

# THE CIRCUS COMES TO TOWN: THE MEDIA AND HIGH-PROFILE TRIALS

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## I

### INTRODUCTION

The time to plan for a hurricane is not when the storm is thirty miles off-coast barreling toward shore, but on a tranquil, sunny day. Similarly, the time to plan for a high-profile trial is before a half-dozen satellite trucks, the network advance team, and a hungry pack of journalists arrive at the courthouse.

This article explores the nonlegal approaches a court can take to manage the media onslaught associated with a high-profile proceeding and asserts that, although the ringmaster (the judge) may be more effective in today's media circuses that surround notorious cases, the roles of the clowns, jugglers, and other side-show distractions are largely unchanged over the past century. By expeditiously and thoroughly addressing cameras in court, advancing technology, and media seating—the three areas with the greatest potential for court and media confrontation—the latest trial of the century will be just another day in court, and will not, as novelist Edna Ferber said of the kidnapping trial of Charles Lindbergh Jr., son of the famed aviator, “make one want to resign as a member of the human race.”<sup>1</sup>

## II

### A HIGH-PROFILE LOOK BACK

Although the current discussion occurs in the wake of the rape allegations against the 2006–2007 Duke men's lacrosse team, history is replete with examples of conflicts between the courts and the media in high-profile settings and of the courts' recognition of that conflict. One hundred years ago, in *Patterson v. Colorado*,<sup>2</sup> the Supreme Court said, “[t]he theory of our system is that the conclusions to be reached in a case will be induced only by evidence

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1. Ronald Goldfarb, *The Trial of the Century*, COSMOS CLUB J. (1998) (quoting LUDOVIC KENNEDY, *THE AIRMAN AND THE CARPENTER: THE LINDBERGH KIDNAPPING AND THE FRAMING OF RICHARD HAUPTMANN* 259 (1985)).

2. 205 U.S. 454 (1907).

and argument in open court, and not by any outside influence, whether of private talk or public print.”<sup>3</sup> More than thirty years later, in *Bridges v. California*,<sup>4</sup> the Supreme Court reversed the lower court’s imposition of a fine against the *Los Angeles Times* for editorials it published while a high-profile criminal matter was pending.<sup>5</sup> Nevertheless, Justice Hugo Black wrote for the Court, “[l]egal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper.”<sup>6</sup>

Throughout history, judges have tried mightily to confine trials to the four walls of the courtroom, only to repeatedly see them spill out onto the streets, pop-up on the evening news, and land in the daily newspaper. For example, the 1925 trial of high-school teacher John Scopes, who was charged with teaching evolution, pitted the era’s top lawyers, Clarence Darrow and William Jennings Bryan, against one another.<sup>7</sup> It gave rise to books,<sup>8</sup> a popular movie,<sup>9</sup> and a long-running Broadway show.<sup>10</sup> The 1935 trial of Bruno Hauptmann for the abduction and murder of the Lindbergh baby was called “the greatest story since the Resurrection” by journalist H.L. Mencken.<sup>11</sup> A Google search of the terms “trial of the century” yields a Wikipedia listing that provides eight examples, starting with the not-so-well-known 1906 murder trial of railroad baron Henry K. Thaw and ending with the 1995 criminal trial of O.J. Simpson.<sup>12</sup> The Simpson case alone gave rise to more than twenty-five different books, according to a recent search on Amazon.com, ranging from the 1997 “Murder in Brentwood,” by Mark Furhman, the lead detective in the case, to a 2007 book “No Stone Unturned,” in which two Indiana journalists go to Los Angeles to try to solve the murder case.

There clearly are more (traditional and new) media outlets today than there were even a decade ago, yet it is unlikely that modern-day trials have generated greater or more scurrilous publicity than the trial of Sam Sheppard, the Ohio physician charged with murdering his pregnant wife.<sup>13</sup> In the fall of 1954, during the second day of voir dire, a debate was broadcast live over the radio, during which one participant claimed that Sheppard’s hiring of a prominent defense

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3. *Id.* at 462.

4. 314 U.S. 252 (1941).

5. *Id.* at 274–75.

6. *Id.* at 271.

7. *The Scopes ‘Monkey Trial,’* <http://xroads.virginia.edu/~UG97/inherit/1925home.html> (last visited May 27, 2008).

8. *E.g.*, MARVIN OLASKY & JOHN PERRY, *MONKEY BUSINESS: THE TRUE STORY OF THE SCOPES TRIAL* (2005).

9. *INHERIT THE WIND* (Stanley Kramer Productions 1960).

10. JEROME LAWRENCE & ROBERT EDWIN LEE, *INHERIT THE WIND* (1955).

11. *The Trial of the Century*, HUNTERDON COUNTY DEMOCRAT, <http://www.nj.com/lindbergh/index.ssf?/lindbergh/trial.html> (last visited Mar. 4, 2008).

12. Wikipedia, *Trial of the century*, [http://en.wikipedia.org/wiki/Trial\\_of\\_the\\_century](http://en.wikipedia.org/wiki/Trial_of_the_century) (last visited Feb. 19, 2008).

13. *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

lawyer was a clear indication of his guilt.<sup>14</sup> After Sheppard testified that he had been mistreated by detectives following his arrest, a captain in the homicide bureau, who was not present at the trial, issued a press statement denying the charge.<sup>15</sup> Justice Tom Clark cited nine flagrant episodes of publicity surrounding the Sheppard case.<sup>16</sup> A decade later, the Sheppard case inspired the popular television show *The Fugitive* and in 1993 the feature movie by the same name.

More than forty years later, another noteworthy legal controversy unfolded first in the court of public opinion rather than in a court of law. In the spring of 2006, the nation's headlines were full of unsubstantiated and inflammatory allegations by Durham County District Attorney Mike Nifong, the prosecutor in the Duke lacrosse case, who subsequently was disbarred after the North Carolina State Bar Association accused him of making "approximately 150 statements to the media that he 'knew or reasonably should have known . . . had a substantial likelihood of prejudicing the criminal adjudicative proceeding.'" <sup>17</sup>

Both courts and the media itself have long sought means of managing this sort of prejudicial spillover from courtroom to street. In 1989, U.S. District Judge Gerhard Gessell tapped Carl Stern, NBC's law correspondent at the time, to serve as the media liaison in the obstruction-of-justice trial of Oliver North, the first of several, high-visibility trials stemming from the Iran Contra Affair. "I'm a public information officer without a portfolio," said Stern in a 1989 interview in *Editor and Publisher*.<sup>18</sup> Recently, consultants like Peter Shaplen have been hired by the media to help manage the various logistics in such notable cases as the 2005 criminal prosecution of Michael Jackson, in Santa Maria, California, and the 2004 Scott Peterson double-murder trial in Redwood City, California. Shaplen, who owns his own production company, previously held various positions with ABC and CBS News. His courtroom responsibilities, however, were not much different than those performed by Stern in the North trial. And in October 2005, the National Judicial College's Donald W. Reynolds National Center for Courts and the Media (Reynolds Center) convened about 100 judges, journalists, lawyers, and court information officers from around the country for a conference entitled: "From O.J. to Martha to Michael: What We Have Learned About the Conduct and Coverage of Trials."<sup>19</sup> Were this conference held seventy-five years ago, it probably would have been called: "From Scopes to Hauptmann: What We Have Learned."

