2001

A comparative analysis of national rules in the United States, the United Kingdom and Canada on the ethical duties of a Judge, Prosecutor and Defense Counsel on making commentary to the press in an ongoing case

Bradley M.J. Kellogg

Case Western Reserve University School of Law
International War Crimes Prosecution Project

(In conjunction with the New England School of Law)

Memorandum for the
Office of the Prosecutor
International Criminal Tribunal for Rwanda

A comparative analysis of national rules in the United States, the United Kingdom and Canada on the ethical duties of a Judge, Prosecutor and Defense Counsel on making commentary to the press in an ongoing case

Bradley M.J. Kellogg
Spring 2001

Table of Contents

Index of Sources

Treaties

1. European Convention on Human Rights, Article 10, 4 November, 1950.

Statutes and Rules

2. American Bar Association, Canons of Professional Ethics, Canon 20 (1908);

3. American Bar Association, Canons of Professional Ethics, Canon 35 (1938).

4. American Bar Association, Model Code of Professional Responsibility, DR 7-107 (1969).

5. American Bar Association, Model Rule of Professional Conduct 3.6 (1995).

6. American Bar Association, Model Rules of Professional Conduct Rule 3.8(g) (1995).

7. Canadian Bar Association, Code of Professional Conduct, Rule 21 (1987).

8. Canadian Charter of Rights and Freedoms, s. 2(b).

9. English Contempt of Court Act, 1981, Ch. 49, 2 (1981).

10. English Criminal Justice Act, ch.86, Article 41 (1925).

11. The Law Society of Manitoba, Code of Professional Conduct, Ch. 18, "Public Appearances and Public Statements by Lawyers."

12. The Law Society of Saskatchewan, Code or Professional Conduct, Ch. XVIII, "Public Appearances and Public Statements by Lawyers."

13. Law Society of Upper Canada, Professional Conduct Handbook, Ruling 30 (1975).

14. Nova Scotia Barristers' Society, Legal Ethics and Professional Conduct Handbook, Ch. 22, "Public Appearances and Public Statements by Lawyers."

15. U.S. Const. Amend. I.

16. U.S. Const. Amend. VI

Cases

33. *Sheppard v. Maxwell*, 384 U.S. 333, 350, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966).

34. *Stewart v. Canadian Broadcasting Corp.*, 150 D.L.R. (4th) 24 (Ont. Gen. Div.) (1997).

35. *Sunday Times v. United Kingdom*, (1980) 2 EHRR 245, [1990] ECHR 6538/74.

36. *Taylor v. Kentucky*, 436 U.S. 478, 485, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978).

Reports and Press Releases

37. American Bar Association Press Release, *Lawyer Stunts on Courthouse Steps Endanger Justice, Warns ABA Leader Jerome Shestack*, August 4, 1997.

38. American Conference of Chief Justices, *A National Action Plan on Lawyer Conduct and Professionalism*, adopted January 21, 1999.

39. International Criminal Tribunal for the former Yugoslavia, Bulletin #3.

40. Law Society of Upper Canada, Communiqué No. 145, March 22 & 23 (1984).

41. Law Society of Upper Canada, Rule 6.06(1), Commentary.

42. Law Society of Upper Canada, Rule 6.06(2), Commentary.

43. Dr. Paul Mason, *Report on the Impact of Electronic Media Coverage of Court Proceedings at the International Criminal Tribunal for the Former Yugoslavia*.

Articles

44. Leslie Renee Berger, *Can the First and Sixth Amendments Co-exist in a Media Saturated Society?*, 15 N.Y.L. Sch. J. Hum. Rts 141 (1998).

45. Robert E. Drechsel, *An Alternative View of Media, Judiciary Relations: What the Non-Legal Evidence Suggests About the Fair Trial – Free Press Issues*, 18 Hofstra L. Rev. 1, 3 (1989).

46. Harris N. Feldman, *Free Press vs. Fair Trial in New Jersey: Capital Appeals Based on Prejudicial Media Publicity*, 31 Rutgers L.J. 209, 248 (1999).

47. Stephen A. Metz, *Justice Through the Eye of the Camera, Cameras in the Courtroom in the United States, Canada, England and Scotland*, 14 Dick. J. Int'l L. 673, 685 (1996).
48. Robert S. Stephen, *Prejudicial Publicity Surrounding a Criminal Trial: What a Trial Court Can Do to Ensure a Fair Trial in the Face of a Media Circus*, 26 Suffolk U. L. Rev. 1063, 1103 (1992).

49. Gerald F. Uelman, *Leaks, Gags and Shields: Taking Responsibility*, 37 Santa Clara L. Rev. 943 (1997).

50. Paul Webster and Stuart Miller, Diana Verdict Sparks Fayed Appeal, The Guardian, Sept. 4, 1999.

51. Charles. W. Wolfram, *Lights, Camera, Litigate: Lawyers and the Media in Canada and the United States*, 19 Dalhousie L.J. 373 (1996).

I. Introduction and Summary of Conclusions

It is recommended that court officers of the International Criminal Tribunal for Rwanda should refrain from commentary which is speculative, tends to bias, or prejudge the outcome of a pending case. This memorandum offers a comparative analysis of national rules in the United States, the United Kingdom and Canada on the ethical duties of a Judge, Prosecutor and Defense Counsel to make or refrain from making public comments to the press who remark on an on-going case. The memorandum then recommends guidelines for international criminal proceedings on such commentary.

Any proposed ethical rules should include recognition of attorneys as educators of the public, found in the Canadian system, and also the Rwandan public's desire for reconciliation and information concerning the proceedings. This memorandum will outline the practices of three countries, the United States, Canada and the United Kingdom, with respect to comments by officers of the court in an ongoing case, and then offer guidelines based on the rules of these jurisdictions for the ICTR.

.

