

GEORGE MASON AMERICAN INN OF COURT

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Press Relations and the Law

Additional Information and Resources

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Defining the news¹

What is news? Webster's definition says news is generally defined as a published account of a recent event. Journalists say that a news story has one or more of the following elements of mass appeal. Those elements are:

- ?? **Proximity:** People are more interested in events that happen near them.
- ?? **Consequence:** How will the event affect the reader or viewer?
- ?? **Prominence:** People may not be interested if John Smith shoplifts, but if a famous senator does it, that is news.
- ?? **Oddity:** If a dog bites a man, that's not news. But if a man bites a dog, that's news.
- ?? **Timeliness:** News is current; old news isn't news.
- ?? **Conflict:** Any type of conflict has drama.
- ?? **Immediacy:** People are drawn to events unfolding as they watch or listen.
- ?? **Emotion:** This is the appeal of human interest, and at the heart of all drama, conflict, and impact.
- ?? **Progress:** People are curious about innovation and new technology.

¹ Taken from <http://www.uscg.mil/lantarea/bjc/news.htm>.

Guidelines for talking to the press²

“The vast majority of [reporters] are hardworking professionals who care very much about doing their jobs the right way. Most of them are generalists. This is particularly true of local television and radio station reporters; it is also true of most newspaper reporters in small cities. They move from covering picket lines to auto accidents to reports on school board meetings. Most of them do not understand the legal system because they have never been exposed to it or taught about it. . . . First, you should recognize that reporters have real deadlines. . . . If a story is not ready in time, it does not air. . . . Second, understand that reporters are subject to the control of their editors. . . . [T]hey can cut the story to fit the space, deleting portions and potentially changing the story as a whole. If the story seems to twist your words or miss a crucial point, it may be the editor, not the writer, who caused the problem.” Richard M. Kerger, *Dealing with the Media*, Litigation, Summer 2000, at 42.

Pre-interview:

- ?? Respect the journalist’s deadline. This is, above all, the key to good media relations.
- ?? Be available. Take a reporter’s call if you can possibly do so. If you are unprepared, say so, but give a time when you will be available and prepared. Always ask when the reporter’s deadline is, and respect that deadline. If you are not available to take the reporter’s call, or cannot speak to them before their deadline, let them know and offer an alternative source of information that they can contact.
- ?? Return calls from reporters as soon as possible, preferably in less than thirty minutes. If you can’t call them back, have someone else do it.
- ?? If you will be appearing with a criminal defendant before television cameras, have them dress in business attire. Do not let them show up in casual or worn clothing.
- ?? Decide on the point that you want to get across and practice it before the interview. After you answer a reporter’s question, segue into that point and make it. Try to do that three times during the interview.

During Interview:

- ?? “Off the record” and “not for attribution:” “A reporter operates under the assumption that he or she is free to use anything you tell him or her, unless you have agreed to ground rules that stipulate *before* the conversation begins.”³ “Nothing is ever ‘off the record’ completely. If a reporter gets the same information from another source, all bets are off. The obligation to not reveal what you said no longer applies, [even though your name still might not be used.] If you are in an ‘off the record’ interview, or are speaking ‘not for attribution’ and the reporter asks to change the ground rules and quote you, find out exactly what language he or she

² See *id.*

³ John Greenya, *Make Your Case*, The Washington Lawyer, December 2000, at 29.

wants to quote.”⁴ You should work out an understanding with the reporter what “off the record,” “not for attribution,” and “for background” will mean *before* you begin the interview. It may be wisest, however, to simply expect everything you say before, during, and after an interview to be used by the journalist.

- ?? When being interviewed by a television or radio reporter, use short sentences in the active voice because they will be trying to extract sound bites for their story. You can avoid this tactic when speaking to a newspaper reporter.
- ?? Answer questions to the best of your ability, unless law or ethics restricts or prohibits your response. If that is the case, be honest and explain why you cannot speak on a particular matter.
- ?? Be cooperative, calm, and honest. Remember, the reporter has a job to do, so if you work with them, then they will be more likely to write an accurate story.
- ?? Be willing to admit it when you don’t know an answer, but then offer to locate the information or a more knowledgeable colleague for the reporter to consult (in time for the reporter to meet their deadline).
- ?? Be concise and straightforward. Avoid legalese, acronyms, and jargon wherever possible. Be prepared to explain and spell out any law-related information.
- ?? Have the reporter repeat back information that you think the average layman would not understand, and correct any errors. This will also help you avoid letting the reporter put words in your mouth.
- ?? If you don’t like the way a question is asked, don’t repeat it in your response.
- ?? Don’t be evasive, belligerent, abrupt, or inaccurate. It is better to admit at the first contact that you are unprepared, professionally restricted, or do not have the information.
- ?? Don’t reply to a question with “no comment.” This is like waving a red flag to a reporter. If you can’t comment, say *why* you can’t comment.
- ?? But at the same time, do not speculate, inject personal opinion or guess. Do not exaggerate. And don’t be trapped by a “what if” question by a reporter.
- ?? Don’t be afraid to appear dull. If a reporter doesn’t get a quotable quote, that’s the reporter’s problem, not yours. Sometimes, it’s better to be left out of the story than stuck with the phrase too well-turned. And, don’t tell jokes in crisis situations because they are apt to read as dumb or insensitive.⁵
- ?? Always speak in good taste, without profanity or slang.

⁴ Public Information Department of the State Bar of Texas, *Ten Commandments for Dealing With Media*, at 96.

⁵ *Id.*

- ?? Ask for clarification of vague questions.
- ?? Don't let yourself divulge information that you are not prepared to share. There are reporters who will try to catch you off-guard and hope that you will share the facts that they need. Their job is to get information. Your job is to provide what information you can professionally and ethically offer. Stay calm and in control.
- ?? Don't leave sensitive documents or other papers lying around in open view during an in-person interview. Reporters are trained to be observant.
- ?? Don't over- or underestimate a reporter's knowledge. Simply tell them the facts.
- ?? Find out when the reporter's deadline is. In the event that realize that you made a mistake, they may be amenable to correcting it, although that gets much more difficult as deadline approaches.

Other:

- ?? Don't "wine and dine" reporters in the hope of favorable coverage. While journalists, unlike doctors and lawyers, are not subject to a licensing board, traditional journalistic ethics forbid reporters and editors from accepting "freebies."
- ?? Don't expect a social friendship with a reporter to produce favorable coverage. Keep your social life separate from your professional dealings with journalists, and keep your interaction with journalists businesslike and correct.
- ?? Don't complain about a reporter's work to the editor, unless you want to assure yourself of everlasting unfavorable coverage and unrelenting enmity from all journalists concerned. If a reporter makes a mistake, call that reporter and tactfully point it out to them.

