

Constitutional Gag Orders Restricting Trial Participants' Speech: A Guide for Ohio Trial Judges

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According to the United States Supreme Court, the press coverage surrounding a certain murder trial was a media carnival.¹ Among the more "flagrant episodes"² of media attention, nine days before trial a local editorial reported about a defense counsel poll concerning the defendant's guilt or innocence. The Court concluded that the poll constituted "mass jury tampering."³ A later radio debate accused the defense counsel of blocking justice and asserted that the defendant must be guilty because he hired a prominent criminal attorney.⁴ On the first day of the trial, the jury viewed the murder scene while hundreds of reporters, camera operators, and onlookers swarmed the area. While one representative of the news media observed the jury's inspection of the scene, a local newspaper rented a helicopter to fly over the scene and photograph jurors.⁵ Also during the trial, a radio commentator likened the defendant to a perjurer and compared the trial to Alger Hiss' confrontation with Whittaker Chambers.⁶ Other reports characterized the defendant as a "Dr. Jeckyl and Mr. Hyde" character⁷ and reported that the arrestee's mistress and mother of his child was arrested for robbery.⁸ In the words of the Supreme Court, "[b]edlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom."⁹ Whereas these media shenanigans might resemble recent media exploitation of the O.J. Simpson trial,¹⁰ this media circus arose from a 1954 Cleveland murder¹¹ case

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¹ See *Sheppard v. Maxwell*, 384 U.S. 333, 358 (1966).

² *Id.* at 345.

³ *Id.* at 345-46.

⁴ *Id.* at 346.

⁵ *Id.* at 347.

⁶ *Id.*

⁷ *Id.* at 348.

⁸ *Id.*

⁹ *Id.* at 355.

¹⁰ See, e.g., Joel Achenbach, *Shocking Images and Muffled Sobs After All the Hype, a Process of Grisly Detail Begins*, WASH. POST, Jan. 25, 1995, at A1, A15 (noting that the O.J. Simpson trial is surrounded by "hype and sensationalism" and "media scrutiny"); Rita Ciolli, *Trial of the Century: Rage, Blood, Sex and Celebrity is the Formula, and O.J. Simpson's Case Isn't the First to Capture the Rapt Attention of America*, CLEVELAND PLAIN

that created trial judges' duty to protect criminal defendants' Sixth Amendment rights.¹²

I. INTRODUCTION

Since this Supreme Court decision, trial courts struggling to fulfill this duty have experimented with various forms of gag orders. Some cases restrain the press from reporting upon certain aspects of the proceedings;¹³ other cases order trial participants, witnesses, court personnel, and law enforcement officers not to speak to the press about the proceedings.¹⁴ As judges have

DEALER, Jan. 22, 1995, at 1C (describing other trials in the twentieth century touted as the "trial of the century"); Ellen Goodman, *O.J. in the Morning, O.J. in the Evening, O.J. at Supper Time*, CHI. TRIB., Jan. 24, 1995, at 15 (stating that the author wants to be on the O.J. Simpson jury because "the jury only has to live with this gawdforsaken trial eight hours a day."); Howard Kurtz, *They've Got Him Covered: TV Examines Simpson from Every Angle*, WASH. POST, Jan. 27, 1995, at C1 (stating that "[t]here's no end in sight" for the television coverage of the O.J. Simpson trial); David Margolick, *Not Guilty: The Overview; Jury Clears Simpson in Double Murder; Spellbound Nation Divides on Verdict*, N.Y. TIMES, October 4, 1995; Haya El Nasser & Sally Ann Stewart, *Verdict Revealed Today*, USA TODAY, October 3, 1995 at 1A; Howard Rosenberg, *The O.J. Simpson Murder Trial: Time to Pull Plug on TV's Trivial Pursuit*, L.A. TIMES, Jan. 27, 1995, at A7 (instructing the media covering the trial to "[s]top it, already, with the live cameras and minute-by-minute score-keeping, the hasty, instant verdicts that treat this fetus of a trial as if it were ending instead of just beginning," and telling reporters covering the trial to "put away [their] Ouija boards, too."); *TV Spots*, NEWSDAY, Jan. 25, 1995, at B64 (stating that the low of the trial coverage was a television debate concerning the trial attorneys' fashion styles); Isabel Wilkerson, *Whose Side to Take: Women, Outrage and the Verdict on O.J. Simpson*, N.Y. TIMES, October 8, 1995, at 4:1.

¹¹ *Sheppard*, 384 U.S. at 335-36.

¹² *See id.* at 362 ("Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance [between the First Amendment and the Sixth Amendment rights] is never weighed against the accused."). The Sixth Amendment states in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed" U.S. CONST. amend. VI.

¹³ *See, e.g., State ex rel. National Broadcasting Co. v. Lake County Court of Common Pleas*, 556 N.E.2d 1120 (Ohio 1990).

¹⁴ *See, e.g., KPNX Broadcasting Co. v. Arizona Superior Court*, 459 U.S. 1302 (1982) (Rehnquist, Circuit Justice); *News-Journal Corp. v. Foxman*, 939 F.2d 1499 (11th Cir. 1991); *Levine v. United States Dist. Court*, 764 F.2d 590 (9th Cir. 1985), *cert. denied*, 476 U.S. 1158 (1986); *see also* Michael E. Swartz, Note, *Trial Participant Speech Restrictions: Gagging First Amendment Rights*, 90 COLUM. L. REV. 1411, 1412 n.12

issued these orders, the media and trial participants have challenged the orders as unconstitutional infringements upon their First Amendment rights to free speech and free press.¹⁵ Defendants' Sixth Amendment rights to a fair trial conflict with the press' and public's rights to free speech and free press.¹⁶ Whereas judicial resolutions of these First Amendment challenges have applied various standards and have reached seemingly inconsistent rulings,¹⁷ Ohio trial judges in criminal cases¹⁸ can formulate constitutional gag orders if they are

(1990). See generally Robert E. Drechsel, *An Alternative View of Media-Judiciary Relations: What the Non-Legal Evidence Suggests about the Fair Trial-Free Press Issue*, 18 HOFSTRA L. REV. 1 (1989) (analyzing social scientific research on the conflict between the rights of the media and the duties of the judiciary).

¹⁵ See sources cited *supra* note 14. The First Amendment states in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." U.S. CONST. amend. I.

¹⁶ *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 547 (1976). The Supreme Court noted that this conflict between the First and Sixth Amendments must have been anticipated by the Framers of the Constitution; yet, these Framers did not resolve the conflict:

The problems presented by this case are almost as old as the Republic. Neither in the Constitution nor in contemporaneous writings do we find that the conflict between these two important rights was anticipated, yet it is inconceivable that the authors of the Constitution were unaware of the potential conflicts between the right to an unbiased jury and the guarantee of freedom of the press.

Id. Because the Framers did not choose one amendment to prevail over the other, the Court also refused to assign such priority. *Id.* at 561; *cf. Sheppard*, 384 U.S. at 362. *But see Dow Jones & Co. v. Simon*, 842 F.2d 603, 609 (2d Cir. 1988) ("When the exercise of free press rights actually tramples upon Sixth Amendment rights, the former must nonetheless yield to the latter.").

¹⁷ In *Nebraska Press*, the Court noted how difficult it is for trial court judges to determine what information may be reported upon and what information may become prejudicial:

The dilemma posed underscores how difficult it is for trial judges to predict what information will in fact undermine the impartiality of jurors, and the difficulty of drafting an order that will effectively keep prejudicial information from prospective jurors. When a restrictive order is sought, a court can anticipate only part of what will develop that may injure the accused. But information not so obviously prejudicial may emerge, and what may properly be published in these "gray zone" circumstances may not violate the restrictive order and yet be prejudicial.

Nebraska Press, 427 U.S. at 566-67. This difficulty on the part of trial judges may lead to varying formulations of gag orders and seemingly inconsistent decisions.

guided by U.S. Supreme Court decisions, federal circuit court decisions, and disciplinary and court rules.

Part II outlines some United States Supreme Court decisions holding that trial judges have an affirmative duty to protect defendants' Sixth Amendment rights. While protecting these rights, trial judges generally may not close the courtroom, yet these rights are sufficiently protected even when jury members know about extensive media coverage. Part III discusses the U.S. Supreme Court's decision in *Nebraska Press Ass'n v. Stuart*¹⁹ and concludes that trial judges generally may not issue a gag order directly restraining what the press may report. As an alternative to a gag order directed at the press, Part IV advocates an order restricting what trial participants may say to the press. Such orders are warranted only when trial participant speech poses a substantial likelihood of materially prejudicing the fairness of the proceeding. Federal cases and court and disciplinary rules provide Ohio trial judges with further bases on which to support such an order. Part V then cautions Ohio trial judges that constitutional orders must not be overbroad and must be based on explicit findings that reject other alternatives.²⁰ By carefully following the requirements

¹⁸ This Note focuses on Ohio decisions in criminal cases as these decisions may be guided by federal case decisions. The Note examines only criminal cases in which the First and Sixth Amendment rights conflict. Whereas the Sixth Amendment guarantees an "impartial jury," U.S. CONST. amend. VI, in civil cases, the Seventh Amendment guarantees only a "trial by jury." U.S. CONST. amend. VII; *see also* Wachsman v. Disciplinary Counsel, No. C-2-90-335, 1991 U.S. Dist. LEXIS 20899, at *28-30 (S.D. Ohio Sept. 30, 1991) (holding that Ohio's DR 7-107(G) concerning attorney out of court statements in civil proceedings is unconstitutionally overbroad and vague). Consequently, restrictions on attorney speech in criminal cases may be more warranted than restrictions on speech in civil proceedings. Differences between criminal and civil proceedings that may justify different treatment of attorney speech include the longer length of civil proceedings and the more extensive discovery available in civil litigation. *Id.* at *28-29. Civil proceedings also may involve significant social issues that should not be hidden from the public, and the attorney in the civil proceeding often is the only person who has knowledge regarding the need for government action or correction. *Id.* at *29. A civil action attorney also may be the only person who realizes the significance of the knowledge he or she possesses. *Id.*

¹⁹ 427 U.S. 539 (1976). In *Nebraska Press*, the Court distinguished between prior restraints on the press, such as an injunction not to publish information about a case, and restraints on persons involved in the case concerning their comments to the press. *Id.* at 564; *see also* *In re T.R.*, 556 N.E.2d 439, 453-54 (Ohio) (upholding a gag order in an Ohio juvenile case and citing *Central S.C. Chapter, Soc'y of Professional Journalists, Sigma Delta Chi v. Martin*, 431 F. Supp. 1182 (D. S.C.), *aff'd*, 556 F.2d 706 (4th Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978)), *cert. denied*, 498 U.S. 958 (1990).

