necessity goes into becoming an effective commentator, one must first ask if she wants to take on such responsibilities. Not surprisingly, there are many reasons that different individuals have chosen to do so. One motive is sheer altruism; for academics and others, serving as a commentator is a means of performing public service, of giving of one's time without pay.[7] The opportunity to work again in what I perceived to be the public interest served as an enticement which I could not ignore. My target audience was no longer only the indigent I had served in practice with Legal Services for over nine years; it was the general public, and I hoped my comments and answers would shed light and understanding on whatever the legal topic was for that given day.

I also believed that serving as a commentator would be "fun" and challenging. The media would provide an alternative forum to the classroom and allow me to be in contact, however indirectly, with a greater segment of the public. I would be placed in a position where I would have to defend my thoughts and views, thereby sharpening my analytical skills.

Lest I get too idealistic, one cannot deny that there are those for whom money, fame, or ego proved to be a real lure in serving as commentators. One example is Leslie Abramson, ABC News consultant, who earned a reported $4,000 a day to comment on the *Simpson* case; as she said, "I just need to make some money" after her work on the *Menendez* case.[8] Then there are Roger Cossack and Greta

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7. For example, University of Southern California Law Professor Erwin Chemerinsky received no compensation for his work as a commentator; Laurie Levenson, Professor at the Loyola Los Angeles School of Law, who served as the primary consultant for CBS on the *Simpson* case, donated all of her case-related earnings to charity. *See* Deborah Graham, *In the* Simpson *Spotlight*, A.B.A. J., Nov. 1995, at 49.

8. *Id.* (quoting Leslie Abramson) (referring to the murder trial of Lyle and Erik Menendez, who shot and killed their parents, *see* People v. Erik Galen Menendez and Joseph Lyle Menendez, No. BA 068880 (Los Angeles County Super. Ct. 1996)). Abramson was startled that she "could make a living by talking about someone else's case." Gail Diane Cox, *What's After O.J.? Withdrawal Sets In*, NAT'L. L.J., Dec. 4, 1995, at A1, *available in* WESTLAW, NLJ database, at *4. Abramson came close to hosting her own syndicated talk show, but instead continued to provide commentary to other television shows. *See Brief Notes*, ELECTRONIC MEDIA, Nov. 25, 1996, at 13, *available in* WESTLAW, ALLNEWS database, 1996 WL 12788684, at *6.

Van Susteren, who headed up CNN's *Simpson* trial coverage and have since graduated to their own legal affairs program, *Burden of Proof*.[9]

Still others have become involved for the sake of their business. As John L. Burris, a commentator on *Rivera Live* noted, he has "gotten a lot of calls" from potential clients and referrals outside his normal client base, thereby resulting in cases he "would not have gotten . . . without having this high level of visibility."[10] Moreover, it cannot be doubted that serving as a commentator provides exposure both for the commentator and his employer. This may provide a useful competitive edge for law schools, in these days of declining applications, and to practitioners in the marketplace. Finally, in certain employment settings or institutions, the commentator's work also may further his own advancement towards tenure or promotion.

B. Nothing Succeeds Like Excess

As Branch Rickey purportedly said, "[l]uck is the residue of design."[11] The "design" inherent in being successful in any field necessarily requires preparation. I admit to being somewhat compulsive about this; I would rather have knowledge of materials over and above what I will ever realistically put to use, whether in the classroom or the courtroom, so as not to be caught unexpectedly short. As a practitioner, I endeavored to stay current with advance sheets and new developments, as well as maintaining up-to-date pleadings files and a brief/memo bank to turn to on a moment's notice. As a teacher, I have valued the comments on student evaluations citing me as being "well prepared" and "topical." One can do no less when serving as an effective commentator.

Having been "enlisted" as a commentator, I began accumulating clippings files on various local issues of the day, ranging from the "hot" trials (*e.g.*, *Simpson*, *Smith*, local and state trials of interest) to ongoing investigations (*e.g.*, the Oklahoma City bombing) to public policy concerns (*e.g.*, litigation reform, tort reform). This meant reading both national and local newspapers and watching ongoing court proceedings as much as time allowed. The reality was that I had

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Abramson also is working on her autobiography to be published by Simon & Schuster. *See* Cox, *supra*, at A2, WESTLAW, NLJ database, at *4-*5.

9. *See* Cox, *supra* note 8, at A1, WESTLAW, NLJ database, at *3. In fact, Cossack wound up leaving his law practice for a full-time career in television midway through the *Simpson* case. *See id.*, WESTLAW, NLJ database, at *2. *Burden of Proof* has, in fact, proven highly successful; it has become CNN's most-watched program on its daytime schedule. *See* Bill Carter, *After the Verdicts, Will It Still Sell?*, N.Y. TIMES, Feb. 6, 1997, at B11, *available in* LEXIS/NEXIS, NEWS Library, NYT File. Even Marcia Clark, one of the prosecutors in the *Simpson* criminal case, is scheduled to begin her own television show, *Lady Law*, portraying women in law enforcement. *See id.* Moreover, of the at least 40 books written about the *Simpson* criminal trial, 17 have made the New York Times best-seller list; IN CONTEMPT, by Christopher Darden, another prosecutor in the *Simpson* criminal case, stayed on the list for 22 weeks. *See id.*

10. Graham, *supra* note 7, at 49. Of course, it may be that practitioners such as Burris and Abramson were so successful to begin with that potential clients sought their counsel; nonetheless, some commentators probably did receive new business based on their media visibility.

