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ARTICLES

HANDLING CAPITAL CASES DEALING WITH THE MEDIA

By:

Judge Sharen Wilson
Judge Cynthia Stevens Kent

I. INTRODUCTION

Perhaps all that needs to be said on the issue of media and trials is *People v. O.J. Simpson*. The lessons of that trial are obvious. The trial judge is directly and personally responsible for maintaining the dignity and decorum of the courtroom proceedings. The media's interests do not involve issues of fair trial and due process. Rather, the media's interests involve issues of public information, ratings, and financial benefits from coverage of a particular trial. Further, when dealing with media coverage, the attorney should determine how media coverage might affect the resolution of the client's case and how he or she can appropriately deal with a capital case so as to protect the client and the integrity of our system of justice. Also, the trial judge must be aggressively involved in media management to ensure the defendant's Constitutional right to a fair trial and the societal right to justice in a properly conducted trial.

A review of some of the issues that often arise when dealing with a capital case will help prepare the judiciary for a capital case with intense media focus:

1. What are the legal guidelines in the area of free press and fair trial interests?
2. What are some of the pitfalls of the capital trial and what planning should the justice system take to appropriately address those concerns?

The trial judge is in charge of the courtroom and determines the extent of courtroom access to cameras and recording devices. However, the law dictates public trials. Whether or not a judge decides to allow media the opportunity to have cameras and recording devices in the courtroom is the individual decision of the trial judge in most jurisdictions. In a capital case, the media's demands for access may be intense and the trial judge should understand the options, benefits, and pitfalls of media and capital case management.

Much of the legal focus on the First Amendment v. Sixth Amendment battle has been in the criminal law field. Judges can begin their preparation for the capital trial by studying not only the case law, but also the guidelines from their state court rules for practice regarding media coverage of trial proceedings. Judges should review the state

constitution and case law for guidance on pretrial and trial management issues for the capital case. Development of a trial-court checklist for media-intense cases can assist the trial judge. Judges should also consider security and press management issues.

II. THE LAW/LEGAL ISSUES IN CAPITAL CASES

The first question a trial judge must answer is what does the law require, prohibit, and leave to the trial judge's decision in media management of a case. Each state has some provision of law or rule that gives some guidelines for media management.

A. *Cameras in the Courtroom*

In his article *Mass Media's Impact on Litigation: A Judge's Perspective*, Judge John F. Onion related a trial (*Hauptmann*) in which the Judge allowed still photography in the courtroom.¹ There were about 700 reporters and 132 photographers in the courtroom during the trial. The media had agreed to not show newsreels until after the trial, but during the trial they published and showed newsreels. Following this trial, the American Bar Association adopted Canon 35 of the Code of Judicial Conduct which made it unethical for a judge to allow broadcasting or still photography of courtroom proceedings.

1. Case Law

The trial of *Estes v. Texas*² demonstrated the problems that could occur with television coverage of a trial. During this trial, the television crews constructed a television booth in the courtroom, requiring cables to be snaked throughout the courtroom.³ As a result, the defendant appealed his conviction claiming a denial of due process.⁴ The Supreme Court reversed the conviction stating that the defendant's due process rights were violated and that the defendant did not have to show actual prejudice in order to obtain a reversal.⁵ Essentially, the Supreme Court banned cameras in the courtroom except for ceremonial purposes.⁶ This was the first Supreme Court decision addressing the issue of in-court broadcasting, but the numerous concurring and dissenting opinions in the plurality decision left the guidelines and full impact of this decision unclear.⁷

1. See Hon. John F. Onion, Jr., Former Presiding Judge, Texas Court of Criminal Appeals, Address at The Review of Litigation Symposium: Mass Media's Impact on Litigation, Lawyers, and Judges (Feb. 24, 1995), in 14 REV. LITIG. 585, 589 (1995).

2. See *Estes v. Texas*, 381 U.S. 532 (1965).

3. See *id.* at 536, 551.

4. See *id.* at 534–35.

5. *Id.* at 542, 552.

6. See *id.* at 550.

7. See *id.* at 552, 587, 596, 601, 615, 617.

In the Court's opinion, Justice Clark listed several ways in which broadcasting trial proceedings could influence jurors:

1. Pretrial announcements of the intention to televise the trial could affect potential jurors;
2. Awareness of the camera's presence could distract the jury from the evidence;
3. Non-sequestered juries could be affected by the interpretation of the trial by the media coverage; and
4. Any retrial could be in jeopardy due to jurors' exposure to clips from the first trial.⁸

Further, Justice Clark expressed concern about the effect of the cameras on the witnesses and their discomfort at testifying not only before the judge and jury, but also before the entire viewing television audience.⁹ He also expressed concern over the effect of broadcasting on invocation of the rule of witnesses, as well as a fear that individuals with evidence would not come forward for fear of becoming famous overnight.¹⁰ The burdening of the trial judge with the additional responsibility of supervising the cameras and the conduct of the reporters, as well as concerns about the judge and lawyers "playing" to the cameras, were also raised as problems with televised trials.¹¹

And finally, Justice Clark was concerned about the harm to the defendant in the form of mental harassment in having a trial televised and the possible creation of community bias.¹² Justice Clark directly held the trial judge responsible for the protection of the individual's rights to a fair trial by an independent court system under the rule of law.¹³

The trial of *Sheppard v. Maxwell*¹⁴ was another case where the trial judge permitted cameras in the courtroom.¹⁵ The situation was described as "bedlam reigned at the courthouse."¹⁶ One observer went so far as to say, "People were standing on the counsel table taking photographs, defense counsel could not confer with his client without being overheard, exhibits were picked up and taken out—it was unbelievable."¹⁷

Although the United States Supreme Court maintains its prohibition of any broadcasting from its proceedings, in *Chandler v. Florida*¹⁸ the court unanimously held that permitting radio, television, and pho-

8. *See id.* at 545–46.

9. *See id.* at 547.

10. *See id.*

11. *See id.* at 548.

12. *See id.* at 549.

13. *See id.* at 548.

14. *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

15. *See id.* at 343, 347.

16. *Id.* at 355.

17. Onion, *supra* note 1, at 592.

18. *Chandler v. Florida*, 449 U.S. 560 (1981).

tographic coverage of criminal proceedings over the defendant's objections was constitutional absent a showing of abuse or actual prejudice.¹⁹ The Court did not find it necessary to overrule *Estes*, explaining that the prior decision was not a majority opinion and did not establish a *per se* rule against televising criminal trials.²⁰

Justice Clark also clarified the court's holding in *Estes* stating:

It is said . . . that the freedoms granted in the First Amendment extend a right to the news media to televise from the courtroom, and that to refuse to honor this privilege is to discriminate between the newspapers and television. This is a misconception of the rights of the press.²¹

Thus, clearly the press does not have a First Amendment right of access to broadcast court proceedings. This decision has been challenged repeatedly but the Court has consistently held that the First Amendment protection of a free press does not require unlimited access to televise from the courtroom.²²

In the *Chandler* decision, the Court held that broadcasting is not inherently prejudicial; rather, due to technological improvements, it is rarely prejudicial.²³ In fact, the Court found that camera coverage of a trial, when properly structured, does not create a significant adverse effect on the participants in the trial.²⁴ The Court stated that to show a legally sufficient claim of denial of due process caused by broadcast coverage of a trial, the complaining party must meet a high standard by demonstrating either: (1) that the coverage compromised the ability of the jury to judge fairly, or (2) the coverage had an adverse impact on the trial participants sufficient to constitute a denial of due process.²⁵

Thus, the *Chandler* court not only held that broadcast coverage was not presumptively unconstitutional or inherently prejudicial; it also reiterated the holding that a media organization does not have a First Amendment right to broadcast court proceedings.²⁶ Further, the court held that a defendant does not have a Sixth Amendment right to a publicly broadcasted trial.²⁷ Rather, the Court decided that the trial court had the discretion as to whether or not to allow in-court broad-

19. *See id.*

20. *See id.* at 570–73.

