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Preparing for the High Profile Case: An Omnibus Treatment for Judges and Lawyers

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PREPARING FOR THE HIGH PROFILE CASE: AN OMNIBUS TREATMENT FOR JUDGES AND LAWYERS*

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INTRODUCTION TO HIGH PROFILE CASES

Cases involving shocking crimes,[1] parental child abuse,[2] toxic and deadly products,[3] famous people,[4] public figures,[5] environmental damage,[6] child custody wars,[7] and other subjects attract massive and pervasive media coverage. A ready public may decry such media coverage while following

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1. *See, e.g.*, United States v. McVeigh, 119 F.3d. 806 (10th Cir. 1997) (challenging right of press access to documents related to the Oklahoma City bombing trial); United States v. Salameh, 992 F.2d 445 (2d Cir. 1993) (barring counsel from publicly discussing a case related to the World Trade Center bombing); Wuornos v. Florida, 676 So. 2d 966, 968 n.2 (Fla. 1995) (upholding the conviction of killer Aileen C. Wuornos despite her claim that she could not receive a fair trial due to the press accounts and "a movie portraying the various killings in which she was implicated").

2. *See, e.g.*, DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989) (discussing abuse of a boy who was permanently injured by his father); Department of Health & Rehab. Servs. v. Yamuni, 529 So. 2d 258 (Fla. 1988) (discussing abuse of a toddler by his natural mother); *see also, e.g.*, Chuck Chynoweth et al., *Horrified Drivers Watch Mom Drop Tot from Car*, MIAMI HERALD, February 20, 1998, at 5B (reporting that an 18-month old infant was dropped or thrown by his mother from a speeding car onto an interstate highway in Florida which prompted hundreds of callers from across the nation and around the world to offer the boy help or an adoptive home).

3. *See, e.g.*, Deitchman v. E.R. Squibb & Sons, 740 F.2d 556 (7th Cir. 1984) (discussing injuries allegedly caused by exposure to the drug DES); Broin v. Phillip Morris Cos., 641 So. 2d 888 (Fla. 3d DCA 1994) (discussing flight attendants' suit for damages from effects of second hand cigarette smoke).

4. *See, e.g.*, State v. William Kennedy Smith, Case No. 91-5482 A02 (Fla. Cir. Ct. 1991); Virginia v. Albert, Case Nos. CR 97-913 and CR 97-914 (Va. Dist. Ct. 1997). According to Roy Black, Jr., Esq., who represented the defendants in these cases, "[m]assive publicity affect[ed] every participant in the[se] case[s]: the lawyers, the parties, the jurors, the judge, the jailers, the clerks and others. There is a quantum difference in every aspect of the case—a different impact on the whole system." Telephone interview with Roy Black, Jr., partner, Black, Srebnick & Kornspan, P.A. (Feb. 28, 1998).

5. *See, e.g.*, Clinton v. Jones, 117 S. Ct. 1636 (1997) (discussing sexual harassment lawsuit by Paula Jones against President Clinton); United States v. McDougal, 103 F.3d 651 (8th Cir. 1996) (ruling on use of videotaped deposition by President Clinton); David E. Rovella, *Perjury Charge a Stretch, Say Nation's DAs*, NAT'L L.J., Feb. 9, 1998, at A1 (discussing the Monica Lewinsky investigation).

6. *See* WILLIAM B. HIRSCH, *Justice Delayed: Seven Years After the Exxon Valdez Oil Spill and No End in Sight, in* THE EXXON VALDEZ DISASTER: READINGS ON A MODERN PROBLEM (1997) (discussing the Exxon Valdes disaster, one of the largest and most ecologically destructive oil spills in North American history); J. Steven Picou, *Compelled Disclosure of Scholarly Research: Some Comments on "High Stakes Litigation,"* 59 LAW & CONTEMP. PROBS. 149 (1996). Exxon's settlement with the government and various civil law suits continue to attract substantial media coverage. *See id.*

7. *See, e.g.*, Foretich v. Capital Cities/ABC, Inc., 37 F.3d 1541 (4th Cir. 1994) (discussing highly publicized child custody case); Foretich v. CBS Inc., 619 A.2d 48 (D.C. 1993) (evaluating a highly publicized child custody case). A LEXIS/NEXIS search revealed more than one thousand news reports on the civil custody dispute between Dr. Eric Foretich and Dr. Elizabeth Morgan.

every revelation. Suddenly, the cloak of indifference about the courts is lifted. The public perception of the courts and the major issues they confront is substantially impacted. In the broadest sense, a new image of justice itself takes shape.

Unlike the reality of everyday life, we expect our justice system to guarantee fairness and equality. Is our justice system racially fair? Does money control the ruling on the verdict? Does our adversarial system, with our procedural rules and constitutional protections, so distort the search for the truth that few have confidence that cases will be decided on their merits? Clearly, the public's perceptions of high profile cases influence their answers to these pressing questions.

The courts and their commentators are increasingly recognizing the need for judges to effectively manage high profile cases because of their ability to affect public confidence in the justice system.[8] Both the American Bar Association[9] and the National Center for State Courts[10] have invested time and treasure to address this need. Moreover, scholars from both the law and court management disciplines have contributed theoretical and empirical articles on high profile cases.[11]

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8. In May 1996, the "National Conference on the Media and the Courts: Working Together to Serve the American People" was held at the national Judicial College in Reno, Nevada. At the conference, journalists, judges, and legal experts examined, criticized, and debated each other's professions, then agreed on steps to improve the quality of justice and court coverage. Of note was a recommendation calling for the establishment in each jurisdiction of local guidelines for management in high profile cases. *See* Vol. XI, No. 3, MJC Alumni, (Summer 1996).

9.

> In the autumn of 1995, then ABA President Roberta Cooper Ramo, recognizing how important high-profile cases are in influencing the image of the justice system, urged that the American Bar Association provide assistance in managing such cases. After discussions with participants in prominent trials, in spring 1996 the Board of Governors created a resource team

for high profile trials. Robert A. Stein, *Help in High-Profile Trials*, A.B.A. J., Feb. 1997, at 93. The team does not provide substantive or strategic advice but does offer resources on media management, security issues, and pretrial and trial issues influenced by media coverage. *See id.*

10. The National Center for State Courts (NCSC) published a manual to assist judges and court administrators in planning for, and managing, notorious cases in 1992. Project staff developed the manual after visiting and studying notorious criminal and civil trials in both small and large jurisdictions. The project staff was aided by an advisory committee, whose members made themselves readily available for guidance and assistance throughout the project. One of the authors served on this committee. The manual, which is currently under revision, has been of great assistance to the authors.

11. *See, e.g.*, Akhil R. Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 641 (1996); Eugene Cerruti, *"Dancing in the Courthouse": The First Amendment Right of Access Opens a New Round*, 29 U. RICH. L. REV. 237, 237 (1995); Adrian Cronaver, *The First Annual Symposium on Media and The Law: Free Speech v. Fair Trial*, 41 S.D. L. REV. 74, 79-130 (1996); Robert Hardaway & Douglas B. Tumminello, *Pretrial Publicity in Criminal Cases of National*

What kinds of special issues arise in these cases? What should a court do to address them? Obviously, preparations for judicial management of these cases must begin by quickly identifying a case as a "high profile" case. The selection of the judge who will preside over the case, deciding which courthouse, courtroom and other facilities are suitable for the media and spectators who will descend upon them, and determining what special procedures regulating their use will be needed to accommodate everyone are all pressing issues. The court should give specific consideration to whether it will permit television coverage of pretrial hearings and of the trial, and if so, under what restrictions. The normal jury pool may be totally inadequate for cases that will take months to try, involving atypical parties and intense media coverage with the looming specter of lengthy jury sequestration.

A judge who is assigned to preside over a high profile case should expect to be confronted with explosive free press and fair trial issues even before the first scheduled hearing. Should access to judicial hearings be closed to prevent prejudicial pretrial publicity? Should gag orders be issued, and if so, what should their scope be? Exactly where is the line between the public's right to know and the parties' right to a fair trial? These are issues to be decided under the glare of television lights and the ever present photojournalist.

Massive publicity often generates motions for change of venue. The defense urges a new venue, the prosecution looks for the home court

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Notoriety; Constructing a Remedy for the Remediless Wrong, 46 AM. U. L. REV. 39, 39-90 (1996); William J. Harte, *Why Make Justice a Circus? The O.J. Simpson, Dahmer and Kennedy-Smith Debacles Make the Case Against Cameras in the Courtroom*, 39 TRIAL LAW. GUIDE 379, 379-421 (1996); Albert J. Kreiger, *Reflections on O.J. After Two Aspirin and a Good Night's Sleep*, CRIM. JUST. BULL., Winter 1996, at 2; Leonard Pertnoy, *The Juror's Need to Know v. The Constitutional Right to Fair Trial*, 97 DICK. L. REV. 627, 627-54 (1993); Harvey K. Sepler, *Where Do We Stand on Cameras in the Courtroom?*, 70 FLA. B.J. 113, 113-14 (1996); Nadine Strossen, *Free Press and Fair Trial: Implications of the O.J. Simpson Case*, 26 U. TOL. L. REV. 647, 647-54 (1995); Robert C. Weaver, Jr., *Sixth Amendment at Peril: The Media Frenzy Surrounding the Tonya Harding Cases*, 4 KAN. J.L. & PUB. POL'Y 53, 53-60 (1995); Charles H. Whitebread & Darrell W. Contreras, *Free Press v. Fair Trial: Protecting the Criminal Defendant's Rights in a Highly Publicized Trial by Applying the Sheppard-Mu'Min Remedy*, 69 S. CAL. L. REV. 1587, 1587-626 (1996); Brian V. Breheny & Elizabeth M. Kelly, Note, *Maintaining Impartiality: Does Media Coverage of Trials Need to Be Curtailed?*, 10 ST. JOHN'S J. LEGAL COMMENT. 371, 371-402 (1995); Megan J. Conboy & Alice R. Scott, Note, *Tipping the Scales of Justice: An Attempt to Balance the Right to a Fair Trial With the Right to Free Speech*, 11 ST. JOHN'S J. LEGAL COMMENT. 775, 775-803 (1996); Stephen J. Krause, Note, *Punishing the Press: Using Contempt of Court to Secure the Right to a Fair Trial*, 76 B.U.L. REV. 537, 537 (1996); Jonathan M. Remshak, Comment, *Truth, Justice, and the Media: An Analysis of the Public Criminal Trial*, 6 SETON HALL CONST. L.J. 1083, 1083-116 (1996); 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, 1066, n.11 (1992).

advantage and the governmental entity funding the cost of the trial struggles to pay the cost of a budget busting bill for a four-week trial at the far end of the state. The search for jury bias or jury neutrality means probing questions far beyond the norm. Issues of juror privacy and security intersect with the right to a fair trial.

This Article will comprehensively address these issues with particular reference to high profile cases that have been recently tried or are pending at the time of this writing. While it focuses on judges' attempts to impose order and reason upon these difficult cases, it goes beyond the specific to suggest some concepts that are generally applicable to this class of litigation.

I. PRELIMINARY MATTERS TO BE DEALT WITH UPON COMMENCEMENT OF HIGH PROFILE LITIGATION

A. *Introduction*

The onset of saturation publicity frequently precedes the filing of a high profile case, signaling the necessity for court officers to begin preparations to handle the extraordinary judicial management problems that such cases generate. Although a civil case does, in some instances, give rise to such massive publicity, it is frequently the criminal case involving well known defendants or bizarre or gruesome facts that generate sensational attention in both the tabloid and mainstream press.[12] In describing the public fascination with the Jon Benet Ramsay case, Dave Mazarilla, editor of *U.S.A. Today*, explained that his paper has written about this murder investigation because "[the] victim was in the spotlight, the family was prominent and the circumstances [were] bizarre."[13] He questioned whether the media would have "devoured the story with the same hearty appetite"

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12. Many recent cases, such as the O.J. Simpson trial,

> differ from their predecessors to the extent that the tabloid media has both expanded the size of the audience following the trial and increased the competition amongst the various members of the tabloid and mainstream press to gather new information about the case. The net effect of these factors have been to exacerbate the chaotic atmosphere criticized in the case law.

Eileen A. Minnefor, *Looking for Fair Trials in the Information Age: The Need for More Stringent Gag Orders Against Trial Participants*, 30 U.S.F. L. REV. 95, 97, n.8 (1995). *See also* MURPHY ET AL, A MANUAL FOR MANAGING NOTORIOUS CASES, ch.3 (identification of pretrial matters in sensational cases tracking many of the issued discussed infra).

13. Stacy Jones, *Covering the Death of a Beauty Queen*, EDITOR & PUBLISHER, Feb. 1, 1997, at 8,9.

without "the [victim's] blond hair and fairy-tale existence."[14]

Once a high profile case is filed, the court must be prepared to begin the decisionmaking process necessary to effectively address the issues and problems discussed below.

B. *Judicial Selection*

Upon the commencement of high profile litigation, one of the most important preliminary matters to be dealt with is the selection of the "right judge" to handle the case. This was forcefully recognized by the recent observation that "the circus-free, no-nonsense trial of convicted Oklahoma City bomber, Timothy McVeigh . . . proves that if you have a bright, prepared judge who maintains control of the courtroom, the system will work."[15] Ordinarily, "the assignment or reassignment of specific court cases between or among the judges of a multi-judge court is a matter within the internal government of that court," and "a litigant does not have standing to enforce internal court policy" with respect to the assignment of judges.[16] Should the wrong judge be assigned to try a case, it may be difficult to remove that judge absent evidence of judicial misconduct. Unless blind filing is required by court rule,[17] it is desirable for the

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14. *Id.* Extensive publicity often produces charges that parties are attempting to manipulate the outcome of a case through use of the media. For example, one commentator made the cynical observation that ever since Paula Jones sued President Clinton for sexual harassment in 1994, the President and his lawyers "orchestrated a media blitz depicting Jones as a gold-digging slut whose allegations are 'tabloid trash'" to delay or frustrate the prosecution. Stuart Taylor, Jr., *Her Case Against Clinton*, AM. LAW. Nov. 1996, at 12.

15. Ryan Ross, *McVeigh's Trial Lean and Trim*, A.B.A. J. July 1997, at 24; *see also* TIMOTHY R. MURPHY ET AL., A MANUAL FOR MANAGING NOTORIOUS CASES 4 (1992) (stressing the importance of trial judge selection).

16. Kruckenberg v. Powell, 422 So. 2d 994, 995 (Fla. 5th DCA 1982); *see also* Peoples v. Fulcomer, 731 F. Supp. 1242, 1245 (E.D. Pa. 1990). However, the judicial officer making the selection decision should not be motivated by impermissible considerations. *See* Cruz v. Abbate, 812 F.2d 571, 574 (9th Cir. 1987).

17. *See* People v. Bell, 659 N.Y.S.2d 713,.715 (Sup. Ct. 1997). Where court rules require assignment of cases on a blind filing basis and a high profile case is assigned to a judge who is not well suited to handle it, administrative judges should provide special assistance to the judge. This should include special training, conferences with other judges who have presided over sensational trials or similar difficult litigation, intensive staff legal assistance, and other assistance designed to compensate for the assigned judge's lack of experience or other limitations. In extreme cases, reassignment of the case may be necessary, but it may be very difficult to achieve. The assigned judge would be embarrassed if the court made an exception to the blind filing rule on the grounds that the assigned judge was not suitable to preside over the case. To avoid this difficulty, the court should have a provision in its blind filing rules that administrative judges will make judicial assignment of high profile cases based upon criteria such as seniority, judicial experience, special knowledge of the legal issues likely to be involved in the case, and other relevant considerations. Moreover, other judicial management concerns such as judicial back loads make flexibility desirable in the assignment of a high profile case.

selecting authority to assign or reassign[18] a judge qualified by training,[19] experience, and temperament[20] to preside over a high profile case. Serious consideration should be given to assigning a judge who has successfully handled a high profile case. If this is not feasible, a judge who has demonstrated excellence in presiding over difficult, highly contentious litigation should be selected. The judge chosen should be one who understands the importance of working with administrative judges and court personnel in the preparation and trial of the case.

While a single judge should be assigned to handle a case from start to finish,[21] the assignment of a back-up judge in a lengthy trial who can take over in the event the presiding judge is unavailable, due to sickness or death, is advisable. For example, during the O.J. Simpson civil trial, the state utilized a two-judge trial team. A specially selected judge managed the logistical and public affairs aspects of the trial,[22] while a randomly selected judge presided over the trial itself. This "tandem" approach has the added benefit of providing an opportunity for less experienced judges to work with and be "mentored" by more seasoned trial judges. Although judges should comply with the assignment directives of the chief judge or other assigning judge, an unwilling judge should ordinarily not be forced to try a high profile case against his or her wishes.[23]

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18. *See* Hughes v. Bedsole, 913 F. Supp. 420, 423 (E.D.N.C. 1994); State v. Eastlack, 883 P.2d 999 (Ariz. 1994).

19. Florida judicial rules state:

> The chief judge shall ensure that no judge presides over a capital case in which the state is seeking the death penalty or collateral proceedings brought by a death row inmate until that judge has served a minimum of 6 months in a felony criminal division and has successfully completed the "Handling Capital Cases" course offered through the Florida College of Advanced Judicial Studies. . . . The chief justice may waive the course requirement in exceptional circumstances at the request of the chief judge.

FLA. R. JUD. ADMIN. 2.050(b)(10).

20. The judge selected to preside over a high profile case must be prepared to deal with a variety of extrajudicial pressures from a variety of public institutions and private interests. *See* Maurice D. Geiger & Kathryn Fahnestock, *Local Judicial Independence: An Endangered Species*, JUDGES' J. Winter 1997, at 24.

21. *See* La Seigneurie U.S. Holdings, Inc. v. Superior Court, 35 Cal. Rptr. 2d 175, 177 (Cal. Ct. App. 1994).

22. The Honorable Douglas David Perez, Presiding Judge of the Los Angeles County Superior Court, personally handled the management of the case. *See* Nat'l Ctr. for State Courts Manual 4 (tentative draft) (on file with author).

23. *See In re* J. Avellino, 690 A.2d 1144, 1145 (Pa. 1997).

C. *Courthouse Facilities*

The physical surroundings in which a high profile case is tried can significantly affect the conduct of the participants, the media, and members of the public attending the trial. If the courtroom is too small, for example, a crowded, tense atmosphere can result as well as fierce competition for the limited seating. Competition for seating can become particularly sensitive when members of the media seek preferential seating to the disadvantage or exclusion of members of the public. To enhance judicial management and the dignity and decorum of a high profile trial, court managers should provide courthouse facilities, equipment, and personnel appropriate to meet the needs of the trial.

1. Courtroom Assignment

Courtrooms assigned for the trial of a high profile case[24]

> must be comfortable and . . . quiet. There must be sanitary restrooms. No participant in court should be required to endure physical discomfort. The courtroom must be properly ventilated, properly heated in cold weather, and properly cooled in hot weather. The chairs must be of sufficient comfort so that lawyers, parties, courtroom personnel, and jurors, who are required to sit for long periods, can do so without physical unease. Since court proceedings are public, there must also be sufficient space and chairs or benches provided for spectators and press.[25]

Additionally, some cases require that the courtroom be equipped with technological features allowing for the remote presentation of evidence, including video-conferencing facilities, computer graphic displays, television monitors for jurors, and computers for counsel and the judge.

2. Juror Accommodations

Juror accommodations, at a minimum, should comply with the Americans with Disabilities Act and otherwise be sufficient to make jury

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24. In many courts, the assignment of courtrooms is regulated by Administrative Order of the Chief Judge. *See, e.g.*, FLA. R. JUD. ADMIN. 2.050(b). It may be necessary to switch or vary courtroom assignments during high profile cases, or to make physical modifications to the courtroom to allow for storage of audio-visual aids and exhibits.

25. Hosford v. State, 525 So. 2d 789, 797 n.4 (Miss. 1998). It is important that the courtroom selected for the trial of a high profile case provide sufficient access for disabled persons. For example, a courtroom with stationary seating could have an area cleared for exclusive use by wheelchair users. *See* John Albrecht, *Changing the Courts Under the Americans With Disabilities Act*, JUDGES' J., Spring 1996, at 14, 20.

service pleasant.[26] Minimum standards for jury facilities and juror treatment have been proposed.[27]

If the jurors selected to hear the case are not sequestered, special arrangements for their transportation to and from their homes and the jury room in the courthouse may help shield them from outside influences. It may be desirable for court personnel to transport them between these locations. Court personnel should receive training on transporting jurors, and should be given strict instructions to avoid any improper statements or inappropriate conduct. The jurors should be aware of these instructions and should report any violations to the judge. The judge should consider rotating the personnel assigned to transport jurors, especially in a long trial.

