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The Ethics of Being a Commentator III

by Erwin Chemerinsky*
and
Laurie Levenson**

I. INTRODUCTION

The use of lawyers and law professors as commentators continues to increase. Although reporters have long used experts to explain and evaluate, in the last decade legal commentators have become a fixture in news stories about legal proceedings. A decade ago, when the *McMartin* Preschool case filled the news in Los Angeles, scarcely a commentator was used. A few years later, when the officers who beat Rodney King were tried in state court, daily legal commentary was absent. In sharp contrast, commentators were used on a regular basis during the federal prosecution of those officers.¹ The subsequent trial of two individuals accused of beating Reginald Denny was accompanied by the continued, and even increased, presence of commentators.

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We are extremely grateful to the *Mercer Law Review* for hosting a symposium to address the issue of ethics of legal commentators. We are particularly honored that top legal and media professionals in the country joined us for this endeavor, including Johnnie L. Cochran, Jr., Barry Scheck, Mary Tillotson, Raymond Brown, John H. McElhaney and Paul Butler. Their contributions to this Article have been immeasurable. Finally, we would like to thank Jennifer Motos, a third-year student at Mercer Law School and Lead Articles Editor of the *Mercer Law Review*, and Jake Daly, a second-year student at Mercer Law School and member of the *Mercer Law Review*. Their inexhaustible energy and effort made this Symposium possible.

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

The O.J. Simpson criminal prosecution exponentially increased the use of legal commentators.² No trial in American history received the sustained media attention that was devoted to this case. Television shows were devoted on a daily basis, both nationally and locally, to analyzing the latest events. Every television network broadcast the opening and closing statements in their entirety, and three cable networks broadcast the full trial. All this created a tremendous demand for commentators to explain the legal proceedings, to analyze the strategy and events, and to sometimes just fill time.

Both of us served regularly as commentators during the Simpson trial for a variety of media. For almost sixteen months, our professional lives were dominated by the latest twists and turns and the demands for media analysis of them. During this experience, we each had many situations that raised ethical issues, and we realized that there was no ready source of guidance available on how to handle the problems. The codes of ethics for lawyers, such as the American Bar Association's Model Rules of Professional Conduct, do not address the issues confronted by lawyers serving as commentators. Codes of ethics for journalists are likewise silent on these questions.

Our experiences convinced us of the need for development of a voluntary code of ethics for legal commentators. While others have noted that there can be downsides to over-codification of ethics, including limiting the number of lawyers who can participate in commentary and diverting attention from other legal problems of importance,³ we believe that the overall benefits of introducing a voluntary code of ethics for legal commentators outweigh the detriments. These benefits range from an increased awareness of the need for commentator preparation and candor when providing commentary to exposure of commentators' biases.

After the Simpson criminal prosecution, we proposed principles for a voluntary code of ethics for legal commentators.⁴ In light of subsequent

2. The Simpson case drew the most media attention since the infamous Lindbergh trial. The Bronco chase alone drew ninety-five million television viewers. The television audience during the trial eclipsed the seventy million Americans who tuned in to watch the preliminary hearing. Daniel Cerone, *Nearly Two-Thirds of L.A. Homes Watched Hearings, Ratings Show*, L.A. TIMES, July 2, 1994, at A3. Following the Simpson trial, more than two dozen books were written regarding it. L.A. TIMES, *IN PURSUIT OF JUSTICE: THE PEOPLE VS. ORENTHAL JAMES SIMPSON* 75 (1995). Moreover, there were books written by television commentators on how to watch the trial and understand the proceedings. See, e.g., CHARLES B. ROSENBERG, *THE TRIAL OF OJ* (1994).

3. See *infra* Part VI.

4. See Erwin Chemerinsky & Laurie Levenson, *The Ethics of Being a Commentator*, 69 S. CAL. L. REV. 1303 (1996) [hereinafter *Ethics I*]. The primary principles for a code of ethics for legal commentators are: (1) commentators must be competent; (2) commentators must disclose conflicts of interest; and (3) commentators should be honest and fair in their

developments—such as the Simpson civil case, the then-pending Oklahoma City bombing trial, and the Unabomber case—we wrote a second article expanding upon and qualifying our earlier conclusions.⁵

The two years since we last wrote have seen many of our predictions realized. Legal commentators are now widely used. The investigation of President Clinton, the resulting impeachment proceedings, and the Senate trial have dominated the news for over a year. As the new millennium nears, America finally is experiencing a legal proceeding worthy of being called the “Trial of the Century.” Again, entire shows are devoted to it on a daily basis, and commentators are an integral part of these programs. Some commentators are familiar faces from the Simpson case and other proceedings; other commentators are new faces to television audiences. A great many of the high profile cases in this decade occurred in Los Angeles, causing the constant use of Los Angeles lawyers and law professors. The proceedings in Washington have shifted the media attention there, and more commentators are being drawn from that area. Also, the investigation of Clinton and resulting congressional proceedings raise many different issues—some constitutional and many political—that warrant some shift in who is used as a commentator.

Some commentators are well-informed and superb at informing the public; some are not. Unfortunately, some, at times, seem ill-informed about the law and the cases they are discussing. A few, at times, seem to have serious conflicts of interest. In short, recent experiences only affirm the need for a code of ethics for commentators.

Witnessing these events and continuing to serve as commentators ourselves has caused us to reconsider some of what we previously wrote about concerning ethical standards for pundits. Additionally, other events have caused us to re-examine the issue. For instance, we have observed a growing trend of law being used for entertainment; what began with *The People's Court* now has exploded into several programs every day. The growth of competing cable news channels has also greatly expanded the use of commentators. Also, our own continuing experiences have caused us to continually rethink aspects of our earlier writings.

We continue to believe that there is a great need for the development of a code of ethics for commentators. As we have previously written, we believe such a code would serve many functions. Ideally, it would offer guidance to those serving as commentators in the future. We have constantly been confronted with difficult ethical issues in our role as

business dealings as commentators. *Id.*

5. See Erwin Chemerinsky & Laurie Levenson, *The Ethics of Being a Commentator II*, 37 SANTA CLARA L. REV. 913 (1997) [hereinafter *Ethics II*].

commentators. The shared wisdom of those who have been in this role might assist those who will serve as commentators in the future by helping them recognize and resolve ethical issues. As is true for codes of ethics in all fields, such a code can help to raise the quality of professional behavior by helping individuals identify ethical issues and by setting minimum standards.

A code of ethics might also guide the news media in using commentators and can certainly help commentators in explaining to the media what is the appropriate, and the inappropriate, role for the pundit. Such a code can also lead to more consistency among commentators because they can be guided by a common set of standards.

Perhaps above all, a code of ethics for commentators can demonstrate that commentators take their ethical obligations seriously. A code of ethics is a way of instilling public confidence in commentators and demonstrating that commentators are cognizant of their important role as public educators.

Rather than repeat what we said in our earlier articles, this Article focuses on topics not previously addressed. Overall, our conclusion is that there is a need for more nuance in defining the ethics of commentators and more attention to the particular setting and role in which a commentator serves. Part II of this Article reviews the basic standards for commentators that we explained and advocated in our earlier articles. Part III discusses the need for attention to roles in developing and applying the standards for legal commentators. Part IV considers the need for attention to setting in developing and applying the standards for legal commentators. Part V examines the need for attention to training the profession, the media, and the public about the role of commentators. Part VI addresses concerns that a code of ethics is unnecessary or, perhaps worse, that it inappropriately discriminates against voices who wish to provide commentary.