21. *Estes v. Texas*, 381 U.S. 532, 539 (1965).

22. *See Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 610 (1978) (stating that “there is no constitutional right to have . . . testimony recorded and broadcast”) (citing *Estes*, 381 U.S. at 539–42).

23. *See Chandler*, 449 U.S. at 576.

24. *See id.* at 577.

25. *Id.* at 581.

26. *See id.* at 569.

27. *See id.*

casting after balancing the procedure for such broadcasting and the fundamental right to a fair trial.²⁸

Most state courts now allow for the broadcast of court proceedings under the discretion of the trial court with a total of forty-seven states now permitting broadcast coverage and only three states prohibiting broadcast coverage altogether.²⁹

2. Rules

The Mississippi Supreme Court's Rules for Electronic and Photographic Coverage of Judicial Proceedings (MREPC) allows electronic media coverage of public proceedings in appellate and trial courts subject to certain conditions.³⁰ The presiding judge has discretion to limit or terminate coverage at any time to control the proceedings and protect the interests of justice by protecting the rights of parties and witnesses and preserving the dignity of the court.³¹ Media coverage is expressly prohibited in matters such as divorce, child custody, adoption, domestic abuse, motions to suppress evidence, proceedings involving trade secrets, and other specified matters.³² In contrast to the Mississippi Rules that allow recording except under certain circumstances, the California Rules of Court permit media coverage only by written order of the judge.³³ Photographing, recording, and broadcasting are prohibited unless the conditions of the rules are met and the judge, in his discretion, permits such coverage.³⁴

Canon 3 of the Louisiana Code of Judicial Conduct requires a judge to "prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto at least during sessions of court or recesses between sessions."³⁵

Canon 3 further states:

A trial judge may authorize:

- (a) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record for the court or for counsel, or for other purposes of judicial administration;

28. *See id.* at 566.

29. Todd Piccus, *Demystifying the Least Understood Branch: Opening the Supreme Court to Broadcast Media*, 71 TEX. L. REV. 1053, 1064 (1993).

30. MISS. R. FOR ELEC. & PHOTOGRAPHIC COVERAGE OF JUDICIAL PROCEEDINGS 1, available at http://www.mssc.state.ms.us/rules/msrulesofcourt/rules_electronicphotographic_coverage.pdf (last visited Oct. 23, 2009).

31. *Id.* R. 3.

32. *Id.* R. 3(c).

33. CAL. R. OF CT. 1.150(e), available at http://www.courtinfo.ca.gov/rules/documents/pdfFiles/title_1.pdf (Oct. 23, 2009).

34. *Id.*

35. LA. CODE OF JUDICIAL CONDUCT CANON 3(A)(9) (2009), available at <http://www.lasc.org/rules/supreme/cjc.asp> (last visited Oct. 23, 2009).

- (b) the broadcasting, televising, recording or photographing of investitive or ceremonial proceedings;
- (c) the photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions:
 - (i) the means of recording will not distract participants or impair the dignity of the proceedings;
 - (ii) the parties have consented, and the consent to being depicted or recorded has been obtained from each witness appearing in the recording and reproduction;
 - (iii) the reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and
 - (iv) the reproduction will be exhibited only for instructional purposes in educational institutions.

An appellate court may permit broadcasting, televising, recording, and taking photographs of public judicial proceedings in the courtrooms of appellate courts in accordance with the guidelines set forth in an appendix to this Canon, subject, however, to the authority of each court and the presiding judge of each court or panel to (a) control the conduct of proceedings before the court, (b) ensure decorum and prevent distractions, and (c) ensure the fair administration of justice in the pending cause.³⁶

However, the Louisiana Revised Statutes Title 13 § 4164 seems to broaden the Canon to allow televising of proceedings when all parties agree and the judge approves:

Unless otherwise provided by rule promulgated by the supreme court to allow a pilot project in a city court, a proceeding in court may be televised or recorded by television equipment in accordance with the terms of a motion and stipulation agreed to by all parties to the proceeding and approved by the judge hearing the matter.³⁷

The seeming contradiction of the statute and the canon was resolved when the Supreme Court of Louisiana held that “[t]here is not necessarily a conflict between the statute . . . and the Canons of Judicial Ethics . . . as long as the trial judge in exercising his authority under the statute complies with the requirement of the Canons.”³⁸

In an Arkansas court a judge may authorize broadcasting, recording, or photographing in the courtroom and areas immediately adjacent thereto—during sessions of court, recesses between sessions, and on other occasions—provided that the participants will not be distracted, nor will the dignity of the proceedings be impaired. The rule sets out the following exceptions:

36. *Id.* Canon 3(A)(9)(a)–(c).

37. LA. REV. STAT. ANN. § 31:4164(C) (2006).

38. *Fitzmorris v. Lambert*, 377 So. 2d 65, 66 (La. 1979).

- (1) An objection timely made by a party or an attorney shall preclude broadcasting, recording, or photographing of the proceedings;
- (2) The court shall inform witnesses of their right to refuse to be broadcast, recorded, or photographed, and an objection timely made by a witness shall preclude broadcasting, recording or photographing of that witness;
- (3) All juvenile matters in circuit court as well as hearings in probate and domestic relations matters in circuit court, e.g., adoptions, guardianships, divorce, custody, support, and paternity, shall not be subject to broadcasting, recording, or photographing;
- (4) In camera proceedings shall not be broadcast, recorded, or photographed except with consent of the court;
- (5) Jurors, minors without parental or guardian consent, victims in cases involving sexual offenses, and undercover police agents or informants shall not be broadcast, recorded, or photographed.³⁹

In Georgia, the statute reads as follows:

Unless otherwise provided by rule of the Supreme Court or otherwise ordered by the assigned judge after appropriate hearing (conducted after notice to all parties and counsel of record) and findings, representatives of the print and electronic public media may be present at and unobtrusively make written notes and sketches pertaining to any judicial proceedings in the superior courts. However, due to the distractive nature of electronic or photographic equipment, representatives of the public media utilizing such equipment are subject to the following restrictions and conditions:

- (A) Persons desiring to broadcast/record/photograph official court proceedings must file a timely written request . . . with the judge involved prior to the hearing or trial, specifying the particular calendar/case or proceedings for which such coverage is intended; the type equipment to be used in the courtroom; the trial, hearing or proceeding to be covered; and the person responsible for installation and operation of such equipment.
- (B) Approval of the judge to broadcast/record/photograph a proceeding, if granted, shall be granted without partiality or preference to any person, news agency, or type of electronic or photographic coverage, who agrees to abide by and conform to these rules, up to the capacity of the space designated therefor in the courtroom. Violation of these rules will be grounds for a reporter/technician to be removed or excluded from the courtroom and held in contempt.
- (C) The judge may exercise discretion and require pooled coverage which would allow only one still photographer, one television camera and attendant, and one radio or tape recorder

39. ARK. SUP. CT. ADMIN. ORDER NO. 6(c).

outlet and attendant. Photographers, electronic reporters and technicians shall be expected to arrange among themselves pooled coverage if so directed by the judge and to present the judge with a schedule and description of the pooled coverage. If the covering persons cannot agree on such a schedule or arrangement, the schedule and arrangements for pooled coverage may be designated at the judge's discretion.

