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Kansas Court of Appeals

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Ten Tips for Judges Dealing with the Media

Steve Leben

Often judges are uncomfortable dealing with the media; many feel that the risks of bad coverage outweigh other factors. But when the public has an interest in a case pending in our courts, there's only one realistic way for most of the public to find out what's happening—through the media. Most judges will need to deal with the media at some time during their judicial careers.

I presided over two high-profile murder trials that drew national media attention, but I was lucky that my background left me comfortable with handling the media relations that surrounded those and other trials. I majored in journalism as an undergraduate at the University of Kansas, which has a top-notch journalism program. I worked part-time as a radio news reporter while in college. And I worked briefly as a press secretary to a Kansas congressman. These experiences, combined with the lack of a trained media representative on our court's administrative staff, made me choose to handle those tasks from within my chambers—and often personally—when trials in my court garnered media attention.

With only one exception (which I'll cover here), everything went very well from my perspective, and I think also from the media's perspective. This article aims to share some of what I learned. In addition, in preparing this article, I contacted several of the reporters and news editors who had worked with me while I was handling these cases. Their comments have also formed the basis for the ten tips for dealing with the media set out below.

1. Don't consider the media as the enemy. That suggestion came from Sam Atwell, the assignment editor for Fox 4 News in Kansas City. As he put it, "Our job is to inform the public and to work with the courts to get that job done."

Realistically, the media can't do their job effectively without help from the courts. So they naturally want to work with you as much as possible. Having a good relationship with them can't guarantee good coverage, but a store of goodwill never hurts. Even if a particular story has some bad sides to it, there's a much greater chance of balanced coverage if you have treated the media professionally and provided as much access as possible.

One example from a recent non-courts news story comes to mind. A story circulated about a potential NCAA rules violation by a major-college basketball coach. One day after the story broke, I noticed a piece on ESPN's website—quoting anonymous sources—essentially giving the coach's defense and a plausible interpretation of NCAA rules under which the coach might not have done anything wrong. By maintaining

contacts with the media members who cover their sport, major-college coaches are able to get out their version of a story when that's needed. Judges have to be careful about how we handle such matters, but the same dynamic is in play.

From a broader perspective, all judges are united in our belief that an independent judiciary is essential to the maintenance of a democratic society. But history is replete with evidence that an independent press is vital too.¹ Despite this common role (one that is too often undervalued by the public), many judges share the public's skepticism about the media. While there are some bad reporters—and some bad judges—the media writ large protect the rights of the people in a vital way. Judges should be willing to work with them as we separately play vital roles in preserving our democratic heritage.

2. Set the right tone for your staff. Most judges will communicate with the media through staff, whether a trained public-information officer, a person in the court clerk's office, or an administrative assistant. They will follow your lead.

Karen B. Russo, a producer with ABC's *Nightline*, long ago discovered how important this can be: "Everyone associated with the trial will look to the judge as an example, so if a judge is open or accessible or even slightly helpful, most everyone else will follow suit," including security personnel and court clerks. In the absence of the judge setting a tone of accessibility, she notes that staff may "be fearful of being 'caught' answering a reporter's questions on innocuous subjects like, 'How can I send a fax from here?'"

Russo makes another good point: "These small interactions can make a difficult trial a more pleasant experience overall, which allows us to focus on the real work: understanding the trial."

3. Have someone available for media to meet with in person and to contact by telephone, even after hours. If you want to make sure that coverage is accurate, media members need someone they can check facts with. In addition, they need someone to check with when there are questions (as there often are) about when the courtroom will be open and available, how seating is being handled, where cameras are allowed, or any number of questions that will arise. The media need someone who can be contacted by phone, email, or both.