We regard this Article as part of a continuing effort to encourage the development of a code of ethics for commentators and to help shape its content. We applaud the groups, such as the National Association of Criminal Defense Lawyers and the American College of Trial Lawyers,

that have begun work in this area.⁶ We hope that others will join them in this important effort.

II. PRINCIPLES OF ETHICAL STANDARDS

In prior articles, we set forth our basic principles for an ethical code for commentators.⁷ In establishing these principles, we discussed in detail how a code of ethics may assist commentators in the various roles they play. For example, a code can enhance the credibility of commentators by setting minimum standards for their conduct. It can also serve as a guide for making the difficult ethical decisions that face commentators regularly. Finally, it can give legal commentators and the media a standard by which to evaluate commentary and its value to the public.

It is critical to keep these goals in mind when reviewing the basic duties of legal commentators. While certain of these duties become more

6. The American College of Trial Lawyers has adopted the following suggested guidelines for legal commentators:

1. The lawyer-commentator should restrict comments to procedure and process and refrain from comments which could be interpreted as opinions or predictions or evaluations regarding the performance of participants, or the effect of testimony or rulings on the outcome of the proceeding.
2. Without limiting paragraph 1, a lawyer should not perform the role of a legal commentator, or comment publicly on a pending case, unless the following guidelines are followed:
 - a. The commentator has an understanding of the background of the case so as to be competent to perform as a commentator;
 - b. The commentator does not have an interest in the proceeding about which he or she is commenting, or represent a client who may be affected by the proceeding, unless the commentator makes a reasonable effort to insure that such interest or representation is clearly and publicly revealed; and
 - c. The commentator provides to the news organization(s) to whom comment is made a full disclosure of his or her legal background and potential for bias, if any.

AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT ON FAIR TRIAL OF HIGH PROFILE CASES 11-12 (1998).

The National Association of Criminal Defense Lawyers ("NACDL") has established the following principles for its code of conduct for legal commentators:

1. Criminal defense lawyers have a duty to provide competent commentary.
2. Criminal defense lawyers who serve as legal commentators have a special obligation to educate the public about what it means to be "liberty's last champions" - our constitutional and ethical responsibilities as advocates for the accused.
3. Criminal defense lawyers have a duty to avoid conflicts of interest with clients and former clients whenever serving as legal commentators.

Ethical Considerations for Criminal Defense Attorneys Serving as Legal Commentators, NACDL Press Release, April 28, 1998 [hereinafter NACDL Ethical Considerations]. These guidelines were adopted by the NACDL on April 25, 1998.

7. See *Ethics I*, *supra* note 4; *Ethics II*, *supra* note 5.

significant and complex with different types of legal commentary, we remain convinced that there are several basic duties for all legal commentators.

A. *Duty of Competence*

As we stated before, “[t]he first and foremost requirement for a legal commentator is to act competently.”⁸ The public has the right to expect a commentator to give accurate and informed remarks. “Shooting from the hip,” especially regarding an area of law or a proceeding with which the commentator does not have a background, should be strongly discouraged.

To be competent, commentators must possess the substantive knowledge and practical experience necessary to comment accurately regarding a proceeding. For some simple legal questions, this may mean no more than commentators calling on their reservoir of experience and information to provide an answer. In other settings, however, as in commentary regarding developments in an ongoing case, it is important that commentators have firsthand knowledge of the proceedings and an understanding of the legal and factual issues in the case.

Similarly, the amount of prior experience that a commentator needs in order to be competent depends very much on the type of commentary the lawyer is being asked to provide. For example, if a commentator is asked what the ruling was in a case, it is not necessary that the commentator have tried that, or a similar, case. It is necessary, however, that the commentator be familiar with the decision at issue. By contrast, if a commentator is asked what an appropriate strategy would be for cross-examining a particular witness, the commentator should know what that witness is likely to say and should have experience conducting such cross-examinations.

Thus, there are four key requisites to being an effective and competent commentator: (1) substantive knowledge of the law, (2) practical experience in the courtroom, (3) familiarity with the proceedings at bar, and (4) a willingness to do the research necessary to answer questions that may arise. At times, some of these requisites will be more important than others. Nonetheless, the best commentators are likely to meet all four requirements. Certainly, they should make an effort to be as knowledgeable about the issue as possible—providing the most accurate reports and the maximum insights for the viewing or listening audience.

8. *Ethics I*, *supra* note 4, at 1319.

There are many ways that a commentator may learn the information necessary to comment on a legal matter. A commentator can read court pleadings, analyze court decisions, observe a proceeding, or review the transcript of a proceeding. Today, more than ever, there are opportunities for commentators to stay up-to-date on recent developments in the law and legal proceedings. For some of the most high-profile cases, there are Internet sites that provide the latest developments or real-time transcripts of proceedings. Likewise, electronic research services provide timely reports of legal decisions and legislative developments. Commentators should avail themselves of these services in their ongoing efforts to provide competent commentary.

Ironically, part of being competent is knowing when you are incompetent. Commentators have an ethical duty to inform the media when they are not prepared to comment on a case. Even the best of commentators will not be an expert on every subject or on the laws of every jurisdiction and may often not have the time to develop the expertise before the reporter needs an answer. It is important that a commentator be honest when confronted with a media request that is outside the commentator's field. Reporters may instinctively call a commentator because that person is generally available and helpful, but the commentator should tell the reporter if the inquiries stray to a subject outside the commentator's expertise. If possible, the commentator should also assist the reporter in finding an expert in the field relevant to the reporter's questions.

Two of the more controversial issues regarding competency are whether commentators should score proceedings or predict their outcomes. These two practices pose particular risks for commentators. First, scoring proceedings may easily give the misimpression to the public that legal proceedings operate like sporting matches. Rarely is the outcome of a case determined by a lawyer's performance on any one day of a trial. More typically, lawyers will have good and bad days during a trial. The public, as well as a jury, should focus on the overall evidence presented. When commentators score each day based on a lawyer's performance, they may mislead the public into thinking that commentators can predict the outcome of a case by which side "scored" higher on any given day.

It is also dangerous for commentators to speculate as to the outcome of a proceeding, even as it draws to a conclusion. This is particularly true for jury verdicts. As any experienced trial commentator knows, jurors are, by nature, unpredictable. While a commentator may be able to say what typically occurs in a case, it is often akin to reading a crystal ball for a commentator to predict the verdict in a trial. There are real dangers in creating false expectations among the public. When a

verdict is returned that is contrary to the commentator's prediction, the automatic assumption by the public is that the jury must have reached the wrong result. Likewise, when commentators predict how a court will rule, they are assuming they know everything that the court knows in making the decision. Often, courts have additional information not available to the public that can influence a decision, including filings in camera or firsthand observations of a witness's demeanor. Although a commentator may fairly state how such issues are ordinarily resolved, it can be dangerous and irresponsible for a commentator to predict how a particular jurist will rule.⁹

It can be a far greater service for commentators to give the public the knowledge base it needs to decide how a case or issue should be resolved under the law, rather than to simply predict the outcome. Competent commentary helps the public understand what factors may affect the judge's or jury's decision and therefore the basis for any decision that is reached.¹⁰

B. Duty to Avoid Conflicts of Interest

Another essential duty of a legal commentator is to avoid conflicts when providing commentary and, if such conflicts exist, to make full disclosure of them to the media and to the viewing audience. While it may be impossible to be completely neutral regarding an issue,¹¹ it is important that a commentator not have conflicting loyalties when serving as a neutral commentator. In many situations, the public expects unbiased commentary. A commentator who has a conflict of interest will have a difficult time fulfilling that expectation.

