

## THE ROLE AND RESPONSIBILITY OF THE COURT

LEVI: This panel is on The Role and Responsibility of the Court in high-profile cases and we have a wonderful panel to address this topic. There couldn't be a better one.

Seated next to me is Gary Hengstler, who is the Director of the National Center for Courts and the Media at the National Judicial College. He was previously editor of the ABA Journal. He has been a practicing lawyer and a practicing journalist sometimes at the same apparently.

Lee Millette seated next to him is Chief Judge of the Circuit Court of Prince William County where he has served since 1993. He's an adjunct faculty member at the National Judicial College. He was the presiding Judge at the trial of John Allen Muhammad, the DC sniper and the 1993 trial of John Wayne Bobbitt.

Terry Ruckriegle is the Chief Judge of the Fifth Judicial District in Breckenridge, Colorado. He has served in that capacity since 1994. He has been President of the Colorado District Judges Association. He presided over the Kobe Bryant rape proceedings.

Seated next to him Judge Reggie Walton is a United States District Judge for the District of Columbia. He also serves on the Foreign Intelligence Surveillance Act Court. He has served as the Associate Director of the Office of National Drug Control Policy, the Drug Tsar position. He presided over the recent trial of Lewis Libby.

David Sellers is Assistant Director for Public Affairs at the Administrative Office of the United States Courts where he oversees media relations, publications, and broadcasting. He is President of the Conference of Court Public Information Officers, and he previously covered the courts for The Washington Times.

Our purpose here today is to consider the role of the judiciary in dealing with high-profile cases. Judges have a variety of tools that they have used traditionally to insulate the trial process from corruption, from outside influence and distortion, including pretrial publicity. We think of change of venue, gag orders, special jury selection procedures such as anonymous juries, the sequestration of juries, all of these are tools the judges have used. And the question is posed and it has been posed

by this conference, are these traditional tools adequate in this era in which we live when the media is no longer traditional?

Judges are used to two-party criminal litigation and to a certain degree two-party civil litigation and those parties are before The Court. What the judges do when some of the parties most interested in the litigation are not actually before The Court and subject to direct supervision.

Gary Hengstler is going to tee up some of these issues for us. Mr. Hengstler.

HENGSTLER: Thank you, Dean Levi. It strikes me that in the previous session we were talking about how the media needs to be factored in and that's happening not only in public service organization, it's happening throughout our world, and I think that is one of the primary reasons why the National Judicial College and the Reynolds School of Journalism wanted to create this Reynolds National Center for Courts and Media, because what we're doing at the National Judicial College is to the extent rules permit and judges are interested we are trying to educate judges about the media and how to respond and how to have a judicial strategy for the media.

Why is this important? I like to begin these kinds of discussions with a quote from Judge Learned Hand. He said, "The hand that rules the press, the radio, the screen, and the far spread magazine rules the country." He added, "We may not like it, but that's the way it is."

What strikes me about that quote is that he said it in 1942. What would he say today with television, the internet, the cable, all of the things you've been talking about the past two days? There is a pervasiveness for the media. And maybe you've already covered this. I apologize. I had to conduct another session yesterday outside of this area, but I think one of things we're all wrestling with not only in the judiciary but in the media itself is who makes those editorial decisions now.

When I went to journalism school, this was almost a religion. Serve the public by keeping them informed. Bleed the First Amendment. It was a passion. One of the problems I see today is that the mergers of corporations and the decision makers taking the pulse through marketing, accounting, MBAs, editorial decisions are not being made by true journalists in the sense of public service to the

extent they use to.

And consequently we've bled over to entertainment. It's okay. It's been a couple of months now. Bill O'Reilly, let's pick on a judge so we can get some ratings. Nancy Grace, let's be shrill not because you want to illuminate an issue, but because you need the ratings. Well, why are the ratings important? Well, just ask Judge Judy for \$30 million. It is a commodity and that's the thing the courts have to deal with. Justice is in the entertainment and the media field becoming a commodity.

So that calls me to think about the questions. Shepherd v. Maxwell is more than 50 years old and it not only gave judges the responsibility for ensuring a fair trial and virtually insulating the press from having any role or responsibility for the fairness of a trial, but gave judges certain tools to try to control the adverse impact of publicity particularly in jury trials.

Well, one of those that I like to focus on are the protective orders. If you're a journalist, they're a gag order. If you're a judge, they're a protective order. And the question I want to pose just to start the

conversations, how effective are they? Because in this 24 hour news cycle, if the lawyers who have the information, if the witnesses who have the information, are not allowed to talk to the media, who is going to talk? Those who want to speculate. Those who have heard something.

So if the goal is accurately informing the public, have we reached the point where these protective orders are actually not working and doing the reverse of what they were intended to? Because you can talk to Lucy Dalglish or any of the leaders in the journalism community and they will get a call from Nancy Grace or from one of the talk pundits saying we need you to come in and talk about that and she will say this is not my area. I can't talk about this. Well, that's all right. We need someone. If you can't, we'll get someone. And you've seen it. You have seen the people on television, the lawyers who want to be in that limelight.

And I suppose the question is to what extent is that counterproductive in terms of our overall goal of informing the public about the trials, the process, so that they have the confidence in the judicial integrity?

LEVI: Thank you. Judge Millette.

MILLETTE:

One of the best things about being a trial judge is you get the last word. Unfortunately today the last word after all the two days we've had of excellent commentary is very difficult, and I just hope that not everything that's important has been said. So I guess this is the ultimate revenge by making us go last.