What *have* we learned? Constant over the years is the importance of effective planning, communication, and coordination. When the trial begins, the

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14. *Id.* at 346.

15. *Id.* at 349.

16. *Id.* at 345-49.

17. *N.C. Bar Files Amended Ethics Complaint Against D.A. Who Prosecuted Duke Lacrosse Team Rape Allegations* (Jan. 24, 2007), <http://news.findlaw.com/cnn/docs/duke/ncbnifong12407cmp.html>.

18. *Double Duty*, EDITOR AND PUBLISHER, Mar. 18, 1989.

19. Gary A. Hengstler, *Pressing Engagements: Courting Better Relationships Between Judges and Journalists*, 56 SYRACUSE L. REV. 419, 423-24 (2006) (providing an overview of the Reynold's Center conference and addressing the inherent tension between the courts and the media).

judge, community, lawyers, litigants, security, news media, and jurors all have goals, which may at times be in conflict. For example, whereas a judge strives to conduct a fair trial, the community wishes to be free of disruption, the media seeks unfettered access, and the jurors hope to be released from service as soon as possible. The ability to balance and manage these various interests likely will determine whether a particular high-profile case ends up as a one night story on the evening news or in the history books, as well.

### III

#### RESOURCES

As a first step, courts should develop a media plan that addresses the logistical issues associated with a high-profile proceeding—where to park the gangly television-satellite trucks, which rules apply to media interviews in the courthouse, and how to access exhibits admitted into evidence—among numerous other issues present in most high-profile cases. Although the media plan does not bind the judge who presides over the high-profile trial, it will be a useful resource for the judge to consider and appropriately tailor in addressing the specific issues present in a case. A media plan also can serve as a framework for a decorum order, a tool many judges use today. For example, the decorum order in *People v. Bryant*,<sup>20</sup> the case involving professional basketball star Kobe Bryant, helped manage the media and its access and was amended as circumstances changed.<sup>21</sup> In *State v. Jeffs*,<sup>22</sup> the case involving an avowed polygamist, there were four decorum orders, extending from September 2006 to August 2007, to address new issues as they arose.<sup>23</sup>

Today a wide assortment of resources is available to judges and court administrators who wish to prepare for the media deluge that accompanies virtually all high-profile or notorious trials. These resources include courtroom simulations, hands-on training, an association of court public-affairs professionals, as well as manuals and guidelines. One resource, the Reynolds Center, biannually offers judges and court staff training on working with the media, dedicating a significant chunk of the three-day program to high-profile trials.<sup>24</sup> The Reynolds Center's stated purpose is "to foster discussion about the inherent tensions between the right to a fair trial, as guaranteed in the Sixth Amendment of the U.S. Constitution, and the First Amendment right of the

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20. 94 P.3d 624 (Colo. 2004).

21. Third Am. Decorum Order, [http://capitaldefenseweekly.com/library/kobe/03-04/amend\\_decorum\\_order\\_3.pdf](http://capitaldefenseweekly.com/library/kobe/03-04/amend_decorum_order_3.pdf) (last visited Feb. 25, 2008) (providing express restrictions on media access to the Kobe Bryant case).

22. No. 061500526 (5th Dist., Wash. County, Utah 2008).

23. See Third Am. Decorum Order, [http://www.utcourts.gov/media/hpcases/index.cgi?mode=displayentries&parent\\_id=334&category\\_id=335](http://www.utcourts.gov/media/hpcases/index.cgi?mode=displayentries&parent_id=334&category_id=335) (last visited Feb. 25, 2008) (clarifying acceptable media access and imposing media restrictions).

24. The Donald W. Reynolds National Center for Courts and the Media in the National Judicial College, <http://www.judges.org/nccm/courses/ect/ect.htm> (last visited Feb. 19, 2008) [hereinafter Reynolds Center].

free press to conduct its work largely unfettered by governmental restrictions.”<sup>25</sup> Nowhere are these tensions more evident than in a high-profile trial. The Reynolds Center also has conducted a series of regional workshops throughout the country, bringing together judges and journalists at the local level to better understand each other and each other’s work.<sup>26</sup>

On the federal level, the First Amendment Center, in partnership with the Judicial Branch Committee of the Judicial Conference of the United States, has convened about a dozen day-long sessions at various locations throughout the country for judges from a particular region and reporters from the same area to become more familiar with each other’s role in a case.<sup>27</sup> All programs have the same goal: bringing better understanding of each other’s daily demands to judges and journalists.<sup>28</sup> A secondary but not insignificant benefit is the establishment of relationships that help smooth the way when a high-profile matter lands in a particular court.<sup>29</sup>

Another resource is the Conference of Court Public Information Officers (CCPIO), which lists more than 100 members from all over the world.<sup>30</sup> Today the group’s diverse membership includes community-relations officers, education specialists, staff attorneys, and court public-information officers.<sup>31</sup> However, when the CCPIO was founded in 1990, it was composed of a small group of individuals who handled media-relations work for their courts.<sup>32</sup> “It was the high-profile trials of the last fifteen years that caused judges to increasingly value the expertise of court public information officers,” says Ron Keefover, the Education Information Officer for the Kansas Supreme Court and the first president of the CCPIO.<sup>33</sup> The CCPIO’s annual meetings feature discussions of the latest high-profile court proceedings.<sup>34</sup> The 2007 conference in Columbus, Ohio, included a presentation by Chris Stotz, the Public Information Officer in the Seventeenth Judicial Circuit of Florida, where quirky Judge Larry Seidlin conducted hearings earlier in the year to determine custody of the body of deceased starlet Anna Nicole Smith, and then later sought a deal for his own TV show.<sup>35</sup> In 2006, the CCPIO focused on how the courts in Louisiana and

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25. *Id.*

26. *See, e.g., id.*

27. The First Amendment Center, <http://www.firstamendmentcenter.org/>.

28. Laura Breslin, *Judges, Journalists Compare Notes on Trial Coverage*, FIRST AMENDMENT CENTER ONLINE, Nov. 18, 2005, available at <http://www.firstamendmentcenter.org/news.aspx?id=16086&SearchString=tjoflat>.

29. *Id.*

30. Conference of Court Public Information Officers (CCPIO), <http://courtpio.org/members.html> (last visited Feb. 19, 2008).

