

# CRIMINAL LAW & PROCEDURE

## LITIGATING THE HIGH PROFILE CASE

Mr. Robert Bennett, *Skadden, Arps, Slate, Meagher & Flom and Former Counsel to President Bill Clinton*

Mr. Plato Cacheris, *Law Offices of Plato Cacheris and Former Counsel to Monica Lewinsky*

Mr. Roger Cossack, *Burden of Proof, CNN*

Hon. James Robertson, *United States District Court Judge for the District of Columbia*

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**MR. MADIGAN:** I'm Mike Madigan and I am honored to moderate today's panel, which I am sure will be interesting and no doubt provocative. Let me introduce our panelists. First, on my immediate right is a man who really needs no introduction. Bob Bennett and I were federal prosecutors together in the 1970s. Over the years, he has been involved in too many important cases to even list. He was involved in the BCCI matter. He represented Secretary of Defense Clifford. He was involved in the Iran Contra matter. He represented Secretary Weinberger successfully. He served as Special Counsel in the Senate in the Charles Keating Hearings. He represented Congressman Rostenkowski; Senator Durenberger; Harold Ickes of the Clinton White House; and, of course, most recently he represented President Clinton.

On his right is Plato Cacheris. Plato is one of the Deans of the Bar here in Washington, D.C. — I think perhaps Co-Dean. Earlier, Plato, I saw your co-dean Mr. Jake Stein, passing through the hotel and he may be making an appearance here a little.

In any event, Plato started his career as a Department of Justice trial attorney. He was First Assistant United States Attorney over in the Eastern District of Virginia. He, too, has handled too many of these cases to even list. He was also involved in the BCCI matter. He was involved in the historic Watergate investigation; in the ABSCAM investigation; also, in Iran Contra; in the famous Ill-Wind investigation that was in the news a number of years ago. More recently, he has handled several of what we have called the "Spy cases". He represented Aldridge Ames and, more recently, Robert Hanson, in highly publicized, big-stakes representation. If I recall correctly, Mr. Hanson was threatened with the death penalty at one point. Also, during the Clinton Administration, Plato represented Monica Lewinsky.

On his right is Roger Cossack. Most of you know Roger from CNN. He is the Chief Legal Analyst at CNN. He hosts, and has for a number of years, the highly rated show called *Burden of Proof*. But, indeed, prior to becoming a television celebrity, he was a practicing lawyer. Roger, before he became a TV celebrity, argued a number of cases, including the *Leon* case, in the United States Supreme Court. And I think perhaps Roger's like my old mentor, Senator and now Ambassador Howard Baker, who said, when people asked him, was he a lawyer? He said, well, I was a lawyer, but I got over it. Roger went to the media world, and we are going to talk to him about the other side of the coin, so to speak — the effort of the members of the Fourth Estate to get information from your clients, from you and from others.

**MR. COSSACK:** I'm the man that ended the Fourth Amendment, as you may recall.

**MR. MADIGAN:** On Roger's right is Judge James Robertson. For the last seven years, he's been a member of the United States District Court here in Washington, D.C. In the surveys of the Bar, which occur every year, he has gotten rave reviews from the lawyers appearing before him for his fairness, thoroughness, and intellect. He, too, had an outstanding career before going to the bench. He practiced for, I think, over 25 years. I was telling him a little while ago, that in January I will have been with Akin Gump as a Partner for 25 years. He spent 25 years at the law firm, Wilmer, Cutler and Pickering here in town, one of the premier Washington law firms. He took time out in the early stages of his career at Wilmer, Cutler to go become Chief Counsel to the Lawyers Committee for Civil Rights Under the Law down in Jackson, Mississippi, during the historic time of 1965 to 1969. He was also very active in the Bar here. He was President of the Bar. I had the honor of serving on the Board of Governors when he was President. He was one of the best Bar Presidents we have had.

Since he has been on the Bench, he has had a number of significant cases, most recently the indictment of Webster Hubbell. The *Hubbell* case ultimately went on to the D.C. Circuit and on to the United States Supreme Court.

So, with that introduction, I am going to sit back down and see if we can talk through some of the issues. The cases that we're going to be talking about today are going to be hypothetical, so any resemblance of real cases is simply coincidental.

Let me start with my friend Bob Bennett, and I thought we'd go about it by, perhaps, examining some hypothetical situations that may occur, and how a lawyer and the members of the Fourth Estate and the court would react.

So, let's suppose, Bob, that you're sitting in that modest office of yours down at Skadden Arps overlooking the Washington Monument, and the phone rings.

**MR. BENNETT:** He's such a smarty, isn't he? He hasn't changed a bit. Been this way for 30 years.

**MR. MADIGAN:** ... and you get a call from a prominent elected public official who's under investigation by Congress. Perhaps there's a civil lawsuit filed. Considerable media attention has been drawn to it. There's talk of a criminal investigation, but at this time, there is no Grand Jury. And you are asked to take the representation.

Why don't we start by perhaps sharing with us, in that kind of a situation, where it is a public official, where it is very highly visible in the media, how you assess the situation and what do you try to accomplish right at the beginning.

**MR. BENNETT:** Well, first you say, how am I going to get paid?

Because a disturbing number of politicians feel that it's such an honor and a privilege to represent them that question is sometimes lost.

Obviously the first thing you do is you want to meet with the client. As is relevant here, you tell them, until we meet and talk, don't say anything; don't let your press agent say anything; don't let all your supporters say anything. That's obviously the first step. And then, you just start the normal lawyerly process of finding out what the problem is and setting out the terms of what they expect of you, et cetera.

**MR. MADIGAN:** Let me ask you about that piece, and ask for Plato's views as well. When you have a non-high profile client, it is sometimes easier to get the facts and to get the time and attention of the client. How do you go about it, when the person is very prominent, whether they're chairman of the board or an elected official or a celebrity on CNN — whoever they are — I should make that NBC, right, in the example? —

**MR. COSSACK:** Yeah, keep me out of this.

**MR. BENNETT:** Well, it has been my experience, we can only talk in general rules here, that very high-profile people, by the time they call you, are very worried and very concerned about their situation. They usually have found themselves in a situation where all of their skills and all of their instincts and talents have let them down up to this point. That is why they find it necessary to call you. So, it's not very difficult to convince them that there's a problem, and you have to really know the facts. So, that's generally been my experience.

Most of the time, political people who get into trouble, or very high-profile people, usually at the front end are much more concerned about their reputations. They sometimes seem less concerned about, whether they will be found liable or not? Whether they will be indicted or not? Most of the time, they are more concerned about their reputations.

Every now and then, they are absolutely shocked that they are in this position. That was particularly true (and I can say this because he has just written a book about it all) with Secretary Weinberger. For five years, thought he was a cooperating witness with the federal government, and one day he got a target letter and, at that point, I was called. He was literally dumbfounded.

I will tell you in all candor that, in 35 years of practice, I have never seen a more outrageous abuse of prosecutorial power than that exercised by Lawrence Walsh in that case. And you can quote me on that, if you want to.

**MR. MADIGAN:** Plato, let's follow along. Perhaps you are in your office. At the end of a long day, you've sent your tailor off to London as your last act of the afternoon.