9. Of course, there is also a danger to the commentator's credibility when a prediction of the proceeding's outcome turns out to be wrong. Media watchdog groups have started to create "pundit scorecards," keeping track of commentators' predictions and their accuracy. See Matthew Heimer, *Pundit Scorecard*, BRILL'S CONTENT, Mar. 1999, at 28, 28-29.

10. By making this proposal, we do not mean to suggest that it is unethical for commentators to criticize a decision if they honestly disagree with it. Indeed, one of the valuable services a commentator can provide is an honest critique of how our courts operate. Nonetheless, a critique, as with any other commentary, must be informed and not an ad hominem attack on individuals. The commentator should also try to remain as objective as possible in making the critique. The problem for commentators who have incorrectly predicted outcomes of cases is that they are unlikely to rethink their positions and are overly invested, at the time of the critique, in proving that they, not the decision maker, held the correct view of the case.

11. In our second article on commentator ethics, we discussed in detail the difficulties in achieving neutrality when one provides commentary. See *Ethics II*, *supra* note 5, at 922-26.

In our earlier articles, we identified many types of conflicts of interest that a commentator may confront.¹² They include (1) conflicts created by a commentator's personal relationship with a party in a case, (2) conflicts created by a commentator's assistance to one party in a case, (3) conflicts created by a commentator's stake in the outcome of a proceeding or a legal ruling, (4) conflicts created by a commentator's political or organizational affiliations, (5) conflicts created by speaking to more than one media outlet, (6) conflicts created by contacting witnesses placed under gag orders or represented by counsel, and (7) conflicts created by directly or indirectly assisting the court. Some of the most dramatic conflict situations we have seen occur when lawyers for a case later try to play the role of objective commentator in proceedings related to that same case.

Conflicts create problems for commentators because they make it more difficult for the commentator to provide unbiased commentary. Additionally, a commentator can be placed in the difficult situation of either having to give an incorrect or misleading answer or revealing confidential information. Both actions raise serious difficulties.

When we first started dealing with the issue of conflicts, we suggested that the problem might be resolved by disclosure of the conflict.¹³ It would then be up to the media agency to disqualify the commentator if it was troubled by the conflict. Alternatively, commentators should disqualify themselves if they felt that they could not provide unbiased commentary.

In a subsequent article, we observed that disclosure itself can raise problems for the commentator.¹⁴ How much must be disclosed? Even if the commentator makes disclosure to the media agency, will the public be notified of the commentator's possible bias? Is disclosure necessary when it is obvious that the commentator has had a role in the case at issue? Is neutrality always expected or even desirable?

Although difficult questions may arise in making disclosure, and we recognize it is not a perfect solution, we still recommend it as a minimum step a commentator must take when serving in the role of a neutral commentator. The media and public must have some way to judge the credibility of the commentator. A key piece of information in making these judgments is what biases, if any, the commentator has regarding the case.

12. See *Ethics I*, *supra* note 4, at 1328-34; *Ethics II*, *supra* note 5, at 921-32.

13. *Ethics I*, *supra* note 4, at 1333.

14. *Ethics II*, *supra* note 5, at 925-26.

C. *Duty of Confidentiality*

In both of our prior articles, we noted that commentators, because they are lawyers, may have continuing duties of confidentiality to clients.¹⁵ The Model Rules of Professional Conduct dictate that "[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation."¹⁶ There is no doubt that an attorney's duty to protect client confidences survives changes in both the lawyer's and the client's circumstances.¹⁷ Thus, even though a commentator takes on a new role as a quasi-member of the media, if the commentator ever wants to practice law again, she will still be governed by ethical standards.¹⁸

This need to avoid disclosure of confidences will ordinarily mean that lawyers should not attempt to serve as neutral commentators on cases substantially related to matters in which they served as counsel.¹⁹ The risk²⁰ is simply too great that the commentator will either fail to disclose information relevant to the public's understanding of the current proceeding or violate the duty of confidentiality to the client.

While we are primarily concerned with the duty of confidentiality to clients, we have also written about the need to maintain trust with

15. See *Ethics I*, *supra* note 4, at 1324-25; *Ethics II*, *supra* note 5, at 926-29.

16. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1998).

17. See, e.g., *Swidler & Berlin v. United States*, 118 S. Ct. 2081, 2088 (1998) (attorney-client privilege survives client's death).

18. In some states it is a statutory violation for a lawyer to violate confidences, whether or not that person remains in the practice of law. See, e.g., CAL. BUS. & PROF. CODE § 6068(e) (West 1990).

19. See *Ethics II*, *supra* note 5, at 928-29.

20. This particular risk is addressed in the NACDL Ethical Considerations for Criminal Defense Attorneys Serving as Legal Commentators. The third principle of that code provides: "Criminal defense lawyers have a duty to avoid conflicts of interest with clients and former clients whenever serving as legal commentators." NACDL Ethical Considerations, *supra* note 6, at 2-3 (emphasis added). The commentary to Principal 3 specifically addresses the problem of counsel providing commentary on a former client's subsequent case. It states:

Criminal defense attorneys serving as legal commentators are nonetheless bound by their primary obligation as members of the bar to act in a manner consistent with the duty of loyalty and confidentiality they owe to current and former clients. While the attorney-client relationship may give the lawyer a unique and valuable insight into related proceedings, assuming the role of a commentator runs the substantial risk that the lawyer will be asked questions that directly or indirectly challenge the lawyer's loyalty or seek disclosure of privileged information. Indeed, the attorney must anticipate these will be precisely the areas the media will seek to explore and should devise strategies to avoid the disclosure of privileged materials.

Id. at 2 (emphasis added).

media organizations. If a commentator promises to maintain the confidentiality of information provided to a reporter, the commentator has assumed that additional duty of confidentiality. A commentator who reveals information provided by a confidential source has breached the trust of those who have provided that information, including the reporters who seek the commentator's opinions.

D. Additional Duties of Commentators

We do not attempt in this Article to re-explore all the various duties a commentator may have.²¹ Depending on the circumstances of the commentary, a host of additional duties may arise, including (1) a responsibility to engage in honest and fair practices in negotiating compensation for commentary; (2) a commitment to provide commentary for a purpose other than merely to advertise one's legal services; and (3) a recognition that as a member of the legal profession, although working in a different role, there should be continuing respect for courts and their orders. Each of these ethical responsibilities poses its own challenges. Yet, these responsibilities are important to consider in drafting an ethical code for commentators, because they too will affect the quality of commentary provided and the public's respect for it.

E. Remedies for Violations

Finally, there is always the challenge of determining what remedy can be used when addressing a violation of a voluntary code of ethics.²² The best remedy would be a commitment by the media to employ only those commentators who abide by ethical standards. The media is in the best position to ensure its own professionalism, including the work of its commentators. Commentators may need to help the media by self-policing and even by whistleblowing on commentators who do not abide by accepted standards. Achieving the goal of excellent and ethical commentary requires the energetic commitment of those participating in the reporting of a case—both the media and the commentators.