11. Rickey was the owner of the then-Brooklyn Dodgers. He was one of the leaders in the movement to bring about the long-delayed racial integration of major league baseball. The quotation reportedly came from his days running the farm system for the St. Louis Cardinals; while its original source is unknown, it comes to me from my colleague, and former Dean, John Maher.

to stay constantly prepared for the "call." I was not under "contract" with any particular television station, radio station, or newspaper; I could be called morning, noon, or night, and frequently was.[12] In reality, I could only speculate, based on the events of the day, when the phone would next ring. Needless to say, my assumptions were not always accurate. However, much like the practitioner who has his "model pleadings" ready to use instantly in pursuing immediate relief, I, too, felt a measure of confidence in the files I had accumulated.

True, there were times when I was "disappointed." There were certainly occasions when the phone did not ring on days when it appeared there were topical issues to discuss. Nonetheless, much like the practitioner in court or the professor in the classroom, it is far better to be overprepared than unprepared. The call may come, the question may be asked—be ready for it.

My clippings files soon expanded to contain my notes from various television interviews. I programmed myself to have the VCR ready for *Nightline* on a regular basis. I knew that I would not be awake to watch it at its unseemingly late East Coast time, but by taping it, I could review it the next day.[13] Mornings, I always kept the remote handy and quickly learned to channel-surf, all the better to catch each network's spin on the news of the day. After all, being a commentator means not only keeping up on the news itself, but on the views and manner of others positing their opinions. Commentators, much like budding professors and practitioners, can do their preparation by emulating the work of those who assist the media in understanding the legal issues of the day.

Nor is preparation a one-person task. I was gratified by the support of my colleagues, to whom I could turn when I suddenly found myself out of my substantive fields. Whether it be some background information on the basics of "fair trial" safeguards or parameters governing possible "jury tampering," I was fortunate to be able to rely on my colleagues to provide me with sufficient background and direction to confront possible inquiries.

My burden was further eased by the assistance of my wife, who was able to learn of broadcasts I might miss during the day, and update me on ongoing news events before my afternoon encounters with the media.[14] And, of course, my students were frequently willing to stop by and share interesting tidbits or inquiries about cases of note, all of which added to my food for thought. In the

12. Over the course of the past two years, I have served as a commentator for various television, radio, and print media well in excess of one hundred times. This number is dwarfed when compared to University of California at Los Angeles Law Professor Peter Arenella. At the height of the *Simpson* trial, Professor Arenella bought a beeper because he was receiving, "100 calls a day." Cox, *supra* note 8, at A2, WESTLAW, NLJ database, at *7.

13. I also learned to beware of *Monday Night Football* and how it can interfere with the normal routine of when to tape *Nightline*! At those times, I wound up watching two-minute drills the next morning, instead of Ted or Cokie or Forrest.

14. One should not discount family as a valuable source for information. At family get-togethers, conversation would inevitably turn to my work as a commentator and sparks would fly as "sides" were inevitably taken; I remember a dinner party at the house of one of my sisters where I enlisted her six other dinner guests to serve as the *Simpson* jurors, who were close to the end of the trial itself. The panel was split and the "deliberations" enlightening, all the better for my ongoing preparation.

end, preparation is not only the predecessor to performance, it is a step which, by necessity, continues daily to demand our energy and time.[15]

C. And the Question Is . . .

Most of us strive for some degree of control over our daily lives. The lawyer's need for a certain regimen in his practice may suggest a disciplined mind to some, a "control freak" to others. As law professors, we tend to have more control over our environment than practitioners, except for the occasional "zinger" of a question, which can sometimes be mirrored back for possible "answers." The call from a reporter can easily remove us from our comfort zone. We are asked to answer questions at that very moment or soon thereafter, with our pronouncements then being carried live over the airwaves or subject to later editing by print or television media. How does the commentator cope with giving up such control?

We begin by accepting the fact that the media seeks information not only to inform the public, but in order to sell its product (*e.g.*, newspapers) and thereby raise its ratings in various broadcast surveys.[16] The legal issue or the personalities involved become a "sellable item," with the public wanting to learn more about that topic.[17] As the number of lawyers has grown and lawyers have become more important players in a society where law seems to touch on every aspect of our lives, so, too, has legal journalism surged forward.[18] Given the constant crush of deadlines and the need to compete with other news sources, it is, therefore, not surprising that the media has turned to law professors to sort out legal issues and concerns.

Accordingly, it is neither presumptuous nor unprofessional for the commentator to ask the journalist, prior to the actual interview or broadcast time, the areas that will be covered and the questions that will be asked. This information will be provided in many instances, because in general, such sessions are more collaborative than confrontational. The journalist's goal is most often simply to foster an intelligent discourse on the issues of the day.