**MR. CACHERIS:** And I owe him money.

**MR. MADIGAN:** And the phone rings, and this time, instead of a high public official, you are asked to represent a young woman who's in the middle of a media siege. You have actually been following the case; her lawyer set a record, perhaps, of going on nine talk shows in one morning and was then fired. But, this lady is under criminal investigation. She's already been subpoenaed to a Grand Jury, and as soon as the media finds out that you're going to be representing her, they're going to be staking out your office.

What do you do in the first strategic steps, when you step into a case that is literally swirling in a media hurricane, and you're client is right in the middle of it and would like to get out of it?

**MR. CACHERIS:** Well, with Monica Lewinsky, who you're alluding to, we certainly did not want her to talk to the media.

I don't have the luxuries that Bob Bennett has, of sitting in a spacious office overlooking the White House and some guy calls and says, Bob, would you come across the street and see me.

My calls might come from a jailer who says, there's a guy in here that needs to see you bad. So I have to leave the office, Mike, and go to jail and meet with the guy who has just been charged with espionage. Of course, the nice thing about that — if there is anything nice about it — is that he's inaccessible to the media and you don't have to tell him to keep his mouth shut because he can't talk to anybody. So, I have a little different perspective. My client's in jail before I've even had a chance to put him there.

**MR. MADIGAN:** Roger, why don't we stay with the hypothetical of the young lady and take it back, perhaps, when it first breaks into the news. There is a woman who is arrested for allegations of obstruction of justice and a high public official is allegedly involved. She has a lawyer. How do you approach it from the Fourth Estate, to try to get as much information as you can get?

**MR. COSSACK:** Well, let me just say this. In every example that we've talked about — we've talked about the young woman, we've talked about the elected public official and we've talked about a spy — all of those are newsworthy. All of those are news, and every one of those stories deserves to be talked about on television.

Why? We're talking about an elected public official. People vote for these people. We should know about what they do and don't do. That has to do with the Monica Lewinsky story. And certainly, espionage is news, and we should know about those things.

So, now having formed the argument that I am a hundred percent legitimate in going after this, let me tell you all the horrible things I will now try and do to undermine what my friends on the left are trying to do, and correctly trying to do, with their clients. They are trying to keep them away from people like me, because we are absolutely, at least in the particular hypothetical we're talking about now, at totally different ends of what we want. The lawyers absolutely correctly want their clients' mouths shut. The last thing they want is to see their client speaking to someone like me. I, of course, could care less about what they want. I want their clients speaking to me. So, what do I do?

In the situation of the espionage, Plato, and this is exactly what happened; obviously we couldn't get to your client. But, we got to your client's neighbors, who were on *Burden of Proof* telling us about the family and how they lived, what they didn't do, how they went to their schools, and all of those kinds of things.

Monica Lewinsky. Well, we could not get to Monica Lewinsky, either. But there were many people who knew Monica Lewinsky, and one of the wonderful things about the work that I do is a phrase we have in *Burden of Proof* called an "FFP". The FFP is a former federal prosecutor. And a former federal prosecutor will come in and talk to you about anything having to do with cases that they, most of the time, know nothing about.

But they will come in and you can say, joining us today is John Harris. John is a former federal prosecutor with the Central District in California, 3,000 miles away — besides the fact that he doesn't know anything about the case, he's 3,000 miles away from the case where it is going on. But John is a former federal prosecutor. What do you think is happening in this case? And, you know, John will tell you exactly what's going on.

So, there are many, many ways that we go about it. Obviously, we can't get to your client. Bob, you're smart enough not to let us get to your client. We know that. But we will go about trying to get as much as we possibly can. And people like to be on television.

**MR. BENNETT:** And if you can't get anybody else, there's always Alan Dershowitz.

**MR. COSSACK:** There's always Alan Dershowitz. What I was going to say was — I think I just said people like to be on television. That's not Alan Dershowitz. Alan loves to be on television.

Alan Dershowitz — you could call him at three o'clock in the morning for the opening of a CVS market and he'd be there before you. So, Alan's a given. Alan will come in and tell you about your case and your case and your case, whatever the case may be.

So, that's the way we go about doing it. Never let it be said, and you'll never hear me not say this: even though I am a legal analyst for CNN, I am also in show business and it is up to me to deliver a product on a daily basis that people want to see and people want to watch.

I try to do it in a responsible manner — as responsible as I possibly can. If you people would let me talk to your clients, it would be better. But you won't and I have to do the best I can.

But that's what we do. We will go about finding people. And as I was just saying, people like to be on television, and if you ask enough people, eventually someone will show up who knows somebody, who knew your client, who went to school with your client, or knows something. And they'll come out.

**MR. CACHERIS:** Mike, Roger reminds me of when Jake Stein and I went down to see Ken Starr, when we first got into the Monica Lewinsky case, to introduce ourselves and tell him that we were counsel in the case. Jake said, "Ken, there's one thing I'm deathly afraid of." And Starr said, "what's that?" He said, "Alan Dershowitz."

**MR. MADIGAN:** Let's bring Judge Robertson into this discussion.

Your Honor, you are actually coming back to your chambers from lunch and you see a bunch of TV trucks outside the federal courthouse — all kinds of microphones and satellite dishes set up. As you approach the steps, you see that the prosecutor is holding a press conference announcing the indictment of a high public official. And not too long after that, the defense lawyer is holding his own press conference on the steps of the courthouse denouncing the indictment. And you go inside and you learn that the case is assigned to you.

Do you have some initial thinking that you go through in terms of how to deal with the media? By this time, the media is calling your chambers, they want copies of whatever they can get. You are going to be handling this case from the beginning to the end. How do you approach it?

**JUDGE ROBERTSON:** Well, just like Bob's reaction is "how am I going to get paid?", my first reaction after the Court of Appeals' treatment of Tom Jackson is to put my hat over my face when I walk into the courthouse, turn off the phone and not talk to anybody. Period.

But, the situation you've given me so far doesn't cause me any particular alarm, frankly. We start thinking gag order, gag order. Well, there aren't too many cases in which gag orders are necessary or ever were necessary or ever will be necessary.

You hear judges and other lawyers cluck-clucking when somebody gives interviews outside the courthouse. But I think it is more out of some notion that this just isn't done than it is out of any notion that the community is going to be poisoned and prejudiced by what is going on.

Mike was good enough to send over to me before this program the kind of thing we know is there but we don't read very often, and that's the American Bar Association rules on trial publicity. They make it very clear that lawyers are not supposed to make public statements, if they know that it will have a substantial likelihood of materially prejudicing an adjudication — know that it will have a substantial likelihood. Well, how do we know *that*?

The trick part of this, though, is on the next page. It says, "Recognizing the public value of informed commentary is great, and the likelihood of prejudice by the commentary of a lawyer who is not involved in the proceeding is small." The rule only applies to lawyers who are in the case.

Well, we have Roger Cossack. We have Greta Van Susteren, we have Alan Dershowitz. We have all these people who get a lot more press time than any of the lawyers standing out in front. If anybody can influence the public's thinking about the case, it's lawyers who don't know anything about the case.