31. *Id.*

32. Mr. Sellers is a founding member and President of the CCPIO.

33. Telephone Interview with Ron Keefover, Educ. Info. Officer, Kan. Sup. Ct. (Nov. 21, 2007).

34. CCPIO, *supra* note 30.

35. CCPIO, 16TH ANNUAL MEETING AUG. 1–3, 2007, COLUMBUS, OH (on file with author).

Mississippi dealt with Hurricane Katrina.<sup>36</sup> The 2005 CCPIO conference featured both Judge Terry Ruckriegle of Eagle, Colorado, who presided over the Kobe Bryant criminal case, and Judge George Greer of Pinellas County, Florida, who presided over the Terry Schiavo case, clearly the year's two highest-profile court proceedings.<sup>37</sup>

In addition to such organizations as the Reynolds Center and the CCPIO, there are a number of helpful publications in the field. One of the most useful is *Managing Notorious Trials*, published by the National Center for State Courts.<sup>38</sup>

In addition to chapters on dealing with the media, jury considerations, and planning for security in notorious trials, the book includes appendices containing sample media advisories, security plans, and juror prescreening questionnaires.<sup>39</sup> There are also several more-general tools for reporters, including *Covering the Courts, A Handbook for Journalists*, by Loyola University Professor and former journalist S.L. Alexander.<sup>40</sup> A number of courts have placed reporters' guides to the courts on their Web sites, including *The Journalist's Guide to Maryland's Legal System*<sup>41</sup> and *A Journalist's Guide to the Federal Courts*, published by the Administrative Office of the U.S. Courts.<sup>42</sup> Several more general, but useful, resources are available on the Internet. For example, the Court of Common Pleas of Lake County Ohio has produced a forty-four page *Media Relations and Public Access Plan for Special Interest/High Profile Proceedings*.<sup>43</sup> The *Media Guide to the Washington State Courts*, also available on the court system's Web site, is a handbook for reporters who cover the state's courts on a regular basis, or those who find themselves assigned to cover a single high-profile matter.<sup>44</sup>

Some courts have established a Court Media or Bar-Bench Media Committee to ensure there is an ongoing dialogue on issues of shared concern, and, perhaps most importantly, to build relationships that may ease tensions in

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36. CCPIO, 15TH ANNUAL CONFERENCE OF COURT PUBLIC INFORMATION OFFICERS AUG. 2-4, 2006, PHOENIX, AZ (on file with author).

37. CCPIO, 14TH ANNUAL CONFERENCE OF COURT PUBLIC INFORMATION OFFICERS AUG. 1-3, 2005, KANSAS CITY, MO (on file with author).

38. TIMOTHY R. MURPHY ET AL., *MANAGING NOTORIOUS TRIALS* (Nat'l Center for State Courts, 2d ed. 1998) (1992).

39. *Id.*

40. S.L. ALEXANDER, *COVERING THE COURTS: A HANDBOOK FOR JOURNALISTS* (Rowman & Littleton 2003) (1999).

41. THE JOURNALIST'S GUIDE TO MARYLAND'S LEGAL SYSTEM (Sue K. Katcef & Robert D. Anbinder eds., 2003), available at <http://www.courts.state.md.us/journalistguide2003.pdf>.

42. James C. Duff & David A. Sellers, *A Journalist's Guide to the Federal Courts*, Administrative Office of the U.S. Courts (on file with *Law and Contemporary Problems*), available at <http://www.uscourts.gov/journalistguide/July2007.pdf>.

43. MEDIA RELATIONS AND PUBLIC ACCESS PLAN FOR SPECIAL INTEREST / HIGH PROFILE PROCEEDINGS IN THE GENERAL DIVISION OF THE COURT OF COMMON PLEAS OF LAKE COUNTY, OHIO (2005) (on file with *Law and Contemporary Problems*), available at <http://www2.lakecountyohio.org/courts/>.

44. PUBLIC TRUST & CONFIDENCE COMM., BD. FOR JUDICIAL ADMIN., *MEDIA GUIDE TO WASH. STATE COURTS* (2006) (on file with *Law and Contemporary Problems*), available at <http://www.courts.wa.gov/newsinfo/content/pdf/mediaGuide.pdf>.

the wake of a high-profile proceeding and the attendant stress it brings. The Bar-Bench Media Conference of Delaware, which was established in 1975, meets quarterly and makes its minutes of the meetings available on the group's Web site.<sup>45</sup>

Appropriate training and solid advance work by a team of professionals can also help ease the pressures of a high-profile case. Emergency preparedness, a term that is prevalent in the post-9/11 and post-Katrina world, also should be part of a court's planning process. Whereas courts should establish continuity of operations plans in the event of natural or manmade disasters, they also should consider a high-profile case as a type of emergency and prepare themselves adequately. Of course, trial judges have a well-stocked arsenal of orders they can unleash, including changes of venue, jury sequestration, protective orders, and more. Yet a judge must be concerned not just with behavior inside the courtroom, but with how activities outside the courtroom may affect events and behavior inside the courtroom.

The media is willing to accept necessary and reasonable court-imposed restrictions, so long as they do not infringe on the First Amendment rights of the press, and most courts are willing to do what they can to accommodate the media's access needs, as long as they do not infringe on a defendant's right to a fair trial. An early and constructive court-media dialogue addressing three core issues—cameras, technology, and courtroom seating—will not dim the high-profile-trial spotlight, but will enable members of the Third Branch and Fourth Estate to perform their jobs most effectively and should allow the trial to proceed without becoming “the greatest show on earth.”<sup>46</sup>

#### IV

#### CAMERAS

Certainly cameras in court are a modern-day issue, although no judge in the last seventy-plus years—including Judge Lance Ito in the O.J. Simpson trial—has struggled with the camera issue as much as did Thomas W. Trenchard, the trial judge in the Hauptmann case. According to various accounts, more than 130 cameramen attempted to cover the trial, and many ignored the judge's ban on photographing witnesses.<sup>47</sup> It was the Hauptmann trial that caused the American Bar Association two years later to adopt Canon 35 of the Canons of Professional and Judicial Ethics, which banned courtroom photography.<sup>48</sup> It stated,

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45. Bar-Bench Media Conference of Delaware, <http://courts.state.de.us/BBMC/minutes.htm> (last visited Feb. 19, 2008).

46. Ned Williams, *The Greatest Show on Earth*, <http://www.localhistory.scit.wlv.ac.uk/articles/Circus/Circus.htm> (last visited Mar. 4, 2008).

47. See, e.g., Goldfarb, *supra* note 1.

48. CHARLOTTE A. CARTER-YAMAUCHI, NATIONAL CENTER FOR STATE COURTS, MEDIA IN THE COURTS 2-6 (1981) (quoting 62 A.B.A. REP. 1134-35 (1937)).