- (D) The positioning and removal of cameras and electronic devices shall be done quietly and, if possible, before or after the court session or during recesses; in no event shall such disturb the proceedings of the court. In every such case, equipment should be in place and ready to operate before the time court is scheduled to be called to order.
- (E) Overhead lights in the courtroom shall be switched on and off only by court personnel. No other lights, flashbulbs, flashes or sudden light changes may be used unless the judge approves beforehand.
- (F) No adjustment of central audio system shall be made except by persons authorized by the judge. Audio recordings of the court proceedings will be from one source, normally by connection to the court's central audio system. Upon prior approval of the court, other microphones may be added in an unobtrusive manner to the court's public address system.
- (G) All television cameras, still cameras and tape recorders shall be assigned to a specific portion of the public area of the courtroom or specially designed access areas, and such equipment will not be permitted to be removed or relocated during the court proceedings.
- (H) Still cameras must have quiet functioning shutters and advancers. Movie and television cameras and broadcasting and recording devices must be quiet running. If any equipment is determined by the judge to be of such noise as to be distracting to the court proceedings, then such equipment can be excluded from the courtroom by the judge.
- (I) Pictures of the jury, whether by still, movie, or television cameras, shall not be taken except where the jury happens to be in the background of other topics being photographed. Audio recordings of the jury foreperson's announcement of the verdict, statements or questions to the judge may be made. Photographs and televising of the public and the courtroom are allowed, if done without disruption to the court proceedings.
- (J) Reporters, photographers, and technicians must have and produce upon request of court officials credentials identifying them and the media company for which they work.
- (K) Court proceedings shall not be interrupted by a reporter or technician with a technical or an equipment problem.
- (L) Reporters, photographers, and technicians should do everything possible to avoid attracting attention to themselves. Reporters, photographers, and technicians will be accorded

full right of access to court proceedings for obtaining public information within the requirements of due process of law, so long as it is done without detracting from the dignity and decorum of the court.

- (M) Other than as permitted by these rules and guidelines, there will be no photographing, radio or television broadcasting, including videotaping pertaining to any judicial proceedings on the courthouse floor where the trial, hearing or proceeding is being held or any other courthouse floor whereon is located a superior court courtroom, whether or not the court is actually in session.
- (N) No interviews pertaining to a particular judicial proceeding will be conducted in the courtroom except with the permission of the judge.
- (O) All media plans heretofore approved by the Supreme Court for superior courts are hereby repealed.
- (P) A request for installation and use of electronic recording, transmission, videotaping or motion picture or still photography of any judicial proceeding shall be evaluated pursuant to the standards set forth in OCGA § 15-1-10.1.⁴⁰

The Kansas Supreme Court's Rule 1001 reads as follows:

The news media and educational television stations may photograph and record public proceedings before the Appellate, District and Municipal Courts of this state in accordance with the following applicable conditions and procedures and with such other conditions and procedures as may be required from time to time by the Supreme Court:

- (1) The privilege granted by this rule to photograph and record court proceedings may be exercised only by the news media and educational television stations. Film, videotape, photography, and audio reproductions shall be used for the purpose of education or news dissemination only.
- (2) The privilege granted by the rule does not limit or restrict the power, authority or responsibility of the judge to control the proceedings before the judge. The authority of the judge to exclude the media or the public at a proceeding or during the testimony of a witness extends to any person engaging in the privilege authorized by this rule.
- (3) Audio pickup and audio recording of a conference between an attorney and client, co-counsel, opposing counsel or attorneys and the judge are prohibited regardless of where conducted. Photographing of such conferences is not prohibited.
- (4) Focusing on and photographing of materials on counsel tables are prohibited.

40. GA. UNIF. R. OF THE SUPERIOR CT. 22, *available at* http://www.georgiacourts.org/courts/superior/rules/rule_22.html (last visited Oct. 23, 2009).

- (5) Individual jurors shall not be photographed. In courtrooms where photography is impossible without including the jury as part of the unavoidable background, the photography is permitted, but close-ups which identify individual jurors are prohibited.
- (6) As a matter of discretion, the judge may prohibit the audio recording and the photographing of a participant in a court proceeding.
- (7) The trial judge shall prohibit the audio recording and photographing of a participant in a court proceeding if the participant so requests and (a) the participant is a victim or witness of a crime, a police informant, an undercover agent or a relocated witness or juvenile, or (b) the hearing is an evidentiary suppression hearing, a divorce proceeding or a case involving trade secrets. Notwithstanding the foregoing and subject to condition 6, the news media may record and photograph a juvenile who is being prosecuted as an adult in a criminal proceeding as authorized by K.S.A. 38-1636.
- (8) No film, videotape, photograph, or audio reproduction of a court proceeding made by the media shall affect the official court record of the proceeding for purposes of appeal or otherwise.
- (9) The administrative judge shall designate a media coordinator who shall work with the administrative judge, the trial judge and the media in implementing this rule in the District Court.
- (10) The judge shall be given at least one week's notice of the intention of the media to bring cameras or recording equipment into the courtroom. The judge may waive this requirement upon a showing of good cause, but is not obligated to do so.
- (11) Members of the media shall not record interviews for broadcast in the hallways immediately adjacent to the entrances to the courtroom if passageways are blocked or judicial proceedings are disturbed thereby. Photographing through the windows or open doors of the courtroom is prohibited. Prior to rendition of the verdict, criminal defendants shall not be photographed in restraints as they are being escorted to or from court proceedings.
- (12) The judge may ban cameras from the entire floor on which a proceeding is conducted.
- (13) Requests to photograph or record District Court proceedings shall be directed to the media coordinator. When more than one television station, still photographer or audio recorder desires to cover a court proceeding, the media coordinator shall designate the pool photographer and audio recorder. If there is a dispute as to the pool designation or the equipment to be used, no audio or visual equipment shall be permitted at the proceeding. Requests for copies of audio recordings, video tape or photographs shall be di-

rected to the pool representatives only who shall supply copies upon request to media representatives at a price not exceeding actual cost.

