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Laurie L. Levenson

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SYMPOSIUM

THE SOUND OF SILENCE: REFLECTIONS ON THE USE OF THE GAG ORDER

FOREWORD

Laurie L. Levenson*

Gag orders are instructions from judges forbidding attorneys to discuss an ongoing trial with reporters. It never has been proven that anything written in a newspaper about a trial in progress has influenced any jury member's vote, especially when the jurors are warned every day not to read newspaper stories about the case or listen to the TV or radio news Yet judges, generally the most insecure ones, still issue stringent gag orders in an attempt to prevent "prejudicial" information from getting into the papers which the jurors are supposedly not reading anyway. The judges who impose gag orders say that they are doing it to ensure the defendant gets a fair trial.¹

—Theo Wilson

The issue of whether courts should impose gag orders in high-publicity cases poses a classic balance of two crucial constitutional rights—the right to a fair trial and the right of free speech. Even those who oppose gag orders acknowledge that ensuring a fair trial is a laudable

* Associate Dean for Academic Affairs and Professor of Law, Loyola Law School, William M. Rains Fellow. Thank you to the *Loyola of Los Angeles Entertainment Law Journal* for sponsoring this timely symposium on gag orders and for giving my husband (Douglas Mirell) and me something to talk about during our few precious minutes together.

1. Theo Wilson, *Headline Justice* 71 (1996).

goal.² Yet, there is fierce disagreement over whether gag orders are necessary and effective to ensure that right.³

Gag orders come with a substantial price. The cost of using a gag order is the limit it places on the free speech rights of the lawyers and parties in a case. There are two dimensions to this cost. The first is one of basic principle. The First Amendment of the United States Constitution guarantees the right to free speech. One should not have to sacrifice that right when becoming part of a lawsuit. The other dimension is of a more practical nature. As we have seen repeatedly during the recent "Trials of the Century,"⁴ high-publicity cases are tried in two arenas: in the formal courtroom and in the court of public opinion. To preserve his or her reputation, a party may seek redemption not only in the courtroom but also in the public arena. By the time a court is assigned to a case, the trial in the public arena may well be in progress. A gag order can restrict the party's ability to respond to prejudicial information that had been disseminated prior to the court's order.

For the trial court faced with a complicated trial surrounded by immense and intense public and media interest, the temptation to rely on gag orders can be overwhelming. The judge's most immediate concern is selecting or retaining a fair jury, and although the parties' First Amendment rights are academically interesting, the most pressing concern of the day is often finishing the case without a mistrial. The fastest and easiest way for the court to maintain and keep control of a case is to impose a gag order. So what if the court must later tailor the contours of its order? So what if the leaks continue? At least the judge will believe that he or she is doing what can be done to ensure a fair trial. Reflection on grand constitutional principles is usually not in the day's schedule.

This gag order symposium is so valuable precisely because it gives courts the background to reflect on the merits of gag orders before a crisis is upon them. Professor Erwin Chemerinsky expertly maps the

2. See Erwin Chemerinsky, *Lawyers Have Free Speech Rights, Too: Why Gag Orders on Trial Participants Are Almost Always Unconstitutional*, 17 LOY. L.A. ENT. L.J. 311 (1997).

3. The imposition of gag orders has always been a controversial issue. For a history of the law regarding gag orders and the Bar and media's response to them, see J. EDWARD GERALD, *NEWS OF CRIME* 85-114 (1983).

4. There have been at least five "Trials of the Century" in Los Angeles alone during the last decade. I served as a commentator on most of them. They include: *People v. Powell*, No. BA035498, (Cal. Super. Ct. Apr. 29, 1992), *United States v. Koon*, 833 F. Supp. 769 (C.D. Cal. 1993); *People v. Williams*, 46 Cal. App. 4th 1767 (Cal. Ct. App. 1996), *People v. Menendez*, No. BA068880, 1996 WL 342092, at *1 (Cal. Super. Ct. July 2, 1996), *People v. Simpson*, No. BA097211, 1995 WL 704381 (Cal. Super. Ct. Oct. 3, 1995), and *Rufo v. Simpson*, No. SC031947, 1997 WL 53038, at *1 (Cal. Super. Ct. Feb. 10, 1997).

constitutional contours of gag orders. The Supreme Court first articulated a test for prior restraints on the press in *Nebraska Press Ass'n v. Stuart*.⁵ That standard makes prior restraints against speech presumptively invalid. The constitutional standard for gag orders on trial participants has not been as well defined. In *Gentile v. State Bar*,⁶ the Court held that attorney speech could be punished if it posed a substantial likelihood of materially prejudicing an adjudicatory proceeding. But that case did *not* involve a gag order. Rather, the State Bar disciplined Mr. Gentile for his violations of that jurisdiction's rules of professional conduct. The United States Supreme Court has yet to decide what constitutional standard—"substantial likelihood of prejudice" or "clear and present danger"—should be used in judging gag orders on attorneys. Professor Chemerinsky offers his own answer to that question.