Proceedings in court should be conducted with the fitting dignity and decorum. The taking of photographs in the courtroom, during session of the court or recesses between sessions, and the broadcasting of court proceedings are calculated to detract from the essential dignity of the proceedings, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted.<sup>49</sup>

In many respects, the presence of cameras in the courtroom today is largely a settled issue. Many state courts allow some degree of camera coverage.<sup>50</sup> The federal trial courts do not allow camera coverage,<sup>51</sup> and the federal appellate courts allow each court of appeals to make its own decision.<sup>52</sup> Currently, only the Ninth and Second Circuits allow television- and radio-broadcast coverage.<sup>53</sup> However, broadcast access is not a simple issue. The Radio–Television News Directors Association publishes on its Web site a state-by-state guide to cameras in court.<sup>54</sup> It divides courts into three tiers: those that allow the most coverage (nineteen states), those that allow coverage with restrictions (sixteen states), and those that limit coverage to only appellate courts or have significant restrictions on trial-court coverage (fifteen states).<sup>55</sup> Consequently, it is impossible to make a blanket statement about the scope of camera coverage in state courts today.

The purpose of this article is not to debate the pros and cons of camera coverage of court proceedings. It is important, however, for the media, and in particular the out-of-town media, to familiarize itself with the court rules regarding cameras in various jurisdictions. Each jurisdiction has a unique wrinkle or two. Likewise, prior to trial, courts should set ground rules for camera and audio coverage. These rules should be readily available, ideally on the court's Web site. Of the courts that publish their rules, many also include the necessary forms for requesting electronic media coverage, including Colorado,<sup>56</sup> Hawaii,<sup>57</sup> Michigan,<sup>58</sup> and Missouri.<sup>59</sup>

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49. *Id.*

50. The Radio–Television News Directors Association, [http://www.rtnda.org/pages/media\\_items/cameras-in-the-court-a-state-by-state-guide55.php](http://www.rtnda.org/pages/media_items/cameras-in-the-court-a-state-by-state-guide55.php) (last visited Feb. 20, 2008) [hereinafter RTDNA] (providing state court rules for camera use in the courtroom).

51. John R. Tunheim, Judge, U.S. Dist. Ct. for the Dist. of Minn., Address to the U.S. House of Representatives (Sept. 27, 2007) at 5–6, available at [http://www.uscourts.gov/testimony/Tunheim\\_cameras092707.pdf](http://www.uscourts.gov/testimony/Tunheim_cameras092707.pdf).

52. *Id.* at 5.

53. *Id.* at 6.

54. RTDNA, *supra* note 50.

55. *Id.*

56. Press Release, Colorado Judicial Branch (May 2, 2002), available at <http://www.courts.state.co.us/exec/media/notices/cameras.doc>.

57. Hawaii State Judiciary, [http://www.courts.state.hi.us/page\\_server/News/Media+Guidelines/7992EDD603B6334EFD52F64FC3.html](http://www.courts.state.hi.us/page_server/News/Media+Guidelines/7992EDD603B6334EFD52F64FC3.html) (last visited Feb. 20, 2008).

58. Admin. Order 1989-1, Film or Electronic Media Coverage of Court Proceedings, <http://courts.michigan.gov/supremecourt/Press/mediainfo.pdf>.

59. Press Release, Missouri Supreme Court Communications Counsel, Cameras in the Courtroom: A Guide to Missouri's Court Operating Rule 16, available at <http://www.courts.mo.gov/page.asp?id=333>.



Virtually every court provides the presiding judge with some degree of discretion, particularly the ability to prohibit or in some form restrict camera access.<sup>60</sup> Pooling—the sharing of resources by the broadcast media—is not uncommon in high-profile trials. Typically, not more than one or two cameras are permitted in a proceeding, with the understanding that the camera crew will share its product with other media who are part of the pool. Such arrangements are put in place by the media, not the court. Courts usually require some form of a written application by the media in order to gain access to a particular proceeding. Cameras and their operators typically are not allowed to move about the courtroom when court is in session and are prohibited from photographing jurors in a manner by which they can be identified. Some courts distinguish between video, audio recording, and photographing.<sup>61</sup> There also may be different broadcast rules for different parts of the trial—voir dire, opening arguments, key witnesses, et cetera.

Cameras can actually make a court's job easier during a high-profile proceeding. Most state courts allow camera coverage of appellate proceedings,<sup>62</sup> and many courts stream oral arguments over their own Web sites. Additionally, cameras can be a useful tool when they are used to transmit proceedings to overflow courtrooms. Even the federal courts, which prohibit camera coverage of trial proceedings, increasingly are providing closed-circuit feeds to overflow courtrooms to allow more people live access to trial proceedings.<sup>63</sup> In what is known as the Fort Dix Six case, the matter involving six defendants who are alleged to have plotted to blow up the Fort Dix military base in New Jersey,<sup>64</sup> the U.S. District Court in New Jersey is using two overflow courtrooms—one for the media and one for the public—both equipped with live, closed-circuit video feeds of the trial.<sup>65</sup> In addition, any piece of evidence that is shown to the jury also is broadcast to the overflow rooms and simultaneously posted to the Court's Fort Dix Trial Web site.<sup>66</sup> In 2007, such overflow courtrooms were used effectively in the federal cases of *United States v. Black*,<sup>67</sup> the Canadian media

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60. *E.g.*, Judicial Council of California, *Cameras in California Courts*, Feb. 2007, <http://www.courtinfo.ca.gov/reference/documents/factsheets/camerasc.pdf>.

61. The Utah State Courts, Judicial Council Rules of Judicial Admin., <http://www.utcourts.gov/resources/rules/ucja/ch04/4-401.htm> (last visited May 14, 2008) (prohibiting video and audio recording, while permitting still photography at the judge's discretion).

62. RTNDA, *supra* note 50.

63. Order, *United States v. Libbey*, Crim. No. 05-394 (RBK) 3–4 (D.C. Dist. 2007).

64. Order, *United States v. Shnewer*, Crim. No. 07-459 (RBK) (N.J. Dist.). The trial began on Sept. 29, 2008. Leo Strupczewski, *Fort Dix case reflects shift in strategy on terror probes*, COURIER-POST (Cherry Hill, N.J.), Sept. 28, 2008; Geoff Mulvihill, *Judge: Fort Dix plot trial will start Sept. 29*, INT'L HERALD TRIBUNE, Sept. 9, 2008, available at <http://www.iht.com/articles/ap/2008/09/09/america/Fort-Dix-Plot.php>.

65. Fort Dix Trial Home Page, <http://www.njd.uscourts.gov/FortDixTrial/index.html> (last visited Nov. 21, 2008).

66. *Id.*

67. 469 F. Supp. 2d 513 (N.D. Ill. 2006).

tycoon convicted of fraud, and *United States v. Libby*,<sup>68</sup> the case of former vice-presidential chief of staff Lewis “Scooter” Libby.