II. Legal Discussion

A. American System

1. *Overview of American System*

The difficult balance between a fair trial and an open trial is a longstanding dilemma in American society. As articulated by Mark Twain, "We have a criminal jury system which is superior to any in the world; and it efficiency is only marred by the

difficulty of finding twelve men every day who don't know anything and can't read."[1] The concern of a fair trial against free press balances the freedom of speech and press goals in the first amendment of the U.S. Constitution[2] and the right to a fair trial as guaranteed by the sixth amendment. The Sixth Amendment guarantees:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an *impartial* jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.[3]

The right to have an unbiased jury is a Constitutional guarantee under the American system, and any attempt of an attorney to prejudice jurors through the media either before selected or during trial is prohibited. Sensationalized accounts by the press cause society to form opinions about the guilt of the accused and consequently violate the defendant's right to a fair trial.[4]

A 1997 poll by the American Bar Association indicated that 58% of the United States public believes that it is never appropriate for lawyers to use the media to influence public opinion about an ongoing case and 55% thought that a large degree of publicity on cases had a negative impact on their views of lawyers.[5] A year later, the American

---

[1] Harris N. Feldman , *Free Press vs. Fair Trial in New Jersey: Capital Appeals Based on Prejudicial Media Publicity*, 31 Rutgers L.J. 209 (1999) [reproduced in accompanying notebook at Tab 46].

[2] U.S. Const. Amend. I (providing, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press…" [reproduced in accompanying notebook at Tab 15].

[3] U.S. Const. Amend. VI (emphasis added) [reproduced in accompanying notebook at Tab 16].

[4] Leslie Renee Berger, *Can the First and Sixth Amendments Co-exist in a Media Saturated Society?*, 15 N.Y.L. Sch. J. Hum. Rts 141 (1998) [reproduced in accompanying notebook at Tab 44].

[5] American Bar Association Press Release, "Lawyer Stunts on Courthouse Steps Endanger Justice, Warns ABA Leader Jerome Shestack," August 4, 1997 [reproduced in accompanying notebook at Tab 37].

Conference of Chief Justices published "A National Action Plan on Lawyer Conduct and Professionalism," which recommended that lawyers refrain from public commentary which might compromise the rights of litigants or distort public perception about the judicial system.[6] While codes regulate the contact between lawyers and the media, critics have compared the media-comment rule to a 'sieve with very large holes;' and have questioned the effectiveness of such codes given lack of enforcement and compliance.[7]

2. *Evolution of American Rule*

The Supreme Court reasoned that problems due to excessive media coverage of trials "are almost as old as the Republic,"[8] and concluded that it is "inconceivable that the authors of the Constitution were unaware of the potential conflicts between the right to an unbiased jury and the guarantee of freedom of the press."[9] The Court cited a letter from Thomas Jefferson written in 1786 in which he concluded that despite it being disturbing that a person could be "arraigned in a newspaper," it was an evil for which there is no remedy because liberty depends on freedom of the press.[10]

In 1807 former Vice President Aaron Burr was charged with treason, accused of trying to make war with the Louisiana Territory against the United States. He

---

[6] American Conference of Chief Justices, "A National Action Plan on Lawyer Conduct and Professionalism," pages 32-33, January 21, 1999 [reproduce in accompanying notebook at Tab 38].

[7] Charles. W. Wolfram, "Lights, Camera, Litigate: Lawyers and the Media in Canada and the United States," 19 Dalhousie L.J. 373 (1996) [reproduced in accompanying notebook at Tab 51].

[8] *Nebraska Press Association v. Stuart*, 427 U.S. 539, 547, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976) [reproduced in accompanying notebook at Tab 26].

[9] *Id*.

[10] *Id* at 548.

complained that it would be difficult to find an impartial jury to serve in his trial because of the publicity surrounding the charges.[11] Media coverage of the alleged crime was coupled with the fact that Burr killed American hero Alexander Hamilton in a duel. While ultimately acquitted, Chief Justice John Marshall of the U.S. Supreme Court ruled that, "in a capital case, the court ought to obtain jurors with 'perfect freedom of previous impression,' but if that were impossible, the duty of the court was to obtain as large a portion of impartiality as possible."[12]

A century later the 1908 American Bar Association Canons of Professional Ethics strongly advised lawyers against talking to the press about pending cases. This advice which was frequently ignored.[13] Canon 20 of the Canons of Professional Ethics read:

> Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any *ex parte* statement.[14]

While in effect for sixty-one years, it was rarely enforced. The Fourth Circuit reasoned that the problem with Canon 20 "was that the standards were so general and vague that

---

[11] Drechsel, Robert E., *An Alternative View of Media, Judiciary Relations: What the Non-Legal Evidence Suggests About the Fair Trial – Free Press Issues*, 18 Hofstra L. Rev. 1, 3 (1989) [reproduced in accompanying notebook at Tab 45]. While the ICTR does not use jury trials, the objectives of an impartial trial remain

[12] Berger, supra note 4, at 144.

[13] American Bar Association, Canons of Professional Ethics, Canon 20 (1908)[reproduced in accompanying notebook at Tab 2].

[14] *Id*.

they were exceedingly difficult to apply and did little to forewarn speakers for publication about what was proscribed and what was permitted."[15]

In 1935, the trial of Bruno Hauptmann for the kidnapping and murder of Charles Lindbergh's baby became America's first notorious case of unfettered publicity due to the media frenzy that ensued.[16] Due to the massive publicity, the trial has been characterized as "perhaps the most spectacular and depressing example of improper publicity and professional misconduct ever presented to the people of the United States in a criminal trial."[17]

As a result, a 'Special Committee on Cooperation Between Press, Radio, and Bar, as to Publicity Interfering with Fair trial of Judicial and Quasi-Judicial Proceedings was formed.[18] The American Bar Association (ABA) responded by revising its Canon of Professional Ethics, and recommended that the media be barred from courtroom proceedings in Canon 35.[19] However, this recommendation was short-lived. In 1947 the

[15] *Hirschkop v. Snead*, 594 F.2d 356, 365 (4th Cir. 1979) [reproduced in accompanying notebook at Tab 23].