In this day of instant-messaging and Internet access and CNN — thank you — and all of the other ways that people get information, the old notion of the circus trial, the *Shepherd v. Maxwell* that everybody reads about in law school, is history.

*Shepherd v. Maxwell* was decided at a time when television was brand new, when there were two newspapers a day and when the public was a lot more naive about what they got from the press. Today, we are so inundated with public information that it is very hard for me to think about very many cases in which any kind of a gag order is appropriate.

We can jawbone; we can cluck-cluck. But gag orders — I am not even close to thinking about a gag order on the hypothetical you have given me.

**MR. BENNETT:** Let me make an observation about that. You know, as a general rule, — I can't think of a time when I would actually go out and publicly comment on a case that was actually at issue.

But even if Judge Robertson is not going to issue a gag order, I know he isn't going to like it. He doesn't like me — correct me, if I'm wrong — he doesn't like me being in his court from ten to four arguing a case, and then at five o'clock showing up on Roger's show. So, I have my own rule and that is I avoid commenting on a case once that case really is at issue. I guess there may have been rare exceptions to that.

Most judges will give you one bite at the apple. There is almost a rough sense of justice that when the prosecutor stands out on the courthouse steps, he or she does not really have to give a press conference; they just stand out there and read this awful, awful indictment. That is the most powerful press conference you can give. And my experience is, most judges aren't offended if the defense lawyer says, "Wait a minute, my client's presumed innocent. Let's wait."

But I think lawyers should not regularly comment at all about a case, when you are actually in litigation. I think it's wrong, and I think if the opposition does it, you have remedies, which, unfortunately, many judges will not enforce. You go to the court. I can tell you, when we were representing Clark Clifford and Bob Altman, the District Attorney of New York was making statements right before the jury went out and deliberated. And their statements appeared in the New York newspapers. It was a very troubling thing.

**MR. COSSACK:** I might add that, sometimes, television and the media does offer an avenue for defense lawyers or for opposition lawyers to come back and get something in front of the public, when they have been prejudiced by what the other side has done.

Let me give you two examples that will come right to your mind. One was — I'll never forget — Michael Tigar right after Terry Nichols had been arrested, standing up at a press conference at, it seems to me, an auditorium.

He was on a stage holding up a big sign that said, Terry Nichols wasn't there. And he kept holding up that sign and holding up that sign and repeating. And he'd answer questions and he'd answer questions, but it seemed like every minute or two, he'd hold up that sign again that said Terry Nichols wasn't there. And, of course, that became a keystone of his defense. But it came at a time when the prejudice against his client was incredible. And so, he used the media and he used the television to get across a position that he needed to get across to defend his client.

Second is Linda Tripp, when she was in the middle of that wire-tapping, case in Virginia, because of the conversations that she had with Monica Lewinsky. Her lawyers came on *Burden of Proof* often. And the point they kept trying to make was, you know, you may not like her, you may not think much of her or you may think she's wonderful. Who knows? But don't you think that basically this is a chicken prosecution, to bring this prosecution?

That was their point. What they were saying was, isn't this piling on? Isn't this a little getting even that she thought she was doing that was the right thing to do? And, isn't this a bad prosecution? And they were very effective with that.

So, sometimes the media can give the opportunity, when the deck is stacked, to come back and have a little opportunity to maybe make it a little more even.

**MR. CACHERIS:** Since, Roger, I have never had a client that wasn't there, I would find it very difficult to adopt the Tigar approach. But generally, I agree with what has been said here, that the less you say, the better. And certainly, the ethical constraints on a lawyer that is defending someone in a highly publicized case are still there. So, you're better off saying less, and just saying, the burden of proof is on the government and my client is pleading not guilty. That is as far as you can go.

**MR. BENNETT:** I totally —

**AUDIENCE PARTICIPANT:** Can you get closer to the microphone, we can't hear you.

**MR. MADIGAN:** This is the first time that someone's said they couldn't hear Bob Bennett, I think.

**MR. BENNETT:** I totally agree with Plato. You are much better off if you never have to deal with the press on these cases. But the fact of the matter is, if you represent the President in a sex case, there is no way you're going to avoid dealing with the press. It is just a question of how you deal with them. And that presents, obvious problems.

There is no way Plato could just ignore the press when he was representing Monica Lewinsky. Then it becomes a question of how you deal with them you and work through a whole bunch of conflicting pressures on you and apply the canons as best you can under the circumstances.

And that's particularly true with politicians. Politicians will say, "well, great, Bob. You're not going to say anything, I'm not going to say anything, and I'll have a trial two years from now but, by then, I'm dead and it's over for me." That is a very relevant concern.

There was a 6th Circuit case a number of years ago, which is very interesting, involving Congressman Ford, who was a sitting congressman. The district court put out a very broad gag order and it got reversed. The Circuit Court seemed to draw a distinction, interestingly, between the Defendant Ford and the lawyer.

**MR. CACHERIS:** Well, one case that comes to mind that none of us were in is the Condit matter, which got heavily publicized, Roger — right?

**MR. COSSACK:** Right.

**MR. CACHERIS:** All of a sudden, he decided to give an interview. His ratings went way down after the interview. So, I thought he came out worse just by talking than what he would have done — he was low already, don't misunderstand me. But no one believed that he was complicit in the disappearance of that young lady. And then, after you watched his press conference, you began to scratch your head and wonder whether he was complicit.

**MR. COSSACK:** That's probably a good example to talk about for a minute, particularly since Abbe's not here to defend himself.

**MR. CACHERIS:** It may not have been his fault.

**MR. BENNETT:** Well, I'll defend Abbe.

**MR. COSSACK:** Go ahead. You defend him.

**MR. BENNETT:** Look, I have yet to watch television and see a doctor from GW, who knew nothing about a case, get on TV and say, "you know, that guy shouldn't have died; they shouldn't have used this procedure." But lawyers do it all the time. You do not know what advice was given or not given. I have had many clients that have not followed my advice on something. When you represent politicians, you are not only dealing with a client, you are often dealing with several other people, many of whom are lawyers, many of whom are not lawyers. You are dealing with press aides; you are dealing with public relations people. And advice is coming from all over the place.

I have been absolutely criticized on television by talking heads who do not know the facts. You are defenseless and you cannot go on T.V. and say, I advised this and the client rejected my advice. You can't do that.

So, yes — Condit looked awful. But my guess is it wasn't Abbe's fault. He is a very good lawyer.

**MR. COSSACK:** I would bet everything that Abbe Lowell told him not to. But let me just say one thing. When you're dealing with politicians in particular, we know the same thing that Bob just said. We know that there is a tension between the lawyer and the press people because there's two things going on. There's the lawyer who is saying, "for God's sake, keep your mouth shut, for the obvious legal reasons." There are the press people saying, "if you keep your mouth shut, you're going to look guilty, and when it comes time to get re-elected, you won't get re-elected, so we've got to get back there and say something." So we talk to the press people; we don't talk to the lawyers.

**MR. COSSACK:** The press people will come across for us. But we absolutely understand what you said. And as a lawyer, I absolutely understand that, too, that tension you face with these kinds of clients.