²⁰ *See Nebraska Press*, 427 U.S. at 562 (in which part of the three-pronged test for restraints on the press states that the trial judge must consider "whether other measures

for gag orders set forth in this Note, Ohio trial judges may constitutionally restrict trial participants' speech and affirmatively protect defendants' rights to impartial juries.

II. SOME U.S. SUPREME COURT HISTORY INTERPRETING SIXTH AMENDMENT RIGHTS

A. Sheppard v. Maxwell—*Trial Judges' Obligation to Preserve Sixth Amendment Rights*

The conflict between the First and Sixth Amendments in the context of gag orders in criminal cases stems from the Supreme Court's decision in *Sheppard v. Maxwell*,²¹ holding that trial judges have "an affirmative duty to ensure the impartiality of jurors" and to protect defendants' fair trial rights.²² In *Sheppard*, the trial judge refused to issue a gag order or to explicitly instruct the jury as to the dangers of prejudice inherent in excessive media coverage.²³ Instead, the judge merely told the jury to "pay no attention whatever to that type of scavenging . . . [and to] confine [them]selves to this courtroom, if [they] please."²⁴ The Supreme Court, however, held that freedom of speech and press may not divert the trial from the "very purpose of a court system . . . to adjudicate controversies . . . in the calmness and solemnity of the courtroom according to legal procedures."²⁵

This suggestion that the Sixth Amendment right to a fair trial may outweigh the First Amendment right to free speech and free press, coupled

would be likely to mitigate the effects of unrestrained pretrial publicity"); *State ex rel. National Broadcasting Co. v. Court of Common Pleas*, 556 N.E.2d 1120, 1125 (Ohio 1990) ("a gag order cannot issue unless 'specific, on the record findings' are made demonstrating that a gag order is 'essential to preserve higher values and is narrowly tailored to serve that interest'" (quoting *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 13-14 (1986))); *State ex rel. Cosmos Broadcasting Corp. v. Brown*, 471 N.E.2d 874, 882 (Ohio Ct. App. 1984) ("The trial court must first exhaust all other *less restrictive measures* to determine if a fair trial can be had before denying [media] coverage. . . .").

²¹ 384 U.S. 333 (1966); *see also* Sheldon Portman, *The Defense of Fair Trial from Sheppard to Nebraska Press Association: Benign Neglect to Affirmative Action and Beyond*, 29 STAN. L. REV. 393, 403 (1977) ("*Sheppard v. Maxwell*, perhaps more than any other case, exemplifies the conflict between free press and fair trial.>").

²² *Sheppard*, 384 U.S. at 362-63; *see also* Swartz, *supra* note 14, at 1418.

²³ *Sheppard*, 384 U.S. at 353.

²⁴ *Id.* at 348.

²⁵ *Id.* at 350-51 (quoting *Cox v. Louisiana*, 379 U.S. 559, 583 (1965) (Black, J., dissenting)).

with some dicta of the *Sheppard* Court, provided later trial judges and reviewing courts with a justification to restrict trial participants' and counsels' speech. When the Court chastised the trial judge for not making "some effort to control the release of leads, information, and gossip to the press by police officers, witnesses, and the counsel for both sides,"²⁶ it prompted later judges to uphold some restrictions on trial participants' speech. The *Sheppard* trial judge's failure to restrict such leaks allowed inaccurate information to be disclosed and led to "groundless rumors and confusion."²⁷ Because the *Sheppard* Court noted that effective control of counsel "might well have prevented the divulgence of inaccurate information, rumors, and accusations that made up much of the inflammatory publicity,"²⁸ later Supreme Court and federal circuit court decisions concluded that carefully constructed gag orders can be constitutional.²⁹

B. Trial Judges May Not Close the Courtroom to the Press and Public

Although the *Sheppard* Court instructed trial judges that they have a duty to control excessive media attention in order to preserve defendants' Sixth Amendment rights,³⁰ trial judges generally may not close the courtroom³¹ to the press and public when exercising that duty.³² In *Richmond Newspapers*,

²⁶ *Id.* at 359.

²⁷ *Id.*

²⁸ *Id.* at 361; see also Portman, *supra* note 21, at 406, stating:

[T]he United States Supreme Court confirmed the authority and the responsibility of trial judges to take affirmative action to protect a defendant's right to a fair trial. Authorized means include not only the control of activities in and about the courtroom during trial but, more significantly, the release of information by police, lawyers, witnesses, defendants, and court officials.

Id.

²⁹ See, e.g., *Gentile v. State Bar*, 501 U.S. 1030, 1076 (1991) (Rehnquist, C.J., majority opinion); *KPNX Broadcasting Co. v. Arizona Superior Court*, 459 U.S. 1302, 1307 (1982) (Rehnquist, Circuit Justice); *Dow Jones & Co. v. Simon*, 842 F.2d 603, 608 (2d Cir. 1988), *cert. denied*, 488 U.S. 946 (1988); *In re Russel*, 726 F.2d 1007, 1010 (4th Cir.), *cert. denied*, 469 U.S. 837 (1984); see also text accompanying notes 76-144, *infra*.

³⁰ *Sheppard*, 384 U.S. at 362-63; see also Swartz, *supra* note 14 and accompanying text.

³¹ The trial judge may close a preliminary hearing only if such actions are essential to preserve "higher values." *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 13 (1986) (quoting *Press-Enterprise v. Superior Court*, 464 U.S. 501, 510 (1984)). Such "higher values" may include the substantial probability that the right to a fair trial will be prejudiced and that closure would prevent such prejudice. *Id.* at 14.

³² See *infra* notes 34-40 and accompanying text.

Inc. v. Virginia,³³ the Court held that criminal trials are presumptively open.³⁴ Because the First Amendment guarantees persons the right to “receive information and ideas,”³⁵ it protects the rights of all people to attend criminal trials³⁶ and it prohibits trial judges in criminal cases from summarily closing the courtroom.³⁷ The trial court in *Richmond Newspapers* violated the press³⁸ and public’s First Amendment rights when it closed the courtroom without considering if any less drastic remedies could assure the defendant an impartial jury.³⁹ Before closing the trial, the trial court must find that an “overriding interest” requires closure,⁴⁰ and according to the *Richmond Newspapers* Court, possible contamination of the jury pool because of media statements is not a sufficiently “overriding interest.”⁴¹

C. An Impartial Jury Does Not Have to Be Ignorant of All Press Coverage

As the consideration of “overriding interests” in *Richmond Newspapers* suggests, although Ohio trial court judges have a duty under *Sheppard* to preserve defendants’ Sixth Amendment rights to an impartial jury,⁴² they need

³³ 448 U.S. 555 (1980).

³⁴ *Id.* at 573.

³⁵ *Id.* at 576 (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972)). The Open Courts Clause of the Ohio Constitution, OHIO CONST., art. I, §16, creates no greater right of public access to court proceedings than that found in the First Amendment of the United States Constitution. The Ohio Constitution creates a qualified right to proceedings that historically have been open to the public and in which public access plays a significant positive role. *In re T.R.*, 556 N.E.2d 439, 448 (Ohio 1990).

³⁶ The Sixth Circuit determined that the guarantee of open public proceedings in criminal trials includes voir dire. *In re Memphis Publishing Co.*, 887 F.2d 646, 648–49 (6th Cir. 1989). The right to access, however, does not extend to pretrial proceedings when trial participants agree that the pretrial proceedings should be closed to protect the defendant’s rights. *Gannett Co. v. DePasquale*, 443 U.S. 368, 394 (1979).

³⁷ *Richmond Newspapers*, 448 U.S. at 576.

³⁸ The press, however, does not have any greater right to access of criminal trials than does the public in general. Mark R. Stabile, Note, *Free Press-Fair Trial: Can They Be Reconciled in a Highly Publicized Criminal Case?*, 79 GEO. L.J. 337, 346 (1990) (citing *Nixon v. Warner Communications*, 435 U.S. 589, 609 (1978)).

³⁹ *Richmond Newspapers*, 448 U.S. at 580–81.

⁴⁰ *Id.* at 581.

⁴¹ *Id.*

⁴² See *supra* part II.A. In *Levine v. United States Dist. Court*, 764 F.2d 590 (9th Cir. 1985) (Beezer, J.), *cert. denied*, 476 U.S. 1158 (1986), Judge Beezer noted that the government, in contrast to the defendant in a criminal trial, does not have an absolute right

not assure that the jury pool is completely ignorant of the circumstances surrounding the trial. Defendants' rights to impartial juries do not require that the juries be oblivious to media coverage. Rather, impartial jurors in a criminal trial must base the trial's outcome on material admitted into evidence within a court proceeding.⁴³ Even when the news coverage is adverse to the defendant, extensive pretrial publicity does not necessarily lead to an unfair trial.⁴⁴ When considering extensive media attention in *Irvin v. Dowd*,⁴⁵ a murder and death penalty case, the Court stated:

In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case.⁴⁶

to an impartial jury: "[I]t is appropriate for the defense, within certain limits, to seek a jury partial to the defendant." *Id.* at 596-97. This ability of the defendant to seek a partial jury, however, is limited by the government's and public's legitimate expectations that the judicial system will produce fair results. *Id.*

⁴³ *Gentile v. State Bar*, 501 U.S. 1030, 1070 (1991). Alfredo Garcia explains in his article about the conflicts between the First and Sixth Amendments that the trial judge's *Sheppard* obligation to preserve an impartial jury under the Sixth Amendment often interferes with the press' and public's First Amendment interests:

[A] trial court . . . must attempt to stem the flow of prejudicial publicity from reaching the public in the hope that a jury untainted by the information may be selected. If that arrangement is not possible, then the judge must ensure that a jury exposed to such information is willing and able to set aside its preconceived notions and decide the case solely on the evidence presented. Though the first alternative is preferable since it enhances the probability of finding an impartial jury, it runs head-on into the freedom of the media to report on matters of public interest.

Alfredo Garcia, *Clash of the Titans: The Difficult Reconciliation of a Fair Trial and a Free Press in Modern American Society*, 32 SANTA CLARA L. REV. 1107, 1110 (1992).

⁴⁴ *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 554 (1976); see also Garcia, *supra* note 43 at 1121 ("Mere juror exposure to the defendant's prior convictions or to news accounts surrounding the crime with which he is charged do not automatically lead to prejudice") (construing *Murphy v. Florida*, 421 U.S. 794, 799 (1975)). See generally Benno C. Schmidt, Jr., *Nebraska Press Association: An Expansion of Freedom and Contraction Theory*, 29 STAN. L. REV. 431, 443-53 (1977) (discussing the effect of prejudicial media coverage on juries and citing social science studies).

⁴⁵ 366 U.S. 717 (1961).

⁴⁶ *Id.* at 722.