[16] *State v. Hauptmann*, 115 N.J.L. 412; 180 A. 809 (1935). The courtroom reportedly contained 141 newspaper reporters and photographers, 125 telegraph operators and 40 messengers Dr. Paul Mason, *Report on the Impact of Electronic Media Coverage of Court Proceedings at the International Criminal Tribunal for the Former Yugoslavia* [reproduced in accompanying notebook at Tab 43].

[17] Robert S. Stephen, *Prejudicial Publicity Surrounding a Criminal Trial: What a Trial Court Can Do to Ensure a Fair Trial in the Face of a Media Circus*, 26 Suffolk U. L. Rev. 1063, 1069 (1992) [reproduced in accompanying notebook at Tab 48].

[18] *Estes v. Texas*, 381 U.S. 532, 596-97, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965) (Harlan, J., concurring) [reproduced in accompanying notebook at Tab 19].

[19] American Bar Association, Canons of Professional Ethics, Canon 35 (1938) [reproduced in accompanying notebook at Tab 3].

Supreme Court of the United States held that trials are public events which should not be suppressed or censored and thus should be open to the public.[20]

The controversy was renewed due to the large amount of media coverage in the criminal trials of Dr. Sam Shepard who was accused of murdering his pregnant wife who was bludgeoned to death. He was convicted in 1954 in one of the first televised trials, a conviction that was overturned twelve years later by the U.S. Supreme Court due to the media coverage. Prospective jurors were photographed and bombarded with media questions without being sequestered. The Supreme Court held that the lack of adequate precautions concerning pretrial publicity turned the trial into a "carnival atmosphere" which jeopardized Dr. Sheppard's right to a fair trial.[21]

In 1961, the murder conviction of Leslie Irvin came before the Supreme Court. Before trial, the county prosecutor released widely publicized press releases that Irvin had confessed to six murders. The U.S. Supreme Court ultimately reversed the conviction but held that a trial court is not required to provide a defendant with a perfect trial, only a fair one.[22]

In another media saturated case, Mr. Estes was convicted of swindling. His pretrial hearing was televised live and repeated on tape the same evening, reaching approximately 100,000 viewers and prospective jurors with an eventual conviction.[23] The U.S. Supreme Court reversed his conviction, reasoning that pretrial publicity "can

---

[20] *Craig v. Harney*, 331 U.S. 367, 67 S. Ct. 1249, 91 L. Ed. 1546 (1947) [reproduced in accompanying notebook at Tab 18].

[21] *Sheppard v. Maxwell*, 384 U.S. 333, 358, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966) [reproduced in accompanying notebook at Tab 33].

[22] Stephen, supra note 17, at 1071.

[23] *Estes v. Texas*, supra note 18, at 536.

create a major problem for the defendant in a criminal case. Indeed, it may be more harmful than publicity during the trial for it may well set the community opinion as to guilt or innocence."[24] The Court recognized not only the threat to jurors, but also the impact publicity can have on the testimony of witnesses[25], the trial judge[26] and the defendant.[27]

As a result of these publicized trials, the ABA enacted Disciplinary Rule 7-107 in its 1969 Model Code of Professional Responsibility.[28] The rule required that, with limited exceptions, lawyers reply with "no comment" to media inquiries.

3. *Model Rule 3.6*

This no-comment rule was extended to Rule 3.6 of the Model Rules of Professional Conduct, which prohibited lawyers from making statements outside of the courtroom which "… will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." In August, 1994 the ABA amended Model Rule 3.6. It now provides:

> (a) A lawyer who is practicing or has participated in the investigation or litigation of a matter shall not make an extra judicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.
>
> (b) Notwithstanding paragraph (a), a lawyer may state:

[24] *Id*.

[25] *Id* at 547.

[26] *Id*. at 548.

[27] *Id*. at 549.

[28] American Bar Association, Model Code of Professional Responsibility, DR 7-107 (1969) [reproduced in accompanying notebook at Tab 4].

(1) the claim, offense or defense involved and, except where prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of the matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, where there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6);

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of the investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effects of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.[29]

[29] American Bar Association, Model Rule of Professional Conduct 3.6 (1995) [reproduced in accompanying notebook at Tab 5].

This rule provides practical guidance as to what a lawyer may state to the media. It is far more extensive than, for example, the Canadian guidelines.[30] Model Rule 3.6 has largely evolved from case law, with the 1994 amendment directly responding to problems addressed in the U.S. Supreme Court cases of *Gentile v. State Bar of Nevada* (1991).

In interpreting the sixth amendment, the Supreme Court has stated that the right to a fair trial includes "the principle that 'one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on the grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.'"[31] Thus, the objectives of a fair trial and an open trial are not entirely compatible during or before a trial if extrajudicial statements unfairly affect the proceedings.

4. *Gentile v. State Bar of Nevada*

In 1991, a Supreme Court case required a revision of the rules addressing attorneys' comments to the media in an ongoing case. Attorney Dominic P. Gentile held a press conference six months before his client's criminal trial, asserting that his client was innocent and that he would prove as a defense police corruption would be used. His client was ultimately acquitted but the State Bar brought disciplinary charges against Mr. Gentile, alleging that he had violated a Nevada prohibition on pretrial extrajudicial statements by attorneys which is almost identical to Model Rule of Professional Conduct

[30] Although see Rules 6.06(1) and 6.06(2) of the Redrafted Rules of Professional Conduct for the Law Society of Upper Canada which offer more guidance to the practitioner than do the rules of the other Canadian provinces or the national guidelines [reproduced in accompanying notebook at Tabs 41 and 42].

[31] *Holbrook v. Flynn*, 475 U.S. 560, 567, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986) (citing *Taylor v. Kentucky*, 436 U.S. 478, 485, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978) [reproduced in accompanying notebook at Tab 24].

