

**THE REPORTER'S KEY
RIGHTS OF FAIR TRIAL AND FREE PRESS**

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THE REPORTER'S KEY: ACCESS TO THE JUDICIAL PROCESS

The History and Purpose of the ABA Standards

Question: Who drafted the ABA Standards?

Answer: The third edition of the ABA STANDARDS FOR CRIMINAL JUSTICE FAIR TRIAL AND FREE PRESS was drafted by a task force appointed in 1988 by the Criminal Justice Standards Committee.

The task force was chaired by the Honorable Alexander H. Williams III, a Superior Court Judge for Los Angeles County in the Criminal Division. Four other participating lawyers reflected a variety of perspectives on the issues involved. In addition, lawyers representing prosecutors, criminal defense lawyers, and the media worked as advisors or liaisons to the primary task force, participating in the discussions but not voting on the final changes.

After the Standards had been drafted by the task force, they were reviewed and eventually approved by the Criminal Justice Standards Committee and the Criminal Justice Section Council. Finally, the Fair Trial and Free Press Standards were ratified by the ABA House of Delegates in February 1991.

Question: How did the Standards originate?

Answer: Concern arises over the potential conflict between a litigant's Fifth Amendment right to an unbiased and fair trial and the First Amendment right to a free press. When the right to gather and publish information has the potential to bias the outcome of a trial, which right should prevail? The earliest concerted efforts to reconcile the conflicting demands of a fair trial and a free press began in the late 1960s. The first edition of the ABA's Fair Trial and Free Press Standards, published in 1968, relied on the conceptual framework the Supreme Court opinion provided in *Sheppard v. Maxwell*¹. The emphasis was heavily upon safeguarding the interests of a fair trial. The second edition of these Standards, published in 1979, contained a revised set of Standards designed to shift the balance significantly in the direction of a free press.

The current third edition continues the attempt to define the proper balance between these two competing interests. On one hand, it tries to restore some emphasis on measures designed to avoid publicity that may be prejudicial to a fair trial. On the other hand, the new Standards recognize a broad and comprehensive right of public and press access to information concerning criminal proceedings. The third edition reflects the impact of *Richmond Newspapers, Inc. v. Virginia*², which guarantees the principle of open trial proceedings. A decision only four months after ratification of the Standards by the ABA House of Delegates, *Gentile v. State Bar of Nevada*,³ leaves the third edition's treatment of a lawyer's outside-the-courtroom statements in question, as we will see later in the more detailed discussion.

¹ 384 U.S. 333 (1966).

² 448 U.S. 555 (1980).

³ 501 U.S. 1030 (1991).

Question: Do the Standards bind the media?

Answer: No. The Standards are guidelines suggested by the ABA, not laws or regulations. They cannot be enforced against anyone unless the language has been adopted by some regulatory body.

Question: What functions do the Standards serve?

Answer: First, they offer a model for state bar associations, avoiding the need for the in-depth research required to reflect the law as it currently stands. Using these and other ABA Standards, state bar associations promulgate rules of conduct that are enforced against judges and lawyers licensed to practice within their jurisdictions.

Second, as part of this function, the Standards provide a balanced and accurate restatement of the case law that is constantly developing and changing. A lawyer doing research in this area may use the Standards and Commentary as a guide, an overview and a source for further research.

Third, even though the Standards may become outdated, they reflect a consensus of many lawyers who represent the full range of interests in the fair trial-free press arena. These Standards are the product of a carefully coordinated effort by informed people within the legal system to address important issues in this area, to anticipate trends and to evaluate past developments. The Standards serve this function by identifying important unresolved issues and by shaping future debate.

**THE REPORTER'S KEY:
ACCESS TO THE JUDICIAL PROCESS
SECTION I. The Standards and Criminal Justice Reporting
A. Conduct of Attorneys in Criminal Cases**

ABA Standard 8-1.1

(a) A lawyer should not make or authorize the making of an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of prejudicing a criminal proceeding.

(b) Statements relating to the following matters are ordinarily likely to have a substantial likelihood of prejudicing a criminal proceeding:

(1) the prior criminal record (including arrests, indictments, or other charges of crime) of a suspect or defendant;

(2) the character or reputation of a suspect or defendant;

(3) the opinion of the lawyer on the guilt of the defendant, the merits of the case, or the merits of the evidence in the case;

(4) the existence or contents of any confession, admission, or statement given by the accused, or the refusal or failure of the accused to make a statement;

(5) the performance of any examinations or tests, or the accused's refusal or failure to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(6) the identity, expected testimony, criminal record or credibility of prospective witnesses;

(7) the possibility of a plea of guilty to the offense charged, or other disposition; and

(8) information which the lawyer knows or has reason to know would be inadmissible as evidence in a trial.

c) Notwithstanding paragraphs (a) and (b), statements relating to the following matters may be made:

(1) the general nature of the charges against the accused, provided that there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty;

- (2) the general nature of the defense to the charges or to other public accusations against the accused, including that the accused has no prior criminal record;
- (3) the name, age, residence, occupation and family status of the accused;
- (4) information necessary to aid in the apprehension of the accused or to warn the public of any dangers that may exist;
- (5) a request for assistance in obtaining evidence;
- (6) the existence of an investigation in progress, including the general length and scope of the investigation, the charge or defense involved, and the identity of the investigating officer or agency;
- (7) the facts and circumstances of an arrest, including the time and place, and the identity of the arresting officer or agency;
- (8) the identity of the victim, where the release of that information is not otherwise prohibited by law or would not be harmful to the victim;
- (9) information contained within a public record, without further comment; and
- (10) the scheduling or result of any stage in the judicial process;

Question: Are there questions an attorney should not answer about a case?

Answer: Yes. Attorneys should say nothing that could seriously affect the outcome of any trial. It is difficult to determine what statements might affect the course of a trial.

In an effort to make clear what topics should be avoided, the Standards until recently included a list of examples (8-1.1(b)) of information that could create a risk to a fair trial. A frequently cited example is publishing a suspect's confession of the crime, even though as a practical matter, cases involving valid confessions rarely go to trial. Another example of potentially prejudicial material is the results of a lie detector test, though defendants sometimes release such results themselves when the results are favorable toward the defense. The list also included the suspect's prior criminal record, though reporters are often able to put that information together themselves, without the aid of lawyers involved in the case. The 1991 Comments to the ABA Standards for Criminal Justice, Fair Trial and Free Press, Third Edition described this list as "suggestive only" and not intended to be a per se list or even a "presumptive designation of prejudice."⁴

⁴ ABA STANDARDS FOR CRIMINAL JUSTICE FAIR TRIAL AND FREE PRESS 4 (3d ed. 1992).

However, four months after this Standard was adopted by the ABA House of Delegates, the Supreme Court decision in *Gentile v. State Bar of Nevada*⁵ threw the Standard into doubt, where it remains. Ironically, the ABA's efforts to make the Standard clear in meaning and limited in scope caused the U.S. Supreme Court to find the Standard "void for vagueness." The ABA Committee on Ethics and Professional Responsibility has now drafted a new Standard intended to avoid the criticism in the *Gentile* decision.

Dominic Gentile, a criminal defense lawyer, held a press conference six months before his client was to be tried. Prior to Gentile's press conference the Las Vegas police had held many press conferences about a particular investigation. These press conferences had implicated Gentile's client. Gentile consulted the Nevada disciplinary rule, and concluded that he was permitted to hold his own press conference to respond to the prosecution's reports about the investigation. Nevertheless, disciplinary charges were brought against Gentile because of statement he made at his press conference. These charges were sustained by the Nevada State Bar and by the state courts. The state courts dismissed Gentile's free speech challenge without comment.

The U.S. Supreme Court held 5-4 that the Nevada disciplinary rule gave insufficient notice of the prohibited speech, and was therefore "void for vagueness." The finding of vagueness turned on the Nevada rule's use of the term "notwithstanding" in the same place as Standard 8-1.1(c) uses the "notwithstanding," above. That insertion persuaded the Court that Gentile could not be prevented by such a rule from speaking publicly about plans for his client's defense, even though his comments might come within the list of suspect topics under 8-1.1(b). The language Nevada had used to restrain attorneys' speech simply did not afford them adequate guidance. Because of the *Gentile* ruling the ABA House of Delegates adopted a revised Model Rule of Professional Conduct 3.6, which corresponds to this Standard.

In addition, the *Gentile* court held that attorneys' speech may be curbed if it raises a "substantial likelihood" of a threat to the fairness of a trial -- a standard well below that of the "clear and present danger" test which applies to media comments on pending cases. Subsequent circuit court cases have held a "reasonable likelihood" standard to also be acceptable.⁶ For Chief Justice William Rehnquist and four others, the "speech of lawyers representing clients in pending cases may be regulated under the less demanding standard than that established for regulation of the press in *Nebraska Press Ass'n. v. Stuart* [cite omitted] and the cases which preceded it."⁷

The Supreme Court has not revisited this topic since *Gentile*. Therefore, as of this writing, lawyers involved in pending criminal cases enjoy a lower level of First Amendment protection than others who may wish to comment about that case. This difference has been noted by several lower courts confronted with the issue.⁸

⁵ 501 U.S. 1030 (1991).

⁶ *In re Morrissey*, 168 F.3d 134 (4th Cir. 1999); *United States v. Brown*, 218 F.3d 415 (5th Cir. 2000); *United States v. Pickard*, 2001 U.S. Dist. LEXIS 1066 (D. Kan. 2001).

⁷ *Gentile*, 501 U.S. at 1074 (emphasis added).

⁸ See, e.g., *United States v. Cutler*, 58 F.3d 825, 834 (2d Cir. 1995)(upholding contempt citation of an attorney for making statements under New York's "reasonable likelihood" of material prejudice standard); *United States v. Davis*, 902 F. Supp. 98, 102 (E.D. La. 1995); *Fieger v. Thomas*, 872 F. Supp. 377, 382 (E.D. Mich. 1994).

It is argued that attorneys involved in pending litigation owe a special duty to the legal system, since their special knowledge of the case puts them in a unique position to threaten the accused's Sixth Amendment right to a fair trial. Changes of venue or a retrial may vindicate the Sixth Amendment rights of a defendant when comments from trial lawyers have “tainted” the jury pool, but both remedies can cause significant delays, deprive the defendant of the right and convenience of a local trial, and add to already strapped court budgets.

On the other hand, these attorneys are the only people in a position to provide the public with accurate, critical and timely information about the criminal justice process. Many argue these attorneys should be free to explain events in the case, with great care, as long as they do not violate the client's right to confidentiality.

Reporters should consider this background information and the discussion immediately below when deciding how far to pursue the answers to particular questions.

Question: May an attorney involved in a trial criticize or comment on the conduct of the trial in statements to the public?

Answer: Under most circumstances, attorneys can answer questions regarding the next procedural events to be expected and the consequences of the court's rulings. However, a comprehensive answer to this question depends on so many variables it cannot be addressed briefly. The Standards and a fair application of common sense do impose some requirement for caution on lawyers. For example, if an attorney dislikes the manner in which the trial judge is controlling the conduct of the trial, criticism outside the courtroom is likely to antagonize the judge and perhaps elicit a warning to the lawyer against contempt of court. However, reporters should not be put off too easily by attorneys who cite “the rules” as a reason to refuse to answer questions about a current or upcoming criminal trial.

For example, charges against a criminal defense lawyer in Ithaca, New York, were dismissed after the attorney appeared on a television during the course of the trial to criticize the prosecutor's use of charges against particular witnesses, and to comment on their testimony. The New York appellate court dismissed the charges against the lawyer for three reasons: (1) the jury had been instructed frequently to avoid media accounts of the trial; (2) a confession the lawyer mentioned was already before the jury; (3) the trial had received an “ocean of publicity” and this particular interview was not sufficient to “alter public knowledge or mood...”⁹ As the selection of these factors suggest, courts are required to look at the actual impact of the words spoken and the current circumstances, and should not assume that any particular revelation will have an impact on a fair trial.

Question: Does the Standard limit the speech of lawyers who are not involved in a particular criminal trial?

Answer: Yes, in theory. This Standard is often criticized because it is not limited to the attorneys actually involved in the case. However, as a practical matter, it appears that state bar rules

⁹ *In re Sullivan*, 586 N.Y.S.2d 322 (App. Div. 1992).

modeled after this Standard are rarely enforced against a lawyer who has no involvement but is asked to comment as an expert on the case. It is difficult to research this point because state bar disciplinary proceedings may be confidential or reported only to members of each state bar. However, lawyers who participate in television news coverage of trials, for example, assume that such a rule would not be enforced against them. This assumption is reasonable, especially because the *Gentile* holding does not appear to apply any more broadly than to attorneys participating in the trial.

The Standard is not explicitly limited to the actual trial of a criminal case. It uses the more expansive term, “criminal proceeding,” which begins with the filing of the indictment or criminal information. Again, as a practical matter, because only the trial itself is subject to a jury’s judgment, no other part of the proceeding is similarly susceptible to media-inspired bias. It would, for example, be difficult to enforce a rule based on Standard 8-1.1 in a plea-bargained case.

**THE REPORTER'S KEY:
ACCESS TO THE JUDICIAL PROCESS
SECTION I. The Standards and Criminal Justice Reporting
A. Conduct of Attorneys in Criminal Cases**

ABA Standard 8-1.1(d)

(d) Nothing in this Standard is intended to preclude the formulation or application of more restrictive rules relating to the release of information about juvenile offenders, to preclude the holding of hearings or the lawful issuance of reports by legislative, administrative, or investigative bodies, to preclude any lawyer from replying to charges of misconduct that are publicly made against him or her, or to preclude or inhibit any lawyer from making an otherwise permissible statement which serves to educate or inform the public concerning the operations of the criminal justice system.

Question: May reporters attend juvenile court proceedings and obtain juvenile court records?

Answer: Courts do not generally consider juvenile proceedings to be criminal prosecutions. On one hand, juveniles are afforded some protections, such as limitations on the length and manner of incarceration; on the other hand, juveniles are not afforded all the rights of adult criminal defendants -- jury trials being the most obvious right denied to juveniles. Increasingly, when juveniles are accused of violent felonies, they are transferred to “adult” court, where trials are open.

Specific answers depend heavily, however, on the jurisdiction of the proceedings. Federal and state practices are discussed briefly below. Reporters must seek local advice, including from the clerk of juvenile court, the prosecutor's office, or the public defender office, but should be aware that these sources may be advising on the basis of the local practice instead of what the law allows. When a major question arises, the news organization's lawyer should be consulted.