III. THE NEED FOR ATTENTION TO ROLES IN DEVELOPING AND APPLYING ETHICAL STANDARDS FOR COMMENTATORS

As our work in developing ethical standards has continued, we have learned that there is a need for more nuance in defining ethics of commentators. The particular setting in which a commentator works can affect how the commentator meets his ethical responsibilities. In

21. See *Ethics I*, *supra* note 4, at 1334-38.

22. See *Ethics II*, *supra* note 5, at 932-40.

particular, there are differences between providing commentary on strictly legal cases and on matters that are more political in nature. There are also differences as to how a commentator should behave depending on whether that person is strictly an outside viewer or is a participant in the case.

A. *Legal vs. Political Commentary*

Since we last wrote, a new "Trial of the Century" has taken place in the United States—the impeachment trial of President William Jefferson Clinton. We were not at all surprised that lawyers and law professors took a starring role in providing commentary during the Independent Counsel's investigation, the House of Representatives inquiry, and the Senate trial. What did strike us, however, was how the slightly different role of commenting on a political matter may have impacted the commentators' ethical responsibilities.

Consider the first duty of a commentator to be competent. While lawyers may have a sense of how ordinary criminal investigations work and how ordinary trials are conducted, political proceedings are a hybrid of legal process and political determinations. Even law professors who have book knowledge of the impeachment process were not versed in the political maneuverings that impacted the proceedings. To be competent in providing commentary on the impeachment proceedings, the commentators needed both legal knowledge and substantive and practical knowledge of the political proceedings.²³

23. Some critics have suggested that lawyers have no particular expertise to bring as commentators to the impeachment proceedings. While we readily acknowledge that other professionals, such as politicians and pollsters, bring specialized knowledge to this case, lawyers and law professors can add their own relevant information to the discussion. For example, legal commentators who are familiar with the history of the phrase "high crimes and misdemeanors" and how it has been interpreted in other cases; who have reviewed the Andrew Johnson impeachment proceedings; who read the trial briefs of both sides in the Clinton proceedings; or who have studied the Nixon impeachment inquiry, the Senate Rules of Impeachment, the constitutional provisions on impeachment, or the numerous cases regarding judicial impeachment, could contribute important legal and historical background to the discussion. In fact, Professor Bruce Ackerman offered one of the most interesting legal analyses of the Clinton impeachment process when he argued that the House of Representatives action in passing the Articles of Impeachment against President Clinton violated the 20th Amendment to the United States Constitution. Harvey Berkman, *Can Lame-Duck Congress Impeach Mr. Clinton?*, NAT'L L.J., Dec. 21, 1998, at A7. Moreover, even though the Senate trial is quite different from a criminal trial, experienced trial lawyers can add to the public understanding by highlighting those strategies that would be effective in such a trial and which procedures, in their experience, provide the fairest and most accurate result. They can also discuss the law regarding perjury and obstruction of justice, two areas of the law that took the forefront in the Clinton impeachment trial and are constantly changing. See, e.g., *United States v. DeZarn*, 157

The coverage of the impeachment process also highlighted how quickly commentators are expected to absorb immense amounts of information and to provide coherent analysis to the public. A clear example was the long-awaited release of the *Starr Report*, a document whose summary was four thousand pages. To provide competent commentary, commentators needed to review that monstrous document in a matter of hours. While there was undoubtedly a great temptation to rely on news summaries of the report, in order to honestly answer the question of whether Independent Counsel Starr had proven perjury, obstruction of justice, or other charges, the competent commentator needed to analyze the precise testimony and evidence offered in support of those charges. Commentators who merely repeated summaries they read, and did not reveal that they were doing so, did not add to the discourse and may have perpetuated misinterpretations of the report.

There also appeared to be added pressures on commentators to speculate on cases occurring in the political, rather than legal, arena. In court cases, commentators have become more sensitive to the need to include the phrase "alleged violation" and to caution reporters and viewers not to draw conclusions until all of the facts are known. In coverage of the political proceedings, caution was often thrown to the wind. There was immediate speculation as to whether the President would be impeached or censured. One wonders whether the speculation about censure led to the public's expectation that there would be a quick end to the proceedings, when in fact no censure was forthcoming.

Lawyers providing commentary on political proceedings must realize that it has challenges of its own. Just the responsibility of being competent means that the lawyer will have to learn about an entirely different decision-making process—the political process.

Recent events have also demonstrated that there is another key difference between legal commentary and political commentary that affects a commentator's ethical responsibilities. By and large, when a commentator discusses a legal proceeding or a court ruling, the commentator is acting in a descriptive role. In such a role it is easier for the commentator to remain objective. The commentator is describing what the judge did, what the witness said, or what the law requires.

By contrast, commentary on political matters often involves less description and more opinion. This can occur in subtle ways. Consider, for example, the basic question of whether the President's conduct constituted "high crimes and misdemeanors."²⁴ Many commentators

F.3d 1042 (6th Cir. 1998).

24. U.S. CONST. art. II, § 4; see also Daniel H. Pollitt, *Sex in the Oval Office and Cover-Up Under Oath: Impeachable Offense?*, 77 N.C. L. REV. 259 (1998); *White House: Charges*

answered that question based on their views of the seriousness of the President's alleged conduct.²⁵ However, in doing so, many failed to acknowledge that the Constitution is silent on what constitutes a high crime and misdemeanor and that their seemingly "legal definition" was really a political opinion about what conduct warrants the removal of a president.

It is more difficult in political commentary to compartmentalize one's opinion from legal description. Therefore, it is even more important that commentators in the political arena be aware of their biases and make full disclosure of them to the media and public.

Commentators in the political arena must also be sensitive about the extent to which they are being used as an advocate for a position, rather than as an objective observer of political developments. It is not uncommon for the media to search for commentators who will debate, rather than explain, proceedings. What the commentators did not seem to realize was that the more they discussed one side's position in the political crisis, the more they seemed to personally adopt those views. Thus, while the commentators may have personally believed that they could present both sides' arguments, they were in fact becoming more like advocates than neutral commentators.

Not surprisingly, commentators may not realize how partisan they have become until they have crossed the line of objectivity in their political commentary. Still referred to as "law professor," a title that may suggest an objective observer, the commentator has actually become an advocate for one side or another. Realizing that their viewpoint is why they are asked to make their many media appearances, commentators perfect that role and become even more entrenched in their positions. It is very difficult in the face of media pressure to step back from partisanship in political commentary and insist on presenting a balanced view of the proceedings or the legal standards governing them.

Even more so than legal commentators, lawyers or law professors engaging in political commentary must be sensitive to the conflicts of interest they bring to their work. One example that we observed during the impeachment proceedings was the conflict created by a commentator being loudly praised or cited by one side of the debate, apparently inducing the commentary to move even more aggressively in that side's

Aren't 'High Crimes.' Clinton's Lawyers Won't Move to Dismiss Now, CHI. TRIB., Jan. 11, 1999, at 1.

25. At least one commentator went as far as admitting that his opinions of the President's actions were based upon a moral view of society with which he could not concur. Jonathan Turley, *Is It the Right Verdict? Well, It's All Relative*, L.A. TIMES, Feb. 12, 1999, at B7.

direction. Therefore, we would add the conflict created by the personal interest a commentator may have in seeking the praise of one side or another during a legal or quasi-legal proceeding to the previous discussed list of conflicts.

Finally, political commentary adds additional challenges for the commentator because, unlike commentary concerning purely legal proceedings, the media may be willing to be guided by the commentator in structuring its coverage. If there is one realm in which reporters believe they are the experts, it is politics. In discussing ways to ensure ethical coverage of legal proceedings, we have previously encouraged commentators to guide reporters in their coverage.²⁶ It takes much more effort for commentators to perform this role in proceedings that are more political than legal in nature.