3. Broadcast Facilities

In *Chandler v. Florida*,[28] the United States Supreme Court held that a defendant's due process rights were not violated by Florida's rule permitting the televising of their trials, and that Florida's guidelines for television broadcasts afforded adequate safeguards to protect the right of an accused to a fair trial.[29] States are accordingly permitted (but are not obliged) to televise trials subject to the limitations stated in *Chandler* and other cases.[30] The court in which a high profile case is filed may be either required or authorized by court rule to permit the televising of all or part of the trial.[31] If the trial is to be televised, space within the courthouse for television and monitoring equipment should be made available. Guidelines governing location and type of broadcasting equipment permitted should also be prepared,[32] including directives as to pool coverage both inside, as well as outside, the courtroom.[33] Those responsible for allocating space and maintaining the building should know of these needs as far in advance of the scheduled trial date as possible.

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26. *See* G. Thomas Munsterman, *A Brief History of State Jury Reform Efforts*, 79 JUDICATURE 216, 219 (1996).

27. *See* James Needham, *A Citizen's Suggestion for Minimum Standards for Jury Facilities and Juror Treatment*, JUDGES' J., Fall 1997, at 32, 32-34.

28. 449 U.S. 560, 582 (1981).

29. *See id.* at 582; *see also* State v. Green, 395 So. 2d 532, 535 (Fla. 1981) (prohibiting electronic media coverage of trial where doing so may render defendant incompetent to stand trial); Charles R. Nesson & Andrew D. Koblenz, *The Image of Justice:* Chandler v. Florida, 16 HARV. C.R.-C.L. L. REV. 405, 409 (1981) (stating televised trials may improve the public's image of the judiciary).

30. *See Chandler*, 449 U.S. at 582; *Green*, 395 So.2d at 535.

31. *See Chandler*, 449 U.S. at 566.

32. *See* FLA. R. JUD. ADMIN. 2.170 (regulating the type and location of broadcasting equipment).

33. *See, e.g.*, Broin v. Phillip Morris Cos., No. 97-49738 (Fla. Cir. Ct. 1997); Policy for Media Conduct within Court During Tobacco Trial (June 1, 1997) (on file with author).

D. *Jury Pool Considerations*

The court should plan in advance to summon a sufficient number of jurors on the date a high profile trial is scheduled to commence.[34] To minimize the burden on citizens and the cost to the court, the number of prospective jurors summoned should not exceed the number that is reasonably necessary, taking into account such factors as the size of the jury panel desired for trial, the nature of the case, the source list from which jurors are drawn,[35] and the number of jurors likely to be excused.[36] The court should summon enough persons, however, so that it will not run out of prospective jurors in the course of the selection process.[37] In this regard, a 1997 report of a judicial oversight group that studied the functioning of the jury systems in the federal and local courts of the District of Columbia, found that nearly twenty percent of the city's residents chose to ignore their jury summons.[38] Moreover, less than one-quarter of citizens summoned were actually qualified and available for jury service.[39] The report pointed to citizen apathy and inaccurate juror source lists as the primary factors causing this low juror yield.[40]

Highly publicized cases often demand an extended voir dire and engender substantial delays in the jury selection process; however, the court can avoid delays with proper planning. The effective use of jury questionnaires to eliminate unlikely candidates may help save the court and legal counsel time and effort.

Jury pool procedures should be established and carefully reviewed with

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34. The court may in some jurisdictions draw jurors from other localities where prejudicial publicity has been concentrated in a given area. *See, e.g.*, FLA. STAT. § 910.03(3) (1997).

35. The U.S. Supreme Court has set clear guidelines to ensure that jurors are drawn from a fair cross section of society. *See, e.g.*, Taylor v. Louisiana, 419 U.S. 522, 538 (1975). In *Taylor*, the Court held that "petit juries must be drawn from a source fairly representative of the community." *Id.* To that end, "jury wheels, pools of names, panels, or venires from which juries are drawn *must not systematically exclude distinctive groups in the community* and thereby fail to be reasonably representative thereof." *Id.* at 538 (emphasis added).

36. Since many prospective jurors are unwilling to put their families, careers and possibly their salaries on hold, it is realistic to expect a substantial number of jurors to request to be excused from service in high profile cases of long duration.

37. For example, in Palm Beach, Florida, notices were sent to 1,500 potential jurors to appear for selection in the state's lawsuit against major tobacco companies. *See* Lori Rosza, *Tobacco's "Holy War" Begins Today*, MIAMI HERALD, Aug. 1, 1997, at 5b. The jurors summoned were broken up into groups and given questionnaires to "help attorneys weed out unlikely candidates." *Id.*

38. *See* Council for Court Excellence, *Juries for the Year 2000 and Beyond: Proposals to Improve the Jury System in Washington, D.C., cited in* Eileen J. Williams, *D.C. Jury Reform Project Recommends Bigger Juror Role, Fewer Peremptories*, 66 U.S.L.W. 2517 (1998).

39. *See id.*

40. *See id.*

all personnel expected to come into contact with the prospective jurors. This will ensure that such personnel do not intentionally or inadvertently do or say anything that could prejudice the parties' right to a fair trial.

E. *Conduct of Spectators and Media*

Since "courts have the inherent power to preserve order and decorum in the courtroom,[41] . . . and generally to further the administration of justice,"[42] the courts should prepare directives in high profile cases relating to the seating and conduct of the media[43] and spectators in the courtroom, and the insulation of jurors and witnesses from the press during the trial period.[44] Limiting access to jury pool areas is particularly advised to avoid the possibility of jury tampering.[45]

F. *Guidelines for Press Coverage*

Well in advance of the trial, the court should adopt voluntary guidelines[46] for press coverage of high profile cases with the consent of the parties and the media, if possible.[47] In developing these guidelines, the

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41. Miami Herald Publ'g Co. v. Lewis, 426 So. 2d 1, 3 (Fla. 1982). The function of a courtroom is to provide a locus in which civil and criminal disputes can be adjudicated. "Within this staid environment, the presiding judge is charged with the responsibility of maintaining proper order and decorum." Berner v. Delahanty, 129 F.3d 20, 26 (1st Cir. 1997).

42. *Miami Herald Publ'g Co.*, 426 So. 2d at 3; People v. Pennisi, 563 N.Y.S.2d 612, 614-15 (Sup. Ct. 1990).

43. Since courtrooms have limited seating capacity, there may be occasions when not every person who wishes to attend can be accommodated. In such situations, preferential seating for media representatives may be appropriate. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 554, 583, n.18 (1980).

44. *See* Sheppard v. Maxwell, 384 U.S. 333, 359 (1966).

45. *See* Turney v. State, 936 P.2d 533, 539 (Alaska 1997). For a discussion of the activities of The Fully Informed Jury Association, see Fredric B. Rodgers, *The Jury in Revolt? A "Heads Up" on the Fully Informed Jury Association Coming Soon to a Courthouse in Your Area*, JUDGES' J., Summer 1996, at 10, 10-12.

46. Voluntary bench-bar-press guidelines have been adopted in various states. *See* Charles H. Sheldon et al., *The Effect of Voluntary Bench-Bar-Press Guideline on Professional Attitudes Toward the Free Press, Privacy, and Fair Trial Values*, 72 JUDICATURE 114, 114-21 (1998). These guidelines are voluntary standards adopted by members of the state bar and news media to deal with the reporting of crimes and criminal trials. *See id.* at 115.

47. At the National Judicial College in Reno, Nevada, on May 29-31, 1996, journalists, judges, and legal experts examined, criticized, and debated each other's professions, then agreed on steps to improve the quality of justice and court coverage. Of note was the recommendation calling for the establishment in each jurisdiction of a bench/bar/media committee that will meet regularly to address issues of mutual concern. Also recommended was the establishment of local guidelines for management in high-profile cases. Court officials should confer and consult with media representatives to avoid unanticipated problems and understand each other's legal constraints. These measures represent a first step in addressing the issues.

parties should consider the Society of Professional Journalists (SPJ) new Code of Ethics for Journalists which advises journalists to distinguish "news reporting" from advocacy while "balanc[ing] a criminal suspect's fair trial rights with the public's right to be informed."[48]

G. *Security*

Since court related violence seems to have increased over recent years, many courts prohibit persons from bringing weapons into the courthouse,[49] and check those who enter for weapons by using hand searches, X-ray screening devices, or walk-through magnetometers.[50] To ensure the safety of all persons on courthouse property, and to prevent escape of prisoners, additional security measures are advisable. Security should be as unobtrusive as possible to avoid an atmosphere which might interfere with a defendant's right to a fair trial.[51] In assessing the various day-to-day security concerns in high profile cases, judges should consult with the U.S. Marshall's Service or other similar court agencies.[52]

II. ACCESS TO JUDICIAL PROCEEDINGS AND DOCUMENTS

In addition to handling the preliminary matters previously discussed, effective judicial handling of high profile cases[53] requires the resolution of issues arising from the demands of the public and the media under the First Amendment. The court must resolve First Amendment issues regarding access to judicial proceedings and court records, and must be prepared to address assertions by one or more of the parties that access should be denied in order to protect the right to a fair trial guaranteed by the Sixth Amendment. The law governing these issues will be discussed below.

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48. Debra G. Hernandez, *S.P.J. Approves Ethics Code*, EDITOR & PUBLISHER, Oct. 19, 1996, at 51. Separate standards of conduct for lawyers serving as public commentators on high profile cases also have been proposed. *See* Michael Higgins, *Rules to Talk By*, 84 A.B.A. J. 20, 20 (1998).

49. *See, e.g.*, People v. Swihart, 897 P.2d 822, 823 (Colo. 1995).

50. *See, e.g.*, Hopkinson v. Shillinger, 866 F.2d 1185, 1218 (10th Cir. 1989) (deciding security measures including armed and unarmed guards and magnetometer were not so inherently prejudicial as to pose unacceptable threat to defendant's right to a fair trial).

51. *See Court Security and the Transportation of Prisoners*, NAT'L INST. JUST. J., June 1997, at 21-22; Kerry M. Healey, *Victim and Witness Intimidation: New Developments and Emerging Responses*, NAT'L INST. JUST. J., Oct. 1995, at 5-8. For cases considering the constitutionality of in-court security measures, see, for example, *Holbrook v. Flynn*, 475 U.S. 560, 572, (1986). *See also* Morgan v. Aispuro, 946 F.2d 1462 (9th Cir. 1991) (approving use of a secure courtroom having a wire-reinforced glass partition and bars separating the spectator area from the court area).

52. *See* United States v. Pasciuti, 803 F. Supp. 568, 571 (D.N.H. 1992) (citing TIMOTHY R. MURPHY ET AL., A MANUAL FOR MANAGING NOTORIOUS CASES (1992)).

53. The pendency of a criminal case for judicial purposes includes the period beginning with the filing of an accusatory instrument against the accused and all appellate and collateral proceedings. *See* ABA STANDARDS FOR CRIMINAL JUSTICE § 8-3.2 (2d ed. 1980).

A. *Defendant's Right to Public Trial*

The tradition of the public trial has deep roots in both English and American History.[54] Regarding criminal trials, the Sixth Amendment specifically provides: "In all criminal prosecutions, *the accused* shall enjoy the right to a speedy *and public* trial. . . . "[55] Case law has uniformly recognized the Sixth Amendment public trial guarantee as "one created for the benefit of the defendant."[56] In *In re Oliver*,[57] the Supreme Court explained:

> [The public trial guarantee] "is for the protection of all persons accused of crime—the innocently accused that they may not become the victim of an unjust prosecution, as well as the guilty, that they may be awarded a fair trial—that one rule [as to public trials] must be observed and applied to all." Frequently quoted is the statement: . . . "The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions. . . ."[58]

Numerous commentators also have recognized that only a defendant has a right to a public trial under the Sixth Amendment.[59]

B. *Public Access to Criminal Trials*

Historically, courts have not recognized an independent right of the public and the press to attend criminal trials apart from the defendant's right to a public trial.[60] Specifically, in *Gannett Co. v. DePasquale*,[61] the Supreme Court held that the Sixth Amendment's guarantee to the accused of a public trial gave neither the public nor the press an enforceable right

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54. *See In re* Oliver, 333 U.S. 257, 266 (1948); *see also* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 596 (1980) (Brennan, J., concurring) (discussing tradition of public trials). Celebrated by Hale, Blackstone, and Bentham, openness has come to be seen as "an indispensable attribute of an Anglo-American trial," which assures the accused a fair trial and "discourage[s] perjury, the misconduct of participants, and decisions based on secret bias or partiality." *Id.* at 570.

55. U.S. CONST. amend. VI (emphasis added).

56. Gannett Co. v. DePasquale, 443 U.S. 368, 380 (1979).

57. 333 U.S. 257 (1948).

58. *Id.* at 270 n.25 (citation omitted).

59. *See Gannett*, 443 U.S. at 381 n.8.

60. *See id.* at 391.

61. 443 U.S. 368 (1979).

of access to a pretrial suppression hearing.[62] However, the Court in *Gannett* reserved the question whether the First Amendment gives the press and the public a right of access to criminal proceeding that is independent of the defendant's Sixth Amendment right to insist on the openness of the proceedings.[63]

In *Richmond Newspapers, Inc. v. Virginia*,[64] the Supreme Court answered the above question and decided that the First Amendment gives the press and public a qualified right of access to criminal trials.[65] Basing its decision on the common law presumption of open trials, the Court found an implied right of access to criminal trials through the First Amendment guarantees of free press, free speech, and the right of assembly.[66] Accordingly, the Court concluded that the right to publish what occurs during a trial would become all but meaningless if the press were denied access to a trial.[67] The Court, however, asserted that this right of access was not absolute and is subject to reasonable limitations.[68]

First Amendment access claims derive from the underlying notion that the First Amendment is a check on government. As Justice Brandeis famously observed: "Sunlight is said to be the best of disinfectants."[69] Also, James Madison, the principal author of the First Amendment, stated: "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both."[70]

This is the thought the Court implicitly had in mind, in deciding in *Richmond Newspapers*, its first-ever, flat-out holding applying the First Amendment as a *sword* (supporting a right of public and press to access government-controlled sources of information) and not merely as a *shield* (protection from the government when it seeks to suppress what one may report or say).[71] As Justice Stevens observed in his *Richmond Newspapers* concurrence: "This is a watershed case. Until today the Court has accorded virtually absolute protection to the dissemination of information or ideas,

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62. *See id.* at 391.

63. *See id.* at 392.

64. 488 U.S. 555 (1980).

65. *See id.* at 573-74.

66. *See id.* at 575.

67. *See id.* at 577-78.

68. *See id.* at 581 n.18. Ostensibly, the United States Supreme Court has thus far declined to recognize the press as having any different, or better, claims than other members of the public to First Amendment access. As a matter of practice, courts do make a distinction between the public and the press by making various accommodations such as providing preferred seating and screened film-recording facilities.

69. Buckley v. Valeo, 424 U.S. 1, 67 (1976) (quoting LOUIS BRANDEIS, OTHER PEOPLE'S MONEY [sic] 62 (1933)).

70. JAMES MADISON, THE WRITINGS OF JAMES MADISON 103 (Gaillard Hunt ed., 1910).

71. *See generally Richmond Newspapers*, 488 U.S. at 555 (granting public and press a limited right to observe criminal trials).

but never before has it squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever."[72]

This constitutional right of access is satisfied by allowing the press to attend the trial and report what they have heard.[73] However, there is no constitutional right to have testimony recorded and broadcast.[74] Even if a right of access attaches, closure of the courtroom may still be permissible where a court finds that closure is essential to preserve higher values and is narrowly tailored to serve that interest.[75]

C. *Proceeding to Which a First Amendment Right of Access Attaches*

While emphasizing that access decisions should be made on a case-by-case basis,[76] the United States Supreme Court suggested that when deciding whether a First Amendment right of access attaches, lower courts should apply a two-prong test. The court must decide, first, whether the proceeding has historically been open to the press and general public (the history prong), and second, whether public access plays a significant positive role in the functioning of the particular proceeding (the logic prong).[77] If a particular proceeding passes both prongs of the test, the court will conclude that a qualified First Amendment right of access exists.[78]

In some respects, the history prong conflicts with the logic prong. While the history prong sanctions the continued secrecy of certain judicial proceedings, it remains that openness promotes the general goals of a given proceeding and helps keep the public informed. The history prong also appears to conflict with the Madisonian explanation that views the First Amendment access claim as a means of providing a check on government and a method of witnessing how it conducts itself. This tension creates substantial doubts about the long term viability of the history prong.

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72. *Id.* at 582 (1980) (Stevens, J., concurring) (emphasis added).

73. *See id.* at 555.

74. *See* Nixon v. Warner Communications, Inc., 435 U.S. 589, 610 (1978); Westmoreland v. Columbia Broad. Sys., Inc., 752 F.2d 16, 24 (2d Cir. 1984) (holding that the First Amendment, while guaranteeing a public right of access to criminal trials, does not guarantee the right to view them on television).

75. *See* Press-Enterprise Co. v. Superior Court of Cal., 464 U.S. 501, 510 (1984); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982).

76. *See Globe Newspaper Co.*, 457 U.S. at 609.

77. *See* Press-Enterprise Co. v. Superior Court of Cal., 478 U.S. 1, 11-13, (1986); United States v. McVeigh, 119 F.3d 806, 812 (10th Cir. 1997).

78. *See Press-Enterprise*, 478 U.S. at 14. The Supreme Court has recognized that the press and public have a coextensive constitutional right of access to criminal trials, deriving from the First Amendment and applied to the states through the Fourteenth Amendment. Moreover, as in the privacy context, a number of states have constitutional provisions guaranteeing court access, which in some circumstances provide greater protection than that mandated under the federal constitution.

Recognizing the problematic nature of the history prong, Judge Kimba M. Wood has stated that courts need to refocus the analysis

> away from history and take a fresh look at first, where public access matters the most; second, whether access needs to be contemporaneous, or could, for example, be afforded equally well by videotapes made available after interests in closure have diminished or vanished; and last, whether new procedures can effectively accommodate First Amendment, Fourth Amendment and Sixth Amendment interests when they diverge.[79]

1. Criminal Trials

"[T]he First Amendment confers an enforceable right of access to criminal trials upon the press and general public."[80] Additionally, the Sixth Amendment's guarantee of a public trial[81] implicates the right of the press and public to attend a criminal trial.[82] The right of access to criminal trials is generally held to apply to the entire trial, including voir dire,[83] opening statements, presentation of evidence, closing arguments, instructions to the jury, return of the verdict, and the penalty phase.[84] There is, however, no right of access to jury deliberations[85] or conferences between the court and counsel.[86]

2. Pretrial Proceedings in Criminal Cases

A qualified right of access has been extended to pretrial proceedings in

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79. Hon. Kimba M. Wood, *Reexamining the Access Doctrine*, 69 S. CAL. L. REV. 1105, 1120 (1996).

80. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 577 (1980); People v. Ramos, 685 N.E.2d 492, 498 n.3 (N.Y. 1997).

81. The Sixth Amendment requirement of a "public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." *In re* Oliver, 333 U.S. 257, 270 n.25 (1948) (quoting THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS 647 (8th ed. 1927)).

82. *See* Williams v. State, 690 N.E.2d. 162, 166 (Ind. 1997).

83. *See* Press-Enterprise Co. v. Superior Court of Cal., 464 U.S. 501, 525 (1984).

84. *See* People v. Woodward, 841 P.2d 954, 956-57 (Cal. 1992).

85. *See* United States v. Antar, 839 F. Supp. 293, 302 (D.N.J. 1993).

86. While there is generally a right of public access to a trial, the public can properly be excluded from conferences between the court and counsel even during a trial. *See* Miami Herald Publ'g Co. v. Krentzman, 435 U.S. 968 (1978); United States v. Valenti, 987 F.2d 708, 713 (11th Cir. 1993); United States v. Gurney, 558 F.2d 1202, 1210 (5th Cir. 1977); B.H. v. Ryder, 856 F. Supp. 1285, 1290 (N.D. Ill. 1994).

criminal cases that historically have been, and logically should be, open to the public, except where closure is essential to serve a higher interest and where closure is narrowly tailored.[87] Pretrial proceedings to which a right of access attaches include preliminary hearings,[88] plea proceedings, change of venue hearings,[89] competency hearings,[90] pretrial suppression hearings[91] and certain post-trial proceedings in criminal cases.[92]

3. Civil Trials

While the United States Supreme Court has not directly considered whether the public and the press have a First Amendment right to attend trials of civil cases, lower federal and state courts have held that such a right exists.[93]

4. Other Proceedings

Proceedings without a tradition of access include juvenile court,[94] grand jury,[95] civil commitment,[96] deposition,[97] search warrant,[98] and settlement

87. *See* Press-Enterprise Co. v. Superior Court of Cal., 478 U.S. 1, 6-10 (1986).