- (14) The trial judge shall designate the location in the courtroom for the electronic and photographic equipment and operators. Under the general supervision of the Chief Justice, the Clerk of the Appellate Courts shall supervise the location of media equipment, and personnel using the equipment, within the Supreme Court courtroom. The presiding judge of the Court of Appeals panel shall supervise the location of media equipment, and personnel using the equipment, at hearings before the Court of Appeals. Equipment and operators ordinarily should be restricted to areas open to the public. The equipment and operators, however, shall not impede the view of persons seated in the public area of the courtroom. Operators shall occupy only the area authorized by the judge and shall not move about the courtroom for picture taking purposes during the court proceeding.
- (15) Media equipment shall not be placed within or removed from the courtroom except prior to commencement or after adjournment of proceedings each day, or during a recess. Television film magazines, still camera film and lenses, and audio cassettes shall not be changed within the courtroom except during a recess. A still camera photographer may leave the courtroom with the photographer's still cameras, but may not return for additional photographs except during a recess.
- (16) One television camera, operated by one person, and one still photographer, using not more than two cameras, are authorized in any court proceeding. The judge may authorize additional cameras or persons at the request of the media coordinator. Automatic film advance devices for still cameras shall not be used in the courtroom. If the still camera is not manufactured for silent operation, use of a quieting device is recommended. The court has the discretion to restrict operation of still cameras which emit distracting sounds during court proceedings.
- (17) One audio system for radio broadcast purposes is authorized in any court proceeding. Audio pickup for all media purposes shall be made through an existing audio system in the court facility. If no suitable audio system exists in the court facility, microphones and related wiring shall be unobtrusive.
- (18) Only audio or visual equipment which does not produce distracting light or sound may be used to cover a court proceeding. Artificial lighting devices shall not be used in connection with any audio or visual equipment. Modifications in the lighting of a district court facility may be made

only with the approval of the administrative judge. Approval of other authorities also may be required.⁴¹

The Ohio Supreme Court's Rule 12 sets the Conditions for Broadcasting and Photographing Court Proceedings.⁴² It states that:

[t]he judge assigned to the trial or hearing shall permit the broadcasting or recording by electronic means and the taking of photographs in court proceedings that are open to the public as provided by Ohio law. After consultation with the media, the judge shall specify the place or places in the courtroom where the operators and equipment are to be positioned. Requests for permission for the broadcasting, televising, recording, or taking of photographs in the courtroom shall be in writing and the written order of the judge shall be made a part of the record of the proceedings.⁴³

The rule sets out the following limitations:

- (1) There shall be no audio pickup or broadcast of conferences conducted in a court facility between attorneys and clients or co-counsel or of conferences conducted at the bench between counsel and the judge.
- (2) The judge shall inform victims and witnesses of their right to object to being filmed, videotaped, recorded, or photographed.
- (3) This rule shall not be construed to grant media representatives any greater rights than permitted by law.
- (4) Media representatives shall not be permitted to transmit or record anything other than the court proceedings from the courtroom while the court is in session.⁴⁴

In an Oregon court "there shall be no public access coverage of the following":

- (1) Proceedings in chambers.
- (2) Any notes or conversations intended to be private including, but not limited to, counsel and judges at the bench and conferences involving counsel and their clients.
- (3) Dissolution, juvenile, paternity, adoption, custody, visitation, support, mental commitment, trade secrets, and abuse, restraining and stalking order proceedings.
- (4) At a victim's request, sex offense proceedings.
- (5) Voir dire.
- (6) Any juror anywhere during the course of the trial in which he or she sits.
- (7) Recesses.⁴⁵

41. KAN. SUP. CT. R. 1001, available at <http://www.kscourts.org/rules/Rule-Info.asp?r1=Media+Coverage+of+Judicial+Proceedings&r2=318> (last visited Oct. 23, 2009).

42. OHIO SUP. R. 12, available at <http://www.sconet.state.oh.us/LegalResources/Rules/superintendence/Superintendence.pdf> (last visited Oct. 23, 2009).

43. *Id.* R. 12(A).

44. *Id.* R. 12(C).

45. OR. UNIF. TRIAL CT. R. 3.180(2), available at http://www.ojd.state.or.us/programs/utcr/documents/2008UTCR_ch3.pdf (last visited Oct. 23, 2009).

In a South Carolina court:

- (i) [R]epresentatives of the media may use video, still cameras or recorders to cover proceedings in the courts.
- (ii) Media representatives must give reasonable notice to the presiding judge of a request to cover a proceeding. . . . In the absence of reasonable notice, the presiding judge may refuse to permit media coverage, after giving due regard for the public educational benefits flowing from the photographing and recording of court proceedings.
- (iii) The presiding judge may refuse, limit, or terminate media coverage of an entire case, portions thereof, or testimony of particular witnesses as may be required in the interests of justice.⁴⁶

The following limitations apply:

- (i) Coverage of proceedings which are otherwise closed to the public is prohibited.
- (ii) There shall be no audio pickup or broadcast of conferences which occur in a court facility between attorneys and their clients, between co-counsel of a client, between adverse counsel or between counsel and the presiding judge.
- (iii) The members of the jury may not be photographed except when they happen to be in the background of other subjects being photographed. Camera and audio coverage of prospective jurors during selection is prohibited.⁴⁷

In a Washington court:

- (a) Video and audio recording and still photography by the news media are allowed in the courtroom during and between sessions, provided
 - (1) that permission shall have first been expressly granted by the judge; and
 - (2) that media personnel not, by their appearance or conduct, distract participants in the proceedings or otherwise adversely affect the dignity and fairness of the proceedings.
- (b) The judge shall exercise reasonable discretion in prescribing conditions and limitations with which media personnel shall comply.
- (c) If the judge finds that sufficient reasons exist to warrant limitations on courtroom photography or recording, the judge shall make particularized findings on the record at the time of announcing the limitations. This may be done either orally or in a written order. In determining what, if any, limitations should be imposed, the judge shall be guided by the following principles:
 - (1) Open access is presumed; limitations on access must be supported by reasons found by the judge to be sufficiently compelling to outweigh that presumption;

46. S.C. APP. CT. R. 605(f)(1)(i)–(iii), available at <http://www.sccourts.org/courtReg/displayRule.cfm?ruleID=605.0&subRuleID=&ruleType=APP> (last visited Oct. 23, 2009).

47. *Id.* R. 605(f)(2)(i)–(iii).

- (2) Prior to imposing any limitations on courtroom photography or recording, the judge shall, upon request, hear from any party and from any other person or entity deemed appropriate by the judge; and
- (3) Any reasons found sufficient to support limitations on courtroom photography or recording shall relate to the specific circumstances of the case before the court rather than reflecting merely generalized views.⁴⁸

3. Enforcement

The court may sanction a violation of its rules by measures that include barring a person or organization from access to future coverage of proceedings in that court for a defined period or contempt sanctions.