**MR. BENNETT:** And sometimes, it's easy, because on occasion when I get hired, I know exactly what the defense is because the client's been on television telling his story.

**MR. MADIGAN:** Let's follow up a bit more on the kind of case. Bob is absolutely right. You have no idea of the communications back and forth between the client and the lawyer. But what do you do? What do you do when you have a public official, as you pointed out earlier, who is getting hammered in the press and it is just going on day after day? What kinds of things can you do as a lawyer to try to stop it, or alleviate it in some fashion, other than having him talk, which is what you don't want to do?

**MR. COSSACK:** You have to remember that this summer, prior to the World Trade Center, was probably one of the lowest news time. And the Condit story is horrible because, as you know, we're talking about Chandra Levy. Is there anyone who doesn't believe that something bad has happened to her?

But during this summer, this was almost like beach reading and, you know, I work for a profit-making organization. At the end of the year when the shareholders come in, and they say, how'd we do this year, when my boss gets up and says, well, we didn't do quite as well as we could have, and the reason is because, when everybody else was hammering Chandra Levy and Gary Condit, we took the high road and talked about, intellectual things. But unfortunately, nobody watched us, so our ad revenue went down.

So, then the shareholders say, you know what? How about not taking the high road the next time? And, get as much Gary Condit as you possibly can because people watch that kind of thing.

That is another thing that happens, is, when does your case appear? This Rabbi just got a hung jury in Philadelphia. I would have been all over this guy; it's an incredible story. No one even knows about it. He's accused of killing his wife. It turns out he was having an affair with somebody else. Great dramatic testimony — he sinned against his religion. This was great stuff that, because of the horror that we are facing now, doesn't get on TV anymore. So, it depends on when it shows up.

**MR. BENNETT:** Well, I think you can overreact, too. And I think clients tend to overreact. With all due respect to you, I don't know how much impact that has at the end of the day. I think sometimes it might; sometimes it might not. But, I don't know if going on and giving your side repeatedly serves any purpose. You know, a scandal needs fresh oxygen everyday. It's like Count Dracula. If a scandal doesn't get a blood fix everyday, it can wither and die.

**MR. COSSACK:** Perhaps the other metaphor would be better.

**MR. BENNETT:** So sometimes, while you think you are out there mouthing all these great things, you're just providing that added oxygen to keep the story going.

One thing you can do, and I think very effectively, if the trial has begun, or you are in preliminary proceedings is to write your pleadings just a little bit differently, a little more expansively, dealing with some of the most troublesome things. And then you call Roger up and say, "Roger, you know, instead of listening to these Bozos who don't know anything, why don't you get somebody to read our pleading?" That has an added advantage. There is not much Judge Robertson will do when it is in a pleading, as long as you haven't written something scurrilous.

**MR. COSSACK:** Then I am not a count. I am that fine legal analyst from CNN, reading this stuff and pointing it out and saying, "Well, in this well-written brief by Mr. Bennett, he points out . . ."

**MR. MADIGAN:** But sometimes, the media hysteria is so great. I will use an example of a case that I had, the defense of the Chief Justice in New Hampshire who had been impeached by a vote of 290 to 90. We were retained the day of the impeachment. There was a lynch-mob mentality to get him to resign. The press was all over the case. We ultimately tried the case and he was overwhelmingly acquitted, 18 to 4 and 17 to 5. But there was a period of time in the beginning, while we were in the pre-trial, in the court analogy, there would be no judge yet. But there was certainly a court of public opinion. And we did, as lawyers, meet with the press, and provide information so that we would get his side of the story out.

What is your view about that, Plato? I know it depends on the case.

**MR. CACHERIS:** Well, it depends on the case. I will say that the most highly publicized was, I guess, Lewinsky. My office was across the street, and it was continually surrounded. I could not drive in or drive out without cameras in my face. But, to her credit, she did not speak. There was nothing for her to say. She did not speak, did not give interviews, until the case was essentially over, when she had her immunity and was free to speak.

So, there are occasions where I can see where I agree with what you have done, Mike. But, if the person can ride it out, as she did, I think that is the best solution for a party like that. She was concerned about an indictment, and she did nothing publicly to encourage an indictment. So, I think she came out all right.

**JUDGE ROBERTSON:** I think it is important to point out that what Plato and Mike are talking about is what works in the court of public opinion. But I don't really think it has any impact over an actual trial.

Now, Mike, your trial wasn't before a jury; it was politicians who had to vote. And politicians, of course, are tuned into the public airwaves like nobody else is. But I am convinced on the basis of my own experience that juries, for one thing, don't read the paper or listen to *Burden of Proof* very much. And, if they do, they are quite committed to doing what they say they are going to do and keep that stuff out of their mind.

Now, there are obvious exceptions to it, but not very many. O.J. Simpson, Timothy McVeigh, maybe the New York bombers — a very, very few extraordinarily high-profile cases like that. But otherwise, I think the notion of infecting juries and infecting the legal system with news is history.

Finally, regarding what Roger does. Don't let anybody think that the lawyers who come on that show are pushing the ethical boundaries, because there's an ethical loophole, if you will, in these canons that is big enough to drive a very large truck through. Notwithstanding any of this impropriety of speaking, a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer. So, there is the privilege of response written right into the canons, and it is there for Roger to explore.

**MR. COSSACK:** What if a lawyer would come on my show, Judge, and say the following: "We were severely disappointed at the verdict in this case. We couldn't believe the jury did what the jury did. We really believe that it's because the judge was prejudiced against us and didn't give us a fair trial.

**JUDGE ROBERTSON:** Well, actually, that strikes awfully close to home.

**MR. COSSACK:** I'm sorry I brought this up.

**JUDGE ROBERTSON:** What do I do about that? Nothing. There's nothing I can do about that. I have no response. I don't go on CNN. I have no response whatever. Period.

**MR. BENNETT:** You know, you have to remember, for a lot of the things we are not talking about of influencing the jury.

Here is an argument I have heard several times. “Bob, as a politician in order for us to run and win, we have to keep collecting money. There are staggering sums of money the politicians have to collect. And if the potential contributors don’t see our candidate and your client denying the charges our funding is going to dry up.

I have been in other situations where political friends of the candidate will say, “Look, I know you are telling your client not to talk but unless he gets out there and talks and denies the allegations we are not going to support him.” So you have to put all that in the equation.

Very often, lawyers tend to think in terms of the case, and sometimes you get overruled because the people who are closest to the politician are telling him, “Yeah, Bennett’s strategy of no comment is best when you win the case two years from now, you’ll be out of your seat.” And usually, that argument is successful.

**MR. CACHERIS:** I think Judge Robertson has raised a good point on how much impact publicity has had on a trial. And I think, as Bob is suggesting, we overreact to that because most judges, in fact, all judges that I know, conduct a thorough and careful, and even lengthy, voir dire, when there is a high publicity case. This is designed to and does ferret out those persons who have made up their minds because they have been listening to Roger.

**MR. BENNETT:** Well, any lawyer that attacks Judge Robertson is a lunatic. Now, Judge Robertson happens to be a wonderful judge — and I mean this candidly — and all these wonderful judges, they are objective and impartial. But they all have lunch together.