As a result, the Court held that a juror who may have a preconceived notion as to the defendant's guilt or innocence still properly may serve on the jury. As long as that juror can set aside his or her opinion and can render a verdict based only on evidence presented in court, the juror may be part of a constitutionally impartial jury.⁴⁷

Although eligible jurors may be aware of extensive media attention and may form preconceived opinions as to the defendant's guilt or innocence, the U.S. Supreme Court found some circumstances in which media attention so influenced the prospective jury pool that an impartial jury could not be seated. In *Irvin v. Dowd*,⁴⁸ for example, the Court vacated⁴⁹ a murder conviction in a habeas corpus proceeding because an examination of prospective jurors revealed that almost ninety percent of the questioned persons entertained some opinion as to the defendant's guilt.⁵⁰ Media coverage included comments from trial spectators stating their opinions that the defendant was guilty and that he "should be hanged."⁵¹ Similarly, in *Rideau v. Louisiana*,⁵² the Supreme Court held that the defendant in a murder and bank robbery case was denied due process when the trial judge refused to change the venue.⁵³ The venue in which the trial was conducted was exposed so repeatedly to a broadcast of the defendant's confession,⁵⁴ the Court determined that any subsequent court proceedings in the community would be a "hollow formality."⁵⁵

In a more recent case, however, the Court found that even in the face of extensive adverse media coverage, the passage of time between the pretrial media accounts and the actual trial still may permit an impartial jury to be seated. In *Patton v. Yount*,⁵⁶ the press disclosed the defendant's prior conviction, confession, and plea of temporary insanity, all facts inadmissible at trial. Voir dire questionnaires further revealed that nearly all the members of the jury pool heard about the case and that seventy-seven percent of the jurors

⁴⁷ *Id.* at 723.

⁴⁸ 366 U.S. 717 (1961).

⁴⁹ *Id.* at 729.

⁵⁰ *Id.* at 727.

⁵¹ *Id.*

⁵² 373 U.S. 723 (1963).

⁵³ *Id.* at 726.

⁵⁴ The day after the defendant was apprehended by the police, the interview containing the confession was broadcast to some 24,000 people in the community. The next day the rebroadcast of the interview reached approximately 53,000 people in the television audience, and the following day another broadcast was seen by about 29,000 people. The venue in which these broadcasts occurred and in which the trial was held contained only about 150,000 people. *Id.* at 724.

⁵⁵ *Id.* at 726.

⁵⁶ 467 U.S. 1025 (1984).

admitted that they had formulated an opinion as to the defendant's guilt.⁵⁷ Despite this seemingly prejudicial media coverage, the Court found that the four years that passed between the first trial and the second trial permitted an impartial jury in the second trial.⁵⁸

As Ohio trial judges therefore fulfill their obligations under *Sheppard* and craft gag orders restricting First Amendment rights, they must craft orders that allow juries to make impartial decisions based on evidence introduced at trial. To properly account for defendants' Sixth Amendment rights, gag orders need not prevent the jury pool from developing preconceived opinions as to guilt or innocence, and they need not restrain all press coverage of the trial.

III. NEBRASKA PRESS AND THE PROHIBITION AGAINST PRIOR RESTRAINTS ON THE MEDIA

If a gag order restrains all press coverage of the trial, the order is unconstitutional. According to the U.S. Supreme Court's decision in *Nebraska Press Ass'n v. Stuart*,⁵⁹ a gag order directly restraining what the press may report almost always violates the press' First Amendment rights.⁶⁰ The *Nebraska Press* trial court restrained newspapers, broadcasters, journalists, news media associations, and national newswire services from publishing or broadcasting confessions or admissions made by the accused and from publishing other facts "strongly implicative" of the accused.⁶¹ Holding that a

⁵⁷ *Id.* at 1029.

⁵⁸ *Id.* at 1033-35; see also *Mu'min v. Virginia*, 500 U.S. 415, 429 (1991). When distinguishing a capital murder case involving defendant *Mu'min* from *Irvin*, the Court noted that the *Mu'min* community was much larger—the community had a population of 182,537 and a part of the Washington, D.C. metropolitan area. *Id.* The Court also noted that the news accounts in the *Mu'min* case did not involve the same type of damaging information present in *Irvin*. The Court noted that much of the publicity was directed at the Department of Corrections and generally at the judicial system: "Any killing that ultimately results in a charge of capital murder will engender considerable media coverage . . ." *Id.*

⁵⁹ 427 U.S. 539 (1976).

⁶⁰ *Id.* at 570 (stating that barriers against prior restraints are high and the presumption exists against issuing prior restraints).

⁶¹ *Id.* at 543. The order applied only until the jury was impaneled, and it specifically prohibited petitioners from reporting about five subjects:

- (1) the existence or contents of a confession of the defendant, which had been introduced in open court at arraignment;
- (2) the existence of or nature of statements the defendant made to other persons;
- (3) the contents of a note the defendant wrote the night of the crime;
- (4) certain aspects of medical testimony at the preliminary hearing; and

presumption exists against issuing prior restraints directly regulating what the press may report,⁶² the majority opinion set forth criteria that trial courts must consider when determining whether to order a prior restraint.⁶³ Before issuing such a restraint, the trial judge must examine: (1) "the nature and extent of pretrial news coverage";⁶⁴ (2) "whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity";⁶⁵ and (3) "how effectively a restraining order would operate to prevent the threatened danger."⁶⁶ These criteria set forth the narrow circumstances under which a gag order directed at the press may be warranted. In fact, subsequent readings of *Nebraska Press* construe the case as a "virtual bar" to prior restraints on the media.⁶⁷ Because *Nebraska Press* instructs trial judges to consider the availability of other mitigating measures,⁶⁸ virtually no situations exist in which a direct restraint upon the press is the only feasible balance between Sixth and First Amendment rights.⁶⁹ When fashioning constitutional gag orders, Ohio trial judges must take guidance from the *Nebraska Press* decision and must avoid directly restraining the press from reporting on the proceedings.

A. Ohio Cases Support Nebraska Press

The Ohio Supreme Court echoed the *Nebraska Press* presumption against prior restraints in *State ex rel. Beacon Journal Publishing Co. v. Kainrad*⁷⁰ when it held that a court may directly restrain the press only if imperative and only if a court makes specific findings that all other measures would not ensure a fair trial.⁷¹ In *Kainrad*, the Ohio Supreme Court overturned an order

(5) the identity of the victims of the alleged sexual assault and the nature of the assault.

Id. at 543-44. The order also prohibited the press from reporting about the exact nature of the order. *Id.* at 544.

⁶² *Id.* at 570.

⁶³ *Id.* at 562.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Stabile, *supra* note 38, at 342 (citing LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 858-59 (2d ed. 1988)); see also James C. Goodale, *The Press Ungagged: The Practical Effect on Gag Order Litigation of Nebraska Press Association v. Stuart*, 29 STAN. L. REV. 497, 498 (1977) (arguing that the practical impact of the *Nebraska Press* case is to outlaw all prior restraints in the free press-fair trial area); *infra* text accompanying notes 70-73.

⁶⁸ *Nebraska Press*, 427 U.S. at 563-64.

⁶⁹ Stabile, *supra* note 38, at 342.

⁷⁰ 348 N.E.2d 695 (Ohio 1976).

⁷¹ *Id.* at 697.

directing all representatives of the press or news media “not to publish or report any statements made or testimony given in the trial”⁷² as a prior restraint directed at the press. By presuming that such a prior restraint was impermissible and by directing the trial judge to consider alternatives to a gag order against the press,⁷³ the Ohio decision parallels the reasoning and requirements set forth in *Nebraska Press*.

IV. CONTROLLING THE SPEECH OF TRIAL PARTICIPANTS AS AN ALTERNATIVE TO A PRIOR RESTRAINT AGAINST THE PRESS

Although Ohio trial judges in criminal cases must not issue gag orders directly restraining what the press may report, one of the alternatives judges consider under the *Nebraska Press* test⁷⁴ permits restraining trial participants’ speech to the press. Whereas gag orders directed toward the media presumptively are unconstitutional,⁷⁵ gag orders directed at trial participants, attorneys, court personnel, and witnesses may be upheld if the pretrial publicity obtained from the speech constitutes a “substantial likelihood of material prejudice.”⁷⁶

A. *Sheppard v. Maxwell Dicta*

Precedent for controlling what trial participants may say to the press stems from the *Sheppard v. Maxwell* dicta noting that effective control of the prosecution, the defendant, defense counsel, court personnel, and law

⁷² *Id.* at 699.

⁷³ *Id.* at 697.

⁷⁴ See *supra* text accompanying note 65.

⁷⁵ *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 570 (1976).

⁷⁶ *Gentile v. State Bar*, 501 U.S. 1030, 1075 (1991) (Rehnquist, C.J., majority opinion). The *Gentile* Court stated that the “rights [of litigants] may be subordinated to other interests that arise in [the courthouse] setting.” *Id.* at 1073 (citing *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32–33, n.18 (1984), which held that a newspaper defendant in a libel action could be restrained from publishing material about the plaintiffs when the newspaper gained access to the information through discovery associated with the trial); see also *Dow Jones & Co. v. Simon*, 842 F.2d 603, 610 (2d Cir.) (applying the reasonable likelihood standard that pretrial publicity will prejudice a fair trial), *cert. denied*, 488 U.S. 946 (1988). Mark Stabile suggests that gagging trial participants still allows the media to attend all trial proceedings and to report on them. Stabile, *supra* note 38, at 353; see also *Radio & Television News Ass’n v. United States Dist. Court*, 781 F.2d 1443, 1448 (9th Cir. 1986) (stating that “the press remains free to attend the trial and scrutinize the fairness of the proceedings” while upholding a gag order on trial participants).

enforcement officers would have prevented inaccurate leads and "groundless rumors and confusion."⁷⁷ The Court instructed the trial judge to take steps by rule or regulation that would protect the judicial process from outside prejudicial influences.⁷⁸ According to the Court, orders directed at trial participants are warranted because "[n]either prosecutors, counsel for the defense, the accused, witnesses, court staff nor enforcement officers . . . [are] permitted to frustrate [the court's] function."⁷⁹ Collaboration between counsel and the press concerning information that is reasonably likely to prevent a fair trial⁸⁰ is subject to the trial court's regulation and disciplinary measures.⁸¹

B. *The Ohio Supreme Court Distinguishes Between Prior Restraints and Gag Orders Directed at Trial Participants*

The distinction between regulating the press directly and regulating the speech of trial participants is also reflected in *In re T.R.*,⁸² an Ohio Supreme Court decision upholding a juvenile court judge's gag order directed at trial participants.⁸³ The Ohio Court stated that a gag order against trial participants is not a prior restraint on the press;⁸⁴ rather, this order merely limits the participants merely from conducting themselves in a manner that could jeopardize the fairness of the judicial process.⁸⁵ According to the Ohio court's

⁷⁷ *Sheppard v. Maxwell*, 384 U.S. 333, 359, 361 (1966); *see also supra* text accompanying notes 21–29.