Rule 3.6.[32] Mr. Gentile was ultimately disciplined and appealed, arguing that his first amendment right to free speech had been violated. The Supreme Court of the United States heard the case on appeal and ultimately voided the Nevada statute on grounds of vagueness. In his opinion, Supreme Court Justice Kennedy eloquently stated:

> An attorney's duties do not begin inside the courtroom door. He or she cannot ignore the practical implications of a legal proceeding for the client. Just as an attorney may recommend a plea bargain or civil settlement to avoid the adverse consequences of a possible loss after trial, so too an attorney may take reasonable steps to defend a client's reputation and reduce the adverse consequences of indictment, especially in the face of a prosecution deemed unjust or commenced with improper motives. A defense attorney may pursue lawful strategies to obtain dismissal of an indictment or reduction of charges, including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried.[33]

In a dissenting opinion as to Part III of the case, Chief Justice Rehnquist stated that, "Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors, and an outcome affected by extrajudicial statements would violate that fundamental right."[34] Thus even members of the United States' highest courts are at odds as to the proper role of counsel in commenting on an ongoing case.

Professor Charles Wolfram has also criticized the outcome, arguing that, "[t]here seems to be widespread professional belief – at least among many segments of the American legal profession – that there is no effective prohibition against improper media

---

[32] The statute in question, Nev. Sup. Crt. R. 177(1), prohibits an attorney from making "an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding."

[33] *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1043, 111 S. Ct. 2720, 115 L. Ed. 2d 888 (1991) [reproduced in accompanying notebook at Tab 21].

[34] *Id* at 1075.

comments by lawyers involved in cases."[35] Other criticisms focus on the fact that anonymous or leaked statements to the press circumvent the prohibition of speaking to the media, urging instead that the professional rules should require that any statement be identified clearly with its speaker.[36] These anonymous or unidentified quotes allow unethical attorneys to circumvent the prohibition against making extrajudicial statements which may affect a trial. A better solution to this dilemma is addressed by the British system (which shall be addressed below) that sanctions the media rather than counsel for statements which may prejudice the outcome of litigation.

5. *Threat of Attorney's Statements Biasing Jury*

It is unquestioned that during a judicial proceeding, in the courtroom itself, an attorney's right to "free speech" is extremely circumscribed. An attorney may not, by speech or other conduct, resist a ruling of the trial court beyond the point necessary to preserve a claim for appeal.[37] This restriction is equally applicable to both defense and prosecution attorneys *outside* the courtroom. The U.S. Supreme Court has held, in *In re Sawyer*, that lawyers in pending cases are subject to ethical restrictions on speech outside of court that would be unconstitutional if applied to an ordinary citizen.[38] In that case, Justice Stewart reasoned that in a trial "obedience to ethical precepts may require

[35] Wolfram, *supra* note 7, at 396-97.

[36] Gerald F. Uelman, "Leaks, Gags and Shields: Taking Responsibility," 37 Santa Clara L. Rev. 943 (1997) [reproduced in accompanying notebook at Tab 49].

[37] *Sacher v. United States*, 343 U.S. 1,8, 96 L. Ed. 717, 72 S. Ct. 451 (1952) (criminal trial) [reproduced in accompanying notebook at Tab 32]; *Fisher v. Pace*, 336 U.S. 155, 93 L. Ed. 569, 69 S. Ct. 425 (1949) (civil trial) [reproduced in accompanying notebook at Tab 20].

[38] *In re Sawyer*, 360 U.S. 622, 3. L. Ed. 2d 1473, 79 S. Ct. 1376 (1959) [reproduced in accompanying notebook at Tab 25].

abstention from what in other circumstance might be constitutionally protected speech."[39] Thus a balance exits between an attorney's first amendment rights to free speech in the press and a defendant's sixth amendment right to an impartial trial.

The first rationale for this limitation is to prevent attorneys from biasing the jury at all stages of the trial. Public statements made through the media *before* a jury is selected should be prohibited, and statements made *during* trial would also theoretically be forbidden if a jury is not sequestered. The Model Rules of Professional conduct explicitly prohibit prosecutors from making statements that increase the likelihood of greater public condemnation of a defendant,[40] and also permit defense counsel to take steps to mitigate adverse publicity in appropriate cases.[41]

6. *Openness as a Means to Fairness*

As early as the 1930's, the U.S. Supreme Court recognized the important function of the media in American society:

> The newspapers, magazines and other journals of the country . . . have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern.[42]

---

[39] *Id* at 646-647.

[40] Model Rules of Professional Conduct Rule 3.8(g) (1995) [reproduced in accompanying notebook at Tab 6].

[41] Model Rules of Professional Conduct Rule 3.6(c) (1995) [reproduced in accompanying notebook at Tab 5].

[42] *Grosjean v. American Press Co.,* 297 U.S. 233, 250, 56 S. Ct. 444, 80 L. Ed. 660 (1936) [reproduced in accompanying notebook at Tab 22].

Thus this 'restraint on misgovernment' is a check on judicial proceedings to ensure fairness in the trial of the accused.

Upholding this principle, Chief Justice Burger announced the judgment of the Supreme Court that criminal trials are presumptively open to both the public and the media because the openness of trials itself acts as an assurance of fairness to all concerned.[43] In a concurring opinion Justice Brennan reasoned that, "[p]ublicity serves to advance several of the particular purposes of the trial (and, indeed, the judicial) process. Open trials play a fundamental role in furthering the efforts of our judicial system to assure the criminal defendant a fair and accurate adjudication of guilt or innocence."[44] This open trial standard has been upheld in subsequent cases before the highest court in the United States.[45]

The press then can be viewed as a welcome participant in the judicial process, one court going as far to say that the press acts as a safeguard for justice. In *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966), the Court reasoned, "The press does not just publish information about trials, but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial process to extensive public scrutiny and criticism."[46]

---

[43] *Richmond Newspapers v. Virginia*, 448 U.S. 555, 570, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980) [reproduced in accompanying notebook at Tab 31].

[44] *Id.* at 593 (Brennan, J., concurring).