One newspaper reporter told me that he has seen some public-information officers "who act as if they are being bothered when a reporter calls them," and others who aren't very well informed about court proceedings. I've known—and trusted—

Footnotes

1. For an excellent overview, see JOHN HOHENBERG, *FREE PRESS, FREE PEOPLE: THE BEST CAUSE* (1973 updated ed.).

that reporter for years, so I'm sure his account is accurate. It's important to us to get accurate coverage, and we can't afford having contact people who don't want to be bothered or aren't willing to keep track of the information needed. Your only real ways to check up on this are to see whether the staff you're designating seems well informed and then to check with a media member or two to get their take on it as well.

A frequent happening during trials is that the court—or a jury—may work after regular court hours. In such cases, unless you've provided a cell-phone number or some other way to gain after-hours access to someone who can answer questions, the media may be at a loss to report accurate, up-to-date information. Particularly in today's media environment, in which newspapers and electronic media all must cover more stories with fewer reporters, reporters can't always stand by to await a jury verdict. Work out in advance a way to promptly get that information to any media members who have covered a trial. These days, email is perhaps the most effective means. You could even scan and send the jury's written verdict as an email attachment, which would help to make sure that it's accurately reported. (If you do so, though, you may want to redact the presiding juror's name if that's shown.)

Sometimes court staff may not want to give out a cell-phone number or be bothered after hours. Sam Atwell, the television assignment editor, urges that somebody provide such phone numbers, adding that "most members of the media will not abuse them." During the trials I held, media members had my email address and cell-phone number, and we were easily able to coordinate last-minute changes in the starting time for trial or other matters. No one ever abused that by making contact when it wasn't needed, and most of the contacts were conveniently handled by email.

4. Find a way to provide information on background.

Sometimes the reporters covering your trial are experienced at covering the courts, sometimes not. Even for experienced reporters, though, they can most accurately report the story if they can confirm some of the basic facts in some way.

Long-time Kansas City-area newspaper reporter and columnist Bob Sigman told me that, although attorneys could provide information, the one source he trusted was the judge. Judges who got to know him came to trust him. He told me, "[I]t took some time because I had to prove the judges that I was seeking only objective information. I found that once that was accomplished, they felt comfortable talking to me off the record." By being able to confirm his understanding of what had taken place, Sigman felt that he was able to provide a more informed and accurate story.

One key to all of this is to confirm with any reporter a judge speaks to personally how the information may be used and attributed. I generally spoke to reporters "on background," which I took to mean that they could use the information generally but couldn't quote me or attribute the information to me.

But there is no universally accepted definition of terms like this,² so you need to make sure—before the conversation—that each reporter confirms that he or she will abide by your intended ground rules. The key point is that if you don't want to be quoted (i.e., to have what you say appear in quotation marks attributed to a highly placed source in the courthouse), make sure that's agreed upon.

What might you talk with a reporter about on background? Judges differ on their views about this, and you must look at the judicial-conduct rules in your jurisdiction because those rules vary greatly.

Rule 2.10 of the 2007 ABA Model Code of Judicial Conduct provides that a judge "shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing." In my view, if you are merely explaining procedures or making sure that reporters understand the rulings you have already made on the record in public portions of the trial, you aren't doing anything that should interfere with a party's ability to get a fair trial. The 2007 Model Code is consistent with that view in its additional statement that notwithstanding the restriction against anything that might impair fairness of the proceeding, "a judge may make public statements in the course of official duties [and] may explain court procedures." In addition, unless it would interfere with the fairness of the proceeding, "a judge may respond directly or through a third party to allegations in the media or elsewhere concerning the judge's conduct in a matter." Whether you have these contacts or someone else does so on your behalf, the same rules apply.

I felt I was well served by helping to make sure that reporters understood my rulings, once they had been made orally in court or by written order. Most of the reporting accurately reflected what had transpired and what my rulings had been. By direct communication, reporters could also accurately learn things like how late we might be in session, when they could get in the courtroom, and how they could gain access to view exhibits that had been admitted.