So, if you’re going to be practicing before lots of judges, you’re a damn fool to go out on television, even if you really believe it, and say your client lost because some judge was biased and prejudiced. I mean, that is really stupid.

**MR. MADIGAN:** Part of the problem for the judges is when the criticism is anonymous, which obviously would not happen on your show, but in the print media it would. And, of course, we saw some of that with the *Microsoft* case. To what extent is the judge is ever allowed to defend himself or herself from the charges?

I think, Judge, we would be interested in your view as to whether there is any way you really can, other than to have, which happens frequently, lawyers come to the defense of the judge.

**JUDGE ROBERTSON:** Well, I wish they would come more frequently.

Not to get too personal about this, but a couple of years ago, I actually was the subject of a really sleazy op-ed piece in a major newspaper, written by a law professor who deliberately distorted the facts. The piece would have been libelous were I not a public figure. Indeed, it may even have been libelous, despite the fact that I was a public figure.

But, what can you do about it? The answer is absolutely nothing. And, if you do try to respond, you just make it worse. That’s why they pay us the big bucks, I think, and give us the lifetime tenure, because there is no response you can make. You just literally shut up and take it.

**MR. BENNETT:** You know, one suggestion I would make. You may already have an organization like this. I am on the board of the American Judicature Society and one of the things that we’re noticing is an increasing number of attacks on and criticism of judges, which is very bad for our system because when we lose respect for our judiciary, we are in real trouble.

Organizations such as yours and I know the American Judicature Society feels, that when judges are attacked in your jurisdiction, you should come out and say something, because the judge is helpless. If you do not have an organization or a committee or some sort of a structure to do it, it doesn’t usually get done. Individual lawyers are afraid that, if they do it themselves, somebody will say, “you’re brown-nosing or you’re just trying to get in good with the court,” or something like that.

But, organizations as large as this one should seriously (I don’t mean to be presumptuous, telling you what to do) think about creating a committee to monitor this because judges are totally defenseless.

I remember the piece that Judge Robertson mentioned. It was a vicious, vicious, vicious piece. So, I think that is something your leadership should at least think about doing.

**MR. COSSACK:** And when they do, they can come right on our show and talk about it.

**MR. MADIGAN:** Let’s move the topic slightly to a congressional hearing. It implicates the same sort of issues that we have been talking about. But, as all of us who have been involved in them know, it is a different breed of cat. And perhaps, if I can introduce that topic, as well as the Fifth Amendment into this discussion.

Let me start by saying that, normally, as a criminal defense lawyer, if there is any chance that the prosecutor or somebody is going after your client, you do not answer any questions. We have the Fifth Amendment in our Constitution to permit that. When you represent somebody who is a high-profile figure, the very last thing in the world that person is going to want to do, notwithstanding what you say, is to take the Fifth Amendment. The concern, of course, is



that it will end up in the media. So-and-so asserts the Fifth Amendment.

Maybe starting with you, Bob, what kinds of strategy considerations do you think about when, instead of a prosecutor, now you have a congressional committee that is interested in your client, who is well known, and they want to talk to him. 18 U.S.C. §1001 was amended specifically to provide perjury penalties for any kind of false statement to a congressional staff person. And, there are a lot of examples of congressional investigations leading to a subsequent criminal investigation. What's your thinking initially?

**MR. BENNETT:** One, I try to avoid them because, on both sides of the aisle, these committee hearings are, for the most part, witch hunts. I hate to sound like the cynic that I am. They are witch-hunts on both sides of the aisle, and it has more to do with face time for individual members of Congress than it does anything else. So, my strong preference is to avoid it, if at all possible.

But many times, it's just not possible. When I was representing Clark Clifford, we were subpoenaed, or asked, to testify before nine separate committees. Now, it wasn't that there were nine separate committees that really needed to investigate. They all wanted a piece of the action. If you could get Clark Clifford, an icon whose face should be up on Mt. Rushmore, walking into a committee room, that is good face time.

Now, if you think I could say to Mr. Clifford, "Mr. Clifford, I think you should take the Fifth," he would have fired me. You represent someone who is the chairman of the board of a major U.S. company, they are not going to take the Fifth. Remember that famous picture in the tobacco case? Seven went in. They all held up their hands. That was show time. That was show time. At least Roger's got a high-quality show. So, if you do go, you have got to thoroughly prepare your client from A to Z because it is going to be frozen in a record. There are some honest Congressional inquiries conducted by responsible members.

There are some of Congress who do it straight, but an awful lot of them do not. And that is just the name of the game.

**MR. COSSACK:** I also think that this is the time when the media has to show some responsibility. It is a cheap trick to jump in on the "So-and-so grabs Fifth Amendment" kind of way, when in fact the implications of that are not correct and should not be used that way. In a place like *Burden of Proof*, where I have some time to talk about these things, or when I am given time during the news to talk about these things, I explain what the Fifth Amendment is and why it is there and why you can't say, "Just because somebody's taking the Fifth Amendment, oh, my gosh, they have to be guilty." Responsibility is necessary at times like that, and hopefully we act responsibly. There are times when we are not as responsible as we should be, but I think during those things that we are talking about, we are responsible.

**MR. CACHERIS:** Well, if you remember the old Teamster investigations when Jimmy Hoffa, Sr., was President of the Teamsters. Dave Beck was President of the Teamsters before he was, and he was called before congressional committees. I remember the old *Washington Star* had a headline that "Beck Pled the Fifth Amendment 56 Times" because for every question that was asked you have to plead the Fifth in order to preserve that privilege. That is a reason why many of the political types will not plead the Fifth Amendment before a congressional hearing.

Mike and I were both involved in Watergate, and every one of those persons summoned before the Watergate Committee, which was highly publicized, testified. Mitchell, Haldeman, Erlichman — they all testified. They all got indicted for lying before the Committee. They went down to the Grand Jury and testified; they all got indicted for lying to the Grand Jury. They were convicted for both of those crimes, in addition to the cover-up.

So, the advice you would like to give: "Do not open your mouth before a congressional committee," will not be followed. If it is a person of a high political stature, he is just not going to do it. He is going to testify.

**MR. BENNETT:** Now, I have brought people — and it's all very fact-specific. There are two people in this room that I've brought clients before, Dick Leon and Michael Madigan. I can tell you that a factor in making that judgment was I knew them both to be honest, straight shooters. And, yes, they were working for Republican committees and I was representing somebody on the other side. But I knew, and this is just the God's honest truth, that before Dick and before Mike, I would have a fair shake. They might not come out my way, but I was not going to get rabbit-punched. I was not going to have a report written, as has happened to me with Mr. Clifford, before they even heard his testimony. So, that makes a difference, too.

**MR. MADIGAN:** Roger, how about you?

**MR. COSSACK:** Well, you know, again I want to go back to what I said earlier. Remember — my goals are not the goals of the lawyers or even the judge at this table. My goals are to present as much information as I possibly can to the public about legitimate subjects. To get as many of these people — players, if you will — to come on the program or come on CNN

and talk about these things.