[45] See also *Press-Enterprises Co. v. Superior Court (II)*, 478 U.S. 1, 7, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (holding that the right to an open public trial is a shared right of the accused and the public, the common concern being the assurance of fairness) [reproduced in accompanying notebook at Tab 28]; *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (holding that openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system) [reproduced in accompanying notebook at Tab 27].

[46] *Sheppard v. Maxwell*, supra note 21.

Press scrutiny then seems welcomed in the interests of reaching a just outcome, but the threat of prejudicing the result remains nonetheless.

7. *Threat of Biasing Witnesses*

Threats of the media being able to influence the outcome of litigation results not only from the risk of biasing the jury but also from prejudicing witnesses who may testify at trial. This risk is even greater when the press has paid witnesses large amounts of money for information in a pending case.[47]

While all of these concerns are genuine and rules remain in place to guide attorneys in their commentary to the press in a pending trial, such rules are ineffective if rarely enforced or easily circumvented through anonymous statements. Despite the existence of such prohibitions during the O.J. Simpson case, the 'trial by the media' remained nonetheless with media outlets competing over coverage. Consequently, the American system of general prohibitions without enforcement allows for 'trials by the media.' This structure is ill advised for the ICTR, due to the fact that the Tribunal's legitimacy is challenged if the Rwandan public reaches a different verdict in the 'media trial from that of the ICTR. Consequently, other national jurisdictions perhaps provide a better example for the proper role of officers of the court in addressing the media in an ongoing case.

[47] Robert S. Stephen, *supra* note 17, at 1103.

B. The Canadian System

1. *Overview of the Canadian System*

In 1983 the Chief Justice of the Supreme Court of Canada indicated that a lawyer was "very close to contempt" for merely speaking to the media on the steps of the Supreme Court. Today the Court allows reporters to interview both parties and their attorneys inside the foyer of the court building itself. Thus the Canadian system has transitioned from a traditional prohibition on any media contract for attorneys to more closely follow the American approach.

However, lawyers and reporters were not always so closely intertwined in Canada. In fact the, Code of Professional Conduct of the Canadian Bar Association explicitly prohibited attorneys from discussing clients' cases with the media.[48] The ban extended equally to Ontario's Rules of Professional Conduct, which provide that, "[a] lawyer should not initiate contract with the news media on behalf of himself in respect of any cause or matter which is, or which reasonably may become, a cause or matter in which he is involved in a professional capacity."[49] The rule further prohibited an attorney from "publicizing himself" if contacted by the media and warned against making "any statement to the media which could constitute contempt of court."[50] The admonition against media contact was even more strongly worded in a Communiqué from the Law Society of Upper Canada that threatened contempt of court and disciplinary

[48] Canadian Bar Association, Code of Professional Conduct, Rule 21[reproduced in accompanying notebook at Tab 7]. "

[49] Law Society of Upper Canada, Professional Conduct Handbook, Ruling 30 (1975) [reproduced in part in accompanying notebook at Tab 13].

[50] *Id.*

proceedings if violated.[51] When tested however, the Ontario Divisional Court invalidated this rebuke.

2. *The Dvorak Case*

In 1983, attorney Robert Dvorak advertised his services in the Toronto Star which resulted in a complaint against him by the Law Society of Upper Canada (LSUC). Using the opportunity to challenge the Rules of Professional Conduct, Mr. Dvorak contacted the Toronto Star with the factual background of the case and provided information which was subsequently published in an article. The complaint was then amended to include a charge that Mr. Dvorak had initiated contact with the media for the purposes of publicizing himself and both charges were brought against him.

The Ontario Divisional Court declared that Commentary 18 to Rule 13 of Ontario's Rules of Professional Conduct was invalid, and dismissed the charges because Mr. Dvorak's conduct constituted protected expression under section 2(b) of the Canadian Charter of Rights and Freedoms.[52] Section 2(b) of the Charter is analogous to the first amendment to the U.S. Constitution, and provides that everyone has the fundamental "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication."[53] Mr. Dvorak's contact with the Toronto

[51] Law Society of Upper Canada, Communiqué No. 145, March 22 & 23 (1984) [reproduced in part in accompanying notebook at Tab 40].

[52] *Re Klein and Law Society of Upper Canada*, 50 O.R. (2d) 118 (1985) [reproduced in accompanying notebook at Tab 30].

[53] Canadian Charter of Rights and Freedoms, s. 2(b) [reproduced in accompanying notebook at Tab 8].

Star thus was a protected expression because "it serves a social purpose and provides information on a matter of potential public interest and debate."[54] The Court explained:

> A lawyer has a moral, civil and professional duty to speak our where he sees an injustice. Furthermore, lawyers are, by virtue of their education, training and experience, particularly well-equipped to provide information and stimulate reason, discussion and debate on important current legal issues and professional practices: see Rule 12. Speech of this kind surely lies at the core of the constitutional right as guaranteed by s.2(b). Rule 13, Commentary 18, restricts such right. Again, a client's interest in many situations, and more particularly, a client's freedom of expression may be legitimately served by having his lawyer initiate contact with the news media. The effect of this Rule is to prevent or impede the client through his lawyer from exercising his constitutionally-guaranteed right. In addition, the public has a legal constitutional right to receive information with respect to legal issues and matters pending in the courts and in relation to the profession and its practices. This right is substantially impaired by the said Rule in that it significantly restricts the right of the press and the other media to offer – and the right of the public to receive and discuss – information of important public issues relate to the law and the operation of legal institutions.[55]

While long, this rationale addresses all the main reasons in support of attorneys being able to freely comment on ongoing cases to the media. As outlined in the American section, these include: the ethical duties of lawyers, the role of the lawyer as an educator and provider of information, the client's right of freedom of expression, the public's right to information, and the media's right to provide such information.

3. *Rule 21 of the Rules of Professional Conduct After Dvorak*

After its defeat, the LSUC considered revised rules addressing lawyers' interaction with the media and proposed new recommendations in its subcommittee on Lawyers and the Media. On April 26, 1985, Rule 21 entitled 'Lawyers in Their Public

[54] *Re Kelin and Law Society of Upper Canada*, supra note 52, at 169.