B. *Closing the Courtroom*

There are very few cases where the closing of court proceedings has been allowed, and the overwhelming case law provides that court proceedings are public and cannot be closed. Recently, the judge in the Martha Stewart criminal case tried closing the jury voir dire. The Judge's decision was vigorously challenged by the media and the appellate court ruled that such closure was improper.⁴⁹

As a general rule, all court proceedings should be open to the public. Most states provide for open courts. It is the best rule of thumb that all proceedings in a case will be held in open court and on the record. There are some situations where statute or case law allows for the court proceedings to be closed. Examples of proceedings that may be closed to the public include certain juvenile proceedings and mental commitment hearings. Closing criminal proceedings should be carefully considered in light of the requirements for public trial. Criminal cases generally protect the right to public and open proceedings. If any portion of a criminal hearing is closed, the judge should (1) make extensive findings and (2) generally think twice or maybe fifteen times, before closing the proceedings.

In Texas, a four-part test is utilized for determining whether the right to a public trial has been violated: (1) the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced; (2) the closure must be no broader than necessary to protect that interest; (3) the court must consider reasonable alternatives; and (4) the court must make findings adequate to support its action.⁵⁰

48. WASH. STATE GEN. CT. R. 16(a)–(c), available at http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=GR&ruleid=gagr16 (last visited Oct. 23, 2009).

49. See *ABC, Inc. v. Stewart*, 360 F.3d 90 104–05 (2d Cir. 2004).

50. *Johnson v. State*, 137 S.W.3d 777, 778 (Tex. App.—Waco 2004, pet. ref'd).

If a Texas court, on its own motion or the motion of either party, is considering allowing broadcasting of the court proceedings, a hearing on such decision is recommended in civil matters and might be considered even in a criminal case. The court can certainly consider evidence and argument of the parties on how the broadcasting of these proceedings may affect the rights of the parties, or the ability of the court to provide a forum for the due and proper administration of justice in the case. The court should carefully consider the requests and objections that may be raised by the parties, witnesses, media representatives, other courthouse personnel, and other individuals as to the inclusion or exclusion of broadcasting from the courtroom. Factors that the court should weigh in the decision on broadcasting include whether the broadcasting of the proceedings would interfere with the ability of the court to receive honest and complete testimony of any witness, cause unfair public criticism of a witness or party, or increase the potential for tampering with the jury or the jury pool.

Protection of witnesses from extreme embarrassment or intimidation that would traumatize them or render them unable to testify is an overriding state interest sufficient to justify partial or complete exclusion of the press or public, but there is no state's interest; however compelling, the state's interest can sustain the exclusion of the press and public from part of a trial, absent findings of necessity articulated on the record.⁵¹ Thus, before closing a trial, the judge should state on the record his reasons for doing so to inform the public and enable the appellate court an opportunity to review the adequacy of their reasons.⁵²

C. *Restricting Access to Jurors and Juror Information*

The courts have held that the unwarranted prior restraint on freedom of the press violates the First Amendment even when there existed a threat of harassment to the jurors if their names were disclosed during the trial.⁵³ The courts stated that where the prohibition of the release of juror's names is in violation of free press right and where the jury list was a public record, the prior restraint on the publication of the jury list was illegal.⁵⁴

However, there is case law that supports a judge's careful exercise of discretion to forbid news media from publishing the names and addresses of jurors in criminal cases. In *Schuster v. Bowen*, the court held, under the exceptional circumstances of that case, the prohibition on the publication of the names of jurors was necessary to protect the

51. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 608–09 (1982).

52. *See Rovinsky v. McKaskle*, 722 F.2d 197, 200 (5th Cir. 1984).

53. *See Des Moines Register & Tribune Co. v. Osmundson*, 248 N.W.2d 493 (Iowa 1976); *N.M. Press Ass'n v. Kaufman*, 648 P.2d 300 (N.M. 1982).

54. *See Osmundson*, 248 N.W.2d at 501; *Kaufman*, 648 P.2d at 304.

integrity and impartiality of the jury.⁵⁵ Further, it held that the public's right to know was irrelevant since the names would be released on the last day of trial and the only imaginable public member who might make use of the information was the one who wished to tamper with the jury.⁵⁶

In *United States v. Gurney*, the court found the trial judge did not abuse his discretion in restricting the press access to the jury panel lists, because there were full findings as to a balanced use of discretion and release of those names that were called in open court.⁵⁷

The decisions in *Nebraska Press Association v. Stuart* and *Nixon v. Warner Communications, Inc.* provide guidance in entry of gag orders dealing with the names and addresses of jurors. The Court set out the following determination to be made by the trial court:

1. The nature and extent of pretrial news coverage;
2. Whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and
3. How effectively a restraining order would operate to prevent the threatened danger.

Many states have laws that specifically provide for the confidentiality of juror information. Strict protection of this right should be provided by the courts. For example, section 35.29 of the Texas Code of Criminal Procedure provides:

Information collected by the court or by a prosecuting attorney during the jury selection process about a person who serves as a juror, including the juror's home address, home telephone number, social security number, driver's license number, and other personal information, is confidential and may not be disclosed by the court, the prosecuting attorney, the defense counsel, or any court personnel except on application by a party in the trial or on application by a bona fide member of the news media acting in such capacity to the court in which the person is serving or did serve as a juror. On a showing of good cause, the court shall permit disclosure of the information sought.⁵⁸

D. *Discharge Contact With and Instructions to Capital Jurors*

1. Federal Law

Most federal courts have local rules that severely limit, if not prohibit, post verdict contact with jurors. Before an attorney may contact a juror, counsel must file a motion with the court, show good cause,

55. *Schuster v. Bowen*, 347 F. Supp. 319, 320 (D. Nev. 1972).

56. *Id.* at 322.

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

58. TEX. CODE CRIM. PROC. ANN. art. 35.29 (Vernon 2008).

and obtain specific permission for the contact.⁵⁹ Such permission is seldom granted.⁶⁰ The historical purpose of these rules is to prevent the impeachment of jury verdicts and the harassment and manipulation of jurors to second guess their jury decisions.⁶¹ At least fifty-one of the ninety-four federal district courts “have adopted local rules governing whether and how attorneys may obtain post verdict interviews with jurors.”⁶² Even where there is no local rule against contact with jurors, the appellate courts have restricted such contact by counsel.⁶³

The American Bar Association has also provided in its Code of Professional Responsibility that a lawyer should not ask questions of or comment to a juror that might influence future jury service.⁶⁴

The federal courts have generally stood by their prohibition on post-verdict contact with jurors, arguing that such contact could “easily lead to juror harassment, to the exploitation of their thought processes in conflict with Rule 606, and to diminished confidence in jury verdicts as well as unbalanced trial results unduly depending on the relative resources of the party.”⁶⁵

2. State Law

Some states allow communication between the parties, counsel, and discharged jurors, provided that the communication complies with the state code of professional responsibility.⁶⁶ Communications with jurors must not be calculated merely to harass or embarrass the juror or to influence the juror’s actions in future jury service.⁶⁷

Look to your state statutes for laws that provide for criminal penalties for tampering with a witness or informant, jury tampering, and bribery of a juror.

3. Example

The trial judge may provide the jury with discharge instructions. Variations on these instructions assist the court in protecting the jury from undue press attention or adverse public criticism.

59. See 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, 1958 (1994).

60. See generally *Haeberle v. Tex. Int’l Airlines*, 739 F.2d 1019, 1021 (5th Cir. 1984) (stating that federal courts disfavor post-verdict interviewing of jurors).