And sometimes, to be honest with you, as you and I have talked about, Mike, I'm shocked when they show up. I practiced law for a longer than I've been on television. I've practiced a lot of law. I'm shocked when some of the people show up willing to talk. There are times when you want to take them by the sleeve and say, "Are you sure you want to — of course I want you to do it — but are you sure you want to do this." So, my goals are just different than their goals. And sometimes we manipulate each other. Sometimes they need me; more times than not, I need them.

But I also think what you said about fairness and knowing someone who's a straight shooter — certainly, in my business, it works that way. I have only lived in Washington eight years. I come from Los Angeles, and living as a practicing lawyer in Los Angeles, we always hear about the word "leaks". Leaks, in Washington, D.C. It's not leaks. It's Niagara Falls in this town.

You can't go anywhere, particularly if you're a CNN person like I am, and maybe the other networks, too, where someone doesn't want to tell you something about what's going on that you're not supposed to know.

So, you learn — I learned to be responsible. That is the only word I can use. Sometimes I'm not as good as others, but I try and be as responsible as I can.

Bob Bennett has spoken to me deep, deep, deep off the record, and he also knows that anything he has ever said to me has never, ever, ever been reported. All I would have to do is do that one time. Not only would I lose his friendship.

**MR. BENNETT:** It was so deep, I don't remember.

**MR. COSSACK:** — But, obviously, my reputation would be shot in this town. So, it's like anything else. You build relationships and you try and do the right thing.

**MR. BENNETT:** What judgments do you exercise, Roger? I've already complimented you as being a straight, wonderful guy, but do you exercise judgment on who your guests are? I have seen some real bums on your show.

**MR. COSSACK:** Yeah.

**MR. CACHERIS:** I've never been on there, so I know you're not talking about me.

**MR. BENNETT:** No, I'm teasing a little bit, but —

**MR. COSSACK:** I understand your point. It's a legitimate question.

**MR. BENNETT:** It's a legitimate question. I think the audience would be interested in. And you could tell them without identifying people — unless you really wanted to the people who call you up and ask to be on your show to talk about cases they know nothing about.

**MR. COSSACK:** I won't do that. I won't give up names. But, as I told you earlier, I'm in show business, as well as doing what we would like to think is a serious, legitimate legal show. But at the end of the day, if nobody watches me, I'm back practicing law in Los Angeles.

You know, F. Scott Fitzgerald said, "There's no second acts in life." Well, I found one and I don't want to go back to that first act.

So, what are my tensions? My tensions are that I want to be on television people who are entertaining, who seem to know what they're talking about, who hopefully do know what they're talking about and will converse, and will not give me the deer in the headlight look, which every now and then you'll get. You'll say, "Former Federal Prosecutor Johnson, you've had cases like this, haven't you?"

**MR. COSSACK:** So, you don't want that.

Have we had Schlockmeisters on? You bet we've had Schlockmeisters on, and sometimes, you know, you just swallow it. And do we do subjects — did I do Gary Condit until was embarrassed to be seen in public? You bet we did Gary Condit until I was embarrassed to be seen in public. But sometimes, I'm afraid that's the nature of the game. You just try and trade off for every one of those ones that you know are people that make you uncomfortable, that you know down deep you would say to yourself, this person doesn't have a clue what they're talking about. They are making this up as they go along. And you are just as uncomfortable as you can be. You've got ten others. I'm looking over at a wonderful guest who doesn't call us to come on our show, who I have to beg to come on our show — you know, Sol Weisenberg, who does know what he's talking about.

And there are many of you in this room who have been on our show. Are there schlockmeisters? You bet. And do they beg? You bet. So, what can I tell you? I mean, as I told you, I wasn't kidding around when I said that Dershowitz would open up a CVS at 3:00 a.m., so —

**MR. MADIGAN:** We all know that the use of delay by responding to letters, even the situation of suggesting that you are not coming but you are not taking the Fifth Amendment either, requiring the congressional committee to try to get a vote to hold somebody in contempt is not exactly the easiest thing to do, and it's threatened a whole lot more than it's actually done.

So, Bob, if you get someone who's not wonderful like Dick Leon or myself, what kinds of things can you do to deal with it?

**MR. BENNETT:** Well, you just named some of the procedural things you do, because the one thing you don't want, you don't want your client to testify and you don't want your client asserting the Fifth. And so, you take advantage of the procedural steps you have.

Now, most of the time you have the ability — you have some built in advantages as a defense lawyer, namely that a good part of the time, the minority and the majority are not in agreement. A lot of the steps that take place require the votes of both sides or the agreement of both sides. So, I think a good defense lawyer, frankly, can take advantage those tensions and differences.

**MR. MADIGAN:** The people who don't do this kind of work do not focus on the fact that those of us who do always focus on, which is that each of these committees has rules. And believe it or not, the rules are highly beneficial. Many times there has to be a certain majority and sometimes supermajority to issue a subpoena.

So, you can deal with the minority staff, and you can essentially block the effort to get your client up there. Once you're up and the klieg lights are on, you're dead, in terms of what you want to try to accomplish. Before you ever get there, you want to be just as prepared as Bob's clients have been — one in particular that I remember.

With that, why don't we take some questions. If you'd go to the microphone, it probably would be easier.

**AUDIENCE PARTICIPANT:** Hi. My name is Elizabeth Brader. I'm a reporter for *National Journal*.

**MR. MADIGAN:** No reporter gets to ask, I'm sorry. Only kidding. Only kidding.

**AUDIENCE PARTICIPANT:** I'm not thin-skinned.

I think we all agree that Gary Condit botched his own chance at redemption. But I wonder whether or not Abbe Lowell erred by attacking the press. I was actually in the room when he screamed at us, and I can't help but wonder if there was an impact and that impact was that we reporters did a lot of the work for the prosecutors.

**MR. MADIGAN:** Why don't you take that hot potato?

**JUDGE ROBERTSON:** I don't think the press is immune from criticism. Whether he erred by attacking the press, I don't know. I don't know that that necessarily escalated the case to the position it got in because the matter of Chandra Levy was highly emotional, and Roger was correct in covering it. Whatever Abbe Lowell did, I don't think exacerbated the situation, in my opinion.

**MR. BENNETT:** I'm always amazed by how sensitive the press is. They write things about people, put shows on about people, and then Abbe Lowell says something like, you shouldn't be doing this, and raises his voice, and it's like these sensitive people are so fragile. It's incredible. I mean, incredible. Anyway, I don't mean that to you personally. I get press people sometimes who call me wanting to sue people about somebody who criticizes them: Steve Brill wrote this about them. Incredible — these are people who forget sometimes that they are destroying lives by sometimes writing things not as carefully as they should.

**MR. COSSACK:** I think what happened with Abbe Lowell, what you saw, was his incredible sense of frustration that he was feeling as a lawyer, dealing with a case that was spiraling out of control, almost like the little Dutch boy with his finger in the dyke. Every time he would get one, there'd be six other holes.

And I think what happened was, when that event occurred — and I've heard about that, too — I think it was just a sense of frustration.