Federal Courts:

Under federal practice, juvenile proceedings are usually closed, but the Juvenile Delinquency Act does not mandate closure.¹⁰ The federal criminal code¹¹ provides that juvenile proceedings can be “convened” any time and place within the district, in chambers or otherwise. Several recent decisions by various circuit courts of appeals have held that this means that closure may be decided by the presiding judge on a case-by-case basis.¹²

Under federal law, reporters and other members of the public will not be given access to files or records (including federal “rap sheets”); personnel under the court's jurisdiction may not release

¹⁰ 18 U.S.C. §§ 5031-42.

¹¹ *Id.* at § 5032.

¹² See *United States v. Eric B.*, 86 F.3d 869, 879 (9th Cir. 1996); *United States v. Three Juveniles*, 61 F.3d 86, 92 (1st Cir. 1995); *United States v. A.D.*, 28 F.3d 1353, 1362 (3d Cir. 1994).

records, identifying information, or photographs of juveniles without court approval.¹³ These restrictions on access to federal juvenile proceedings and records apply through a transfer hearing (a hearing to determine whether the juvenile will be prosecuted as an adult). Once a transfer is granted, the juvenile is treated as an adult, so subsequent proceedings and court records are available to the same extent as for an adult.

If reporters are able to attend a hearing or obtain federal juvenile records, no sanctions may be imposed for reporting on the proceeding or publishing such material.¹⁴

State Courts:

State laws differ from the federal law, vary from state to state, and are likely to provide greater access than federal law affords. For example, a Washington State statute¹⁵ provides, “The general public and press shall be permitted to attend any hearing unless the court, for good cause, orders a particular hearing to be closed. The presumption shall be that all such hearings will be open.” Juvenile court files “of any alleged or proven juvenile offender shall be open to public inspection, unless sealed...”¹⁶ The court files, however, generally contain limited information such as the official statement of the charges, copies of subpoenas, and final disposition of the charges. Much more information is likely to be contained in the social history files, probation files, and treatment files. These latter files are not available to the public or press: “All records other than the official juvenile court file are confidential...”¹⁷

Some states -- Colorado, Florida, and New Mexico -- have apparently created a presumption that all or some juvenile proceedings are open.¹⁸ In California and Virginia, juvenile hearings on particular violent crimes must be open.¹⁹ At the other extreme, Alabama and the District of Columbia do not allow those attending a juvenile proceeding to identify the child.²⁰ In Illinois, only the media (not the public) may attend juvenile proceedings, and the judge may prohibit publication of the minor's identity.²¹

Most states fall somewhere between these extremes, typically recognizing that because states have a substantial interest in protecting the confidentiality of juvenile proceedings, access is not presumed. In such states as Indiana, Iowa, Maryland, Michigan, Nebraska, Oregon, and Texas,

¹³ The federal criminal code, 18 U.S.C.A. § 5038, provides: Throughout and upon completion of the juvenile delinquency proceeding, the records shall be safeguarded from disclosure to unauthorized persons... (e) Unless a juvenile who is taken into custody is prosecuted as an adult, neither the name nor picture of any juvenile shall be made public in connection with a juvenile delinquency proceeding.

¹⁴ *Oklahoma Pub. Co. v. United States*, 515 F. Supp. 1255 (Okla. 1981).

¹⁵ WASH. REV. CODE § 13.40.140(6) (2001).

¹⁶ WASH. REV. CODE §§ 13.50.050(2) (2001).

¹⁷ WASH. REV. CODE § 13.50.050(3) (2001).

¹⁸ See, e.g., COLO. REV. STAT. ANN. § 19-2-110 (2000).

¹⁹ CAL. R. CT., Div. Ic. R 1423(g) (2001); CAL. WEL. & INST. CODE § 602 (2001); VA. CODE ANN. § 16.1-302(C) (2000).

²⁰ ALA. CODE § 12-15-65(a) (2001); D.C. CODE ANN. § 16-2316(e) (2000).

²¹ 705 ILL. COMP. STAT. ANN. 405/1-5(6) (2001).

the trial judge has wide discretion depending on the circumstances. A number of states also call for consideration of such factors as the seriousness of the offense and the age of the minor.

The states are more nearly in accord about access to juvenile court documents. Traditionally, states consider such documents confidential information and thus not accessible to the media.²² On the other hand, concern about juvenile violence has prompted several states to create a presumption of access to juvenile documents (and hearings) where certain felonies are charged, especially when a handgun was used.

The traditional rationale for closing certain adult criminal proceedings -- to avoid pretrial publicity which could taint the jury pool -- does not apply to juvenile proceedings because there are no jury trials in juvenile courts. But when there is a probability of transfer to adult court, where the juvenile would be entitled to a jury trial, the court and the attorneys will have the same concern to avoid prejudicial pre-trial publicity as in high-profile cases involving adult defendants.

Generally, if there is an adult co-defendant, that adult will be prosecuted in adult court and the juvenile will be handled in juvenile court. The juvenile court and authorities may not alter restrictions on access to juvenile proceedings and records for the juvenile even if there is an adult co-defendant. Information obtained through the adult's trial process may be published even though it pertains to the juvenile as well, but reporters must check with their attorneys to ascertain the law applicable to a particular case.

Question: Are there additional limits placed on the information given out about juvenile offenders?

Answer: The ABA Standard reflects the fact that most states impose greater restrictions on information pertaining to juvenile offenders. Because there is such substantial variation among states, reporters must be aware of the rules in their jurisdiction.

In all cases, however, it is important to remember that reporters may reveal a juvenile's name when the information is obtained in legal ways outside the juvenile courtroom. For example, if a reporter is interviewing eyewitnesses to an event, and the eyewitnesses identify the people they saw involved, the state may not forbid the reporter to publish those names as suspects.²³ On the other hand, if the published reports are false, and especially if not based on privileged²⁴ sources, reporters must consider whether they would be held liable for defamation.

²² See, e.g., VA. CODE ANN. § 16.1-305(A) (2000)(Juvenile court records defined as "social, medical, or psychiatric reports" to be filed separately from adult files and thus available only to a specified group of people).

²³ *Smith v. Daily Mail Publ'g. Co.*, 443 U.S. 97 (1979).

²⁴ In the defense of defamation cases, reporters have a legal "privilege" to rely on certain kinds of sources, such as legislative reports, so long as reporters' accounts are fair and accurate. The privilege protects the reporter from liability should the report be false.

THE REPORTER'S KEY:
ACCESS TO THE JUDICIAL PROCESS
SECTION I. The Standards and Criminal Justice Reporting
A. Conduct of Attorneys in Criminal Cases

ABA Standard 8-1.2

Unless adopted by statute or pursuant to the supervisory authority of the highest court in the jurisdiction, the substance of Standard 8-1.1 should be adopted as a rule of court governing the conduct of attorneys.

Question: May a reporter use information a lawyer has given in violation of these Standards?

Answer: The Standards apply to lawyers and court personnel -- not to journalists. Thus, if the information has been lawfully obtained, and is accurate, a reporter's use of it will not violate court rules based on these Standards.

State legislatures have written laws that impose penalties for the release of certain information. When the penalty is imposed on the state employee, these laws usually meet constitutional requirements. It would be difficult, however, to write a constitutional law that imposes a penalty on a reporter who obtains secret information legally and then publishes it. For example, a state law in Florida made it illegal for newspapers or television to reveal the name of the victim of a sex crime. But the Sheriff's Department in Jacksonville, Florida, inadvertently released the name of "BJF," the victim of a rape, and the story appeared in *The Florida Star* under the "Robberies" section of the "Police Reports." In *Florida Star v. BJF*²⁵, the Supreme Court ruled that punishment for the publication of truthful information, lawfully obtained, may be imposed only when "narrowly tailored to a state interest of the highest order. . . ." Under the circumstances of that case, the Court said, liability may not be imposed.²⁶ In *Bartnicki v. Vopper* the Supreme Court held that the media could not be held liable in damages for publishing information on a matter of public concern obtained legally, even when it was obtained from someone who obtained it illegally.²⁷ The Court has made several similar decisions, for example, in *Smith v. Daily Mail Publ'g Co.* when reporters obtained and published the name of a juvenile charged with a homicide.²⁸

State law may, however, limit the release of certain information. The statutes tested in *Florida Star* and *Smith*, noted earlier, failed when applied to newspaper publishers, not to state employees. If a state employee were to release information in violation of state law, the state's interest in holding its employees accountable would probably outweigh First Amendment restraints.

²⁵ 491 U.S. 524 (1989).

²⁶ *Id.* at 541.

²⁷ 2001 U.S. LEXIS 3815 (2001). *See also Ollio v. Mills*, 1998 U.S. Dist. LEXIS 14024, 68-71 (M.D.N.C. 1998).

²⁸ *Smith*, 443 U.S. 97

Question: Can lawyers and court personnel get in trouble for violating rules based on these Standards?

Answer: As we noted above, the ABA Standards are enforceable against no one until they have been adopted by a state bar, by the state legislature, or, in some cases, by a state agency. At that point, lawyers and court personnel may be disciplined for failing to follow the rules or guidelines. Court personnel may be disciplined or fired. Lawyers who violate the state bar's code of professional conduct may be subject to penalties that range from a private reprimand to permanent suspension of the license to practice law.

Though reporters cannot be disciplined in this way, those who cover the criminal justice system will deal with persons who are subject to the rules adopted from the ABA Standards. It is worth noting that reporters who obtain information from court employees may find themselves subject to an investigatory subpoena if the published story reveals information that seems to be protected by such a rule. Reporters should consult with legal counsel when this problem presents itself.

It makes sense for reporters to be aware of the terms and coverage of applicable parts of the Standards. Reporters should also be aware of the degree to which the Standards have been adopted -- and the level at which such adoption has taken place. States make their own changes to the ABA Standards. Virginia's trial publicity rule, for example, uniquely requires proof of a "clear and present danger" before a lawyer's comment can be sanctioned; the District of Columbia omits any detailed lists of "do's and don'ts" and uses "serious and imminent threat" as a threshold test.²⁹

²⁹ VA. SUP. CT. PROF. RESP. CANNON DR 7-106; D.C. BAR APPX. A, R 3.6.

**THE REPORTER'S KEY:
ACCESS TO THE JUDICIAL PROCESS
SECTION I. The Standards and Criminal Justice Reporting
B. Conduct of Law Enforcement Officers, Judges, and Court Personnel in Criminal Cases**

ABA Standard 8-2.1

(a) The provisions of Standard 1.1 should be applicable to the release of information to the public by law enforcement officers and agencies.

(b) Law enforcement officers and agencies should not exercise their custodial authority over an accused individual in a manner that is likely to result in either:

(1) the deliberate exposure of a person in custody for the purpose of photographing or televising by representatives of the news media; or

(2) the interviewing by representatives of the news media of a person in custody except upon request or consent by that person to an interview after being informed adequately of the right to consult with counsel and of the right to refuse to grant an interview.

(c) Nothing in this Standard is intended to preclude any law enforcement officer or agency from replying to charges of misconduct that are publicly made against him or her or from participating in any legislative, administrative, or investigative hearing, nor is this standard intended to supersede more restrictive rules governing the release of information concerning juvenile offenders.

Question: What information may law enforcement agencies and officers release about a pending criminal matter?

Answer: This question is controlled by the open record laws of each state, not the ABA Standards or local bar association standards. The laws of most states recognize that the public has a strong interest in current, regular reports on the details of law enforcement efforts to investigate crime, and prosecution or the decision not to prosecute after any particular incident. Most state laws require that arrest reports, jail logs and criminal incident information be treated as open records, with exceptions that apply when public release would create particular dangers.³⁰

Nonetheless, police department policies are not always consistent with state open records laws. Anecdotal reports from lawyers who represent news media in three widely separate regions suggest that access to information about criminal investigation is either consistently difficult to obtain or is inconsistently available. "On a day-to-day basis," writes one lawyer, "there's probably no greater abuse of exemptions to the public records law than in the area of police agency responses to requests for information about investigation and prosecution of crimes." This same lawyer cites several methods that police agencies routinely use to deny access to

³⁰ See, e.g., VA CODE ANN. § 2.2-3706 (2001).

information about highly publicized cases, including “deliberate attempts to confuse public records law by asserting courtroom guidelines regarding pretrial publicity as an exemption under the public records law. The net result is that investigative records are seldom released on a timely basis in newsworthy cases. . . .” Another lawyer writes: “We have a great deal of difficulty in collecting information from the police concerning the investigation of crimes. None of the police agencies in this area are particularly forthcoming, at least overtly.”

The Fair Trial and Free Press Standards provide that “speech by law enforcement offices presents precisely the same fair trial-free speech issues as does speech by attorneys.”³¹ In the third edition, law enforcement officers are directed to abide by the same lists of topics that affect prosecutors and defense lawyers. However, reporters should investigate whether police media policies conflict with the obligation to release information made accessible by a state freedom of information statute or by case law. For example, state law may require the routine release of criminal incident reports or arrest reports, while police departments actually decide on an ad hoc basis when to release such information, citing bar guidelines as authority.

When police and law enforcement agencies adopt specific policies of their own, reporters covering the agencies should have a current copy of any such policy. If such a policy is more restrictive than the state Freedom of Information Act, reporters have the option to challenge the policy through the chief of the agency, or the local state's attorney's office, or to file a petition under the state Freedom of Information Act to correct the problem.

Question: Can a judge order police not to release information to reporters?

Answer: Beyond the application of Freedom of Information Act statutes, courts may control law enforcement release of information only when the court has jurisdiction over a particular criminal prosecution and the release of particular information would create a threat to a fair trial.³² In contrast to the ABA Standard's premise that courts may generally limit statements made by law enforcement officials, case law suggests that “gag orders” may be imposed on police only when a court finds there is a “reasonable likelihood” of prejudice to the defendant's Sixth Amendment rights, and such an order is the least limiting method available to protect those rights.³³ (The subject of “gag orders” and the permissibility of their use is addressed much more fully in a later section.)

³¹ ABA STANDARDS FOR CRIMINAL JUSTICE FAIR TRIAL AND FREE PRESS 14 cmt. 8-2.1 (3d ed. 1992).

³² *Rizzo v. Goode*, 423 U.S. 362, 370-71 (1976).

³³ See *United States v. Hill*, 893 F. Supp. 1039, 1040-41 (N.D. Fla. 1994).