88. *See* El Vocero v. Puerto Rico, 508 U.S. 147, 150 (1993); *Press-Enterprise*, 478 U.S. at 7.

89. *See In Re* The Charlotte Observer, 882 F.2d 850, 855 (4th Cir. 1989); L.A. Times v. County of Los Angeles, 956 F. Supp. 1530, 1539 (C.D. Cal. 1996).

90. *See In Re* Times-World Corp., 488 S.E.2d 677, 683 (Va. Ct. App. 1997).

91. *See* Waller v. Georgia, 467 U.S. 39, 48 (1984) (explaining that when defendant objects to the closure of a pretrial suppression hearing, the hearing must be open unless the party seeking to close the hearing advances an overriding interest which is likely to be prejudiced).

92. *See* United States v. Ellis, 90 F.3d 447, 448 (11th Cir. 1996); United States v. Simone, 14 F.3d 833, 840 (3d Cir. 1994).

93. *See* Grove Fresh Distribs., Inc. v. Everfresh Juice Co., 24 F.3d 893 (7th Cir. 1994) (determining that media was entitled to intervene and challenge abuse of protective order); NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, 56 Cal. Rptr. 2d 645 (Cal. Ct. App. 1996) (reversing trial court order barring press from civil trial proceedings).

94. *See* United States v. A.D., 28 F.3d 1353, 1358 (3d Cir. 1994) ("No centuries old tradition of openness exists for juvenile proceedings, which are relatively recent creation, and proceedings to determine whether a juvenile is a delinquent are not generally regarded as criminal proceedings."); Note, *The Public Right of Access of Juvenile Delinquency Hearings*, 81 MICH. L. REV. 1540, 1547-49 (1983). At this writing, the Supreme Court has not decided whether an across-the-board ban on access to juvenile proceedings would contravene the First Amendment.

95. *See In Re* Motions of Dow Jones & Co., 142 F.3d 496, 499 (D.C. Cir. 1998). Constitutional powers such as Congress' impeachment power may authorize overriding grand jury secrecy requirements. This was obviously the House of Representatives' conclusion when it voted to release a videotape of President Clinton's grand jury testimony in the Monica Lewinsky investigation.

96. *See In Re* Belk, 420 S.E.2d 682, 685 (N.C. Ct. App. 1992).

97. *See* Palm Beach County Newspapers, Inc. v. Burk, 504 So. 2d 378, 383 (Fla. 1987).

98. *See* United States v. Certain Real Property, 977 F. Supp. 833, 836 (E.D. Mich. 1997).

proceedings.[99]

D. *Place of Trial*

While the place of trial is subject to judicial control, holding a criminal trial or part thereof at a location other than the common place or time may give rise to questions of whether the public trial rights of the defendant or the public have been violated. It has been held, however, that conducting part of a criminal trial in prison,[100] or the individual voir dire of jurors in the anteroom[101] did not constitute a denial of a party's right to have a public trial where it was determined that the public could have gained access if it so desired.

E. *Court Documents*

The United States Supreme Court has recognized a common law right to inspect and copy judicial records and documents.[102] Under this doctrine, "judicial documents are presumptively available to the public, but may be sealed [or pseudonyms used] if the right to access is outweighed by the interests favoring nondisclosure."[103]

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99. "Settlement proceedings are historically closed procedures" to which there is no First Amendment right of access. *In Re* Cincinnati Enquirer, 94 F.3d 198, 199 (6th Cir. 1996). *See also* B.H. v. Ryder, 856 F. Supp. 1285, 1291 (N.D. Ill. 1994). Such settlement techniques as summary jury trials have been closed to the press and public. *See* Cincinnati Gas & Elec. Co. v. General Elec. Co., 854 F.2d 900, 905 (6th Cir. 1988). In a summary jury trial proceeding attorneys present arguments to mock jurors who render an informal verdict that guides settlement of the case. *See id.* at 901-02.

100. *See* William J. Appel, *Exclusion of Public from State Criminal Trial by Conducting Trial or Part Thereof at Other Than Regular Place or Time*, 70 A.L.R. 4th 632 (1990).

101. *See* Commonwealth v. Harris, 703 A.2d 441, 445-46 (Pa. 1997).

102. *See* Nixon v. Warner Communications Corp., 435 U.S. 589, 597 (1978). Court documents have been defined to include

> documents, exhibits in the custody of the clerk, papers, letters, maps, books, tapes, photographs, films, recordings, data processing software or other material created by any entity within the judicial branch, regardless of physical form, characteristic, or means of transmission, that are made or received pursuant to court rule, law or ordinance, or in connection with the transaction of official business by any court or court agency.

FLA. R. JUD. ADMIN. 2.051 (b).

At this writing, the United States Supreme Court has not answered the question whether there is a First Amendment right of access to documents in a criminal case or whether a First Amendment balancing test must be applied before court records and documents can be sealed.

103. United States v. McVeigh, 119 F.3d 806, 811 (10th Cir. 1997); *see* Doe v. Blue Cross & Blue Shield, 112 F.3d 869, 872 (7th Cir. 1997); People v. Burton, 597 N.Y.S.2d 488, 491 (App. Div. 1993); *see also* FLA. R. JUD. ADMIN. 2.051 (setting forth interests favoring confidentiality).

Court documents to which access is presumed include indictments, motion documents, closed criminal case files, trial exhibits, recusal motion documents, plea hearing documents, plea agreements, bail hearing documents, affidavits of already-executed search warrants, jury lists, juror questionnaires, appellate briefs, and all documents in a civil suit.[104] On the other hand, access has been denied to on-line computer data,[105] unfiled discovery depositions,[106] videotapes,[107] search warrant affidavits,[108] documents maintained by a pretrial services agency,[109] settlement documents,[110] and records made confidential by statute.[111] The presumption of access is "stronger" with regard to documents filed with the court, "stronger yet" with regard to documents "upon which the court relies in making a dispositive ruling," and "strongest" with regard to documents offered in evidence at trial.[112]

III. CLOSURE OF COURT PROCEEDINGS

Even where a qualified right of public access attaches, complete or partial exclusion of the public may be justified if a court finds "that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was

104. *See* Washington Post v. Robinson, 935 F.2d 282, 288 (D.C. Cir. 1991); *In re* New York Times, 828 F.2d 110, 113-16 (2nd Cir. 1987)); L.A. Times v. County of Los Angeles, 956 F. Supp. 1530, 1539 (C.D. Cal. 1996). For a discussion as to the extent which the First amendment right of access applies to civil court files and records, see Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1067-68 (3d Cir. 1984); *In re* Continental Ill. Secs. Litig., 732 F.2d 1302, 1308-09 (7th Cir. 1984); NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, 56 Cal. Rptr. 2d 645, 648-56 (Ct. App. 1996) (reversing trial court order barring press from civil trial proceedings).

105. *See L.A. Times*, 956 F. Supp. at 1540.

106. *See* Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33 (1984); Palm Beach Newspapers, Inc. v. Burk, 504 So. 2d 378, 381-82 (Fla. 1987); State v. Lowe, 673 N.E.2d 1360, 1363 (Ohio 1997); Hutchison v. Luddy, 581 A.2d 578, 583 (Pa. Super. Ct. 1990).

107. In *United States v. McDougal*, the press was denied access to the videotape recording of President Clinton's deposition testimony in a criminal case because members of the public, including the press, had been permitted to listen to the videotapes as they were played to the jury in the courtroom and furnished with copies of the written transcript. *See* 103 F.3d 651, 658 (8th Cir. 1996).

108. *See In re* Four Search Warrants, 945 F. Supp. 1563, 1568 (N.D. Ga. 1996).

109. *See* Copley Press, Inc. v. Administrative Office of the Courts, 648 N.E.2d 324, 328 (Ill. 1995).

110. *See* Minneapolis Star & Tribune Co. v. Schumacher, 392 N.W.2d 197, 204 (Minn. 1986).

111. *See* T.T. v. State, 689 So. 2d 1209, 1210 (Fla. 3d DCA 1997) (discussing FLA. STAT. § 39.045(4) (1996), which addresses access to court records of juveniles); *see also* UNIFORM TRADE SECRETS ACT § 5 (U.L.A.).

112. *In re* Adobe Systems, Inc. Secs. Litig., 141 F.R.D. 155 (N.D. Cal. 1992).

properly entered."[113] However, "transcripts of properly closed proceedings must be required to be released when the danger of prejudice has passed."[114]

A. *Criteria for the Denial of Access*

The right of public access to judicial proceedings[115] or documents[116] is qualified and may be overcome when the proponent of closure demonstrates, and the court finds, that the denial of access is necessitated by an overriding governmental interest and that closure is narrowly tailored to serve that interest. Interests justifying closure may include the right to a fair trial,[117] protecting the physical and psychological well-being of juvenile victims of sex crimes,[118] assuring the safety and effectiveness of police informants,[119] furthering the privacy interests of third parties,[120] and preventing in-court media coverage from creating a "carnival atmosphere"

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113. Waller v. Georgia, 467 U.S. 39, 48 (1984) (quoting Press-Enterprise Co. v. Superior Court of Cal. 464 U.S. 501, 510 (1984)); *see also* Williams v. State, 690 N.E.2d 162, 167 (Ind. 1997). However, courts are encouraged to seek the voluntary cooperation of the news media before invoking closure. *See* State v. Montana Twenty-First Judicial Dist. Court, 933 P.2d 829, 834 (Mont. 1997).

114. Gannett Co. v. DePasquale, 443 U.S. 368, 393 (1979); *see also* United States v. Valenti, 987 F.2d 708, 714 (11th Cir. 1993) (citing *Gannett Co.*, 443 U.S. at 393).

115. *See* State v. Bone-Club, 906 P.2d 325, 328 (Wash. 1995). In deciding whether to close a proceeding, the same factors should be considered whether a closure motion is made by the defendant over the First Amendment objection of the government or press. *See* United States v. Doe, 63 F.3d 121, 127-28 (2nd Cir. 1995).

116. *See* United States v. McVeigh, 119 F.3d 806, 811 (10th Cir. 1997).

117. *See* Welsh Television, Inc. v. Freeman, 691 So. 2d 332 (Fla. 5th DCA 1997). Closure to protect the accused's right to a fair trial is appropriate only if specific findings are made demonstrating that, first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights. *See* Bigelow v. Commissioner, 65 F.3d 127 (9th Cir. 1995).

118. *See* Globe Newspaper, Inc. v. Superior Court, 457 U.S. 596, 607-08 (1982); United States v. Osborne, 68 F.3d 94, 99 (5th Cir. 1995); State v. Fageroos, 531 N.W.2d 199, 202 (Minn. 1995); Austin Daily Herald v. Mork, 507 N.W.2d 854, 858 (Minn. Ct. App. 1993).

119. *See* Okonkwo v. Lacy, 104 F.3d 21, 25 (2d Cir. 1997); Pearson v. James, 105 F.3d 828, 831 (2d Cir. 1997); State v. Bone-Club, 906 P.2d 325, 328 (Wash. 1995); Ex Parte Birmingham News Co., 624 So. 2d 1117, 1134 (Ala. Crim. App. 1993); Robin Zeidel, Note, *Closing the Courtroom for Undercover Police Witnesses: New York Must Adopt a Consistent Standard*, 4 J.L. & POL'Y 659-717 (1996).

120. *See* United States v. Doe, 63 F.3d 121, 128 (2d Cir. 1995); United States v. Haller, 837 F.2d 84, 87 (2d Cir. 1988); *In re* New York Times Co., 828 F.2d 110, 116 (2d Cir. 1987); Wendt v. Wendt, 706 A.2d 1021, 1025 (Conn. Super. Ct. 1996). On the other hand, most courts expressly exclude reputation and embarrassment as a permissible basis for closure or to justify the use of pseudonyms. *See, e.g.*, Reznik v. Hofeld, 618 S.E.2d 160 (Ill. 1996).

in the courtroom.[121] On the other hand, preventing injury to personal or corporate reputation,[122] or lessening the anxiety of a defendant,[123] have been held not to constitute overriding interests justifying closure.

B. *Closure Procedures*

Before ordering a closure of court proceedings, the United States Supreme Court requires that the trial court find not only that closure is essential to preserve an overriding governmental interest,[124] but also that there is a "substantial probability" that the interest sought to be protected will be prejudiced by the open courtroom and that closure would prevent the prejudicial effect.[125] The court must narrowly tailor its closure order to serve the interest sought to be protected,[126] consider reasonable alternatives to closure, and then conclude that such alternatives would not adequately protect the defendant's right to a fair trial.[127] These determinations should be supported by specific, individualized findings articulated on the record before closure is effected. The court must make such findings regardless of whether closure is sought by the government over the defendant's Sixth Amendment objection or by the defendant over the First Amendment objection of the government or press. Ordinarily, a motion to close a trial to the public should be made before trial to avoid unfair surprise and to

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121. Sheppard v. Maxwell, 384 U.S. 333, 358 (1996).

122. *See* State v. Cottman Transmission Sys. Inc., 542 A.2d 859, 864 (Md. 1988). Injury to corporate or personal reputation is an inherent risk in almost every civil trial.

123. *See Ex Parte* The Island Packet, 417 S.E.2d 575, 578 (S.C. 1992) ("[L]essening a defendant's anxiety, even a juvenile's, does not promote a higher value than protection of the public's constitutional right of access."). "A reasonable alternative to closure can be in camera testimony regarding matters of a confidential nature." *Id.*

124. "A court ordering closure must first establish that the competing interest asserted is not only 'compelling,' but also that it outweighs the First Amendment right of access." United States v. Antar, 38 F.3d 1348, 1359 (3d Cir. 1994).

125. Press-Enterprise Co. v. Superior Court of Cal., 478 U.S. 1, 13 (1986) ("If the interest asserted is the right of the accused to a fair trial, [a proceeding to which the right of access applies] shall be closed only if specific findings are made demonstrating that, first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights.").

126. The trial court, upon ruling that a closure is warranted, must extend its order no further than the circumstances warrant. *See, e.g.*, Miami Herald Publ'g Co. v. Lewis, 426 So. 2d 1, 8 (Fla. 1982).

127. *See id.* Alternatives that may be considered include continuance, peremptory challenges, sequestration, admonition of the jury or severance. Although courts list a change of venue as an alternative measure, the Sixth Amendment right of the accused to trial by "an impartial jury of the state and district wherein the crime shall have been committed," U.S. CONST. amend. VI, may override the efficacy of this option, at least over the defendant's objection. U.S. CONST. amend. VI.

give the trial court time to do research and hear arguments.[128]

C. *Partial Closure*

A partial closure of court proceedings is one that generally "results in the exclusion of certain members of the public while other members of the public are permitted to remain in the courtroom."[129] Where a partial rather than a total closure is involved, a "substantial reason" is sufficient to justify the closure.[130] The exclusion of certain members of the public from the courtroom in order to maintain proper decorum,[131] prevent overcrowding,[132] avoid the intimidation of witnesses[133] or preserve trade secrets,[134] exemplify justifications for partial closures of court proceedings.

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128. *See* State v. Garcia, 561 N.W.2d 599, 605 (N.D. 1997). As recommended guidelines for a judge making a closure determination, (1) notice must be given to at least one representative of the local news media when a motion for closure is filed and when it is heard by the court, and (2) those seeking closure have the burden of producing evidence and proving that closure is necessary. *See Miami Herald Publ'g Co.*, 426 So. 2d at 7.

129. *Garcia*, 561 N.W.2d at 605.

130. *Press-Enterprise Co.*, 464 U.S. at 510; *see also* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 581 (1980) (plurality opinion); Guzman v. Scully, 80 F.3d 772, 775 (2d Cir. 1996); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606-07 (1982) (requiring a "compelling" interest); People v. Chan, 656 N.Y.S.2d 22 (App. Div. 1997) (holding that the exclusion of certain individuals from courtroom was constitutional); State v. Garcia, 561 N.W.2d at 606 (N.D. 1997) (holding partial closure of trial is constitutional).

131. *See* United States v. Alvarez, 755 F.2d 830, 860 (11th Cir. 1985); Thomas M. Fleming, *Exclusion of Public from State Criminal Trial in Order to Prevent Disturbance by Spectators or Defendant*; 55 A.L.R. 4th 1170 (1988).

132. *See* Commonwealth v. Stilley, 689 A.2d 242, 253 (Pa. Super. Ct. 1997).

133. *See* Consentino v. Kelly, 102 F.3d 71, 73 (2d Cir. 1996); *Guzman*, 80 F.3d at 774; Woods v. Kuhlmann, 977 F.2d 74, 76 (2d Cir. 1992); United States v. Sherlock, 962 F.2d 1349, 1356-59 (9th Cir. 1989); Nieto v. Sullivan, 879 F.2d 743, 753 (10th Cir. 1989) (excluding the defendant's relatives only during the victim's testimony was justified in order to protect the victim who was afraid of testifying); Fleming, *supra* note 131.

134. *See Richmond Newspapers, Inc.*, 448 U.S. at 600 (plurality opinion) (Stewart, J., concurring) ("The preservation of trade secrets . . . might justify the exclusion of the public from at least some segments of a civil trial."); Standard & Poor's Corp. v. Commodity Exch., Inc., 541 F. Supp. 1273, 1277-78 (S.D.N.Y. 1982) (discussing how a courtroom was closed during testimony concerning alleged trade secrets). An exception to the public's right to access when a case involves trade secrets is widely recognized. *See, e.g.*, Valley Broad. v. United States District Court, 798 F.2d 1289, 1294 (9th Cir. 1986); *In re* Iowa Freedom of Info. Council, 724 F.2d 658, 662 (8th Cir. 1983); Brown & Williamson Tobacco Co. v. Federal Trade Comm'n, 710 F.2d 1165, 1180 (6th Cir. 1983). Closing the courtroom during testimony concerning confidential data supporting scientific research which is deemed to be relevant to issues in litigation may alleviate some of the problems arising from court ordered disclosure of academic research. *See generally* Joe S. Cecil & Gerald T. Wetherington, *Court-Ordered Disclosure of Academic Research: A Clash of Values of Science and Law*, LAW AND CONTEMP. PROBS., Summer 1996, at 3.

D. *Time, Place, and Manner Restrictions*

A trial judge may impose reasonable time, place, and manner restrictions on access to court proceedings.[135] For example, admittance into a courtroom can be conditioned on spectators providing identification,[136] surrendering firearms,[137] submitting to security screening,[138] or entering only during certain hours.[139] Limitations on ingress and egress by locking the courtroom doors or posting "Do Not Enter" signs have been upheld in order to maintain security, avoid interruptions, ensure a nondisruptive atmosphere,[140] or prevent overcrowding.[141] Delaying the dissemination of public information,[142] or conditioning the media's attendance at a court proceeding upon the media's agreement not to publish certain

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135. *See Richmond Newspapers Inc.*, 448 U.S. at 581 n.18.

> Just as a government may impose reasonable time, place, and manner restrictions upon the use of its streets in the interest of such objectives as the free flow of traffic, so may a trial judge, in the interest of the fair administration of justice, impose reasonable limitations on access to a trial. "[T]he question in a particular case is whether that control is exerted so as not to deny or unwarrantedly abridge . . . the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places."

Id.; see also Bell v. Evatt, 72 F.3d 421, 432-33 (4th Cir. 1995); ABA STANDARDS FOR CRIMINAL JUSTICE 8-3-2(c) (2d ed. 1980).

136. *See* United States v. Brazel, 102 F.3d 1120, 1155-56 (11th Cir. 1997) (requiring all persons entering courtroom to identify themselves by identification card, name, address, and birth date); Williams v. State, 690 N.E.2d 162, 168-69 (Ind. 1997).

137. *See* People v. Swihart, 897 P.2d 822, 825-26 (Colo. 1995).

138. *See* McMorris v. Alioto, 567 F.2d 897, 901 (9th Cir. 1978) (upholding inspection of briefcases and parcels as condition to enter a courthouse); Commonwealth v. Harris, 421 N.E.2d 447, 448 (Mass. 1981) (stating that packages, briefcases, or other items carried by a person must be offered for an inspection); Bozer v. Higgins, 613 N.Y.S.2d 312, 313 (N.Y. App. Div. 1992) ("[L]imited courthouse searches to screen for weapons are reasonable under the Federal and State Constitutions."); Rhode Island Defense Attorneys Ass'n v. Dodd, 463 A.2d 1370, 1372 (R.I. 1983) (approving inspection of parcels, objects, or briefcases brought into courthouse).