Only once did I get burned. One television reporter who missed the start of court when I had ruled on something from the bench came back to my chambers at the first break. I explained to him exactly what had already happened in open court (which I had also explained in the media room on background for other reporters who had been on time that day). He went on the air that evening with something like this: "In an exclusive interview, Judge Leben told this reporter . . ." I had some email communications with him after that to explain my displeasure, and I never spoke with him again. He was the only reporter who was ever less than professional about these sorts of things, and I would admit that I should have had a more direct conversation with him about the ground rules since I hadn't worked with him before. I made the mistake of assum-

2. A 1994 article from the *American Journalism Review*, which is available online, provides quite a variety of understandings for the term "on background." Bob Woodward said it meant that he could "use it all" so long as he didn't identify the source, while a

Louisville newspaper editor said it meant that "you can use it only for your own information, just so you understand." See *On Deep Background*, AMER. JOURNALISM REV. (Dec. 1994), available at <http://www.ajr.org/article.asp?id=1621>.

ing that he would be equally trustworthy as the reporters I'd already worked with from the same television station; I didn't make that mistake again.

5. Make it easy for them. Who doesn't like for their jobs to be as easy as possible? So if you're committed to having a good relationship with the media, why not think about what you could do to make their jobs easier?

Let me give you one example. I've often found that witness names were misspelled in the newspaper, but sometimes that's because the attorneys had them wrong and reporters took the spellings out of the court pleadings. My court reporter always checked the spelling of a witness's name when that person took the stand, but it wasn't necessarily audible to media members in the back of the courtroom or in a nearby media room watching via closed-circuit television. So we provided cumulative lists of the spelling of all witness names at least twice each day to the media who were present in person or who had signed up for emailed information. (We automatically included all of the regulars, which included assignment editors.) Most media outlets are now putting information promptly on their websites, and having this sort of information accurately provided throughout the day helps them to be accurate. In addition to sending it out by email, we also put it on a dry-erase board in the media room we had set up in another judge's jury room.

In addition to providing witness names, we also provided electronic copies of all written court rulings, and we sometimes provided transcript excerpts for oral rulings of significance. When possible, I ruled in writing so that the record would be clear, something that helps both the appellate court and the media. And, of course, providing a good place for media to do their work whenever you can is greatly appreciated too.

6. Understand deadlines. Sometimes, journalists just can't wait until tomorrow. They have real deadlines, and with our increasingly 24-hour news cycle, the pressures on them are real. Try to have someone return messages in some way as soon as possible, and try to make sure that the needed substantive information can be provided promptly.

7. Communicate with the media as soon as possible about key events. This goes hand-in-hand with understanding deadlines. Time is of the essence to journalists. If you want accuracy and the court's side of things to be part of the story, you need to provide it before the story is written.

If you have a big trial coming up, make contact in advance with the media who are likely to cover it. Get the ground rules in place, figure out where the media can work while they're at the courthouse, and designate a contact person for them.

If you're about to issue a ruling in a case, you can advise them that a ruling will be issued at a certain time. You can then provide it to them electronically. (Of course, be sure you give it to the parties in advance of that or at the same time.) Many media outlets will post your written decision on their own website, which helps to make sure that the public gets exactly the information you thought was most important about that decision. Of course, you'll also want to make sure that your written decision is written in plain language, not legalese.

8. Don't impose restrictions unless it's really necessary—and explain them when you do. Let's consider another example. Kansas City television news reporter John Pepitone told me that he'd seen a recent trend toward allowing video coverage of court proceedings but no audio recording of them. He rightly noted that this has made his job harder: "It's already difficult to hear what is being said in many courtrooms. When I can record the sound, I can replay it so that I make sure I get it right. To accurately quote someone is an important part of our job, and I'm sure the court system wants us to get it right as much as we do."

I don't know for sure what has led to this trend among some judges, but I suspect that they're afraid of having things picked up on the microphones that aren't intended to be part of the record (like what a defendant might say at counsel table to his or her attorney). Maybe other judges have had more of a problem with that than I did. When there was full coverage of a trial in my courtroom, I had a "kill" switch to turn off the microphones being used for the television feed when appropriate, and the ground rules agreed upon in advance stipulated that no conversations between the defendant and counsel could be recorded (and that they couldn't be used if they were accidentally picked up).