News release format⁶

Occasionally, you may decide to take your case to the media. If you publish a news release widely in this town, you are very likely to get some attention from the media, depending on what information you are peddling. In the event that you decide to simply put together a news release and fax it to the media, the following advice should prove useful:

- ?? Content is more important than format, but you should give the editor/news director a write-up that is easy to work with. A grossly improper format may convince them your release will cost too much time to fix.
- ?? The header on the form includes space for your name, the date and a release number. Slug the release using 14-point underlined type. Slugging is putting something right at the top that tells the story in one or two lines in such a way as to catch the reader's attention.
- ?? Sometimes you won't have time to write a polished press release. In those cases, you will pull all the information of which you are certain into a fact sheet. A fact sheet lists information in "bullet fashion," or as snippets. You do not even need complete sentences in a fact sheet. In most cases, the reporter will use the fact sheet to write an outline of the story and then call you for added detail or quotes to flesh out the final story.
- ?? Whether you are writing a release or a fact sheet, write in plain, American English, with short sentences and understandable words. Avoid jargon and acronyms. Answer the questions Who? What? Where? When? in the first sentence. The lead paragraph should stand alone, telling the gist of the story, with the following paragraphs expanding on the lead. Avoid acronyms and jargon. Use the spell checker in your computer and look up unfamiliar words, especially geographic locations.
- ?? Releases should seldom run beyond two pages, and a one-page fact sheet is best.
- ?? Type and duplicate the material on one side of the paper only.
- ?? Space down the page about two or three inches before you begin typing. This will give the editors space for notes to reporters or typesetters. If you use a letterhead, put two or three inches below the letterhead before you begin typing.
- ?? Mark the release with the date you release it. Use "Hold for release" only when a situation demands.
- ?? Give the name and phone number of the person the media should call for information. In the letterhead, give an address.

⁶ Taken from <http://www.uscg.mil/lantarea/bjc/news.htm>.

Effective Television Techniques

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Visual

How can you improve your visuals?

1. Make-up.

?? Men:

- ⚡⚡ Always carry a translucent powder in a medium shade to eliminate shiny forehead and nose.
- ⚡⚡ To control perspiration, apply witch hazel with a cotton ball before make-up.

?? Women:

- ⚡⚡ Let make-up enhance your natural beauty. Emphasize your good points.
- ⚡⚡ Indent the cheekbones by placing blush under them, not on them.
- ⚡⚡ Enhance the jaw line by using a darker contour just under the chin - this is especially important if you are overweight or have a full, round facial shape.
- ⚡⚡ Use a liquid or cream-stick base a shade warmer than your face or very close to your natural shade.
- ⚡⚡ Eliminate circles under the eyes with a soft creamy liquid or concealer one shade lighter than your base color.
- ⚡⚡ Avoid chalky white look.
- ⚡⚡ Choose a lipstick color that blends with the inside of your mouth, so that the inside and outside move as one.
- ⚡⚡ **Close-up cameras demand soft, natural, more invisible make-up.**
Avoid shiny lip gloss, dark lip pencils and heavy brow pencils.

2. Clothes. Check the color of the outfit before the program or interview, so you don't choose an outfit that blends with the background.

?? **Men:**

- ⌘⌘ The darker the suit the more seriously you'll be taken, but avoid black, dark gray or even mid blue which comes out very dark on camera.
- ⌘⌘ Choose **dark background ties** with monotone blended colors. Avoid shiny fabrics, stripes, checks and bold prints.
- ⌘⌘ Appropriate shirt colors are a pale blue or gray tab collar dress shirt. Avoid button downs which tend to bulge and look ruffled.
- ⌘⌘ White shirts can flare under lights and wild ties distract the viewer.

?? **Women:**

- ⌘⌘ You need a few good suits with a variety of blouses and scarves.
- ⌘⌘ A navy blue blazer is a good, reliable addition to any political wardrobe.
- ⌘⌘ Gray outfits may sound boring, but can provide attractive neutral frame for your face. Keep in mind the color choices for television.
- ⌘⌘ Strive for an unbroken line, with the same color value from head to toe.
- ⌘⌘ Avoid bare arms, white hose, silk shirts (they can cause crackling in the mic) and spike heels.
- ⌘⌘ Also, no stripes, polka dots, bold patterns, big flowered prints or fancy frills. All subconsciously draw the viewer's attention away from your message.
- ⌘⌘ Avoid big jewelry. Gold jewelry should have a matte, not shiny, finish. Earrings should not be larger than your eyes. Bracelets can rattle into a microphone so don't wear them. Pins can also distract and bring the viewers eyes away from the face.
- ⌘⌘ When you are dressed, stand in front of a mirror and squint your eyes. If any of your jewelry jumps out take it off.

3. **Hair.**

?? **Men:**

- ⚡⚡ Keep your hair neat and well-trimmed.
- ⚡⚡ A good hairstyle may touch the collar in back and extend over the top third of your ears.
- ⚡⚡ A well-trimmed beard can be effective. It should follow the jaw line and widen slightly at the temples where it meets the hairline. If you have a mustache, trim it evenly so that the upper lip is visible.
- ⚡⚡ Accept baldness graciously. Never pull a long lock of hair across the bald spot. To reduce glare, use a translucent powder.

?? **Women:**

- ⚡⚡ Have your hair shaped and layered to fit your head. Adopt a style you can care for yourself.
- ⚡⚡ A natural look is most flattering. Hair that clears your shoulders will move with your head and will not break up.
- ⚡⚡ Hair that falls below the shoulders draws the attention away from the face. Allow at least $\frac{3}{4}$ inch between your hair and eyes so both can be seen.

4. **Smile.** Only the one that wrinkles your eyes is perceived as sincere. Practice the E-O exercise to release facial tension. Remember television is two-dimensional and tends to flatten.
5. **Posture.** Keep shoulders back straight and sit on your spine. Don't slouch. Don't look down at an angle -- the studio lighting will darken your eyes. Lean into camera if you feel comfortable.
6. **Gestures.** Use hand and facial gestures if they are comfortable for you, but don't force their use.
 - ⚡⚡ To Emphasize gestures, slow them down to make them natural.
 - ⚡⚡ Use shoulder turns for more warmth.
 - ⚡⚡ Keep hand gestures within a six inch square around your heart.

⚡⚡ Keep an open position using the arm furthest from the camera for emphasis.
⚡⚡ Hands are paler than faces. Keep your hands out-of-sight until you use them to gesture.

⚡⚡ Don't do the following with your hands:

?? fiddle with rings, coins in pocket, watch or pen,

?? touching and patting anything,

?? clutching chair, notes or lectern,

?? scratch any part of your body,

?? hide your hands, point at the audience or wring them in despair.

7. **Exaggeration.** Every move of your eyebrows, mouth and other facial muscles needs to be exaggerated by 25 percent to be effectively conveyed on television. Unless it feels as if you are exaggerating, you're not exaggerating enough. This requires practice with video. Remember most camera shots are head and shoulders which focuses attention on your face.
8. **On Camera Interviews:** Never look at the camera when you are being interviewed. During questions and answers always keep your eyes on the anchor/reporter. Try to always appear interested and alert. To control nervousness it's good to imagine having a conversation with a friend in your living room.
9. **On the Set:** When the floor manager begins the countdown to start the program, remember the camera may be on you at any moment. Don't think of moving until you are told you can get up.
10. Avoid caffeine because it will create the bags under your eyes.