One modern-day phenomenon brought on by camera coverage of trials, primarily since the O.J. Simpson trial of 1995, is the proliferation of tabloid—largely TV—media. Over the years, the public has exhibited a great fondness for courtroom drama—real, simulated, or fabricated. One well-known, television court commentator is Nancy Grace, a former Atlanta prosecutor and an outspoken victims’ rights advocate best known for hosting CNN’s *Headline News* legal analysis.<sup>69</sup> She dedicates one hour every night to the most high-profile and sensational legal news of the day.<sup>70</sup> Likewise, Greta Van Susteren hosts the Fox News show *On the Record with Greta Van Susteren*, an hour-long look at legal news that airs weekdays.<sup>71</sup> Van Susteren, a former criminal-defense lawyer, joined CNN in 1991 as a legal analyst but made her name during the Simpson criminal trial coverage and analysis in 1995. Together, Fox and CNN devote two hours of television nearly every night to legal and court news, both relying in part on video captured inside courtrooms across the country. The popular YouTube Web site is filled with video snippets from courtrooms throughout the world, ranging from an argument in the summer of 2007 before the Ohio Supreme Court,<sup>72</sup> to a simulation of the Salem witch trials.<sup>73</sup> Add to the mix the popular television shows—*Judge Judy*, *Judge Hatchett*, *Judge Joe Brown*, and others—and it appears that Americans have a nearly insatiable appetite for courtroom video.

Ironically, despite the public’s apparent taste for courtroom drama, it appears viewers are most interested in the snippets that appear on the nightly news or YouTube, or in the excerpts with a little spin that appear on the television tabloids. As a result, Court TV, the cable network that more than fifteen years ago brought live courtroom coverage to millions of living rooms, is reinventing itself, and on January 1, 2008, began to broadcast as truTV.<sup>74</sup> According to a press release issued by the network, “the soon-to-be rebranded network will feature high stakes, action-packed originals that give viewers access to places and situations they can’t normally experience.”<sup>75</sup> Apparently, gavel-to-gavel courtroom coverage no longer attracts sufficient interest from advertisers and viewers.

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68. 475 F. Supp. 2d 73 (D.C. Cir. 2007).

69. Cable News Network (CNN), [http://www.cnn.com/CNN/anchors\\_reporters/grace.nancy.html](http://www.cnn.com/CNN/anchors_reporters/grace.nancy.html) (last visited Feb. 21, 2008).

70. *Id.*

71. Fox News, <http://www.foxnews.com/ontherecord/index.html> (last visited Feb. 21, 2008).

72. YouTube.com, Ohio Supreme Court, The Fisher Case, [http://www.youtube.com/watch?v=\\_8HM0XpsRo0](http://www.youtube.com/watch?v=_8HM0XpsRo0) (last visited Feb. 21, 2008).

73. YouTube.com, Salem Witch Trials of 1962, <http://www.youtube.com/watch?v=a3WmH2Hs4aw> (last visited Feb. 21, 2008).

74. Press Release, truTV, Court TV Prepares Major Rebranding Initiative as truTV, *available at* [http://www.courtstv.com/press/2007/tru\\_tv\\_102907.html](http://www.courtstv.com/press/2007/tru_tv_102907.html).

75. *Id.*

## V

## TECHNOLOGY

“Once a new technology rolls over you, if you’re not a part of the steamroller, you’re part of the road,” said futurist Stewart Brand.<sup>76</sup> In courts, technology can exert a profound impact—positive or negative—on court operations and on how the media covers the courts. It is most likely that the “steamroller” effect will be felt during high-profile proceedings, when reporters and courts must depend on technology to manage the volume of information and the number of media outlets seeking access.

At the outset, courts should establish policies governing media access to courthouses and courtrooms with various electronic devices. Although virtually every court has in place a clearly articulated policy regarding camera access to the courtroom,<sup>77</sup> many are less clear about camera access to other parts of the courthouse, such as a public cafeteria where jurors or witnesses may eat breakfast.<sup>78</sup> Even less clear are policies about bringing laptops, cell phones (with or without cameras), and Blackberry-type devices into courthouses and courtrooms.

In March 2005, a committee of the Judicial Conference of the United States, the federal-court system’s policymaking body, issued “Considerations in Establishing a Court Policy Regarding the Use of Wireless Communications Devices.”<sup>79</sup> Although the guidelines were intended for courts, the policy was posted on the federal judiciary’s Web site.<sup>80</sup> Some federal courts have taken this general guidance and turned it into a court order. Such a document was signed October 12, 2005, by Chief Judge John Heyburn of the Western District of Kentucky.<sup>81</sup>

Whatever policy a court develops regarding access and use of wireless-communications devices, the policy should be widely distributed and posted clearly on the court’s Web site. It is likely the policy will differ regarding access and use inside and outside the courtroom, as well as in how it treats witnesses and jurors. Many courts carve out exceptions for courthouse employees and attorneys. For example, the Kent County, Delaware, courthouse allows cell-phone access for those two groups, only.<sup>82</sup> Other court systems are particularly

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76. Katherine Fulton, *The Anxious Journey of a Technophobe*, COLUM. JOURNALISM REV. (Nov.–Dec. 1993), available at <http://backissues.cjrarchives.org/year/93/6/technophobe.asp>.

77. See *supra* III.

78. S.C. Judicial Dept. R. 605 (providing detailed rules for media contact in the courtroom, but failing to address conduct outside the courtroom).

79. ADMIN. OFFICE OF THE U.S. COURTS, CONSIDERATIONS IN ESTABLISHING A COURT POLICY REGARDING USE OF WIRELESS COMMUNICATION DEVICES (on file with *Law and Contemporary Problems*), available at <http://www.uscourts.gov/newsroom/wireless.pdf>.

80. *Id.*

81. General Order 2005-04, Use of Wireless Devices in Courthouses, available at [http://www.kywd.uscourts.gov/pdf/GeneralOrder\\_2005-04.pdf](http://www.kywd.uscourts.gov/pdf/GeneralOrder_2005-04.pdf).