**AUDIENCE PARTICIPANT:** My name is Scott Fry. I'm an Assistant U.S. Attorney in the Northern District of California. I

would be interested in the Panel's thoughts on when, if ever, it is appropriate for public pressure to influence a prosecutor, and whether any of the individuals on the panel have known someone who or, perhaps or themselves, attempted to use public pressure to influence that decision to indict or dismiss?

**MR. MADIGAN:** Do you want to start with that one, Bob?

**MR. BENNETT:** Could you — when you say “public pressure”, you mean a congressman calling, or a senator? Is that what you're talking about?

**AUDIENCE PARTICIPANT:** I really mean the gamut, whether we are talking about a popular prosecution where, perhaps, the prosecutor may feel pushed to indict, or an unpopular prosecution where pressure might be exerted to decline and back off a prosecution.

**MR. BENNETT:** Well, let me divide it up because I think there are really two different — well, there are really 20 different calibrations to this.

One of the things, whenever I represent a high-profile client, I make absolutely clear to them that I don't want anybody — anybody — contacting somebody to call the U.S. Attorney to put the word in because I know when I was a federal prosecutor, that was the surest way to get indicted. It presented me the opportunity to show I was honest, I was not on the take and nobody could influence me. I really am afraid, in highly political cases, that some big-time fundraiser is going to call and say something. And I just really press people not to do anything like that. So, that's one category.

But the other is, you know, prosecutors read papers, too. And it is not that a prosecutor will say, “I'm going to drop this case because the public is sympathetic to the defendant.” But sometimes, in high-profile cases, prosecutors in a close case like to have a security blanket. They like to know in a close case that, if they go this way, there isn't going to be this groundswell of people trying to run them out of town.

Now, it may come as a surprise to you, but some U.S. attorneys want to go on to a political life. So, I think that that is a factor which can be used delicately and appropriately, but it's got to be done with a surgeon's scalpel and not the butcher's meat ax.

**MR. COSSACK:** When Webster Hubbell was having his troubles, we said several times on *Burden of Proof*, and I said, “It seems to me there's a little piling on here. And it seems like the U.S. Attorneys Office is — enough is enough with this guy.” Was that pressure? Sure it was. A lot of people heard me say that. Was I wrong in saying that? I don't think so. I don't think I was irresponsible in saying that.

But it is clearly something that the lawyer could have said and chose not to. But I had a soapbox to say it and said it. I think that if somebody would have called me on it, I could have at least articulated a reason why I said it. Maybe you wouldn't agree with me, but at least I was able to say it. I think that's pressure on a prosecutor, and I think they hear it.

**AUDIENCE PARTICIPANT:** Let's say you are representing a high-profile witness in an investigation. The witness is compelled to testify before the grand jury. After the witness comes out, you debrief the witness and find out exactly what was asked by the prosecutor.

You find out that night that person is going on Roger's show, and you ask the person, “What are you going to do on Roger's show? You can't help your friend who's the target of this investigation.”

He answers, “Well, who says I am going to testify as to what I said before the grand jury? I'm going to tell them something totally different than from what I told the grand jury.”

What do you tell the client? Roger, if you find out about it, what do you do? And Judge Robertson, if you find out this person has testified, and a transcript is laid on your desk the next morning from the prosecutor, saying, here's what the person testified to; this is what they said on TV last night; is this contempt? What do you do?

**JUDGE ROBERTSON:** Contempt is a perjury.

**AUDIENCE PARTICIPANT:** Well, let's say they told the truth before the grand jury. The truth is what they told before the grand jury.

**MR. CACHERIS:** You're saying a witness goes on Roger's show and says something contrary to what he or she testified to in the grand jury?

**AUDIENCE PARTICIPANT:** Purposely to obstruct the investigation because they know what they testified before the

grand jury's going to hurt their friend, and if their friend finds out that they testified truthfully, it's going to burn them. And they're going to say on Roger's show, "I would never say that. He didn't do anything wrong. He's perfectly innocent. What they're trying to allege about his conduct is not true because he was with me somewhere else. We didn't go to this party."

**MR. CACHERIS:** That's the "he never owned an ice pick" theory.

**AUDIENCE PARTICIPANT:** Right.

**MR. CACHERIS:** Ice pick? What ice pick?

I've never heard of that, to be honest with you. I guess if you could stretch it, and it is for the purpose of obstructing the investigation, then that person could be investigated for that reason. And I assume that the Assistant U.S. Attorney that had that witness before that grand jury that day watched the show. They might subpoena him or her to come back the next day and say, okay, what's the true version? But, aside from that, I see no other remedies.

**MR. COSSACK:** Well, talk about some great Jencks Act stuff; talk about getting some stuff turned over at time of trial that would be really interesting.

I suppose, from my point of view, gosh, wouldn't I love it to find out that somebody who testified before the grand jury came on my show and said something entirely different, putting us right in the middle of the mix, and getting a subpoena from about three different people that we could fight in the court and getting our name in the paper every day. It would be wonderful. So, you know, from my point of view, it would be exciting television. I suspect that there would be some discussion about perjury — which side does the truth start?

**JUDGE ROBERTSON:** There would be some discussion about perjury farther down the road if you're getting committed on both sides, but the contempt I don't see, at this point.

**AUDIENCE PARTICIPANT:** I'd like Bob and Plato to tell us whether you use public relations firms in these cases and, if so, at what point do you typically engage them, and do you have any war stories on that?

**MR. CACHERIS:** For me, no. I don't use public relations firms.

**MR. BENNETT:** Same here.

**MR. MADIGAN:** I don't believe in them. I think that the lawyer is better at it. The problem you have with public relations firms — and I've seen them used — is you get P.R. people talking to the media and they don't know the facts well enough and something bad happens.

**MR. COSSACK:** However, let me tell you that there are lawyers who do, in high-profile cases, use public relations firm. And they will, from time to time, call us and pitch a particular thing that they want to get on the air.

**AUDIENCE PARTICIPANT:** I didn't mean that they would be up front. I meant, in helping craft the message, when you feel that you need to respond publicly.

**MR. MADIGAN:** Oh, I see.

**AUDIENCE PARTICIPANT:** Just behind the scenes.

**MR. BENNETT:** Well, again, it depends on the kind of case. My strong preference is not to use them. I think that there are some lawyers who know how to do this. Now, it's better to have a public relations, if you're a lawyer who doesn't know how to do this. But I think the key is to keep control of these things.

But, in big, high profile civil cases, very often these companies have on retainer these big PR firms and tend to use them. And I, in those cases, try to force myself into the process so that I can at least be in the position to say "No." Let me give you a perfect example. I like to call it cross-town hypocrisy. I am aware of a case — I won't identify the players. The client had an SEC attorney who was submitting to the SEC all the reports that were required to be filed. The lawyer told the client they did not have to report something because it was not material..” At the same time, the criminal lawyers were saying something different to the Justice Department. That is the kind of problem that can develop when you have these P.R. firms and there is no control or coordination. .

Another instance I was involved in was a criminal case. There was a witness, this middle-management guy who the government really wanted to turn. And, without my knowledge the inside P.R. people sent out what would normally be a very good statement to our effort that the company was good and would not tolerate wrongdoing, and would fire those responsible.