In certain instances, the topic suggested by the journalist may be so general as to give the commentator reason to pause and wonder if he is being drawn into a discussion of a local political dispute, such as a zoning or county commission matter. If so, the commentator should not hesitate to ask the journalist to put her

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15. The American Bar Association has itself this year established a High Profile Mentor Team, which is to "help lawyers and judges in highly publicized trials deal with unique, unexpected, and unavoidable problems." Mark Hansen, *Weathering Media Blitzes*, A.B.A. J., Apr. 1996, at 100. This "team" should help judges in high profile cases to accommodate both the needs of the media and the needs of the lawyers involved in the case. *See id.* The team provides expertise in the management of media relations, as well as advice on managing the trial itself. *See* Robert A. Stein, *Help in High-Profile Trials*, A.B.A. J., Feb. 1997, at 93.

16. *See* Jack B. Patrick, *The Case of the Famous Client: Effects of the Media on Ethics, Influence, and Fair Trials*, ARMY LAW., May 1988, at 24.

17. *See id.*

18. *See* Rorie Sherman, *The Media and the Law*, NAT'L L.J., June 6, 1988, at 32, *available in* LEXIS/NEXIS, Genfed Library, NTLAWJ File.

inquiry into more specific factual context; this will allow the commentator to better respond to the investigative reporting of a budding Woodward or Bernstein.

Additionally, it is not unusual for the commentator to suggest to the journalist, in advance, other questions which the journalist may wish to pursue.[19] In sharing such information in advance, the commentator and journalist have clearly embarked on a relationship built on trust: no surprise topics, no surprise questions. The more the commentator knows about his medium and his reporter/host, from word of mouth and the experiences of others, the more that trust is well placed.[20] He may even be able to establish certain "ground rules" allowing him a certain amount of time to research a topic before responding "on the spot" to the journalist's inquiry.[21]

However, beyond the setting of the agenda and the boundaries of the questions to be asked, it is unrealistic for the commentator to expect to have greater control over the results of his encounter with the media. He will not be provided the resultant newspaper article or edited tape in advance; nor will he have ultimate control of the broadcast to be dispersed live over the airways. Knowing the issues can help us glean from our files and our internal storehouse of knowledge the information with which we need to respond. How we respond becomes the next hurdle.

III. PERFORMANCE

A. *And the Answer Is . . .*

The law professor begins his lesson plan by considering his goals for the day's topic and then determining how best to get there. The legal practitioner knows her closing argument in advance of the trial, and everything one does at trial is meant to support that argument. Both experiences help to prepare the commentator for her day in the court of public opinion; she knows the key points she wishes to make. Now comes the execution of that lesson plan.

The most effective performance is one that looks and sounds unrehearsed. This execution results from the skillful organization of one's thoughts in advance of contact with the media and the application of skills that have been honed over the years of both teaching and practice. Our experience has enabled us to have

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19. *See* David A. Harris, *Talking Heads: Effective Television Techniques for Academics*, 44 J. LEGAL EDUC. 207, 211 (1994).

20. That much being said, it is still possible to be waylaid by a journalist's inquiry. In one instance, the talk show host and I had an ongoing relationship which suddenly veered away from the agreed-upon discussion on the *Simpson* case to wholly surprising questions about the "McDonald's hot coffee case," Liebeck v. McDonald's Restaurants P.T.S., Inc., No. CV-93-02419 (N.M. Dist. Ct. filed March 12, 1993). Fortunately, over a station break, I was able to dig up materials on this litigation from one of my clippings files and offer suitable responses. Once off the air, the host was "apologetic" for his "left turn"; still, the trust between us had been fractured. For a description of the "McDonald's hot coffee case," see Press, *supra* note 5, at 32, 1995 WL 14496936, at *1; see also S. Reed Morgan, *Liebeck Attorney Gives Side of Hot-Coffee Case*, ALBUQUERQUE J., Oct. 3, 1994, at Business Outlook 2.

21. Thank goodness for voicemail, which allows us the built-in capacity to screen calls in advance and, thus, play for a little more time.

confidence in our abilities to analyze and to think on our feet, as well as to communicate in an effective manner.

It is often said that a lawyer's words are her stock in trade. The commentator should know in advance what she wants to say and select the appropriate words to communicate that message. Our responses to the media should help to explain the law and put events in proper perspective. For days on end, or so it seemed, I was asked to analyze the conduct of the attorneys, the witnesses, the jury, and Judge Ito in the *Simpson* case. I endeavored to demystify the process by providing brief answers, in short but complete sentences, using simple words. I quickly learned that the media and its audience became more engaged when I spoke in "plain English," avoiding the jargon of the legal trade. Occasionally, I would need to pause to find the precise words I needed, which helped maintain a semblance of control. Much as in the classroom, I knew the ability to be thorough while at the same time reminding myself not to rush through explanations. In certain instances, I became aware that I needed to seize the initiative to help "steer" the journalist, who may not have been as knowledgeable as he had thought on particular aspects of the law. This sometimes required a brief summary of the law or the revisiting of certain "war stories" to cast a practical light on the journalist's inquiry.