139. *See* Ridenour v. Schwartz, 875 P.2d 1306, 1309 (Ariz. 1994) (holding that trial court's general administrative order denying access to courthouse to any person not within the building by 3 p.m. did not violate the Arizona Constitution).

140. *See* Herring v. Meachum, 11 F.3d 374, 379-80 (2nd Cir. 1993); People v. Woodward, 841 P.2d 954, 956-60 (Cal. 1992); United States v. Bails, 413 N.W.2d 709, 710 (Mich. Ct. App. 1987).

141. *See* Peterson v. Williams, 85 F.3d 39, 43 (2d Cir. 1996); Bell v. Evatt, 72 F.3d 421, 433 (4th Cir. 1995); People v. Hughes, 657 N.Y.S.2d 695 (N.Y. App. Div. 1997); *In re* Times-World Corp., 373 S.E.2d 474, 478-81 (Va. Ct. App. 1988).

142. *See, e.g.*, Sacramento Bee v. United States Dist. Court, 656 F.2d 477, 482 (8th Cir. 1981); Advisory Committee Note, 91 F.R.D. 289, 373 (discussing delays in dissemination of potentially prejudicial information).

information,[143] or not to photograph the faces of sitting or prospective jurors,[144] may also be justified under certain circumstances.

IV. SETTLEMENT OF A HIGH PROFILE CASE: THE NEED FOR CONFIDENTIALITY

During the pretrial stage of a high profile case and, in some instances, even during the trial, the parties may attempt to settle their disputes. Courts generally have a strong interest in promoting settlement of cases.[145] Settlement saves judicial time and resources[146] and permits the parties to reduce expenses, eliminate the risks of trial, and resolve the case after consideration of possible solutions that may or may not be available through court remedies.[147]

This strong judicial interest in promoting the settlement of cases is especially critical in high profile cases. A settlement agreement in a high profile civil case or a negotiated plea agreement in a high profile criminal case can serve the interests of justice by leading to resolutions that are both acceptable to the parties and public's sense of justice. This can be vastly important, particularly in cases posing a threat of civil disturbance. Conversely, an unpopular settlement of a high profile case can severely damage public confidence in the judicial system with consequent repercussions. Thus, the court should exercise great forethought before encouraging settlement efforts.

One of the greatest difficulties presented to the court and the parties in attempting to settle a high profile case is that such a case pits the need for confidentiality, which is generally believed to be essential to the settlement process, against the voracious desire of the media and the public to know every development in the case. Aggressive media activity can produce breaches in confidentiality which can impede and perhaps defeat settlement

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143. *See* Tsokalas v. Purtill, 756 F. Supp. 89, 90 (D. Conn. 1981); Mayer v. State, 523 So. 2d 1171, 1172-73 (Fla. 2d DCA 1988); *In re* A Minor, 563 N.E.2d 1069, 1071 (Ill. App. Ct. 1990); Austin Daily Herald v. Mork, 507 N.W.2d 854, 856 (Minn. Ct. App. 1993); *In re* VV Pub. Corp., 577 A.2d 412, 414 (N.J. 1990).

144. *See* State *ex rel* National Broad. Co. v. Court of Common Pleas, 556 N.E.2d 1120, 1123 (Ohio 1990). Such an order was entered by Miami-Dade County, Florida Circuit Court Judge Robert Kaye in the case of *Broin v. Phillip Morris Cos.*, Case No. 91-49738 (Fla. Cir. Ct. 1991).

145. Expanding caseloads having significantly increased the need for settlement in judicial systems. For example, civil filings in federal courts increased from 51,063 in 1960 to almost 240,000 in 1988. *See* FEDERAL COURTS STUDY COMM'N, WORKING PAPERS AND SUBCOMMITTEE REPORTS 30 (1990). This expansion in case filings has resulted in an increased pressure for judicial involvement in settlement and alternative dispute resolution. *See* Lauren K. Robel, *Private Justice and the Federal Bench*, 68 IND. L.J. 891, 893 (1993).

146. *See* Dale E. Rude & James A. Wall, Jr., *Judicial Involvement in Settlement: How Judges and Lawyers View It*, 72 JUDICATURE 175, 175-79 (1988).

147. *See id.*

attempts. Moreover, pervasive media coverage can generate public resentment towards confidential attempts to resolve a high profile case.

These and other concerns may prompt a trial judge handling a high profile case to avoid direct participation in confidential settlement negotiations outside the presence of the public and the media,[148] which often occurs in non-high profile cases. If the trial judge elects not to participate in settlement discussions, but wishes to promote settlement, the trial judge may decide to appoint a mediator or other alternative dispute resolution professional to direct settlement discussions.[149]

The importance of promoting settlement in a high profile case with the attendant difficulties stated above requires the trial judge to undertake settlement efforts with caution. The court's authority concerning settlement negotiations and the principles of confidentiality that apply to such negotiations should be carefully ascertained before the settlement process begins. Moreover, the court should think about how to deal with the situation if confidentiality is breached or other problems arise in the settlement process. The court should give the same thought, care, and attention to the settlement process as to the trial of the case itself.

V. TELEVISED COVERAGE OF JUDICIAL PROCEEDINGS

While televised coverage of judicial proceedings does not per se violate a defendant's due process rights, the United States Supreme Court has not yet recognized any First Amendment right of the media to televise court proceedings.[150] Many states now permit electronic coverage of court proceedings.[151] In those states, various rules and guidelines govern such coverage. Such guidelines generally include provisions with regard to media equipment, lights, number of media personnel, types of cameras, position of equipment operators, and movement in the courtroom.[152]

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148. Settlement proceedings are historically closed procedures to which there is no First Amendment right of access. *See In Re* Cincinnati Enquirer, 94 F.3d 198, 199 (6th Cir. 1996); Cincinnati Gas & Elec. Co. v. General Elec. Co., 854 F.2d 900, 903 (6th Cir. 1988); Ritti v. Ryder, 854 F. Supp. 1285 (N.D. Ill. 1994).

149. *See* PETER SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC TORT DISASTERS IN THE COURTS 143-67 (1987) (discussing use of settlement masters).

150. *See* Chandler v. Florida, 449 U.S. 560, 574, 582-83 (1981); Marin Indep. Journal v. Municipal Court, 16 Cal. Rptr. 2d 550, 551 (Cal. Ct. App. 1993).

151. *See* Christo Lassiter, *TV or Not TV—That It is the Question*, 86 J. CRIM. L. & CRIMINOLOGY 928, 928 (1996); Christo Lassiter, *An Annotated Descriptive Summary of State Statutes, Judicial Codes, Canons, and Court Rules relating to Admissibility and Governance of Cameras in the Courtroom*, 86 J. CRIM. L. & CRIMINOLOGY 1019 (1996). A nationwide three-year experimental program allowing television coverage in some federal trial and appeals courts was voted down by the Judicial Conference of the United States on December 31, 1994. *See id.*

152. *See, e.g.*, Fla. R. Jud. Admin. 2.170 (Standards of Conduct and Technology Governing Electronic Media and Still Photography Coverage of Judicial Proceedings).

Consent of the presiding judge is often required and the judge has discretion to control the coverage during the proceedings, such as by prohibiting visual identification of jurors, victims, or witnesses who object.[153]

Electronic or other recording of judicial proceedings is subject to judicial control.[154] Judges deciding whether to permit proceedings to be televised should consider such factors as the identity of the parties and witnesses, the nature and subject matter of the proceeding, and the impact of television coverage. Potential impacts include prejudice to the public's trust in the juridical system, as well as possible adverse effects on the parties' right to a fair trial, the ability to impanel an impartial jury, and the trial participants' right to privacy and confidentiality.[155]

Due in part to backlash to the O.J. Simpson criminal trial, judges across the country have prohibited the televising of a number of high-profile cases.[156] These cases include the second prosecution of the Menendez brothers in California,[157] the trial of Susan Smith for the murder of her two sons in South Carolina,[158] the death penalty case in California of Richard Allen Davis accused of killing 12-year-old Polly Klass,[159] and the trial of Yolanda Saldivar for the murder of the singer Selena in Texas.[160] Superior Judge Hiroshi Fujisaki, repeatedly citing the media coverage in the criminal trial, banned televised coverage of O.J. Simpson's civil trial under California Court Rule 980.[161]

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153. *See, e.g.*, Times Publ'g Co. v. State, 632 So. 2d 1072, 1073-76 (Fla. 4th DCA 1994).

154. *See* State v. Green, 395 So. 2d 532, 536 (Fla. 1981).

155. *See* 66 U.S.L.W. 2479 (citing Civil Practice Standards adopted by the A.B.A. House of Delegates at its mid-year meeting in February of 1998).

156. *See, e.g.*, Mark Hamblett & Nell Porter Brown, *Justice Upholds TV Ban at Salvi Trial: "Special Circumstances"* (citing PATRIOT LEDGER, Feb. 2, 1996, at 5).

157. *See* Ann W. O'Neill & J. Michael Kennedy, *Judge Bars Television Cameras from Courtroom for Menendez Retrial; Ruling: Although Simpson Case Is Not Mentioned, Decision Is Seen as Backlash to Controversy Over Media Coverage It Received*, L.A. TIMES, Oct. 7, 1995, at B1.

158. *See Cameras, Electronic Media Banned at Susan Smith Trial*, L.A. TIMES, July 2, 1995, at A16.

159. *See* Jamie Beckett, *Cameras Barred at Klass Trial*, S.F. CHRON., Feb. 6, 1996, at A1.

160. *See Judge Rejects Requests for Live TV Coverage of Trial in Selena's Slaying*, DALLAS MORNING NEWS, Sept. 7, 1995, at 25A.

161. California Rule of Court 980 permits film or electronic media coverage by court order, although the court may "refuse or terminate [such coverage] in the interests of justice to protect the rights of the parties and the dignity of the court, or to assure the orderly conduct of proceedings." Kelli L. Sager & Karen N. Frederiksen, *Televising the Judicial Branch: In Furtherance of the Public's First Amendment Rights*, 69 S. CAL. L. REV. 1519 (1996); *see also* Abraham Abramovsky & Jonathan I. Edelstein, *Cameras in the Jury Room: An Unnecessary and Dangerous Precedent*, 28 ARIZ. ST. L.J. 865, 865-892 (1996); S.L. Alexander, *The Impact of* California v. Simpson *on Cameras in the Courtroom*, 79 JUDICATURE 169, 169-75 (1996).

VI. METHODS TO CONTROL PREJUDICIAL PRETRIAL PUBLICITY

Massive publicity of inadmissible facts about a party or issues involved in a high profile case can prejudice a party's right to a fair trial.[162] Publicizing illegally seized evidence or an illegally obtained confession, for example, can potentially devastate a defendant's right to a fair trial in a criminal case. The court has a duty to provide all parties their right to a fair trial and, consequently, to prevent prejudicial publicity from interfering with this right.

There are several methods available to the court to discharge this duty. The most extreme method under First Amendment law is the imposition by the court of a prior restraint prohibiting the dissemination of prejudicial information. Prior restraints are seldom justified under the constitutional standards governing their exercise. In limited circumstances, however, a prior restraint may be both necessary and permissible.

Additionally, the court may, in some circumstances, order closure of a pretrial proceeding to insure that dissemination of prejudicial information throughout the community will not jeopardize the fairness of the trial. Moreover, where statements of participants or lawyers involved in the case threaten the right to a fair trial, the court may prevent such statements by issuing a restraining order. Even without a restraining order, however, the attorneys and judge involved in the case are usually prohibited from making prejudicial statements about the case by applicable ethics codes.[163]

Each of the above methods of controlling prejudicial publicity is governed by its own standards and criteria and has its own advantages and disadvantages. The court should consider and evaluate all available methods of controlling prejudicial publicity in a high profile case.[164]

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162. The United States Supreme Court has long recognized that adverse publicity can endanger the ability of a defendant to receive a fair trial. *See* Sheppard v. Maxwell, 384 U.S. 333 (1966) (discussing the prejudicial effect of pretrial publicity). In *Sheppard*, the Court reversed the conviction of Dr. Sam Sheppard for the murder of his wife Marilyn because the trial judge failed to fulfill his duty to protect Sheppard from the inherently prejudicial publicity which saturated the community and failed to control disruptive influences in the courtroom. *See id.* at 362-63. Although Sheppard was acquitted on retrial, he remained convicted in the public's mind until DNA studies of hair samples confirmed that another man had in fact murdered Marilyn Sheppard (just as Sheppard had always maintained) proving he was innocent after all. *Cf., e.g., Sam Sheppard: The Real Story* (The Learning Channel television broadcast, Sept. 7, 1997). But for the Warren Court's decision, we probably would never have known.

163. *See, e.g.*, FLA. R. PROFESSIONAL CONDUCT 4-3.6 (1997); FLA. CODE OF JUDICIAL CONDUCT, Canon 5A (1997).

164. Restrictions on the freedom of speech are subject to different tests depending upon whether the restriction is content based or content neutral. Content based restrictions are subject to "strict scrutiny" while content neutral restrictions are subject to a balancing analysis. *See* United States v. O'Brien, 391 U.S. 367, 382-86 (1968); State v. Conforti, 688 So. 2d 350, 354-55 (Fla. 4th

A. *Prior Restraints on the Media*

"The term 'prior restraint' is used 'to describe administrative or judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.'"[165] The constitutional guarantee of "freedom of the press"[166] embodies special protection for the media from prior restraints on publication.[167] Prior restraints on publication consist of court imposed restrictions that are directed at the media, and that intrude upon the media's editorial process by interfering with its right to publish material which it already possesses.[168]

Because prior restraints on speech and publication are the most serious, and the least tolerable infringement on First Amendment rights, any prior restraint bears a heavy presumption against its constitutional validity.[169] A party seeking to obtain an order of prior restraint carries a heavy burden of showing justification for the imposition of such an order. Whether an order of prior restraint violates the First Amendment guarantee of freedom of the press is determined principally by reference to the United States Supreme Court's decision in *Nebraska Press Ass'n v. Stuart*.[170] In that case the Court confronted the difficult task of determining the proper balance between a defendant's right to a fair trial and the media's First Amendment free press right in the context of a sensational murder case that generated

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DCA 1997).

165. Alexander v. United States, 509 U.S. 544, 550 (1993). It is not always clear what government actions constitute a "prior restraint." *See* John Calvin Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409, 419 (1983). Some prior restraints involve permits or licenses and some involve injunctions (for example, "gag orders"). *See id.* Some involve neither permits nor injunctions but are treated as prior restraints; others, meanwhile, are not so treated. *See id.*; *see also* State v. Globe Communications Corp., 622 So. 2d 1066, 1072-75 (Fla. 4th DCA 1993) (discussing restraints on media coverage of cases).

166. U.S. CONST. amend. I. The purpose of the First Amendment provision which guarantees a free press is "to afford special protection against orders that prohibit the publication or broadcast of particular information or commentary—orders that impose a 'previous' or 'prior' restraint on speech." Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 556 (1976).

167. Examples of prior restraints on the media are found in *Nebraska Press Ass'n*, 427 U.S. at 542-46, a case involving judicial orders prohibiting the news media from disseminating confessions or admissions made by an accused in a murder case, and in *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971), a case in which the United States sought to enjoin the New York Times and the Washington Post from publishing the contents of a classified historical study on Vietnam policy.

168. *See* State v. Montana Judicial District Court, 933 P.2d 829, 840-41 (Mont. 1997).

169. *See Nebraska Press Ass'n*, 427 U.S. at 556-570. A court may impose a prior restraint on the media for the purpose of protecting the integrity of court proceedings only if "the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." *Id.* at 561 (quoting United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950)).

170. 427 U.S. 539 (1976).

extensive pretrial publicity.[171]

The Court set forth the following factors in *Nebraska Press Ass'n* to govern the constitutionality of a court order imposing a prior restraint on the media to protect a party's right to a fair trial.

> [W]e must examine the evidence before the trial judge when the order was entered to determine (a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger. The precise terms of the restraining order are also important. We must then consider whether the record supports the entry of a prior restraint on publication, one of the most extraordinary remedies known to our jurisprudence.[172]

Justice Blackmun summarized the state of prior restraint doctrine as follows:

> Although the prohibition against prior restraints is by no means absolute, the gagging of publication has been considered acceptable only in "exceptional cases." Even where questions of allegedly urgent national security, or competing constitutional interests, are concerned, we have imposed this "most extraordinary remedy" only where the evil that would result from the reportage is both great and certain and cannot be militated by less intrusive measures.[173]

In almost all reported cases, court-imposed prior restraints on the publication of information already in the media's possession have been declared invalid. For example, courts applying the *Nebraska Press Ass'n* analysis have held that the following violated the test for a constitutional prior restraint: an injunction prohibiting *Business Week* magazine from publishing an article disclosing the contents of documents placed under the seal of secrecy by the parties to a lawsuit;[174] a court order prohibiting the broadcast of a segment of Fox Network's *America's Most Wanted* program

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171. *See id.* at 541.

172. *Id.* at 562. In a separate concurring opinion, Justice Brennan, joined by Justices Stewart and Marshall, advocated an absolute ban on prior restraints on publication of information related to a criminal trial. *See id.* at 572 (Brennan, J., concurring).

173. CBS, Inc. v. Davis, 510 U.S. 1315, 1317 (1994).

174. *See* Proctor & Gamble Co. v. Bankers Trust Co., 78 F.3d 219, 224-25 (6th Cir. 1996). Nonetheless, protective orders may be imposed in connection with information acquired through civil discovery. *See* United States v. Aguilar, 515 U.S. 593, 602 (1995); Seattle Times v. Rhinehart, 467 U.S. 20, 31 (1984).

on the ground that it lacked newsworthiness;[175] and an order prohibiting the publication of certain information obtained by the press at jury selection.[176] Moreover, judicial decisions have invalidated prior restraints on the publication of confidential information lawfully obtained by the media.[177]

In only a very narrow class of "exceptional cases" have court-imposed prior restraints been upheld as necessary and proper. Such cases might take place when the nation is at war, and national security mandates a prior restraint, or where a prior restraint is necessary to protect the right of a litigant not to have their trial strategy and protected confidences disclosed to the prosecution.[178] Also, the United States Supreme Court held that a newspaper, which was itself a defendant in a libel action, could be restrained from publishing material about the plaintiffs and their supporters to which it had gained access through court-ordered discovery.[179] In that case the Supreme Court said that "[a]lthough litigants do not 'surrender their First Amendment rights at the courthouse door,' those rights may be subordinated to other interests that arise in this setting."[180]

Other courts have temporarily enjoined the publication of information to maintain the status quo pending a later determination of validity.[181] For example, in *United States v. Noriega*,[182] Judge William Hoeveler temporarily enjoined CNN from broadcasting certain recorded telephone

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175. *See* Clear Channel Communications v. Murray, 636 So. 2d 818 (Fla. 1st DCA 1994).

176. *See* Times Publ'g Co. v. State, 632 So. 2d 1072, 1074 (Fla. 4th DCA 1994).

177. *See* B.J.F. v. Florida Star, 491 U.S. 524, 540-41 (1989); Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 104 (1979); Oklahoma Publ'g Co. v. District Court, 430 U.S. 308, 311 (1977); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 495-97 (1975). At this writing, the Supreme Court has not decided whether information unlawfully obtained by the press in violation of court rule or statute can be restrained; however, some courts have so held. *See, e.g.*, Marin Indep. Journal v. Municipal Court, 16 Cal. Rptr. 2d 550, 553 (Ct. App. 1993).

178. *See, e.g.*, New York Times v. United States, 403 U.S. 713, 725 (1971) (Brennan, J., concurring); United States v. Noriega, 752 F. Supp. 1045, 1051-52 (S.D. Fla. 1990).

179. *See Seattle Times*, 467 U.S. at 37.

180. *Id.* at 32 n.18.

181. *See* Public Citizen Health Research Group v. Food & Drug Admin., 953 F. Supp. 400, 401 (D.D.C. 1996) (finding that a temporary protective order prohibiting citizens' group from disseminating information that the government had inadvertently released did not run afoul of the First Amendment); Tsokalas v. Purtill, 756 F. Supp. 89, 90 (D. Conn. 1991) (ordering confiscation of a sketch artist's drawing to prevent its publication); *Marin Indep. Journal*, 16 Cal. Rptr. 2d at 551; Marin Indep. Journal v. Mun. Court, 16 Cal. Rptr. 2d 550, 551 (Cal. Ct. App. 1993); State v. Alston, 887 P.2d 681, 687 (Kan. 1994) (citing Unified School District No. 503 v. McKinney, 689 P.2d 860 (1984)) ("[T]he purpose of such [an] order is to restrain a defendant for a very brief period, pending a hearing on the application for a temporary injunction."); KUTV, Inc. v. Wilkinson, 686 P.2d 456, 458 (Utah 1984). The restraining order can go no further than to preserve the status quo until the hearing is held for the temporary injunction, the status quo being the last actual, peaceable, noncontested position of the parties which preceded the pending controversy.").

