Lights and cameras; Tweets and Google

With TV cameras in the courtroom, cutting off jurors from Web searches and social media is proving more difficult

By Anayat Durrani

They don't call it La La Land for nothing. Los Angeles is the epicenter of celebrity trials and the Conrad Murray trial is no exception. Dr. Conrad Murray's involuntary manslaughter trial dominated international headlines, with countless media outlets streaming live from the courthouse. The use of Twitter, laptops and cameras in the courtroom has ushered in a new era, allowing the public a front row seat to trials, as both spectator and commentator.

While jurors in the Conrad Murray trial were barred from tweeting or updating their Facebook statuses through the course of the trial, discussion of the case was rampant outside the courtroom. Blogs, 24/7 media coverage, endless expert analysis, Tweets, and tabloids dissected every detail of the trial, as a worldwide audience eagerly tuned in. From La Toya Jackson tweeting conspiracy theories about her brother's death to the dozens of colorful, vocal fans outside the courtroom supporting the late King of Pop – the jury of public opinion had been unleashed.

Like earlier celebrity trials, the Conrad Murray prosecution came ready-made for television. But does the presence of cameras and Web technology in the courtroom interfere with the right to a fair trial?

The Conrad Murray case is one of the first major celebrity trials since social media came to dominate the communication landscape. Trial Judge Michael Pastor warned jurors daily not to follow the media or go online. In a more traditional "gag" move, he also warned lawyers not to discuss the case publicly, particularly after a partner of the defense attorney criticized one of the witnesses on a TV show.


Imwinkelried

"Many trial judges now give jurors repeated, stern warnings against such research. The litigants are entitled to a decision based on the evidence presented in court – which they hear and can challenge," said UC Davis Law Professor Edward J. Imwinkelried, an expert on scientific evidence. "If a juror accesses information on the Internet, the litigant may never even know of the existence of the 'evidence' that was the real basis for the decision against the litigant."

Trial by media

Trial by media describes the impact media coverage can have on painting someone innocent or guilty before they even reach the courtroom. Some of the most media-hyped cases have tended to involve celebrities, such as the Conrad Murray trial, or disturbing crimes involving children, such as the Casey Anthony trial.

"TV media coverage can certainly have an impact. Often defendants are tried on TV long before they are tried in a court of law," said Donna Shestowsky, who has both a law degree and a PhD in Psychology, and is a Professor at UC Davis School of Law where she teaches Criminal Law. "And the 'evidence' discussed by TV commentators is not necessarily valid or reliable enough to meet the standards set by the rules of evidence."


Shestowsky

Television shows can also have an impact. Prof. Shestowsky talked about the CSI Effect, as related to high-profile cases such as the Conrad Murray trial. The popularity of television shows like CSI has many attorneys fearing that jurors expect high-tech forensic tests. If not presented, attorneys fear jurors may wrongfully acquit guilty defendants, letting criminals get away with murder.

"Trial lawyers often speak of the 'CSI Effect,' which epitomizes the fear that TV shows create unrealistic expectations on the part of jurors regarding the kinds of evidence that lawyers are expected to produce at trial," said Prof. Shestowsky. "This hypothesized effect has only recently been subject to serious academic and theoretical scrutiny. And, the jury is still out."

Through a camera lens

The relationship between the courts and the media has always been on shaky ground, and the addition of social media has taken it to another level. In 1965, the United States Supreme Court ruled against media coverage in the courtroom when it decided *Estes v. Texas* (1965) 381 U.S. 352. The case involved a claim by a convicted swindler that media coverage of his trial had taken from him his right

to due process under the Fourteenth Amendment.

But, the Court reversed its decision, although not formally overruling, in the 1981 case of *Chandler v. Florida*, declaring that a state could allow broadcast of criminal trials. This resulted in many states passing legislation allowing televised trials.

Today, more than one-third of the states allow cameras in the courtroom at trial and appellate levels of criminal and civil trials, and another third have rules allowing camera coverage in many circumstances, according to the Radio Television Digital News Association (RTDNA). The remaining 14 states either do not allow or have rules that prohibit camera coverage of trials, the RTDNA said. The District of Colombia is the only jurisdiction that bars cameras in trial or appellate courts. Cameras are generally prohibited in civil and criminal federal trials, according to the RTDNA.