As with most "answers," there is frequently a caveat. The manner in which the commentator presents his ideas will be affected by the medium he is addressing and its potential audience. I have been fortunate to have had the opportunity to work as a commentator for the press, television, and radio, as well as to have been exposed to the grilling of talk show hosts and questions from listeners calling in to the studio. Each of these three media have considerable followings.[22] A large percentage of the population considers network or local television news, newspapers, or local radio news and radio talk shows as extremely or very important sources for news and information.[23] Each of these sources has its own significant following and the mechanics of serving as a commentator varies for each medium.

B. *So Much to Say . . . So Little Time*

The lawyer who seeks a TRO is impinging on the court's limited resources and time to seek extraordinary relief. Accordingly, she must be prepared to state her case concisely and to the point, as well as to provide the precedent and facts necessary to substantiate this accelerated request for relief. In addition, the

22. *See* STATISTICAL ABSTRACT OF THE UNITED STATES, No. 898 (1995). In general, 42% of the populace spends less than three hours watching television, whereas 33% listen to the radio and 30% read newspapers for a similar time period. *See* GEORGE GALLUP, JR., THE GALLUP POLL: PUBLIC OPINION 1991 48-49 (1991). More people watch television than listen to the radio, and more people listen to the radio than read newspapers. However, people with either a college education or a household income in excess of $50,000 read the newspaper more than they watch television or listen to the radio. *See id.*

23. When asked to indicate how important each news service was, 57% of the populace ranked local television news extremely or very important; newspapers received a 53% response, network television news a 50% response, local radio news shows a 32% response, and radio talk shows an 11% response. *See* GEORGE GALLUP, JR., THE GALLUP POLL: PUBLIC OPINION 1995 118-20 (1995).

scheduling of the hearing for the TRO also disrupts the court's normal schedule, so it is imperative for counsel to quickly convince the court of the merits of her position.

Similarly, commentators also are limited by the time afforded to them by the media to respond to various requests for information. Journalists have deadlines, shows must be broadcast on time, and the presses must run. Moreover, the item on which the commentator has been asked to respond is usually not the only item on the journalist's docket for that day. The amount of time in which to perform is at a premium; the commentator must use it wisely.

My experiences in serving as a commentator for local news radio programs illustrate the commentator's potential plight. On one particular program, the host was quite verbose. A self-proclaimed anarchist, he also had a huge chip resting on his shoulder against lawyers and the "system." It quickly became clear that I was his chosen target, the culprit responsible for leading future recruits into his vision of a legal abyss. While my appearances on this show would last for twenty-five to fifty-five minutes on the average, I soon learned how to handle his surly nature. I maintained a professional demeanor, refusing to lose my cool or raise my voice in response. I became well versed in talking in sound bites and refrained from trying to talk over my host. I also became more adept at wrapping up my comments as the "sign-off" music played in the background, indicating an upcoming commercial break. During those breaks, my host assured me that his comments were not meant to be "personal," but only to be "provocative." I used those breaks to suggest other areas to probe, upon our return to the air, and to suggest inviting calls from listeners.

Fielding live telephone calls adds another challenge to the commentator's task. It is important to treat all callers with a measure of courtesy and patience, even while dealing with the occasional irate listener. The commentator should remember the level of her audience and respond in an interesting and understanding manner, possibly disarming hostile callers with the use of humor. The commentator sets an example for callers. Her preparation, civility, tact, listening skills, and ability to provide feedback can potentially calm, though probably not convince, even the most disagreeable caller.

The commentator should personalize her callers and their ideas, calling them by name and inviting their opinions while inquiring into the bases for those opinions. It is, admittedly, difficult to listen to questions when one's mind is racing on to something else; nonetheless, the commentator should do so and respond accordingly, much as she would do in the classroom. Nor does it bode well for the commentator to belittle or intimidate callers; again, one's experiences in the classroom suggest that a lack of caring will appear to be a "form of alienation"[24] to her audience. The commentator can thus assure further participation from callers by involving them in the process, showing concern for their ideas even while potentially disagreeing with them. And, occasionally, if

24. James R. Elkins, *Rites de Passage: Law Students "Telling Their Lives"*, 35 J. LEGAL EDUC. 27, 51 (1985).

the switchboard lights are ablaze and the host is pleased, one may even be given an extension of time to continue her performance![25]

C. *Yes, There Are Differences*

Most of my experiences as a commentator have been with radio journalism. I have found this to be my preferred medium because it provides a greater chance to maintain some control over an otherwise uncertain situation. While it is true that the radio host can talk over me and cut me off for commercial breaks, at least I know the general time limitations in advance and can thus appropriately address my comments. I have also enjoyed the "give and take" with radio hosts and callers, which invariably provides greater flexibility in raising further points that I believe are essential to provide meaningful information. And, speaking from the comfort of my office by way of hookup to the station, I can explore my files as I speak, with important notes spread out in front of me or available for me to peruse during breaks.

By contrast, I have found television and the print media (and for that matter, taped radio comments) more troubling, due to my general lack of control. I view television interviews as a form of "working without a net" (*i.e.*, notes). Even though I have my abbreviated notes available on file cards at my side, I have found that it is extremely difficult to steal a glance at them once on camera. The editing process also leaves much to be desired; it becomes more imperative to speak in catchy sound bites, given the reality that only minimal footage of one's comments will likely escape the cutting room floor.[26] And even that segment which appears may not be to the commentator's satisfaction. He may believe the part which was cut really contained the guts of his message.