⁷⁸ *Id.* at 363.

⁷⁹ *Id.*

⁸⁰ In *Gentile*, 501 U.S. at 1062, the Supreme Court applied a slightly stricter standard to prohibitions on certain extrajudicial attorney speech during a criminal trial. The Court held that gagging extrajudicial attorney speech was constitutional as long as such speech posed a "substantial likelihood of material prejudice" to the fairness of the trial. *Id.* at 1063. The Court also noted that most lower courts after the *Sheppard* decision applied a "reasonable likelihood of prejudicing a fair trial" test. *Id.* at 1067–68. Ten years after the *Sheppard* decision, the American Bar Association amended its guidelines so that extrajudicial attorney speech was regulated by a "clear and present danger" test, while the Model Rules of Professional Conduct drafted in the early 1980s applied a "substantial likelihood of material prejudice" test like that upheld in the *Gentile* case. *Id.* at 1068.

⁸¹ *Sheppard*, 384 U.S. at 363.

⁸² 556 N.E.2d 439 (Ohio), *cert. denied*, 498 U.S. 958 (1990).

⁸³ *Id.* at 455. The court found that the trial judge had properly issued a gag order, but ordered the trial judge to modify the order so that it would not be overbroad. *Id.* at 455–56.

⁸⁴ *Id.* at 453–54 (citing Central S.C. Chapter, Soc'y of Professional Journalists, *Sigma Delta Chi v. Martin*, 431 F. Supp. 1182 (D. S.C.), *aff'd*, 556 F.2d 706 (4th Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978)).

⁸⁵ *Id.* at 454–55.

reasoning, a gag order against trial participants is a less restrictive alternative to a prior restraint against the media.⁸⁶ Neither the public nor the press suffers any personal injury other than a general deprivation of a right to know.⁸⁷

C. Criticism of Gag Orders Against Trial Participants and Application of a Clear and Present Danger Analysis

Critics of this distinction drawn in *Sheppard* and in *In re T.R.* would apply heightened scrutiny to both types of gag orders—those directed at trial participants as well as those directed at the press. According to René L. Todd's Note concerning gag orders directed at trial participants, such an order provides the trial judge with a "back door for restricting communication about trial activities without incurring the prohibitive scrutiny of prior restraint doctrine."⁸⁸ According to Todd's reasoning, any order that reduces the total communication available to the media concerning the trial should be treated as a prior restraint and subject to a presumption against constitutionality.⁸⁹

Todd further argues that gag orders directed at trial participants delay speech concerning the trial and assure that information about the trial is not published at the time when it could be most helpful. If the "participant speech is delayed beyond the scope of public attention, the media may have little interest in obtaining and disseminating that information. . . ."⁹⁰ Consequently, the public may not become aware of important facts and interpretations of the trial; likewise the public loses "the opportunity to respond to perceived judicial misconduct when that misconduct [can] be most easily remedied."⁹¹

⁸⁶ *Id.* at 454 (citing *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 564 (1976)).

⁸⁷ *Id.* at 455; see also *State ex rel. Dayton Newspapers, Inc. v. Phillips*, 351 N.E.2d 127, 158 (Ohio 1976) (Celebrezze, J., dissenting) (stating that "[a]lthough the Constitution, except in limited circumstances, absolutely protects the right of the press to publish such information as it possesses, the protection afforded by the Constitution to the concomitant right of the press to gather news for the purpose of publication is not nearly so pervasive") (footnote omitted).

⁸⁸ René L. Todd, Note, *A Prior Restraint by Any Other Name: The Judicial Response to Media Challenges of Gag Orders Directed at Trial Participants*, 88 MICH. L. REV. 1171, 1172 (1990). Todd also claims that judges have a propensity to over regulate trial participant speech because it is relatively easy for them to issue a gag order; such orders require little judicial time or deliberation. *Id.* at 1185. This Note, however, illustrates that several considerations and steps must be made by a trial judge restraining trial participant speech in order for the gag order to withstand constitutional scrutiny.

⁸⁹ *Id.* at 1173.

⁹⁰ *Id.* at 1186.

⁹¹ *Id.*

Also applying a heightened scrutiny test to gag orders directed at trial participants, the Sixth Circuit in a civil case preceding the *Nebraska Press* decision held that such gag orders are unconstitutional prior restraints.⁹² In *CBS, Inc. v. Young*, the Sixth Circuit reasoned that because trial participant gag orders effectively remove from the press significant and meaningful sources of information, such orders are only warranted if the trial participant speech poses a "clear and present danger of a serious or imminent threat" to the fair administration of justice.⁹³ In the Sixth Circuit, gag orders directed at trial participants bear the same presumption of unconstitutionality as do prior restraints directed at the media.⁹⁴

The Sixth Circuit also applied this heightened scrutiny test in *United States v. Ford*,⁹⁵ a criminal case in which a gag order restricted the criminal defendant's speech.⁹⁶ Because the trial court prohibited Congressman Ford from making any extrajudicial statements that a "reasonable person would expect to be disseminated by means of public communication,"⁹⁷ except statements on the floor of the House of Representatives or statements that he is not guilty of the charges,⁹⁸ the order implicated the defendant's First Amendment right to respond to charges.⁹⁹ The order, however, did not implicate the defendant's Sixth Amendment right to an impartial jury. In this case, the common conflict between defendants' Sixth Amendment rights and

⁹² *CBS Inc. v. Young*, 522 F.2d 234, 241 (6th Cir. 1975). *But see* *Dow Jones & Co. v. Simon*, 842 F.2d 603, 608, 609 (2d Cir.) (rejecting the Sixth Circuit's analysis and holding that a "critical distinction" exists between orders directed at the press, a form of censorship that the First Amendment attempts to abolish, and orders directed at trial participants), *cert. denied*, 488 U.S. 946 (1988); *Levine v. United States Dist. Court*, 764 F.2d 590, 594 (9th Cir. 1985) (plurality opinion) (holding that an order directed against all parties, their representatives, and their attorneys "neither denies the media access to any criminal proceeding nor bars the media from disseminating any information that it obtains.").

⁹³ *CBS*, 522 F.2d at 239 (quoting *Wood v. Georgia*, 370 U.S. 375 (1962)).

⁹⁴ *Id.* at 241 (stating that "[a]ny restrictive order involving a prior restraint upon First Amendment freedoms is presumptively void and may be upheld only on the basis of a clear showing that an exercise of First Amendment rights will interfere with the rights of the parties to a fair trial."); *see also supra* text accompanying notes 59-69.

⁹⁵ 830 F.2d 596 (6th Cir. 1987) (plurality opinion).

⁹⁶ *Id.* at 600.

⁹⁷ *Id.* at 597.

⁹⁸ *Id.*

⁹⁹ *Id.* at 599 (stating that the "accused has a First Amendment right to reply publicly to the prosecutor's charges . . .") (quoting *Monroe H. Freedman & Janet Starwood, Prior Restraints on Freedom of Expression by Defendants and Defense Attorneys: Ratio Decidendi v. Obiter Dictum*, 29 *STAN. L. REV.* 607, 618 (1977)).

the press' and public's First Amendment rights did not exist; instead, the defendant's First Amendment rights conflicted with the government's and public's interest in seeing that the prosecution produces a fair result.¹⁰⁰ In the context of a trial participant order as applied to the criminal defendant,¹⁰¹ the court found that the defendant's extrajudicial speech did not constitute a "clear and present danger" of a serious and imminent threat to the administration of justice.¹⁰² As Judge Merritt's plurality opinion stated, "[t]rial judges, the government, the lawyers and the public must tolerate robust and at times acrimonious or even silly public debate about litigation."¹⁰³ As a result, in the Sixth Circuit, gag orders that restricted criminal defendants' statements to the press had to meet a strict clear and present danger standard.¹⁰⁴

D. *The U.S. Supreme Court Upholds Trial Participant Gag Orders in Gentile v. State Bar*

The Sixth Circuit decisions, however, predate the U.S. Supreme Court decision upholding a disciplinary rule prohibiting counsel in a criminal trial from making certain extrajudicial comments. After the Court's plurality decision in *Gentile v. State Bar*,¹⁰⁵ the Sixth Circuit's heightened scrutiny approach does not apply to most criminal-proceeding gag orders directed at counsel.¹⁰⁶ In *Gentile*, a plurality of the Court¹⁰⁷ held constitutional a Nevada

¹⁰⁰ *Id.* at 600 & n.1.

¹⁰¹ The court explicitly stated that it was not considering the authority of the judge to restrain the speech of lawyers, officers of the court, or witnesses. *Id.* at 597.

¹⁰² *Id.* at 600.

¹⁰³ *Id.* at 599.

¹⁰⁴ The court also held that the order was overbroad and that the trial judge did not specifically find that less burdensome alternatives such as voir dire, sequestration of the jury, and change of venue would have preserved the integrity of the judicial proceedings. *Id.* at 600.

¹⁰⁵ 501 U.S. 1030 (1991) The opinion of the Court was delivered by two justices in two separate opinions. "Kennedy, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts III and VI . . . Rehnquist, C.J., delivered the opinion of the Court with respect to Parts I and II." *Id.* at 1032.

¹⁰⁶ *See id.* at 1036 (Kennedy, J., opinion) ("A rule governing speech, even speech entitled to full constitutional protection, need not use the words 'clear and present danger' in order to pass constitutional muster."). Although this portion of Justice Kennedy's opinion was not part of the majority's opinion as to the constitutional test, all of the Justices appear to agree that a "clear and present danger" test is not warranted for gag orders directed at counsel in criminal trials. *See id.* at 1074 (Rehnquist, C.J., majority opinion).

¹⁰⁷ Chief Justice Rehnquist's opinion spoke for the majority as to the substantial likelihood of material prejudice standard because Justice O'Connor joined part of the

Supreme Court rule prohibiting attorneys from making "an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication" if the attorney "knows or reasonably should know that [the extrajudicial statement] will have a substantial likelihood of materially prejudicing an adjudicative proceeding."¹⁰⁸ The rule further provided attorneys with a safe harbor in which statements about the general nature of the defense, without elaboration, would not be subject to discipline.¹⁰⁹ After the indictment of the defendant whom Gentile was representing, Gentile held a press conference in which he attacked the indictment and accused the prosecutor and police department of misusing their authority.¹¹⁰ As a result of this exercise of "classic political speech,"¹¹¹ the state bar disciplined Gentile.