82. KENT COUNTY COURTHOUSE, CELLULAR PHONE POLICY (2007), [http://courts.delaware.gov/Courts/Superior%20Court/pdf/?cell\\_policy\\_KENT\\_rev.pdf](http://courts.delaware.gov/Courts/Superior%20Court/pdf/?cell_policy_KENT_rev.pdf).

accommodating to modern technology. More than fifty New York state courts currently provide wireless access to jurors, litigants, lawyers, and others who wish to connect to the Internet while in the courthouse.<sup>83</sup>

However, news stories about how technology is affecting the trial process, especially in high-profile proceedings, are increasingly frequent. Although some of the technological enhancements are violations of court rules, many are not. For example, in 2007, one of the staff photographers of the *Deseret Morning News* took a picture of a handwritten note polygamist Warren Jeffs tried to give the judge.<sup>84</sup> The newspaper had the note “analyzed by a digital enhancement expert, a forensic handwriting analyst and a genealogist.”<sup>85</sup> The presiding judge soon afterward modified his decorum order to state, “[t]he enhancement of any photograph or video image for the purpose of discerning the content of a privileged writing not part of the record of the Court’s proceedings is also prohibited.”<sup>86</sup>

Although cameras were barred from the sentencing phase of the Scott Peterson double-murder trial, an enterprising reporter from a Sacramento television station used a laptop to send reports from inside the courtroom back to the station, taking advantage of the court’s wireless network.<sup>87</sup> His detailed account provided color, and a degree of vitality, that competitors lacked and appeared to skirt existing court policies at the time.<sup>88</sup>

In 2005, the *National Law Journal* reported an alleged incident involving a murder trial in which a Detroit judge discovered that someone in the courtroom had used a cell phone to send a text message to a witness outside the courtroom disclosing details about testimony that had been delivered.<sup>89</sup> According to the story, when sheriff’s deputies told the judge of the rumor, the judge ordered all cell phones to be put away.<sup>90</sup>

There also are increasing instances of blogs’ influencing the trial process. A March 2007 *National Law Journal* story reported on a New Hampshire case involving a prospective juror who made entries on his blog four days before jury selection and then again once seated on the jury, but before the start of the trial.<sup>91</sup> The juror, who became the foreman, wrote in his post that he would “have to listen to the local riff-raff try and convince me of their innocence,”

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83. *Wi-Fi Now Available at Numerous Court Sites*, N.Y. ST. JURY POOL NEWS (Summer 2007), at 2, 7.

84. The note reportedly said, “I have not been a Prophet and am not the Prophet.” Ben Winslow, *‘I am not the Prophet,’ says Note by Jeffs*, DESERET MORNING NEWS, Apr. 5, 2007, available at <http://deseretnews.com/dn/view/0,1249,660209057,00.html>.

85. *Id.*

86. Third Am. Decorum Order, *State v. Jeffs*, No. 061500526 (5th Dist., Wash. County, Utah 2007).

87. Ed Frauenheim & Beth Charny, *Peterson Death Sentence Relayed via Messaging*, CNET NEWS, Dec. 13, 2004, [http://www.news.com/Peterson-death-sentence-relayed-via-messaging/2100-1025\\_3-5489516.html?tag=item](http://www.news.com/Peterson-death-sentence-relayed-via-messaging/2100-1025_3-5489516.html?tag=item).

88. *Id.*

89. Tresa Baldas, *Text Messaging and Trials Can be a Volatile Mix*, NAT’L L.J., May 6, 2005.

90. *Id.*

91. Vesna Jaksic, *A New Headache for Courts: Blogging Jurors*, NAT’L L.J., Mar. 12, 2007.

according to the news account.<sup>92</sup> Similarly, in the summer of 2007, a federal judge in San Diego excluded five witnesses from testifying in a financial-fraud trial when the judge became aware that the potential witnesses had been reading a blog about the trial.<sup>93</sup> Later the same month, the judge excused the last remaining alternate juror for reading the same blog.<sup>94</sup> And then there is the incredible account from Boston of the pediatrician who blogged about his own malpractice case during his trial.<sup>95</sup> According to the *Boston Globe*, the defendant, using an on-screen name different than his own, a common practice with bloggers, ridiculed the plaintiff's case and discussed other case details on his blog.<sup>96</sup> When the blogger-defendant's role was revealed in open court, he immediately settled the case.<sup>97</sup>

The most common use of technology, however, is by the courts themselves to provide large amounts of docket information to the public and media for little or no charge. This is a generally welcome innovation, which has become most useful to reporters who are trying to cover a case from a distance. The federal courts make nearly every document filed in a district court or bankruptcy court available over the Public Access to Court Electronic Records system (PACER).<sup>98</sup> Although there is a fee of eight cents per page, users are not charged unless they accrue a bill of more than ten dollars in a given year and no individual document costs more than \$2.40.<sup>99</sup> By contrast, “[t]here was a time when reporters had to check the paper index in the courthouse and then ask court personnel to retrieve a court file,” wrote Sally Rankin, Court Information Officer for the Maryland judiciary.<sup>100</sup> “Today, in many courthouses across the country, a reporter can go to a public access terminal in the courthouse or visit an Internet site to find information about cases.”<sup>101</sup>

The Reporters Committee for Freedom of the Press, a nonprofit organization that provides pro bono legal assistance to journalists, tracks state-by-state policies for access to court records and provides a useful summary on its Web site.<sup>102</sup> “By preserving the presumption of openness as judicial records move to electronic form, the courts will maintain this vital link with the public and bolster public confidence in the administration of justice,” the Reporters

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92. *Id.*

93. Bruce V. Bigelow, *Peregrine Juror Excused; saw blog; No Alternates Remain; Internet Snag is Second this Month in Fraud Trial*, SAN DIEGO UNION-TRIB., June 27, 2007, at C1.

94. *Id.*

95. Jonathan Saltzman, *Blogger Unmasked, Court Case Upended*, BOSTON GLOBE, May 31, 2007, [http://www.boston.com/news/local/articles/2007/05/31/blogger\\_unmasked\\_court\\_case\\_upended/](http://www.boston.com/news/local/articles/2007/05/31/blogger_unmasked_court_case_upended/).

96. *Id.*

97. *Id.*

98. Public Access to Court Electronic Records (PACER), <http://pacer.psc.uscourts.gov/pacerdesc.html> (last visited Feb. 21, 2008).

99. *Id.*

100. *Public Access to Electronic Court Records*, 5 COURTS TODAY 53 (Oct./Nov. 2007).

101. *Id.*

102. The Reporters Committee for Freedom of the Press (RCFP), *Electronic Access to Court Records*, <http://www.rcfp.org/ecourt/index.html> (last visited Feb. 21, 2008).

Committee said in the introduction to its court electronic-records directory.<sup>103</sup> As Chief Justice Warren Burger noted in *Richmond Newspapers v. Virginia*, the case that established the First Amendment right of access to court proceedings, “[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.”<sup>104</sup>

In addition to pleadings and opinions, other case-related information is being placed on court Web sites, which provide the only effective and economical method for making such information available to a broad audience. In the case of *Zacarias Moussaoui*,<sup>105</sup> who is serving a life sentence for his role in the 9/11 attacks, over twelve hundred exhibits admitted into evidence during the trial, excluding seven that were classified or remain under seal, were placed on the court’s Web site.<sup>106</sup> They included video and audio tapes, documents, and photos.<sup>107</sup> This was the first time a federal court had made all exhibits publicly available online.<sup>108</sup>

More than five years ago, the Center for Democracy and Technology called the rapidly increasing access to court electronic records “a quiet revolution in the courts.”<sup>109</sup> Today, electronic access to court documents is so common, the practice hardly can be called “revolutionary.” Although many courts continue to wrestle with privacy issues and the cost of developing and deploying electronic filing systems, it is clear that the trend is toward greater automation and public access to court records of various types. This will benefit all involved—particularly in high-profile matters.