I admit to having less concerns about print journalism because I have my notes to fall back upon as necessary. Yet, the editing process once again prevents any ultimate control by the commentator. Furthermore, words in print live on far longer than those accompanying a brief image on the screen. Thus, preparation and performance take on even greater importance.

D. *A Final Caution . . .*

Enthusiasm in the classroom can be contagious. Many times as law professors we try to be fresh, entertaining, and stake out new ground in challenging students to expand their horizons. Conversely, as a commentator, it is best to maintain one's objectivity and not take sides. This does not mean that we should be dishonest in our opinions. It simply means that the commentator should be wary when asked for her legal opinion or advice and should not feel forced to gaze into a crystal ball and make predictions. There are many instances in which she does not have all the facts. She, therefore, would better serve the public by

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25. While this occasionally did happen, I always had in the back of my mind a "set" time I would need to "disconnect" and get ready for class.

26. I well remember a two hour interview with a local television station, accompanied by several Dickinson School of Law students, from which approximately twenty seconds emerged on the news. And yet, the footage, covering the awaited *Simpson* verdict, was part of the lead story that evening.

expounding on the law and explaining what the parties must prove in order to prevail.

An example is the commentary I provided on the Cleveland Browns' proposed move to Baltimore. I was asked if the Browns had the right to move and if, accordingly, a request for a preliminary injunction sought by the City of Cleveland would be denied. At that time, the facts were quite muddy regarding the terms of any agreements, whether in writing or otherwise, between the parties. I, therefore, responded in a non-judgmental manner, sorting out the legal burdens facing each side and refraining from issuing my own decree.

We need not be backed into a corner and feel required to answer the unanswerable. The inherent risk is a possible distortion of our views and the resultant lack of credibility.[27] Therefore, present a balanced view, because only the judge and jury actually hearing the case in controversy are privy to all the admissible evidence and sheltered from out-of-court histrionics.

IV. PERSEVERANCE

A. *I Used to Have a Life*

One's daily livelihood as a law professor generally provides more than enough activities to assure his hours are well filled. Whether it be teaching in the classroom, conferring with students, coaching or judging trial teams, researching and publishing, grading and editing papers, keeping up with legal developments, revising classroom materials, fulfilling committee and bar commitments, performing community service, or attending and speaking at conferences, there is never a shortage of work to be done. Yet, each of those tasks usually affords the possibility of scheduling within a flexible time frame; our professional lives are quite occupied, but for the most part very sane.

However, a law professor can quickly find his tidy little world has become undone once he begins working as a commentator. If he agrees to offer his views, prepares, and thus performs well, he can likely expect calls bidding for his knowledge at all hours. I would receive calls as early as 6:45 a.m. and as late at 9:30 p.m., as well as calls throughout the day, whether workday or weekend.

My work as a commentator soon cut into family time, preparation time, committee time, and student time; in short, my work with the media came to dominate my life.[28] This was especially true when multiple inquiries from different journalists came in throughout the same day.[29] I suddenly felt like a first-year law student all over again: having established myself as a credible

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27. *See* Erwin Chemerinsky, *Trial Over,* Simpson *Analyst Re-Evaluates*, A.B.A. J., Dec. 1995, at 100.

28. *See, e.g., id.*

29. For instance, on the night preceding the *Simpson* verdict, I received several calls from journalists asking for my comments on the closing stages of the case and my predictions on the verdict. Those calls continued the next morning up until the verdict was rendered and published; several media, including television, radio, and newspaper, asked me to be available once the verdict was read. I did my best to handle the onslaught of inquiries that followed throughout that day and the following day's aftermath.

commentator, my opinion was sought not only by journalists, but by family, friends, students, and our housing contractor and his workers![30]

Realistically, it is hardly surprising that media contacts so alter one's otherwise fairly placid life in academia. The very essence of news is its topicality; issues and the public's focus on them vary from day to day. The commentator must, therefore, respond when the issue is still "hot" and in the public's mind.[31] Otherwise, the passage of time will decrease its news value.[32] Nonetheless, the media's request for the commentator's instant availability can cause the commentator to question if there is a way to handle his responsibilities while still having a life.

B. Setting Limits

It can be difficult, but certainly not impossible, to re-assert some measure of control over your life once you have begun serving as a commentator. We all have our limits, although few of us will readily admit to them. Clearly, there are only so many hours in the day, and the responsibilities of the law professor are manifold. The commentator must know how much he can handle in addition to his other responsibilities.

Much like a practitioner, he should not handle areas beyond his expertise.[33] I was fortunate to generally be asked to comment in areas in which I had practiced (litigation) and taught (Evidence, Advocacy, Professional Responsibility, Products Liability, Torts, and Remedies). However, when I was asked to comment on issues involving child custody, executive privilege, or victims' rights legislation, I realized that both the media and I would profit by a referral to one of my colleagues. In those instances, I would attempt to educate the journalist as to the complexities of the law and its ambiguities, allude to my own limitations, and point out the merits of having a colleague in that specialty serve as a possible commentator.[34] This not only helps "expand the pie" of possible commentators, but also serves to limit the risk of losing one's credibility when treading into unknown waters.