**THE REPORTER'S KEY:
ACCESS TO THE JUDICIAL PROCESS
SECTION I. The Standards and Criminal Justice Reporting
B. Conduct of Law Enforcement Officers, Judges, and Court Personnel in Criminal Cases**

ABA Standard 8-2.2

Court personnel should not disclose to any unauthorized person information relating to a pending criminal case that is not part of the public records of the court and that may be prejudicial to the right of the prosecution or the defense to a fair trial, particularly with reference to information covered by a closure order issued pursuant to Standard 3.2.

Question: What information may court personnel disclose?

Answer: Court personnel have more limited First Amendment freedoms than do attorneys and law enforcement officers, but this Standard is not intended to interfere with the ability of the press to obtain access to court records. The restriction is limited to case information that is not included in such records. In part this difference reflects the fact that court personnel are public employees under the direct supervision of a judge. Local court rules apply.

Question: Do state open records laws affect access to court documents?

Answer: In most of the states, the courts are not covered by the open records and open meetings laws. However, in 20 states these so-called “sunshine laws” do apply to court records and judicial records, though in varying degrees. To illustrate the variations, for example, in Connecticut, judicial administrative records are subject to the Freedom of Information Act.³⁴ In Georgia, the Open Records Act provides for access to photocopied or original trial exhibits, subject to approval of the judge assigned to the case.³⁵ The Indiana Open Records Law provides that all records of courts are covered by the law unless there is a specific exemption or a protective order in pending litigation.³⁶ In Kansas, courts are subject to the Kansas Open Records Act, but judges are specifically excluded from the definition of “public agency.”³⁷ Specific questions about statutory access to court files should be addressed by further legal research in the jurisdiction.

³⁴ CONN. GEN. STAT. § 1-200, § 1-201 (2001).

³⁵ GA. CODE ANN. § 50-18-70(b), § 50-18-70 (a), § 50-18-71.1(a) (2001).

³⁶ IND. CODE ANN. § 5-14-3-3, § 5-14-3-4, (2000).

³⁷ KAN. STAT. ANN. § 45-217(e)(2)(A) (2000).

**THE REPORTER'S KEY:
ACCESS TO THE JUDICIAL PROCESS
SECTION I. The Standards and Criminal Justice Reporting
B. Conduct of Law Enforcement Officers, Judges, and Court Personnel in Criminal Cases**

ABA Standard 8-2.3

Judges should refrain from any conduct or the making of any statements that may be prejudicial to the right of the prosecution or the defense to a fair trial.

Question: What information may judges disclose?

Answer: Judges may make public statements in the course of their official duties, and may explain or clarify the legal process and the procedures of the court. Judges can freely discuss the scheduling of hearings, the progress of a case, the requirement for decorum and order in the courtroom, the handling of the jury, and other logistical matters that may affect the public's interest in the trial of a case. However, reporters should never expect judges to express opinions about the merits of a pending case or about any case pending or likely to come before his or her court.

Reporters should understand that the primary obligation of a judge is to maintain a fair and impartial forum for the trial of a case. Necessarily, that duty includes maintaining the appearance of fairness and impartiality while proceedings are pending. Judges must be cautious in their approach to public comment, to avoid the appearance of bias.³⁸

Nonetheless, reporters and judges can and should maintain communication between one another. The Manual for Managing Notorious Cases, published in 1992 by the National Center for State Courts and designed for judges, suggests several principles that will increase reporters' effectiveness in covering a highly publicized case.

-- All reporters should be treated equally; all should be given the same access (or lack of access, as the circumstances require).

-- Explicit, clear, fair ground rules should be set, explained, and widely distributed from the start of the proceeding, then fairly enforced.

-- Judges should make every reasonable effort to accommodate the media, and to provide them with the information needed to report on the case before the court.

-- Reporters must understand and acknowledge the judge's need to control the conduct of the trial and every individual in the courtroom. Rules set by the court must be followed; variations cannot be accepted. Petitions and motions to challenge the court's trial coverage rules must be presented in an orderly fashion.

³⁸ *Broadman v. Commission on Judicial Performance*, 18 Cal. 4th 1079, 1099-1104 (Cal. 1998).

-- Reporters should have ready access to accurate, current and complete information about hearing dates, the handling of the jury, and procedural problems.

To encourage open communication and enhance cooperation, many state bar and media associations have worked together to draft bench-bar-press guidelines, which offer practical suggestions for the handling of high publicity cases. Collaboration among lawyers, reporters and judges to produce such guidelines allow the participants to debate, listen and learn from one another without the immediate pressure of a current explosive trial.

**THE REPORTER'S KEY:
ACCESS TO THE JUDICIAL PROCESS
SECTION I. The Standards and Criminal Justice Reporting
C. Conduct of Judicial Proceedings in Criminal Cases**

ABA Standard 8-3.1

Absent a clear and present danger to the fairness of a trial or other compelling interest, no rule of court or judicial order should be promulgated that prohibits representatives of the news media from broadcasting or publishing any information in their possession relating to a criminal case.

Question: What can a reporter do when a judge says that information about a trial or gleaned during a trial may not be published?

Answer: Courts may not impose “gag orders” on reporters without a basis for the specific findings required by the “clear and present danger” test, and not until after exhausting alternatives set out in *Nebraska Press Association v. Stuart*³⁹. In *Nebraska Press*, the Supreme Court recognized that “prior” restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights.” *Nebraska Press* set out a three-part test to be applied when the media have obtained and plan to publish information about a pending criminal case. Before imposing any restraint upon publication, the trial judge must find that: (1) release of the information will create a clear and present danger to the conduct of a fair trial; (2) the danger would be alleviated by the gag order; and (3) the danger cannot be met by any narrower or less drastic means. This rigorous test makes it difficult for a court to issue a constitutionally valid gag order against the news media. Available alternatives open to a trial judge in such a case may create additional concerns. Relocating the trial to a community that has not been saturated by publicity may reduce the risk of bias, but can also make it harder for friends, family, and witnesses for the accused to attend the trial. Delaying the trial until the effects of publicity abate may improve the chances for objective judgment, but may at the same time conflict with a jurisdiction's commitment to a “speedy trial.” Even so, all such alternatives must be considered and rejected by the trial judge before imposing a gag or restraining order against the news media.

Question: Have judges had any success imposing gag orders on reporters?

Answer: Only once has such an order been upheld on appeal, and in a most unusual case. The 1990 confrontation between General Manuel Noriega and the Cable News Network (CNN) provides a rare, but well-known example of a prior restraint on news material that was upheld or left in place by the higher courts. CNN had obtained tapes of telephone conversations between General Noriega and his defense counsel, recorded by the government while the General was in jail.⁴⁰ CNN intended to broadcast portions of the tapes, and contacted Noriega's defense counsel to confirm the tapes' authenticity. General Noriega's defense team first confirmed the authenticity of the tapes, playing some of the tape on-camera during the CNN interview. Then,

³⁹ 427 U.S. 539, 564-68 (1976).

⁴⁰ *United States v. Noriega*, 917 F.2d 1543, 1545. (11th Cir. 1990).

however, they asked the federal district court in Miami for a restraining order against CNN's planned broadcast. A temporary restraining order was issued prohibiting the publication of any material protected under the attorney/client privilege, until CNN produced the tapes for court review. The trial judge felt it was important to determine whether key defense strategies would be disclosed by CNN's broadcast.⁴¹ However, CNN immediately broadcast the story, including a portion of the taped conversation, and the same time appealed to the U.S. Court of Appeals for the Eleventh Circuit. The appeals court upheld the restraining order, as well as the order requiring CNN to produce the tapes for review by the district court.⁴² After appealing this decision to the Supreme Court, CNN did produce the tapes for the trial court's review.

The Eleventh Circuit had upheld the trial court's restraining order because, the court reasoned, CNN had no right of access to the material and therefore no right to broadcast the material. Rather than starting from the fact that CNN had the material and that no access issue was raised, the appeals court instead looked at the balancing test employed in access cases and analyzed the gag order in terms of the harm potentially caused if the taped material contained client confidences and defense strategies.

The Supreme Court declined to review the case, although two Justices dissented from the denial because they found no threshold showing under *Nebraska Press* either that broadcasting the tapes would threaten a fair trial, or that any possible harm could be averted only by a suppression of the tapes.⁴³ It is important to note, however, that the restraining order had been imposed only until CNN produced the tapes, so that the district court could make this determination. Once the tapes had been produced, the district court found that they were not prejudicial.⁴⁴

The *Noriega* decision is an anomaly. The Eleventh Circuit's opinion makes no reference to the *Nebraska Press* holdings on the issue of prior restraint, though it does recognize the Supreme Court's stress on the defendant's right to a fair trial. The two dissenting Justices objected to the absence of any showing by the parties in support of the prior restraint. There matters remained for nearly four years. Most observers assumed the *Noriega* case had run its course. In late March 1994, however, the District Judge charged CNN with contempt of court for having "knowingly and willfully" violated his 1990 order barring the broadcast of pretrial recordings of Noriega's discussions with his attorneys. Lawyers for CNN agreed to certain procedures for the trial of the new charge, but continued to insist they had not violated the judge's original order. The constitutional free press issues, of course, had been resolved in 1990 and could not now be reopened.⁴⁵

Reporters facing a gag order must, however, have legal representation to advance their legal position effectively. Even though case law opposing such prior restraints is extensive, the reporter who violates such an order risks contempt fines, even jail-time, if the basis for the order turns out to be sound in the judge's mind. CNN's counsel warns that the lesson of its case is that

⁴¹ *Id.* at 1546-47.

⁴² *Id.* at 1551-52.

⁴³ *CNN, Inc. v. Noriega*, 498 U.S. 976 (1990).

⁴⁴ *United States v. Noriega*, 752 F.Supp. 1032, 1045 (S.D. Fla. 1990), withdrawn.

⁴⁵ *United States v. Noriega*, 865 F. Supp. 1549 (S.D. Fla. 1994).

release of material that is traditionally sensitive to lawyers and judges creates a higher risk of a gag order than other material.

**THE REPORTER'S KEY:
ACCESS TO THE JUDICIAL PROCESS
SECTION I. The Standards and Criminal Justice Reporting
C. Conduct of Judicial Proceedings in Criminal Cases**

ABA Standard 8-3.2

(a) In any criminal case, all judicial proceedings and related documents and exhibits, and any record made thereof, not otherwise required to remain confidential, should be accessible to the public, except as provided in section (b).

(b) (1) A court may issue a closure order to deny access to the public to specified portions of a judicial proceeding or related document or exhibit only after reasonable notice of and an opportunity to be heard on such proposed order has been provided to the parties and the public and the court thereafter enters findings that:

(A) unrestricted access would pose a substantial probability of harm to the fairness of the trial or other overriding interest which substantially outweighs the defendant's right to a public trial;

(B) the proposed order will effectively prevent the aforesaid harm; and

(C) there is no less restrictive alternative reasonably available to prevent the aforesaid harm.

(b) (2) A proceeding to determine whether a closure order should issue may itself be closed only upon a prima facie showing of the findings required by Section b(1). In making the determination as to whether such a prima facie showing exists, the court should not require public disclosure of or access to the matter which is the subject of the closure proceeding itself and the court should accept submissions under seal, in camera or in any other manner designed to permit a party to make a prima facie showing without public disclosure of said matter.

(c) While a court may impose reasonable time, place and manner limitations on public access, such limitations should not operate as the functional equivalent of a closure order.

(d) For purposes of this Standard, the following definitions shall apply:

(1) "criminal case" shall include the period beginning with the filing of an accusatory instrument against the accused and all appellate and collateral proceedings;

(2) "judicial proceeding" shall include all legal events that involve the exercise of judicial authority and materially affect the substantive or procedural interests of the parties, including courtroom proceedings, applications, motions, plea-acceptances,

correspondence, arguments, hearings, trials and similar matters, but shall not include bench conferences or conferences on matters customarily conducted in chambers;

(3) “related documents and exhibits” shall include all writings, reports and objects, to which both sides have access, relevant to any judicial proceeding in the case which are made a matter of record in the proceeding;

(4) “public” shall include private individuals as well as representatives of the news media;

(5) “access” shall mean the most direct and immediate opportunity as is reasonably available to observe and examine for purposes of gathering and disseminating information;

(6) “closure order” shall mean any judicial order which denies public access.

Question: When can court proceedings be closed or access to court documents and records be denied?

Answer: Rarely and then only after a hearing, arguments, and written findings. For more than 20 years, criminal trial proceedings and documents have been presumed to be open proceedings and open records, until a definitive and limited finding is made to the contrary.

The Supreme Court framed its current approach to public access in a quartet of cases dating from the early 1980s. The first and most important of these was *Richmond Newspapers Inc. v. Virginia*⁴⁶, which firmly established that criminal courts have historically been, and must remain open to the public, and thus to the news media. The Court adopted a functional approach to the central issue of the *Richmond Newspapers* decision. If access to information about the criminal process provides citizens and voters with the means to evaluate the performance of an important branch of government, such information should be public, to ensure “freedom of communication on matters relating to the functioning of government.”⁴⁷ Only by finding an “overriding state interest” to the contrary of an open hearing could a trial judge close the courtroom.⁴⁸

In his concurring opinion in *Richmond Newspapers*, Justice Brennan wrote,

[T]he First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a structural role to play in securing and fostering our republican system of self-government. (citations omitted.) Implicit in this structural role is not only ‘the principle that debate on public issues should be uninhibited, robust, and wide-open,’ (cite omitted), but also the antecedent assumption that valuable public debate - as well as other civic behavior - must be informed. The structural model that links the First Amendment to that process of communication

⁴⁶ 448 U.S. 555 (1980).

⁴⁷ *Id.* at 575.

⁴⁸ *Id.* at 581.

necessary for a democracy to survive, and thus entails solicitude not only for communication itself, but for the indispensable conditions of meaningful communication.⁴⁹

Such a constitutional judgment is quite consistent with an expanding concept of openness. Legislatures had relied on this principle to apply “sunshine laws” increasingly to state government and to federal government operations in the 1960s and 1970s. In 1980, *Richmond Newspapers* held this presumption of openness would apply to the courts as well.

Aware that it had brought about an important change, the Court quickly took three related cases and wrote extensively on the nature of court access in the six years after *Richmond Newspapers*. In the 1982 case of *Globe Newspaper Co. v. Superior Court*⁵⁰, the Court rejected the concept of mandatory or automatic closure for any part of the criminal process, striking down a state law that required a judge to close a criminal trial during the testimony of a child who had been the victim of a sexual assault. The decision was a narrow one, which continued to recognize the need occasionally to close some portion of an otherwise open trial. While special circumstances might justify closure in a special case, particular and detailed findings, defining the risk or harm, must be made before any such action is taken.