Mr. Douglas Mirell continues the constitutional discussion. As he notes in his article,⁷ courts now seeking to impose gag orders often look to other codes for guidance in drafting gag orders. One ready guide may be found in the California Rules of Professional Conduct. On the heels of the criminal trial of O.J. Simpson, the California Supreme Court adopted Rule 5-120 of the California Rules of Professional Conduct.⁸ The rule limits attorney's speech in both criminal and civil trials.

5. 427 U.S. 539 (1976).

6. 501 U.S. 1030 (1991).

7. Douglas E. Mirell, *Gag Orders & Attorney Discipline Rules: Why Not Base the Former Upon the Latter*, 17 LOY. L.A. ENT. L.J. 353 (1997).

8. Rule 5-120 of the California Rules of Professional Conduct, as applicable to civil cases, provides:

(A) A member who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the member knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(B) Notwithstanding paragraph (A), a member may state:

- (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the person involved;
- (2) the information contained in a public record;
- (3) that an investigation of the matter is in progress;
- (4) the scheduling or result of any step in litigation;
- (5) a request for assistance in obtaining evidence and information necessary thereto;
- (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe there exists the likelihood of substantial harm to an individual or the public interest.

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

For some courts, Rule 5-120 represented a commandment delivered from on-high. The rule, by its terms, limits attorney speech and therefore offers an additional mechanism for restraining attorney speech. There is, however, one significant lingering problem. The constitutionality of Rule 5-120 is still in dispute. Is it void for vagueness? Are its contours still unconstitutionally overbroad? If Rule 5-120 is a flawed guide, have the courts turned to a false idol to solve its problems of trial publicity?

All of us participating in this symposium have had a birds'-eye view into the recent "Trials of the Century"—the civil O.J. Simpson lawsuits⁹—serving either as legal commentators or amicus counsel on First Amendment and media issues. From these vantage points we have been able to gauge the impact of gag orders on high-profile cases. As Paul Hoffman's article suggests, it sometimes feels like we have been caught in a war. Not only have we witnessed the war between the parties to the suit, we have also observed or participated in "gag" wars that have become a controversial part of high-publicity trials.¹⁰

The "gag" war in the civil Simpson proceedings began with the court's early offensive. Before jury selection began, and without advance notice, the trial judge issued a sweeping gag order precluding all counsel from discussing "anything connected with this trial with the media or in public places."¹¹ In the First Amendment world, such an order is the equivalent of a nuclear attack. Taken to its logical (and illogical) extremes, the court's order would have barred lawyers in the case from discussing matters privately with each other even in the courtroom which is, of course, a public place. The ACLU and media lawyers¹² moved to challenge the order.¹³ The trial judge modified his order but the

CALIFORNIA RULES OF PROFESSIONAL CONDUCT Rule 5-120 (1995).

9. See *Rufo v. Simpson*, No. SC031947 (Cal. Super. Ct. filed July 20, 1994), consolidated with *Goldman v. Simpson*, No. SC036340 (Cal. Super. Ct. filed May 4, 1995), and *Brown v. Simpson*, No. SC036876 (Cal. Super. Ct. filed June 12, 1995).

10. Paul L. Hoffman, *The "Gag" Order in the O.J. Simpson Civil Action: Lessons to Be Learned?*, 17 *LOY. L.A. ENT. L.J.* 333 (1997).

11. *Rufo v. Simpson*, No. SC031947 (Cal. Super. Ct. filed July 20, 1994) (Minute Order issued Aug. 13, 1996).

12. These lawyers included some of the finest attorneys in the First Amendment field, including two of the authors of this symposium—Paul Hoffman and Douglas Mirell.