30. One commentator, Erwin Chemerinsky, noted that, as his wife was going through the final stages of labor, her doctor and nurses "wanted to talk about the O.J. case." *See* Graham, *supra* note 7, at 49 (quoting Erwin Chemerinsky).

31. As one commentator noted: "When the issue is hot, it's news. When it's cold, it loses its news value .... That is the way the news game is played in this society." Clarence Jones, *Media Relations Law: When Lawyers Have a Duty to Talk to the Media*, FLA. B.J., June 1984, at 404.

32. For example, I was asked by three separate journalists to be available to comment on the *Smith* verdict when it was rendered. As my family and I were on the verge of beginning travel on a family vacation, I asked if I could contact those journalists' stations "from the road." I was told that would be fine; however, this proved unnecessary because the verdict was entered prior to our trip, and I was therefore able to provide commentary from my home area code. One station asked if I could call in the next day to provide further comment; when I did so, I was told they did not need any further views, because the verdict was now "old news."

33. This would otherwise be quite time-consuming, especially in preparation time. Beyond that, even once interviewed, the commentator may still feel somewhat like a fish out of water in discussing this new area. *See, e.g.*, Harris, *supra* note 19, at 210.

34. I stress "possible" because, of course, not everyone wishes to serve. In those instances, I would advise the media that I would sound out my colleagues concerning possible availability and subsequently let the media know of this prospect.

It is also appropriate to try to set limits on your own time. Admittedly, I learned to predict generally when the early morning calls would come in, based both on legal developments of the preceding day (for example, allegations of jury tampering in the *Simpson* case,[35] Judge Howard's decision to ban cameras from the courtroom in the *Smith* case[36]) and the gnawing feelings of unrest in my gut as the clock approached 7:00 a.m. On those occasions, I would try to re-arrange my schedule in advance, whether it be doing my final class preparation the night before, re-scheduling conferences, or alerting colleagues that I would not be attending a particular meeting. In other instances, I would politely thank the journalist for her inquiry, attempt to learn how much lead time she had before she needed my response, and try to arrange a later time to be available as a compromise to both of our schedules.

In most instances, I found journalists to be quite accommodating, as much as their deadlines would allow. Occasionally, I was able to delay responding to that morning's inquiry until the afternoon or that afternoon's inquiry until the evening. At various times, I would use my home answering machine or office voicemail to screen calls in advance, thereby learning the topic sought to be discussed and the pertinent time frame. This would allow me additional time to gather my thoughts before responding to the inquiry. Regrettably, there were those rare instances in which the reporter's deadline and my schedule did not mesh. In those situations, I would express my regrets, try to find an appropriate referral, and suggest my willingness to handle future inquiries. And far more times than not, I received them.

Setting limits need not be draconian; my own view is that, oxymoron though it may be, one needs to be flexible in setting limits. One example that comes to mind involved a request that I serve as a commentator on a radio show at 10:00 a.m. that same morning. I advised the radio host that my family and I would be in transit at that time to a local children's pizza restaurant featuring an ever-present seven-foot tall costumed mouse.

The host indicated he could delay my views until 11:00 a.m., and asked if I could call him after we were situated in the restaurant; I told him I would do so. As luck would have it, I was able to prevail upon the restaurant's manager to let me use his office for that thirty-minute radio segment; it turned out the manager was a regular listener of the show. Other than for the image of that seven-foot mouse walking past the office, it was a veritable studio. Flexibility worked!

Finally, the commentator must remain steadfast when asked to answer questions to which there are not any clear answers. As a law professor, I have occasionally encountered this in the classroom. An "I don't know" is not the worst response, especially if used in rare instances; it may actually "humanize" the professor in students' eyes. More times than not, possible "answers" are sought by bouncing the question back to the class to analyze based on what the students already have

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35. *See, e.g.*, Jane Hall & Tim Rutten, *Jury Tampering in* Simpson *Case?*, HOUSTON CHRONICLE, Mar. 30, 1996, *available in* WESTLAW, ALLNEWS database, 1996 WL 5589881; at *1.

36. *See Judge Bans TV from Trial of Susan Smith*, L.A. TIMES, July 1, 1995, at A4, *available in* WESTLAW, LATIMES database, 1995 WL 2061370, at *1.

learned about law and public policy. At other times, students and/or the professor herself can be "assigned" to research the "answer" for the next class. Even the practitioner, when stumped by the tribunal, can request leave to file a supplemental brief responding to a particular inquiry.

By contrast, when the commentator has been billed as the "expert," it becomes more difficult to satisfy inquiries by merely disclaiming any knowledge. In these situations, the commentator may wish to reframe the question in an effort to point out what he views as the "real" issue.[37] The commentator should be admonished not to "guess" at the answer or provide an uneducated, instantaneous opinion without mulling over the question or its implications. The consequences resulting from a superficial or erroneous response may undermine the commentator's credibility in future comments to the media.