Justice Rehnquist's plurality opinion held that gag orders directed at criminal counsel can be constitutional when the prohibited speech is substantially likely to materially prejudice the fairness of the proceedings.¹¹² This standard provides a "constitutionally permissible balance between the First Amendment rights of attorneys . . . and the State's [and public's] interest[s] in fair trials."¹¹³ According to the Rehnquist plurality, such a gag order against attorneys was "expressly contemplated"¹¹⁴ by *Sheppard v. Maxwell*; attorney speech while representing a client may be governed by a less rigorous standard than that the *Nebraska Press* presumption of unconstitutionality.¹¹⁵ Following the guidance from *Gentile*, Ohio trial courts, constitutionally can issue a gag order restricting the speech of attorneys and other trial participants¹¹⁶ when

opinion. Justice O'Connor, however, also joined part of Justice Kennedy's opinion so that a majority of the Court also held that the safe harbor portion of the rule was void for vagueness.

¹⁰⁸ *Gentile*, 501 U.S. at 1033 (Kennedy, J., opinion).

¹⁰⁹ *Id.* A majority of the Court held this provision to be void for vagueness. *See infra* note 188.

¹¹⁰ *Id.* at 1033-34.

¹¹¹ *Id.* at 1034.

¹¹² *Id.* at 1063 (Rehnquist, C.J., majority opinion)..

¹¹³ *Id.* at 1075.

¹¹⁴ *Id.* at 1072.

¹¹⁵ *Id.* at 1072-73 (also citing *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), *cert. denied*, 467 U.S. 1230 (in which a newspaper defendant in a civil case was prohibited from publishing material about the plaintiffs which the newspaper gained through discovery)). In her concurrence with this part of the opinion, Justice O'Connor further stressed that attorneys, as "officers of the court," may be subject to ethical constraints that prevent them from speaking in an otherwise constitutionally protected manner. *Id.* at 1081-82 (O'Connor, J., concurring opinion).

¹¹⁶ Although *Gentile* deals explicitly with court rules governing attorney speech, the Rehnquist majority opinion occasionally speaks in terms of prohibiting trial participants in

such speech constitutes a substantial likelihood of materially prejudicing the criminal proceeding.

E. Lower Federal Courts Uphold Gag Orders Directed at Trial Participants

When balancing defendants' Sixth Amendment rights and the press' and public's First Amendment rights, Ohio trial judges also can garner some guidance from other federal decisions upholding restraints on trial participants' speech.¹¹⁷ For example, Justice Rehnquist, acting as a circuit judge, refused to stay a gag order in a murder case when the trial court prohibited court personnel, counsel, witnesses and jurors from speaking directly with the press.¹¹⁸ In *KPNX Broadcasting Co. v. Arizona Superior Court*, Justice Rehnquist approved a gag order¹¹⁹ in which a court-appointed liaison served as a "unified and singular source for the media."¹²⁰ Reasoning that *Sheppard v. Maxwell* justified such an order,¹²¹ Justice Rehnquist found that even the "mere potential for confusion . . . between trial participants and the press" warranted the gag order restricting trial participants' speech.¹²²

When an investigation into the affairs of a military contractor led to the indictment of a former Bronx borough president and Congressman Mario

general. In Rehnquist's opinion, he states that *Sheppard v. Maxwell* expressly contemplates restricting speech of "those participating before courts." *Id.* at 1072 (Rehnquist, C.J., majority opinion) (emphasis added). Other federal circuit court cases decided before and after *Gentile* also suggest that gag orders directed at all trial participants are warranted if such speech constitutes a substantial likelihood of materially prejudicing a criminal proceeding. *See infra* discussion accompanying notes 118-44.

¹¹⁷ In addition to the cases cited, *infra, see also* *News-Journal Corp. v. Foxman*, 939 F.2d 1499, 1505 (11th Cir. 1991) (holding that an order aimed at trial participants is not telling the media to do something or not to do something—thus, the court upheld an order prohibiting the "prosecution, counsel for the defense, witnesses, defendants, court personnel," and members of the local police and sheriff's department from releasing, making, or authorizing release of "extra judicial statements for dissemination by any means of public communication" when such statements relate to matters of the case).

¹¹⁸ *KPNX Broadcasting Co. v. Arizona Superior Court*, 459 U.S. 1302, 1307 (1982) (Rehnquist, Circuit Justice).

¹¹⁹ *Id.* at 1308.

¹²⁰ *Id.* at 1302-03.

¹²¹ *Id.* at 1306. Chief Justice Rehnquist, however, noted that the trial remained open to the public at all times and that the court issued no prior restraint directly restricting what the press may report of the proceedings in open court. *Id.* at 1302. *See supra* text accompanying notes 30-41 and 59-73.

¹²² *Id.* at 1307.

Biaggi, and when trial participants were suspected of leaking the identities and testimony of grand jury witnesses, the Second Circuit in *Dow Jones & Co. v. Simon*¹²³ also upheld a gag order against criminal defendants and their counsel.¹²⁴ Because the trial participants effectively made the secret grand jury proceedings a matter of public knowledge, the trial court prohibited them from making certain extrajudicial statements concerning the case.¹²⁵ The court prohibited such statements when they were made to persons associated with the media or when a reasonable person would expect such statements would be communicated to the media.¹²⁶ The order, however, did permit statements "without elaboration or characterization . . . concernin[g] the general nature of an allegation or defense," "information contained in the public record," and "the scheduling or result of any step in the judicial proceedings."¹²⁷ Finding that a "critical distinction"¹²⁸ existed between directly restraining the media and restricting the speech of trial participants, the Second Circuit held that maintaining the secrecy of grand jury proceedings warranted a restriction on trial participants' speech.¹²⁹ A gag order against trial participants was warranted because the speech was reasonably likely to prejudice a fair trial.¹³⁰

Similarly, in *In re Russe*¹³¹ the Fourth Circuit upheld an order prohibiting potential witnesses¹³² in a criminal case from making extrajudicial statements relating to their testimony.¹³³ When their communication was intended for dissemination by means of public communication,¹³⁴ potential witnesses could not discuss testimony that may be given in the case, any "parties or issues

¹²³ 842 F.2d 603, 604-05 (2d Cir. 1988), *cert. denied*, 488 U.S. 946 (1988).

¹²⁴ *Id.* at 612.

¹²⁵ *Id.* at 605.

¹²⁶ *Id.* at 606.

¹²⁷ *Id.*

¹²⁸ *Id.* at 608.

¹²⁹ *Id.* at 611.

¹³⁰ *Id.* at 611. Note that the reasonable likelihood standard is a more relaxed standard than that approved in *Gentile* when the Rehnquist majority endorsed a "substantial likelihood of material prejudice" standard. *Gentile*, 501 U.S. 1030, 1063 (1991) (Rehnquist, C.J., majority opinion). See also *infra* text accompanying notes 154-62.

¹³¹ 726 F.2d 1007 (4th Cir.), *cert. denied*, 469 U.S. 837 (1984).

¹³² "Potential witness" was defined as a person "who ha[d] been notified by the government or by defendants that he or she may be called to testify in th[e] case, or any person who ha[d] actually testified" in the case. *Id.* at 1009.

¹³³ *Id.* at 1008.

¹³⁴ Statements which were intended for dissemination by means of public communication expressly included extrajudicial statements "by a potential witness to any third party [when the] potential witness authorize[d], intend[ed], or expect[ed] the third party] to disseminate [the] statement by means of public communication." *Id.* at 1009.

[that] reasonably should [have been] expect[ed] to be involved in th[e] case, or the events leading up to [the case]."¹³⁵ Recognizing the difficulty trial judges encounter when trying to formulate a restrictive order, the Fourth Circuit concluded that *Sheppard v. Maxwell* and *Nebraska Press* warranted an order regulating witnesses' speech.¹³⁶

F. Ohio Courts Uphold Gag Orders Directed at Trial Participants

Ohio cases considering the conflict between Sixth Amendment and First Amendment rights provide further precedent for issuing gag orders that constitutionally restrain what trial participants may say.¹³⁷ The Ohio Supreme Court in *State ex rel. Cincinnati Post v. Court of Common Pleas*¹³⁸ distinguished between restricting the press and restricting the speech of persons involved in the judicial process.¹³⁹ Although the court found that an order prohibiting anyone from talking to the jurors about the case was overbroad,¹⁴⁰ the court explained that trial participants and officers of the court voluntarily assume a "special status."¹⁴¹ Trial participants "subject themselves to greater restraints on their communications than might constitutionally be applied to the general public,"¹⁴² and protecting the freedom of the press does not specifically

¹³⁵ *Id.* at 1008.

¹³⁶ *Id.* at 1010-11.

¹³⁷ In addition to the cases cited, *infra*, see also *State ex rel. National Broadcasting Co. v. Lake County Court of Common Pleas*, 556 N.E.2d 1120, 1125 (Ohio 1990) (stating that a trial court judge must hold a hearing to restrain the speech of court participants, and a gag order may issue only if the trial judge makes specific findings "demonstrating that . . . there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that . . . [the gag order] would prevent and . . . reasonable alternatives . . . cannot adequately protect the defendant's fair trial rights"); *State ex rel. Dispatch Printing Co. v. Golden*, 442 N.E.2d 121, 125 (Ohio App. 1982) (stating that prior restraints on the press are a "last resort measure," but distinguishing between orders directed at trial participants and orders directed at the press itself).

One Ohio appellate court found that an order requiring public comments by all counsel of record, court personnel, and law enforcement officers to be made in writing by lead counsel or by the court did not constitute a gag order because the order did not require trial participants to refrain from discussing the case with reporters. *State ex rel. Bellefontaine Examiner v. O'Connor*, No. 8-93-12, at 6 (3d Dist. Ct. Ohio Nov. 23, 1993).

¹³⁸ 570 N.E.2d 1101 (Ohio 1991).

¹³⁹ *Id.* at 1104.

¹⁴⁰ *Id.* at 1102, 1104; see also *infra* part V.A.

¹⁴¹ *Id.* at 1104 (citing *Haerberle v. Texas Int'l Airlines*, 739 F.2d 1019, 1022 (5th Cir. 1984)).