Vocals

How you can improve your vocals?

1. **Speak slowly.** Take the time to really listen to Larry King, Barbara Walters, Peter Jennings, Bill Clinton and Ronald Reagan - their speech delivery is very slow. Viewers and listeners rarely put any effort into listening. Make it easy for them - talk slowly, don't slur your words.
2. **Enunciate each word completely.** Sometimes we will trail off when we're speaking. A microphone is cruel to those who do this because everything is captured and conveyed. Each and every word must be stated completely, fully and slowly for maximum impact.
3. **Punch key words and phrases for emphasis.** Audiences want to hear "punchy", quick responses to questions and brief statements.
4. **Extend vowels** for more warmth and emotion.
5. Practice with a tape recorder placing emphasis on key words.
6. **Breathing** from the diaphragm is the source for vocal power. Take a deep breath and count to 30.
7. When you suffer from cotton mouth, rub your tongue over your lower teeth to stimulate the saliva glands.
8. Position **table microphones** about 5 inches from your mouth and 1 inch below your chin. This will help you to stop "popping the P's". Remember that desks and tables can act as a drum, so do not drum them with your fingers. Use heavy bond paper or 5 x 7 cards for notes so they do not rustle in the background.

9. **Lavaliere Microphones:** This is a small microphone that clips to your jacket or blouse. The microphone allows you complete flexibility in movement within the range of the cord. It should be placed 6-9 inches below your chin.

10. **Request a clip-on lapel microphone** if it is available (Conceal the cord under your armpit or jacket and never let it hang down in front. If standing, tuck the cord in your belt behind your right hip) or cordless if you want to move around more freely.

11. When giving the “**audio check**” before an interview, and during the interview itself, speak at a natural level. The audio operator will adjust the sound levels to your voice. If you must cough or burp, turn away from the microphone and briefly cover your mouth.

12. **Clarity.** Many people speak with their teeth together, hardly moving their lips, and then wonder why they are not understood. You’re trapping air behind your teeth and here’s how you get it out. Say the alphabet out loud, opening your mouth wide as if you were talking through a half yawn and imagine your jaws cannot close and your lips cannot touch, except on the letters B, M, P, and W. Repeat the exercise using twice as much air. Try saying these sentences smoothly all on one breath, without pauses or jerkiness:
 - ?? No man would listen to you talk unless he knew that it was his turn next.
 - ?? It is always the best policy to speak the truth, unless you are an exceptionally good liar.
 - ?? One of the tests of leadership is the ability to recognize a problem before it becomes an emergency.

13. **Vary** your volume to avoid speaking in a dull, flat voice.

14. **Vary** your speed and use pauses for emphasis. To eliminate nerves that cause your voice to go up a few octaves.

15. **Conversational** language communicates. Formal language is dull

?? **Conversational:** Who are we speaking to?

?? **Formal:** For what organization are we presenting?

The Statement

One type of on-camera presentation is the statement. Statements are one part of a television news program. It is directed towards an issue that is part of a major news event that may be local, regional or national. **Your goal is to provide deeper insight into an issue and shift public sentiment for your views.**

Elements of a good Statement

1. A good statement makes your case. It doesn't just draw attention to a problem or issue. It makes a point about it.
2. An effective statement contains several key elements:
 - ? A cause. A statement addresses a critical issue.
 - ? A firm conviction. A statement emphatically states a position on the issue and remains committed to it.
 - ? Evidence. A statement contains information to substantiate the position.
 - ? Reasoning. A statement is rational.
 - ? Logical development. A statement is well-organized. Thoughts flow from problem to solution smoothly.

A statement is tough because you must be brief. For this exercise we'll start at two minutes and condense to 15 seconds. Your words and information must be carefully selected. You should repeat your main point three times in the two minute version. Two times in the 15 second version.

TRIAL PUBLICITY

What can you do as an attorney during a trial when you are approached by the media for a statement? The following is a compilation of cases and rules that will help you determine what is ethically permissible as you represent your clients. In addition, the footnotes contain many of the comments and supplemental information for the Model Rules that are provided.

In Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991) (State Bar Rule governing pretrial publicity is void for vagueness), the petitioner appealed a finding by the Southern Nevada Disciplinary Board of the State Bar that he violated Nevada Supreme Court Rule 177, a rule governing pretrial publicity that closely resembles ABA Model Rule of Professional Conduct 3.6, after he held a press conference shortly after his client was indicted. The Supreme Court held that a state may regulate speech by lawyers representing clients in pending cases more readily than it may regulate the press and therefore a rule prohibiting speech that would have a substantial likelihood of materially prejudicing an adjudicative proceeding was constitutional. However, the Court ruled that Nevada's Rule was void for vagueness in that it provides a "safe harbor" provision for lawyers that may conflict with the general provisions of the rule.

In Marshall v. United States, 360 U.S. 310 (1959) (new trial granted if jurors learn through media prejudicial evidence that is prohibited at trial), the Supreme Court addressed what should be done if jurors learn about evidence through the media. Marshall requested a new trial on grounds that seven jurors had read newspaper accounts of his two previous felony convictions. The trial court ruled that each of the exposed jurors could rule on the case based solely on the evidence presented and without prejudice toward the defendant. However, prosecutors had sought to introduce evidence of the convictions at trial directly but were denied the request on grounds that doing so would be prejudicial to the defendant. The Supreme Court thus held that "the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence," is even more prejudicial when "that evidence reaches the jury through news accounts" because it is not tempered by protective procedures. Id. at 312-13. The Supreme Court accordingly ordered a new trial for the defendant.

In Sheppard v. Maxwell, 384 U.S. 333 (1966) (prejudicial publicity warrants new trial), Sheppard was tried for the murder of his wife amid widespread publicity, both before and during the trial. Much of the publicity reached the jurors, who were not sequestered prior to their deliberations. After his conviction, defendant filed a habeas corpus petition contending that he did not receive a fair trial. The Supreme Court, agreed, holding that the prejudicial publicity prevented him from receiving a fair trial consistent with the Due Process Clause of the Fourteenth Amendment. The court held that:

[d]ue process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused.

Id. at 362.

RULE 3.6 ABA MODEL RULES OF PROFESSIONAL CONDUCT

- (a) A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.
- (b) A statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:
 - (1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;
 - (2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;
 - (3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;
 - (4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;
 - (5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial; or
 - (6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.
- (c) Notwithstanding paragraphs (a) and (b) (1-5), a lawyer involved in the investigation or litigation of a matter may state without elaboration:
 - (1) the general nature of the claim or defense;
 - (2) the information contained in a public record;
 - (3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;
 - (4) the scheduling or result of any step in litigation;
 - (5) a request for assistance in obtaining evidence and information necessary thereto;
 - (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
 - (7) in a criminal case:

- (i) the identity, residence, occupation and family status of the accused;
- (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
- (iii) the fact, time and place of arrest; and
- (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.⁷

Virginia Supreme Court Professional Responsibility Rule 3.6 (2000)

- (a) A lawyer participating in or associated with the investigation or the prosecution or the defense of a criminal matter that may be tried by a jury shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication that the lawyer knows, or should know, will have a substantial likelihood of interfering with the fairness of the trial by a jury.
- (b) A lawyer shall exercise reasonable care to prevent employees and associates from making an extrajudicial statement that the lawyer would be prohibited from making under this Rule.