In *Press-Enterprise v. Superior Court (I)*⁵¹, and *Press-Enterprise v. Superior Court (II)*⁵², the Court extended the principle of access to include jury selection -- specifically, a special death penalty jury selection process -- and the preliminary hearing, making clear that the presumption of openness applied to the entire criminal proceeding. Any exceptions must be based on detailed and specific findings of potential harm, must be announced in open court, and must demonstrate the inadequacy of alternative means short of closure by which to meet the needs of defendant or witness. Yet the Court recognized that closure might occasionally be warranted, and made special mention of the privacy interests of jurors.

A judge issuing a closure order must make the requisite findings on the record. The absence of any one of them can jeopardize the constitutionality of the closure order:

- (1) there is a substantial threat to a criminal defendant's right to a fair trial;
- (2) no alternative available in the case will avert that threat;
- (3) closure will avert the threat;
- (4) the closure is narrowly tailored or is as brief as possible to avert the threat to a fair trial.⁵³

Reports from media lawyers indicate that some proceedings are closed, and that protective orders are issued and records are sealed regularly, especially when the news media do not promptly

⁴⁹ *Id.* at 587-588.

⁵⁰ 457 U.S. 596 (1982).

⁵¹ 464 U.S. 501 (1984).

⁵² 478 U.S. 1 (1986).

⁵³ *Id.* at 13-15.

challenge the closure motion. Courtroom access litigation is described by one prominent media law firm as “one of the most intense activities” in representing a media client. Often litigation concerns access to a proceeding that is ancillary to the trial, or to an unusual piece of evidence, but equally often those who cover the criminal courts are presented with the need to litigate over the basic issues of access to the trial itself, or to a clearly related proceeding such as a preliminary hearing.

In such a case, it is important for reporters to remember the cases say that the criminal defendant's Sixth Amendment rights to a fair trial may outweigh the public's First Amendment rights to an open proceeding when there is a genuine and otherwise irremediable threat to the fairness of an open trial. Many defense lawyers will feel an obligation to seek closure, especially when there has been special media attention to their case or when news reports describe evidence suppressed by the judge. This is when it is up to the court to decide whether the news reports did actually or are most likely to create an unfair influence, according to the test described in this section.

Question: When and how may a reporter challenge a closure order?

Answer: Whether the journalist is at the office, in the courthouse or in the courtroom, he or she may challenge (or ask a lawyer to challenge) a motion to seal a document or close a hearing during any criminal proceeding. The decision to object during the proceeding should be made with great care. The ideal moment for raising such an objection would be right after the motion for closure has been made and the opposing party has responded. At this point, the reporter should stand, remaining behind the bar, and ask the judge's permission to address the court.

Identifying oneself as a reporter, the person who objects should explain that he or she (and the employer news organization) has standing to object to the closing on the basis of the public's First Amendment right of access to the courtroom, and that the organization's lawyer should have an opportunity to oppose the closure motion. The judge may insist on hearing argument at once, requiring the organization's lawyer to appear in the next hour or so. Anticipating such emergencies, many news organizations ask their lawyers to be prepared in advance, and have equipped their reporters with cards that spell out the nature of objections that may be raised in the courtroom.

Journalists should also recognize that the presumption of openness may not be used to disrupt the orderly court processes. Judges may and often do meet in chambers with lawyers to discuss procedure, schedules, and prospects for settlement, though there are occasions when reporters may appropriately seek access to these meetings. Judges may and do summon lawyers to the bench during a trial, out of the hearing of the jury, to discuss procedural issues such as the admissibility of evidence. Judges can impose requirements of orderliness on anyone attending trials or hearings, and this includes, as discussed below, the ability to control photographic recording of courtroom events.

Question: Does the right of access to the criminal trial extend to proceedings outside of the trial itself and to every part of the trial?

Answer: Yes, the right of access applies to most parts of the criminal process. While the right of access to the trial itself is virtually absolute, that right may not extend to every moment of the trial. Access to other stages in the process is less certain. Grand jury proceedings, for example, are almost universally closed to the public and the media, and such secrecy is seldom questioned. Most other parts of the criminal process are presumptively open, though special circumstances may create exceptions.

Following the Supreme Court's lead in the cases after *Richmond Newspapers*, lower courts quickly recognized that meaningful access to the criminal justice system would have to include the many different kinds of proceedings that precede a trial. At preliminary hearings, for example, many state courts decide whether there is sufficient evidence for the prosecutor to proceed with charges against the suspect. At suppression hearings, the defense is allowed to test the admissibility of the prosecution's evidence. At plea-bargaining sessions, defense and prosecution decide whether the case will go to trial at all. In about 90 percent of the criminal cases brought, defendants go free or go to jail based on these negotiations. The agreements are announced and approved by the judge at plea hearings. On the other hand, if the case goes to trial, jury members are questioned and selected at jury selection proceedings. What follows is a list of these and a few other critical points in a criminal case, with brief discussion of federal appellate treatment of the right of access to each event. The following discussion provides a sampling of decisions and entry points into the law for further research.⁵⁴

Preliminary Hearings: *Press-Enterprise II* controls; the Supreme Court found that the right of access is presumed in a hearing to determine whether there was probable cause to try the accused. The Court found that later release of a transcript did not render the question moot. It found that the right of access was necessary to the proper functioning of the criminal justice system, thus a hearing must precede any decision to close the preliminary hearing. The court must find "substantial probability" of a threat to a fair trial, and must consider all reasonable alternatives to closure. The Court noted that the "vast majority of states considering this issue" have concluded that the probable cause hearing is presumptively open.⁵⁵ In May 1993 the Supreme Court issued a brief unsigned opinion declaring that Puerto Rico's rule permitting "privacy" at preliminary hearings at the defendant's request was "irreconcilable" with *Press-Enterprise II*.⁵⁶ The cursory nature of that disposition illustrates the Court's firm and continuing commitment to this principle. Nonetheless, there is considerable litigation; though closure orders are disfavored, some are occasionally upheld by reviewing courts.

Suppression Hearings: In *Waller v. Georgia* the Supreme Court held that the *Press Enterprise* standard applied to pre-trial suppression hearings.⁵⁷ The complicating variable is that this case was decided on the basis of a defendant's Sixth Amendment right to a fair trial, so the First

⁵⁴ These cursory summaries rely heavily on the courtroom access outline provided in the 1993 COMMUNICATIONS LAW outlines published by the Practising Law Institute in New York. The access summary is written annually by Dan Paul and Richard J. Ovelmen. This reference and the Media Law Reporter, published by the Bureau of National Affairs in Washington, D.C., are excellent resources because they provide summaries and indices to access litigation.

⁵⁵ 478 U.S. at 10, n.3.

⁵⁶ *El Vocero De Puerto Rico v. Puerto Rico*, 508 U.S. 147 (1993).

⁵⁷ 467 U.S. 39 (1984).

Amendment right of access was not reached.⁵⁸ However, the Court did acknowledge “[a] challenge to a seizure of evidence frequently attacks the conduct of police and prosecutor... The public in general also has a strong interest in exposing substantial allegations of police misconduct to the salutary effects of public scrutiny.”⁵⁹ The matter has been addressed by several Circuit Courts of Appeal. The consensus seems to be the logic of *Richmond Newspapers* and *Press Enterprise* compels recognition that the press and public have a presumptive right to attend suppression hearings.⁶⁰

Plea Hearings, Plea Bargaining: At least four federal circuits have extended the right of access to plea hearings, principally because the plea hearing effectively takes the place of a trial and traditionally occurs in the courtroom.⁶¹ Access is also justified by the high proportion of criminal cases concluded by plea-bargaining. The plea agreement documents may be open if there is no compelling reason to seal them⁶², although the right of access does not permit the co-defendant to see plea agreements for co-conspirators or prosecution witnesses.⁶³ A compelling need for closure has been readily found in concern for on-going criminal investigations and grand jury secrecy.⁶⁴

Jury Selection: The Supreme Court extended the right of access to the jury selection in *Press-Enterprise I*⁶⁵, after a California criminal trial court closed access to a six-week long jury selection process in a rape and murder trial, and continued to deny access to transcripts after the defendant was convicted and sentenced to death. The Supreme Court decision reflected an historic tradition of access to the jury selection process and the public interest in observing the selection of jurors. It is clear that any closure of the jury selection process must serve some compelling interest and that the closure be as narrow as possible. The federal circuits have provided extensive discussion of the jury selection process access.⁶⁶

Bench Conferences: “Bench conferences” is a commonly used term that has no precise meaning. It may apply to whispered conferences at the bench over an objection to a lawyer's question, as well as to mid-trial evidentiary hearings over the admissibility of evidence. The Fifth

⁵⁸ *Id.* at 48 n.6.

⁵⁹ *Id.* at 47.

⁶⁰ See, e.g., *In re New York Times Co.*, 828 F.2d 110, 114 (2d Cir. 1987)(“It makes little sense to recognize a right of public access to criminal courts and then limit that right to the trial phase of a criminal proceeding, something that occurs in only a small fraction of criminal cases. There is a significant benefit to be gained from public observation of many aspects of a criminal proceeding, including pretrial suppression hearings that may have a decisive effect upon the outcome of a prosecution.” (quoting *In re Harold Co.*, 734 F.2d 93, 98 (2d Cir. 1984))).

⁶¹ See, e.g., *In re Washington Post Co.*, 807 F.2d 383, (4th Cir. 1986).

⁶² See, e.g., *Oregonian Publishing Co. v. United States Dist. Ct.*, 920 F.2d 1462 (9th Cir. 1990).

⁶³ *United States v. Hickey*, 767 F.2d 705 (10th Cir.), cert. denied, 474 U.S. 1022 (1985).

⁶⁴ *United States v. Haller*, 837 F.2d 84 (2d Cir. 1988).

⁶⁵ 464 U.S. 501.

⁶⁶ See, e.g., *United States v. King*, 140 F.3d 76 (2d Cir. 1998); *United States v. Three Juveniles*, 61 F.3d 86 (1st Cir. 1995); *United States v. Antar*, 38 F.3d 1348 (3d Cir. 1994); *CNN, Inc. v. United States*, 824 F.2d 1046 (D.C. Cir. 1987); *United States v. Peters*, 754 F.2d 753 (7th Cir. 1985).

Circuit has recognized that conferences between lawyers and judges at the bench are an “established practice” and “generally within a trial judge's broad discretion.”⁶⁷ In *United States v. Valenti*⁶⁸, the court denied access to transcripts of closed proceedings in the judge’s chambers, pre-trial and bench conferences during the trial, based on a continuing threat to an on-going criminal investigation. This court also held that the practice in the Middle District of Florida to maintain a secret “double docket” (a concept explained below) in certain criminal cases violated the public's qualified right of access to criminal proceedings.

Trial Exhibits and Other Evidence: The question here is whether reporters may obtain physical access to evidence already introduced so that it may be copied and published or broadcast further, especially when the evidence consists of taped recordings. In *Nixon v. Warner Communications, Inc.*⁶⁹, the Supreme Court declared that the media did not have a First Amendment right to copy audio-tapes of conversations between then-President Richard Nixon and presidential advisers who were on trial for obstructing justice in the investigation of the Watergate break-ins. There was no question of the right to hear the tapes as evidence or to read the transcripts; the decision was confined to a limitation on physical access to the evidence itself. In *Group W. Television v. Maryland*⁷⁰, a television station tried to copy a videotape made of a notorious “carjacking” in which a young mother died trying to retrieve her baby from the back seat of the stolen car. The Maryland Court of Special Appeals supported the lower court's decision to withhold the tape in deference to the fair trial rights of a co-defendant who was awaiting trial. The Maryland court observed that none of the U.S. Supreme Court's courtroom access decisions subsequent to *Nixon v. Warner Communications* had limited or changed its holding in any way.⁷¹

Search Warrant Affidavits: Search warrants are issued by magistrates or judges after examining the investigatory work of law enforcement agents submitted in the form of affidavits sworn by an investigating officer. Customarily the affidavits and search warrant returns are filed at the courthouse, even before an indictment and prosecution have begun. They are court records, not law enforcement records. Furthermore, they form a critical part of the criminal justice process. “[A] search warrant is certainly an integral part of a criminal prosecution. Search warrants are at the center of pretrial suppression hearings, and suppression issues often determine the outcome of criminal prosecutions.”⁷²

Based on this reasoning, at least two federal circuits have found a qualified right of access to search warrant documents.⁷³ In contrast, several federal circuits have found no First Amendment right of access to these documents, and have not addressed the issue of access after an

⁶⁷ *United States v. Gurney*, 558 F.2d 1202, 1210 (5th Cir. 1977).

⁶⁸ 987 F.2d 708 (11th Cir.), cert. denied sub nom., *Times Publishing Co. v. United States Dist. Ct.*, 510 U.S. 907 (1993).

⁶⁹ 435 U.S. 589 (1978).

⁷⁰ 626 A.2d 1032 (Md. Ct. Spec. App. 1993).

⁷¹ *Id.* at 1035.

⁷² *In re Search Warrant for Secretarial Area -- Gunn*, 855 F.2d 569, 573 (8th Cir. 1986).

⁷³ *In re Application of Newsday, Inc.*, 895 F.2d 74 (2d Cir. 1990); *Secretarial Area*, 855 F.2d at 573).

investigation is concluded or an indictment returned.⁷⁴ The latter result has been justified on the ground that proceedings for the issuance of search warrants have not been traditionally open to the public.⁷⁵ Since the Supreme Court has not resolved this dispute, the split in the circuit remains, and reporters should consult the controlling law in their jurisdiction. It should be noted that even in jurisdictions with a qualified right of access, this right is sometimes more illusory than real because courts have sometimes found that maintaining the secrecy of an on-going investigation is a compelling interest.⁷⁶

Grand Jury Documents: Cloaked as it is in a tradition of secrecy, the proceedings of the grand jury itself are usually virtually impervious to public access. However, there are exceptions. For example, in *Butterworth v. Smith*⁷⁷, the Supreme Court ruled that Florida could not penalize a grand jury witness for publishing an account of his testimony after the grand jury's term had ended. However, the *Butterworth* decision states an exception, rather than the rule. The extreme to which grand jury records are traditionally kept private can be seen in a notable decision by the chief judge of the U.S. District Court for the District of Colorado. The judge found with express regret that federal law⁷⁸ barred the court from requiring the release of substantive grand jury documents regarding allegations of environmental crimes at the Rocky Flats Nuclear Weapons Plant after lengthy investigation in which no indictments were issued.⁷⁹ However, this court and others have found a right of access to the ministerial documents relating to the empanelling and operation of a grand jury.⁸⁰

The preceding discussions provide a small sample of the extensive litigation prompted by the question of access to proceedings and documents generated by the criminal justice systems in state and federal courts. The frequency of litigation illustrates two points. There is constant tension between the perception of the Sixth Amendment right to a fair trial and the parallel but not co-extensive Sixth and First Amendment rights to a public trial. The presumption of openness is only a presumption; closure is possible and many criminal defense lawyers feel the obligation to seek closure.