I want to tell you first of all about the two high-profile cases that I was involved with. I've been asked to start my remarks that way. In 1993 when I first came on the circuit bench, which is the General Jurisdiction Trial Bench of Virginia, almost immediately after I came on the bench a fellow by the name of John Wayne Bobbitt suffered a grievous injury at the hands of his wife, Lorena. Fortunately for him the severed body part was reattached successfully, but out of that domestic dispute came cross criminal complaints. And some of you may remember the televised trial of Lorena Bobbitt where she was charged with aggravated malicious wounding which is aggravated battery in our jurisdiction. But about two months before that I tried a case where he was charged with the marital rape of Lorena and that also ended in an acquittal. I think the jury just kind of let everything resolve itself at the end.

But I learned a lot of things from handling that case that I think helped me in the next high-profile case I had, which was in 2003. In the fall of 2002 two men, John Muhammad and Lee Boyd Malvo, were in the Washington, DC area and Malvo was the proclaimed son of John Muhammad. He was not his actual son, but John Muhammad treated him that way. And as we learned later they had obtained a vehicle that they modified so that Lee Boyd Malvo could crawl through the backseat into the trunk and shoot through a opening that they cut in the back of the vehicle and shoot a high-powered assault rifle at unsuspecting people in the Washington, DC area. And for about three or four weeks there was a reign of terror that went on in the DC area where a number of people were shot and many of those people were killed because of the velocity of this high powered weapon.

A number of people were shot while they were pumping gas at gas stations. People were shot as they stood waiting for a bus. One person was shot as he was driving a grass cutter. Another person was shot while he was taking property back to a Walmart. And the entire community was terrorized. People were afraid to pump gas in their cars. People were



afraid to let their children go to school. One of the people that was shot was a student at school. All the after school activities were shut down until these people were arrested in 2002, and it was a very high-profile case.

We went to trial almost exactly a year after they arrested in October of 2003, and I would have to say that one of the tools for a judge in handling media attention is one that I employed first and that was to point the very best attorneys I could appoint in this particular case.

The prosecution already had what would be called a dream team of prosecutors. I think they had about 80 years of experience and two-dozen capital and high-profile trials. So the two attorneys that I was able to persuade to take this case had about 50 years of prior experience and I think a dozen high-profile and capital cases. And the professionalism that all five attorneys demonstrated throughout the whole trial process just shown through and I think made it the fair trial that I ultimately think it was, and also perceived to be.

Among the things that they did was they agreed not to talk to the media at all before the trial. They wanted these

cases tried in the courtroom and not in the media. They were all conscious of the fact that this may be just one of a series of cases. We never knew whether there were going to be other murder charges brought in other jurisdictions, so we were very conscious of not putting the case on TV which may taint future jurors, of not putting out information pretrial that would taint our jury and also future juries. And among the things that they had to deal with was the fact that there was an incredible amount of discovery that was available.

When these things were going on, a federal task force was setup as well as the different state task force involved, so there was an incredible amount of information that the prosecution was quite willing to turn over to the defense, but contained in that discovery was a lot of material that was not ever going to be allowed in trial, so they were concerned about the media having access to this material, putting it out, and possibly tainting a future jury. So we agreed that we would not file it in The Court file. We simply paged everything and preserved the record for the appeal, but did not put that information out for the media to have access to.

We also agreed to seal pretrial suppression motions. We did not close the courtroom at any point in time despite motions by the Commonwealth and Defense to do that. They were opposed by the media and I did not agree to that. But we did seal the suppression motions themselves, and so as we went through the process, we would make reference to a certain number on the suppression motion and we were able to successfully argue and resolve the suppression motions without the information, again, being disclosed so that the media could disseminate it in a way that might influence potential jurors.

We did have one problem. There was a parallel trial with Malvo that was going on in Fairfax while this trial was going on in Prince William County, Virginia, and Malvo had confessed, but the confession was suppressed by the judge in Fairfax. And so shortly after that information was dispensed to the media about that confession, and we never believed it was a lawyer that was doing that. We always believed it was a disgruntled federal law enforcement person who was afraid these men would get off and he was dispensing information to the media and that was getting out. That was the only protective order that we had and that one was not effective in preventing the dissemination

of that information from the media.

We also had two books published, I think, but it turned out later that nobody read those books and it didn't really seem to affect much.

The main tool that we used in getting a fair jury, I believe, was a change of venue. It's an old tool, but it worked very effectively in our case. We really had no choice. Even if the pretrial publicity was not enough to require a change of venue, we did not believe we could get a fair veneer because of the fact that almost everybody on our panel would feel personally terrorized. Each and every one of them had been afraid to pump gas in their car and to go to the grocery store and to let their children go out at night to go to school events, and so we did not think we could get a jury.

So we moved the trial to Virginia Beach, which was out of the Washington metropolitan DC/Richmond area, I-95 corridor and it was about 200 miles away. And, of course, everyone in Virginia Beach had heard of the trial, but they had not looked at any of the information that had really been disseminated.

And we used the tools that are ordinarily used in, I think, change of venue cases. We protected the jury. We used numbers instead of names of jurors. We had the jurors assembled offsite and we brought them into the courthouse in buses that were blocked off. We had a very extensive media order to prevent the media from in any way naming the jurors or taking any photographs of the jurors. We segregated the jurors once we selected a jury. Our county actually agreed to pay for lunch for them everyday and they actually got to use the judge's lunchroom down in Virginia Beach. So we kept them segregated. And I went through an extensive process of questioning them each and every time that they came back into court to make sure that they had followed the court's instructions so that we could preserve the fact that they remained impartial.

I think whenever you have a high-profile case there are three things that a judge really worries about. At least I did. And they're all sort of interrelated.

I think the first thing is that no matter how media attention is involved in a case, you want to preserve what's going on in a courtroom to make it as normal as you

possibly can. And there's some things we did, and I'll talk about that a little bit later that I think helped do that.

The second thing is you want to be able to get a jury, select a jury, that's not been tainted by this pretrial publicity. And you want to get a fair jury to start with.

And the third thing is you want to keep that jury impartial, not have them tainted by the process itself.