[Adopted effective January 1, 2000.]⁸

⁷ Comment

It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

No body of rules can simultaneously satisfy all interest of fair trial and all those of free expression. The formula in this Rule is based upon the ABA Model Code of Professional Responsibility and the ABA Standards Relating to Fair Trial and Free Press, as amended in 1978.

Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such Rules.

⁸ [1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. In a criminal matter which may be tried by a jury, preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a defendant or witnesses prior to trial. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. In addition to its legitimate interest in the conduct of judicial proceedings, the public has a right to know about threats to its safety and measures aimed at assuring its security.

Virginia Supreme Court Professional Responsibility Rule 3.8

Rule 3.8 Additional Responsibilities of a Prosecutor

A lawyer engaged in a prosecutorial function shall:

- (a) not file or maintain a charge that the prosecutor knows is not supported by probable cause;
- (b) not knowingly take advantage of an unrepresented defendant;
- (c) not instruct or encourage a person to withhold information from the defense after a party has been charged with an offense;
- (d) make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence which the prosecutor knows tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment, except when disclosure is precluded or modified by order of a court; and
- (e) not direct or encourage investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case to make an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.

[Adopted effective January 1, 2000.] ⁹

Virginia Code Comparison

Rule 3.6 is substantially the same as DR 7-106, except that paragraph (a) adopts a "substantial likelihood of material prejudice" standard rather than the "clear and present danger" standard of DR 7-106(A).

Committee Commentary

The Committee believed that one lesson of *Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979) is that a rule, such as the ABA Model Rule, which sets forth a specific list of prohibited statements by lawyers in connection with a trial, is constitutionally suspect. Accordingly, the more succinct language of DR 7-106 was adopted. However, the Committee changed the standard to the arguably broader "substantial likelihood of material prejudice," in accord with the language approved by the Supreme Court of the United States in *Gentile v. State Bar*, 501 U.S. 1030 (1991).

⁹ Comment

1. A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.
2. Paragraph (a) prohibits a prosecutor from initiating or maintaining a charge once he knows that the charge is not supported by even probable cause. The prohibition recognizes that charges are often filed before a criminal investigation is complete.

U. S. District Court for the Eastern District of Virginia

LOCAL CRIMINAL RULE 57, FREE PRESS—FAIR TRIAL DIRECTIVES

(A) Potential or Imminent Criminal Litigation. In connection with pending or imminent criminal litigation with which a lawyer or a law firm is associated, it is the duty of that lawyer or firm not to release or authorize the release of information or opinion (1) if a reasonable person would expect such information or opinion to be further disseminated by any means of public communication, and (2) if there is a reasonable likelihood that such dissemination would interfere with a fair trial or otherwise prejudice the due administration of justice.

(B) Grand Jury Proceedings. With respect to a grand jury or other pending investigation of any criminal matter, a lawyer participating in or associated with the investigation shall refrain from making any extrajudicial statement which a reasonable person would expect to be disseminated, by any means of public communication, that goes beyond the public record or that is not necessary to inform the public that the investigation is underway, to

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3. Paragraph (b) is intended to protect the unrepresented defendant from the overzealous prosecutor who uses tactics that are intended to coerce or induce the defendant into taking action that is against the defendant's best interests, based on an objective analysis. For example, it would constitute a violation of the provision if a prosecutor, in order to obtain a plea of guilty to a charge or charges, falsely represented to an unrepresented defendant that the court's usual disposition of such charges is less harsh than is actually the case, e.g., that the court usually sentences a first-time offender for the simple possession of marijuana under the deferred prosecution provisions of Code of Virginia Section 18.2-251 when, in fact, the court has a standard policy of not utilizing such an option.
 4. At the same time, the prohibition does not apply to the knowing and voluntary waiver by an accused of constitutional rights such as the right to counsel and silence which are governed by controlling case law. Nor does (b) apply to an accused appearing pro se with the ultimate approval of the tribunal. Where an accused does appear pro se before a tribunal, paragraph (b) does not prohibit discussions between the prosecutor and the defendant regarding the nature of the charges and the prosecutor's intended actions with regard to those charges. It is permissible, therefore, for a prosecutor to state that he intends to reduce a charge in exchange for a guilty plea from a defendant if nothing in the manner of the offer suggests coercion and the tribunal ultimately finds that the defendant's waiver of his right to counsel and his guilty plea are knowingly made and voluntary.
 5. The qualifying language in paragraph (c), i.e., "... after a party has been charged with an offense," is intended to exempt the rule from application during the investigative phase (including grand jury) when a witness may be requested to maintain secrecy in order to protect the integrity of the investigation and support concerns for safety. The term "encourage" in paragraph (c) is intended to prevent a prosecutor from doing indirectly what cannot be done directly. The exception in paragraph (d) also recognizes that a prosecutor may seek a protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.
 6. Paragraphs (d) and (e) address knowing violations of the respective provisions so as to allow for better understanding and easier enforcement by excluding situations (paragraph (d)), for example, where the lawyer/prosecutor does not know the theory of the defense so as to be able to assess the exculpatory nature of evidence or situations (paragraph (e)) where the lawyer/prosecutor does not have knowledge or control over the ultra vires actions of law enforcement personnel who may be only minimally involved in a case.

describe the general scope of the investigation, to obtain assistance in the apprehension of a suspect, to warn the public of any dangers, or otherwise to aid in the investigation.

(C) Pending Criminal Proceedings--Specific Topics. From the time of arrest, issuance of an arrest warrant, or the filing of a complaint, information, or indictment in any criminal matter until the termination of trial or disposition without trial, a lawyer or a law firm associated with the prosecution or defense shall not release or authorize the release of any extrajudicial statement which a reasonable person would expect to be further disseminated by any means of public communication, if such statement concerns:

- (1) The prior criminal record (including arrests, indictments, or other charges of crime), or the character or reputation of the accused, except that the lawyer or law firm may make a factual statement of the accused's name, age, residence, occupation, and family status and, if the accused has not been apprehended, a lawyer associated with the prosecution may release any information necessary to aid in his or her apprehension or to warn the public of any dangers such person may present;
- (2) The existence or contents of any confession, admission, or statement given by the accused, or the refusal or failure of the accused to make any statement;
- (3) The performance of any examinations or tests or the accused's refusal or failure to submit to an examination or test;
- (4) The identity, testimony, or credibility of prospective witnesses, except that the lawyer or law firm may announce the identity of the victim if the announcement is not otherwise prohibited by law;
- (5) The possibility of a plea of guilty to the offense charged or a lesser offense;
- (6) Any opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case.