Lawyers and law professors can play a vital role in the coverage of political proceedings. One important function may be to simply contrast political proceedings with the ordinary operation of legal proceedings. A second important function is to help the public understand the meaning of technical terms such as "perjury" or "obstruction of justice," which may be imported into the political proceedings. Yet another important function is to help the public understand what the effect of certain procedures can be in a truth-seeking process.

We do not advocate that commentators abandon these important functions.²⁷ Rather, we encourage the commentators to perform them with an even closer eye toward the duties to be competent and open about their biases.

If commentators do not take their responsibilities seriously, the consequences of commenting on a political proceeding can be even more grave than commenting on a legal proceeding. In a legal proceeding, because there is an appellate process, errors in a proceeding precipitated by the press can be reviewed after the heat of trial has passed. The impact of commentary on a political proceeding can be more pronounced and long-lasting. As we have seen, once a political matter heads down the impeachment track, it is very hard to slow it down and seek impartial review of the political process.

B. Commentator vs. Participant

One omission from our earlier writings on this topic concerns the lack of sensitivity to the difference between the role of a commentator who is

26. See *Ethics I*, *supra* note 4, at 1307-09.

27. In fact, while it may be uncomfortable and outside their traditional role to enter the world of politics, legal commentators are often needed to respond to presentations by nonlegal experts who claim to have the "law" on their side of the argument.

serving as an analyst and of a commentator who is participating, or has participated, in the proceedings in some manner. This lack of sensitivity has become evident in the last eighteen months, as one of us, Erwin Chemerinsky, has dealt with the media in a very different capacity—as Chair of an elected commission charged with rewriting the Los Angeles City Charter. The charter reform process has been extensively covered in the media in Los Angeles, and Professor Chemerinsky has dealt with the press frequently in his role as Commission Chair. At times, there have been daily articles about the process and all of the major newspapers have frequently editorialized about it.

This experience has caused us to realize the profound difference between the roles of commentator and participant. A commentator should express honest opinions without hesitation. By having an agenda that needs to be served, a participant cannot do so. A commentator should not be constrained by the need to protect confidential communications. A participant will often have confidences that need safeguarding. A commentator rarely should have the need to talk on “background” to a reporter. A participant will often need to speak on background. A commentator’s primary function should be to educate and inform the public. A participant’s primary function must be to advance the cause or client for which the participant is working. A commentator will be evaluated for the quality of the commentary. A participant will be evaluated primarily for how the participant performed the principal task.

It has been an unusual experience to be interviewed by the same reporter for two different stories—one as a commentator and one as a participant—and to realize the great role difference. This experience convinces us that a code of ethics for commentators must acknowledge these varying situations in which lawyers and law professors talk to the press. Also, as always, it is evident that the burden must be on the commentator to identify and explain this to the reporter who is often focused on the particular story and has not considered the difference in roles and what that difference means.

First, the code should strictly require that the commentator disclose to the media any involvement in the matter. There are reasons to believe, however, that disclosure to a reporter may not be sufficient. The reporter may not communicate it in the story. Especially in dealing with the broadcast media, such disclosures are likely to become outtakes never heard by the public. Also, the reporter may not appreciate the importance of the information.

Therefore, second, we believe that the burden should be placed on the commentator to take reasonable steps to communicate the participation to the public. This includes encouraging reporters to communicate and

include it within statements made to the press. Also, we think the commentator bears the responsibility of communicating to the reporter the significance of the conflict, if it is not otherwise apparent.

The issue arises as to when someone should be deemed a "participant." Obviously, an attorney representing a client in the matter is deemed a participant. But how far should this extend? In the Simpson criminal trial, commentators included criminal defense lawyers who had cases involving other defendants who might have been affected by aspects of that case. For example, the District Attorney's decision as to whether to seek the death penalty in the Simpson case might have influenced whether a capital sentence would be sought in other pending cases. Some of the commentators were defense lawyers from those pending cases, and they expressed their view on the death penalty in the Simpson case.

We believe that the definition of "participant" should be broad enough to include that situation. Those criminal defense lawyers should have disclosed to the media the importance of the District Attorney's decision to their clients. Otherwise, the media and the public have no way to assess how the opinion expressed by the commentator might be influenced by other interests.

More generally, we are concerned that the NACDL, in its effort to develop a code of ethics for criminal defense lawyers, has taken the view that its members should see their role as advancing a particular perspective when serving as commentators. Overall, we applaud its effort and agree with most of the content of its proposed code. However, we are troubled by the way in which it defines the criminal defense lawyer's role as a commentator.

Principle 2 of the NACDL Ethical Considerations for Criminal Defense Lawyers Serving as Legal Commentators provides that "[c]riminal defense lawyers who serve as legal commentators have a special obligation to educate the public about what it means to be 'liberty's last champions'—our constitutional and ethical responsibilities as advocates for the accused."²⁸ The commentary to Principle 2 states in part: "Defense lawyer-commentators should avoid sweeping statements regarding an accused's guilt, especially in the pre-arrest, post-arrest or pretrial stages of litigation. Unfair speculation can jeopardize an accused's right to a fair trial."²⁹

While defending the constitutional rights of a defendant is an important function, it is not limited to commentators with a criminal defense background. Moreover, in addition to protecting and explaining

28. NACDL Ethical Considerations, *supra* note 6, at 2.

29. *Id.*

the rights of an accused, it is important to educate the public about the rights and interests of others in the criminal process, including witnesses, prosecutors, and law enforcement officers. The dictates of the NACDL rule seem to direct the criminal defense lawyer to focus first and foremost on the interests of the accused in providing legal commentary.

Criminal defense lawyers, like prosecutors, should be able to be neutral commentators and not serve simply as advocates for a particular viewpoint. Certainly, one's experiences shape how events are perceived, described, and evaluated, but it should not be mandated that any particular perspective be expressed. Ordinarily, commentators should not be "champions" for a cause. Even criminal defense lawyers should keep in mind broader interests when providing legal commentary.

Ultimately, the key is that commentators should be clear in their own mind, and clearly communicate to the media, whether they see their role as neutral or as an advocate for a particular position. Either is fine, but commentators must be as clear about this as possible. Moreover, as described above, the commentator should do everything possible to communicate to the media any participation or involvement in the matter or any way in which the matter might affect the commentator or the commentator's clients or interests.

Thus, we slightly modify our earlier proposal for the code to say:

1. Commentators should disclose to the media and to the reporter any current or prior legal, business, financial, professional or personal relationship with a party or witness in the case. Commentators also should disclose any interest, including interests of clients or personal interests, that might be affected by the handling or outcome of the matter.

2. The media should disclose to the public such a relationship when using commentators. For instance, those who were previously attorneys in the case should be identified as such.

3. Commentators should identify, in their own minds, whether they are being used by the media as advocates or as neutral experts. If commentators are being used as neutral experts, they should strive to be fair and balanced. If the commentators are unable to do this, then they should not be used in the role of neutral experts. In other words, if the commentators see themselves being used in the role of neutral analysts, then the commentators should strive to fulfill that role. The task of the reporter generally includes a duty of neutrality and reporters are asked to set aside their own feelings and opinions to the greatest extent possible. Commentators performing the role of neutral experts should be asked to do the same.