Because of the professionalism of the lawyers, because of the change of venue tactic and tool that we used, I think we had a fair trial. And I would say in our particular case, and I realize it was four years ago before the blogs were out there, that we did get a fair trial.

I would also say that once you do get a jury in a case like this, particularly of this kind of importance, they take it very, very seriously. And I think if you tell them not to look at information on the blogs they will follow those instructions. And I was confident that not only did we have a fair trial, we had the perception of a fair trial in that case.

LEVI: Thank you. Judge Ruckriegle.

RUCKRIEGLE: In the summer of 2003, Kobe Bryant came to Colorado for arthroscopic knee surgery and met a young woman at a hotel, which ended in a sexual encounter. The Eagle County Sheriff's Office obtained arrest warrants and the DA took two weeks to decide whether or not to actually file criminal charges. During that time, stories were rampant and the information about the case was leaked. Since no case was actually filed, we were unsure about our ability to issue orders. However, as soon as the charges were filed then an order limiting pretrial publicity, and Gary and I have been on programs before and there is no such thing as a gag order in the law, but there are orders limiting pretrial publicity, was issued and it's law based, as I said, just like the First Amendment is law based.

That order was reissued when the case was bound over to District Court. We have a preliminary hearing process in Colorado, so it was initially in County Court where the determination of whether there was probable cause to believe there is sufficient evidence to bind the matter over for trial. That decision was made there.

But once it was bound over to District Court, I issued another order limiting pretrial publicity, and specifically

issued what we called a decorum order outlining the expectations for conduct on the premises of the Justice Center of the media, the attorneys, and the public as well.

Over the next ten months we had 26 days of motions hearings. We calculated that approximately 20 percent of the subsidy of motions that were filed were by the media as a result of some of the hearings being closed due to the nature of the subject matter, not only rape shield law that was applicable in Colorado, but also matters relating to mental health issues, alleged suicide attempts, alleged drug and alcohol use, and, of course, the defendant's motion to suppress the statements and evidence that were obtained from the police on the night that they contacted him.

Then one night I got a call on my cell phone. I was actually at a ski club board meeting. My daughters were all in ski club and I was there about 7:00 at night and I got a call from my court reporter saying I think that I may have just released a portion of those transcripts of the hearings to the media. And originally we had setup a system by which we could release information about the proceedings and we had setup a website. The first time ever in



Colorado. And unfortunately I'm sure that most of you have dealt with group e-mails and there was one group here and one group there and the group that was right adjacent to The Court, the District Attorney, and the Defense Attorneys was the seven media original outlets that were involved in the beginning of the case. And she made a mistake.

And while I was talking to her why my public information officer, I got this other phone call interceding and it was from her to tell me that the media had just called her saying that they had just been sent a day and a half worth of transcripts.

Well, at that point, of course, I was literally trying to think on my feet, because I'd stepped outside the meeting, was talking to her and then talking to the PIO, and I said, well, we'll do the only thing I need to do and that's issue an order for them to delete and destroy those transcripts. Of course, as you heard Lucy Dalglish referred to earlier that's what you call a prior restraint order, which is, as she said, like poking a sleeping bear with a stick. That was the result of that attempt to try to limit that information.

If you ever run into a situation like that you know that you have minimal alternatives. And even though I had actually attended one of the courses that Gary Hengstler and the National Judicial College put on about handling high-profile cases and knew about prior restraint, I had no idea that I was going to get into that sort of a fight over those types of issues. So that was my entrée into the law of prior restraint.

That order worked temporarily, and the Colorado Supreme Court actually upheld it in a four to three decision with specific instructions to me to rule on the release of testimony on those transcripts relating to expert opinion on whether the DNA of a third person existed in the evidence of the undergarments.

Not only was I doing legal battle with the prosecution and the defense and the attorneys who were representing the alleged victim, but also the media. And that ended up all the way in the Supreme Court with Justice Breyer issuing an order, because the media didn't like the four/three decision that was not favorable to them from the Colorado Supreme Court, so they decided to go on up. And he followed the direction also that the Colorado Supreme Court had and

said I think the Judge is working on this and will shortly have an order with regard to release of these transcripts, because the media was, needless to say, wanting to release them because they had some very interesting material in that expert testimony.

After being given a few days to evaluate the transcript in pursuant to the directive of both the Colorado Supreme Court and Justice Breyer, I released about 95 percent of the contents of those transcripts. And that was -- we spent a lot of time very carefully going through that. And only the material which we felt were protected by some of those other circumstances were limited, otherwise they had everything.

Thereafter while the prosecution and the defense and The Court prepared for a three to four week trial less than a month off, the accuser's civil attorneys went on a media blitz attacking The Court and laying their foundation for filing a civil case in Federal Court only a couple of weeks before the criminal trial and ultimately pulling the accuser from participation in the criminal case.

(DEAD AIR FOR 14 SECONDS)

TELEVISION CLIP: Absolutely not.

TELEVISION CLIP: Might there be some sort of resolution whereby Kobe Bryant would say I am sorry for everything she's been through, but not accept responsibility for any sexual assault?

TELEVISION CLIP: No. That would be unacceptable. To apologize for the nature, the difficult nature, of the court system that he and his attorneys had created and I think that would be a sufficient means to get something like the case dismissed that's not an acceptable option.

TELEVISION CLIP: But might there be a way, Lynn, for Kobe Bryant to say something publically that might put an end to the criminal proceedings or at least from the alleged victim's point of view?

TELEVISION CLIP: Kobe Bryant would have to publically admit the truth of what happened in that hotel room that night and I don't believe Kobe Bryant is willing to do that, because to do so would be the end of his career. And so I think he will continue to have his well-paid lawyers fight to try to avoid the truth from coming out.

RUCKRIEGLE: What I wanted to introduce to this discussion was the fact that not only do you have the possibility of having prosecutors speak to the media, defense attorneys speak to

the media, other sources such as Gary was referring to, speak to the media, but you may have yet another source of information being put out to the public through the media.