61. See Susan Crump, *Jury Misconduct, Jury Interviews, and the Federal Rules of Evidence: Is the Broad Exclusionary Principal of Rule 606(b) Justified?*, 66 N.C. L. REV. 509, 515 (1987).

62. Lawsky, *supra* note 58, at 1956.

63. See *id.*

64. See MODEL CODE OF PROF’L RESPONSIBILITY DR 7-108 (1980).

65. *United States v. McDougal*, 47 F. Supp. 2d 1103, 1104 (E.D. Ark. 1999).

66. See Lawsky, *supra* note 58, at 1956-57 (stating that courts with local rules also follow the Model Rules).

67. *Id.* at 1960.

The jury can be instructed that they are free to talk to anyone they want to about the case, but are also entitled to refuse to talk about the case and their verdict. If the jurors report any threat or other security concern, the sheriff's office stands ready to assist the jurors and their families in maintaining their privacy and peace free from outside threat, harassment, or intimidation.

E. *Ethical Considerations in a Capital Case*

It is occasionally necessary to caution members of the Bar regarding their responsibility toward professionalism, courtesy, timeliness, and honesty. Several courts have found it necessary to enter orders regarding the conduct of counsel before the courts. In a capital case, the use of an Order on Conduct of Counsel may be prudent to prevent the potential for attorney abuse from the pressure of the media or the glare of the press.

Model Rules of Professional Conduct Rule 3.6, Trial Publicity, prohibits lawyers involved in litigation, and the other lawyers in their firm, from making "an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding."⁶⁸ However, the rule lists exceptions where a lawyer may make certain statements about the case, such as the offense involved, that an investigation is in progress, the identity of the accused, and the time and place of arrest.⁶⁹ The rule also permits a lawyer to mitigate adverse publicity by making a statement that is reasonably required to "protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client."⁷⁰

Further, in *Gentile v. State Bar of Nevada* the Court found that attorneys, as officers of the court, have a fiduciary responsibility to the justice system and must protect its integrity.⁷¹ However, the Supreme Court expressly declined to decide whether a higher standard of ethical speech applies to the speech of lawyers who are strangers to the litigation.⁷² Nonetheless officers of the court should always be cautious about public remarks that might adversely impact the ability to select a fair and unbiased jury. Reference to this decision may also assist the trial court in protecting the jury pool from poisoning caused by the attorney "talking heads" in the press.

Also, trial judges should always use caution when making remarks in front of the jury. In *Kennedy v. State*, the Indiana Supreme Court reaffirmed that trial judges must refrain from any action that would

68. MODEL RULES OF PROF'L CONDUCT R. 3.6 (1983).

69. *Id.*

70. *Id.*

71. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1057 (1991).

72. *Id.*

indicate a position other than strict impartiality and should exercise great care when speaking so as to avoid an indirect expression of opinion that could improperly influence the jury.⁷³

III. PRACTICAL APPLICATIONS IN A CAPITAL CASE

The issues of the public's right to know the news, the media's job to report, and the right of the litigants to a fair and impartial trial must be weighed and balanced carefully by the judge. The attorneys in any litigation should be focused on the actual preparation and trial of their cause of action and not on creating publicity that could influence the outcome of a particular trial. Unfortunately, there are attorneys who believe that their case should be tried in the court of public opinion instead of the court of law. Additionally, even in a case where the court and counsel are completely focused on the professional disposition of the case in the courtroom, the press may take an interest in a case and create a media focus which might adversely affect the due and proper administration of justice in the case, trial hearings, and the trial itself. Normally, pretrial hearings will not attract significant media interest unless the parties or attorneys are improperly fanning the fire of media interest. However, capital cases are different, and every hearing will generate some type of media comment or focus, particularly in smaller counties. Because of the unique attention of the media to capital cases, the trial court should carefully manage and limit the number and timing of pretrial hearings. The trial court should enter appropriate pretrial orders and discuss with counsel the need to limit pretrial hearings that could unduly affect the potential jury pool.

A cautious trial court may enter a detailed pretrial and trial management order with specific deadlines for discovery, hearings, jury selection, and trial. Some of the court's rulings can be carried until after the jury is selected to limit the effect of the publicity upon the jury pool. Once the jury is selected and placed under the court's instructions or sequestered, then the court can issue rulings that might generate additional publicity or that might contain prejudicial information. The trial court should utilize its sanction authority if counsel attempts to try the case in the media or unduly prejudice the jury pool by filing pretrial motions that try the case in the pleadings. A hearing on a pretrial matter can be set so that it does not hit the prime-time media market on the highest distribution day.

At the first hint that a case will be the focus of exceptional media attention, the trial judge should take appropriate steps to prepare the court staff to deal with the capital case. Development of protocols for dealing with a capital case should be addressed in the calm environment of life "before" the capital case. Once the case hits the press,

73. *Kennedy v. State*, 280 N.E.2d 611, 620–21 (Ind. 1972); *see also* *Starr v. United States*, 153 U.S. 614 (1894); *Lagrone v. State*, 84 Tex. Crim. 609, 209 S.W. 411 (1919).

the swirl of media attention may interfere with preparation of a capital-case-management plan by the court.

Early planning and management in a capital case is critically important to providing the calm, focused, and judicious atmosphere for the pretrial and trial of a case.

A. *Pretrial Management Issues to Protect Jury Pool*

The trial court should promptly issue pretrial orders, restrictive and protective orders, orders on conduct of counsel, and such other security or media orders necessary to focus counsel, the parties, and the witnesses on organization of the case for trial in a courtroom and not in the press. The entry of such orders and limitations on the number of pretrial hearings and motions heard by the court may help protect the jury pool from damaging and prejudicial pretrial publicity. The trial court should stand ready to enforce its orders through appropriate sanctions against the witnesses, parties, and counsel who seek to improperly influence the outcome of a case through the press. The Texas Penal Code section 36.03 provides that it is an offense to influence or attempt to influence a public servant in a specific exercise of his official power or duty.⁷⁴ It is also a violation of the Texas Penal Code to privately address communications to any public servant (that includes a juror) who exercises or will exercise official discretion in an adjudicatory proceeding with the intent to influence the outcome of the proceeding on the basis of considerations other than those authorized by law.⁷⁵

1. Restrictive and Protective Order

The trial court should never enter a gag order. The very sound of the word raises an objection. However, many courts now look to appropriate restrictive and protective orders to protect a case from unfair pretrial publicity and inappropriate comments by counsel regarding pending litigation. The use of a well-drafted Restrictive and Protective Order will set the tone of the trial. Attorneys and the public will sense that the judge is in control of the proceedings and is focused on providing the proper environment for a fair trial.

The court should consider promptly issuing a Restrictive and Protective Order to prevent counsel, parties, and potential witnesses from adversely influencing the jury pool or impeding the due and proper administration of justice. This order should be issued timely, copies served on counsel, the parties, and witnesses, and amended as needed. Copies should also be available for the media. To avoid problems with pretrial publicity, the court may issue restrictive and protective

74. TEX. PENAL CODE ANN. § 36.03(a) (Vernon 2003).

75. *Id.* § 36.04(a).

orders dealing with witnesses, counsel, security, and media conduct during pretrial and trial.