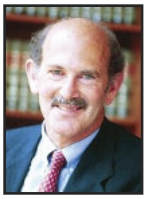
The reasons for not allowing cameras into courtrooms have not much changed since 1965, explained Douglas E. Lee, a partner in the Dixon, Ill., law firm of Ehrmann Gehlbach Badger & Lee, LLC, and a legal contributor to Freedom Forum First Amendment Center. The Judicial Conference and the federal courts continue to feel live media coverage "distracts trial participants, unfairly affects the outcome of trials and diminishes the dignity of the courts," he said. In contrast, Lee explained, broadcasters feel that media coverage is no longer distracting or disruptive and that the public and the judiciary actually benefit when trials are broadcast on television.

"Allowing cameras in courtrooms is a natural extension of the tradition of public access to the courts," said Eric Robinson, Deputy Director of the Donald W. Reynolds National Center for Courts and Media at the University of Nevada, Reno. "With reasonable rules in place, and a judge who understands and protects both the public's right of access to the courts and litigants' rights to fair trials, cameras can operate in courtrooms unobtrusively and allow citizens to see their judicial system at work."

The O.J. Simpson media circus

The O.J. Simpson trial received the most media coverage of any trial in U.S. history. It had 2,000 reporters covering the trial with 121 video feeds coming out of the Criminal Courts building where it took place, according to truTV. Nineteen television stations, eight radio stations and 23 newspapers and magazines were represented throughout the trial. An astonishing 91 percent of television viewers tuned in to watch it and 142 million listeners heard it unfold on the radio and watched television when the verdict was delivered, according to truTV.

The O. J. Simpson trial received more media attention and scrutiny than any other criminal trial since the Lindbergh kidnapping-murder case in New Jersey in the 1930s. It even surpassed the Manson Family trial of the early 1970s, according to truTV. The media's impact became so influential that more people could identify houseguest Kato Kaelin than name the Vice President of the United States.


Olson

Karl Olson, media lawyer for the San Francisco-based firm Ram, Olson, Cereghino & Kopczynski, LLP, said he doesn't see any proof that media coverage or cameras interfere with the right to a fair trial. He has represented newspapers and other media who have pressed for public access in several criminal and civil cases, including the Scott Peterson murder trial and the Phillip and Nancy Garrido kidnapping case.

"Even cases with extensive media coverage, such as the O. J. Simpson and Michael Jackson cases, have ended in acquittals. Likewise, media coverage does not detract from the fairness of civil trials," said Olson. "There is great value in having public access to trials, and that includes cameras. The courts have recognized, and experience in our country has shown, that subjecting the administration of justice to public scrutiny improves the system and promotes fairness."

The Internet and social media

The O.J. Simpson trial came before the explosion of social media platforms and blogs. Interestingly, social media has had some unexpected advantages for attorneys and has changed the way some attorneys defend or prosecute a case. The Orlando Sentinel recently reported that a consultant for Casey Anthony's attorneys combed over more than 40,000 positive and negative opinions on social media sites and blogs, and used the information to help the defense hone their trial strategy. Whether that worked is unknown. Anthony, who was accused of killing her two-year-old daughter Caylee, was found not guilty. The newspaper said that social media sites and blogs "could revolutionize the way lawyers defend their clients, especially in highly-publicized cases like the Casey Anthony murder trial."

With the birth of social media and pocket-sized technology came the ability to research anything and everything, whenever and wherever a person goes. Not surprisingly, this caused problems for lawyers and judges. Jurors have done everything from send Tweets and Facebook status updates to even researching cases during breaks in trial.

"The ease of accessing the Internet tempts many jurors to research issues discussed in testimony that they have heard in court," said UC Davis Professor Imwinkelried.

But Sacramento plaintiff's attorney Roger A. Dreyer didn't allow jurors to succumb to the temptation when he tried the Jennifer Strange case. Strange, a 28-year-old Sacramento mother of three died after participating in a water-drinking contest on a local morning radio show. The incident garnered significant media coverage and heavy online discussion. Dreyer, who represented the plaintiffs in the wrongful death trial of Strange, became the first attorney in California to require jurors to sign

declarations that they would not visit the Internet during the entire trial. Dreyer gained a $16.5 million judgment for his clients.

Getting jurors to sign a contract is a surefire solution to get them away from the Internet. However, simply telling them not to, may not work. UC Davis professor Shestowsky said there is "plenty of psychological research suggesting that rules instructing jurors to not do something often backfire." As a result, she said it might be "counterproductive" to ask them to abstain from Twitter and Facebook.

"Instructions to disregard information presented at trial is often relied on more than if that same information is not accompanied by an instruction to disregard," said Prof. Shestowsky.