Whatever the perceived problem may be that has led some judges to ban audio, I would hope that they might reconsider the decision and try to find another way to solve the problem that would still give the media audio access to most of the proceeding. That helps to ensure accuracy, as Pepitone notes, and also provides equal and fair access to radio coverage. If no solution other than banning audio can be found, however, judges should explain why they have any rules that limit access. Reporters shouldn't be left to wonder why access has been restricted. In addition, Pepitone's comments suggest that the judges who have imposed these restrictions haven't made either themselves or court staff available to discuss the ground rules for court proceedings; if they had done so, Pepitone, a good reporter, would have had some idea why this trend was taking place. I would suggest that if the judges and media members involved talked about whatever concerns are driving these access restrictions, a mutually agreeable solution could be found.

The same advice applies to the limitations on what you can and can't say to reporters. Explain those limitations, and reporters will respect them. Two reporters suggested to me in response to my inquiry that it can be quite helpful to have written guidelines for your court about what the media can do and what the limits are. That seems especially good advice since you'll periodically encounter reporters who haven't been there before, and even seasoned reporters can have trouble remembering the idiosyncracies of courts throughout their coverage area.

9. If you don't know something, don't try to answer. The law is complicated, and none of us knows everything that might come up during a trial. If you're asked something procedural or legal during a background session with reporters, don't guess. If it's something like the elements of the crime charged, you can offer to get them a copy of the pattern jury instruction. (Or, if you've given preliminary substantive jury

instructions giving the elements of each crime charged, hopefully you already provided that to reporters at the start of the trial.)

10. Prepare. The coverage of court proceedings is important. It shapes public opinion of the court system, and fair coverage promotes fair trials. Given its importance, judges should focus on preparing to handle our dealings with the media just as we must prepare to tackle complicated legal issues, the procedural aspects of court hearings, or supervision of our staff. These are all important parts of our job.

For a general guide, there's a 58-page monograph prepared by the National Judicial College.³ It provides an excellent overview, with checklists for handling media issues during a trial, a glossary of media terms, ethics rules followed by professional journalists, tips on handling television interviews, and advice for handling ambush interviews.

When you're actually going to talk with the media, prepare yourself by thinking through the main point you want to make. With limited time and space for stories, that may be all that you can get across, and you should make sure that you at least make that one point in clear language and a short sen-

tence or two. If it's an on-the-record interview about your court generally or some new initiative your court has started that you want the public to know about, you need to say something that's short and quotable. Even if it's an off-the-record interview for background purposes, keep the main point in mind and keep your language simple. That will enhance the chance that the reporter's understanding of what you're trying to say will correspond to your own.



Steve Leben is a judge on the Kansas Court of Appeals. Before joining that court in 2007, he spent nearly 14 years as a general-jurisdiction trial judge in suburban Kansas City. On the trial bench, Leben presided over two high-profile murder cases that attracted national coverage, as well as civil and criminal cases that were covered in Kansas City media outlets.

Leben is a 1982 graduate of the University of Kansas law school, where he has taught a course on statutory interpretation since 2007, and a 1978 graduate of the William Allen White School of Journalism at the University of Kansas.

3. THE DONALD W. REYNOLDS NATIONAL CENTER FOR COURTS & MEDIA IN THE NATIONAL JUDICIAL COLLEGE, TOOLS FOR JUDGES AND COURT PERSONNEL TO DEAL WITH THE MEDIA (undated). The Indiana state judiciary has posted this monograph and other materials that may be helpful to judges in dealing with the media on its website at

<http://www.in.gov/judiciary/pubs/media-guide/fire-brigade.html>. Although the National Judicial College monograph as found there is undated, a version of it was produced in 2006 (available at <http://www.nacmnet.org/PastConferences/2006Annual/HengstlerHandout.pdf>).