## VI

### COURTROOM SEATING

Although reporters’ access to court documents is essential, perhaps the most valuable commodity a court possesses during a high-profile trial is seats in the courtroom. Every reporter wants a seat reserved just for him or her, as do many members of the public and other interested bystanders.

This demand is nothing new. According to one account of the January 1875 trial of clergyman Henry Ward Beecher,

[t]he proceedings provided the chief entertainment in town. Tickets were black-marketed at five dollars apiece, and as many as three thousand persons a day were turned away, affording nearby saloons a booming business. Prominent politicians,

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103. *Id.*

104. 448 U.S. 555, 572 (1980).

105. *United States v. Moussaoui*, 483 F.3d 220 (4th Cir. 2007).

106. U.S. Dist. Ct. for the E.D. of Va., *United States v. Moussaoui*, Crim. No. 01-455-A, Trial Exhibits, <http://www.vaed.uscourts.gov/notablecases/moussaoui/exhibits/> (last visited Mar. 5, 2008).

107. *Id.*

108. *Id.*

109. Center for Democracy & Technology, *A Quiet Revolution in the Courts: Electronic Access to State Court Records*, Aug. 2002, <http://www.cdt.org/publications/020821courtrecords.shtml>.

diplomats, and society leaders fought for seats in the courtroom with ordinary curious folk and without their lunch in order to hold them . . . .<sup>110</sup>

Today there are many methods for allotting seats to the media, yet almost all result in some degree of disappointment and conflict. Despite advances in technology, no court has devised a scheme for adequately accommodating one hundred reporters when only forty seats are available in the courtroom, nor has any court resorted to selling tickets to trials on eBay, the modern day equivalent to selling tickets to the Ward Beecher trial on the black-market.

Participants in each high-profile trial learn from previous proceedings. This is one reason that it is advisable for the court to appoint a representative of the media to at least assist in the handling of this task. It is a thankless and manifestly unpopular assignment. Even though many courts allow camera coverage and though an increasing number provide closed-circuit feeds to an overflow courtroom or a media room,<sup>111</sup> many reporters still seek direct access to the proceeding because it is the only location where they can watch all courtroom activity—including that of jurors, witnesses, the defendant, the judge, and their demeanor and body language—as opposed to the limited picture the camera provides.

Some courts employ media-access badges, particularly useful tools when security is a concern. The court's security arm, marshal, or the sheriff should be accustomed to handling this responsibility, although it should be conducted in consultation with the court. When reporters wear colorful badges, it makes them easy to identify and can help avoid any inadvertent contact a juror or witness may have with them.

At the outset, it is important that while the court attempts to address the media's seating concerns, it also recognizes the needs of others who may wish to attend the trial. Seats should be reserved each day for the public, the parties, and lawyers on both sides, as well as security officers. Courtroom sketch artists, if they are present, traditionally have reserved seats very close to the front of the courtroom that allows them unobstructed visibility.

Many courts try to set aside half the seats in the spectator area of the courtroom for the media, although this number may be adjusted depending on whether the remaining seats are occupied on a regular basis.<sup>112</sup> The guidelines for allotting courtroom seats must be fair and transparent. It should not appear that the court is favoring any individual or any single media outlet, although it is not unusual for the "regular working media," those who cover the court on a daily basis, to receive automatic press credentials for a high-profile case that takes place in their local court. This preferential treatment typically will not go

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110. Goldfarb, *supra* note 1 (quoting ROBERT CHAPLAIN, *FREE LOVE AND HEAVENLY SINNER: THE STORY OF THE GREAT HENRY WARD BEECHER SCANDAL* 225, 253 (1954)).

111. See RTNDA, *supra* note 50.

112. See, e.g., U.S. Dist. Ct. for the M.D. of Pa., *Kitzmiller v. Dover Area School Dist., et al.*, Attending the Proceedings, <http://www.pamd.uscourts.gov/kitzmiller/attend.htm> (last visited May 14, 2008).

over well with the large, national, out-of-town media, but it is a fair benefit to provide to those who cover the court on an ongoing basis. There also may be instances when courts want to make seats available to the specialized media, such as the Hispanic, African American, or gay press, whose audience may have a heightened interest in a particular trial. Otherwise, a random system for the selection of media seats is advised.

In the trial of deceased, underworld leader John Gotti, trial judge Leo Glasser issued an order governing press access.<sup>113</sup> The order established a press committee, composed of one broadcast and two print reporters, to serve as a liaison between the media and the courts with responsibility, not only to determine which reporters worked for “recognized press organizations,” but also to address any press problems or complaints that arose.<sup>114</sup> Any issues the committee could not resolve were to be referred to the Clerk of Court.<sup>115</sup> In the Gotti trial, reporters were not assigned a specific seat in the courtroom, but were directed to a particular row.<sup>116</sup> Some courts prefer to provide specific seats for individual media organizations. Some courts will have new passes each day for the media.<sup>117</sup> In the Kobe Bryant case in Colorado, reporters were provided with three-day passes.<sup>118</sup>

In some instances, courts provide that if a reporter does not occupy his or her seat for a pre-prescribed period of time—typically a day or two—the reporter will lose the pass and it will be made available to the next member of the media who is on a waiting list.<sup>119</sup> In order to assure proper courtroom decorum, most judges require the press to be present in the courtroom ten to fifteen minutes prior to the start of the day’s proceedings.<sup>120</sup> Many judges place restrictions on a reporter’s ability to leave the room and return during the trial.<sup>121</sup> This is particularly problematic for reporters who wish to file stories throughout the day.

The Media Plan for the 1994 O.J. Simpson Trial in the Municipal Court of Los Angeles Judicial District provided for twenty-seven media seats, including three specifically reserved for the three wire services—Associated Press, City News Service, and Copley/United Press International.<sup>122</sup> Providing wire-service representatives a full-time seat is a common practice, since the Associated

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113. United States v. Gotti, 1992 WL 25625 (E.D.N.Y. 1992).

114. *Id.*

115. *Id.*

116. *Id.*

117. TIMOTHY R. MURPHY, MANAGING NOTORIOUS TRIALS 46 (Nat’l Center for State Courts, 2d ed. 1998) (1992).

118. Memorandum from Karen Salaz, Administrator, Colorado Judicial System, to Media Outlets [hereinafter *Kobe Bryant Media Plan*] (Sept. 29, 2003) (on file with author).

119. Media Plan, *People v. Simpson*, Coverage Policies, Courtroom Seating, at 14 (on file with author).

120. *Kobe Bryant Media Plan*, *supra* note 116.