182. *See* 752 F. Supp. 1032 (S.D. Fla.), *aff'd*, 917 F.2d 1543 (11th Cir. 1990), *cert. denied sub nom.* Cable News Network, Inc. v. Noriega, 498 U.S. 976 (1990).

conversations between General Noriega and his defense counsel that were allegedly taped by the government while Noriega was in prison and obtained by CNN from an undisclosed source.[183] The injunction was to remain in effect until CNN produced the tape recordings in its possession so the District Court could review the contents of those recordings, and determine if the *Nebraska Press* test justified a prior restraint in favor of Noriega's right to a fair trial.[184] The Eleventh Circuit Court of Appeals upheld Judge Hoeveler's order and directed CNN to produce the tapes for the court's review.[185] After the Supreme Court denied CNN's application for certiorari, the news network produced the tapes for the trial court's review.[186] After hearing the tapes, Judge Hoeveler determined that General Noriega was not entitled to a prior restraint prohibiting the broadcasting of the tapes by CNN since Noriega could not meet his burden under the first prong of the *Nebraska Press* test requiring the judge to consider the extent and the prejudicial nature of the publication sought to be restrained.[187] Judge Hoeveler concluded that the capture of a foreign ruler brought to trial in the United States had created extensive negative publicity "well beyond the Southern District of Florida."[188] However, in reviewing the tapes the judge stated that the conversations were insignificant or so "cryptic and disjointed that . . . the court could [not] construct an adequate description of its nature or content," meaning the conversations, if published, would not prejudice Noriega's right to a fair trial.[189]

Prior restraints on the media should be distinguished from other restraints which affect the media's ability to obtain information but which do not regulate the media's ability to publish information in its possession. As noted in *State v. Montana Judicial District Court*,[190] such other restraints include:

> (1) Restraints which are aimed at the media's ability to gather information or to access official proceedings but which do not intrude upon the media's prerogative to publish or edit information already in its possession. Examples include orders which prohibit the press from attending voir dire examinations or pretrial suppression hearings. Such restrictions are not 'prior restraints' on

183. *Noriega*, 752 F. Supp. at 1047.

184. *See id.* at 1049. The recorded tapes allegedly contained discussions of the defense's trial strategy and the investigation of pending criminal charges against Noriega. *See id.* at 1047.

185. *See* United States v. Noriega, 917 F.2d 1543, 1552 (11th Cir. 1990).

186. *See id.*

187. *See Noriega*, 752 F. Supp. at 1053.

188. *Id.*

189. *Id.*

190. 933 P.2d 829 (Mont. 1997).

publication. . . .

(2) Restraints which are not directed at the media but at the sources of information; for example, participant gag orders. Although such restrictions infringe upon the media's ability to access news and thus the public's right to know, they are not "prior restraints" upon the media's right to edit or publish that which it knows.[191]

B. *Closure of Pretrial Proceedings*

In contrast to a prior restraint on publication, the closure of court proceedings is an "indirect restraint" aimed at the media's ability to gather information or to access official proceedings which does not intrude upon the media's prerogative to publish or edit information already in its possession.[192] Closure of pretrial proceedings[193] can help a trial judge ensure that dissemination of inadmissible prejudicial information before the trial has begun will not jeopardize the fairness of the proceeding.[194]

In the context of a trial court's decision to close a preliminary hearing to protect a defendant's right to a fair trial, the United States Supreme Court requires specific factual findings that: 1) "there is a substantial probability that the defendant's right to a fair trial will be prejudiced by the publicity;"[195] 2) there is a substantial probability that closure would prevent that prejudice; and 3) "reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights."[196] Other factors examined include the extent of prior hostile publicity, the probability that the issues involved

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191. *Id.* at 842.

192. *Id.* at 838-39.

193. The Supreme Court has recognized a qualified right of access to certain pretrial proceedings. *See* Press-Enterprise Co. v. Superior Court of Cal., 478 U.S. 1, 13 (1986).

194. *See* Gannett Co. v. DePasquale, 443 U.S. 368, 378 (1979) ("The danger of publicity concerning pretrial suppression hearings is particularly acute, because it may be difficult to measure with any degree of certainty the effects of such publicity on the fairness of the trial."); Estes v. Texas, 381 U.S. 532, 536 (1965) (pretrial publicity "can create a major problem for the defendant in a criminal case" and "may be more harmful than publicity during the trial for it may well set the community opinion as to guilt or innocence").

195. *Press-Enterprise*, 478 U.S. at 14. The Court also stated that the purpose of requiring specific findings is to demonstrate that "closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id.* (quoting *Press-Enterprise*, 464 U.S. at 510).

196. *Id.* Reasonable alternatives to closure include searching voir dire examination of jurors, clear and emphatic cautionary instructions, change of venue, continuance of the trial date, sequestration of the jury, and postponement of the hearing of a pretrial motion. *See* Sheppard v. Maxwell, 384 U.S. 333, 363 (1966); Press-Enterprise Co. v. Superior Court of Cal., 27 Cal. Rptr. 2d. 708, 712 (Cal. Ct. App. 1994); State v. Kelly, 695 A.2d 1, 14 (Conn. App. Ct. 1997); Rockdale Citizen Publ'g Co. v. State, 463 S.E.2d 864, 866 n.1 (Ga. 1995); Baltimore Sun Co. v. Colbert, 593 A.2d 224, 229 (Md. 1991); State v. Bassett, 911 P.2d 385, 388 (Wash. 1996).

at the pretrial hearing will further aggravate the adverse publicity, and whether traditional judicial techniques to insulate the jury from the consequences of such publicity will ameliorate the problem.[197] Unless these requirements are satisfied, the trial court should not grant a motion to close the hearing.[198]

Courts have clearly identified jury voir dire as the preferred alternative to closure. The court in the case of *In re Charlotte Observer*,[199] stated that:

> [R]ecent experience in a number of nationally publicized trials of widely publicized individuals serves to validate the efficacy of the voir dire for this purpose. Cases such as those involving the Watergate defendants, the Abscam defendants, and more recently, John DeLorean, all characterized by massive pretrial media reportage and commentary, nevertheless proceeded to trial with juries which—remarkably in the eyes of many—were satisfactorily disclosed to have been unaffected (indeed, in some instances, blissfully unaware of or untouched) by that publicity.[200]

Conducting a closure hearing presents special problems to the court:

> The proper conduct of the hearing of a motion to close carries with it its own problems. Ordinarily, at the hearing the moving party must inform the court of the precise nature of sensitive information, which necessarily will be revealed at the proceeding to be closed, and must convince the court that the public disclosure of that information would interfere with the constitutional guarantee of a fair trial. Patently, if the sensitive information is publicly disclosed at the hearing of the motion for closure, the very damage sought to be avoided is done. Thus, the hearing of the motion must itself often be closed to the public, at least in part. In making the determination of how much, if any, of the closure motion must be conducted privately, the trial judge must receive, on the record but not publicly, proffers sufficient to allow the judge to make an informed decision. That part of the record may, of course, be sealed, but for no longer than is reasonably required.[201]

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197. *See* Gannett Co. v. DePasquale, 443 U.S. 368, 378 (1979); *accord* Sheppard v. Maxwell, 384 U.S. 333, 362-63 (1966); Miami Herald Publ'g Co. v. Lewis, 426 So. 2d 1, 6 (Fla. 1982); Miami Herald Publ'g Co. v. Morphonios, 467 So. 2d 1026, 1029 (Fla. 3d DCA 1985).

198. *See* sources cited, *supra* note 197.

199. 882 F.2d 850 (4th Cir. 1989).

200. *Id.* at 855; *see also In Re* Times-World Corp., 488 S.E.2d 677, 683 (Va. Ct. App. 1997).

201. *Baltimore Sun Co.*, 593 A.2d at 230.

C. *Participant Gag Orders*

Prior restraints on publication should be distinguished from indirect restraints on the media's ability to obtain information such as participant gag orders. For purposes of this discussion, participant gag orders may be defined as orders restraining trial participants from communicating with the press.[202] Such orders usually prohibit parties, witnesses,[203] their attorneys, court staff, and members of law enforcement from disseminating certain information about the case outside the courtroom.[204]

Gag orders have been issued in several high profile cases.[205] For example, in the Oklahoma bombing trial of Timothy McVeigh, the court entered a gag order restricting the extrajudicial statements of the lawyers in the case.[206] Court staff was also prohibited from disclosing to any persons, without court authorization, "any information relating to the criminal case that is not part of the public record of the court."[207] Likewise, in the O.J. Simpson civil trial the court entered the following standing order:

> No counsel, party or witnesses under the control of counsel may discuss or state any opinions concerning evaluation of evidence, including any witness whether called to testify or

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202. *See* State v. Montana Judicial Dist. Court, 933 P.2d 829, 837 (Mont. 1997).

203. There is a surprising dearth of authority involving constitutional challenges to restrictive orders directed to witnesses in criminal cases. *See* Pedini v. Bowles, 940 F. Supp. 1020, 1022 (N.D. Tex. 1996). For example, in *In re Russell*, the trial court entered an order prohibiting potential witnesses in a racially-motivated murder case from making any extra-judicial statement "that relates to, concerns, or discusses . . . any of the parties or issues such potential witness expects or reasonably should expect to be involved in this case." 726 F.2d 1007, 1008 (4th Cir. 1984). The court's use of a reasonable likelihood standard of prejudice was upheld on appeal. *See id.*; *cf.* Butterworth v. Smith, 494 U.S. 624, 636 (1990) (holding unconstitutional a Florida law prohibiting a grand jury witness from disclosing their testimony after the term of the grand jury had ended).

204. The court should be reluctant to impose such restrictions on persons who are neither attorneys nor participants in the case. *See* Stanfield v. Florida Dep't. of Child & Fam. Servs., 698 So. 2d 321, 323 (Fla. 3d DCA 1997). In contrast, protective orders restraining the dissemination of civil discovery materials have not been subjected to the same level of stringent First Amendment scrutiny as applied to the dissemination of other materials. *See* United States v. Aguilar, 515 U.S. 593, 606 (1995); Seattle Times Co. v. Rhinehart, 467 U.S. 20, 21 (1984); Farley v. Farley, 952 F. Supp. 1232, 1245 (M.D. Tenn. 1997).

205. *See Pedini*, 940 F. Supp. at 1025; United States v. Davis, 904 F. Supp. 564, 565 (E.D. La. 1995); United States v. Hill, 893 F. Supp. 1039, 1042 (N.D. Fla. 1989); Sentinel Communications Co. v. Watson, 615 So. 2d 768, 770 (Fla. 5th DCA 1993); Breiner v. Takao, 835 P.2d 637, 640-42 (Haw. 1992); Erwin Chemerinsky, *Lawyers Have Free Speech Rights Too: Why Gag Orders on Trial Participants Are Almost Always Unconstitutional*, 17 LOY. L.A. ENT. L.J. 311, 311 (1997).

206. *See* United States v. McVeigh, 931 F. Supp. 760, 756 (D. Colo. 1997).

207. *Id.* at 761.

> not, whether offered, received, excluded, purported to exist but not tendered or not available, the jury or any juror, the Court, including the trial proceedings, or whether the defendant did or did not commit the homicides, outside of the trial proceedings with the media or in public places within hearing of the general public. This order extends to employees and agents or representatives, whether paid or unpaid, of the attorneys. This order does not apply to private discussions by and among the attorneys in preparation of their case, with their clients, staff, investigators and witnesses. . . . [208]

In some cases gag orders are difficult to enforce[209] and may not stem the flow of prejudicial information from the media.[210] In such cases, the court should consider attempting to get the parties to voluntarily limit extrajudicial comments.[211] When possible, the issuing court should specifically delineate the topics forbidden by the gag order, and also consider establishing a process to permit the restrained party to obtain a court ruling determining whether a particular statement is prejudicial.

1. Status of Party Challenging Order

A participant gag order is subject to challenge by the parties, witnesses in the case, the attorneys for the parties, and third parties, such as the media. One of the major issues that has arisen regarding participant gag orders is whether the standard to be applied in determining the constitutionality of a gag order is affected by the status of the party challenging it.[212]

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208. Robert A. Pugsley, *This Courtroom Is Not a Television Studio: Why Judge Fujisaki Made the Correct Call in Gagging the Lawyers and the Parties, and Banning the Cameras from the O.J. Simpson Civil Case*, 17 LOY. L.A. ENT. L.J. 369-381 (1997).

209. There is some reluctance on the part of judges and others to pursue sanctions for gag order violations. For example, "federal prosecutors backed away from pursuing contempt charges against a defendant in the Cali Cartel trial and an out-spoken local attorney for critical remarks they made about the government's case," even though a gag order barring comments from trial participants was still in effect. Frank Davies, *Judge in Cali Case Weights Gag Rule Violation*, MIAMI HERALD, Nov. 22, 1997, at B3. The judge in that case said he "was bothered by the trend of 'trying cases on the courthouse steps' in front of TV cameras," but wasn't sure what could be done about it. *Id.*

210. *See generally* Eileen A. Minnefor, *Looking for Fair Trials in the Information Age: The Need for More Stringent Gag Orders Against Trial Participants*, 30 U.S.F. L. REV. 95 (1995) (arguing for greater use of gag orders).

211. *See* Order on Motion for Relief, issued May 5, 1997, *in* Broin v. Philip Morris Co., Case No. 91-49738 (Fla. 11th Jud. Cir. Ct.).

212. *See In re* Application of Dow Jones & Co., 842 F.2d at 609 (2d Cir. 1988) (stating that "there is a fundamental difference between a gag order challenged by the individual gagged and one challenged by a third party").

2. Media Challenges to Participant Gag Orders

Although there is contrary authority,[213] most courts hold that the *Nebraska Press Ass'n* analysis does not apply when participant gag orders are challenged by the media,[214] and instead have upheld gag orders against media challenges upon a showing of a reasonable likelihood that the prohibited speech would prevent a fair trial.[215] The United States Supreme Court has denied a media petition for writ of certiorari to review a case adopting the reasonable likelihood standard.[216] Other courts have employed the following heightened scrutiny analysis in the context of a participant gag order challenged by the media.[217]

> [A] gag order may issue only when the following conditions have been met: (1) the press and general public must be given an opportunity to be heard on the question before issuance of the order; (2) the court describes what reasonable alternatives have been considered and explains why those reasonable alternatives cannot adequately protect the defendant's fair trial rights; (3) the order is narrowly tailored to serve the interest of protecting the defendant's fair trial rights; and (4) the court has made specific findings 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 otherwise prevent. This test grants more protection to the defendant than allowed under traditional prior restraint analysis and at the same time guarantees greater protection of the public's right

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213. *See* Journal Publ'g Co. v. Meachem, 801 F.2d 1233, 1235 (10th Cir. 1986); CBS Inc. v. Young, 522 F.2d 234, 238 (6th Cir. 1975). These courts deem gag orders as prior restraints regardless of whether the order is challenged by the media or the party gagged. *See Journal Publ'g Co.*, 801 F.2d at 1235; *CBS, Inc.*, 522 F.2d at 238.

214. *See* United States v. Hill, 893 F. Supp. 1039, 1041 (N.D. Fla. 1994).

215. *See Dow Jones & Co.*, 842 F.2d at 604; Davis v. East Baton Rouge Parish Sch. Bd., 916 F. Supp. 575, 581 (M.D. La. 1996); United States v. Hill, 893 F. Supp. 1039, 1040-43 (N.D. Fla. 1994); South Bend Tribune, Inc. v. Elkhart Circuit Court, 691 N.E.2d 200, 202 (Ind. Ct. App. 1998); State v. Montana Judicial Dist. Court, 933 P.2d 829 (Mont. 1997).

216. *See Dow Jones & Co.*, 842 F.2d at 604. Justice White dissented to the Supreme Court's denial of certiorari and noted the conflicting circuit decisions concerning the analysis of a restrictive order directed to the trial participants. *See* Dow Jones & Co. v. Simon, 488 U.S. 946, 946-47 (1988) (White, J., dissenting).

217. *See* State v. Montana Judicial Dist. Court, 933 P.2d 829, 841 (Mont. 1997); Rene' L. Rodd, 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); *see also* United States v. Cleveland, 128 F.3d 267 (5th Cir. 1997) (sustaining a lower court order concerning "the deliberations of the jury," upon a finding that the order was "narrowly tailored to prevent a substantial threat to the administration of justice—namely, the threat presented to freedom of speech within the jury room by the possibility of post-verdict interviews").

> to know under Article II, Section 9 of the Montana Constitution than offered by a reasonableness test.[218]

3. Party and Witness Challenges to Gag Orders

There is disagreement among courts whether participant gag orders are subject to traditional prior restraint analysis when challenged by the party gagged. Some courts upholding the issuance of gag orders directed to trial participants have employed a "reasonable likelihood" standard of review requiring the court to evaluate whether it is reasonably likely that the pretrial publicity will jeopardize the accused's right to a fair trial.[219] As one court observed:

> [T]he reasonable likelihood standard is susceptible of objective measurement. It is expressed in straightforward language, in terminology that is commonly and frequently used in communications. Whether a particular utterance creates a reasonable likelihood of affecting trial fairness will depend upon the special circumstances of each case. This inquiry involves a careful balancing and consideration of all relevant factors. These factors can include such matters as the nature of the statement, the timing of the statement, the extent to which the information has been publicized, the nature of the proceeding and its vulnerability to prejudicial influence, the attorney's status in the case, the lawyer's unique position as an informed and accurate source of information in the case, and the effect of unrestricted comment on the interest of the litigants and the integrity of the proceeding.[220]

Other courts have held that participant gag orders should be viewed as prior restraints subject to a clear and present danger analysis.[221] Under this analysis a participant gag order is justified only if the prohibited speech poses "a clear and present danger" to the administration of justice, the order is "narrowly drawn," and no reasonable alternatives are available

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218. *Montana Judicial Dist. Court*, 933 P.2d at 841.

219. *See, e.g., Dow Jones & Co.*, 842 F.2d at 604; Levine v. United States Dist. Court, 764 F.2d 590, 596 (9th Cir. 1985); *In re* Russell, 726 F.2d 1007, 1010 (4th Cir. 1984); United States v. Tijerina, 412 F.2d 661, 663-67 (10th Cir. 1969); *South Bend Tribune*, 691 N.E.2d at 202.

220. *In re* Hinds, 449 A.2d 483, 493 (N.J. 1982) (citations omitted).

221. *See* United States v. Salameh, 992 F.2d 445, 447 (2d Cir. 1993); United States v. Ford, 830 F.2d 596, 600 (6th Cir. 1987); CBS, Inc. v. Young, 522 F.2d 234, 240 (6th Cir. 1975) (holding that a participant gag order was a prior restraint on CBS's right to gather news); Breiner v. Takao, 835 P.2d 637, 642 (Haw. 1992).

having a lesser impact on First Amendment freedoms.[222] What emerges from the "clear and present danger" cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before a court can impose a gag order on a participant.[223]

In some jurisdictions, courts have held that challenges by participants to participant gag orders are different from third party challenges and should be judged under a different standard.[224] In *In re Application of Dow Jones*,[225] the court specifically held that "there is a fundamental difference between a gag order challenged by the individual gagged and one challenged by a third party; an order objected to by the former is properly characterized as a prior restraint, one opposed solely by the latter is not."[226] This holding is defensible on the grounds that although a participant gag order directly restrains a participant from speaking, it does not directly restrain a third party such as the media from saying anything. As to a third party, it only forecloses a source of information that would otherwise be available. This is arguably a lesser prohibition than a prior restraint and, as such, should be judged under a less restrictive standard than that applied to prior restraints. Moreover, since a third party probably has standing to assert only its own injury and not that of a trial participant, a third party cannot assert the prior restraint standard (clear and present danger) in challenging a participant gag order.

4. Attorney Challenges to Gag Orders

Since attorneys representing clients in litigation may be subject to greater speech limitations than could constitutionally be imposed on other citizens,[227] the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press in *Nebraska Press Ass'n v. Stuart*.[228] Specifically, the United States Supreme Court, in *Gentile v. State Bar of Nevada*,[229] held

222. *Breiner*, 835 P.2d at 641.

