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### Influence of Media and Technology: Changing Roles and Responsibilities

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## INFLUENCE OF MEDIA AND TECHNOLOGY: CHANGING ROLES AND RESPONSIBILITIES

TERRY GILBERT<sup>1</sup>

As a young boy growing up in the fifties, there were two images that must have shaped my perception of the world, now that I have had forty plus years to think about it. One was the image of Russia taking over my community by launching an atomic war. On television, I remember the porky, finger pointing Senator McCarthy trying to save us all from the evil communists that lurked among us.

The other image was of a young doctor, his wife, their child, and the house in Bay Village where they lived. I only knew that something very terrible had happened and that the name Sheppard, similar to the communists, was also synonymous with something very evil.

Every time we took our 1949 Hudson for a drive along Lake Road to family vacations at Cedar Point, there was my mother saying, "That's where Dr. Sheppard killed his wife." Little did I know that when I grew up both images, derived from this amazing new technology called television, would play a major role in how I saw myself as a lawyer.

I wanted to fight and preserve the Bill of Rights, which McCarthyism, the Vietnam war, and Watergate damaged, as did well documented constitutional abuses of power by the FBI and other police agencies across the country that are now a matter of historical embarrassment. More recently, for me, the damage created by the *Sheppard* case, one of the great miscarriages of justice, has left a lasting blemish on the so called sanctity of american justice.

Parenthetically, it is probably worth noting that I spent my early years as a lawyer engaged in what is known as "movement" law—representing every target of the government from the American Indian Movement to the Black Panther Party. During that time, the *Sheppard* case was the furthest from my mind. Why would I be concerned with a murder case involving an upper class family? What political and social significance could this case have when countless segments of the population were being victimized daily because of race, politics, sex, and economic status?

The *Sheppard* case never resonated for me—not until I met Sam Reese Sheppard in 1989, and realized the personal devastation a wrongful conviction has on family members, as well as to the larger political and social culture. It was through Sam, a fellow activist, that I saw an opportunity to expose larger truths about the legal system. *Sheppard* was the legendary case that inspired the *Fugitive* television series and would be a vehicle to enlighten and spawn debate on the vexing questions about American Criminal Justice System—not only historically, but in the present as well.

I envisioned, through this case, the chance for an activist lawyer to take on a cause to educate people on how the legal system could be improved. We had newly acquired forensic evidence, a fresh perspective, and what we thought was a more

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sophisticated climate to revisit the case. We expected the contemporary media would be hungry to once again obsess on this case. Essentially we hoped to use the same media that destroyed Dr. Sheppard to vindicate him. Despite our recent loss in Court, I believe we ultimately succeeded in the Court of Public Opinion. Frankly, public opinion was the central reason to take this case on. No lawyer in his or her right mind would take a case like this and try to navigate the minefield and resolute resistance that was sure to come.

This is not to say that we did not hope for a legal victory. We did hope to provide classic justice for the real victims: Sam and his family. We wanted accountability for the framing of Dr. Sheppard. We wanted justice, and our cry was, it is never too late for the system to redeem itself. We wanted an expansion of remedies for wrongful convictions and incarcerations. We wanted to test the utility of modern forensic methods to solve historic cases. We also knew that the stakes were very high, and that the power structure in Cuyahoga County would never stand for compensating the Sheppard family for what the county did to Dr. Sheppard. There were too many people still in power, or their descendants, who would do everything possible to sabotage our efforts. It is the nature of power and pride.

So we did the next best thing. We took the case to the people knowing full well that the best strategy in this effort was to change public opinion. The *Sheppard* case was born and shaped by public opinion and would end in shaping public opinion. Because of our successes in laying out a strong case for innocence in the media, I believe that this case never would make it to trial. Obtaining the trial was an amazing accomplishment in a forty-five year old case. So no matter what the verdict, at least we were able to present the evidence—not all of the evidence as it turned out, but enough to show the world how an innocent man can be targeted and destroyed by a vicious campaign to manipulate our legal system.

So how did we do it? First, the partnership between Sam Reese and myself. This was not a traditional lawyer/client relationship. There is no question that we were dedicated to professionally building a case. We were serious in developing the strongest litigation approach we could with our limited resources. We were also partners in using the case to develop wider issues such as the alarming rise in wrongful convictions, the role of DNA evidence, the mounting unworkability of the death penalty, the proliferation of prosecutorial and police abuses and the issue of prisoner and prisoner family rights.