The foregoing shall not be construed to preclude the lawyer or law firm during this period, in the proper discharge of the official or professional obligations imposed, from announcing the fact and circumstances of arrest (including time and place of arrest, resistance, pursuit, and use of weapons), the identity of the investigating and arresting officer or agency, and the length of the investigation; from making an announcement, at the time of seizure of any physical evidence other than a confession, admission or statement, which is limited to a description of the evidence seized; from disclosing the nature, substance, or text of the charge, including a brief description of the offense charged; from quoting or referring without comment to public records of the Court in the case; from announcing the scheduling or result of any stage in the judicial process; from requesting assistance in obtaining evidence; or from announcing without further comment that the accused denies the charges made against such person.

- (D) Pending Criminal Proceedings--General.** During a jury trial of any criminal matter, including the period of selection of the jury, no lawyer or law firm associated with the prosecution or defense shall give or authorize any extrajudicial statement or interview relating to the trial or the parties or issues in the trial, which a reasonable person would expect to be disseminated by means of public communication, if there is a reasonable likelihood that such dissemination will interfere with a fair trial, except that the lawyer or law firm may quote from or refer without comment to public records of the Court in the case.
- (E) Provisos.** Nothing in this Rule is intended to preclude the formulation or application of more restrictive rules relating to the release of information about juvenile or other offenders, to preclude the holding of hearings or the lawful issuance of reports by legislative, administrative, or investigative bodies, or to preclude any lawyer from replying to charges of misconduct that are publicly made against such lawyer.
- (F) Court Personnel.** All Court personnel, including, among others, Marshals, deputy Marshals, Court Clerks, bailiffs, Court reporters, and employees or subcontractors retained by the Court-appointed official reporters, are prohibited from disclosing to any person without authorization by the Court, information relating to a pending grand jury proceeding, or criminal case that is not part of the public records of the Court. The divulgence of information concerning grand jury proceedings, in camera arguments, and hearings held in chambers or otherwise outside the presence of the public is likewise forbidden.
- (G) Motions.** In a widely publicized or sensational criminal case, the Court, on motion of either party or on its own motion, may issue a special order governing such matters as extrajudicial statements by parties and witnesses likely to interfere with the rights of the accused to a fair trial by an impartial jury, the seating and conduct in the Courtroom of spectators and news media representatives, the management and sequestration of jurors and witnesses, and any other matters which the Court may deem appropriate for inclusion in such an order.
- (H) Open Court.** Unless otherwise provided by law, all preliminary criminal proceedings, including preliminary examinations and hearings on pretrial motions, shall be held in open Court and shall be available for attendance and observation by the public; provided that, upon motion made or agreed to by the defense, the Court, in the exercise of its discretion, may order a pretrial proceeding be closed to the public, in whole or in part, on the grounds:
- (1) that there is a substantial probability that the dissemination of information disclosed at such proceeding would impair the defendant's right to a fair trial; and
 - (2) that reasonable alternatives to closure will not adequately protect defendant's right to a fair trial.

If the Court so orders, it shall state for the record its specific findings concerning the need for closure.

[Effective February 1, 1997.]

Local Rule 57(C) was tested and upheld as constitutional in the two In re Morrissey cases. The court in In re Morrissey, 996 F. Supp. 530 (E.D.Va. 1998), held that Local Rule 57(C) is constitutional. Prior to a criminal trial in which he was a participating lawyer, Morrissey made extrajudicial statements to the media regarding the case. Based on these statements, the court issued two show cause orders charging him with violating Local Rule 57(C). Morrissey challenged Local Rule 57 (C) on grounds that it violated his First Amendment rights as set forth in Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991). The court held that Local Rule 57(C) is substantially identical to Disciplinary Rule 7-107(B), the constitutionality of which was measured by the Fourth Circuit in Hirschkop v. Snead, 594 F.2d 356 (4th Cir. 1979). Furthermore, the court held that by providing a list of proscribed topics, as well as employing a “reasonable likelihood of prejudice” standard, Rule 57(C) provided a constitutionally adequate level of protection for lawyer speech respecting criminal proceedings. The rule imposed narrowly tailored restraints on speech designed to prevent influencing a trial’s outcome and prejudicing the venire.

The Fourth Circuit agreed with the District Court of the Eastern District of Virginia in In re Morrissey, 168 F.3d 134 (4th Cir. 1999). Morrissey challenged his convictions of violating Rule 57(C) on grounds that the “reasonable likelihood” standard in Rule 57(C) was less protective than the “substantial likelihood” standard upheld in Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991). Relying on its pre-Gentile decision in Hirschkop v. Snead, 594 F.2d 356 (4th Cir. 1979), the court held that the “reasonable likelihood” standard was sufficiently narrowly tailored to pass constitutional muster and was constitutionally applied to Morrissey. The court explained that the restrictions imposed on lawyers’ speech under Rule 57 are narrow in that they prohibit only the statements that are likely to threaten the right to a fair trial and an impartial jury. Furthermore, Rule 57 serves the function of avoiding conduct that imposes unnecessary costs on the judicial system. As such, Rule 57 imposes only constitutional restrictions on lawyers’ speech.

CAMERAS AT TRIALS

Virginia has a very specific law that dictates how and when cameras may be used in the courtroom. This law can be very helpful as you try to keep cameras out or encourage their presence at one of your future trials. The footnote contains the annotations to the code.

In Diehl v. Commonwealth, 9 Va. App. 191, 385 S.E.2d 228 (1989) the court addressed whether the presence of cameras alone violates due process absent a showing of prejudice. After a conviction of involuntary manslaughter, abduction, child neglect and assault and battery, Diehl appealed in part on the trial court’s decision to allow cameras in the courtroom during his, questioning whether Code § 19.2-266, on its face and as applied, violates the equal protection clause of the United States Constitution. Relying on Chandler v. Florida, 449 U.S. 560 (1981), the court reasoned that neither the statute nor Rule 1:14 violates the equal protection clause. The

court cited a lack of evidence by Diehl showing that “the use of cameras to record and telecast parts of the trial hampered the presentation of his case, deprived him of an impartial jury, or in any way impaired the fairness of trial.” Diehl, 9 Va. App. at 198. The court “further observe[d] that by adopting Rule 1:14 pursuant to enabling legislation, Code § 19.2-266, the Supreme Court of Virginia implicitly determined that television coverage in selected courts on an experimental basis violates no state or federal constitutional provision.” Id.

Virginia Code § 19.2-266 (2000)¹⁰

§ 19.2-266. Exclusion of persons from trial; photographs and broadcasting permitted under designated guidelines; exceptions

In the trial of all criminal cases, whether the same be felony or misdemeanor cases, the court may, in its discretion, exclude from the trial any persons whose presence would impair the conduct of a fair trial, provided that the right of the accused to a public trial shall not be violated.