IV. THE NEED FOR ATTENTION TO SETTING IN DEVELOPING AND APPLYING ETHICAL STANDARDS

The more we observe and participate in legal commentary, the more we believe that a commentator's responsibilities may vary depending on the type of commentary being provided and the type of broadcast in which it is made. Of course, the essentials remain the same—a commentator should be competent, honest, and forthright about any conflicts of interest. But there are nuances to the ethical duties depending on the setting in which the commentators operate.

Consider, for example, the different roles of commentators who provide daily trial coverage and those who are called with a discrete legal question, such as the penalty for a particular crime. Certainly, the lawyer who is providing the daily coverage has an added burden of remaining competent to provide that type of commentary. Not only is there a need to substantively understand the issues that arise in the trial, but there is also a need to remain up to date on developments in the case. It is also more helpful in this setting for the commentator to have prior practical experience than it would be for the commentator who is asked to answer a narrow legal question.

Additionally, when providing daily trial coverage, there is a need for the commentator to refrain from speculating on the outcome of the case and to avoid creating conflicts of interest by intentionally assisting one side or the other. The commentator who is providing daily coverage also has a greater opportunity, and therefore a greater responsibility, to help guide the media in its coverage. Because the commentator may have insights regarding the trial process that reporters without legal training do not possess, the commentator can help steer the media to the relevant legal issues and downplay those issues that are merely sensationalist or exploitative.

By contrast, the commentator who is asked to answer a specific legal question does not necessarily have to possess extensive trial experience. Frankly, law professors are accustomed to doing quick research on a wide variety of novel legal issues. The most important ethical commitment for the commentator in these situations is a willingness to do the research that will give an accurate answer to the reporter's question.

The setting is also critical to framing a commentator's ethical responsibilities. Consider, for example, the many types of shows in which legal information is conveyed to the public. Today, the public learns about the law from a wide variety of shows, ranging from the

evening news to *Judge Judy*.³⁰ We believe that it may be helpful to tailor ethical standards to meet the needs of the particular type of programming involved.

Consider, first, the most common type of legal commentary—the evening news soundbite. Based on our experience, there are particular ethical responsibilities a commentator should have in mind when providing such commentary. Competency is a primary concern in this setting. Because news stories develop so quickly, the commentator may have very little opportunity prior to the reporter's questions to learn the facts and law regarding the issue at hand. It is imperative that the commentator make an effort to learn this information before providing the commentary and to inform the reporters if their questions are misdirected.

Second, a commentator providing a soundbite should realize that the reporters are unlikely to use precious news time to explain any bias or conflict the commentator has in providing commentary. A commentator can assist in this task by suggesting ways the commentator may be chyroned and including in the soundbite why the commentator has a particular perspective.

Finally, a commentator providing a soundbite is at great risk of being used as a simple scorekeeper for a proceeding. It is not unheard of for a commentator's remarks to be edited into a simple "the defense has no chance" prediction of the outcome of the case. Commentators in these settings must be particularly careful not to engage in speculation, in part because there is a high likelihood that the basis for their speculation may be left on the editing room floor.

In recent years there has also been a proliferation of legal talk shows that use commentators to discuss a wide array of legal topics.³¹ Many of these shows are hosted by famous lawyers who have an opportunity to frame and direct the discussion. In this setting commentators are often prompted to become advocates for positions, using their skills more to outwit the other guests than to provide a true and balanced picture of the law.

Both the hosts of these shows and the commentators who appear as guests have an opportunity to improve the quality of legal commentary. It is essential that the lawyer-host play a role in framing the discussion

30. See Virginia Kirk, *Most Influential (legal) TV Shows Ever*, NAT'L JURIST, Oct. 1998, at 18 (citing the following as the most influential legal television shows ever: *L.A. Law*, *Perry Mason*, *The Defenders*, *Law & Order*, *The Paper Chase*, *Night Court*, *Matlock*, *The Practice*, *Ally McBeal*, and *The People's Court*).

31. These shows range from *Burden of Proof* (CNN), *Cochran & Co.* (Court TV), and *CNN & Co.* (CNN) to *Larry King Live* (CNN), *Geraldo* (CNBC), *The Crier Report* (Fox), and *Politically Incorrect with Bill Maher* (ABC).

and not allow the lawyer-commentators to completely control the commentary. Unlike the people behind the scenes, the lawyer may have a sense of which issues are most important to the discussion and which are just sensational or provocative. In a day and age where the line between entertainment and information continues to be blurred, just getting a show focused on the important questions can be a valuable contribution to the improvement of legal commentary.³²

Guests on legal talk shows can improve the quality of these shows by resisting the temptation to make remarks simply because they are quotable or fit into the role the commentator was assigned for the debate. Part of being competent means that the commentator has a legal and factual basis for the remarks and believes them to be true. It also means revealing all possible biases. On a talk show, there really is no excuse for a commentator failing to admit any personal conflicts or biases that may influence the commentary.

Legal commentators may also want to consider whether there are particular types of talk shows on which they would rather not appear. There is a tendency, particularly for new commentators, to get caught up in the rush and appear on every show that wants to schedule them for an appearance. It is fair, however, for commentators to distinguish among the shows. Indeed, it is unlikely that discussing a legal issue on *Leeza* will be the same experience as discussing it on *Face the Nation*. While legal commentators certainly have the right to appear on all types of programs, if the very nature of the program is likely to mislead the viewing audience on an issue, commentators should seriously consider whether they want to participate. In some situations, they might hope that their participation would elevate the discussion. The sad reality, however, is that they will not have enough control of the programming to prevent sensational, incompetent, or biased commentary from being presented during the program.

Commentators in the field have other types of responsibilities. When commentators are assigned to provide daily coverage of a high-profile trial, they may be located at the courthouse and have access to the participants. In this setting the commentators will confront the additional issues of (1) how much information they should seek from participants, even though they know the participants are subject to a gag order, and (2) how much advice, solicited or unsolicited, the commentators can give the parties in the case. In an effort to be friendly and obtain the quick "scoop" for the reporters for whom they are

32. Of course, in making these determinations, it will undoubtedly be helpful for the host to talk to the guests ahead of time to learn any insights they may have regarding the prospective discussion.

working, commentators could easily find themselves stepping outside their role of analyzing the events in a case and into a more aggressive role of influencing the proceedings.

Finally, one of the challenges for everyone in the legal profession is how to deal with the proliferation of legal entertainment shows that purport to show the public the law but do so in a very distorted fashion. Two of today's most popular shows are *Judge Judy* and *The People's Court*. The format of these shows is very much in line with that of a typical small claims court. Each party makes an argument to the court, and the court, without jury or lengthy deliberations, decides the matter. For dramatic effect, the judges in these shows also tend to deliver a lecture to the parties in the case.³³

Contrary to what these shows portray, most trials are much more complicated affairs. They cannot be resolved in fifteen minutes or a half-hour, and it is not in the job description of most trial judges to be a psychological therapist. Trials involve delays, rulings on evidence, juries, competing counsel, and testimony of witnesses. To the extent that lawyers play a role in the production of such programs, they can ensure that these programs are as realistic as possible or inform the viewers of their altered nature. It is wrong for lawyers to assume that the public will know, simply from life experience, that real court is different from the programs they view on television.

Commentators must be sensitive to the particular challenges raised by the type of programming in which they participate. Establishing an ethical code for legal commentators provides a basic guidepost from which commentators can begin to confront some of these legal issues. It is unlikely, however, that a code will answer all the questions. Legal commentary, much like the practice of law, is too nuanced to codify a response to every situation. Nonetheless, the standards of competency, disclosure of conflicts and biases, maintenance of confidence, and professionalism in the business of being a commentator can provide an important starting point for those commentators taking their participation seriously.