Question: How much effort must lawyers and judges make to let the media (and the public) know when a closure motion has been made?

Answer: In theory, if the right of access is presumed, a closure motion must be disfavored, and always subjected to the four-part test set out above. In practice, it doesn't always work that way. Reporters must be in the courtroom, be told about the closure motion by trial participants, or have a dependable source willing to call when a closure motion is made.

⁷⁴ See, e.g., *In re Eyecare Physicians of Am.*, 100 F.3d 514 (7th Cir. 1996); *Times Mirror Co. v. United States*, 873 F.2d 1210 (9th Cir. 1989).

⁷⁵ *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 64 (4th Cir. 1989).

⁷⁶ See, e.g., *Certain Interested Individuals v. Pulitzer Pub.*, 895 F.2d 460 (8th Cir. 1990).

⁷⁷ 494 U.S. 624 (1990).

⁷⁸ 18 U.S.C. § 3333(b) (1998).

⁷⁹ *In re Grand Jury Proceedings*, 813 F. Supp. 1451 (D. Colo. 1992).

⁸⁰ See, e.g., *In re, Grand Jury Investigation*, 903 F.2d 180 (3rd Cir. 1990); but see *United States v. Enigwe*, 17 F. Supp. 2d 390 (E.D.Pa. 1998) (refusing discovery of grand jury ministerial records by a criminal defendant).

Some courts had been in the practice of scheduling certain hearings secretly, and maintaining a “double docket.” “Docket” is a term sometimes used to mean the court’s calendar. “Docket” as used here is another name for the court’s schedule of hearings, trials and other proceedings. Dockets are typically posted on a central bulletin board in the courthouse or just outside each courtroom, and are also kept in the clerk’s office. More recently, dockets may also be posted on the Internet. However, if a second docket is kept secretly, this prevents reporters from knowing anything about the court’s business in secretly docketed cases. Decisions in two circuits⁸¹ hold that the “maintenance of a dual-docketing system is an unconstitutional infringement on the public and press’s qualified right of access to criminal proceedings.”⁸²

The larger question is whether the closure motion itself must be docketed, and what effort (if any) must be made to let reporters know that the closure motion is before the court. One Justice of the Supreme Court has written that the right to be heard on a closure motion “extends no farther than the persons actually present at the time the motion for closure is made, for the alternative would require substantial delays in trial and pretrial proceedings while notice was given to the public.”⁸³ Subsequent decisions in the federal circuit courts have been more generous, requiring that closure motions be on the public docket⁸⁴, and sometimes requiring the motion far enough in advance to let the public have the opportunity to present their views to the court.⁸⁵ Where there is no such case law, however, this problem might easily be solved by discussion in bench-press conferences, jurisdiction by jurisdiction.

⁸¹ *CBS, Inc. v. United States Dist. Ct.*, 765 F.2d 823 (9th Cir. 1985); *United States v. Valenti*, 987 F.2d 708 (11th Cir.), cert. denied sub nom., *Times Publishing Co. v. United States Dist. Ct.*, 510 U.S. 907 (1993).

⁸² *Valenti*, 987 F.2d at 715.

⁸³ *Gannett Co. v. DePasquale*, 443 U.S. 368, 401 (1978) (Powell, J. concurring).

⁸⁴ See, e.g., *Washington Post v. Robinson*, 935 F.2d 282 (D.C. Cir. 1991).

⁸⁵ See, e.g., *In re Knight Publ'g. Co.*, 743 F.2d 231 (4th Cir. 1989); *United States v. Brooklier*, 685 F.2d 1162 (9th Cir. 1982).

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ABA Standard 8-3.3

The following Standards govern the consideration and disposition of a motion in a criminal case for change of venue or continuance based on a claim of threatened Supreme Court interference with the right to a fair trial:

(a) Except as federal or state constitutional or statutory provisions otherwise require, a change of venue or continuance may be granted on motion of either the prosecution or the defense.

(b) A motion for change of venue or continuance should be granted whenever it is determined that, because of the dissemination of potentially prejudicial material, there is a substantial likelihood that, in the absence of such relief, a fair trial by an impartial jury cannot be had. This determination may be based on such evidence as qualified public opinion surveys or opinion testimony offered by individuals, or on the court's own evaluation of the nature, frequency, and timing of the material involved. A showing of actual prejudice shall not be required.

(c) If a motion for change of venue or continuance is made prior to the impaneling of the jury, the court may defer ruling until the completion of voir dire. The fact that a jury satisfying prevailing standards of acceptability has been selected shall not be controlling if the record shows that the criterion for the granting of relief set forth in paragraph (b) has been met.

(d) It should not be a ground for denial of a change of venue that one such change has already been granted. The claim that the venue should have been changed or a continuance granted should not be considered to have been waived by the subsequent waiver of the right to trial by jury or by the failure to exercise all available peremptory challenges.

Question: Do reporters get in trouble if news stories cause the court to change the place of the trial or delay the trial because of adverse pretrial publicity?

Answer: No legal penalty or obligation may be imposed on reporters to deter publicity about a case. No legal penalty may be imposed for even the most intense, exaggerated, biased or “hyped” coverage of any criminal case (except the remedies provided by successful libel suits). Continuance and change of venue are options available to trial courts when there is a need to avoid the impact of highly adverse publicity. They are among the alternative measures to closure that a court must consider in place of a closure motion. *See*, Discussion of Standard 8-3.2 above. Because of cost and/or inconvenience to the court, witnesses and family members, both

continuance and change of venue are increasingly disfavored by trial courts, though they receive “prominent support” by the appellate courts, according to the Commentary in the third edition.⁸⁶

⁸⁶ ABA STANDARDS FOR CRIMINAL JUSTICE FAIR TRIAL AND FREE PRESS 36 (3d ed. 1992).

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ABA Standard 8-3.4

In cases in which there is a substantial likelihood that one or more of the defendants will not receive a fair trial because of potentially prejudicial publicity against another defendant, the court should grant severance on motion of either the prosecution or the defense.

The Commentary to Standard 8-3.4 in the third edition notes that severance -- trying one defendant separately from another higher-profile co-defendant -- is another remedy for extensive prejudicial publicity. For the same reasons discussed above, however, this is not an issue that has any legal impact on reporters.

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ABA Standard 8-3.5

The following Standards govern the selection of a jury in those criminal cases in which questions of possible prejudice are raised:

(a) If there is a substantial possibility that individual jurors will be ineligible to serve because of exposure to potentially prejudicial material, the examination of each juror with respect to exposure should take place outside the presence of other chosen and prospective jurors. An accurate record of this examination should be kept by court reporter or tape-recording whenever possible. The questioning should be conducted for the purpose of determining what the prospective juror has read and heard about the case and how any exposure has affected that person's attitude toward the trial, not to convince the prospective juror that an inability to cast aside any preconceptions would be a dereliction of duty.

(b) Whenever prospective jurors have been exposed to potentially prejudicial material, the court should consider not only the jurors' subjective self-evaluation of their ability to remain impartial but also the objective nature of the material and the degree of exposure. The court should exercise extreme caution in qualifying a prospective juror who has either been exposed to highly prejudicial material or retained a recollection of any prejudicial material.

(c) Whenever there is a substantial likelihood that, due to pretrial publicity, the regularly allotted number of preemptory challenges is inadequate, the court should permit additional challenges to the extent necessary for the impaneling of an impartial jury.

(d) Whenever it is determined that potentially prejudicial news coverage of a criminal matter has been intense and has been concentrated in a given locality in a state (or federal district), the court should, in jurisdictions where permissible, consider drawing jurors from other localities in that state (or district).

Question: Must potential jurors have forgotten everything they have read or heard about a case to qualify as impartial jurors?

Answer: No. The Supreme Court answered this question in *Mu'Min v. Virginia*⁸⁷, after a man was convicted of a murder he committed during an escape from a prison work detail, while serving time for another murder. Jurors on the second murder case were asked whether they had read anything about the case, but were not dismissed unless they acknowledged some effect on their ability to be impartial. The defendant argued that ABA Criminal Justice Standard 8-3.5 meant he was entitled to an ignorant jury as well as an impartial one. Citing its own precedent,

⁸⁷ 500 U.S. 415, reh'g den., 501 U.S. 1269 (1991).

the Supreme Court rejected this argument and remarked on the ABA Standard: “The ABA Standards . . . have not commended themselves to a majority of the courts that have considered the question.”⁸⁸

Paragraph [c] of this Criminal Justice Standard suggested that judges should expand the use of peremptory challenges “to the extent necessary for the impaneling of an impartial jury.” In other words, judges should allow lawyers the use of more peremptory challenges to excuse more potential jurors in high publicity cases. The Commentary to this Standard in the third edition (previously noted) notes that the Supreme Court’s decision in *Batson v. Kentucky*⁸⁹, allows the use of judicial supervision to prevent the discriminatory use of peremptory challenges, based on race. The Commentary notes that “[t]hese teachings are consistent with the position taken by” paragraph [c]. The Court extended the *Batson* rule to gender-based peremptory challenges and expanded the need for judicial supervision of jury selection.⁹⁰ That case held that peremptory challenges may not be based on the assumption that men and women jurors will vote a particular way because of their gender.⁹¹ Because gender bias is a potential in every peremptory strike (at least in some cases), this rule is likely to involve the judge much more frequently in jury selection. This suggests constraint in the use of peremptory challenges, rather than an expansion of their role.

Question: How strong is the right of a reporter to attend the jury selection process?

Answer: As always, the presumption of openness applies, but the right is a qualified one. In *Press-Enterprise I*, the United States Supreme Court set the following standard under which courts can close the jury selection process of examination of potential jurors: “The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.”⁹² The Supreme Court further held that a court denying access to juror information must articulate in open court the compelling interest which justifies denial of access, along with specific findings of fact so that a reviewing court can decide whether the denial was proper. The court must also set forth on the record that less restrictive alternatives to closure were considered and found wanting.⁹³

Courts can use the *Press-Enterprise I* precedent to determine whether denial of access to other information about jurors is proper. Each judgment about whether the press should be denied access to juror information is fact-specific; however, the lower courts’ interpretation of the *Press-Enterprise I* precedent provides some guidance with respect to access to jury selection and related information about jurors. See, discussion under Standard 8-3.2 (previously noted).

So clearly is the initial presumption of an open court recognized, that the Court of Appeals of Maryland granted a murder defendant a new trial because a deputy sheriff had excluded the public from the courtroom during jury selection without the knowledge or consent of the parties

⁸⁸ *Id.* at 430.

⁸⁹ 476 U.S. 79 (1986).

⁹⁰ *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994).

⁹¹ *Id.* at 138-40.

⁹² 464 U.S. at 510.

⁹³ *Id.* at 510-11.

or the trial judge.⁹⁴ The Maryland court remarked that the trial judge is the only person in control of the courtroom. Reporters should note that no security officer may make any decisions about access to the courtroom without orders from the judge.⁹⁵

Question: Are all parts of jury selection presumptively open?

Answer: Yes. Generally, the press has the right to attend jury selection as well as to receive transcripts of jury selection questions and answers. However, a court may close all or part of the proceedings if it finds that closure is essential to preserve a compelling governmental interest, that the closure is narrowly tailored to preserve that interest, and that there is no alternative to closure which would protect that interest.⁹⁶ A defendant's Sixth Amendment right to a fair trial is a compelling interest which, if prejudiced by publicity, may justify closure of jury selection process proceedings. Closure has been upheld on a finding that potential jurors may not be frank in their responses if they believe their responses will be reported.⁹⁷ When the jury selection process is closed, the judge may balance the public's right to know by allowing disclosure of the transcript at a later date after the jury has been selected and sequestered.⁹⁸

Trial judges who deny the press access to jury selection proceedings or transcripts often cite the jurors' privacy as a compelling interest which requires closure. Reviewing courts have, however, ruled that concern for jurors' privacy, alone, does not warrant complete closure of jury selection proceedings or denial of access to transcripts. Courts addressing the issue of juror privacy may find that intensely personal information about a juror can be protected by conducting the selection process as to sensitive questions in closed proceedings in the judge's chambers or by redacting the sensitive information from the transcript, but allowing the press access to the rest of the proceeding or transcript.⁹⁹

Question: Does the press have a right of access to juror questionnaires?

Answer: Juror questionnaires are completed by prospective jurors to assist the court and counsel in the jury selection process. The questionnaires are part of the jury selection process and thus are subject to the presumption in favor of open trials. Courts which have reviewed challenges by the press to trial courts' withholding of juror questionnaires have applied the *Press-Enterprise I* test to determine the issue of access. Reviewing courts have upheld limited restrictions on access when faced with specific findings that certain sensitive information must be redacted in order to

⁹⁴ *Watters v. Maryland*, 612 A.2d 1288 (Md. 1992); see also *Campbell-Eley v. State*, 756 So.2d 1043 (Fla. Dist. Ct. App. 2000).

⁹⁵ 612 A.2d at 1293 n.5.

⁹⁶ *Press-Enterprise I*, 464 U.S. at 510.

⁹⁷ See, e.g., *United States v. King*, 140 F.3d 76, 81 (2d Cir. 1998); *In re South Carolina Press Ass'n.*, 946 F.2d 1037, 1042-43 (1991).

⁹⁸ *Press-Enterprise I*, 464 U.S. at 512; *In re Greensboro News Co.*, 727 F.2d 1320, 1326 (4th Cir), cert. denied, 469 U.S. 829 (1984).

⁹⁹ *Press-Enterprise I*, 464 U.S. at 512-13.

protect the privacy rights of the jurors and to allow them to serve without fear of intimidation or harassment.¹⁰⁰

Question: Do reporters have the right to see a list of jurors' names and addresses?

Answer: The right to attend jury selection is regarded as a separate question from the right to know and to publish the individual identities of the jury pool or the jury panel, whether as names or faces.

In federal court, each district must draw up a plan for random jury selection. Title 28 of the U.S. Code requires the clerk of the court to seal records used in the jury selection process, so the list of possible jurors may not be disclosed before the jury is selected and seated, unless disclosure would otherwise be consistent with the district plan.¹⁰¹ After the jury is seated, most (but not all) district court plans permit the clerk to release of the names and addresses of jurors, as well as the names and addresses of those not seated.¹⁰² Practice will vary in the state courts as well.