121. Decorum Order, District Court, Boulder County, Colo., *JonBenét Ramsey Case*, at 3 (on file with author).

122. Media Plan, *People v. Simpson*, *supra* note 117, at 14.



Press, for example, has the ability to reach thousands of media outlets throughout the world.<sup>123</sup>

The Simpson Media Plan stated,

Any media seat that is not occupied within 15 minutes after court convenes for each morning and each afternoon session will be given to another member of the media. Any news organization with a permanently assigned seat that does not occupy the seat for the day will lose the seat for the duration of the trial and the news organization will go on the rotating seat list. News organizations sharing seats must determine among themselves how the seat will be shared. If agreement cannot be reached, the seat will be lost to the organizations who were to share the seat.<sup>124</sup>

Turn the clock forward twelve years to the 2006 Moussaoui case in federal court in Alexandria, Virginia. The unique security issues involved in this case required the U.S. Marshals Service to check each media request for access well in advance of the anticipated trial. As a result, several months before the trial started, twenty-nine news organizations were granted reserved courtroom seating to cover the proceeding.<sup>125</sup> Other reporters were required to apply for a daily credential an hour and a half before the day's proceedings were to begin.<sup>126</sup>

Typically, press interest is most intense during the defendant's arraignment, during opening and closing statements for the prosecution and the defense, and during the testimony of the defendant or other key witnesses. Many courts provide for pool coverage only of juror selection, although media interest in this sometimes-prolonged process can be minimal.<sup>127</sup>

One of the most challenging issues courts face today is defining "recognized press organizations," a chore that surely was less perplexing to Judge Glasser and his media committee in the 1992 Gotti trial. The initial issue relates to the many reporters who may be employed by the same media conglomerate. For example, NBC TV, NBC Radio, MSNBC, and CNBC all are owned by General Electric. If a reporter from each station wishes to cover a particular proceeding, should each be granted his own seat? The answer in large part will hinge on the availability of seats, but it is advisable to make certain that each independent media outlet is allotted a single seat before any organization is provided a second seat.

The more difficult issue is to determine whether bloggers, book authors, freelance journalists, and those who write for Web sites and trade publications should receive access to a trial as members of the press. The U.S. Congress has established criteria for granting credentials that may be illustrative here. They state "Congressional rules require all Gallery members to be bona fide news gathers and/or reporters whose chief attention is given to—or more than half of

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123. *E.g., Kobe Bryant Media Plan, supra* note 116.

124. Media Plan, *People v. Simpson, supra* note 117, at 14.

125. U.S. Dist. Ct. for the E.D. of Va., Notable Cases, <http://www.vaed.uscourts.gov/notablecases/moussaoui/media.html#trialeseats> (last visited Feb. 25, 2008).

126. *Id.*

127. U.S. Dist. Ct. for the E.D. of Va., *United States v. Moussaoui*, Crim. No. 01-455-A, Information for the Media, <http://www.vaed.uscourts.gov/notablecases/moussaoui/media.html#seats> (last visited May 27, 2008).

their earned income derived from—the gathering or reporting of news.” Courts probably will not want to conduct their own fact-finding on this issue, however. If a reporter has been issued credentials from the U.S. Congress or a state legislature, that reporter likely should qualify for court credentials as well.

Bloggers present unique issues. According to the Web site *blogworld*, there are approximately 120,000 new blogs created daily.<sup>128</sup> Clearly, very few bloggers will ever have an interest in covering a high-profile trial. However, the sheer number and variety of bloggers raise especially challenging issues for courts when they seek access to a trial that has limited available space.

The Democratic National Convention Committee announced guidelines in late November 2007 that may be instructive: it simply opened the doors of its 2008 national convention in Denver to bloggers.<sup>129</sup> “The move [gave] bloggers and the new media a chance to shine, much as they did at the trial of Scooter Libby earlier [in 2007]. . . .”<sup>130</sup> In the Libby trial, the court took the bold step of setting aside two press seats for bloggers. “Bloggers can bring a depth of reporting that some traditional media organizations aren’t able to achieve because of space and time limitation,” said Sheldon Snook, administrative assistant to Chief Judge Thomas Hogan of the federal court in the District of Columbia.<sup>131</sup> Since cameras are not allowed in federal courts, the bloggers who attended the Libby trial provided what amounted to essentially live verbal coverage of the trial over various Web sites, much like the text that would be provided by a courtroom stenographer.

How courts cope with the new media is an evolving area and is likely to be addressed by courts in ways similar to the allocation of courtroom seats—rarely without controversy and individually by each court. Each trial will be a learning experience for the next.

## VII

### CONCLUSION

The origin of the term “media circus” is not clear, but today it is used most commonly as a pejorative, and most often applied to high-profile trials that attract a swarm of media.

A June 2005 *San Diego Union-Tribune* story on the trial of entertainer Michael Jackson reported, “There was truly a media circus in that 2,200 members of the international media received credentials to cover Michael Jackson’s trial—more than the O.J. Simpson and Scott Peterson murder trials

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128. Blog World Expo, Important Blogging Statistics, <http://www.blogworldexpo.com/general-information/important-statistics.html> (last visited Feb. 25, 2008).

129. Katharine Q. Seelye, *Conventions Throw Doors Open to Bloggers*, THE CAUCUS, N.Y. TIMES, Nov. 25, 2007, available at <http://thecaucus.blogs.nytimes.com/2007/11/26/conventions-throw-doors-open-to-bloggers/>.

130. *Id.*

131. Alan Sipress, *Too Casual to Sit on Press Row?; Bloggers’ Credentials Boosted with Seats at the Libby Trial*, WASH. POST, Jan. 11, 2007, at D1.

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combined.”<sup>132</sup> In comparison, the paper said, it was estimated that between 500 and 600 reporters covered the Vietnam War.<sup>133</sup> Trial after trial at the national and local level is labeled a “media circus.” Football star Michael Vick,<sup>134</sup> former NASA astronaut Lisa Nowak,<sup>135</sup> and musical artist R. Kelly<sup>136</sup> are among the growing list of defendants whose trials daily newspapers have tagged “media circus[es].”

Into this fray steps the ringmaster—the judge—who must attempt to manage the acrobats, jugglers, animals, and clowns, while still allowing them to perform. After all, “the show must go on.” The goal of the judge, then, is to assure that the “show” is fair, orderly, and expeditious, and to delicately, yet firmly, walk the tightrope that balances the First Amendment right of access and the Sixth Amendment right to a fair trial.

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132. Gina Lubrano, *Is This Fair Criticism of Journalists?*, SAN DIEGO UNION-TRIB., June 20, 2005, at B7.

133. *Id.*

134. Gary Mihoces, *Vick Arraignment to Attract Crowd*, USA TODAY, July 26, 2007, at 1C.

135. Sarah Lundy, *Lisa Nowak Comes to Court Today: Lights, Cameras . . . Ex-Astronaut*, ORLANDO SENTINEL, Aug. 24, 2007, at B1.

136. Emma Graves Fitzsimmons, *R. Kelly Trial Set for September*, CHI. TRIB., Aug. 2, 2007, at 5.