[55] *Id*. at 169h-170d.

Appearances and Public Statements' was enacted, incorporating many elements of the *Dvorak* Court. The Canadian Bar Association amended its Code of Professional Conduct in 1987 to mirror Ontario's Rule 21, and professional codes in Saskatchewan[56], Manitoba[57] and Nova Scotia[58] were amended to incorporate aspects of the rule. Rule 21 provides:

> 1. Lawyers in their public appearances and public statements should conduct themselves in the same manners as with their clients, their fellow practitioners, the courts, and tribunals. Dealings with the media are simply an extension of the lawyer's conduct in a professional capacity. The mere fact that a lawyer's appearance is outside of a courtroom, a tribunal or the lawyer's office does not excuse conduct that would otherwise be considered improper.
>
> 2. The lawyer's duty to the client demands that, before making a public statement concerning the client's affairs, the lawyer must first be satisfied that any communication is in the best interests of the client and within the scope of the retainer. The lawyer owes a duty to the client to be qualified to represent the client effectively before the public and not to permit any personal interest or other cause to conflict with the client's interests.
>
> 3. The lawyer should, when acting as an advocate, refrain from expressing the lawyer's personal opinions as to the merits of the client's case.
>
> 4. The lawyer should, where possible, encourage public respect for and try to improve the administration of justice. In particular, the lawyer should treat fellow practitioners, the courts and tribunals with respect, integrity, and courtesy. Lawyers are subject to a separate and higher standard of conduct than that which might incur the sanction of the court.
>
> 5. Public communications should not be use for the purpose of publicizing the lawyer and should be free from any suggestion that the lawyer's real purpose is self-promotion or self-aggrandizement.[59]

---

[56] The Law Society of Saskatchewan, Code or Professional Conduct, Ch. XVIII, "Public Appearances and Public Statements by Lawyers" [reproduced in accompanying notebook at Tab 12].

[57] The Law Society of Manitoba, Code of Professional Conduct, Ch. 18, "Public Appearances and Public Statements by Lawyers" [reproduced in accompanying notebook at Tab 11].

[58] Nova Scotia Barristers' Society, Legal Ethics and Professional Conduct Handbook, Ch. 22, "Public Appearances and Public Statements by Lawyers" [reproduced in accompanying notebook at Tab 14].

[59] The Canadian Bar Association, *supra* note 48.

While significant for the practices of lawyers in Canada, there have been relatively few cases addressing Rule 21 since its enactment over twenty years ago.[60]

Despite Rule 21 offering specific elements, the debate remains in Canada as to the degree, and even whether, attorneys should discuss ongoing cases with the media. The concern was eloquently articulated by the Former Chief Justice of Ontario, The Honorable Charles Dubin.

> I am puzzled by what appears to be a practice these days of advocates thinking that in a case in which he or she is conducting, you can leave the courtroom, throw off the mantel of responsibility, of independence, and take the case to the public. Trials are not like elections. They are not to be fought or won in the townhall of the media. The advocate is not the mouthpiece of his client, nor the press agent, nor an advertising agency… The advocate who takes his case to the public does not advance the client's case and indeed we intuitively subjectively hurt him because the court might be more hesitant to accept the submissions of an advocate, accept his frankness, his candour (*sic*) and credibility, if outside the courtroom he has prejudged the matter…"[61]

According to this reasoning, an attorney may actually hurt his case *inside* the court room because a judge has reason to doubt the lawyer's ethics outside the courtroom, a trend which clearly does not serve the interest of the client. On the other hand, according to Justice John Sopinka of the Supreme Court of Canada, an attorney can harm the interests of his client by remaining silent to the media. Justice Sopinka deems contact with the media appropriate as long as the lawyer has considered: "First of all, am I doing something that will get me into trouble with either the criminal process or the law

---

[60] *Stewart v. Canadian Broadcasting Corp.*, 150 D.L.R. (4th) 24 (Ont. Gen. Div.) (1997) (stating that the second and third provision apply only to present clients while the other three paragraphs apply to both past and existing clients) [reproduced in accompanying notebook at Tab 34].

[61] Dr. Paul Mason, *supra* note 16.

society? And secondly, should I do it as a matter of tactics?"[62] Thus even Justices in Canada are divided as to the proper method for attorneys to comment to the media about their client in an ongoing case.

4. *Commentary not Involving a Client*

While the above rules for professional conduct apply to both prosecutors and defense attorneys in representing clients, the media often contacts lawyers to offer commentary on proceedings not involving their clients. The LSUC recognizes the important and explanatory role that attorneys can play in commenting on existing cases pending before the courts.[63] These consultations are frequently to obtain background information and analysis by recognized experts in various fields of law.[64] While proper, the American Conference of Chief Justices has warned that such commentary should be restricted to comments on procedure and process and that lawyers should refrain from predicting outcomes, evaluating performances or weighing evidence.[65]

The Canadian system thus requires that: media contact must be an extension of professional conduct, such conduct be in the best interest of the client, the statements should not include personal opinions, the statement should encourage public respect for the proceedings, and should avoid self promotion.[66] The proper role of the Canadian

[62] *Id.*

[63] Law Society of Upper Canada, Rule 6.06(1), Commentary [reproduced in accompanying notebook at Tab 41].

[64] *Id.*

[65] American Conference of Chief Justices, *supra* note 6.

[66] Canadian Bar Association , supra note 48.

attorney then is a provider of information and an educator rather than a speculator or an analyst in predicting a verdict. This function is more appropriate for the ICTR as it facilitates the cathartic goal of the Tribunal without have predictions in the press which may be inconsistent with the ultimate outcome. The approach has the additional advantage of not biasing future witnesses in the trial who otherwise may hear evidence or facts of the case through broadcasts or the press. In sum, guidelines for officers of the Tribunal which are modeled on the Canadian system assist in the healing role of the ICTR and in bolstering its legitimacy for the Rwandan public.