In the State of the News Media 2004 an annual report on American journalism, ironically the same year that the case ended up being dismissed, one of the eight primary concerns that was addressed in that report was those who would manipulate the press and public appear to be gaining leverage over the journalists who cover them. Several factors point in that direction. One is simply supply and demand. As more outlets compete for their information it becomes a sellers' market for information. Another is workload. And the increased leverage enjoyed by news sources already encourage a new kind of checkbook journalism in 2003 referring to the year before.

There were a couple of ironies, more than a couple. But there were a couple in particular that came from this case. One was that the filing of the civil case in Federal Court while the attorneys were complaining about the disclosure of the name of the accuser knowing that the applicable civil law would require ultimately the disclosure of her name in that process. And then secondly contrary to The

Court's case management order and reasonable prosecution procedures the District Attorney admitted in that final hearing that he had failed to actually subpoena the alleged victim for trial thus when the DA was faced with the reality of her unwillingness to appear he sadly and reluctantly moved to dismiss. So our case, even though sometimes people refer to it as the Kobe Bryant trial never actually went to trial.

We spent three and a half days with doing questionnaires and in-camera voir dire with our jury. Out of three hundred jurors, we had qualified after those three and a half days 174 jurors who said even though almost all of them but not all had heard or read something about the Bryant case that they would be able to set aside that information and focus and make their decision upon the evidence presented in court. And that's one of the tools that I consider to be useful.

I've had a few times when I've been challenged on my process for voir dire and rehabilitation of jurors, but I try to emphasize to them this is fair for you to read, it's fair and normal for you to have an opinion developed, either an initial opinion or over a period of time, but

what we're really asking you to do is to set that aside and look at the information that is presented in trial that is sworn testimony and evidence allowed only by The Court to make a decision upon. And that worked very well.

So an interesting aspect that sometimes comes up, a question comes up, is well, why didn't you change venue. One predominant reason: neither the prosecution nor the defense sought to have venue changed in that case and that's, I guess, a point of discussion for them at another time. But interestingly enough I found that we were able in spite of what I really considered to be potentially massive and pervasive publicity it wasn't necessary to change venue. And through a rather protracted process of voir dire we were able to get a potential jury.

Now, the media response both today and then in other circumstances, other panels that I've been on, sometimes has been well, see, you actually could have gotten a jury. But the time and the expense and the endeavor to go through that extra process to make sure that you qualify jurors can be burdensome, can protract the proceedings. And ultimately, of course, the irony was that contrary to what was stated there about four weeks before trial, at the time

of the dismissal by the District Attorney a statement of apology was also released on behalf of Mr. Bryant.

LEVI: Thank you. Judge Walton?

WALTON: Good afternoon. As Dean Levi indicated, I presided over the Lewis Scooter Libby case earlier this year. I also am currently presiding over the Stephen Hatfield case. That's a pending case, so obviously I can't say anything about it. And I can't say anything about the facts of the Libby case either, because that case is on appeal.

I found out that I had been assigned this case as I was leaving the courthouse shortly after the arraignment, and much to my dismay there was what generally happens in cases of this nature a press conference that had been conducted by the prosecutor. A prosecutor I have a high degree of regard for. I had never known him before, but I thought he was one of the most professional prosecutors that I've ever dealt with. However, there is this trend contrary to when I was a prosecutor of making public statements after the return of the indictment and I was troubled by that.

So once I was assigned the case, I thought in order to let the playing field be leveled that I should also let Mr. Libby's lawyers have their say before the press, which they



did. And at that point I called them in and issued an order letting them know that I was not going to tolerate this case being tried in the press, at least not from the perspective of the lawyers making statements to the press. And I must say, I mean, I had a great cast of lawyers both on the prosecution and the defense side. And they complied with that and I never saw anything else that came from them in the media. However, obviously other sources have things to say about the case.

I know from the inception that my biggest challenge was going to be impaneling a fair and impartial jury from Mr. Libby's perspective, because the District of Columbia is a heavily democratic city and obviously there was the overlay of politics in this case. And so I knew I had to try and do the best I could to ensure that he, in fact, would have a fair and impartial jury so he could receive a fair trial. And I thought reading the riot act to the lawyers and making sure that they were not going to potentially taint the pool of potential jurors was the first step to try and accomplish that and I think the order I issued did, in fact, do that.

However, obviously there was still a lot of media coverage

about this case, a lot of interest in this case. In fact, we received over 100 requests from media outlets from all over the world to cover the case. And one of the things I decided early on to try and do, and fortunately we were able to accomplish it, was to setup a media room that had the ability to accommodate 65 media outlets. They had internet access and the ability to communicate with their newsrooms from that location. And we had a closed circuit feed that we put into that room and we also opened a second courtroom that would be available not only to the media, but to the press, because of the number of people we anticipated would attend the trial.

But in any event I went about the process early on of working with the lawyers to come up with questions that would appropriately address the obvious concerns that I had about a fair trial. And we put together an extensive list of questions and one of the issues I had was would we do a written questionnaire. I've ever used one. I know there are a lot of proponents of it, but I don't like it, because I think it poses a disadvantage for less educated jurors who may not have the capacity to respond in writing as well as others, so I'd never used it and I won't use it. But I gave the lawyers extensive ability to ask questions.

And one of the issues I had to deal with as far as the press was concerned was would the press be permitted to be present during the voir dire, because I had a concern that if we had a courtroom full of people looking at these people as they are about to be selected possibly to this jury panel that they may not be as open as they otherwise would. And I wanted them to be open to tell us what their views were politically and otherwise to ensure that we had people who would not be on that jury who for political reasons would make decisions contrary to where the evidence should lead them.

And I talked to the press and I ultimately issued an order limiting the number of press people who could be present to one from the print media and one from the electronic media. That wasn't liked, but with the media room and them to be able to watch the proceedings and have access to their newsrooms immediately I didn't get any real challenge.