A court may solely in its discretion permit the taking of photographs in the courtroom during the progress of judicial proceedings and the broadcasting of judicial proceedings by radio or television and the use of electronic or photographic means for the perpetuation of the record or parts thereof in criminal and in civil cases, but only in accordance with the rules set forth hereunder. In addition to such rules, the Supreme Court and the Court of Appeals shall have the authority to promulgate any other rules they deem necessary to govern electronic media and still

¹⁰ HISTORY: Code 1950, § 19.1-246; 1960, c. 366; 1971, Ex. Sess., c. 28; 1975, c. 495; 1978, c. 477; 1987, c. 580; 1989, c. 582; 1990, c. 243; 1992, c. 557.

CROSS REFERENCES. --As to exclusion of witnesses in civil cases, see § 8.01-375.

LAW REVIEW. --For survey of Virginia statutory changes in substantive criminal law for the year 1970-1971, see *57 Va. L. Rev. 1467 (1971)*. For survey of Virginia law on criminal law for the year 1971-1972, see *58 Va. L. Rev. 1206 (1972)*. For comment on the fair trial-free press controversy, see *11 U. Rich. L. Rev. 177 (1976)*. For survey of Virginia law on evidence for the year 1977-1978, see *64 Va. L. Rev. 1451 (1978)*. For note on public access to criminal trials, see *15 U. Rich. L. Rev. 741 (1981)*. For comment on the prejudicial effects of cameras in the courtroom, see *16 U. Rich. L. Rev. 867 (1982)*. For 1987 survey of Virginia criminal procedure, see *21 U. Rich. L. Rev. 727 (1987)*. For article, "Cameras in Virginia Courtrooms," see *26 U. Rich. L. Rev. 921 (1992)*. For article, "Dancing in the Courthouse": The First Amendment Right of Access Opens a New Round, see *29 U. Rich. L. Rev. 237 (1995)*.

CONSTITUTIONALITY. --This section, permitting the closure by the court of a criminal trial to the public and press, upon the unobjected-to request of the defendant, without requiring the court to make specific findings as to whether alternative solutions would have met the need to ensure fairness and without the specific finding of an overriding interest, violates the right of the public and press to attend criminal trials implicit in the guarantees of the First Amendment. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980).

This section, if properly applied in the context of a pretrial suppression hearing, is constitutional. *Richmond Newspapers, Inc. v. Commonwealth*, 222 Va. 574, 281 S.E.2d 915 (1981).

Neither this section nor Rule 1:14 violates the equal protection clause of the Constitution of the United States. *Diehl v. Commonwealth*, 9 Va. App. 191, 385 S.E.2d 228 (1989).

photography coverage in their respective courts. The following rules shall serve as guidelines, and a violation of these rules may be punishable as contempt:

Coverage Allowed.

1. The presiding judge shall at all times have authority to prohibit, interrupt or terminate electronic media and still photography coverage of public judicial proceedings. The presiding judge shall advise the parties of such coverage in advance of the proceedings and shall allow the parties to object thereto. For good cause shown, the presiding judge may prohibit coverage in any case and may restrict coverage as he deems appropriate to meet the ends of justice.
2. Coverage of the following types of judicial proceedings shall be prohibited: adoption proceedings, juvenile proceedings, child custody proceedings, divorce proceedings, temporary and permanent spousal support proceedings, proceedings concerning sexual offenses, proceedings for the hearing of motions to suppress evidence, proceedings involving trade secrets, and in camera proceedings.
3. Coverage of the following categories of witnesses shall be prohibited: police informants, minors, undercover agents and victims and families of victims of sexual offenses.
4. Coverage of jurors shall be prohibited expressly at any stage of a judicial proceeding, including that portion of a proceeding during which a jury is selected. The judge shall inform all potential jurors at the beginning of the jury selection process of this prohibition.
5. To protect the attorney-client privilege and the right to counsel, there shall be no recording or broadcast of sound from such 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 held at the bench or in chambers.

Location of Equipment and Personnel.

1. The location of recording and camera equipment shall be strictly regulated so as not to be intrusive.
2. Media personnel shall not enter or leave the courtroom once the proceedings are in session except during a court recess or adjournment.
3. Electronic media equipment and still photography equipment shall not be taken into the courtroom or removed from the designated media area except at the following times:
 - a. Prior to the convening of proceedings;
 - b. During any luncheon recess;
 - c. During any court recess with the permission of the trial judge; and

- d. After adjournment for the day of the proceedings.

Official Representatives of the Media.

The Virginia Association of Broadcasters and the Virginia Press Association may designate one person to represent the television media, one person to represent the radio broadcasters, and one person to represent still photographers in each jurisdiction in which electronic media and still photographic coverage is desired. The names of the persons so designated shall be forwarded to the chief judge of the court in the county or city in which coverage is desired so that arrangements can be made for the "pooling" of equipment and personnel. Such persons shall also be the only persons authorized to speak for the media to the presiding judge concerning the coverage of any judicial proceedings.

Equipment and Personnel.

1. No distracting lights or sounds shall be permitted.
2. Not more than two television cameras shall be permitted in any proceeding.
3. Not more than one still photographer, utilizing not more than two still cameras with not more than two lenses for each camera and related equipment for print purposes, shall be permitted in any proceeding.
4. Not more than one audio system for broadcast purposes shall be permitted in any proceeding.

Audio pickup for all media purposes shall be accomplished with existing audio systems present in the court facility. If no technically suitable audio system exists in the court facility, microphones and related wiring essential for media purposes may be installed and maintained at media expense. The microphones and wiring must be unobtrusive and shall be located in places designated in advance of any proceeding by the chief judge of the court in which coverage is desired.

5. Any "pooling" arrangements among the media required by these limitations on equipment and personnel shall be the sole responsibility of the media without calling upon the presiding judge to mediate any dispute as to the appropriate media representative or equipment authorized to cover a particular proceeding. In the absence of advance media agreement on disputed equipment or personnel issues, the presiding judge may exclude all contesting media personnel from a proceeding.
6. In no event shall the number of personnel in the designated area exceed the number necessary to operate the designated equipment.
7. Only television photographic and audio equipment which does not produce distracting sound or light shall be employed to cover judicial proceedings. No artificial lighting device of any kind shall be employed in connection with the television camera.

8. Only still camera equipment which does not produce distracting sound or light shall be employed to cover judicial proceedings. No artificial lighting device of any kind shall be employed in connection with a still camera.
9. With the concurrence of the chief judge of the court in which coverage is desired, modifications and additions may be made in light sources existing in the facility, provided such modifications or additions are installed and maintained without public expense.

Impermissible Use of Media Material.

None of the film, video tape, still photographs or audio reproductions developed during or by virtue of coverage of a judicial proceeding shall be admissible as evidence (i) in the proceeding out of which it arose, (ii) in any proceeding subsequent and collateral thereto, or (iii) upon any retrial or appeal of such proceedings.