C. United Kingdom

1. *Overview of British System*

In contrast to the media-driven society of the United States, the United Kingdom tends to be a more reticent country with treatment of issues in the press. Historically trials conducted in England were closed to the public and decisions were not usually announced.[67] The media while covering a trial may report only information presented in court.[68] This trend is equally applicable to filming in British court rooms - where cameras are prohibited.[69] Although the 1925 Criminal Justice Act applies to still

[67] Berger, supra note 4, at 143.

[68] *Id.*

[69] Criminal Justice Act, 1925 ch.86 Article 41 (Eng) provides that "(1) No person shall -
(a) take or attempt to take in any court any photograph, or with a view to publication make or attempt to make in any court any portrait or sketch, of any person, being a judge of the court or a juror or a witness in or a party to any proceedings before the court, whether civil or criminal; or
(b) publish any photograph, portrait or sketch taken or made in contravention of the foregoing provisions of this section or any reproduction thereof; and if any person acts in contravention of this section, he shall, on summary conviction, be liable in respect of each offense to a fine [reproduced in accompanying notebook at Tab 10].

cameras, it is equally applicable to video cameras.[70] While prohibiting television cameras in courtrooms was an "unforeseen consequence" of the Act, Section 41 continues to prohibit any courtroom cameras.[71]

Advocates of changing the prohibition of media in the courtroom have similar arguments to proponents of allowing attorneys greater flexibility in their statements to the press. Such activity, it is argued, will inform and educate, expose the legal system to public scrutiny, and prevent miscarriages of justice.[72] Supporters of the stricter British system advance that such rules prevent their system from "sliding into the U.S. style of 'trial by the media,' where freedom of expression takes precedence over the right to a fair trial."[73] These stricter rules are not only necessary because British society is inherently more private, but also because English juries are rarely sequestered.

This 'slide' is further protected by the 1981 Contempt of Court Act, which allows contempt proceedings to be brought against the media even in absence of proof that there is a "substantial risk of serious prejudice" to the proceedings.[74] Unlike the ineffective American system discussed above, which focuses on sanctioning attorneys, the British

---

[70] The Public Affairs Committee of the General Council of the Bar of England and Wales, *Televising the Courts: Report of a Working Party*, May 1989, The Caplan Report, named after Chairman Jonathan Caplan. The Report recommends the limited use of cameras in English courts, but the recommendations were never implemented.

[71] *Id*. at 2.2.

[72] Stephen A. Metz, *Justice Through the Eye of the Camera, Cameras in the Courtroom in the United States, Canada, England and Scotland*, 14 Dick. J. Int'l L. 673, 685 (1996) [reproduced in accompanying notebook at Tab 47].

[73] *Id*. at 686.

[74] English Contempt of Court Act, 1981, Ch. 49, 2. provides that, "The strict liability rule applies only in relation to publications, and for this purpose 'publication' includes any speech, writing,… or other communication in whatever form, which is addressed to the public at large or any section of the public" [reproduced in accompanying notebook at Tab 9].

system concentrates on sanctioning the press for publishing prohibited information about a pending case. This approach has the advantage of addressing anonymous reports or leaks to the press from court officers which, while unethical, are effectively unpunished in the United States.

2. *Contrast with American and Canadian Rules*

The British system is thus more stringent than its American and Canadian counterparts, and is likely to remain that way despite recent events liberalizing the role of the judiciary and the media in Canada. Both the media circus in the O.J. Simpson case and the tragic death of one of England's own celebrities have pressured the Parliament to enforce the role of the media in English society. On May 31, 1997, Princess Diana of Wales died from injuries sustained in a car accident as the media pursued her vehicle. While French magistrates determined that the paparazzi did not play a role in the accident and that it "was caused by the fact that the driver of the car was inebriated and under the effects of drugs incompatible with alcohol,"[75] this renewed the debate in the United Kingdom as to the proper role of the media in British society and further impacted the roles of judges and counsel in their conduct with the media.

While case law previously codified media relations with the judiciary, the authority is not nearly as extensive as American cases dealing with the relationship. Trials in England were closed to the public and even decisions were usually not announced to the press. This trend of strict separation occurred as recently as 1967 when the British Criminal Justice Act was enacted, which closed preliminary hearings to the

[75] Paul Webster and Stuart Miller, Diana Verdict Sparks Fayed Appeal, The Guardian, Sept. 4, 1999 [reproduced in accompanying notebook at Tab 50].

public.[76] Only the simple facts of the crime and the arrest were allowed to be reported by the media and only information which was actually presented in court were reported during a pending trial.

3. *Attorney-General v. Times Newspapers Ltd.*

The Act alone was insufficient to control Judiciary-Media relations. In *Attorney-General v. Times Newspapers Ltd.* (1974), the House of Lords addressed the problem of a 'trial by media.' It outlined a general prohibition against any public prejudgment of the merits of a pending case and stated that such prejudgment was punishable by contempt of court (regardless of whether or not it had any influence on the trial participants.)[77] Several years later however, the European Court of Human Rights held that this principle infringed on the guarantee of freedom of expression in Article 10 of the European Convention on Human Rights.[78] Article 10 provides that

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of

[76] Leslie Renee Berger, *supra* note 4, at 143.

[77] Attor*ney-General v Times Newspaper Ltd* [1974] AC 273 [1973] 3 All ER 54, [1973] 3 WLR 298 [reproduced in accompanying notebook at Tab 17].

[78] *Sunday Times v. United Kingdom*, (1980) 2 EHRR 245, [1979] ECHR 6538/74 [reproduced in accompanying notebook at Tab 35].