It is clear that courts may protect the identity of jurors from threatened harm to their personal safety. Courts may withhold jurors' names and addresses upon particularized findings that the "interests of justice so require."¹⁰³ Decisions to deny access to jurors' names and addresses have been upheld when there is a real threat of jury tampering or where the safety of jurors is at issue. The mere desire of jurors to maintain privacy is not enough to support a decision to withhold names and addresses,¹⁰⁴ but courts have allowed the information to be withheld for a short period of time after the trial in order for jurors to be able to catch up on business and family matters delayed by the trial.¹⁰⁵ Ultimately, ". . . the public's long-term interest in maintaining an open judicial process must prevail in the balance. In a democracy, criminal trials should not, as a rule, be decided by anonymous persons."¹⁰⁶ Thus, when jurors' identities are not released, it is important for reporters and their lawyers to know whether anonymity is required by local rule or is the result of an individual decision made in the particular case.

Courts look with disfavor upon prior restraint of speech; thus only in exceedingly rare circumstances will courts uphold an order forbidding the press from publishing names and addresses of jurors already in hand. Courts apply the familiar test to determine whether restraint on publication is necessary to preserve a defendant's right to fair trial: (a) the nature and extent of news coverage; (b) whether other measures would be likely to mitigate the effects of

¹⁰⁰ See, e.g., *Newsday v. Goodman*, 552 N.Y.S. 2d 965 (App. Div. 1990); *Leshner Communications, Inc. v. Contra Costa Superior Ct.*, 274 Cal. Rptr. 154 (Ct. App. 1990).

¹⁰¹ 28 U.S.C. 1867(f).

¹⁰² *In re Baltimore Sun Co.*, 841 F.2d 74, 75 (4th Cir. 1988).

¹⁰³ See, e.g., 28 U.S.C. § 1863(b)(7) (authorizing local jury plans to permit district judges to withhold juror names when "the interests of justice so require").

¹⁰⁴ *In re Globe Newspaper Co.*, 920 F.2d 88 (1st Cir. 1990); *In re Baltimore Sun Co.*, 841 F.2d 74; *In re Indianapolis Newspapers, Inc.*, 837 F. Supp. 956 (S.D.Ind. 1992); *United States v. Butt*, 753 F. Supp. 44 (D. Mass. 1990) (identities of jurors may be withheld for seven days after trial without particularized findings).

¹⁰⁵ *Id.*; *United States v. Espy*, 31 F. Supp. 2d 1 (D.D.C. 1998).

¹⁰⁶ *In re Globe Newspaper Co.*, 920 F.2d at 91.

unrestrained publicity; and (c) whether a restraining order would prevent the threatened harm.¹⁰⁷ A trial court's order forbidding news media from publishing the names and addresses was upheld in a case where the penalty phase of a conviction was retried before another jury. The court, noting that this was an exceptional case, balanced the press's and public's First Amendment rights with the defendant's Sixth Amendment right to a fair trial and concluded that the restraint was necessary.¹⁰⁸

Question: Does the press have the right to sketch or photograph jurors?

Answer: Judges have some discretion to restrict the press from sketching or photographing jury members. One court has held that the "strict scrutiny" test of *Press-Enterprise I* need not be applied to decisions to prohibit sketches or photographs of jurors because such a prohibition "does not impinge on the fundamental news dissemination process of the press nor does it limit fair comment on any of the proceedings."¹⁰⁹ A full discussion of the right to use video and still cameras in courtrooms follows in the discussion of Standard 8-3.8.

Question: Do reporters have the right to interview jurors after a verdict?

Answer: There are at least two answers to this question. The privacy of on-going juror deliberations is indisputable. Yet lawyers consistently question jurors after a trial in order to evaluate their case presentations, save where courts preclude doing so. Reporters consistently interview jurors and occasionally uncover some disturbing influences on jurors, as when a black juror in Washington, D.C., refused to vote to convict a black man of a crime regardless of the evidence¹¹⁰, or when a law student-juror in a libel case instructed his fellow jurors erroneously on the "actual malice" standard.¹¹¹ However, judges sometimes feel there is a need to protect jurors in high publicity criminal cases.

Some courts and legislatures have experimented with rulings and rules to limit what jurors can say, and what the media may ask and publish as to jury deliberations. However, broad orders prohibiting the media from contacting and interviewing jurors after trial are rarely upheld.¹¹² The sanctity of secret jury deliberations allows courts some discretion as to whether and how jurors may be interviewed after trial. Therefore, while a court's broad order prohibiting jurors from

¹⁰⁷ *Nebraska Press Ass'n. v. Stuart*, 427 US 539 (1976) (restraint on broadcasting confessions or admissions of accused); *State, ex rel. N.M. Press Ass'n. v. Kaufman*, 648 P.2d 300 (N.M. 1982); *Des Moines Register & Tribune v. Osmundson*, 248 N.W.2d 493 (Iowa 1976).

¹⁰⁸ *Schuster v. Bowen*, 347 F. Supp. 319 (D.Nev. 1972).

¹⁰⁹ *Tsokolas v. Purtill*, 756 F.Supp. 89 (D.Conn. 1991); see also, *KPNX Broadcasting Co. v. Arizona Superior Ct.*, 459 U.S. 1302, 1308 (1982).

¹¹⁰ *Racial Politics in the Jury Room*, LEGAL TIMES OF WASH., Apr. 23, 1990, at 1.

¹¹¹ *Inside the Jury Room at The Washington Post Libel Trial*. AMERICAN LAW., November 1982, at 1; *Tavoulaareas v. The Washington Post*, AMERICAN LAW, March 1989, at 168.

¹¹² *Journal Pub. Co. v. Mechem*, 801 F.2d 1233 (10th Cir. 1986); *In re Express-News Corp.*, 695 F.2d 807 (5th Cir. 1982); *United States v. Sherman*, 581 F.2d 1358 (9th Cir. 1978).

discussing the case with anyone will generally not be upheld,¹¹³ an order prohibiting jurors from discussing what influenced another juror in voting for a particular verdict has been upheld.¹¹⁴

In one instance, the United States Court of Appeals for the Third Circuit curtailed a district judge's attempt to shield jurors from reporters' post-trial questions. Following a high publicity case, the judge wrote a letter to the jurors telling them that while they could speak to anyone they wished about the case, they could also refuse requests to discuss it. The letter explained at length why the judge believed that the jurors should not speak to anyone about jury deliberations and invited jurors to contact him if anyone pressured them to give an interview. The judge issued an order forbidding persistent requests for interviews and forbidding jurors from discussing any vote but their own.¹¹⁵

On appeal, the Third Circuit upheld the jurors' right to decline requests for interviews. However, it also declared that the judge's prohibitions against "repeated" juror contacts and against any attempt to continue an interview after the juror expressed a desire to conclude it could not "stand in the absence of any finding by the court that harassing or intrusive interviews were occurring or intended."¹¹⁶ Finally, the court upheld the portions of the judge's order forbidding inquiry into votes, statements, or opinions of other jurors, noting that such a restriction is appropriate in certain specific cases.¹¹⁷ The court did indicate it was distressed over the "lack of explanation" for the imposition of such restrictions in the case before it, and directed that in the future district judges should make findings in the record before making such a ruling.¹¹⁸

Question: May the press be prevented from publishing the identities of an anonymous jury?

Answer: While upholding an anonymous jury order and denial of post-verdict access to juror information and interviews, the United States Court of Appeals for the Fifth Circuit reversed a district judge's order that the media "not attempt to circumvent this Court's ruling preserving the jury's anonymity."¹¹⁹ Citing the *Nebraska Press* treatment of prior restraints, "with considerable doubt" the court concluded that "the noncircumvention orders were unconstitutional insofar as they interdicted the press from independent investigation and reporting about the jury based on facts from sources other than confidential court records, court personnel, or trial participants."¹²⁰ The court expressed its doubt about the result, asking "Can it be that the First Amendment prevents a court from fully enforcing orders it strongly believes necessary to protect jurors, the jury system, and the defendant's fair trial rights? Since the Supreme Court has not in recent history upheld any limit on the press, we decline to be the first court to do so."¹²¹

¹¹³ *In re Dallas Morning News Co.*, 887 F.2d 1084 (5th Cir. 1989) (unpublished).

¹¹⁴ *United States v. Faulkner*, 17 MEDIA L. RPTR. 1444 (D. Tex. 1989).

¹¹⁵ *United States v. Antar*, 839 F. Supp. 293 (D.N.J. 1993).

¹¹⁶ *United States v. Antar*, 38 F. 3d at 1364.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *United States v. Brown*, 250 F.3d 907 (5th Cir. 2001).

¹²⁰ *Id.* at 24.

¹²¹ *Id.* at 25.

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ABA Standard 8-3.6

The following Standards govern the conduct of a criminal trial when problems relating to the dissemination of potentially prejudicial materials are raised:

(a) Whenever possible, in view of the notoriety of a case or the number or conduct of news media representatives present at any judicial proceeding, the court should ensure the preservation of decorum by instructing those representatives and others as to the permissible use of the courtroom and other facilities of the court, the assignment of seats to news media representatives on an equitable basis, and other matters that may affect the conduct of the proceeding.

(b) Sequestration of the jury should be ordered if it is determined that the case is of such notoriety or the issues are of such a nature that, in the absence of sequestration, there is a substantial likelihood that highly prejudicial matters will come to the attention of the jurors. Either party may move for sequestration of the jury at the beginning of the trial or at any time during the course of the trial, and, in appropriate circumstances, the court may order sequestration on its own motion. Whenever sequestration is ordered, the court, in advising the jury of the decision, should not disclose which party requested it. As an alternative to sequestration in cases where there is a significant threat of juror intimidation during or after the trial, the court may consider an order withholding public disclosure of jurors' names and addresses as long as that information is not otherwise required by law to be a matter of public record.

(c) Whenever appropriate, in light of the issues in the case or the notoriety of the case, the court should instruct jurors and court personnel not to make extrajudicial statements relating to the case or the issues in the case for dissemination by any means of public communication during the course of the trial and should caution parties and witnesses concerning the dangers of making an extra-judicial statement during trial. The court may also order sequestration of witnesses prior to their appearance, when it appears likely that in the absence of sequestration they will be exposed to extrajudicial reports that may influence their testimony.

(d) In any case that appears likely to be of significant public interest, an admonition in substantially the following form should be given before the end of the first day if the jury is not sequestered:

During the time you serve on this jury, there may appear in the newspapers or on radio or television reports concerning this case, and you may be tempted to read, listen to, or watch them. Please do not do so. Due process of law requires that the evidence to be considered by you in reaching your verdict meet certain Standards;

for example, a witness may testify about events personally seen or heard but not about matters told to the witness by others. Also, witnesses must be sworn to tell the truth and must be subject to cross-examination. News reports about the case are not subject to these Standards, and if you read, listen to, or watch these reports, you may be exposed to information which unduly favors one side and to which the other side is unable to respond. In fairness to both sides, therefore, it is essential that you comply with this instruction.

If the process of selecting a jury is a lengthy one, such an admonition should also be given to each juror as he or she is selected. At the end of each day of the trial, and at other recess periods if the court deems necessary, an admonition in substantially the following form should be given:

For the reasons stated earlier in the trial, I must remind you not to read, or listen to, or watch any news reports concerning this case while you are serving on this jury.

(e) If it is determined that material disseminated during the trial goes beyond the record on which the case is to be submitted to the jury and raises serious questions of possible prejudice, the court may on its own motion or should on the motion of either party question each juror, out of the presence of the others, about exposure to that material. The examination should take place in the presence of counsel, and an accurate record of the examination should be kept. The Standard for excusing a juror who is challenged on the basis of such exposure should be the same as the Standard of acceptability recommended in Standard 8-3.5(b), except that a juror who has seen or heard reports of potentially prejudicial material should be excused if reference to the material in question at the trial itself would have required a mistrial to be declared.

Question: How should a trial judge reconcile conflicting pressures when there is unusual or extensive coverage of a crime, its investigation, and prosecution?

Answer: Judges usually recognize that news reports of a defendant's name in connection with the charges do not by themselves constitute prejudicial publicity. However, when reports of a crime are extensive and cause the defendant to contend that publicity may have a negative impact on jury selection and jury deliberations, judges have several traditional options by which to offset outside influences.

Almost every trial judge uses instructions admonishing jurors to leave behind their prejudices and earlier impressions when they are seated on the jury. Jurors are asked to consider only what they hear in the courtroom. As Standard 8-3.6 suggests, jurors may be asked not to read the newspapers, not to tune into broadcast news reports, and not to discuss the trial with friends or family. To emphasize the seriousness of this order, judges may ask jurors on a daily basis whether there has been any breach, and may repeat the order to avoid discussions and media reports. All of this can be done without nighttime sequestration, which is costly, inconvenient, and sometimes unfair to jury members.

However, some judges have tried to keep the identity of jurors secret, especially when the fear of publicity is coupled with the fear of intimidation from defendants and their associates or supporters. The practice has been employed in several high-publicity cases, such as the World Trade Center bombing case, the prosecution of John Gotti in New York, and the federal civil rights suit against the four police officers in the Rodney King case.¹²² Aside from the access problems discussed above, defendants' lawyers complain that the juror anonymity creates the implication that there is something to fear from the particular defendant, thus the defendant must be guilty of the crime charges. Reacting to that criticism, the presiding judge of the Los Cerritos Municipal court in Bellflower, California, ordered that the name of every juror in every case be withheld.¹²³ In Texas, the state criminal procedure code was amended to require the court and the prosecutor to withhold information about jurors unless good cause could be shown for granting access.¹²⁴ However, at this writing, juror anonymity has been honored more in publicity than in use. There seem to have been relatively few such cases the federal courts.¹²⁵

¹²² *When Jurors Dare Not Speak Their Name*, LEGAL TIMES, May 9, 1994, at 1.

¹²³ *Courthouse Makes Blanket Use of Juror Anonymity*, L.A. TIMES, July 25, 1994, at A1.

¹²⁴ TEX. CODE CRIM. PROC. ANN art. 35.29 (2000). But see, art. 1.24 (2000): "The proceedings and trials in all courts shall be public."

¹²⁵ *When Jurors Dare Not Speak Their Name*, LEGAL TIMES, May 9, 1994, at 1.