¹⁴² *Id.*

entail protecting the press' right to gather information.¹⁴³ As a consequence, in Ohio a more narrowly focused gag order directed at trial participants' speech may withstand constitutional scrutiny.¹⁴⁴

G. Ohio Court Rules and Disciplinary Rules Provide Guidance to Issue Gag Orders

When balancing defendants' Sixth Amendment rights against the press' and public's First Amendment rights, Ohio trial judges striving to craft a constitutional gag order also should consider the obligations set forth under Ohio court and disciplinary rules. Such rules provide a further basis upon which trial judges may restrict the speech of trial participants. Whereas the Ohio Code of Judicial Conduct¹⁴⁵ and the Ohio Rules of Superintendence for

¹⁴³ *Id.* at 1102; see also *In re T.R.*, 556 N.E.2d 439 (Ohio 1990), *cert. denied*, 498 U.S. 958 (1990). In *In re T.R.*, a custody contest prompted extensive media coverage, including national coverage by *People* magazine, the *New York Times*, the tabloid newspaper *Star*, and the *Geraldo* talk show. A trial judge order prohibited "adult parties, their attorneys, and their agents from 'disseminating any information about this pending cause or about the minor child . . . to any and all persons . . . including, but not limited to, representatives of both the broadcast and print media; and . . . from appearing on any and all radio and television broadcasts regarding these causes or the minor child herein . . .'" *Id.* at 443. The Ohio Supreme Court held that the order was overbroad, *id.* at 455, but the court noted that a properly tailored order may be warranted because a juvenile court proceeding is not "presumptively open" and because the trial judge has the "power to control extrajudicial comments by the litigants." *Id.* at 454.

¹⁴⁴ *Id.* at 1104-05.

¹⁴⁵ See OHIO CODE OF JUDICIAL CONDUCT Canon 3(A)(7) (1994), stating:

A trial judge or appellate court should permit:

(c) the broadcasting, televising, recording, and taking of photographs in the courtroom by news media during sessions of the court, including recesses between sessions, under the following conditions:

(i) permission should be expressly granted in advance in writing by the trial judge or appellate court pursuant to such conditions as the judge or appellate court and superintendence rules of the Supreme Court may prescribe;

(ii) the trial judge or appellate court determines, upon consideration of a request for permission for the broadcasting, televising, recording, or taking of photographs in the courtroom in a particular case, that the broadcasting, televising, recording, and taking of photographs would not distract participants or impair the dignity of the proceedings or otherwise materially interfere with the achievement of a fair trial or hearing therein;

(iii) the filming, videotaping, recording, or taking of photographs of victims or witnesses who object thereto shall not be permitted;

(iv) the filming, videotaping, recording, or taking of photographs of jurors shall not be permitted.

Courts of Common Pleas¹⁴⁶ both provide for the broadcasting, recording by electronic means, and photographing of court proceedings open to the public, these rules and the Ohio Code of Professional Responsibility¹⁴⁷ also suggest that speech of trial participants, especially attorneys, may be limited. Canon 3(A)(7)(c) of the Ohio Code of Judicial Conduct states that the trial judge should grant permission for media coverage of the court proceedings only when "the broadcasting, televising, recording, or taking of photographs in the courtroom . . . would not distract participants, . . . impair the dignity of the proceedings or . . . materially interfere with the achievement of a fair trial. . . ."¹⁴⁸ Whereas the holding of *Nebraska Press*¹⁴⁹ indicates that the judge should not regulate what the media may report about the open trial proceedings, this Canon suggests that the judge may regulate the speech of trial participants as potential sources to the media when such speech materially interferes with the achievement of a fair trial. By specifically referring to the standards of Canon 3(A)(7) of the Ohio Code of Judicial Conduct, the Ohio Rules of Superintendence for Courts of Common Pleas Rule 11(A)¹⁵⁰ incorporates the Canon's standard and provides a further basis for restricting the speech of potential media sources.

Ohio Code of Professional Responsibility Disciplinary Rule 7-107, although not worded identically to the Nevada disciplinary rule upheld by the U.S. Supreme Court in *Gentile v. State Bar*,¹⁵¹ provides the Ohio trial judge with still further justification for restricting attorney speech. As applied to attorney speech during the selection of a jury or trial in a criminal matter,¹⁵² Rule 7-107(D) states:

Id.

¹⁴⁶ See OHIO RULES OF SUPERINTENDENCE FOR COURTS OF COMMON PLEAS Rule 11(A) (1994), stating that "the judge presiding at the trial or hearing shall permit the broadcasting or recording by electronic means and the taking of photographs in court proceedings open to the public as provided in Canon 3(A)(7) of the Code of Judicial Conduct. . . ."

¹⁴⁷ OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107(A) (1993).

¹⁴⁸ OHIO CODE OF JUDICIAL CONDUCT Canon 3(a)(7)(c)(ii) (1994).

¹⁴⁹ 427 U.S. 539, 570 (1976) (stating that "barriers to prior restraint remain high and the presumption against its use continues").

¹⁵⁰ OHIO RULES OF SUPERINTENDENCE FOR COURTS OF COMMON PLEAS Rule 11(A) (1994).

¹⁵¹ 501 U.S. 1030 (1991).

¹⁵² Disciplinary Rule 7-107 also sets forth obligations for the attorney who may disseminate information concerning the case at various stages of the criminal proceedings. Disciplinary Rule 7-107(A), for example, establishes the lawyer's obligation during the investigation of a criminal matter. DR 7-107(A) states:

(A) A lawyer participating in or associated with the investigation of a criminal matter shall not make or participate in making an extra-judicial statement that a reasonable

person would expect to be disseminated by means of public communication and that does more than state without elaboration:

- (1) Information contained in a public record.
- (2) That the investigation is in progress.
- (3) The general scope of the investigation including a description of the offense and, if permitted by law, the identity of the victim.
- (4) A request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto.
- (5) A warning to the public of any dangers.

OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107(A) (1994).

DR 7-107(B) sets forth the lawyer's obligation at the time of the filing of a complaint, information or indictment, issuance of an arrest warrant, or arrest until the commencement of the trial or disposition without trial. During these times, a lawyer or law firm associated with a criminal matter may not:

make or participate in making an extra-judicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to:

- (1) The character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.
- (2) The possibility of a plea of guilty to the offense charged or to a lesser offense.
- (3) The existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement.
- (4) The performance or results of any examinations or tests or the refusal or failure of the accused to submit to examinations or tests.
- (5) The identity, testimony, or credibility of a prospective witness.
- (6) Any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.

OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107(B) (1994).

During the time period after investigation and before trial or disposition without trial, however, DR 7-107(C) states that certain "safe harbors" exist in which the attorney may speak about certain subjects without fear of being disciplined. DR 7-107(C) states:

(C) DR 7-107(B) does not preclude a lawyer during such period from announcing:

- (1) The name, age, residence, occupation, and family status of the accused.
- (2) If the accused has not been apprehended, any information necessary to aid in his apprehension or to warn the public of any dangers he may present.
- (3) A request for assistance in obtaining evidence.
- (4) The identity of the victim of the crime.
- (5) The fact, time, and place of arrest, resistance, pursuit, and use of weapons.
- (6) The identity of investigating and arresting officers or agencies and the length of the investigation.
- (7) At the time of seizure, a description of the physical evidence seized, other than a confession, admission, or statement.
- (8) The nature, substance, or text of the charge.
- (9) Quotations from or references to public records of the court in the case.
- (10) The scheduling or result of any step in the judicial proceedings.

[A] lawyer or law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making an extra-judicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial, except that he may quote from or refer without comment to public records of the court in the case.¹⁵³

Because under Rule 7-107(D) an attorney in a criminal matter already has an ethical obligation not to speak in a manner that poses a reasonable likelihood of interfering with a fair trial, an Ohio trial judge issuing an order restricting attorneys' speech can assert that the order enforces the attorney's ethical obligations.

In *Gentile v. State Bar*, the U.S. Supreme Court plurality upheld a similar Nevada disciplinary rule restricting attorney speech when such speech posed a "substantial likelihood of material[ly] prejudic[ing]" the fairness of the proceedings.¹⁵⁴ The Ohio Code of Professional Responsibility Rule, however, permits the restriction of attorney speech when such speech is "reasonably likely to interfere with a fair trial."¹⁵⁵ Although the practical application of these two standards is not clear,¹⁵⁶ the Ohio standard appears to be less protective of attorney speech. When the Southern District of Ohio federal court

(11) That the accused denies the charges made against him.

OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107(C) (1994). Note that this section does not provide a safe harbor provision in which the attorney may state "without elaboration . . . the general nature of the . . . defense." *Gentile v. State Bar*, 501 U.S. 1030, 1048 (1991). Such a safe harbor provision was determined to be unconstitutionally void for vagueness by Justice Kennedy's majority opinion in *Gentile. Id.*; see also *infra* note 188.

¹⁵³ OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107(D) (1994).

¹⁵⁴ 501 U.S. 1030, 1075 (1991) (Rehnquist, C.J., majority opinion).

¹⁵⁵ OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107(D) (1994); see also *Gentile*, 501 U.S. at 1068 n.2 (Rehnquist, C.J., majority opinion).

¹⁵⁶ *Wachsman v. Disciplinary Counsel*, No. C-2-90-335, 1991 U.S. Dist. LEXIS 20899, at *20 (S.D. Ohio Sept. 30, 1991). (stating that the Supreme Court in *Gentile* found constitutional the "substantial likelihood of material prejudice" standard, but it left unresolved whether the "reasonable likelihood of prejudice" standard is constitutional). Although not discussing the Ohio standard, Justice Kennedy noted in *Gentile* that the difference between the Nevada standard of "substantial likelihood of material prejudice" and other states' standards that attorney speech may be disciplined under the rule if it poses a "serious and imminent threat" to the fairness of the trial could be a difference of "mere semantics." *Gentile*, 501 U.S. at 1037 (Kennedy, J., opinion). This statement may suggest that the Supreme Court holding of constitutionality could be extended to other formulations of disciplining attorneys' extrajudicial speech.

interpreted *Gentile* and Ohio Rule 7-107¹⁵⁷ in *Wachsman v. Disciplinary Counsel*,¹⁵⁸ the court cautioned that the *Gentile* holding of constitutionality does not necessarily render constitutional the standard set forth in the Ohio disciplinary rule.¹⁵⁹ Moreover, in *Chicago Council of Lawyers v. Bauer*,¹⁶⁰ a case decided long before the Supreme Court's *Gentile* decision, the Seventh Circuit Court of Appeals overturned an Illinois disciplinary rule that was nearly identical to the present Ohio rule because the rule was unconstitutionally overbroad.¹⁶¹ Applying a standard different from that of the *Gentile* rule or the Ohio rule, the Seventh Circuit concluded that attorneys' extrajudicial comments may be proscribed only when the comments "pose a 'serious and imminent threat' of interference with the fair administration of justice."¹⁶² As a result of this uncertain constitutionality of the Ohio standard as it compares to the *Gentile* standard, an Ohio trial judge may restrict attorney speech by relying on *Gentile v. State Bar* and the Ohio Code of Professional Responsibility, but careful trial judges should restrict attorney speech only when the speech poses a "substantial likelihood of material prejudice."

In addition to the guidance Ohio trial judges may find in the Ohio disciplinary and court rules, judges issuing gag orders directed at trial participants also may garner support from the Judicial Conference of the United States Free Press-Fair Trial Guidelines.¹⁶³ Because prosecutors and defense attorneys constitute "one of the chief sources of prejudicial publicity in a criminal case,"¹⁶⁴ the Conference concluded that *Sheppard v. Maxwell* gives trial courts the power and duty to regulate attorneys as sources of information.¹⁶⁵

¹⁵⁷ See OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107(G) (1994).