I mean, one of the things I did initially also was there was someone in the Chief Judge's chambers who was designated to work directly with the press, and I decided that we had to in some way filter complaints that would

come to The Court about issues related to the trial. And I decided that I would require the print media to designate one person, which was a big job for them to do obviously, because everybody wanted the seat at the table, who would be their spokesperson before The Court who would bring complaints to The Court and one from the electronic media. And they ultimately were able to do that.

I sat down with them before the trial. I ultimately issued an extensive order about how the proceedings would be covered and the media, I must say, I think, did comply by in large with that order.

The selection process was tedious. It took some time and there were a lot of jurors who did come forward and candidly say that they did not like the policies of the current administration, they did not like the war, there were underpinnings of the war that were related to this case, and a lot of jurors candidly said that they could not be fair to someone who had been involved in the effort related to the Iraqi war.

There were people, however, who also said that they did not have fond feelings for the administration, but nonetheless

appreciated the importance of people receiving a fair trial and they would not let those views impact on their impartiality. And I must say one of the assets that we have in the District of Columbia is that we have a wholesome degree of skepticism about law enforcement and the government, and I think that's good. Even having been a prior prosecutor, I think that's good, because I think people should be cautious when it comes to the issue of convicting someone. So I think that worked in our favor, because even though people had strong feelings, I think they nonetheless went out of their way to make sure they would be fair and impartial. And I think with the process taking the time that we took asking hard questions, giving a lot of leeway to the lawyers to ask follow-up questions, I think we did impanel a fair and impartial jury.

And then after that obviously the chore became very difficult, because there was extensive coverage, as you know, about this case in all forms of media and I had to constantly remind the jurors of their obligation not to have contact with that media coverage. We partially sequestered them. They were picked up at a central location by the marshall every morning. They were brought to the courthouse. We fed them breakfast so they were collectively

together. We kept them together for lunch and fed them lunch. They liked, obviously, getting those free breakfasts and lunches. And they stayed together behind the courtroom in a larger room that we had fixed up for them with a microwave, with a refrigerator, lounge chairs, so that they weren't in Court they would be comfortable. And then in the evening they were taken home.

We also had someone, I had a number of interns who worked with me during the trial and they would screen the newspapers, cutout anything related to the war, cutout anything related to the trial, and then we would make the newspapers available. And we only had one incident where one of the jurors did, in fact, go online, did have contact, and that was actually during the deliberations itself, with media coverage. She related that to one of the jurors when she saw that juror the next day who immediately refused to talk to her anymore, brought that to my attention, and the lawyers agreed that the deliberations could continue with eleven jurors, so we had to dismiss that one juror. But other than that, we didn't have any problems as far as the jury was concerned as far as I know.

I must say I was dismayed, however, at how I was portrayed

in the media. Initially attacks were directed at me by members of a certain segment of the media feeling that somehow I was going to be unfair and impartial because I was appointed by a republican president. And then the tide turned after I made some of the rulings I made, which were dictated by my impression of where I had to go and where the law require that I go, and all of a sudden I became the darling of that media segment and the, I guess, the devil of the other.

But it was a difficult, trying experience. As I was telling one of the former professors of mine who is here, I developed high blood pressure, which I had never had. I guess I didn't realize how much I was internalizing some of the things that were taking place. And there's no question that it was a challenge, and it was a particular challenge because of the extent of the media coverage.

LEVI: Thank you. David Sellers, how do judges work with the media?

SELLERS: Well, in most cases, probably as little as possible. And I think one of the reasons is I think each of our judge panelists has talked about the use of someone they are called a Public Information Officer, which Judge Ruckriegle had available, whether they're called, I believe, the

Administrative Assistants of the Chief Judge, who Judge Walton had available, or I think Judge Millette used the Court Administrator. But more often than not judges are turning to people who are for lack of a better term Court Public Information Officers.

I think about 25 or 30 years ago there was a single Public Information Officer, Court Public Information Officer, in the country and she was at the Supreme Court of the United States. Today there are probably several hundred. There's an Association of Court Public Information Officers.

There's a website. And typically these are people who have backgrounds in the media more often than not, people who have covered courts and then they move to the other side if you will and work for the judiciary as liaison between the courts and the media.

And I like to think of it that most of what we've been talking about over the last two days just boils down to free press vs. fair trial, and the problem is you always have that V in the middle of it. And I think that the Public Information Officer, who, again, has a foot in both camps, is trying to keep both sides happy here, likes to look at a way that this isn't like a Duke/North Carolina



basketball game. There doesn't have to be a winner and a loser. Somebody is not going to cut down the nets at the end of this and the other party isn't going to go sulking home.

Your Public Information Officer or whoever plays that role will try to find a way to accommodate to the best they can those apparently competing rights of fair press and free trial. And I think Judge Ruckriegle mentioned three issues that concerned him most. I've thought of five. They boil down to cameras, technology in general, seating, jurors, and the verdict. I think we've touched on all of them, but just let me take maybe a minute on each one of them.

Cameras, I guess, is largely a settled issue. In the Federal Trial Courts you can't have media cameras. Most State Courts allow them, but that's in most instances also with some discretion to the presiding judge. The only thing I would say is we've talked a lot over the last two days about O.J. One, Two, and Three. In O.J. One, of course, there were cameras. People draw their own conclusions from that. Four months after O.J. Simpson was convicted, the Oklahoma City bombing case, the Timothy McVeigh case, was granted a change of venue and moved from Oklahoma City to

Denver. And, of course, there weren't cameras in that courtroom. You can make all sort of comparisons, but one of them certainly was one had cameras and the other didn't.