223. *See* Bridges v. California, 314 U.S. 252, 263 (1941). Under the clear and present danger analysis the court must reach an inescapable conclusion that speech will be prejudicial and that the threat of prejudice must be "present or imminent." *See id.* This has also been characterized as the "high-threshold test."

224. *See, e.g.*, State v. Montana Judicial Dist. Ct., 933 P.2d 829, 841-42 (Mont. 1997).

225. 842 F.2d 603 (2d Cir. 1988).

226. *Id.* at 609.

227. *See* Gentile v. State Bar of Nevada, 501 U.S. 1030, 1074-75 (1991) (holding that state ethics codes can constitutionally prohibit the speech of attorneys in pending cases if it creates a "substantial likelihood of materially prejudicing" the parties' right to a fair trial); *see also* United States v. Salameh, 992 F.2d 445, 447 (2d Cir. 1993); Breiner v. Takao, 835 P.2d 637, 640 (Haw. 1992).

228. 427 U.S. 529, 539-606 (1976).

229. 501 U.S. 1030 (1991).

a prohibition against attorney statements having a "'substantial likelihood of materially prejudicing an adjudicative proceeding'" to be constitutionally permissible, since it was "designed to protect the integrity and fairness of a state's judicial system," and "imposes only narrow and necessary limitations on lawyers' speech."[230] In light of the decision in *Gentile*,[231] the American Law Institute in its *Restatement of the Law Governing Lawyers* has stated that the proper standard governing speech regulation of attorneys in pending cases is the substantial likelihood of prejudice standard, which approximates the clear and present danger standard by focusing on the likelihood of injury and its substantiality.[232]

Prior to *Gentile*, some courts upheld the constitutional validity of the "reasonable likelihood of prejudice" standard for limiting lawyer extrajudicial comments during criminal trials,[233] relying on the admonition of *Sheppard v. Maxwell*[234] that "where there is a reasonable likelihood that prejudicial news" would prevent a fair trial, the judge should take remedial action or grant a new trial.[235] Regardless of the standard that governs gag orders on attorneys, gag orders in general can create problems. For example, suppose that a news reporter says to an attorney representing a defendant in a murder case that a police report reflects that the defendant's fingerprints were all over the gun found at the crime scene. The attorneys know that the report is false and that if this false report is made public, it will predispose the community to believe the defendant is guilty. The attorney is under a typical gag order "not to comment to the press on

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230. *Id.* at 1075. *Gentile* construed a Nevada Bar Rule patterned after the A.B.A. Model Rule of Professional Conduct 3.6 ("Trial Publicity") as it applied to a defense attorney's comments made at a scheduled press conference. *See id.* at 1032. At the press conference held the day after his client's indictment, six months before the trial, the defense attorney asserted the innocence of his client, implicated a police detective in the theft with which his client was charged, accused the police of a cover up, and accused other witnesses of being drug dealers and money launderers. *See id.* at 1040-42. The defense attorney admitted in the disciplinary hearing that he had sought to stop a wave of publicity he perceived as poisoning the prospective juror pool, prejudicing potential jurors against his client, and injuring his client's reputation. *See id.* at 1047-48.

231. In evaluating the impact of the *Gentile* case on the issue of the standard to be applied in determining the validity of attorney gag orders, it is important to note that *Gentile* involved a substantive rule of bar discipline rather than a gag order; additionally, *Gentile* was a closely contested five to four decision. *See id.* at 1031-34. It appears that four Justices would have stuck with the clear and present danger test, even with respect to lawyers and even in respect to a bar discipline rule.

232. *See* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 169 (Tentative Draft Nov. 8, 1997).

233. *See* Note, *A Constitutional Assessment of Court Rules Restricting Lawyer Comment on Pending Litigation*, 65 CORNELL L. REV. 1106, 1120-21 (1980).

234. 384 U.S. 333 (1966).

235. *Id.* at 363. An order limiting extrajudicial commentary by trial participants is an appropriate alternative to restraint on the media. *See* News-Journal Corp. v. Foxman, 939 F.2d 1499, 1512-13 (citing *Sheppard*, 384 U.S. at 361).

matters relating to the case." The attorney's statement that the report is false would create no danger of prejudice to a fair trial. Rather, under these circumstances, the only effect, if any, would be to mitigate the prejudice that is likely to occur if the reporter publishes the false report. By obeying the gag order, the attorney will lose an opportunity to assist in protecting his or her client's right to a fair trial by speaking out. If, however, the attorney defies the gag order, is it a defense to a contempt citation that his or her statements protected rather than undermined a fair trial?

If the general gag order in the above hypothetical case stated that the attorney was prohibited from making "extrajudicial statements substantially likely to prejudice a fair trial" or "creating a clear and present danger of prejudicing a fair trial," whichever standard is deemed applicable, then the question presented would be whether the attorney's statements under the particular circumstances violated the court's order, which they clearly did not under the facts stated. Orders formulated in the terms stated above, therefore, permit flexibility in their application to particular circumstances. On the other hand, this flexibility can itself create uncertainty as to the applicability of the gag order. Consequently, general gag orders restraining attorney comments can create numerous difficult issues. This is also true as to general gag orders restraining clients or other non-attorney participants.

Another issue involving attorney gag orders is the extent to which an attorney's role as a court officer will subject the attorney to speech regulations different from non-attorney participants such as parties and witnesses.[236] For example, may persons on trial for serious offenses be subject to gag orders of the same breadth as those sustainable with respect to the prosecutor or attorneys for the defense? If the defendant chooses to do so, may he or she write a letter protesting his or her innocence without regard to the more limiting restraints governing her attorneys? The *Gentile* case would appear to support a "yes" answer to these questions.[237] However, as stated previously, some jurisdictions do not apply a clear and present danger test to participant challenges to participant gag orders. In such jurisdictions, it appears that the same standards would apply to attorney as well as to non-attorney challenges to participant gag orders.

5. Ethical Rules Governing Extrajudicial Speech of Attorneys Representing Clients in Pending Cases

Even in the absence of a gag order, attorneys, as officers of the court,

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236. Attorneys are "officers of the court," clients and defendants are not. Does that make a difference in their respective obligations or accountability for what they presume to say?

237. *See generally Gentile*, 501 U.S. at 1030 (permitting "substantial likelihood of material prejudice" test).

may be ethically restricted from making extrajudicial statements prejudicial to a fair trial. Standards used to determine whether extrajudicial speech by an attorney is prohibited are currently embodied in lawyer ethics rules governing trial publicity.[238] In addition to the "substantial likelihood of material prejudice" standard presently incorporated into Rule 3.6 of the A.B.A. *Model Rules of Professional Conduct*,[239] the three other commonly applied ethics code formulations are "clear and present danger,"[240] "serious and imminent threat"[241] and "reasonable likelihood" of prejudice.[242]

Proponents of the clear and present danger standard cite *Bridges v. California*[243] for the proposition that to pass constitutional muster, a rule governing speech must use the words "clear and present danger."[244] However, the United States Supreme Court has observed that:

> 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.
>
> Mr. Justice Holmes' test was never intended "to express a technical legal doctrine or to convey a formula for adjudicating cases." Properly applied, the test requires a court to make its own inquiry into the imminence and magnitude of the danger said to flow from the particular utterance and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression. The possibility that other measures will serve the State's interests

238. *See* Esther Berkowitz-Caballero, Note, *In the Aftermath of* Gentile*: Reconsidering the Efficacy of Trial Publicity Rules*, 68 N.Y.U. L. REV. 494, 494-551 (1993); John Fletcher, Commentary, Gentile v. State Bar of Nevada*: ABA Model Rule 3.6 As the Constitutional Standard for Reviewing Defense Attorneys' Trial Publicity*, 46 S.M.U. L. REV. 293, 293-308 (1992); L.S. Fulstone, Note, Gentile v. State Bar of Nevada*: Trial in the "Court of Public Opinion" and Coping with Model Rule 3.6—Where Do We Go From Here?*, 37 VILL. L. REV. 619, 619-62 (1992).

239. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1998). Model Rule 3.6 prohibits the extrajudicial speech of attorneys having a "substantial likelihood of materially prejudicing an adjudicative proceeding." *Id.*

240. *Gentile*, 501 U.S. at 1068. In *Gentile*, the Court rejected the view that the First Amendment requires a state to demonstrate a "clear and present danger" of "actual prejudice or an imminent threat" before any discipline may be imposed on a lawyer. *Id.*

241. *Id.* at 1068-69 n.3. The "serious and imminent threat" formulation derives from *Craig v. Harney*, 331 U.S. 367, 373 (1992) in which the United States Supreme Court used this language interchangeably with "clear and present danger."

242. *Id.* The ABA's Model Code of Professional Responsibility DR 7-107 (1983) also employs the "reasonable likelihood" formulation. DR 7-107 prohibits a lawyer from making an extrajudicial comment that is "reasonably likely" to interfere with the administration of justice. *Id.*

243. 314 U.S. 252 (1941). In *Bridges* the Supreme Court held that publications could not be punished as contemptuous of the court unless they posed a clear and present danger or a serious and imminent threat to the administration of justice. *See id.* at 263.

244. *See id.*

should also be weighed.[245]

In *Gentile v. State Bar of Nevada*,[246] a five judge majority upheld the constitutionality of a state disciplinary rule which barred lawyers from making extrajudicial statements that would have a "substantial likelihood of materially prejudicing" an adjudicative proceeding.[247] The Court explained:

> We agree with the majority of the States that the "substantial likelihood of material prejudice" standard constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials.
>
> When a state regulation implicates First Amendment rights, the Court must balance those interests against the State's legitimate interest in regulating the activity in question. The "substantial likelihood" test embodied in Rule 177 is constitutional under this analysis, for it is designed to protect the integrity and fairness of a state's judicial system, and it imposes only narrow and necessary limitations on lawyers' speech. The limitations are aimed at two principal evils: (1) comments that are likely to influence the actual outcome of the trial, and (2) comments that are likely to prejudice the jury venire, even if an untainted panel can ultimately be found.[248]

In declining to apply to the speech of lawyers the extremely strict test set for regulating comments by the press, Chief Justice Rehnquist explained that:

> Lawyers representing clients in pending cases are key participants in the criminal justice system, and the State may demand some adherence to the precepts of that system in regulating their speech as well as their conduct. . . . Because

245. *Gentile*, 501 U.S. at 1036 (citations omitted).

246. 501 U.S. 1030 (1991); *see also* Katrina M. Kelly, *The "Impartial" Jury and Media Overload: Rethinking Attorney Speech Regulations in the 1990s*, 16 N. ILL. U. L. REV. 483, 487-90 (1996); Cheryl Y. Park, Gentile v. State Bar of Nevada, *A Lawyer's Right to Speak*, 23 W. ST. U. L. REV. 523 (1996).

247. *Gentile*, 501 U.S. at 1076-77. The *Gentile* decision was a closely contested five to four decision with two separate opinions. Justice Kennedy wrote that part of the Court's judgment which overturned the sanctions imposed upon Gentile, holding Nevada Rule 177 void for vagueness "[a]s interpreted by the Nevada Supreme Court," because *Gentile* legitimately could have viewed the rule's safe-harbor provision as permitting the comments he made to the press and because the state court did not provide "any clarifying interpretation." *Id.* at 1048.

248. *Id.* at 1075.

> lawyers have special access to information through discovery and client communications, their extrajudicial statements pose a threat to the fairness of a pending proceeding since lawyers' statements are likely to be received as especially authoritative.[249]

It was the view of Justice Kennedy and three other members of the Court in Part 1B of the majority opinion that it was not necessary to rule on the constitutionality of the "substantial likelihood of material prejudice" standard since such formulation approximated the "clear and present danger" test, and, because there was no real difference between such standards other than semantic variations.[250] Justice Kennedy opined that the standard requires a case-by-case inquiry into such matters as the nature of the statement, the timing of the statement, the extent to which the information has been publicized, the nature of the proceeding and its vulnerability to prejudicial influence, the attorney's status in the case, the lawyer's unique position as an informed and accurate source of information in the case, and the effect of unrestricted comment on the interests of the litigants and the integrity of the proceeding.[251]

To protect fair trial rights, courts may utilize ethics code restrictions to deal with extrajudicial statements by attorneys in pending cases. The court can simply enter an order directing the attorneys to comply with ethics code restrictions.[252] If the court does not wish to order compliance with ethical restrictions on attorneys' extrajudicial speech, the court might accomplish substantially the same result by directing the attorneys to file memoranda of law on the applicability of the governing ethics code to the

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249. *Id.* at 1074 (citations omitted). The majority opinion notes that the clear and present danger test at play in Nebraska Press is nearly equivalent to the "serious and imminent threat" standard. *See id.* at 1068-69 n.3 (maintaining that several tests, including the "serious and imminent threat" standard "arguably approximate 'clear and present danger'"); *see also Fair Trial and Free Press*, 11 ABA STANDARDS FOR CRIMINAL JUSTICE § 8-1.1, at 8-11 (2d ed. 1980) ("[T]he serious and imminent threat terminology was and is a part of the judicial gloss on the clear and present danger test and is not distinct from it.").

250. *See Gentile*, 501 U.S. at 1037. The drafters of Model Rule 3.6 apparently thought the substantial likelihood of material prejudice formulation approximated the clear and present danger test. *See In re* Hinds, 449 A.2d 483, 493 (N.J. 1982) (finding the substantial likelihood of material prejudice standard the linguistic equivalent of clear and present danger); AMERICAN BAR ASS'N, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 243 (1984) ("[F]ormulation in Model Rule 3.6 incorporates a standard approximating clear and present danger by focusing on the likelihood of injury and its substantiality."); GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT 397 (1985) ("To use traditional terminology, the danger of prejudice to a proceeding must be both clear (material) and present (substantially likely).").

251. *See Gentile*, 501 U.S. at 1036-37. To assist a lawyer in deciding whether an extrajudicial statement is problematic, some ethics codes contain "safe harbor" provision, listing statements which are proper. *See, e.g.*, CAL. RULES OF PROFESSIONAL CONDUCT § 5-120(B) (1995).

252. *See, e.g.*, People v. Buttafuco, 599 N.Y.S.2d 419, 421 (N.Y. App. Div. 1993).

statements being made by the attorneys. The court could also, in some other pointed manner, bring to the attorneys' attention their ethical responsibilities and the consequences of failing to meet them. This approach may, in some cases, rival the effectiveness of a gag order because the ethics code provisions may be based on the same standards prohibiting attorney comments as those justifying the entry of a gag order against the attorneys. Moreover, even if a different standard underlies the ethics code and the court's gag order power, the ethics code standard might sufficiently protect the parties' right to a fair trial in the particular case.

D. *The California Experience*

After the O.J. Simpson criminal verdict, California adopted a state bar rule similar to the one approved in *Gentile*.[253] Previously, California had no rule on pretrial publicity, but instead left regulation to the judge assigned to the case. However, subsequent to the O.J. Simpson criminal verdict, the California Legislature passed Senate Bill 254, which demanded that the state bar develop an ethical rule to curtail attorneys' statements outside the courtroom.[254] Effective October 1, 1995, Rule 5-120 was added to the California Rules for Professional Conduct,[255] prohibiting attorneys from making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if he or she knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter. However, the last part of Rule 5-102 allows a lawyer to make statements that a "reasonable member would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the member or the member's client."[256]

E. *Restrictions on Comments by Judges*

The Code of Judicial Conduct prohibits judges from commenting on pending cases so as to avoid the possibility of undue influence on the judicial process and the threat to public confidence posed by judges criticizing each other.[257] Neither judges nor court personnel should disclose to any unauthorized person information relating to a pending criminal case that is not part of the public records of the court and that may be prejudicial to the right of the prosecution or the defense to a fair trial.

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253. *See* Park, *supra* note 246, at 546.

254. *See id.*

255. *See id.*; *see* Kelly, *supra* note 246, at 495-96.

256. CAL. RULES OF PROFESSIONAL CONDUCT § 5-120(c) (1995).

257. *See In re* Inquiry of Broadbelt, 683 A. 2d 543, 548 (N.J. 1996) (interpreting Canon 3A(8)).

Because of the above ethical restrictions, judges are severely limited in their ability to respond publicly to criticism regarding their handling of particular cases. In February 1998, the ABA House of Delegates adopted policies regarding criticism of judges and urged state, local, and territorial bar associations to adopt programs enabling timely and effective response to criticisms of state and administrative law judges.[258] The policy statement supporting the resolution asserts:

> The reporting of inaccurate or unjust criticism of judges, courts, or our system of justice by the news media erodes public confidence and weakens the administration of justice. It is vital that nonlitigants as well as litigants believe that the courts, their procedures and decisions are fair and impartial.[259]

VII. TECHNIQUES TO SELECT A JURY UNTAINTED BY PREJUDICIAL PUBLICITY

The closure of pretrial hearings or the imposition of prior restraints on the media may be unavailable or insufficient to protect against prejudicial publicity attending high profile trials. The court may have to take additional actions to minimize the effects of such publicity as stated by the United States Supreme Court in *Sheppard v. Maxwell*[260] and other cases.[261]

A. *Selection of Impartial Jury Through Use of Searching Voir Dire*

Generally, the most effective method of identifying jurors unaffected by pretrial publicity, and eliminating those who are biased, is a searching voir dire of prospective jurors.[262] To assist in the voir dire examination, the court may direct that prospective jurors fill out a court-approved questionnaire.[263]

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258. *See ABA Adopts Civil Trial Practice Standards, Urges Protection of Judicial Independence*, 66 U.S. L. W. 2478, 2478 (Feb. 10, 1998).

259. *Id.*

260. 384 U.S. 333, 358-59 (1966).

261. *See, e.g.*, Jonathan M. Remshak, Comment, *Truth, Justice, and the Media: An Analysis of the Public Criminal Trial*, 6 SETON HALL CONST. L. J. 1083, 1099 (1996).

262. *See* Boggs v. State, 667 So. 2d 765, 767 (Fla. 1996); People v. Tyburski, 518 N.W.2d 441, 447 (Mich. 1994); Douglas M. Bates, Jr., *Voir Dire Examination in Criminal Jury Trials: What Is the Proper Scope of Inquiry?*, FLA. B. J., Jan. 1996, at 64.

263. *See, e.g.*, FLA. R. CIV. P. 1.431(a)(2). Under this Rule completed forms may be inspected in the clerk's office and copies are to be available in court during the voir dire examination for use by parties and the court. *See id.* On request in a criminal case, any party must be furnished by the clerk with a list of the names and addresses of prospective jurors summoned to try the case, together

1. Voir Dire Methods

It is the trial court's duty to select a voir dire method that will sufficiently determine whether or not a prospective juror will be able to decide the case fairly.[264] Permissible voir dire methods include submitting a questionnaire to the jury,[265] questioning of prospective jurors by the attorneys,[266] and individual[267] or individually sequestered[268] examination of jurors by the court. The United States Supreme Court has held that it is not a denial of due process under the Fourteenth Amendment for a state to restrict the voir dire examination of a prospective juror.[269] The state may preclude any inquiry about the extent of the juror's knowledge of a heavily publicized case and limit inquiry solely as to whether the juror, having previously obtained information about the case, could nonetheless remain impartial.[270] It is advisable, however, once a prospective juror's exposure to pretrial publicity has been established, to examine the juror individually outside the presence of other jurors regarding "not only the juror's

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with copies of all jury questionnaires returned by them. *See* FLA. R. CRIM. P. 3.281. Questionnaires have the advantage of allowing an in-depth exploration of the source, extent, and content of media exposure for each potential juror with a minimum of the court's time. However, questionnaires have the disadvantage of not allowing observation of demeanor which is important in assessing credibility. Notwithstanding this limitation, "they serve as a useful starting point by allowing identification of those potential jurors who may be most tainted because of exposure to particularly prejudicial news items or by extensive exposure." *Tyburski*, 518 N.W.2d at 449.

264. *See* United States v. Nash, 910 F.2d 749, 753 (11th Cir. 1990); Davis v. Singletary, 853 F. Supp. 1492, 1516 (M.D. Fla. 1994).

265. *See supra* note 263.

266. Because the attorneys are more familiar with the complexities and nuances of the case, they are generally in a better position than the trial judge to ask in-depth questions designed to uncover hidden bias. However, in attorney-conducted voir dire, there is a risk that the skillful attorney can inject partiality by establishing rapport and introducing his theory of the case to the jury. *See Tyburski*, 518 N.W.2d at 449.

267. Individual voir dire examination of a juror or jurors apart from the others is designed to prevent panel contamination by inflammatory answers. *See* Bates, *supra* note 262, at 67. The individual voir dire examination is generally limited to determining whether publicity has prejudiced a prospective juror.