¹⁵⁸ No. C-2-90-335, 1991 U.S. Dist. LEXIS 20899, at *19-20.

¹⁵⁹ *Id.* In 1991 Ohio and ten other states had not yet adopted Model Rule 3.6, the model on which the Nevada Supreme Court rule in *Gentile* was based. The standard that Ohio uses is less protective of lawyer speech because it utilizes a "reasonable likelihood of prejudice" standard as opposed to the "substantial likelihood of material prejudice" standard. *Id.*

¹⁶⁰ 522 F.2d 242 (7th Cir. 1975), *cert. denied*, *Cunningham v. Chicago Council of Lawyers*, 427 U.S. 912 (1976).

¹⁶¹ *Id.* at 249.

¹⁶² *Id.* (quoting *Chase v. Robson*, 435 F.2d 1059, 1061 (7th Cir. 1970)); *see also* *Hirschkop v. Snead*, 594 F.2d 356, 371 (4th Cir. 1979) (holding that Disciplinary Rule 7-107(D) and its prohibition from speaking on matters that are "reasonabl[y] likely to interfere with a fair trial" is unconstitutionally vague).

¹⁶³ Revised Free Press-Fair Trial Guidelines of the Judicial Conference of the United States—1980, 87 F.R.D. 519 (1980).

¹⁶⁴ *Id.* at 527.

¹⁶⁵ *Id.* (citing *Sheppard v. Maxwell*, 384 U.S. 333, 361 (1966)).

[T]he trial judge should regulate and control the proceedings by special directions to trial participants, spectators, and news media representatives where necessary to preserve decorum in and around the courtroom and to maintain the integrity of the trial. . . . Such a special order might . . . proscri[be] . . . extrajudicial statements by participants in the trial (including lawyers, parties, witnesses, jurors and court officials) which might divulge prejudicial matter not of public record in the case.¹⁶⁶

These guidelines for federal judges provide Ohio trial judges with yet another federal source that advocates the use of gag orders to restrict trial participants' speech.

V. CONSTITUTIONAL GAG ORDERS MUST NOT BE OVERBROAD AND MUST MAKE EXPLICIT FINDINGS REJECTING ANY ALTERNATIVES

A. *Overbreadth*

By following federal decisions of the U.S. Supreme Court and the circuit courts and by enforcing court and disciplinary rules, Ohio trial judges may constitutionally constrain the speech of trial participants. The court must hold a hearing and determine by specific findings on the record that the speech poses a "substantial likelihood of materially prejudicing" the fairness of the proceeding. Even if an order gagging trial participant speech is based upon the proper standards and is accompanied by the proper findings, the order will be overruled if it is overly broad, or if it prohibits protected as well as unprotected speech. Ohio trial judges wishing to construct narrowly tailored gag orders must avoid orders that restrict all trial participant speech to the press. The Second Circuit in *United States v. Salameh*,¹⁶⁷ for example, held that a blanket provision preventing trial participants from making any statements that "have anything to do with th[e] case" or that "may have something to do with the case" was unconstitutionally overbroad.¹⁶⁸ The Sixth Circuit applied similar reasoning in *United States v. Ford*¹⁶⁹ when it held unconstitutional¹⁷⁰ an order prohibiting the defendant from making any "extrajudicial statement that a

¹⁶⁶ *Id.* at 529-30.

¹⁶⁷ 992 F.2d 445 (2d Cir. 1993).

¹⁶⁸ *Id.* at 447. The oral order was made sua sponte when the judge instructed the trial participants that "[t]here will be no more statements [in the press, on TV, on radio, or in any other electronic media] issued by either side or their agents." *Id.* at 446. The trial judge told the attorneys, "[t]he next time I pick up a paper and see a quotation from any of you, you had best be prepared to have some money." *Id.*

¹⁶⁹ 830 F.2d 596 (6th Cir. 1987); see also *supra* text accompanying notes 95-104.

¹⁷⁰ *Id.* at 600.

reasonable person would expect to be disseminated by means of public communication.”¹⁷¹ This overly broad order unconstitutionally covered “opinion[s] of or discussion of the evidence and facts in the investigation,” statements about “alleged motive[s] the government may have had in filing the indictment,” and “opinion[s] as to . . . the merits of the case.”¹⁷²

In *Levine v. United States District Court*,¹⁷³ the Ninth Circuit held an order to be overbroad¹⁷⁴ when it stated that “all attorneys in this case, all parties and all their representatives and agents of counsel and the parties shall not make *any* statements to members of the news media concerning *any aspect* of this case that bears upon the merits to be resolved by the jury.”¹⁷⁵ The *Levine* court noted that many statements that may bear “upon the merits to be resolved by the jury” would present little or no danger of prejudicing the fairness of the proceedings. The court suggested that a narrowly tailored gag order directed at the trial participants could proscribe statements relating to the following subjects:

- (1) The character, credibility, or reputation of a party;
- (2) The identity of a witness or the expected testimony of a party or a witness;
- (3) The contents of any pretrial confession, admission, or statement given by a defendant or that person’s refusal or failure to make a statement;
- (4) The identity or nature of physical evidence expected to be presented or the absence of such physical evidence;
- (5) The strengths or weaknesses of the case of either party; and
- (6) Any other information the lawyer knows or reasonably should know is likely to be inadmissible as evidence and would create a substantial risk of prejudice if disclosed.¹⁷⁶

Ohio cases construing gag orders directed at trial participants also instruct trial judges to narrowly tailor such orders. In *In re T.R.*,¹⁷⁷ the Ohio Supreme Court struck down an overbroad order¹⁷⁸ in a custody case because the order

¹⁷¹ *Id.* at 597.

¹⁷² *Id.*

¹⁷³ 764 F.2d 590 (9th Cir. 1985) (plurality opinion), *cert. denied*, 476 U.S. 1158 (1988).

¹⁷⁴ *Id.* at 599.

¹⁷⁵ *Id.* at 593 (emphasis added).

¹⁷⁶ *Id.* at 599. Note that item six, stating a standard allowing speech to be restricted if it creates a “substantial risk of prejudice,” closely resembles the *Gentile* “substantial likelihood of material prejudice” standard. See *Gentile*, 501 U.S. 1030, 1075 (1991) (Rehnquist, C.J., majority opinion).

¹⁷⁷ 556 N.E.2d 439 (Ohio 1990), *cert. denied*, 498 U.S. 958 (1990).

¹⁷⁸ *Id.* at 455.

enjoined all parties from "disseminating *any* information" about the case to "*any and all* persons" and from otherwise providing, "directly or indirectly 'in any fashion whatsoever,' *any* information regarding" the minor child.¹⁷⁹ The Ohio Supreme Court found a similar order in *State ex rel. Nat'l Broadcasting Co. v. Lake County Court of Common Pleas*¹⁸⁰ to be unconstitutional¹⁸¹ because it forbade trial participants and law enforcement personnel from making any public comment on the case.¹⁸² Yet another Ohio Supreme Court case¹⁸³ found overbroad¹⁸⁴ an order that "[n]o one . . . talk to the jurors about the case, and the jurors aren't to talk to anybody about it" because the order seemingly applied to "everyone," including persons who were not trial participants.¹⁸⁵ Similarly, an Ohio appellate court found unconstitutionally overbroad¹⁸⁶ an order that trial participants may not make any statements that "could interfere with the defendant's right to a free and fair trial and due process of law."¹⁸⁷

These federal and Ohio cases therefore suggest that Ohio trial judges formulating gag orders must avoid sweeping statements that apply to persons who are not trial participants and must not proscribe all trial participants' statements to the press. Whereas dicta offered by the Ninth Circuit suggests that trial judges may issue gag orders prohibiting statements by trial participants, constitutional orders may prohibit only statements concerning certain aspects of the case.¹⁸⁸

¹⁷⁹ *Id.*

¹⁸⁰ *State ex rel. Nat'l Broadcasting Co. v. Lake County Court of Common Pleas*, 556 N.E.2d 1120 (Ohio 1990).

¹⁸¹ *Id.* at 1124.

¹⁸² *Id.* at 1123.

¹⁸³ *State ex rel. Cincinnati Post v. Hamilton County*, 570 N.E.2d 1101 (Ohio 1991).

¹⁸⁴ *Id.* at 1102.

¹⁸⁵ *Id.*

¹⁸⁶ *State ex rel. Dispatch Printing Co. v. Golden*, 442 N.E.2d 121, 126 (Ohio App. 1982).

¹⁸⁷ *Id.* at 123.

¹⁸⁸ Because the Kennedy majority in *Gentile v. State Bar*, 501 U.S. 1030, 1048 (1991) (Kennedy, J., majority opinion), found that the safe harbor provision of the Nevada Supreme Court rule was void for vagueness, trial judges formulating gag orders directed at trial participants also should be careful to make the terms of the order as specific as possible. The order must give fair notice of what is protected. *Id.* The Nevada rule provided that a lawyer may "state without elaboration . . . the general nature of the . . . defense" without being disciplined. *Id.* The Court, however, found that this provision was unconstitutionally vague. *Id.* Ohio trial judges, therefore, probably should avoid wording gag orders in such a way that the order permits attorneys to state the "general nature" of the case.

B. Findings Dismissing the Effectiveness of Alternatives

In order to formulate a constitutional gag order directed at trial participants, trial judges also must make explicit on the record findings that alternatives to the gag order will not mitigate the prejudice to defendants' Sixth Amendment rights. Ohio trial judges explicitly must consider and reject the alternatives of voir dire, jury instructions, change of venue, and sequestration of the jury.

In *Nebraska Press Ass'n v. Stuart*,¹⁸⁹ when the U.S. Supreme Court overturned the trial judge's order against the press,¹⁹⁰ the Court noted that reversal was warranted partly because the trial court made no express finding that other measures would not control prejudice to the defendant.¹⁹¹ The Court recommended change of venue, postponement of the trial, searching questions of prospective jurors, clear jury instructions, and sequestration of the jury as alternatives to the prior restraint.¹⁹² Picking up on this language, lower federal court decisions considering trial participant gag orders held that a constitutional gag order requires the trial judge explicitly to consider and dismiss the effectiveness of these alternatives.¹⁹³ When rejecting alternatives to a gag order, however, a trial judge may consider whether the alternatives force the jurisdiction to incur great expense. According to Justice Rehnquist's opinion in *Gentile v. State Bar*:

¹⁸⁹ 427 U.S. 539 (1976).

¹⁹⁰ *Id.* at 568.

¹⁹¹ *Id.* at 563.

¹⁹² *Id.* at 563-64.