In *Nebraska Press Association v. Stuart*, the Court held that the state court's restraining order (gag order) prohibiting the media from reporting accounts of the case was in violation of the First Amendment constitutional provisions.⁷⁶ These prior restraining orders, or gag orders, are normally found to be in violation of the Constitution and should not be entered.⁷⁷ However, the court is permitted to enter appropriate protective orders controlling the dissemination of information from attorneys, parties, witnesses, court staff, and law enforcement agencies where the orders are necessary and appropriate for due process protection of rights.⁷⁸

Courts have held that the media has the same right of access to a criminal trial as the public, and that absent an overriding interest articulated in a finding, the trials of a criminal case must be open to the public.⁷⁹ Therefore, any restrictive order must be based on specific findings and articulate the overriding interest that made the basis of the restrictions.⁸⁰

2. Court Information Officer

In a capital case, the court may appoint a court information officer to assist the media with obtaining accurate information regarding state law and procedural matters in the case. This individual is not allowed to give opinions about the merits or demerits of the case but to assist in making sure that non-lawyer media representatives receive accurate information.

During the pretrial hearings, the information officer may moderate any press briefings and serve as a contact for information regarding case setting and court orders. During the trial the information officer may hold daily press briefings, obtain public information for the press, and serve as a liaison to the press for public information about the case from the court and clerk's office.

A benefit of appointing a court information officer is that he or she can become an effective presence in obtaining media compliance with the court's orders in the case. The eyes and ears in the press room allow the court to problem solve before the problem becomes serious enough to influence the trial.

The court information officer should develop an open dialogue with the media to problem solve and yet maintain compliance with the court's orders. This will allow the media to obtain their information

76. *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 568–70 (1976).

77. *See id.*

78. *See id.*

79. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580–81 (1980).

80. *See id.*

and the court to maintain the proper dignity and decorum for judicial decision making.

3. Retaining an Expert

In a capital case, the trial court might consider retaining an expert to assist in media management. This expert can assist in pre-filing and post-filing, adverse publicity management, and can assist the trial court in establishing orders and media-management rules that will be effective in creating a calm, focused, and judicious atmosphere and approach to case disposition. An expert with a media and legal background will prove most effective in developing a positive media and legal approach to the case.

This expert can assist in development of a media committee to guide the court in media management and trial management issues. Working with the media through a skilled professional who is respected by the press can be the most valuable tool in management of the case. This will allow the media to express their needs, concerns, recommendations and demands and will allow the court to respond through the media expert, rather than directly, to the development of a media-management plan for the case.

B. *Media Management*

1. Media Management Order

A well written and edited Media Management Order is essential to handle the press of the capital case. This order should be developed with input from the media expert, attorneys, sheriff, and facility plant manager at the courthouse, court clerk, court information officer, and the trial court. The trial judge must sign onto this order and be willing to enforce its provisions.

2. Media Room

If the case is a capital case, the court might consider setting up a media room. This room may prove very useful in diverting the media from the courtroom to a place more accessible for them, more convenient to conduct their writing and reporting tasks, and to a location that does not distract the court, counsel, litigants, witnesses, and most importantly the jury from the trial focus and work in the courtroom.

Many courthouses will not have adequate space for a proper media room, but if the judge looks at surrounding buildings, a media room space might be conveniently located adjacent to the courthouse. If the case is capital enough, many courthouses will cooperatively work to provide a media room in the courthouse, with a little advanced planning.

The media room should contain sufficient space, tables, chairs, telephone lines, cable access (preferably high speed), a copier, and an in-

interview area. Most media plans will have the media committee allocate the expense of such a set up among the media members requesting media room access passes. It is important to have the cooperation of the facility plant manager at the courthouse, the sheriff's office, the county judge, and the presiding judge to set up the media room arrangements.

If the court is allowing cameras in the courtroom, the designated pool television camera organization should make arrangements to provide the feed into the media room for the other media outlets. They should also arrange access for the other cameras to pool the audio and video feed.

Organizations such as truTV⁸¹ are extremely efficient in setting up the pooling arrangements and the gavel-to-gavel feed to the media room. This setup normally will take one day of advance work by an experienced court television organization.

If the trial is not receiving gavel-to-gavel coverage, setting up the pool and media room feed may be a little more complicated and the media committee should take the lead in making those arrangements.

3. Reserved-Seating Plan

In a capital case, there may be a large number of media representatives who want access to the courtroom during the trial, as well as members of the public, local schools, attorneys, courthouse officials and employees, and court security officers and their families. A courtroom that is usually empty behind the bar may be overflowing with interested persons. The court must address the seating plan and the attorneys should communicate their needs with the court. Counsel may need extra seating for his staff, co-counsel, parties, and expert witnesses and room to stack the boxes of exhibits, depositions, and other documents needed for the trial. In a high-profile case, the space needs of counsel, the court, and the media may conflict. This demands early and cooperative planning.

It is important for counsel to notify the court, in writing, of any specific space and seating needs for the trial of the case. The importance of having the legal team available to assist in document handling, evidence retrieval, and production of deposition summaries during the trial is critical. Placement of these team members in a convenient location to the counsel table can assist in the orderly presentation of the case.

The court may assign seats for the general public to ensure compliance with the spirit of the open courts provisions of many state constitutions.

81. Court TV changed its name to truTV as of December 31, 2007. See truTV Name Change, <http://www.trutv.com/newname.html> (last visited Oct. 23, 2009).

The media will always request courtroom seating, but the press seldom utilizes all of the seating made available to them. This is especially true if the court is allowing gavel-to-gavel coverage which is delivered by closed circuit to the media room. The media will generally prefer to remain in the media room to snack, drink, work, talk, and watch the trial at the same time.

The court can assist by preparing a reserved-seating chart. In an extremely capital case, the court should issue seating passes, have a bailiff assigned outside the courtroom door to check passes before entry, and issue a public, press, student, and public information packet to give instructions to those wishing to watch the trial in the courtroom.

4. Press Conferences

If the case is extremely high profile, there will be an interest in daily press conferences or press briefings. If the trial court can limit the attorney's ability to give press conferences, the trial will progress quicker with the attorneys, witnesses, litigants, and jurors focused on their jobs and not publicity. The appointment of a court information officer can help provide the press with accurate information on scheduling, legal terminology interpretation, and logistical information. This may help relieve the media pressure upon the attorneys and allow them greater freedom to focus on their case. Following the trial verdict, the press will be extremely interested in interviewing the attorneys, witnesses, parties, and the jurors. At the conclusion of the trial, counsel should make themselves available to address questions in an ethical and professional manner. This may help foster public confidence in the justice system. Counsel should be careful not to be critical of the jurors so as not to improperly influence future jury pools.

5. Media Truck Parking

An enormous distraction to the jurors, witnesses, attorneys, litigants, and general public is the parking of satellite trucks around the courthouse. The court should consider designated parking areas for the satellite trucks at a location that is not noticeable to jurors and others coming to the courthouse. Early direction, court orders, and constant enforcement of these parking restrictions are important to provide a quiet atmosphere and proper courthouse decorum for decision making in the case.