V. THE NEED FOR ATTENTION TO TRAINING PROFESSIONALS, THE MEDIA, AND THE PUBLIC

As we watch the many commentators in the broadcast media and read quotations from even more in the print media, we realize that developing a code of ethics for commentators is not sufficient. Some commentators

33. See Jan Hoffman, *On TV's Docket: Judge Koch v. Judge Judy*, N.Y. TIMES, Dec. 29, 1997, at A1.

are excellent at clearly communicating the law; other times, we see commentators unquestionably misstating the law. Some commentators clearly distinguish their statements of the law from their opinions about it. Others present their opinions as if they are the law. In the recent media coverage of the Clinton impeachment proceedings, we frequently heard commentators offering definitive opinions as to the constitutional meaning of the phrase "high crimes and misdemeanors." Certainly, each commentator can express a view on this, but there is no basis for claiming that any opinion is definitive.

Viewing all of this convinces us that there also must be training for those who serve as commentators and for the media that uses them. As we have argued elsewhere, serving as a commentator is a different role than being an attorney. Nothing in legal education or even professional experience prepares commentators for that role. Also, media professionals—both reporters and those in managerial roles—likely have not been trained in the appropriate use of commentators. The use of legal commentators is a practice that has grown dramatically in the last decade without systematic thought on the part of the media about their appropriate use or the ethical issues involved.

Therefore, we suggest that attention be given to training commentators and the media. First, professional education should include express attention to issues related to the ethics of being a commentator. For instance, in law school professional responsibility courses, there should be consideration of ethical issues in speaking to the press. In light of the ever-increasing media attention devoted to high-profile cases, many students will find themselves handling matters in which there is press interest. Therefore, students should be familiar with the Model Rules of Professional Conduct governing lawyer statements to the press³⁴ and the court cases interpreting them.³⁵

Students should consider when speaking to the press is advantageous to an attorney's position and when it is likely to be harmful. The instruction should also include consideration of what types of statements are appropriate and which are inappropriate under certain circumstances.

Additionally, the demand for commentators also is growing, and some students will find themselves in that role. Discussion can include consideration of the ethics of being a commentator. Issues such as confidentiality and conflicts of interest faced by commentators fit within the scope of courses on legal ethics. Obviously this need not be a major focus of these courses, but it should be considered and discussed.

34. MODEL RULE OF PROFESSIONAL CONDUCT Rule 3.6 (1998).

35. *See, e.g.,* *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991).

Journalism students also should be given instruction in the use of commentators. When is a commentator appropriate? What are the different types of uses for commentators and when is each best employed? Prospective journalists should also be aware of the ethical issues that arise in using commentators and consider what is appropriate behavior by all concerned.

Second, continuing education programs can focus on training, including ethical instruction, for professionals serving as commentators. Most states now require attorneys to complete regular courses in continuing legal education. Some states require that a certain number of course hours be taken in professional ethics. Courses might be developed about being a commentator and the ethics involved. Some of the instruction can include tips and techniques for serving as a commentator. Speaking to the press, especially in contexts when soundbites are required or in live programming when time is very short, is different from almost any other speaking situation. Instruction also should include attention to the ethical issues that frequently arise in being a commentator.

Third, the public should be educated about the role of a commentator. However, it is difficult to identify the forum where this should occur. Nevertheless, commentators certainly should look for opportunities, including op-ed pieces and media discussion programs, to discuss the role of commentators and the ethical issues involved.

VI. USING A COMMENTATOR'S ETHICAL CODE FOR POSITIVE, NOT DISCRIMINATORY, PURPOSES

As we have discussed throughout this Article, our goal is to have a voluntary code of ethics for legal commentators that will assist, not hamper, commentators in their efforts to educate the public. While most of the feedback regarding our proposed code and plans for educating commentators has been positive, thoughtful criticisms have also arisen. We would like to take this opportunity to address some of that criticism.

Raymond M. Brown, a pre-eminent attorney and respected television commentator, noted that there may be several downsides to concentrating our efforts in obtaining an ethical code for commentators.³⁶ First, he suggests that there are already too many statutes and that a code of ethics, particularly if voluntary, is likely to be disregarded, increasing cynicism and people's beliefs that laws overregulate behavior.³⁷ We

36. *Panel Discussion Transcript*, 50 MERCER L. REV. 681, 704-07 (1999). Raymond M. Brown, *A Ransom Note from the Opposition to the Proposed Rules of Ethics for Legal Commentators*, 50 MERCER L. REV. 767 (1999).

37. *Panel Discussion Transcript*, *supra* note 36, at 704.

acknowledge that there are certainly many arcane and ignored laws on the books. However, the difference between these legislative leftovers and the proposed code of ethics for legal commentators is that there is a need for such a code, and a voluntary code serves as a tool, rather than a dictate, for legal commentators. Instead of overly complicating the commentator's life, the code can help simplify it by providing answers to common ethical problems.

Mr. Brown also suggests that the commentator's code would be an insult to journalists, portraying the legal profession's arrogance that we are the only ones with a true commitment to high standards and ethics.³⁸ Of course, the code we have proposed is in no way intended to send such a message. We both have the highest respect for many of the journalists with whom we have had the privilege to work during high-profile cases. We note that many journalists subscribe to their own code of ethics.³⁹ Therefore, it would hardly seem insulting for commentators to emulate these efforts by adopting a code that better fits their own roles as commentators.

Moreover, a code of ethics for commentators is designed to assist journalists, not to insult them. Journalists cannot be expected to know whether a particular commentator is competent in a specific area of law or has a conflict of interest in a given case. The proposed code of ethics places the burden on the commentator to inform the journalist so that the highest standards of journalistic integrity may be observed.

Mr. Brown also worries that a code of commentator ethics would not take into account the differences in types of media covering legal issues.⁴⁰ As he notes, entertainment, not education, covers much of what the electronic media does.⁴¹ We are certainly open to the tailoring of a code to address the realities of a commentator's situation. For example, if a program uses a "cross fire" approach, commentators may want to engage in a different demeanor than they do in a one-on-one news interview. However, we reject the suggestion that commentators are merely chameleons and must become the character designated by the show on which they appear. No matter what the type of program or reporting, a commentator should be competent, open about biases, and respectful of confidences.

One of Mr. Brown's most significant complaints, also raised by other reviewers like Professor Paul Butler of George Washington University

38. *Panel Discussion Transcript, supra* note 36, at 704-05.

39. See BRUCE M. SWAIN, REPORTERS' ETHICS 85-96 (1978); Steven Brill, *The New Code for Journalists*, AM. LAW., Dec. 1994, at 5.

40. *Panel Discussion Transcript, supra* note 36, at 705.

41. *Panel Discussion Transcript, supra* note 36, at 705.

School of Law and Johnnie L. Cochran, Jr., outstanding lawyer and Court TV host, is that a code of ethics will be used to silence dissenting voices and to discriminate against certain groups in the legal community.⁴² This concern troubles us the most. Certainly, given the history of the ABA and its enactment of standards, we understand why minority groups are naturally suspicious of ethical rules and limitations.⁴³ As one author has written, "there is always an inherent danger in a self-regulating profession to reproduce itself in the same colors and tones."⁴⁴ Opponents of an ethical code for legal commentators are particularly suspicious of provisions that require a commentator to invest a considerable amount of time in preparing to comment on a case, when lawyers in many types of practices do not have such time available to them for this purpose. They argue that such a provision smacks of elitism.