And this middle-management guy read the release, and felt that it was pointed towards him, that his head was about to be severed, and he ran to the prosecutor and, as far as I'm concerned, made up a whole bunch of stuff. So, I don't like them and I agree with Plato.

**MR. CACHERIS:** Yeah, but every corporation has a publicity department. It is a little different than your question. If you are in a case involving a corporate defendant, one of your jobs is to make sure that you sit a little bit on the public relations guy in that corporation and have a say. Tell him what not to say.

**MR. BENNETT:** But if you are in a big, massive civil case like, say, the Ford Explorer case, you as a lawyer are not going to be running the public relations aspects of that. They are going to have a big P.R. firm. But you should at least fight to have a seat at the table, or an understanding that you will see statements before they go out.

**MR. MADIGAN:** Yes, sir.

**AUDIENCE PARTICIPANT:** I wanted to follow up on a point that was made at the outset. I think the suggestion was made that judges do not like lawyers going to trial all day, and then going out and speaking on the courthouse steps. I think this is directed more to Judge Robertson, perhaps, than anybody else. But, if it's not affecting a jury, okay — which is what you suggested, I think, generally — and so long as it's not slanderous or libelous, do you judges generally care, or does it affect you consciously or subconsciously?

**JUDGE ROBERTSON:** I think that is really a judge-specific question. It bothers some judges more than others. I have indicated how I feel about it. It does not particularly bother me.

There is a little bit of cluck-clucking — you know, “That's not professional; we didn't do it that way in my day.” But it really is a case, as far as I am concerned, of no harm, no foul. I may think it's stupid to make a lot of statements and foul up the press coverage. I may have a view on whether or not it's productive or not productive for the lawyer to do that.

**AUDIENCE PARTICIPANT:** Right.

**JUDGE ROBERTSON:** And sometimes — this wasn't in my case at all — but during the trial we all watched, I think, the nightly back-and-forth every day during the trial of the *Microsoft* case, you sort of graded them on their performance. But it didn't really have any effect, I don't think.

**MR. CACHERIS:** There was a case, before Judge Robertson took the bench in District of Columbia, involving a high-profile defendant. And his lawyer was Edward Bennett Williams — the late Edward Bennett Williams, who was a fine trial lawyer.

He went in and pled very eloquently before the judge about how serious and how much effect this conviction would have on his client, and convinced the judge that he should be given probation — this was before the guidelines, of course, when judges could do things like that. He then came out on the steps of the courthouse and said his client will wear this conviction as a badge of honor.

Later, I'm told that one of Williams' partners was in front of that same judge, and the judge inquired whether or not this case was going to be a badge of honor for this client.

**JUDGE ROBERTSON:** Now, just the last part of your question was, would it affect me subconsciously. The answer is, I don't know.

**MR. BENNETT:** What would you do, Judge Robertson, though — to sharpen up the question, if you don't mind me doing that. I am before you, defending somebody. The prosecution puts on their key witness. You recess court at four o'clock, and at ten after four I am on the courthouse steps, (which I would never do — I really wouldn't) and I'm saying, “Twenty minutes ago, before Judge Robertson, the biggest liar I've ever heard testified in that courtroom.” You don't think you'd drag me in, in front of you the next —

**JUDGE ROBERTSON:** I think you'd be in talking to me about it the next morning.

**MR. BENNETT:** All right. Okay. I figured that — you'd give me until the morning?

**JUDGE ROBERTSON:** Well.

**MR. MADIGAN:** He's a nice judge.

**MR. BENNETT:** Nice guy.

**MR. MADIGAN:** Yes, sir.

**AUDIENCE PARTICIPANT:** A slightly different question, but taking a little bit different turn. Mr. Bennett, when you advised President Clinton, I always wondered about the attorney-client privilege. I really do not know the rules about this. I would assume that the only person you can talk to about these things is the President himself, since he is your client. But, you have got all these advisors who want to know what's going on. How did you deal with that? If you can tell me.

**MR. BENNETT:** Well, I can tell you something. Most of the time, I met with the President by myself. And on those occasions when I met with him with other people, I saw to it that it was in a situation where the privilege would not be breached. If I had any doubt about it, I did not discuss things that I thought I could have problem with. That is how I dealt with it.

But also — maybe I should not say this, but quite apart from the privilege, if people did not have to hear something or know something, my attitude was, they had no business being in the room. And I didn't want them to be.

There were times when there were issues that came up and there would be other people in the room. It was a very awkward situation at certain points because when the impeachment process started, there were certain issues that White House Counsel had an interest in, and other issues that I had an interest in. So, there was a right, for both of us to be discussing an issue.

As you probably know, some of the decisions in the Court of Appeals came down and arguably undercut Executive privilege — I don't think it's even arguable. I think it clearly did cut back on some of the Executive privilege. But fortunately, I kept my counsel and was very cautious when I was discussing things. I certainly did not anticipate (I'm no prophet) that the decisions would come out the way they came out. But maybe it was just a natural caution of not talking about things when I should not be talking about them, or running any risks at all.

**MR. CACHERIS:** And it's a good thing Bob did not represent President Nixon because, if he had, everything that he talked about with the President would have been recorded and would now be in a book that you could all read.

**MR. MADIGAN:** Yes, sir.

**AUDIENCE PARTICIPANT:** I'm interested in the thoughts of the entire Panel, but particularly interested in Mr. Bennett's thoughts. I understood you to say that you thought it would be colossally dumb to say anything negative about a judge. But you also said it would be inappropriate, unseemly and fundamentally unfair.

I wonder what your thoughts are about criticizing a judicial appointee; namely, the independent counsel.

**MR. BENNETT:** Well, let me go back to your predicate. I don't have a problem criticizing a judge. But there is a way to criticize a judge. You do it in a pleading; you do it in a brief. I do not hesitate to take on judges, but there are ways to take them on.

My guess is, most judges would not be particularly troubled if you said they made the wrong decision and they were wrong. I have filed, only one or two motions to recuse. But that is a far cry from going on Roger's show and saying, "Judge So-and-So is this or that."

Now, the second part of your question is how I feel about criticizing an independent counsel. I draw a clear distinction between a member of the judiciary and a prosecutor, whether that prosecutor is an independent counsel or whether that prosecutor is a state D.A. or an Assistant U.S. Attorney. And I think there, too, it is always very, very fact-specific. It's what you say and it's how you say it.

**MR. COSSACK:** Was the implication that an independent counsel is in the same position as a judge, in that there is an inability to fight back?

**JUDGE ROBERTSON:** I think that is largely true. The independent counsel, unlike a career prosecutor, particularly given

that he is appointed by the judiciary, is constrained in what he can say and in his ability to defend himself.

**MR. COSSACK:** I'm not sure — and I agree with you, but I'm not sure, personally at least, whether or not that reason would rise to a rule that says you cannot criticize them. I agree with Bob. I think there is a clear distinction between a member of the judiciary and independent counsel. And, while it's true, I think, that independent counsel are in tough spots to fight back, I think that just goes with the territory.

**MR. BENNETT:** All these independent counsel, after they get all this office space, hire their own public relations person.

**MR. MADIGAN:** Well, on that note, we're going to wrap it up. Please join me in a round of applause.

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