V. POSTERITY

The commentator's work benefits several constituencies. The primary beneficiary is, perhaps, the public. The commentator has the necessary background to help to explain the law, put events into perspective, and help lay people to understand seemingly complicated developments by providing intelligible and concise explanations. These explanations can help to demystify court proceedings and put rulings into proper perspective.[38] In essence, the commentator educates the public and encourages it to think more deeply. This is clearly a major role, given the impact of the news and the public's need to receive clear, concise information.

Moreover, as the number of practitioners has increased and society has grown more litigious, attorneys have become, as previously stated, even more important "players" in a world where law touches on so many aspects of everyday life.[39] The legal commentator can provide not only a service to the public, but also to the Bar, by agreeing to spend time in the media's focus.[40] In days when lawyers

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37. Two potential "I don't know" instances quickly come to mind. One involved the Cleveland Browns' planned move to Baltimore; the inquiry was addressed to whether the City of Cleveland could enjoin this move. At the time of the inquiry, emotions were running high, but facts were not in abundance. I reformulated the issue to reflect the difficult burden Cleveland would have under the antitrust laws and standards for preliminary equitable relief, but noted that it was incumbent to first explore the actual lease provisions in effect between the Browns and Cleveland. The other situation involved a question the morning of the *Simpson* verdict. A journalist asked what would happen if before the verdict was actually read, a juror died; would this present grounds for a re-trial, since that juror could no longer be polled? (Truly, an academic question, if there ever was one.) I commended the journalist on his question and went on to state that this would have to be analyzed under state statutes addressing the required polling of jurors and issues of fairness under the Due Process Clause.

Both of these responses satisfied the questioners at those particular moments. The answers also provided time to further research those issues should they arise again.

38. *See* Laurie L. Levenson, *Reporting the Rodney King Trial: The Role of Legal Experts*, 27 LOY. L.A. L. REV. 649, 650, 652 (1994).

39. *See* Sherman, *supra* note 18, at 32.

40. Interestingly, very little has been written about possible ethical standards to govern the work of the legal commentator. *See, e.g.*, Levenson, *supra* note 38, at 659, n.33. This is likely the result of the new role that commentators are playing in their work with the media. *See* Chemerinsky, *supra* note 27, at 100.

in general are increasingly the target of ridicule and bathroom humor,[41] legal commentators can help to contribute to a more positive image of attorneys through their contact with the public, both directly and indirectly, via the media. Those who speak with the legal commentator over the airwaves or learn of her views by television or the print media will hopefully come away with a more positive image of attorneys, both as professionals and as human beings.[42]

It is not surprising that the media turns to law professors to clarify and enlighten itself and the public on the nuances of the law and the justice system. We are likely viewed as authorities in our fields, untainted by the perceived wiles of practice, ever resolute to think deeply about issues and matters of public policy. Yet, whether academic or practitioner, the commentator's performance in the court of public opinion can help enhance the image of the Bar itself.

Similarly, the professor's work can be of value to his students. Like it or not, law professors cannot help but provide some version of what is or is not good lawyering to their students.[43] In effect, the example we set, both inside *and* outside the classroom, is instructive for our students. Mere encouragement of public service is likely not as effective as taking the lead and providing a walking, talking, case in point. My work as a commentator, while in some ways making me less available to the students themselves, also served to enliven class discussions.

I was able to use examples from "hot" cases involving Colin Ferguson,[44] Susan Smith, O.J. Simpson, and the Oklahoma City bombing investigation and trial to illustrate principles in my Evidence class. My media commentaries on tort reform, ranging from the "McDonald's hot coffee case"[45] to pending products liability legislation,[46] have provided materials for discussion in my Torts and Products Liability classes. In my Remedies class, to illustrate the mechanism of an impending injunction, I used the Cleveland Browns' proposed move and Cleveland's request for an impending injunction.[47] I trusted that my work as a commentator added to my credibility as being a "real lawyer" in the students'

41. *See, e.g., No Joke*, NAT'L L.J., May 20, 1996, at A-18, *available in* LEXIS/NEXIS, Genfed Library, NTLAWJ File.

42. During my stint as a commentator, I have received several kind notes from individuals thanking me for having served as a commentator, one of which expressed "admiration" for my "self-control" in coping with particular callers and thanking me for my "insights" into the American legal system. Even the foreman for our building contractor, while expressing frustrations in handling our punch list, stated that he had come away with a better understanding of attorneys and what we do.

43. *See* Carrie J. Menkel-Meadow, *Can a Law Teacher Avoid Teaching Legal Ethics ?*, 41 J. LEGAL EDUC. 3, 3, 9 (1991). I remember one student commenting to me after completion of one of my courses that she learned more from how I comported myself in class and answered questions than perhaps any other aspect of the course; I *think* that was meant to be a compliment.

44. Colin Ferguson was tried and convicted for the murder of six people he shot to death on a Long Island commuter train on December 7, 1993. *See generally* Jerry Adler, *Bloodied But Unbowed*, NEWSWEEK, Apr. 3, 1995, at 54, *available in* WESTLAW, NEWSWEEK database, 1995 WL 14496482. Ferguson represented himself at trial. *See id.*

45. Liebeck v. McDonald's Restaurants P.T.S., Inc., No. CV-93-02419 (N.M. Dist. Ct. filed Mar. 12, 1993); *see also* Morgan, *supra* note 20, at Business Outlook 2.