> information received in confidence, or for maintaining the authority and impartiality of the judiciary."[79]

Despite this holding, the rules in the United Kingdom remain strict in attorneys' relations with the media. Throughout Great Britain and members of the British Commonwealth, it is considered contempt of court for any branch of the media to publish anything that might even 'tend' to prejudice the public either against or for a criminal defendant in an ongoing case.[80] This broad standard is less than ideal for the ICTR, due to its vague nature and prohibition on data which would inform the Rwandan public about the status of proceedings. For example, it would prohibit information that the prosecution rested after calling 73 witnesses. Such a fact may 'tend' to cause the public to find that a strong case remains against a criminal defendant and thus he should be guilty.

The British system however has the advantage of sanctioning the media rather than attorneys, hereby preventing anonymous accounts of unaccredited statements from being introduced to the public. Since the ICTR may have difficulty in sanctioning media outlets from around the globe, a more effective solution involves precise guidelines as to what information officers of the court can provide to the media. However, the guidelines for the ICTR on statements from judges or attorneys should include the British aspect of contempt, sanctions, or some disciplinary mechanism if violated, such as perhaps dismissal from the Registry.

---

[79] European Convention on Human Rights, Article 10, 4 November, 1950 [reproduced in accompanying notebook at Tab 1].

[80] Harris N. Feldman, supra note 1, at 246.

D. International Criminal Tribunal for the former Yugoslavia

The ICTY provides six cameras[81] in each trial courtroom, which have the capacity to zoom, tilt and move. There are four video directors responsible for the video recording of the trial, but the Tribunal ultimately decides what proceedings can and cannot be shown. The footage is filmed live but broadcast with a thirty-minute delay for the purposes of protecting participants. The tapings are provided freely and are regularly distributed to several television companies around the world.

A questionnaire was circulated to the ICTY and to its staff who participated in the Tribunal from November 1998 to April 1999 on the impact of cameras in the courtroom and the media access.[82] The results indicated that the majority of respondents did not think that judges were affected by the coverage due to "judicial professionalism and day to day experience of televised trials which allows them to perform their tasks without distraction."[83] A smaller majority believed that counsel was not affected by the cameras, but some respondents were unsure whether courtroom theatrics by attorneys was due to their trial tactics or as a result of publicity.[84] Thus similarly to the ABA study discussed above on the negative impact media coverage had on the American public's opinion of lawyers, it appears that even participants of the judicial process itself question attorney's motives when the bright lights of the cameras are present.

[81] Due to budgetary restrictions there were originally only four cameras but this number was increased after contributions from several U.N. members.

[82] Dr. Paul Mason, *supra* note 16.

[83] *Id*. at ch. 2.

[84] *Id.*

Due to the ICTY's analogous nature to the ICTR, the purpose of the cameras is different from the national jurisdictions previously outlined. In addition to the publication of the Tribunal's proceedings, which is similar to the role of the press in national courts, media coverage in tribunals provides a full and accurate record of the proceedings and enables them to be easily archived for reference. Judges for the ICTY have argued that providing a link from the Tribunal to the people of Bosnia was essential due to the Tribunal's remote nature from where the atrocities were committed.[85] Due to the function of these trials as a healing mechanism for the society of Rwanda, recorded and public proceedings assist in reconciliation and the public's sense of a legitimate administration of justice. Equally, direct video links from Arusha would allow the people of Rwanda to see first hand the events of the ICTR and would diminish the need for court officers or counsel to comment to the media in a pending case.

The ICTY also provides a recent example of an officer of the court improperly addressing the media and subsequently being admonished by the tribunal. In *Prosecutor v. Milosevic*, Trial Chamber III issued an oral decision "instructing the Registrar to revoke the appointment of Michail Wladimiroff as an amicus curiae".[86] The decision was a result of a complaint by Milosevic about two articles published on September 7, 2002 in the Haagsche Courant (a Dutch Newspaper) and on September 13, 2000 in the Kultura (a Belgian Newspaper). Both articles were a result of interviews given my Mr. Wladimiroff. The Court reasoned that the interviews, even if misquoted, were

[85] International Criminal Tribunal for the former Yugoslavia, Bulletin #3, p.1 [reproduced in accompanying notebook at Tab 39].

[86] *Prosecutor v. Slobodan Milosevic*, Trial Chamber III, Decision Concerning an Amicus Curiae, 10 October 2002 [reproduced in accompanying notebook at Tab 29].

inappropriate and instructed the Registrar to revoke Mr. Wladimiroff's status as an amicus curiae. Judge Richard May held for the Court that

> The Chamber has considered this matter very carefully, and has concluded that the statements made by Mr. Wladimiroff, even with the explanations accepted, raise serious questions about the appropriateness of his continuing as amicus curiae. The Chamber observes that not only did he comment on parts of the case in respect of which evidence has been given, but that he also made an assessment of parts in respect of which evidence had not yet been adduced, and that in both instances he appears to have formed a view of the case unfavourable to the accused. Of particular concern is the view expressed that the accused must be convicted of, at least, some of the charges. The statements taken as a whole, would, in the Chamber's view, give rise to a reasonable perception of bias on the part of the amicus curiae.[87]

While not officially a defense attorney for Milosevic, the same principles should apply for counsel before the ICTR.

4. Recommendations for the ICTR

A. Proposed Rule

1. Counsel and Judges of ICTR shall not make extrajudicial statements or public commentary in an ongoing case with the except in:

A. Providing information contained in the public record or information related to scheduling of an aspect of litigation;

B. Affirming that an investigation is in progress;

C. Providing the general scope of the case, including the charged offense or defense;

D. Educating the public in the legal issues involved in pending litigation;

E. Requesting assistance from the public in apprehending suspects and in obtaining evidence and information;

F. Warning the public of potential dangers.

[87] *Id.*

2. Public appearances and commentary are an extension of the Officer of the Tribunal's professional capacity and thus should avoid any commentary which:

A. Speculates about the outcome of the proceeding;

B. Distorts or prejudices materially the public perception about the proceeding;

C. Contains personal opinions about the merits of the litigation;

D. Contains confidential information about the client without the informed consent of the client;

E. Is self-promoting or self-publicizing;

3. When making public commentary, Officers of the ICTR shall encourage public respect for the Tribunal and its administration of justice.