On their face, the ethical standards we propose do not discriminate against any group of lawyers. For example, all lawyers, no matter what their perspective or background, must be competent. We agree, however, that we must be vigilant in ensuring that the code is not used as an excuse by certain groups to discriminate for ulterior reasons. The best commentary will come from people with different perspectives. Rather than eliminating a code of ethics for commentators, it may be better to include in it a provision that encourages an outreach to different groups and perspectives when looking for the best commentators regarding an issue.

A code of ethics for commentators in no way limits the ability of commentators to express their views and criticisms of the judicial system. Professor Butler voiced concern that a code of ethics would limit his and others' ability to expose racism in the criminal justice system.⁴⁵ Nothing in the code implies such a restriction. Commentators, of course, should be able to express any view or opinion they hold. Our only point with regard to commentators expressing opinions is that it should always be clear when the commentator is doing so, as opposed to making factual statements or neutral observations.

The proof that a code of ethics does not provide a monopoly of access to the media to any one segment of the legal community is the fact that

42. *Panel Discussion Transcript*, *supra* note 36, at 705-06. For further explanation of Professor Butler's concerns, see *Panel Discussion Transcript*, *supra* note 36, at 707-09. For further explanation of Mr. Cochran's concerns, see *Panel Discussion Transcript*, *supra* 36, at 709-13.

43. See Robert Stevens, *Democracy and the Legal Profession: Cautionary Notes*, 3 LEARNING & L., Fall 1976, at 12, 15-16.

44. *Id.* at 68.

45. *Panel Discussion Transcript*, *supra* note 36, at 708.

diverse groups, from the NACDL to The Federalist Society, have taken seriously the challenges posed when lawyers become commentators.⁴⁶ Given the nature of many media broadcasts—embracing controversy and seeking opposing views on issues—it is unlikely that any voices, no matter how extreme, will not be heard. A voluntary code of ethics does not pose the same threats as a mandatory code under the supervision of a disciplinary body. With a mandatory code, a disciplinary body would have the power to threaten disciplinary action and thereby effectively screen out those views with which they disagree. If commentators, no matter what their views, are honest and forthright regarding their opinions and conflicts, their conduct would satisfy the proposed standards for ethical conduct.

Finally, critics have argued that a code of ethics for legal commentators is a bad idea because it diverts attention from more pressing problems facing the legal professions, including, for example, the widespread problem of ineffective assistance of counsel.⁴⁷ We do not pretend that all the ills of the legal system will be cured just because legal commentators abide by ethical standards. However, there may be greater credibility for commentators addressing these problems if they have engendered respect from the public for the way they have handled their responsibilities as legal commentators. By being a respected legal commentator, a lawyer has a unique opportunity to bring to the attention of the media and public those other problems that confront the justice system today.

A code of ethics for legal commentators is not a panacea for the problems in the legal or journalistic profession. Some may choose to use it as a bully pulpit. If they are honest and open in their biases, we do not object. In fact, there is a need for commentators who have the courage to identify the problems in our legal system, including criticisms of judges, that otherwise often go unmentioned.

Professor Butler is undoubtedly correct when he states that true objectivity is a myth.⁴⁸ As human beings, we have our individual opinions and biases. However, we are not as convinced as Professor Butler that the public can intuitively detect a commentator's agenda. To

46. At its 1998 National Lawyers Convention, the Professional Responsibility Practice Group of The Federalist Society held a panel discussion entitled "Lawyers and the Media: When Lawyers Become Publicists." *Nearly 600 Attend Twelfth Annual National Lawyers Convention*, FEDERALIST PAPER (The Federalist Soc'y, Wash., D.C.), Winter 1999, at 1, 1-2. For the principles established by the NACDL, see *supra* note 6.

47. *Panel Discussion Transcript*, *supra* note 36, at 706.

48. *Panel Discussion Transcript*, *supra* note 36, at 707.

the extent we know our opinions and biases, we should have a duty to disclose them.

While some would equate any ethics code with an attempt to impose one group's morals on another, we view the proposed standards for legal commentators as more of a collection of approaches that can assist both the commentators and the media in presenting the most informative and accurate information to the public. Every commentator is free to have personal beliefs, including a belief as to the value of commentary, but as in any profession, there should be a conscious effort to provide the best service possible.

For these reasons, we strongly believe that the benefits of a voluntary code of ethics for legal commentators outweigh its downsides. The more opportunities we have to inspect these standards, evaluate their fairness and effectiveness, and receive constructive criticism, the more likely we will be to develop standards that serve both the public and the lawyers themselves.

VII. CONCLUSION

Developing an ethical code is a process, not a singular event.⁴⁹ In writing three articles regarding ethics for legal commentators, our own ideas have evolved. We continue to believe in the need for voluntary standards to guide and elevate legal commentary. However, as we have discussed in this Article, we recognize that when it comes to the details, one size will not fit all.

It is a significant advancement that so many organizations, both legal and media, are beginning to think about ethical standards for legal commentators and are adopting those that assist in their particular practices. By doing so, they keep ethics on the front burner and contribute to the ongoing dialogue on how we can best serve the public and ourselves by providing legal commentary.

The United States does not stand alone in using legal commentators. Throughout the world, legal commentators explain legal proceedings and developments in the law.⁵⁰ Advances in defining the proper role of

49. The ABA rules have gone through several permutations and are facing yet another as a result of the Ethics 2000 movement and efforts of the American Law Institute, which is developing a *Restatement (Third) of the Law Governing Lawyers*. The first *Canons of Professional Ethics* were published in 1908. They were changed dramatically and adopted in 1969 as the *Model Code of Professional Responsibility and Code of Judicial Conduct*. In 1983, the ABA adopted another version of professional standards, known as the *Model Rules of Professional Conduct*.

50. See, e.g., Paul Conroy, *Australia: New Court Chief Plans to Stay in Background*, *THE AGE* (Melbourne), May 8, 1996, at 1 (Chief Magistrate of Victoria, Australia resigned his position to pursue a career as a legal commentator in the media); Patrick Reaney,

legal commentators, and the ethical standards they should meet, can contribute not only to the quality of American journalism, but to the quality of international reporting as well.

We can be better than talking heads, but to do so we must take our responsibilities seriously. It is our hope that when lawyers decide to do commentary, forefront in their minds will be a concern over standards, ethics, and professionalism. If they are, Newton N. Minow, former Chairman of the Federal Communications Commission, will have been proven wrong.⁵¹ Television legal commentary will not be a vast wasteland.

'McLibel' Decision is Finally Looming Duo Fights Burger Giant in England's Longest Trial, TORONTO STAR, June 17, 1997, at D9 (legal commentators used to describe high publicity libel trial); Herb Keinon, *Taking the Law Out of Violators' Hands*, JERUSALEM POST, Sept. 4, 1998, at 15 (commentary on lack of enforcement of the laws); *Ch 7 Deal Points Up Long-term Privilege—Concession Contract Escapes Required Scrutiny*, THE NATION (Bangkok), Nov. 2, 1998 (legal commentators criticizing contract to operate Army-run Channel 7); *Larry King Live* (CNN television broadcast, Nov. 16, 1998) (interview with British barrister and legal commentator Michael McParland).

51. Newton N. Minow, *Address to the 39th Annual Convention of the National Association of Broadcasters*, in EQUAL TIME 48, 52 (Lawrence Laurent ed., 1964) (Minow commenting that anyone watching television for an extended period of time "will observe a vast wasteland").