268. In camera voir dire may be necessary in cases involving matters that create a likelihood that a prospective juror might be embarrassed to confess his true opinion before an audience. *See* Randolph v. State, 562 So. 2d 331, 337 (Fla. 1990); Davis v. State, 461 So. 2d 67, 69 (Fla. 1984).

269. The United States Supreme Court has determined that there is no federal constitutional right to content-based questions in every high publicity case. *See* Mu'Min v. Virginia, 500 U.S. 415, 431 (1908). However, *Mu'Min* does not limit a court's authority to require a voir dire that includes content-based questions. *See* Brian P. Coffey, Note, Mu'Min v. Virginia: *Reexamining the Need for Content Questioning During Voir Dire in High Profile Criminal Cases*, 13 PACE L. REV. 605, 627-29 (1993); Magdalena Gonzales, Note, Mu'Min v. Virginia: *Jury Partiality and the Role of Content Questions During Voir Dire*, 18 T. MARSHALL L. REV. 161, 170 (1992).

270. *See supra* note 268.

subjective self-evaluation of [their] ability to remain impartial but also the objective nature of the material and degree of exposure."[271] The court should allow jurors the opportunity to request an in camera voir dire regarding confidential matters.[272]

2. Pre-Trial Investigation of Jurors

In jurisdictions where the parties have access to the names of venire members prior to trial, it is not uncommon for attorneys to investigate the backgrounds of prospective jurors to obtain information that might be relevant to potential challenges.[273] Miami criminal defense attorney Roy Black, defending NBC sportscaster Marv Albert in a sexual assault trial in Virginia, retained a professional polling firm to telephone local residents to determine the "community feelings" regarding Albert.[274] The trial court declined to order Black to cease conducting the telephone polls but did rule that no person contacted would be allowed to serve on the jury for the case.[275]

3. Exclusion of Jurors

If, after the examination of any prospective juror, the court believes that the juror cannot be impartial due to prejudice, the court should excuse the juror.[276] To save the court time and effort, in some cases it may be advisable to excuse a prospective juror who manifests an unwillingness to place their family, career, or salary on hold during the term of extended jury service in a high profile case.[277] If the court does not excuse a juror, either party may then challenge the juror, as provided by law.[278] Challenges to the individual jurors are subdivided into challenges for cause and

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271. State v. Bible, 858 P.2d 1152, 1173 (Ariz. 1993).

272. *See* Press-Enterprise Co. v. Superior Court of Cal., 464 U.S. 501, 502 (1984); Jay M. Zitter, Annotation, *Validity of Jury Selection as Affected by Accused's Absence from Conducting of Procedures for Selection and Impaneling of Final Jury Panel for Specific Case*, 33 A.L.R. 4TH 429 (1984).

273. *See* United States v. Lehder-Rivas, 667 F. Supp. 827, 827 (M.D. Fla. 1987).

274. Telephone interview with Roy Black, Jr., partner, Black, Srebnik & Kornspan, P.A. (Feb. 28, 1998).

275. *See* Commonwealth of Virginia v. Albert, Case Nos. 97-913 and 97-914 (Va. Dist. Ct. 1997).

276. *See* Bowling v. Commonwealth, 942 S.W.2d 293, 299 (Ky. 1997).

277. During the jury selection in the second Oklahoma City Bombing case, it was reported that numerous jurors expressed unwillingness to place their family, careers and possibly their salaries on "hold" during an extended term of jury service. *See Slow Going in Bombing Trial: Prospective Jurors Find Variety of Reasons to Avoid Serving*, MIAMI HERALD, Oct. 6, 1997, at 3A.

278. Often, challenges to prospective jurors are made by counsel at a voir dire bench conference at which the defendant has a right to be present. *See* Coney v. State, 653 So. 2d 1009, 1013 (Fla. 1995).

peremptory challenges.[279]

a. Challenges for Cause

If the court sustains a challenge for cause of an individual juror, the juror should be discharged from the trial.[280] Jurors subject to a challenge for cause include those who are incapable of impartiality due to the effects of prejudicial pretrial publicity.[281]

b. Peremptory Challenges

Peremptory challenges permit the parties to exclude, in a nondiscriminatory manner,[282] jurors they could not challenge for cause. The number of peremptory challenges and the procedure for their exercise are covered by statute or state rule.[283] While peremptory challenges give the parties wider opportunity to secure a jury they consider balanced, in recent years peremptory challenges have been the subject of criticism.[284]

4. Alternate Jurors

In a high profile, case it is advisable for the court to empanel a number of alternate jurors to replace jurors who become unable or disqualified to perform their duties.[285] Alternate jurors should go through the same selection process, have the same qualifications, take the same oath, and have the same functions, powers, facilities, and privileges as the regular jurors. Alternate jurors have been used to replace jurors where, during a trial, the court discovers that during voir dire a principal juror concealed information pertinent to their qualifications.[286]

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279. It is error to force a defendant to exhaust their peremptory challenges on jurors who should have been excused for cause. *See* Smith v. State, 510 So. 2d 143 (Fla. 3d DCA 1983).

280. It is within the trial court's province to determine whether a challenge for cause is proper, and the trial court's determination of juror competency will not be overturned absent manifest error. *See* Mendoza v. State, 700 So. 2d 670, 675 (Fla. 1997).

281. What has been termed "specific prejudice involves attitudes and beliefs about the particular case that may cause the juror to be incapable of deciding guilt or innocence with an impartial mind. These attitudes and beliefs may exist because of personal knowledge about the case, publicity through mass media, or public discussion and rumor arising in the community from which the jurors are drawn." Neil Vidmar, *Pretrial Prejudice in Canada: A Comparative Perspective on the Criminal Jury*, 79 JUDICATURE 249 (1996); *see also* McGinn v. State. 961 S.W.2d 161, 163 (Tex. Crim. App. 1998).

282. There is an initial presumption that peremptory challenges will be exercised in a nondiscriminatory manner. *See* Purkett v. Elem, 514 U.S. 765, 768 (1995).

283. *See, e.g.*, State v. Dishon, 687 A.2d 1074, 1083 (N.J. Super. Ct. App. Div. 1997).

284. *See* ABA STANDARDS FOR CRIMINAL JUSTICE § 15-2.6 (2d ed. 1980).

285. *See, e.g.*, FLA. R. CRIM. P. 1.43(g), 3.280.

286. *See* State v. Tresvant, 359 So. 2d 524, 526 (Fla. 3d DCA 1978).

B. *Postponement of Trial*

The postponement of trial to allow public attention to subside may help eliminate the impact of prejudicial pretrial publicity on potential jurors.[287] For example, in the Oklahoma bombing trial of Timothy McVeigh, the defense sought a continuance to counteract pretrial publicity surrounding the defendant's alleged confession.[288]

C. *Change of Venue*

Venue refers to the county or other geographical location where a case is to be tried.[289] Venue is fixed primarily by constitutional or statutory provision.[290] Even when a defendant is guaranteed a right to trial by an impartial jury in the geographical location where a crime has been committed, due process requires a change of venue when an impartial jury cannot be impaneled in that location.[291]

1. Criteria for Change of Venue

A party should move for a change of venue when the community where the case is to be tried harbors so great a prejudice against the moving party that the moving party cannot obtain a fair and impartial trial in that community.[292] The moving party has the obligation to justify the need for a change of venue by proving that the trial will be held in an inherently prejudicial environment or by showing actual juror prejudice during voir dire.[293] While the trial court may rule on a motion for change of venue prior to the commencement of jury selection, in doubtful cases, it is preferable for the court to attempt to empanel an impartial jury and reserve ruling on

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287. The Supreme Court recognized in cases of "extraordinary public moment" the court's authority to stay proceedings if the public welfare or convenience will be promoted thereby. Clinton v. Jones, 117 S. Ct. 1636, 1650 (1997).

288. *See* United States v. McVeigh, 955 F. Supp. 1281, 1281 (D. Colo. 1997).

289. Venue should be distinguished from vicinage which refers to the right of a criminal defendant to be tried by a jury drawn from the area in which the crime occurred. *See, e.g.*, People v. Gbadebo-Soda, 45 Cal. Rptr. 2d 40, 45 (Cal. Ct. App. 1995).

290. *See* 77 AM. JUR. 2D *Venue* § 5 (1997).

291. State laws restricting venue must on occasion yield to the constitutional requirement that the state afford the defendant a fair trial. *See* Groppi v. Wisconsin, 400 U.S. 505, 511 (1971).

292. *See* Patton v. Yount, 467 U.S. 1025, 1031-32 (1984); Murphy v. Florida, 421 U.S. 794, 798-99 (1975); *Groppi*, 400 U.S. at 510 (1971) (quoting Irvin v. Dowd, 366 U.S. 717 (1961)).

293. *See* Sheppard v. Maxwell, 384 U.S. 333, 362 (1966). The determination of whether to change venue is entrusted to the sound discretion of the trial court; its decision will not be disturbed on appeal absent a showing of prejudice to the substantial rights of the defendant. *See id.* The burden is on the defendant to show prejudice exists in the community, not as a matter of speculation, but as a demonstrable reality. *See id.*

the motion until it becomes apparent during jury selection that an unbiased jury cannot be seated.[294]

2. Pretrial Publicity

To justify a change of venue on grounds of prejudicial pretrial publicity, the burden is on the moving party to demonstrate that prejudicial pretrial publicity makes it impossible to seat an impartial jury.[295] Generally, in the absence of evidence that pretrial publicity is presumptively prejudicial, the moving party must demonstrate that pretrial publicity resulted in actual prejudice that prevented the impaneling of an impartial jury.[296] Actual jury prejudice occurs where a sufficient number of the jury panel have such fixed opinions that they cannot "judge impartially the guilt of the defendant, so that it is clear that a trial before that panel would be inherently prejudicial."[297] "[A] key factor in gauging the reliability of juror assurances of impartiality is the percentage of veniremen who 'will admit to a disqualifying prejudice.'"[298]

The movant must prove three elements to show that pretrial publicity was presumptively prejudicial. "[T]he publicity must: (1) be sensational, inflammatory, slanted towards conviction rather than factual and objective; (2) have revealed that the accused had a prior criminal record or referred to confessions, admissions or reenactments of the crime by the accused; or (3) have been derived from reports from the police and prosecuting

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294. *See* Provenzano v. State, 497 So. 2d 1177, 1182-83 (Fla. 1986); Davis v. State, 461 So. 2d 67, 69 (Fla. 1984); Manning v. State, 378 So. 2d 274, 276 (Fla. 1979).

295. The existence of extensive pretrial publicity by itself does not necessarily create a right to change of venue because "[u]sually, despite pretrial publicity, voir dire examination is a sufficient mechanism to insure that a defendant obtains a fair and impartial trial." Stouffer v. State, 703 A.2d 861, 881 (Md. Ct. Spec. App. 1997). *See also* State v. Hill, 493 S.E.2d 264, 270 (N.C. 1997); McGinn v. State, 961 S.W.2d 161, 164 (Tex. Crim. App. 1998) (explaining that even though some members of venire are challengeable for cause due to attitudes generated by publicity, it does not mean that an impartial jury cannot be empaneled, as required for change of venue, due to pretrial publicity).

296. Prejudice can be either presumed or actual. "Prejudice is presumed when the record demonstrates that the community where the trial was held was saturated with prejudicial and inflammatory media publicity about the crime." Ainsworth v. Calderon, 138 F.3d 787, 795 (9th Cir. 1998). "An additional factor is whether the media accounts were primarily factual, as such accounts tend to be less prejudicial than inflammatory editorials or cartoons. A final factor is whether the media accounts contained inflammatory, prejudicial information that was not admissible at trial." *Id.* Prejudice is rarely presumed because "saturation" defines conditions found only in extreme situations. To establish actual prejudice, the defendant must demonstrate that the jurors exhibited "actual partiality or hostility that could not be laid aside." United States v. Collins, 109 F.3d 1413, 1416, 1417 (9th Cir. 1997).

297. Murphy v. Florida, 421 U.S. 794, 802-03 (1975); *see also* Oats v. State, 446 So. 2d 90, 93 (Fla. 1984); Moyen v. State, 225 So. 2d 458, 459 (Fla. 1st DCA 1968).

298. Henyard v. State, 689 So. 2d 239 (Fla. 1996).

officers."[299] "However, even if one of these elements exists, a change of venue may not be necessary where there has been a sufficient time between the publication and the trial for the prejudice to dissipate."[300]

3. Conformity Prejudice

A change of venue may be required when strong community feeling about the case results in juror perception about what is expected regarding the case outcome.[301] For example, during the Oklahoma bombing trial of Timothy McVeigh, the court changed venue from Oklahoma because the entire state had become a unified community, sharing the emotional trauma of those who had been directly victimized.[302] Also, venue for the trial of an Hispanic police officer who shot and killed the African-American driver of a motorcycle was changed on the theory that jurors would be reluctant to vote for acquittal for fear of causing further violence in their community.[303]

4. Other Considerations

Before ordering a change of venue, the court should balance the need for such action against other considerations. These considerations include the expense of moving the trial, the defendant's right to a speedy trial, the inconvenience to all parties of moving the trial, the potential for bias at the target jurisdiction, and the target jurisdiction's comparative demographic composition.[304] Some states have adopted procedures allocating costs and expenses between the jurisdiction where the action originated and the jurisdiction receiving the case after change of venue.[305]

Once it becomes likely that the court will order a change of venue, the appropriate officials should attempt to locate a venue with a similar demographic composition that is willing to accept the case. The court to which a case is transferred should be equipped with a courthouse and courtrooms large enough to accommodate the case without disrupting other court business.

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299. Commonwealth v. Hawkins, 701 A.2d 492, 504 (Pa. 1997).

300. *Id.*

301. *See Henyard*, 689 So. 2d at 245; Berry v. State, 481 S.E.2d 203, 207 (Ga. 1997); Bell v. State, 938 S.W.2d 35, 46 (Tex. Crim. App. 1996); Henley v. State, 576 S.W.2d 66, 72 (Tex. Crim. App. 1979 (en banc)); Valerie P. Hans, *The Contested Role of the Civil Jury in Business Litigation*, 79 JUDICATURE 242 (1996).

302. *See* United States v. McVeigh, 955 F. Supp. 1281, 1282 (D. Colo. 1997).

303. *See* Lozano v. State, 584 So. 2d 19 (Fla. 3d DCA 1991).

304. In Florida, after the court orders a change of venue, it shall, upon a motion of any party, "give priority to any county which closely resembles the demographic composition of the county wherein the original venue would lie." FLA. STAT. § 910.03(2) (1997).

305. *See* FLA. R. JUD. ADMIN. 2.180 (1998).

D. *Change of Venire*

Alternatives to granting a full-scale change of venue should be explored before moving the trial, including the selection of an out-of-county jury. Florida has adopted a statute authorizing the court to select a jury from a county other than where the offense was committed and upon completion of jury selection, bring the jury to the county where the offense was committed for trial.[306] The selection of such an out-of-county jury is proper only if the court finds both a fair and impartial jury cannot be empaneled in the county where the offense was committed, *and* the court determines that once a jury is selected it shall be sequestered.[307]

E. *Severance of Defendants*

In cases in which there is a substantial likelihood that one or more of the defendants will not receive a fair trial because of potentially prejudiced publicity against another defendant, severance (trying one defendant separately from another higher-profile co-defendant) is another remedy for extensive prejudicial publicity.[308]

F. *Dual Juries*

In multi-defendant cases where there is a basis for severing the trials of codefendants, trial judges may wish to consider using dual juries to minimize the exposure of potential jurors in the second trial to media reports of the first and to avoid the time and expense of multiple trials. When this procedure is followed, two independent juries are selected and sworn. The parties may wish to make separate opening statements unless the prosecution agrees not to refer to any inadmissible evidence. Separate closing arguments are required. When evidence inadmissible against a codefendant is presented, that codefendant's jury must be removed from the courtroom. Although this procedure has some obvious inherent problems, it has generally been upheld.[309]

VIII. MINIMIZING PREJUDICIAL PUBLICITY DURING TRIAL

The Supreme Court has endorsed various techniques to protect the judicial process from prejudicial outside influences during trial. One of the most common of these techniques is sequestration. "A jury is sequestered

306. *See* FLA. STAT. § 710.03(3) (1997).
307. *See id.*
308. *See* ABA STANDARDS FOR CRIMINAL JUSTICE § 8-3.4 (2d ed. 1980).
309. *See, e.g.*, Velez v. State, 596 So. 2d 1197, 1199 (Fla. 3d DCA 1992).

by being kept together in the charge of an officer of the court so as to be secluded from outside communication."[310] Sequestration of the jury is discretionary with the court and should be ordered only if it is determined that the case is of such notoriety or the issues are of such a nature that, in the absence of sequestration, there is a substantial likelihood that highly prejudicial matters will come to the attention of the jurors.[311] If jurors are sequestered, a "neutral" instruction should be given by the court "to prevent any negative inference being drawn by the jurors from the sequestration order."[312] Even when not sequestered overnight, the court must ensure that the jurors do not mix with the public, press, or parties to the case.[313]

Many judges are reluctant to sequester jurors as evidenced by non-sequestering in the O.J. Simpson civil trial.[314] There are several reasons why courts disfavor sequestration. First, sequestering the jury is burdensome and imposes high costs on the court.[315] Extended sequestration "can [also] breed jury resentment, encouraging the very anti-defendant bias that the court sought to prevent."[316] Finally, "sequestration does not shield jurors from exposure to pretrial publicity prior to their selection to the venire," meaning information may be "piped" to jurors via conjugal or family visits.[317]

IX. PROTECTION OF JUROR PRIVACY DURING TRIAL

Extensive publicity attending a high profile trial can create substantial intrusion into the privacy of jurors and possibly affect their verdict. To protect jurors' privacy and guard against potential adverse impacts on jury deliberations resulting from such publicity, as well as from other factors, the court may decide to limit media and public access to jurors' names and addresses. In extreme circumstances, the judge may empanel an anonymous jury.

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310. State v. Allen, 682 So. 2d 713, 727 (La. 1996).

311. The rule of sequestration does not "bar communication between the judge and jury when such communication is within the bounds of trial related necessity." *Id.*

312. United States v. El-Jassem, 819 F. Supp. 166, 177 (E.D.N.Y. 1993).

313. *See* United States v. Muyet, 945 F. Supp. 586, 595 (S.D.N.Y. 1996).

314. *See generally* Marcy Strauss, *Sequestration*, 24 AM. J. CRIM. L. 63 (1996) (discussing all aspects of sequestration).

315. *See* United States v. Bermea, 30 F.3d 1539, 1561 (5th Cir. 1994); United States v. Greer, 806 F.2d 556, 557 (5th Cir. 1986).

316. Stephen J. Krause, Note, *Punishing the Press: Using Contempt of Court to Secure the Right to a Fair Trial*, 76 B.U. L. REV. 537, 565 (1996).

317. *Id.*

A. *Anonymous Juries*

The practice of withholding the names of jurors from the parties at voir dire is commonly referred to as the empaneling an anonymous jury.[318] This practice generally has been limited to exceptional circumstances. "The defendant's involvement in organized crime; his participation in a group with the capacity to harm jurors or past attempts to interfere with the judicial process; the potential punishment faced by the defendant; the degree of publicity the trial had received; and the possibility of juror harassment" are factors a court should consider in determining whether to impanel an anonymous jury.[319]

B. *Limiting Press and Public Access to Jurors' Names and Addresses*

To protect juror privacy and prevent intimidation, lower courts have recognized a judge's right to withhold jurors' names and addresses from the public,[320] and to use juror identification numbers instead of names.[321] For example, in the case of the suspected Unabomber, Theodore Kaczynski, Federal Judge Garland Burrell ruled that the court would withhold the jurors' names, ages, and occupations from the public until the case ended. He also barred the media from photographing or sketching prospective jurors. The judge cited as the basis for his ruling "the combination of the extensive publicity . . . the media's efforts to interrogate any and all individuals connected to the trial and the efforts by the public to contact and threaten witnesses."[322] Various states have adopted court rules or statutes limiting access to names and addresses of jurors under various circumstances.[323]

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318. *See* United States v. Wong, 40 F.3d 1347, 1376 (2d Cir. 1994); United States v. Tutino, 883 F.2d 1125, 1132-33 (2d Cir. 1989); United States v. Scarfo, 850 F.2d 1015, 1017, 1021-22 (3d Cir. 1988); United States v. Persico, 832 F.2d 705, 717-718 (2d Cir. 1987); *Muyet*, 945 F. Supp. at 590. The empaneling of an anonymous jury has "serious implications for a defendant's interest in effectively conducting voir dire and in maintaining the presumption of innocence." Ephraim Margolin & Gerald F. Uelmen, *The Anonymous Jury: Jury Tampering by Another Name?*, CRIM. JUST., Fall 1994, at 14, 17; *see also* United States v. Barnes, 604 F.2d 121, 134 (2d Cir. 1979). In the meantime, safeguards to protect these jurors must be provided. *See* United States v. Ross, 33 F.3d 1507, 1519-22 (11th Cir. 1994).