¹⁹³ *See, e.g., Dow Jones & Co. v. Simon*, 842 F.2d 603, 611-12 (2d Cir.), *cert. denied*, 488 U.S. 946 (1988); *United States v. Ford*, 830 F.2d 596, 600 (6th Cir. 1987) (plurality opinion). In *Dow Jones* the Second Circuit found that the gag order against trial participants was valid because the court "carefully considered and found the use of these other measures unable to stop the grand jury leaks." *Dow Jones*, 842 F.2d at 612. In *Ford* the Sixth Circuit reversed the gag order as it was directed at the criminal defendant partially because the trial judge did not make specific considerations of less burdensome alternatives to the order. *Ford*, 830 F.2d at 600.

An Ohio appellate case considering a gag order constraining the media also holds that the trial judge must consider and dismiss the alternatives to such an order. In *State ex rel. Dispatch Printing Co. v. Golden*, 442 N.E.2d 121 (Ohio App. 1982), an Ohio appellate court held that before a prior restraint directed at the media may be issued, the trial judge must find that "all other measures within the power of the court to insure a fair trial have been found to be unavailing and deficient." *Id.* at 126.

[E]ven if a fair trial can ultimately be ensured through *voir dire*, change of venue, or some other device, these measures entail serious costs to the system. . . . The State has a substantial interest in preventing officers of the court, such as lawyers, from imposing such costs on the judicial system and on the litigants.¹⁹⁴

1. *Change of Venue*

When evaluating alternatives to a gag order directed at trial participants, trial court judges may find that in many high profile cases the federal courts' suggested alternatives are inadequate and costly. Concerning a change of venue as an alternative to issuing a gag order, a venue change could be ineffective for a trial in which prejudicial information is distributed nationally.¹⁹⁵ Regardless of the geographic scope of the publicity, such a change still does not give the court effective control over unwarranted statements made by counsel.¹⁹⁶ Moreover, as Ohio Supreme Court Justice Celebrezze's dissent in *State ex rel. Dayton Newspapers, Inc. v. Phillips*¹⁹⁷ demonstrated, the state has an interest in preserving the venue.¹⁹⁸ A change of venue can amount "to a virtual confession that the citizens of [the community] would be unable to afford this defendant a fair trial."¹⁹⁹ It implies that the "fairness and objectivity of the citizens" in the original forum is inadequate while it denies the community an "opportunity to observe its legal system" during the actual resolution of a case.²⁰⁰ Such a change also "presents numerous costly practical problems such as transportation of witnesses to and from the trial, and transportation of jurors

¹⁹⁴ *Gentile v. State Bar*, 501 U.S. 1030, 1075 (1991) (Rehnquist, C.J., majority opinion).

¹⁹⁵ *Stabile*, *supra* note 38, at 344. Robert S. Stephen suggests in his note on prejudicial publicity that national awareness of a trial does not assure national prejudice toward the defendant. Robert S. Stephen, Note, *Prejudicial Publicity Surrounding a Criminal Trial: What a Trial Court Can Do to Ensure a Fair Trial in the Face of a "Media Circus"*, 26 SUFFOLK U. L. REV. 1063, 1086 (1992). A venue of a high profile case should be changed if there is local prejudice within the community but only awareness outside the community. *Id.*

¹⁹⁶ *Levine v. United States Dist. Court.*, 764 F.2d 590, 600 (9th Cir. 1985) (plurality opinion), *cert. denied*, 476 U.S. 1158 (1988). Chief Justice Rehnquist's opinion in *Gentile*, recognized that a change of venue would not have been effective to undo the statements made by the defense attorney in that case. *Gentile*, 501 U.S. at 1075.

¹⁹⁷ 351 N.E.2d 127 (Ohio 1976) (Celebrezze, J., dissenting).

¹⁹⁸ *Id.* at 168-69.

¹⁹⁹ *Id.* at 169.

²⁰⁰ *Id.*

to view the [crime scene].”²⁰¹ A venue change also may be “at variance with the defendant’s right to be tried in the community in which the crime occurred.”²⁰² Because of these costs and dilemmas, an Ohio trial judge rejecting change of venue as an effective alternative to a gag order²⁰³ may consider the alternative inadequate.

2. Postponement of Trial

As an alternative to issuing a gag order directed at trial participants, postponement of a criminal trial may encroach upon defendants’ rights to a speedy trial.²⁰⁴ Delay of the proceeding also may exacerbate any backlog of the court, and it may increase the public’s attention and questioning once the trial actually begins.²⁰⁵ Even after the trial is postponed, excessive media attention likely will resume upon the new trial date.²⁰⁶ Ohio trial judges therefore may take all of these disadvantages into consideration when finding that postponement of the trial is an inadequate alternative to a gag order.

3. Voir Dire

As an alternative to issuing a gag order, voir dire also may provide little assurance that defendants’ rights to an impartial jury are being adequately protected.²⁰⁷ The Ninth Circuit in *Levine v. United States District Court*,²⁰⁸ for

²⁰¹ *Id.*

²⁰² Garcia, *supra* note 43, at 1125. “The Sixth Amendment provides . . . that a [criminal] defendant has a right to be tried before a ‘jury of the State and district wherein the crime shall have been committed.’” *Id.* at 1125 n.150.

²⁰³ In addition, the trial judge should consider the Ninth District Court of Appeals’ holding that before a trial court grants a motion for change of venue, “a good faith effort should be made to impanel a jury.” *State v. Herring*, 486 N.E.2d 119, 120 (Ohio App. 1984).

²⁰⁴ Stabile, *supra* note 38, at 343–44.

²⁰⁵ *Id.* at 344. William H. Erickson notes in his article about fair trial-free press conflicts that statutory provisions in a particular jurisdiction may limit trial judges’ ability to postpone the trial. William H. Erickson, *Fair Trial and Free Press: The Practical Dilemma*, 29 STAN. L. REV. 485, 492 n.43 (1977).

²⁰⁶ Stephen, *supra* note 195, at 1085.

²⁰⁷ In *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539 (1976) (Brennan, J., concurring), Justice Brennan argues that trial judges should liberally apply voir dire and “broadly explore . . . the extent to which prospective jurors had read particular news accounts.” *Id.* at 602. Voir dire also may be more effective when individual jurors are questioned or when jurors are questioned in small groups. *Id.* Justice Brennan also suggests that defense counsel

example, noted that voir dire is completely ineffective against publicity disseminated after the jury is selected and during the trial, and it does not remedy any harm that may result from prejudicial statements made by trial participants.²⁰⁹ Ohio trial judges, therefore, may gain guidance from this federal decision and may reject voir dire as an effective gag order alternative.

4. *Extensive Jury Instructions*

In high profile criminal cases, extensive jury instructions often tell jurors that they may not consider any news accounts that they heard before or during the trial, yet such instructions may not be an effective alternative to a gag order. These instructions often are considered an “ineffective remedy”²¹⁰ against prejudicial news accounts, and they do not address the threat of prejudice resulting from trial participants’ extrajudicial statements.²¹¹ Because such instructions necessarily would be long and detailed, the instructions also might highlight the issues that the jurors are instructed to ignore.²¹² When considering detailed jury instructions as an alternative to gag orders directed at trial participants, Ohio trial judges often may find that such instructions inadequately protect defendants’ Sixth Amendment rights.²¹³

5. *Sequestration*

As an alternative to gag orders directed at trial participants, sequestration of the jury is the most burdensome and costly alternative. As the Ninth Circuit in *United States v. Levine*²¹⁴ considered the alternative of sequestration, it noted that the district court labeled it an “undesirable alternative.”

should be accorded great latitude when asking searching questions that might indicate bias.
Id.

²⁰⁸ 764 F.2d 590 (9th Cir. 1985) (plurality opinion), *cert. denied*, 476 U.S. 1158 (1988).

²⁰⁹ *Id.* at 600.

²¹⁰ *Id.* One commentator has stated that “[t]o the extent that voir dire is insufficient to detect impartiality due to the subconscious character of some preconceptions of guilt, . . . it is unlikely that admonitions or instructions will have a remedial effect in erasing prejudice, even in the usual case of the well-intentioned juror.” Erickson, *supra* note 205, at 493 n.46.

²¹¹ *Levine*, 764 F.2d at 600.

²¹² *Stabile*, *supra* note 38, at 345.

²¹³ Robert S. Stephen, however, notes that because jury instructions are of only nominal expense, trial courts should use such instructions in addition to any other alternatives to a gag order or in addition to a gag order directed at trial participants. Stephen, *supra* note 195, at 1090.

²¹⁴ 764 F.2d at 600.

Sequestration actually may be a more drastic method of protecting the defendant from potential prejudice than would be a gag order directed at trial participants' speech.²¹⁵ Sequestration forces the jurors to suffer because of the trial participants' and media's highly publicized acts.²¹⁶ Long periods of sequestration also can produce juror resentment and can result in jury bias.²¹⁷ Furthermore, sequestration protects against prejudice only after the jury has taken its oath; as an alternative to gag orders, it largely is ineffective against potential juror bias prior to or during jury selection.²¹⁸ When Ohio trial judges consider sequestration as an alternative to a gag order directed at trial participants' speech, these undesirable aspects may render sequestration an ineffective option.

VI. CONCLUSION

In the modern era, criminal trials increasingly are played out in the media. As a result, if the jurors are unable to set aside preconceived notions and are unable to decide the case based only on the evidence presented in court, criminal defendants' Sixth Amendment rights to an impartial jury increasingly could be jeopardized. Whereas trial judges in criminal cases have an affirmative duty to protect defendants' Sixth Amendment rights, they may constitutionally fulfill that duty by issuing a gag order restricting the speech of trial participants.

When issuing a constitutional order, Ohio trial judges should not close the criminal trial to the press or public, they should not issue an order directed at what the press may report, and they should carefully follow the federal decisions and restrict the trial participants' speech only when such speech poses a substantial likelihood of materially interfering with the fair administration of justice. When restricting trial participant speech in such a way, judges should narrowly tailor the orders so that they are not overbroad, and they should make explicit findings that alternatives to a gag order insufficiently protect defendants' rights. By following the decisions and reasoning of federal courts and Ohio court and disciplinary rules, Ohio trial judges in criminal cases may constitutionally restrict trial participants' speech. Without such restrictions, judges are not protecting defendants' Sixth Amendment rights. Excessive media coverage then could threaten "the fair and efficient administration of

²¹⁵ *Id.*

²¹⁶ Stabile, *supra* note 38, at 345.

²¹⁷ *Id.*

²¹⁸ *Id.*

justice . . . [and] undermine[s] the public's confidence in the legitimacy of verdicts and in the ability of the judiciary to resolve disputes."²¹⁹

²¹⁹ Swartz, *supra* note 14, at 1417.