Whether or not they have an impact on the trial process there have been lots of studies about that, one thing they clearly do impact is this market that Gary talked about. The tabloid journalism, the Greta Van Susterens, the Nancy Graces, the Youtubes. Certainly if there are cameras in the courtroom you're feeding this media beast that is so interested in trials nowadays with video every night.

By the same token -- as Judge Walton indicated -- cameras can be a very useful tool for The Court to broadcast to an overflow courtroom or to a media courtroom. So draw your own conclusions, but they do have at least a secondary impact on that media market.

Number two, technology in general, which is probably changing as we speak. There's probably some new form of technology I don't yet know about, which wouldn't surprise me. But you will see instances, and one jumps to mind, the Scott Petersen trial in California, where the judge did not allow cameras. A reporter sat in there with his cell phone

and text messaged various news out to the producers outside, including the verdict. So the only thing I mention is for all the parties be aware that technology and its rapid change can and probably will have a potential impact on the trial process.

Number three, seating. There's a limited commodity in any high-profile trial, whether there are cameras in that courtroom or an overflow courtroom, the press wants to be there firsthand to see the key witnesses. And so courts typically work with the media less frequently the Bar is involved, but to try to come up with plans, seating plans.

And that's not as easy as you may think. Number one, you never have enough seats. Number two, it's a little hard nowadays to figure out who the media is. As Marcy Wheeler will testify, there are blogs and Judge Walton did allow some bloggers into his trial, but there are, I don't know, 60 million bloggers out there as opposed to a more limited number of traditional media.

And then you need to decide there's NBC, there's MSNBC, there's NBC radio, there's CNBC, there's NBC's website. Do they each get a seat? Do they get a seat for voir dire,

trial, verdict, all the way through? So there's some issues that The Courts need to work out there.

Number four on my list is the jury and, of course, that's the most important one. I think everyone would agree what this is all about is what you can do to protect the integrity of the jury and these five topics certainly overlap and intersect. But there have been stories I've seen in the media within the last several months about jurors who have blogged. There are people during voir dire who come home and blog about their experience. And even jurors who have sat on jury duty and in the middle while they're on jury duty, not afterwards, have had ongoing blog posts about what their doing. Obviously a clear violation of the instructions The Court would give them.

By this same token you remember the days when you would tell jurors not to read any news coverage and then you expanded that to not just newspaper and TV and website. Clearly there are other people in the courtroom who may blog about that trial. You want to make sure the jurors don't read those blogs.

Fifth, of course, is the verdict, and that's what everyone

wants to be a part of and when the media really probably show their worst facets, because it is a competition. You want to be the first one to have the story.

We had some involvement with the trial of Zacharias Musawi, the so-called 20th terrorist in Eastern District of Virginia, and in that court a TV producer had planned, and had actually tried this, as soon as the verdict was read, he would run out of the courtroom and he would signal to someone who was standing, a colleague of his, standing on a roof across the way thumbs up for a guilty, thumbs down for not guilty and then they could radio downstairs and be the first one on the air. The Marshall service caught wind of that and probably the person on the building across the street was lucky they weren't shot. But they did away with that.

But what The Court decided to do, and this was very innovative in the Federal Courts, was to allow the Court Public Information Officer, they had a fine, full time Public Information Officer there, to walk outside as soon as the verdict was rendered, stand in front of a bank of microphones and read what was a very complicated verdict so that everyone got the verdict at the same time. He answered

no questions, but he simply read the verdict.

The first time I saw this was when the Florida Supreme Court had the Bush v. Gore case and they allowed their Public Information Officer to walk out to the bank of microphones and announce the verdict.

So those are some of the issues that people who aren't judges and aren't journalists and aren't lawyers help advise all parties about when you get a high-profile trial.

LEVI: David, I think you said O.J. was convicted.

SELLERS: I'm sorry. Excuse me.

LEVI: He was acquitted in the criminal trial, but then he was -- he lost the civil trial, and I think the civil state trial did not permit cameras in the courtroom.

SELLERS: That's correct.

LEVI: I'd like to hear from Judge Walton how you dealt with the bloggers and how you decided which ones you would credential.

WALTON: I actually didn't make that call. That call was made by the Assistant to the Chief Judge, and he identified several bloggers who we thought were responsible and who would fairly cover the proceedings and that's how the call was made. And I did occasionally when people would tell me

there was something I should maybe look at I did look at some of the blogging at certain times and I thought the two who we gave a seat at the table actually did a very good job.

But I know there are a lot of people who get their news through that source and I agree. I mean, I was asked whether I would approve it, and I did, because I know a lot of people get their news that way and, therefore, I thought it was appropriate as long as we had responsible bloggers.

LEVI: And could they blog directly from the courtroom or from the feed room?

WALTON: From the feed room and I mean, I think the feed room, the media room, really served me well, because the media was able to hear the jury verdict as soon as it was rendered. They had immediate access to their media rooms from that location. And one of the things I put in my extensive order regarding how the trial would be covered was that people who were actually in The Court, the media people in The Court, if they got up and left they could not come back in. And so that was a disincentive for a lot of the media to come actually into the courtroom and to use one of the offsite facilities where they did have the ability to move in and out of the courtroom.

LEVI: I'd like to ask Judge Ruckriegle and Judge Millette now that we're in this new era where things can be posted on the internet, video can be, do you have any concern about permitting people cameras in the courtroom or other kind of video in the courtroom knowing that a witness might end up on the internet or just a segment of a witness and it could -- could that -- does that change things?

RUCKRIEGLE: That's interesting that you ask that and we hadn't even rehearsed this. I've had a number of what would be called high-profile cases in Colorado and locally including a trooper murder case and a 15 year old was charged with that, and I have always up to this point in Bryant allowed the use of cameras in the courtroom. One of the issues that became the focal point for me not allowing video cameras but allowing a still had the trial gone was the age of several of the witnesses who were involved. They were very young people. And then -- or young adults and teens. And then also the nature of the testimony, because they were going to be talking about certain things that are still considered somewhat delicate, although none of you watch mainstream TV obviously. But the point is that that concern exists.