319. David Weinstein, Note, *Protecting a Juror's Right to Privacy: Constitutional Constraints and Policy Options*, 70 TEMP. L. REV. 21, 27 (1997).

320. *See* United States v. Antar, 839 F. Supp. 293, 305 (D. N.J. 1993); Gannett Co., Inc. v. State, 571 A.2d 735,748 (Del. 1989); Times Publ'g Co. v. State, 632 So. 2d 1072, 1074 (Fla. 4th DCA 1994).

321. *See* People v. Goodwin, 69 Cal. Rptr. 2d 576, 581 (Cal. Ct. App. 1997) (holding that there is no constitutional right to have jurors' names announced in court).

322. *Unabomber Juror Names to be Secret*, MIAMI HERALD, Oct. 4, 1997, at 16A.

323. *See, e.g.*, CAL. CODE OF CIV. P. § 237(a)(1), (b) (West 1998).

X. TECHNIQUES TO INCREASE JURY INVOLVEMENT DURING TRIAL

Courts should develop techniques to ensure that jurors feel like participants in the legal process rather than passive observers who must wait until a trial ends before playing their part. The court can increase juror participation by allowing jurors to take notes and ask questions of witnesses.[324] Juror involvement should also be encouraged by providing the jurors with explanations for prolonged delays, phone accessibility, and comfortable seating in the jury lounge.

A. *Juror Notetaking and Notebooks*

In many states, jurors are permitted to take notes for their own use during deliberations.[325] Where note-taking is permitted, jurors should be instructed that they may not share their notes with other jurors. Note sharing improperly places a notetaking juror's recollection above the recollections of a non-notetaking juror.[326]

The A.B.A. House of Delegates, at its meeting in February 1998, adopted new Civil Trial Practice Standards intended to help juries by providing procedures for use when courts permit practices such as juror note-taking. These standards also approve the practice of providing jurors with notebooks which include such items as preliminary instructions, selected exhibits, stipulations, short statements of the parties' claims and defenses, glossaries and chronologies.[327] It is also recommended that the trial judge "supervise [the] preparation of the notebooks to assure that they are useful to the jurors and that neither side has an unfair advantage."[328]

B. *Questioning By Jurors*

In some jurisdictions, jurors are allowed to pose questions to witnesses. For example, Palm Beach County Court Judge Nelson Bailey reports that

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324. *See* Larry Heuer & Steven Penrod, *Increasing Juror Participation in Trials Through Note Taking and Question Asking*, 79 JUDICATURE 256, 256 (1996).

325. Cases discussing the taking and use of notes by a jury are collected and analyzed in Sonja Larsen, *Taking and Use of Trial Notes by Jury*, 36 A.L.R. 5th 255 (1996); *see also* Harold J. Bursztajn et al., *Keeping a Jury Involved During a Long Trial*, CRIM. JUST., Winter 1997, at 8; Larry Heuer & Steven Penrod, *Increasing Jurors' Participation in Trials: A Field Experiment With Jury Notetaking and Question Asking*, 12 LAW & HUM. BEHAV. 231, 231 (1988); David L. Rosenhan et al., *Notetaking Can Aid Juror Recall*, 18 LAW & HUM. BEHAV. 53, 53-54 (1994).

326. *See, e.g.*, Johnson v. State, 887 S.W.2d 957, 958 (Tex. Crim. App. 1994).

327. *See Attorneys—Bar Associations: ABA Adopts Civil Trial Practice Standards, Urges Protection of Judicial Independence*, 66 U.S.L.W. 2478 (Feb. 10, 1998).

328. *Interview with Judge Michael B. Dann, Waking Up Jurors, Shaking Up Courts*, TRIAL, July 1997, at 20, 21.

he routinely tells jurors in his courtroom that "if a witness does not provide all the answers," the jurors "can do probing of their own."[329] Usually, questions are solicited in writing from the jurors and posed to the witness by the court after the lawyers have had a chance to object.[330] Studies by the American Judicature Society, the State Justice Institute, and other organizations have shown that allowing jurors to ask questions keeps them alert, focuses their attention on relevant issues, and enhances their sense of participation and responsibility. Judges find these benefits especially valuable in complex cases.[331]

C. *Expediting Trial Time*

To ensure that jurors are not unduly burdened, the court should take steps to expedite trials, including limiting the length of arguments by counsel and the number of witnesses each party can call, when possible. To avoid keeping the jury waiting, the court should generally devote the trial day to the uninterrupted presentation of evidence. Objections, motions, and other matters that may interrupt the trial should, as much as possible, be heard at a time set aside for that purpose, before the jury arrives in the morning or after it leaves in the afternoon. Motions in limine,[332] pretrial conferences, and protective orders often help shorten trial, simplify issues, and reduce the possibility of mistrial.[333]

D. *Juror Pay and Accommodations*

Although a juror's right to compensation is purely statutory and a matter of legislative, and not judicial, prerogative,[334] the low jury pay in many states may discourage potential jurors from serving for financial reasons. Various committees have recommended an increase in jury fees, with employers paying the juror their regular salary for the first three to five days of jury service.[335]

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329. MIAMI DAILY BUSINESS REVIEW, Oct. 9, 1997.

330. *See* Pierre v. State, 601 So. 2d 1309, 1309 (Fla. 4th DCA 1992).

331. *See* Bursztajn et al., *supra* note 325, at 9.

332. A motion in limine is similar to a protective order in that it seeks to prohibit any reference to offending evidence at trial by first having its admissibility determined outside the presence of the jury. *See* Benson v. Shuler Drilling Co., Inc., 871 S.W.2d 552, 555 (Ark. 1994); 75 AM. JUR. 2D *Trial* § 94 (1991).

333. *See* Rosa v. Florida Power & Light Co., 636 So. 2d 60, 61 (Fla. 2d DCA 1994).

334. *See* Patierno v. State, 391 So. 2d 391, 393 (Fla. 2d DCA 1980).

335. *See* B. Michael Dann & George Logan, III, *Jury Reform: The Arizona Experience*, 79 JUDICATURE 280, 284 (Mar./Apr. 1996).

E. *Instructions to Jurors*

Particularly in a complex case, the judge should consider giving comprehensive instructions to jurors before allowing opening statements to begin. At a minimum, the instructions should deal with pertinent legal concepts and provide an outline of the issues in dispute and related burdens of proof. During trial recesses, the trial judge should not say anything to jurors that they might interpret as an instruction on the law.[336] If the jurors request instructions on the law during recesses, such requests should be received only in the presence of the parties and their attorneys.[337]

XI. DUTY TO REGULATE CONDUCT AND ATMOSPHERE OF TRIAL

It is crucial in a high profile case that the presiding judge assume full command of the proceeding and regulate the conduct and atmosphere of the trial.[338] The two most noted cases presuming prejudice due to a carnival or circus atmosphere at trial are *Sheppard v. Maxwell*[339] and *Estes v. Texas*.[340]

> The trial in *Estes* had been conducted in a circus atmosphere, due in large part to the intrusions of the press, which was allowed to sit within the bar of the court and to overrun it with television equipment. Similarly, *Sheppard* arose from a trial infected not only by a background of extremely inflammatory publicity but also by a courthouse given over to accommodate the public appetite for carnival. The proceedings in these cases were entirely lacking in the solemnity and sobriety to which a defendant is entitled in a system that subscribes to any notion of fairness and rejects the verdict of a mob.[341]

A. *Regulation of In-Court Conduct of Spectators*

Since the public has the right to watch the trial, but not to participate in it or indicate a desired outcome, the presiding judge should strictly forbid

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336. *See* Mendoza v. State, 700 So. 2d 670, 674 (Fla. 1997).

337. *See id.*

338. *See* Holbrook v. Flynn, 475 U.S. 560, 572 (1986); State v. Bible, 858 P.2d 1152, 1172 (Ariz. 1993).

339. 384 U.S. 333, 382 (1966).

340. 381 U.S. 532, 605 (1965).

341. *Bible*, 858 P.2d at 1171 (quoting Murphy v. Florida, 421 U.S. 794, 799 (1975)); *see also* Samuel H. Pillsbury, *Time, TV, and Criminal Justice: Second Thoughts on the Simpson Trial*, 33 CRIM. L. BULL. 3, 26 (1997).

spectators' tactics designed to influence the jury and be prepared to deal with those who attempt to do so.[342] For example, in *United States v. Yahweh*,[343] the judge was faced with a courtroom containing forty to fifty uniformed members of a religious cult.[344] The judge barred the uniformed spectators from the courtroom, holding that their presence was prejudicial.[345] Likewise, the court "in the high profile 'Central Park Jogger' case, barred a spectator-brother of one of [the] defendants from wearing a black sweatshirt with the letters emblemized in white, 'My Brother Antron McCray Is Innocent.'"[346]

B. *Handling Pro Se Litigants*

A defendant in a state criminal trial has a constitutional right to proceed without counsel if they voluntarily and intelligently elect to do so. Because lay people are generally unfamiliar with court procedures and applicable substantive and procedural law, a trial judge will often have difficulty in trying a criminal case where the defendant waives counsel and proceeds pro se, especially if the defendant is obstreperous and misbehaves in court. Publicity can provide an incentive for a pro se litigant to be disruptive. Such conduct can challenge the court's ability, in the public's eye, to effectively administer justice. This consideration may make it especially important for the court to appoint stand-by counsel to consult with the defendant concerning court procedure and law. The trial will often be more expeditiously conducted if stand-by counsel is available to assist the defendant—although such an assignment is often a frustrating and tedious job for counsel.[347]

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342. *See* David E. Westman, Note, *Handling the Problem Criminal Defendant in the Courtroom: The Use of Physical Restraints and Expulsion in the Modern Era*, 2 SAN DIEGO JUST. J. 507, 527-28 (1994).

343. 779 F. Supp. 1342 (S.D. Fla. 1992).

344. *See id.* at 1344.

345. *See id.*

346. People v. Pennisi, 563 N.Y.S.2d 612, 616 (N.Y. Sup. Ct. 1990) (citation omitted).

347. *See* Behr v. Bell, 665 So. 2d 1055, 1056 (Fla. 1996); Jones v. State, 449 So. 2d 253, 257 (Fla. 1984). *Jones* concerned a criminal defendant who refused to cooperate with the trial court and with court-appointed counsel in their efforts to provide legal assistance. *See id.* at 256. The court stated that

> it was prudent of the court to appoint standby counsel, even over defendant's objection, to observe the trial in order to be prepared, as well as possible, to represent defendant in the event it became necessary to restrict or terminate self-representation by shackling and gagging defendant or by removing him from the courtroom.

Id. at 257.

The purpose of standby counsel is to assist the court in conducting orderly and timely

Special security concerns may arise in high profile cases involving pro se litigants. As in all cases, judges must take prompt action if they are threatened or harassed by such litigants. It is important however, to distinguish a "true threat" from the "hundreds of 'crackpot communications' which . . . [a court] receives each year from frustrated and/or unschooled litigants."[348] Instituting a criminal prosecution against such defendants may be appropriate under the statutes of some jurisdictions.[349] If circumstances require it, security personnel should attend at all times a pro se litigant appears in court or chambers.[350] At the very least, all chambers and courtrooms should have an "emergency button" to summon security. Finally, courts should take steps, where necessary, to insulate witnesses and jurors from tampering or intimidation by such defendants.

Additional remedies also may be needed to protect a pro se litigant's right to self-representation while providing adequate security in the courtroom and control of the trial. In *Parker v. Norris*,[351] the court approved the use of a transparent plexiglass screen around the witness stand separating the pro se defendant from the witnesses whom the defendant was examining.[352] By use of such screen, the defendant could walk around during the course of the trial without any handcuffs or other forms of restraint, although a deputy sheriff sat immediately behind the defendant at the counsel table.[353]

XII. POST VERDICT JUROR PRIVACY

Jurors, even after completing their duty, are entitled to privacy and to protection against harassment.[354] Jurors have no obligation to speak to the

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proceedings. *See id.* at 258; *see also* McKaskle v. Wiggins, 465 U.S. 168, 169 (1984); Faretta v. California, 422 U.S. 806, 820-821 (1975).

348. Melugin v. Hames, 38 F.3d 1478, 1484 (9th Cir. 1994).

349. *See id.*

350. In *Holbrook v. Flynn*, 475 U.S. 560 (1986) the Court determined that "the conspicuous, or at least noticeable, deployment of security personnel in a courtroom during trial is [not an] inherently prejudicial practice" and does not violate the fundamental principles of the criminal justice system. *Id.* at 568.

351. 859 F. Supp. 1203 (E.D. Ark. 1994).

352. *See id.* at 1225.

353. *See id.*; *see also* United States v. Lampley, 127 F.3d 1231, 1237 (10th Cir. 1997) ("[N]oting that guards have become commonplace in most public places 'so long as their numbers or weaponry do not suggest particular official concern or alarm.'").

354. California passed a statute in 1995 requiring that jurors' identities be sealed following a criminal verdict. *See* CAL. CODE OF CIV. P. § 237(2) (West 1998). Any person can then petition for this information, which could be released upon an undefined showing of "good cause," provided there was no "compelling interest" against disclosure. *See* § 237(4)(b). If such a petition is filed, a complicated hearing process is set in motion. *See* § 237(4)(c). At the hearing, individual jurors

news media or anyone else about their service. The juror's freedom of speech is also the freedom not to speak.[355] Since there is a lack of agreement as to how jurors and the press should deal with each other after a trial has ended,[356] a model post-verdict jury instruction has been published for use by the court and jurors.[357] As a caveat, courts should instruct jurors not to divulge anything said or done in the jury room by any of the other jurors, including opinions expressed, or votes cast by fellow jurors.[358] Most jurisdictions have rules that prohibit attorneys from interviewing jurors after a trial without the court's permission, and also strictly limit the scope of any allowed inquiry.[359] The United States Supreme Court denied certiorari in a case upholding a trial court order prohibiting juror interviews concerning the deliberations of the jury, upon a finding that the order was "narrowly tailored to prevent a substantial threat to the administration of justice—namely, the threat presented to freedom of speech within the jury room by the possibility of post-verdict interviews."[360]

Another concern is "checkbook journalism," the sale of stories by witnesses and jurors. For example, in California, the court may admonish jurors that, "prior to discharge, [they may not] accept, agree to accept, or

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may object to the release of their names and can essentially veto the disclosure of their identities. *See* § 237(4)(c). To ensure that information is not released in violation of these strictures, the statute attaches misdemeanor penalties to court personnel who release jurors' names without authority. *See* § 237(e). The purpose of this statute, according to the legislative history, was to protect "jurors' privacy, safety and well-being," along with public confidence in and willingness to participate in the jury system.

355. *See* United States v. Hooshmand, 931 F.2d 725, 737 (11th Cir. 1991); Benjamin M. Lawsky, *Limitations on Attorney Postverdict Contact with Jurors: Protecting the Criminal Jury and Its Verdict at the Expense of the Defendant*, 94 COLUM. L. REV. 1950, 1960-77 (1994); Nancy A. Novak, *Jury on Trial: Juror's Constitutional Right to Privacy Falls Under Scrutiny of the Courts*, 3 SAN DIEGO JUST. J. 215, 215 (1995).

356. If a case is settled midway into the trial, it may be unwise for the jurors to reveal their thought process to the media since all the evidence has not yet been presented.

357. *See* Arthur Murphy & Christine Kellett, *Meet the Press: How the Court Can Prepare Jurors*, CRIM. JUST., Winter 1996, at 8, 49-50.

358. It is virtually taken for granted that what goes on in the jury room should stay in the jury room. For instance, judges routinely instruct jurors not to speak to anyone about a case prior to retiring for deliberations and once deliberations commence to talk only to fellow jurors. *See* United States v. Antar, 839 F. Supp. 293, 307 (D.N.J. 1993). Court security officers are posted outside of jury rooms to guard against intrusions. Where the risks of intrusion are high, juries are sequestered. The danger in allowing unfettered probing into juror deliberations is found in the discouragement of the free and open operation of the deliberative process. *See id.* at 305-07. *See generally* Note, *Public Disclosures of Jury Deliberations*, 96 HARV. L. REV. 886, 887 (1983) (recognizing that post-verdict interviews of jurors are "more widespread than ever before").

359. *See* Baptist Hosp., Inc. v. Maler, 579 So. 2d 97, 100 (Fla. 1991); Lawsky, *supra* note 355, at 1955-57.

360. United States v. Cleveland, 128 F.3d 267, 270 (5th Cir. 1997).

benefit... [in] consideration for supplying any information concerning the trial."[361] Also, in California, a prospective witness who accepts payment in exchange for information pertaining to a criminal trial is subject to prosecution.[362] Such laws, however, raise constitutional issues.[363]

XIII. CONCLUSION

The proper administration of justice in America is essential to maintaining the appropriate balance between social order and individual rights. The due process concept which embodies the principle of fundamental fairness is not a constitutional luxury—it is a regulating principle that impacts our expectations of justice in the courtroom as well as many aspects of American culture. Our societal well being is therefore dependent, in part, on our justice system's ability to provide due process in reality and in appearance.

The ability of our courts to provide due process is severely tested in high profile cases that pit the right of a fair trial against the right to freedom of speech and of the press in the context of massive publicity. The public perception of justice in our courts is, therefore, highly affected by the judicial handling of high profile cases. This has generated a widespread recognition by both the bench and the bar that the effective judicial management of these cases is required to maintain public confidence in our justice system.

Effective judicial management of high profile cases is very difficult and complicated. It includes judicial administration functions such as selection of the "right" judge to handle the case, assignment of appropriate courtroom and juror facilities, and, if necessary, broadcast facilities. It also includes issuing directives to regulate the seating and conduct of the media and spectators, and providing necessary security and special accommodations for disabled individuals or others with special needs.

On a more substantive note, effective judicial handling of high profile cases requires the proper resolution of issues arising from the demands of the public and the media under the First Amendment to have access to judicial proceedings and court records. These rights must be balanced against the assertions by one or more of the parties that access should be denied to protect the right to a fair trial guaranteed by the Sixth Amendment. The law governing these issues is extensive and evolving, and substantial areas of uncertainty exist.

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361. CAL. PENAL CODE § 1122.5(a) (West 1998).

362. *See id.* at § 132.5(a).

363. *See* James R. Cady, *Bouncing "Checkbook Journalism": A Balance Between the First and Sixth Amendment in High-Profile Criminal Cases*, 4 WM. & MARY BILL OF RTS. J. 671, 712-13 (1995).

Besides denying access to court proceedings and court records under appropriate circumstances, courts in high profile cases are often confronted with the issue of whether to impose gag orders on the participants and their attorneys, or on the media, to prevent prejudice. Courts in high profile cases must therefore decide what standards govern the issuance of such orders. In some cases, gag orders may be difficult to enforce, even with the contempt powers; alternatively, they may be ineffective. In this case, the court may encourage the parties to agree not to make extrajudicial statements, or may direct the attorneys to comply with applicable ethics code provisions limiting extrajudicial comments by attorneys in pending cases.

The court's duty to minimize the effects of prejudicial publicity requires it to control the trial and its atmosphere so that fairness and impartiality are not compromised. This may require courts to permit searching voir dire examination of prospective jurors, including individual voir dire examination concerning prejudicial publicity issues. A court can also change the venue of the trial, protect juror privacy during trial, and regulate in-court conduct of the media and spectators, including placing appropriate restrictions on televising the trial.

Real or perceived abuses concerning the extent and nature of publicity in certain notable high profile cases have apparently resulted in several recent judicial decisions denying media requests to televise trials. These judicial decisions may signal a broad-based concern that the integrity of the judicial process may have been jeopardized by excessive, prejudicial publicity and that the appropriate balance between free press-fair trial rights needs to be restored.

High profile cases will continue to play a significant role in the American justice system. The challenges that these cases present to our courts will also continue. This class of litigation is dynamic—it involves some of our most important judicial doctrines in cases of great interest and importance to our courts and our society. High profile cases will continue to significantly impact judicial values and generate great public interest in the administration of justice. For these reasons, our courts must constantly seek to improve their ability to effectively manage high profile cases.