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Organizational Proposal: American College of Trial Lawyers

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American College of Trial Lawyers

Excerpt from *Report on Fair Trial of High Profile Cases*¹

VI. STANDARDS APPLICABLE TO ATTORNEYS ACTING AS COMMENTATORS

Gag orders and presently existing ethical rules customarily apply to the attorneys in the case or people associated with them, and to a limited extent to the investigators and law enforcement personnel involved in the case. However, as we have seen, a veritable army of law professors and attorneys with no official role in the case may give (or sell) views or comments to the media as to how each side is doing, how well the judge is handling the case, what particular rulings of the court may mean and more. The greatest concern is that the comments of such lawyers, if made known to the jury, could unfairly affect the outcome of the case.

Broadly speaking, the First Amendment allows freedom both to the wise and the ignorant to speak their views, unless there is the equivalent of shouting "fire" in a crowded theater, or talking about bombs while

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boarding an airliner. However, the question has been raised as to whether there ought to be specific ethical rules or guidelines that would apply to lawyers—because they are lawyers—who appear on television or radio or address the media and opine on ongoing court proceedings.

In appropriate circumstances, legal commentators can play an important role in the reporting of court proceedings. They can assist the public by explaining the significance of events occurring in and out of court, and by “demystifying” the judicial process. However, even commentators who seek to fill this role may have serious limitations, such as lack of knowledge with respect to particular issues, or bias and motivation to exploit the role for personal advantage, that pose dangers to the public and to the administration of justice. In some instances the comments by a lawyer commentator conceivably could impact the outcome of the trial.

There currently appear to be no specific ethical standards governing conduct as a legal commentator. Substantial additional study would be needed before adopting comprehensive and enforceable ethical standards. No doubt the American Bar Association and the bar associations of individual states would participate in such a study. In anticipation of such a study, the American College of Trial Lawyers proposes the following guidelines for serious consideration.²

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

2. See the Essay by Laurie L. Levenson, Associate Dean for Academic Affairs of Loyola Law School, entitled, “Reporting the Rodney King Trial: The Role of Legal Experts,” that appeared in the January 1994 issue of Loyola of Los Angeles Law Review. Dean Levenson, and Professor Erwin Chemerinsky of the University of Southern California Law Center, are the co-authors of an article entitled, “The Ethics of Being a Commentator,” 69 Southern California Law Review, May 1996, No.4.

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.