46. *See generally* Press, *supra* note 5, 1995 WL 14496936.

47. *See generally* Myers, *supra* note 4.

eyes and that the class discussion of these issues of contemporary public interest from my own media experience put a different spin on course materials. Indeed, I have received considerable positive feedback from students.

Gradually, I changed the format of my Evidence class to allow and encourage students, at the beginning of each class hour, to inquire about current cases and how they were affected by particular rules of evidence we had been or were discussing. The response was encouraging. The students seemed to learn better when exposed to concrete examples from ongoing "real world" cases. I no longer had to rely on my aging war stories but had a whole new arsenal of material to enhance the students' education.

Finally, on a personal level, I will readily admit that my work as a commentator deepened my own understanding of the law. Being exposed to uncensored questioning by the media and the public presented a new challenge, one different than the more predictable and, comparatively, comforting questions received within the classroom or even the courtroom. I confronted an audience different than that to which I was typically accustomed, one that was faceless, far more vast, and generally legally unsophisticated. The ability to "think on my feet" allowed me to explain matters in a way that was not only accurate, but also compelling and understandable to the average lay person. I thus shed the layers of legalese that saturate us in the law school setting.

I would learn from each new experience with different journalists and from calls from listeners; it helped me to better appreciate the levels of sheer confusion and misunderstanding much of the public has with attorneys and the legal system. Curiously, while there was some repetition from day to day, from host to host, and from caller to caller, I discovered most questioners truly desired to learn more about the system of justice in this country. The effect on me was energizing. Learning was a two-way street, definitely for me and, hopefully, for the public.

I also received my own personal feedback. Comments from my family, friends, colleagues, students, alumni, and members of the public were both kind and encouraging.[48] Perhaps the nicest boost to my confidence was when a particular radio host started using ideas I had discussed during earlier programs and when various law students called in, anonymously, of course, espousing views notably similar to those we had discussed in class. My wife was my most

48. I even began receiving what I perceived to be "fan" mail. One particular episode will always stay with me. My parents were visiting us and happened to listen to the radio one morning when I was the commentator for a three-hour block of time, fielding questions from the radio host and several callers. When I returned home, my parents congratulated my performance; my mother commented that "she never knew I was so smart." That, too, was a compliment, I think. Since that occasion, my father has continually asked, during his letters and telephone calls, about the recent media inquiries I have received, as well as remaining insistent that he receive a copy of this Article upon its publication.

Nor has my wife been spared from various comments. Most recently, after a bad fall, she visited our family group of physicians for a diagnosis. The particular doctor on call noticed her last name in the file and inquired "Is your husband that radio celebrity?." He then went on to ask about my most recent media commentary, as well as about my teaching package and other miscellaneous information. The small talk concluded, his probing of my wife's ankle reminded both of them why she had visited his office ("Does that hurt?," as my wife winced noticeably in response.)

objective critic, many times lending constructive criticism to my efforts. I was also fortunate that she kept recorded tapes of radio news and shows for which I provided commentary. Perhaps I will one day subject myself to hearing my own voice for further self-analysis.

And, yet, despite my overall positive feelings on having served as a commentator, I am aware of certain risks inherent in my new responsibilities. In certain instances, as in the *Simpson* case, the commentator faces the danger of becoming associated with the very "sleaze factor" and "carnival atmosphere" that, to some, permeated that trial.[49] Clearly, the commentator should select her media carefully as well as act professionally in all instances. This means properly preparing and performing, using the skills we have learned in the classroom and the courtroom.

Moreover, some have commented that the law professor who serves as a commentator risks tarnishing his reputation in academia, implying that such work is somehow beneath the academy's image of itself. I fear that this is true at some schools; at others, including my own, my experience has been viewed by the administration as being positive for the Law School's image, as well as having been appreciated by the students.

Finally, there is always the concern that journalists can get facts wrong or misstate the law, resulting in misconceptions or misquotations. There is little that can be done to prevent this from happening; the commentator needs to consider whether she trusts that the particular journalist will understand her message and then carefully frame responses to questions, as well as communicate ideas as coherently as possible. This may, at times, involve an effort by the commentator to "educate" the journalist on the various intricacies of the law. Subsequently, she may seek feedback prior to the close of the interview to ensure that the message was properly understood, as well as affirmatively offering to be available if questions arise during the editing process.

VI. FINAL THOUGHTS

My work as a commentator has proven to be an invaluable experience for me. At times I have felt like the proverbial fish out of water, being placed in what I then believed to be a "sink-or-swim" situation. However, I soon came to view my newfound responsibilities as providing a fresh forum for a different kind of teaching. There is no denying that the work can be demanding and tiring, an infringement on one's privacy and a nemesis to what would otherwise be a normal, orderly day. Nevertheless, the benefits are numerous: to the public, to the Bar, to students, and to one's self. Given the proper preparation, performance, and perseverance, the educator can positively prevail in the court of public opinion.

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49. *See* Graham, *supra* note 7, at 49. Judge William Howard, who presided over the *Smith* trial, noted during a speech at The Dickinson School of Law in December, 1995 that part of his decision to ban cameras from the courtroom was due to this concern.