**THE REPORTER'S KEY:
ACCESS TO THE JUDICIAL PROCESS
SECTION I. The Standards and Criminal Justice Reporting
C. Conduct of Judicial Proceedings in Criminal Cases**

ABA Standard 8-3.7

On motion of the defendant, a verdict of guilty in any criminal case shall be set aside and a new trial granted whenever, on the basis of competent evidence, the court finds a substantial likelihood that the vote of one or more jurors was influenced by exposure to prejudicial matter relating to the defendant or to the case itself that was not part of the trial record on which the case was submitted to the jury. Nothing in this recommendation is intended to affect the rules or procedures in any jurisdiction concerning the impeachment of jury verdicts.

Question: Do we know to what degree jurors are influenced by intense news reports?

Answer: Several studies reached an opposite conclusion after examining the impact of news reports on the verdicts and deliberations of jurors.¹²⁶ Likewise, there is considerable variation in the way courts react to appeals of convictions based on prejudicial publicity. See, Discussion of Standard 3.5 above.

¹²⁶ See e.g., Frasca, *Estimating the Occurrence of Trials Prejudiced by Press Coverage*, 72 JUDICATURE 162 (1988); Swift, *Restraints on Defense Publicity in Criminal Cases*, 64 UTAH L. REV. 45, 77 (1984); Freedman and Starwood, *Prior Restraints on Freedom of Expression by Defendants and Defense Attorneys' Ratio Decidendi v. Obiter Dictum*, 29 STAN. L. REV. 607 (1977).

**THE REPORTER'S KEY:
ACCESS TO THE JUDICIAL PROCESS
SECTION I. The Standards and Criminal Justice Reporting
C. Conduct of Judicial Proceedings in Criminal Cases**

ABA Standard 8-3.8

A judge should prohibit broadcasting, televising, recording, or photographing in courtrooms and areas immediately adjacent thereto during sessions of court, or recesses between sessions, except that under rules prescribed by a supervising appellate court or other appropriate authority, a judge may authorize broadcasting, televising, recording and photographing of judicial proceedings in courtrooms and areas immediately adjacent thereto consistent with the right to a fair trial and subject to express conditions, limitations, and guidelines which allow such coverage in a manner that will be unobtrusive, will not distract or otherwise adversely affect witnesses or other trial participants, and will not otherwise interfere with the administration of justice.

Question: Is there a constitutional right to photograph or televise court proceedings?

Answer: No. Until recently, no court had ever held that the constitutional right of access includes the right to photograph or televise trials. In fact, in *Estes v. Texas*,¹²⁷ the Supreme Court came within one vote of holding that televising trials inherently deprives a defendant of due process. That case involved the notorious criminal trial of Billy Sol Estes in Texas in the early 1960s where bulky and noisy camera equipment inside the courtroom (and numerous roving cameras outside of it) contributed to a circus-like atmosphere that the Supreme Court held deprived Estes of the due process of law guaranteed by the Fourteenth Amendment. The *Estes* court acknowledged that future technological developments may alter its perspective, and was read by many not as a general prohibition on camera in the courtroom, but more as a judgment limited to the unusual facts of that case. The *Estes* holding was later clarified by *Chandler v. Florida*,¹²⁸ which held that states may choose to prevent photographing or televising trials, so long as it is not done so in such a way as to deprive defendants of their right to a fair trial.

In early 2000, three separate New York trial courts acted on the *Estes* court's acknowledgement that future technological developments could change the analysis in striking down a New York law banning broadcasting of court proceedings on the grounds that the statute violated the First Amendment.¹²⁹ On appeal however, the most recent of the decisions was reversed. The appeals court stated, "the right of access... is not the right to broadcast the proceedings" and ruled that the media intervenors did not have standing to intervene in that court.¹³⁰ The issue is not yet settled. In September 2001, Court TV filed a suit against New York's governor and other officials once again challenging the statute's constitutionality.

¹²⁷ 381 U.S. 532, 617 (1965) (Brennan, J., dissenting).

¹²⁸ 449 U.S. 560 (1981).

¹²⁹ *People v. Boss*, 701 N.Y.S.2d 891 (N.Y. Sup. Ct. 2000); *Coleman v. O'Shea*, 707 N.Y.S.2d 308 (N.Y. Sup. Ct. 2000); *People v. Santiago*, 712 N.Y.S.2d 244 (N.Y. Sup. Ct. 2000).

¹³⁰ *In re Santiago*, 273 A.D.2d 813 (N.Y. App. Div. 2000).

Question: What is the source of rules on camera access?

Answer: As camera access rules have been fashioned in quite distinct ways, so the process of review and revision varies among the states. In most states such rules are considered procedural, and are promulgated by the state's court system, sometimes upon petition from outside the system. In a few states such policies are considered substantive, and for that or other reasons are shaped by the legislature. The Radio-Television News Directors Association publishes an encyclopedia of state policies every year in a volume called *Camera and Microphone Coverage of the Courts: A Survey of States*.

Question: If cameras are allowed, may a trial judge prescribe how photo coverage is used or insist on a role in the editing process?

Answer: While the precise issue has not been litigated, courts would not likely allow trial judges such authority -- even though such judges have broad discretion whether or not to allow coverage at all. Any such effort would probably violate the firm prohibition upon prior restraints of the press. In *Miami Herald Publishing Co. v. Tornillo*,¹³¹ where a state had attempted to require a newspaper to print an editorial reply, the Supreme Court observed that the choice of material comprising a newspaper involves editorial judgment, and concluded that “[i]t has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press.”¹³²

Question: Do federal courts allow camera coverage inside courtrooms?

Answer: Generally no.

District Courts. Cameras have never been allowed in federal criminal trials pursuant to Federal Rule of Criminal Procedure 53. This rule has survived at least one constitutional challenge.¹³³

Cameras are also currently prohibited in civil trials in federal court, but this was not always the case. During the early 1990s, the Federal Judicial Conference sponsored an experiment that allowed the televising of civil proceedings in certain district and circuit courts. At the conclusion of the experiment, the Judicial Conference's staff recommended that federal courts allow televising of civil cases. This proposal was not enacted. Thus, federal policy currently prohibits the televising of civil, as well as criminal, trials. In 1998, the Conference voted to expand the prohibition to include federal trials held in state courthouses and state trials held in federal courthouses.

Circuit Courts of Appeal. In 1996 the Judicial Conference vested each of the 13 federal circuits with the authority to decide for itself whether to allow oral arguments before their courts to be televised. Since then, the Second Circuit Court of Appeals has voted to allow televising of all

¹³¹ 418 U.S. 241 (1974).

¹³² *Id.* at 258.

¹³³ *United States v. Hastings*, 695 F.2d 1278, reh'g denied, 704 F.2d 559 (11th Cir.), cert. denied, 461 U.S. 931 (1983).

arguments not involving "criminal matters."¹³⁴ By contrast, the Fifth Circuit Court of Appeals¹³⁵ has banned broadcasting entirely. The rules of the Seventh Circuit prohibit broadcasting from any point in or around the courtrooms without permission of the court.¹³⁶ The other circuits do not seem to have enacted policies at this time. Reporters should consult the local rules of their federal circuit for guidance.

Supreme Court. The Supreme Court does not allow taping or photography during oral argument. Testifying before Congress two years ago, Justice Souter stated, "The day you see a camera coming into our courtroom, it's going to roll over my dead body."¹³⁷

Question: Do state courts allow television and photographic coverage inside the courtroom?

Answer: The overwhelming majority of states allow some form of camera access. According to Ronald L. Goldfarb,¹³⁸ 44 states allowed some form of television access as of 1998. That number had risen to 48 by 2000, with 35 states allowing cameras in criminal trials.¹³⁹ However, since the specifics of access are determined by the policy of individual states, there is a considerable variation in the degree of access afforded by the various states.

Most states place some limits on the use of cameras in the courtroom. As of 1998, 31 states required the consent of the trial judge, while others required notice. Some states required neither the consent of nor notice to the trial judge. Some states allow the defendant to prevent his or her trials from being televised. Some states categorically ban access in certain types of cases such as family law, trade secrets, and sexual assaults.¹⁴⁰

On the other hand, Florida represents the nation's pacesetter when it comes to camera access. In 1979 the Florida Supreme Court noted that it was impressed with the new generation of electronic cameras, which were significantly smaller and less noisy than their predecessors. The court entered an order¹⁴¹ which established a strong presumption of access for television, radio microphones, and still cameras, premised on Florida's commitment to open government and the principle that "what transpires in an open courtroom is public property."¹⁴² "Ventilating the judicial process," said the court, "will enhance the image of the Florida bench and bar, and therefore elevate public confidence in the system."¹⁴³

¹³⁴ 2D CIR. APP. Guidelines of the Court of Appeals for the Second Circuit Concerning Cameras in the Courtroom.

¹³⁵ 5TH CIR. R 34.7.

¹³⁶ 7TH CIR. R 55.

¹³⁷ Natl. L.J., April 22, 1996, at A16.

¹³⁸ TV OR NOT TV: TELEVISION, JUSTICE, AND THE COURTS (New York University Press 1998).

¹³⁹ *Santiago*, 712 N.Y.S2d at 246 n.5.

¹⁴⁰ Jon Shure, *Televised Trials: Let's Turn On Those Cameras*, N.J. LAW, May 4, 1998, at 3.

¹⁴¹ *In re Post-Newsweek Stations Fla.*, 370 So. 2d 764 (Fla. 1979).

¹⁴² *Id.* at 780.

¹⁴³ *Id.* at 781.

The Florida rule does not require advance permission, nor does it provide for closing an entire proceeding to the camera. Instead, the presumption of access may be overcome only on the following basis:

The presiding judge may exclude electronic media coverage of a particular participant only upon a finding that such coverage will have a substantial effect upon the particular individual which would be qualitatively different from the effect on members of the public in general and such effect will be qualitatively different from coverage by other types of media.¹⁴⁴

The Florida Supreme Court elaborated on this rule in a case where a prisoner-witness claimed to fear retaliation from other inmates if his testimony were televised.¹⁴⁵ The court stressed the judge's duty to ensure the dispute over camera coverage did not unnecessarily delay the trial¹⁴⁶, but held that notices of a witness' challenge to the camera's presence must be given, and a hearing held to allow the media to contest the challenge.¹⁴⁷

It must be stressed that Florida's policy is the exception rather than the rule. Since rules vary greatly from state to state, reporters should consult their state's policy for guidance.

Question: What are the arguments against allowing cameras inside of the courtroom, and how have those arguments played out in practice?

Answer: Experience with such access rules has been generally quite positive. Certain concerns have been expressed in every state: physical disruption of proceedings, distraction of participants, showboating by lawyers, intimidation of witnesses, subtle pressures on juror decisions, and the like. Most studies have shown little or no basis for such fears. The most reliable data come from the states themselves, in proportion to the duration and degree of camera access. In Florida, where thousands of proceedings have been televised, the general absence of controversy, and the rare expression of concern in appellate decisions, suggests that the concerns that accompany photographic coverage at the outset diminish rapidly if the access is broad enough.

High profile trials obviously test the limits of camera access. The O.J. Simpson trial certainly contributed to a backlash against cameras in the courtroom, although a thoughtful observer has argued that the "overdose of coverage" and "obnoxious behavior" that occurred in that case took place outside of the courtroom.¹⁴⁸ Firm administration of the trial environment by the judge is essential, with or without a camera in the courtroom. In *Chandler v. Florida*, the Supreme Court observed that "[o]ver the years, courts have developed a range of curative devices to prevent publicity about a trial from infecting jury deliberations."¹⁴⁹ Dozens of high-visibility cases across the nation have been extensively televised. Pooling arrangements, where the signal from a single

¹⁴⁴ *Id.* at 779.

¹⁴⁵ *Florida v. Palm Beach Newspapers, Inc.*, 395 So. 2d 544 (Fla. 1981).

¹⁴⁶ *Id.* at 549.

¹⁴⁷ *Id.* at n.1.

¹⁴⁸ Shure, *Televised Trials*.

¹⁴⁹ 449 U.S. at 574.

camera is shared by many news entities, have unquestionably diminished courtroom congestion and disruption in such cases.

**THE REPORTER'S KEY:
ACCESS TO THE JUDICIAL PROCESS
SECTION II. Access to Civil Proceedings**

Question: Do the ABA Fair Trial and Free Press Standards apply to civil trials?

Answer: No. The Standards do not address the issues surrounding access to civil proceedings and court documents, although many of the justifications for guaranteeing public access to criminal trials apply equally in the civil court context. In fact, the justifications for access may be stronger in the civil setting because the Sixth Amendment guarantee of a fair trial on criminal charges does not weigh against the access arguments.

Question: Is there a constitutional right of access to civil trials and proceedings?

Answer: Courts that have addressed that issue have uniformly recognized a constitutional right of access to civil trials, although the Supreme Court has never directly addressed the issue. In *Richmond Newspapers, Inc. v. Virginia*,¹⁵⁰ the justices recognized the public importance of access to civil proceedings and assumed or implied that there was some guaranteed right of access.¹⁵¹

A clear majority of the federal circuits, following the logic of *Richmond Newspapers*, have recognized a right of access to civil trials arising under the First Amendment.¹⁵² For example, the Second Circuit held that the First Amendment guarantees the public and the press a right of access to civil proceedings because such access “enhances the quality and safeguards the integrity of the fact-finding process, fosters an appearance of fairness and heightens public respect for the judicial process.”¹⁵³ The Seventh Circuit recognized a constitutional right of access because public monitoring of the courts ensures “quality, honesty and respect for our legal system.”¹⁵⁴

In addition to providing access to civil trials, courts have extended the constitutional right of access to other proceedings that affect or determine the outcome of civil cases. Courts have recognized a public right of access to preliminary injunction hearings,¹⁵⁵ as well as pretrial and post-trial hearings in class action suits.¹⁵⁶ With less consistency, and generally later in time, state

¹⁵⁰ 448 U.S. 555 (1980).

¹⁵¹ *Id.* at 580 n.17 (plurality opinion of Burger, C.J.); *Id.* at 596 (Brennan J., concurring); *Id.* at 599 (Stewart, J., concurring).

¹⁵² See, e.g., *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165 (6th Cir.), cert. denied, 465 U.S. 1100 (1984).

¹⁵³ *Westmoreland v. CBS, Inc.*, 752 F.2d 16, 23 (2d Cir. 1984) (citations omitted), cert. denied sub nom., *CNN, Inc. v. United States Dist. Ct.*, 472 U.S. 1017, 1308 (1985).

¹⁵⁴ *In re Continental Ill. Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984).

¹⁵⁵ *Publicker*, 733 F.2d at 1073.