Now, we had the same thing. We had an auxiliary media room



where they could get, you know, sit there in some relative comfort rather than being in the courtroom and able to get the information and able to use their electronic equipment. We specifically had an order in there in this decorum order again not allowing any electronic devices, cameras, cell phones, tape recorders, any of those types of equipment in the courtroom. We did have one reporter who ended up bringing in a cell phone and pursuant to the order it was confiscated and she was removed and not allowed to come back into the courtroom.

The concern is not so much about the reporting, because I do think that it's fair to in most cases have the access to the courtroom, but it's the potential disruption there of having everybody have those types of devices available to them.

I wanted to make one comment. We talked earlier about some of the entertainment aspects rather than the actual media and reporting aspects. In one instance I watched almost nothing of what was presented on the media and local news. I had my wife record some and then I obtained some of these tapes later on from other sources, but one time my wife said, here, come here, come here, look at this. And it was

Nancy Grace and she was talking about the nature of the injuries and how she had never in all of her prosecutorial experience or in her media experience seen any injuries that were so serious and so substantial, and I just hesitated and I said, well, that was a closed hearing. I mean, nobody knew that except for the attorneys who were allowed, the parties, and so forth. And, of course, secondarily the fact that that was not consistent was irrelevant. I mean they feel free to make comment as they would with regard to the proceedings for entertainment purposes, and that's very disturbing.

LEVI: Judge Millette, let ask you this. In your Muhammad case you were very fortunate to have wonderful lawyers, very professional. Let's assume you did not and let's assume that even before the case were charged there was a prosecutor with a publicity machine making all sorts of statements that would violate Bar rules and the ethical rules. What can a judge in your position when you haven't even been assigned it what can the judiciary do to put a stop to that?

MILLETTE: Can I take their questions? That's it. That's the question that's almost unanswerable I think. We have a tradition in Virginia and it goes, I guess, Virginia gentlemen, but people don't act like that. The prosecutors don't act like

that, the defense lawyers don't act like that, but I'll take your premise that we had somebody from out of state, I guess, some carpetbaggers that came in and they're trying to case.

I think that what we try to do is we try to assign a judge to the case early on. Of course, we can't assign a judge until the case has been charged, so that's a problem. I think we would probably look to the Bar Association to try to be of some assistance. We'd ask our local Bar Association perhaps and then the State Bar Association. But I think it's an issue that we perhaps need some guidance either from the Supreme Court or from Legislature or somebody. I'm just not sure we have the tools to do anything about it at this point.

LEVI: I'll come to you, Gary, in a moment. But Judge Walton, from the point of view of the federal system, a grand jury system, what would your answer be to that question?

WALTON: Well, I think the Chief Judge who monitors and oversees the grand jury proceedings would clearly have the authority if a prosecutor was running amuck and making clearly statements that were going to potentially be prejudicial to the defendant's ability to get a fair trial, I think the Chief Judge would have every authority, and I'm confident

my Chief Judge would, step in and take strong action in reference to that.

LEVI: I'd like to ask you, Gary, maybe try to unify the whole conference here. Our very first speaker, Hodding Carter, said in effect it's up to the Bar, it's up to the judges, it's up to the lawyers to police themselves. The media is not going to police itself. That's just antithetical to the way it operates. When we're dealing with a criminal justice system which is primarily in the state courts and we're dealing from time to time with prosecutors and defense attorneys who abuse the process, are the judges in a position deal with this? Is the Bar Association in a position to deal with it and will they?

HENGSTLER: I think they are in a position. I think a bigger question is will they? I mean, I have talked to a lot of judges who have issued protective orders and told witnesses and attorneys not to speak and then somehow some information gets out and someone has violated that order. But how many judges want to stop the proceedings or create collateral proceedings to go order the prosecutor to investigate where the leak came from, who violated the gag order, and particularly in states where there are shield laws to varying degrees that would prevent asking the reporter directly where he or she got the information, I think

that's the weakness of the protective orders, the restraining orders.

Number one, you cut off the flow of information from the people who actually have it so that what the public is left with is distorted spin inaccurate information. And two, if someone does violate the gag order then the judge in many instances will not take the initiative and say, all right, we're going to do something about this. Sometimes they can't, and so I go back to my original question of are the tools that were designed to address these working in this day and age for a variety of reasons and I'm not sure they are. I think they can if they want to. I think the Bar Association can do more. But there is a reluctance.

We've sort of hovered around the First Amendment, and I'll close with this, that is the powerful amendment. It is not only the media that is using this, but when you think of lawyer advertising rules, GOP of Minnesota v. White and judicial speech, that is so valued in our country that it is very difficult for Bar Associations, for judges to restrict the speech, because if it's challenged there's a good likelihood the person who is being restrained will win on a First Amendment claim.

LEVI: Anybody want to speak to this issue before we go?

RUCKRIEGLE: Well, I just want to say that there have been a couple of comments here in addition to Hodding Carter with a regard to the courts taking the responsibility for this, and I have to tell you once I was fully researched with regard to it it's not the trial court's, with all due respect, who don't want to take control. It's 95 percent of the United States Supreme Court cases that say they win. I mean, we don't have the ultimate ability to control those types of leaks. I mean, you can have contempt proceedings, you can have the investigations, and the conclusion that we reached with regard to a couple of instances of that was we were not going to create a side show to take over the circus.

HENGSTLER: That is one of the ironies of working with judges in the media. Judges are very upset about the degree of freedom and irresponsibility on the part of the press, and as Chief Justice Warren Burger said a responsible press is to be desired, but like other virtues, cannot be constitutionally mandated. All right.

The press has the amount of freedom that the Supreme Court has given it and the irony is that the trial judges and the legal community we have what the Supreme Court has given

us, and I'm not sure that all of the trial judges or even a majority of the trial judges would necessarily agree with that. And that's part of the ongoing challenge of the Center.