All electronic media and still photography coverage of public judicial proceedings authorized by this section, with the exception of electronic or photographic means authorized for the perpetuation of the record or parts thereof shall be conducted at no cost to the Commonwealth.¹¹

¹¹ THIS SECTION MERELY RESTATES CERTAIN INHERENT POWERS OF A TRIAL COURT. A court must have the power and authority to remove persons from the courtroom who are causing a disturbance or are otherwise disrupting the orderly conduct of a trial, and a judge is vested with such discretion absent the provisions of this section. *Richmond Newspapers, Inc. v. Commonwealth*, 222 Va. 574, 281 S.E.2d 915 (1981).

SECTION APPLIES PRIMARILY TO SPECTATORS. --Although the word "persons" may include witnesses, the court has read this section to apply primarily to spectators. *Johnson v. Commonwealth*, 217 Va. 682, 232 S.E.2d 741 (1977), decided under this section and former § 8-211.1 before the enactment of Title 8.01. See § 8.01-375 and the note thereto.

A "PUBLIC TRIAL" is a trial which is not limited or restricted to any particular class of the community, but is open to the observation of all. *Cumbee v. Commonwealth*, 219 Va. 1132, 254 S.E.2d 112 (1979).

CLASSES OF EXCLUDABLE PERSONS NOT PARTICULARIZED. --The Supreme Court has not particularized those classes of persons who may properly be excluded without impairing the nature of a public trial either from a constitutional standpoint or under this section. *Cumbee v. Commonwealth*, 219 Va. 1132, 254 S.E.2d 112 (1979).

MUCH MUST BE LEFT TO THE DISCRETION OF THE COURT IN EXCLUDING FROM THE COURTROOM EXTRANEOUS INFLUENCES on the trial of a criminal case. *Doyle v. Commonwealth*, 100 Va. 808, 40 S.E. 925 (1902).

LIMITS OF JUDGE'S DISCRETION. --In exercising his discretion under this section, the trial judge must not act arbitrarily nor violate or abridge guaranteed constitutional rights. *Richmond Newspapers, Inc. v. Commonwealth*, 222 Va. 574, 281 S.E.2d 915 (1981).

THE SEPARATION OF WITNESSES IN THE TRIAL OF A CASE IS NOT GRANTABLE AS A MATTER OF RIGHT. It is a matter which lies within the sound discretion of the court, subject to review and reversal upon a showing of abuse of discretion or prejudice resulting therefrom. The particular facts in each case must be considered in determining whether the court abused its authority in that case. *Huffman v. Commonwealth*, 185 Va. 524, 39 S.E.2d 291 (1946); *Near v. Commonwealth*, 202 Va. 20, 116 S.E.2d 85 (1960), cert. denied, 365 U.S. 873, 81 S. Ct. 907, 5 L. Ed. 2d 862 (1961), 369 U.S. 862, 82 S. Ct. 951, 8 L. Ed. 2d 19 (1962).

Neither the accused nor the Commonwealth, as a matter of right, is entitled to have the witnesses separated, as this is a matter within the sound discretion of the court, subject to review and reversal upon a showing of abuse of discretion or prejudice resulting therefrom. *Yorke v. Commonwealth*, 212 Va. 776, 188 S.E.2d 77 (1972).

THE BETTER PRACTICE IS TO GRANT A MOTION FOR EXCLUSION WHEN IT IS SEASONABLY MADE IN GOOD FAITH in the absence of some showing of a good reason for its denial. *Yorke v. Commonwealth*, 212 Va. 776, 188 S.E.2d 77 (1972).

NO REVERSAL UNLESS RECORD DISCLOSES ABUSE OF DISCRETION. --As both the common law and this section give the trial court discretion in the matter, the Supreme Court will not reverse its ruling unless the record discloses an abuse of that discretion. *Burford v. Commonwealth*, 179 Va. 752, 20 S.E.2d 509 (1942); *Hampton v. Commonwealth*, 190 Va. 531, 58 S.E.2d 288, cert. denied, 339 U.S. 989, 70 S. Ct. 1013, 94 L. Ed. 1390 (1950), 340 U.S. 914, 71 S. Ct. 286, 95 L. Ed. 660 (1951); *Campbell v. Commonwealth*, 194 Va. 825, 75 S.E.2d 468 (1953).

FAILURE TO EXCLUDE CERTAIN WITNESSES HELD NOT ERROR. --Failure of the court upon motion by defendant to exclude the sheriff and one of his deputies as well as another witness was not error where the Commonwealth's case would have been complete even if the sheriff and deputy had not testified, and where the testimony of the other witness was harmless. *Near v. Commonwealth*, 202 Va. 20, 116 S.E.2d 85 (1960), cert. denied, 365 U.S. 873, 81 S. Ct. 907, 5 L. Ed. 2d 862 (1961), 369 U.S. 862, 82 S. Ct. 951, 8 L. Ed. 2d 19 (1962).

PRETRIAL SUPPRESSION HEARINGS SHOULD BE OPEN ABSENT OVERRIDING INTEREST. --Absent an overriding interest articulated in findings, pretrial suppression hearings should be open to the public. This holding is mandated by Va. Const., Art. I, § 12. *Richmond Newspapers, Inc. v. Commonwealth*, 222 Va. 574, 281 S.E.2d 915 (1981).

CLOSURE OF HEARING JUSTIFIED WHEN FAIR TRIAL JEOPARDIZED. --An "overriding interest" exists to justify closure of a pretrial suppression hearing when a fair trial for the defendant is likely to be jeopardized by an open pretrial hearing. *Richmond Newspapers, Inc. v. Commonwealth*, 222 Va. 574, 281 S.E.2d 915 (1981).

ALTERNATIVES MUST BE CONSIDERED BEFORE CLOSURE EMPLOYED. --Before closing a pretrial suppression hearing to the public, the trial court should consider whether there are alternatives available which would eliminate the likelihood of prejudice to the accused. While there are fewer alternatives available at pretrial than at trial, they should be explored before closure is employed. *Richmond Newspapers, Inc. v. Commonwealth*, 222 Va. 574, 281 S.E.2d 915 (1981).

ONLY PART OF HEARING SHOULD BE CLOSED WHERE POSSIBLE. --When it is not possible to hold the entire pretrial suppression hearing in public, only that portion that would be prejudicial should be closed. *Richmond Newspapers, Inc. v. Commonwealth*, 222 Va. 574, 281 S.E.2d 915 (1981).

RIGHT OF PUBLIC TO BE HEARD ON CLOSURE ISSUE. --Before a pretrial suppression hearing is closed, interested members of the public should have the right to be heard, with the assistance of counsel if desired. *Richmond Newspapers, Inc. v. Commonwealth*, 222 Va. 574, 281 S.E.2d 915 (1981).

NOTICE TO PUBLIC OF CLOSURE MOTION. --For intervention to take place, the public must have notice of the closure motion. For this reason, motions to close a pretrial suppression hearing should be made in writing and filed with the court before the day of the hearing involved, and the public must be given reasonable notice that a closure hearing will be conducted. *Richmond Newspapers, Inc. v. Commonwealth*, 222 Va. 574, 281 S.E.2d 915 (1981).