¹⁵⁶ *Newman v. Graddick*, 696 F.2d 796 (11th Cir. 1983).

courts have also recognized the importance of openness and access to civil proceedings, absent a compelling reason for closure such as litigation over a trade secret.¹⁵⁷

Question: Does the constitutional right of access extend to civil court documents and records?

Answer: Once again, the Supreme Court has never decided the issue. However, a number of federal appeals courts have held that the right of access to civil court documents is a necessary corollary to the First Amendment right of access to the proceedings themselves.¹⁵⁸ As one court stated, “Access means more than the ability to attend open court proceedings; it also encompasses the right of the public to inspect and to copy judicial records.”¹⁵⁹

Question: Is there also a common-law right of access to civil courts?

Answer: Yes. In *Nixon v. Warner Communications, Inc.*, the Supreme Court noted that “the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.”¹⁶⁰ Many federal and state courts have recognized a common-law right of access based on the democratic tradition that all government institutions must be answerable to the public.¹⁶¹

The common-law right of access extends to all materials on which a court relies in determining the litigants' substantive rights.¹⁶² Courts have applied the common-law presumption of access to documents filed in connection with a motion for summary judgment,¹⁶³ exhibits admitted at trial,¹⁶⁴ settlement documents and post-settlement motions,¹⁶⁵ and the transcript of a hearing for a preliminary injunction.¹⁶⁶

However, while the scope of the common-law privilege of access is quite sweeping, the substantive scope it offers is more limited than what is provided by the First Amendment. Under the common-law, the presumption of access to judicial records can be overcome by a showing

¹⁵⁷ See, for a very recent and exhaustive analysis of these issues, the California Supreme Court's ruling in *NBC Subsidiary (KNBC-TV) v. Superior Court*, 20 Cal. 4th 1178, 980 P.2d 337 (1999).

¹⁵⁸ See *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249 (4th Cir. 1988); *In re Continental Ill. Sec. Litig.*, 732 F.2d at 1308; *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1177-79.

¹⁵⁹ *Littlejohn v. BIC Corp.*, 851 F.2d 673, 678 (3d Cir. 1988).

¹⁶⁰ 435 U.S. 589, 597 (1978).

¹⁶¹ See, e.g., *Stone v. University of Md. Med. Sys. Corp.*, 855 F.2d 178 (4th Cir. 1988); *FTC v. Standard Fin. Management Corp.*, 830 F.2d 404 (1st Cir. 1987); *Barron v. Florida Freedom Newspapers*, 531 So. 2d 113 (Fla. 1988); *Pantos v. City & County of S.F.*, 198 Cal. Rptr. 489 (Ct. App. 1984).

¹⁶² *Anderson v. Cryovac, Inc.*, 805 F.2d 1 (1st Cir. 1986).

¹⁶³ *Philippines v. Westinghouse*, 949 F.2d 653 (3d Cir. 1991).

¹⁶⁴ *Littlejohn*, 851 F.2d at 678-80.

¹⁶⁵ *Bank of America Nat'l. Trust & Savings Ass'n. v. Hotel Rittenhouse Ass'n.*, 800 F.2d 339, 343-46 (3d Cir. 1986).

¹⁶⁶ *Publicker Indus. Inc.*, 733 F.2d at 1072.

that some “overriding” interest outweighs the public's interest in access.¹⁶⁷ Furthermore, if a trial court denies access to court documents, the decision is only reviewed for an abuse of discretion.¹⁶⁸ Thus, the common-law right of access can almost always be used to argue for access to civil courts, but an opposing party is also more likely to be able to deny access to the public. Several states have enacted statutes mandating the common-law right of access.¹⁶⁹

Question: What standard is used by civil courts to determine whether court documents should be available to the public?

Answer: The standard used by civil courts to determine whether to allow public access to court documents or records depends on whether the First Amendment or the common-law right of access is applied. Under the First Amendment, the court can only deny access if there is a compelling government interest and the restriction is “narrowly tailored to serve that interest.”¹⁷⁰ Under the common law, however, there is only a presumption of access to judicial records.¹⁷¹ This presumption can be overcome if there is some “significant” or “overriding” interest that heavily outweighs the public interest in access.¹⁷² The burden is on the party seeking to overcome the presumption of access to show that some interest justifies closure.

Question: Is there a right of access to discovery materials filed in civil cases?

Answer: The right of access to discovery documents varies greatly, depending on the nature of the materials and the purpose for which they are being used.

The clearest consensus is on denial of access to discovery materials that have not been filed with the court. As one court stated, “[D]iscovery ... which is ordinarily conducted in private, stands on a different footing than does a motion filed by a party seeking action by the court.”¹⁷³ At least one court has noted that the nonfiling of discovery denies the public the right it would otherwise have had to freely inspect the materials.¹⁷⁴ As most courts decide not to require the filing of discovery materials, access becomes a moot point.

In the federal courts, there is a well-established presumptive right of access to all materials filed with pretrial motions that do not relate to the discovery process.¹⁷⁵ This presumption extends to

¹⁶⁷ See, e.g., *Bank of America*, 800 F.2d at 344.

¹⁶⁸ *Nixon*, 435 U.S. at 597-99.

¹⁶⁹ See, e.g., ARIZ. ST. S. CT. R 123; CAL. R. OF CT. Div. I R 243.1; GA. SUPER. CT. R 21; VA. CODE ANN. § 17.1-208 (2001). See for interpretation and application, *Atlanta Journal v. Long*, 369 S.E.2d 755 (Ga. 1988).

¹⁷⁰ See, e.g., *Rushford*, 846 F.2d at 253; *Publicker*, 733 F.2d at 1070.

¹⁷¹ *Nixon*, 435 U.S. at 597-98.

¹⁷² See, e.g., *Rushford*, 846 F.2d at 253; *Bank of America*, 800 F.2d at 344.

¹⁷³ *Id.* at 343.

¹⁷⁴ *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 755, 788-89 (1ST Cir. 1998), *cert. denied*, 488 U.S. 1030 (1989); see also *United States ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1519 (10th Cir. 1996); *United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1520 (9th Cir. 1995).

¹⁷⁵ *Bank of America*, 800 F.2d at 343; c.f. *Philippines*, 949 F.2d at 661.

sealed discovery documents that are filed in support of these motions.¹⁷⁶ Some courts have held that there is a presumptive right of access to materials submitted with discovery motions such as motions to amend protective orders and motions to compel discovery.¹⁷⁷

The Third Circuit held that there is no right of access to documents submitted with discovery motions.¹⁷⁸ Likewise, the First Circuit held that the common-law right of access does not extend to documents submitted with discovery motions because “there is no tradition of public access to discovery, and requiring a trial court to scrutinize carefully public claims of access would be incongruous with the goals of the discovery process.”¹⁷⁹

Such decisions as these reflect the Supreme Court's view of the discovery process in *Seattle Times Co. v. Rhinehart*¹⁸⁰: “[P]retrial depositions and interrogatories are not public components of a civil trial.”¹⁸¹ “Discovery rarely takes place in public. Depositions are scheduled at times and places most convenient to those involved. Interrogatories are answered in private.”¹⁸²

Rather than debating the need for a common-law right of access to discovery materials, some courts have relied on the Federal Rules of Civil Procedure.¹⁸³ The rules create a presumption of access to all papers, including discovery, that are filed with the court.¹⁸⁴ The rules also provide that a district court can, for good cause, grant a protective order requiring that “a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way.”¹⁸⁵ However, the rules emphasize that “courts have not given trade secrets automatic and complete immunity against disclosure, but have in each case weighed their claim to privacy against the need for disclosure.”¹⁸⁶

Several courts have held that the “good cause” requirement of Rule 26(c) means that pretrial discovery must take place in public unless “compelling reasons” exist for denying access.¹⁸⁷ Other courts have emphasized that a district judge's protective order must be supported by current evidence that dissemination of the materials in question would cause competitive harm.¹⁸⁸

¹⁷⁶ *Leucadia v. Applied Extrusion Tech., Inc.*, 998 F.2d 157 (3d Cir. 1993).

¹⁷⁷ *Mokhiber v. Davis*, 537 A.2d 1100 (D.C. App. 1988).

¹⁷⁸ *Leucadia*, 998 F.2d at 164.

¹⁷⁹ *Anderson*, 805 F.2d at 13.

¹⁸⁰ 467 U.S. 20 (1984).

¹⁸¹ *Id.* at 33.

¹⁸² *Id.* at n.19.

¹⁸³ *United States ex rel. Stinson v. Prudential Ins. Co.*, 944 F.2d 1149 (3d Cir. 1991); *In re Agent Orange Prod. Liab. Litig.*, 821 F.2d 139 (2d Cir.), cert. denied sub nom., *Dow Chem. Co. v. Ryan*, 484 U.S. 953 (1987).

¹⁸⁴ FED. R. CIV. P. 5(d).

¹⁸⁵ FED. R. CIV. P. 26(c)(7).

¹⁸⁶ FED. R. CIV. P. 26(c), 1970 Cmt. C-Protective Orders.

¹⁸⁷ See, e.g., *Public Citizen*, 858 F.2d at 778-80; *AT & T Co. v. Grady*, 594 F.2d 594, 598 (7th Cir. 1978), cert. denied, 440 U.S. 971 (1979).

¹⁸⁸ *Philippines*, 949 F.2d at 663.

At this writing, Florida and Louisiana are the only states that have applied a statute in a way that deals with the problems of a secret discovery process. A 1991 Florida statute prohibits courts from entering any order that has the effect of concealing a “public hazard,” which is defined as “any device, instrument, person, procedure, product ... that has caused and is likely to cause injury.”¹⁸⁹ The statute explicitly states that agreements which conceal information concerning public hazards are “void” and “contrary public policy.”¹⁹⁰ Any “substantially affected person, including ... representatives of news media, has standing to contest an order” sealing such information.¹⁹¹ One Florida court has applied this statute in a way that includes discovery.¹⁹² Louisiana has since adopted a similar statute.¹⁹³ Since rules are likely to vary state by state through a combination of statutory law, case law, and rules of court, reporters are advised to investigate the policy of their state.

Question: Is there a right of access to sealed settlement agreements in civil cases?

Answer: The increasing emphasis on the right of public access has resulted in new laws in several states to require access to settlement agreements under some circumstances. For example, Florida¹⁹⁴ and North Carolina¹⁹⁵ by statute, and Texas by Supreme Court rule,¹⁹⁶ have barred the issuance of court orders that would permit concealment of settlement agreements involving the state or its agencies.

The federal and other state courts have extended the common law right of access to settlement and post-settlement documents, reasoning that “[o]nce a settlement is filed in the district court, it becomes a judicial record, and subject to the access accorded such records.”¹⁹⁷ The Second Circuit held that since a settlement agreement provides the basis for concluding the adjudication, “only the most compelling reasons can justify the total foreclosure of public and professional scrutiny.”¹⁹⁸

Courts have been cautious about restricting access to settlement agreements when it might conceal information that is in the public interest. For example, a confidentiality agreement between a cigarette manufacturer and the FTC was found to be insufficient justification for sealing access to documents at the trial court level in *Brown & Williamson Tobacco Corp. v. FTC*.¹⁹⁹ The court held that the public had a “strong interest” in obtaining the information in the court record because “the subject of this litigation potentially involves the health of citizens who

¹⁸⁹ FLA. STAT. ANN. § 69.081(2)-(3) (2000).

¹⁹⁰ FLA. STAT. ANN. § 69.081(4) (2000).

¹⁹¹ FLA. STAT. ANN. § 69.081(6) (2000).

¹⁹² *AC and S, Inc. v. Askaw*, 597 So. 2d 895 (Fla. Ct. App. 1992).

¹⁹³ LA. CODE CIV. PROC. art. 1426 (2000).

¹⁹⁴ FLA. STAT. ANN. § 69.081(8)(a) (2000).

¹⁹⁵ N.C. GEN. STAT. § 132-1.3 (2000).

¹⁹⁶ TEX. R. CIV. P. ANN. 76a.

¹⁹⁷ *Bank of America*, 800 F.2d at 345; see also *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982), cert. denied sub nom., *City Trust v. Joy*, 460 U.S. 1051 (1983); *In re Estates of Zimmer*, 442 N.W.2d 578 (Wis. Ct. App. 1989).

¹⁹⁸ *Joy*, 692 F.2d at 894.

¹⁹⁹ 710 F.2d at 1180.

have an interest in knowing the accurate ‘tar’ and nicotine content of the various brands of cigarettes on the market.”²⁰⁰

The *Brown & Williamson* case seems to be, however, one of many instances in which the parties have attempted to bar access to settlement agreements in order to prevent potentially embarrassing information from being released to the public. For example, Honda was able to restrict access to volumes of materials relating to all-terrain vehicle litigation to all but potential litigants because the documents were “trade secrets”.²⁰¹ After the Exxon Valdez oil spill, environmental groups had to fight to resist secrecy orders in both state and federal litigation.²⁰²

In addition to the compelling public policy justifications for recognizing a right of access to such agreements, the extensive involvement of the court in the settlement process provides a strong basis for public disclosure. In *Bank of America Nat’l. Trust & Savings Ass’n. v. Hotel Rittenhouse Ass’n.*, the court noted that the parties could have avoided public access by filing a voluntary stipulation of dismissal; instead they filed a settlement agreement because they anticipated that they would disagree and might later want recourse to the court.²⁰³ The court stated, “As in the cases involving trial rulings or evidence admitted, the court’s approval of a settlement or action on a motion are matters which the public has a right to know about and evaluate.”²⁰⁴

Courts have also been sensitive to the interests weighing against public disclosure of settlement agreements. As the *Bank of America* court conceded, there is a “strong public interest” in encouraging the settlement of private litigation because such settlements “save the parties the substantial cost of litigation and conserve the limited resources of the judiciary.”²⁰⁵ Another oft-cited rationale for sealing settlement agreements is the protection of trade secrets because companies can suffer irreparable harm if proprietary information is released to the public.²⁰⁶ However, courts have been careful to scrutinize such claims because a corporation will have the greatest incentive to seal prejudicial information, which is precisely where the public’s need to know is greatest.²⁰⁷

²⁰⁰ *Id.*

²⁰¹ *American Honda Motor Co. v. Dibrell*, 736 S.W.2d 257 (Tex. App. 1987).

²⁰² *In re Exxon Valdez Oil Spill Litig.*, 17 MEDIA L. RPTR. 1509 (D. Ala. 1990).

²⁰³ 800 F.2d at 344.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ See, e.g., FED. R. CIV. P. 26(c); *Publicker Indus. Inc.*, 733 F.2d at 1071.

²⁰⁷ See, e.g., *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1180.

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