The court's security and media order should address media truck parking. Cooperation by the local police department is often needed to enforce these orders. The media will quickly forget and violate these orders unless promptly enforced by the police.

6. Local v. National Media Interest and Compliance

Generally, the court will have better success in having local media comply with the court's orders. This is because those local media concerns will want access on other, perhaps not as capital, cases in the future.

Many times the national media anticipate that this is the one and only time they will need access to that court and therefore their vested interest in compliance is directly related to how much access they are deprived of if they violate the court's order. Some organizations, such as truTV, have developed an excellent reputation for cooperative and professional work on capital cases. The key is to provide information to these media organizations about what the rules of access are and that they will be enforced.

7. Courtroom and Courthouse Violations of Orders

The trial judge must be committed to enforcing the courtroom and courthouse orders. If violators go unsanctioned, the violations will grow exponentially. Many judges will not relish the responsibility of enforcing orders against the media, but this is critical to an orderly trial.

The maximum penalty is not needed for all violations; however, quick, decisive and firm direction, correction, and response are needed when a violation occurs.

The media should have a vested interest in working within the court's orders, not around them. If the media wants access to cameras in the courtroom, reserved seating, a media room, and the other arrangements that the court can provide in a carefully structured media order, then the media must abide by the rules and restrictions that provide such open access.

C. *Trial Management*

1. Trial Management of Jurors in Capital Cases

The trial court should carefully manage the coming and going of the jurors in a capital case. If the jury is not going to be sequestered, the court must spend time carefully admonishing and reminding the jurors not to read, listen to, or watch anything regarding the case and trial. Whether or not the jury is sequestered, the trial court should attempt to protect the jurors from contact with or exposure to the media while traveling to the courthouse, while at the courthouse, and when leaving the courthouse. Special pretrial orders designating secure areas can help protect the jury from press exposure. The trial court should work with the local sheriff to help escort the jurors in and out of the courthouse and to keep others away from the jury room and their break area.

2. Jury Room and Jury-Break Management

In order to protect the jurors from the glaring eye of the press, the court will need to provide the jurors with a safe, convenient, and secure location to assemble in the morning before court, during breaks, and during deliberations. This area should be carefully protected from the inquiring eyes and voices of the media, witnesses, attorneys, and the parties. In capital cases the court should seriously consider sequestering the jury or, at the least, protecting their arrival and departure from the courthouse from becoming publicly disseminated news.

The court's bailiff should arrange snacks, drinks, and stretch breaks for the jury. Accommodations for rest rooms, smoke breaks, and meals should be planned so that the jury is not paraded in front of the press, witnesses, or litigants.

The court should give the jury careful instructions with constant reminders regarding their duty not to talk to anyone about the case; not to read, listen, or watch anything discussing the case; and not to allow anyone to discuss the case within hearing. Communications with jurors during their service can result in contempt penalties, criminal punishment, and mistrials. The parties need to assist the court by carefully instructing their witnesses, litigation team, and parties not to have any contact or communication with the jury.

3. Witness Ready Room and Instructions

Another tool used to protect a case from being adversely affected by the media and public interest is to have a location for the witnesses to assemble at the courthouse. They should receive careful instructions not to talk about the case. These instructions should also be posted in and around the witness ready room and counsel should be directed to discuss these instructions with their witnesses.

4. Scheduling of Trial Day

The trial schedule and media schedule are generally on two different planes of existence. The media's deadlines vary by media outlet and organization. The court's schedule varies depending on what other work the court has that day and the organization of counsel in having witnesses and evidence prepared for presentation. Consider clearing your calendar of other matters and devoting extraordinary time to the trial of the capital case. This will keep the lawyers working on the trial and not playing to the press. This will also assist in keeping the courthouse and security personnel focused on their trial duties. Furthermore, a schedule will help keep the jurors in a more controlled environment, focus them on the evidence produced in the courtroom, and have them deliberating quicker, which limits opportunities for jury misconduct or tampering.

The trial court should schedule the work day, publish that schedule, and keep the attorneys on track. Unscheduled delays are frustrating to the jury, the litigants, and the court's busy work schedule, and allow the media to show a judicial system that appears unorganized and unprofessional. Keeping to a trial-day schedule is difficult, but it can be accomplished by professional attorneys and a tough judge.

D. *Preparing the Judge and Court Staff for a Capital Case*

Remember that no matter how many capital cases you have presided over, the case that is drawing significant media attention should be carefully handled by the attorneys and the trial judge. This case is "on show" more than any others to demonstrate that our system of justice is effective or an embarrassment. A high degree of professionalism, ethics, and abilities of the judge and staff is essential in all cases, but is particularly important in a case where the public will be judging how our system of law responds to claims brought before the bar of justice.

In handling a capital case, it is important that the public remains confident that the judge and attorneys are committed to fairness, justice, and a scholarly application of the law.

1. Conduct of Court Staff

The court's staff is an important part of the successful trial of a capital case. Before the first media event, whether pretrial or trial, the judge and staff should review and discuss the media and trial-management plan. The plan could be a formal document or developed by experience in dealing with capital cases and should include procedures, schedules, and conduct. The court staff should consider the following:

1. limit casual remarks to jurors, other staff, and even friendly attorneys;
2. show no emotion or physical reaction to testimony or to events in the courtroom or to the jury at any time;
3. always be courteous and professional, especially in the stress of the capital case;
4. jury panel processing and trial are open to the public even when jury empanelling is in a remote location;
5. always communicate problems and concerns to the judge as they arise; and
6. review in detail the plans for jury, media, and witness rooms, as well as restrictive and protective orders.

2. Role of the Judge

The trial judge should exemplify the independence, integrity, dignity, impartiality, and work ethic of the highest standard. A judge's

conduct not only reflects upon that judge and his or her court, but on the entire judiciary, and impacts the public's perception and confidence in the judicial system as well. Therefore, each judge should restrict his personal conduct in an appropriate fashion so as not to bring discredit or unjust criticism upon the judiciary. The judge should maintain complete control, appropriate decorum, and authority in the courtroom; and should restrict comments and rulings to those statements reasonably necessary to properly dispose of the case and to preserve the orderly administration of justice.

The trial judge should remember:

1. Every case has its own unique complexities, but the capital case will certainly call upon the judge to utilize all of his or her training and education. Early and decisive rulings from the trial court may help direct the case to a decision protected from the outside influence of media attention.
2. The capital trial is work—hard work. We are not in the entertainment business. Complete attention to the facts and law to seek truth and justice is the critical obligation of a good judge.
3. Enter appropriate orders to counsel as soon after filing or indictment as possible to assist counsel in understanding and following their professional responsibility to restrict trial publicity.
4. Consider any reasonable continuances to allow arrest and indictment publicity to quiet down before trial of the case.
5. Summon a larger jury panel from which you would select your jurors to allow additional challenges for cause based on pretrial publicity bias.
6. Request cooperation from the local news media (this will only occasionally be successful) and issue any necessary restrictive and protective orders.
7. Provide careful and complete instructions to the selected jurors on their restricted conduct.
8. Sequester the jury when necessary to limit media impact.
9. Issue restrictive orders and instructions to witnesses in the case.