Instructing jurors to refrain from Internet searches, she said, falls in the same category. Judges and attorneys take the risk of having jurors who come across information from a search – one that is not subjected to scrutiny as in a trial – and these jurors rely on the information even more "because the forbidden nature of it is psychologically appealing on some level, and then this promotes a very unjust verdict."

Sometimes it takes going to extremes to get the message across. Juror addiction to technology has spurred a new law in California, starting in 2012, where jurors who Tweet during trial or deliberations can be sentenced to jail time. The new law was recently signed by Gov. Jerry Brown. The new law states that trial judges must inform jurors that the prohibition of communication or research about a case involves all forms of electronic or wireless communication or research. The law was a result of several reports of jurors using cell phones and other devices to research cases. Violators could face up to six months in jail. Gov. Arnold Schwarzenegger vetoed a similar bill last year because he believed the current warnings to jurors were sufficient.

"Sadly, it's a reflection that in the mind of many, even stern judicial warnings are proving to be ineffective," said UC Davis Professor Imwinkelried. "You need the threat of jail time to deter the jurors from violating the judge's order."

"Cameras in courts" pilot program

The concept of cameras in the courtroom continues to be evaluated. So much so, the Judicial Conference of the United States has approved a national "cameras in courts" pilot project to analyze the effect of cameras in federal district courtrooms and the public release of digital video recordings of some civil proceedings. Fourteen federal trial courts, including the Northern District of California, volunteered to take part in the three-year experiment, which started July 18, 2011. More than 100 federal judges, including those who support cameras in court and those who are still unsure of them, will participate in the pilot project.

"One of the hallmarks of our judicial system is its transparency; such that in America, trials do not occur in secret, barring very special privacy and/or safety issues for the parties, witnesses, or jurors," said Professor Fred Galves, University of the Pacific, McGeorge School of Law. "Instead, for the most part, trials are out in the open, as they should be, for citizens to attend in person."


Galves

Prof. Galves said most citizens have likely never even seen a trial, and making the time to drive downtown to visit a courtroom to attend a trial may prove impractical. Technology provides the means for citizens to actually view cases. "And the middle ground of allowing sketch artists to make quick drawings of the proceedings seems silly in light of the world in which we now live," he said.

The pilot program is not the federal courts' first experimentation into video coverage of judicial proceedings. In 1990, the Judicial Conference conducted a pilot program permitting electronic media coverage of civil proceedings in six district courts and two courts of appeals. In contrast to the current pilot program, media outlets rather than courts operated cameras in the courtroom. In 1994, the Conference reinstituted its policy on barring cameras, mainly as a result of the impact of the coverage of the O.J. Simpson murder trial in California State Court.

"The traditional argument against having the media in the courtroom is that the lawyers, or witnesses, will simply "play to the camera"; but if so, then they would need to grow up, understand their legal duties, and not do so, period," said Prof. Galves. "Of course, if there are witness intimidation issues, or cases of sexual assault or molestation where a witness's privacy would need to be respected and protected, then so be it, but those are not typical cases, and those special situations ought not to deny the rest of the cases from being exposed to society."

The "cameras in court" pilot program has indeed elicited some concern that allowing such technology in the courtroom could bring about a "media circus" as with the O.J. Simpson trial. There is also some concern regarding how lawyers and justices may act during filming, with some fearing that viewers may witness grandstanding.

Robinson, the Deputy Director of the Donald W. Reynolds National Center for Courts and Media, believes the major lesson that can be taken away from the O.J. Simpson televised trial "is that judges must maintain control of their courtrooms, including the parties, lawyers, witnesses, and the judges themselves." While the judge cannot control everything, such as outside commentary by those not involved in the case, he said, "Decorum and propriety can – and should – be maintained in the courtroom."

The recordings from the "cameras in court" pilot program will be made publicly available on www.uscourts.gov and on local participating court Web sites at the court's discretion. The Federal Judicial Center will perform a study of the pilot, and establish interim reports at the

conclusion of its first and second years, according to a press release on the site.

"The O.J. case and the Casey Anthony case were spectacles to be sure, but they should not be the models for which cameras in the courtroom should be forever judged," said Prof. Galves. "Hopefully we are smart enough to learn from our mistakes and make the necessary adjustments in order to make the public's access to the operation of the judicial branch of government more accessible."

Anayat Durrani is a professional freelance journalist with a Master's degree in Journalism and International Relations. A versatile writer, her work has been featured in publications worldwide, including Cairo's Al-Ahram Weekly; California Lawyer Magazine; Caesar's Player *magazine;* 944 Magazine, *and several articles in* Plaintiff *magazine, among others.*


Durrani