RUCKRIEGLE: If the judge on a case were to even whisper the possibility of that there would be a motion for recusal immediately. And that would be another one of those side show issues as opposed to -- I mean, a lot of times I describe it as I just put my head down and ran forward reading briefs, trying to issue orders, and not be too distracted by what else was going on in the media.

LEVI: Let's -- yes, there's a question.

AUDIENCE: (Inaudible) earlier this year (inaudible) one of our alumni, a federal circuit judge (inaudible) where were the judges in the Duke Lacrosse case and one of the responses that I've heard is that under the local system after indictment and prior to trial there was no clear responsibility among several judges on The Court to take the action that you have been talking about. There was a system which led to a tendency to (inaudible) the controversial issues off to the next patient, the next judge (inaudible). From a systemic standpoint I think your assumptions have always been that there is a judge who has responsibility for any particular case. From a systemic

standpoint how important is that to be sure that there is someone for counsel to go to with concerns about prosecutorial misconduct or some of the other issues talked about.

LEVI: Okay. Thank you. This is the question. The question is whether particularly looking at the lacrosse case was there a judge, and I think the answer is no, during the pre-charging period when there was so much inflammatory publicity and is it important that there be a judge at least once charges are brought into the courthouse, an assigned judge, so that the lawyers who may become involved on the defense side certainly, and perhaps others, have somebody to go to to ask for intervention? So let's start with Judge Walton and then we'll go to Judge Millette.

WALTON: I think it's vital. And I have spoken to a number of judges since the Libby trial was over about handling high-profile cases and I don't want you to believe or leave here feeling that we as trial judges are impotent either. I think we have to take control of the case immediately and despite some of the issues that we've talked about, I think you have to be willing to step up to the plate and take a hardline position if you feel that things are taking place that are going to potentially compromise the ability of the parties to get a fair trial.



Now, obviously you have to be appreciative of the First Amendment, but my bottom line responsibility as a judge is to do all I can obviously to accommodate the press to the extent I can, but my bottom line is to make sure that defendant and that government receive a fair trial. And if something is brought to my attention that's undermining the ability of that to occur, I think I have an obligation to do something to try and address it.

LEVI: Judge Millette?

MILLETTE: Well, I have some doubts about pre-charging. I think once the charge has been brought, the Chief Judge would be responsible for either handling the issue or assigning it to another judge, and I don't think there's any doubt that that judge has the authority to take some action. In our court we would do that.

LEVI: It's very hard, I think it's fair to say, and we'll get some comment here, before charges are brought for a judge to intervene, because there's truly nothing before The Court. However, in the federal system where you do have an empowered grand jury, it's very rare that the -- well, it's not -- it's in a big case the federal government is going to be before the grand jury and there will be a grand jury judge or the Chief Judge, and that judge will be in a

position to intercede if the prosecutor is acting improperly or unethically. And I just pose the question.

None of us on this panel were in Durham during the past year, but one could imagine that had there been a judicial order after the very first press conference or even during the press conference, the very first press conference of the District Attorney, telling him not to continue in that way, that would've removed the political incentive from him. It could've affected the entire decision whether to even to charge or not. It would've pulled him back into his role and it would've been very beneficial had there been such a thing.

RUCKRIEGLE: I showed you the one clip. There were a number of instances where those types of comments were made and at the motion of the defense I issued a supplemental order limiting pretrial publicity and specifically identifying any attorneys who were involved in the case. And the civil attorneys actually had been involved. They had filed some pleadings, because in Colorado there is a constitutional victim's rights amendment and a statute that allows them to speak to -- to be present at certain hearings and speak to interests of the victim, and therefore, when I reissued that order, the supplemental order, their immediate

response was a motion to vacate the unconstitutional order entered by The Court. I didn't vacate it. I upheld it.

Those types of interviews ceased and we went on from there.

LEVI: Okay. We can take one more question if there is one. Yes, sir.

AUDIENCE: I just would be interested in light of the comments of panel about the difficulty of effectively taking action to ensure a fair trial because of publicity or other media leaks, etc., in view of the First Amendment concerns -- what your reaction would be -- was here this morning we had a panel from other countries, Italy, Britain, and Canada, and I think the consensus there is that they were sort of appalled by what they perceived to be sort of a cavalier assumption in the US, that, of course, we're going to try cases by media. It's just as American as apple pie, and I think that what they were really saying is that we have the First Amendment and the Sixth Amendment and our jurisprudence and our statutes, the First Amendment always trumps, and I think I'm still hearing from this panel. Any reactions to that?

LEVI: Okay. The question is whether the First Amendment always has to trump the Sixth Amendment, because after all in other countries they do things differently. Why must it be so? Gary?

HENGSTLER: Well, it's interesting, because yesterday I spent the whole day in Vancouver at the American Judges Association. We conducted a program and I flew here overnight for that, and that was the very question. And the consensus there was that Canada is going to go more like the United States. We are not going to go more like Canada. They're experimenting with television. Vancouver particularly is vulnerable, because their Canadian journalists are restricted in covering the Pickton trial, which is their serial murder trial going on right now, but Seattle's reporters aren't and in this age of internet and satellites...

So I guess my point is we have the extreme degree of freedom in the media to do almost whatever we want, because the Supreme Court said that's the way the First Amendment is going to be applied in this country. I'd say it's almost impossible to have had this much freedom in the media for 200 years and now say okay, we're going to cut back and be more like Canada. I don't think the public would stand for it, and I know that the media would go ballistic.

LEVI: Well, as I think it's time to conclude. As Gary began with Learned Hand and I'll end I think to paraphrase he said something to the effect of you get the system that you want, the people get the system that they want and that

they deserve. Let's hope that it's a good one. Thank you very much, panelists.