13. Indeed, as discussed in detail by Mr. Hoffman and noted by Professor Robert Pugsley, the gag order wars are often fought more by proxies than the parties themselves. Media and First Amendment organizations represent the parties subject to the gag order. Those parties may be reluctant to wage the battle themselves because they are reluctant to antagonize a trial judge who will be ruling on many more issues during the course of their trial before him or her. The court, too, may be represented by a proxy. In many gag order situations, one party may feel a tactical advantage by having a gag order imposed and will defend the court's right to impose one, even if it was ordered *sua sponte*.

skirmishing continued. A challenge to the gag order was filed in the California Court of Appeal. Assuming that some type of gag order would be appropriate, based upon the history of the case rather than specific findings regarding ongoing improprieties, the Court of Appeal ordered further modifications of the order.

Even though they won a small victory, opponents of gag orders worried that they may be losing the war. The Court of Appeal's instinctive deference to the trial court's right to impose a gag order represents in itself a gradual erosion of First Amendment standards.¹⁴ The court was no longer obliged to target for redress specific abuses by counsel. Less restrictive alternatives for protecting a jury did not appear on the court's radar scope. Rather, the court immediately sought to use the most powerful weapon in its arsenal—the gag order.

If the court's order in the Simpson civil case represents a trend, there may indeed be good reason to worry about the devaluation of First Amendment rights in high-profile cases. Dismissing the order as an extreme act during extreme times offers little comfort. Although it would be nice to think of the Simpson case as the last "Trial of the Century" in which such an extreme approach is necessary, the next century is almost upon us and so is the next major trial. Even before the year 2000, two cases demanding nationwide attention will be tried and others loom on the horizon.¹⁵ The broad gag order imposed in the Simpson case is likely to be used as support for court measures to limit the dissemination of information in upcoming civil and criminal cases.

A gag order is only one of the weapons that a trial court has in its arsenal to prevent a trial from becoming a "media circus." Hand in hand with the debate over gag orders is the argument over whether cameras should be allowed in the courtroom. In his essay, Professor Robert Pugsley praises Judge Hiroshi Fujisaki's decision to ban cameras from the Simpson civil trial. For him, a gag order was not enough. To ensure the parties' right to a fair trial, the cameras also had to be turned off.

Pugsley's position is a controversial one. Both the gag order and the order banning cameras limited the public's access to first hand information regarding the trial. In hindsight, was this a good thing? If the public could

14. See generally, Hoffman, *supra* note 11.

15. The trial of Timothy McVeigh for the bombing of the Alfred P. Murrah Federal Building in Oklahoma City is scheduled to begin on March 31, 1997. His co-defendant, Terry Nichols, will be tried separately at a date yet to be determined. The first trial of Theodore Kaczynski (the suspected "Unabomber") is scheduled to begin in Sacramento, California, on November 12, 1997. A second trial in New Jersey has yet to be scheduled but will not begin before 1998.

have seen the civil trial, might there have been more understanding of the different verdicts in the civil and criminal cases? Would the cameras have really jeopardized the integrity of a case in which the jury had already been flooded with information from the criminal trial? Is it fair and accurate to assume that Judge Fujisaki, who ruled the civil case with an iron fist, could not have prevented a recurrence of the showboating that characterized the criminal trial?

In the end, the question of what is the greater evil—the uncalculatable risk to a fair trial or the infringement on the parties' right to speak and the public's right to know—depends on a balancing of rights and interests. From my perspective, I doubt that gag orders will ever work to stem the tide of leaks of information that inevitably occur in a high-profile case. Instead, they tend to drive the media underground and put a premium on clever media manipulation.

I worry greatly that we will seal off the public from seeing what is occurring in our courtrooms. Good, bad, or ugly, the justice system is accountable to the people. Even the civil justice system, which is designed to address disputes between parties, has an impact on the community. There are solutions other than gag orders and television “kill switches” that can prevent the media circus. One is the solution that Judge Fujisaki ultimately selected when he realized that he could neither stem the tide of leaks under the gag order nor put his jurors in a sequestered bubble. Judge Fujisaki appealed to the participants' sense of responsibility. On the eve of the verdict, when the jury was going home among a swirl of media coverage, Judge Fujisaki asked everyone to exercise restraint. He asked a dismissed juror not to discuss her deliberations; he asked the jurors not to watch television or read press accounts of the case; he asked the media not to hound the dismissed juror for her inside story. Guess what? It worked. The media continued to do its job and the jurors theirs. The First Amendment and Sixth Amendment moved forward in peaceful coexistence.

I am not so naive as to believe that gag orders will never be appropriate or that the media will act responsibly when the next salacious court story hits. The pressures of covering high-profile cases often lead both the media and courts to overreact. It seems clear, however, that we are more likely to reach better decisions regarding these important issues if we reflect on them during our few precious moments between “Trials of the Century.” This symposium provides an excellent opportunity to do just that.