Second, we conceived of and implemented a sophisticated media strategy. We did not just respond to the media. We created media events to coincide with developments in the case. We had to understand how the media worked. We had to know whether to have a press conference or not. When to have it? What time of the day? Who to give exclusives to? Do we go national with the story or locally? How to get your message out in a soundbite? You realize that media is a business that sells news like commodities and is highly competitive. You learn how to keep them happy, and make them think that they are special.

It is interesting to note that the most expensive media coverage in the case was not the actual trial proceeding. In a sense the trial was an afterthought. The big stories were those involving the release of DNA findings, even though one of our press conferences had to compete with the Clinton State of the Union address and the O.J. Simpson civil verdict.

The second major press conference in March 1998, at the Justice Center, when we released the second DNA findings, was broadcast live and made national news.

Our opponents were caught off guard. While our demand was that the prosecutor simply review our findings and consider opening up an investigation of Richard Eberling, the response entailed a personalized attack against me and an abrupt dismissal of our efforts. This was a big turnaround for us. Because there was nothing unreasonable about seeking the truth. Yet, the prosecutor appeared as if there was something to hide.

The other big story was our victory in the Ohio Supreme Court after the state tried to stop the trial from proceeding. They pursued an unprecedented avenue to seek a writ of prohibition against the judge. Then, when we won the right to proceed to trial, barely surviving a 4-3 vote, once again there was national news.

Then there was the NOVA documentary, which aired on October 19, 1999, three months before the trial. This was an impressive review of the science which supported our cause. It is interesting that the Coroners office, long personally involved in the culture of this case as exemplified by the biased role of Dr. Sam Gerber, took it upon itself to spend over a hundred thousand dollars in taxpayers money to conduct their own experiments to challenge the NOVA findings. The Coroners office was not even a party to the litigation, yet the current Coroner conducted her own carefully timed press conference two weeks before the trial, which had the effect of undermining our case. Most of the experiments conducted by the Coroners office were held to be inadmissible in Court. Nonetheless, the unusual display showed how a television documentary forced a forensic agency, whose role in the *Sheppard* case has generated frequent controversy, to react and become an advocate in an adversarial context.

As for the trial itself, the news coverage was mostly local. However, Court TV, the new “official” record of trial proceedings, was present throughout the trial and conducted the first webcast. My sense was that the local coverage was, for the most part, fair. It seemed that the prevailing opinion was that we were winning the case. Most of the journalists and commentators saw the power in DNA. The state’s case was nothing more than a character assassination of Sheppard, an ad hominem attack on the DNA, and a resurrection of the arguments and transcripts of the unfair 1954 trial. Unfortunately, because of the difficulty of proving to a jury absolute innocence, the absence of the real victim of the wrongful incarceration, and the emotional detachment and impatience of the jury after twelve weeks, we fell short.

Of course, we were not the only side of the case to use the media. My opponent, recently appointed and facing an election, was not one to shy from the media attention. He began to leak slanted news stories and saw fit to announce, after reviewing the case only a few weeks into office, that he believed Sheppard was guilty. A few months before the trial was originally scheduled, he dropped a media bombshell: the body of Marilyn Sheppard was to be exhumed. This served to demonstrate a perception of the State trying to get to the truth (even though it did nothing to advance the forensics and simply postponed the trial).

During the trial, both sides gave regular press conferences. At least one by my opponent drew an angry response from the judge. Without regard to admonishments and ethical considerations, the prosecutor released the specifics of private settlement negotiations which were understood to be confidential—in order to bolster a phony argument that we were all in this for money. At least one juror saw the headline and the prosecutor’s indiscretion almost caused a mistrial.

While it is impossible to ever know the influence media coverage has on a jury, it is no surprise that parties in high profile cases will attempt to play the “media card”

to affect the legal playing field. The Courts hopefully will continue to be vigilant in finding a workable balance between the public's right to be informed and the right to a fair trial.

#### CONCLUSION

High profile cases are therefore media driven. What happens in the courtroom is a reflection of the attitudes of the larger society. Such was the case then and it is the case now. From the cases of *Lizzy Borden*, the Lindburgh kidnapping, O.J. Simpson, and *Sheppard*, anyone who thinks justice is completely blind to the influences of popular opinion is blind themselves. All too often justice is a function of political culture. The courtroom is nothing but a vehicle to carry out the popular will, often with lynch mob mentality. Despite the attempts to control this phenomenon, and certainly the *Sheppard* decision has played a big role in curbing excesses, the business of media (and that is the problem, it is a business) will continue to push the envelope. The techniques have changed to look better, but the results are the same. The sobering reality is that there is no relief in sight. The only remedy is to know how it works and to use it to one's advantage. This leaves out the poor, the disenfranchised, and those without resources and clout to advance an effective media plan. Yet, those who fail to heed the lessons might wind up on the short end of justice.