RECEIPT OF INFORMATION IN CAMERA AT CLOSURE HEARING. --There is the danger that the information sought to be kept from the public will be disclosed in the hearing on closure, thereby negating the purpose of closure. To protect against this, the trial court may hear or observe this information in camera in order to establish to what extent its release would be prejudicial to the defendant. *Richmond Newspapers, Inc. v. Commonwealth*, 222 Va. 574, 281 S.E.2d 915 (1981).

In Stewart v. Commonwealth, 245 Va. 222; 427 S.E.2d 394 (1993) (cameras allowed in courtroom absent showing of prejudice), Defendant was tried for the murder of his wife and the capital murder of his son in Bedford County. Bedford County had previously been designated as an experimental court for the use of “electronic media” under the provisions of Code §19.2-266. Prior to trial, Defendant objected to electronic coverage of his trial on grounds that it was inherently prejudicial and would violate his right to due process. The court held that absent a “showing that a criminal trial is ‘compromised by television coverage,’ its use is not unconstitutional.” Id. at 233 (citing Chandler v. Florida, 449 U.S. 560, 581-82). Because Defendant failed to show that the use of television cameras influenced the outcome of his trial, the trial court did not abuse its discretion in allowing video cameras to be used at trial.

CHANGE OF VENUE

What can you do when you believe that the jury pool has been tainted by pre-trial publicity? The Virginia Code and cases provide an opportunity to change venue to a locale that may not have heard or seen the media coverage of the case.

Virginia Code § 19.2-251 (2000)¹²

§ 19.2-251. When and how venue may be changed

BURDEN AT CLOSURE HEARING. --At the hearing on closure of a pretrial suppression hearing, the burden will be on the moving party to show that an open hearing would jeopardize the defendant's right to a fair trial. The intervenors, however, shall have the burden of showing that reasonable alternatives to closure are available. *Richmond Newspapers, Inc. v. Commonwealth*, 222 Va. 574, 281 S.E.2d 915 (1981).

Cameras were allowed in the courtroom since the record failed to demonstrate good cause; the only evidence presented by defendant was the testimony of one experienced trial attorney who opined that permitting cameras in court to document the proceedings may have an adverse effect upon the interest of a defendant, and he offered no proof to support his opinion. *Diehl v. Commonwealth*, 9 Va. App. 191, 385 S.E.2d 228 (1989).

DEFENDANT'S CONSTITUTIONAL RIGHT TO A PUBLIC TRIAL WAS ABRIDGED where at the beginning of his incest case and before the first witness, the prosecutor moved to remove spectators at least while the victim was testifying, and in granting the motion, the trial court stated that the courtroom was to be cleared in view of the type of case, and thereafter and for the remainder of the trial, all persons except the actual participants in the proceedings were barred from the courtroom. *Cumbee v. Commonwealth*, 219 Va. 1132, 254 S.E.2d 112 (1979).

FOR A CASE INVOLVING FORMER D.R. 7-107, TRIAL PUBLICITY (SEE NOW RULE 3.6 OF THE RULES OF PROFESSIONAL CONDUCT), see *Hirschkop v. Virginia State Bar*, 421 F. Supp. 1137 (E.D. Va. 1976), aff'd in part and rev'd in part, 594 F.2d 356 (4th Cir. 1979).

¹² HISTORY: Code 1950, § 19.1-224; 1960, c. 366; 1975, c. 495.

NOTES:

CROSS REFERENCES. --As to constitutional provision prohibiting local, special or private laws for change of venue in civil and criminal cases, see Va. Const., Art. IV, § 14 (2). As to custody of defendant when venue changed, see § 19.2-252. As to procedure upon and after change of venue, see § 19.2-253.

LAW REVIEW. --For comment on change of venue in criminal cases, see 26 *Wash. & Lee L. Rev.* 89 (1969).

A circuit court may, on motion of the accused or of the Commonwealth, for good cause, order the venue for the trial of a criminal case in such court to be changed to some other circuit court. Such motion when made by the accused may be made in his absence upon a petition signed and sworn to by him.

Whenever the mayor of any city, or the sheriff of any county, shall call on the Governor for military force to protect the accused from violence, the judge of the circuit court of the city or county having jurisdiction of the offense shall, upon a petition signed and sworn to by the accused, whether he be present or not, at once order the venue to be changed to the circuit court of a city or county sufficiently remote from the place where the offense was committed to insure the safe and impartial trial of the accused.¹³

¹³ **I. RIGHT AND POWER TO CHANGE.**

THIS SECTION IS NOT IN CONFLICT WITH VA. CONST., ART. I, § 8. *Newberry v. Commonwealth*, 192 Va. 819, 66 S.E.2d 841 (1951).

THE PURPOSE OF A CHANGE OF VENUE is to accord litigants, both the Commonwealth and the defendant, a fair and impartial trial. *Newcomer v. Commonwealth*, 220 Va. 64, 255 S.E.2d 485 (1979).

UNDER THIS SECTION, THE COURTS HAVE POWER WHENEVER NECESSARY TO ALLOW A CHANGE OF VENUE. *Wormeley v. Commonwealth*, 51 Va. (10 Gratt.) 658 (1853); *Muscoe v. Commonwealth*, 87 Va. 460, 12 S.E. 790 (1891); *Bowles v. Commonwealth*, 103 Va. 816, 48 S.E. 527 (1904), overruled on other grounds, *Graham v. Commonwealth*, 127 Va. 808, 103 S.E. 565 (1920).

QUESTION OF CHANGE OF VENUE IS WITHIN SOUND JUDICIAL DISCRETION of the trial judge. *Evans v. Commonwealth*, 161 Va. 992, 170 S.E. 756 (1933); *Poindexter v. Commonwealth*, 218 Va. 314, 237 S.E.2d 139 (1977); *Newcomer v. Commonwealth*, 220 Va. 64, 255 S.E.2d 485 (1979); *Watkins v. Commonwealth*, 229 Va. 469, 331 S.E.2d 422 (1985), cert. denied, 475 U.S. 1099, 106 S. Ct. 1503, 89 L. Ed. 2d 903 (1986).

It is only where the record affirmatively shows an abuse of discretion that the trial court's ruling on a motion for a change of venue will be reversed. *Poindexter v. Commonwealth*, 218 Va. 314, 237 S.E.2d 139 (1977); *Newcomer v. Commonwealth*, 220 Va. 64, 255 S.E.2d 485 (1979); *Watkins v. Commonwealth*, 229 Va. 469, 331 S.E.2d 422 (1985), cert. denied, 475 U.S. 1099, 106 S. Ct. 1503, 89 L. Ed. 2d 903 (1986).

An application for a change of venue in a criminal case on the ground of local prejudice rendering impossible an impartial trial is a matter addressed to the sound discretion of the trial court and its ruling on this question will not be reversed on appeal unless the record clearly shows abuse of that discretion. *Farrow v. Commonwealth*, 197 Va. 353, 89 S.E.2d 312 (1955).

Change of venue is within the sound discretion of the trial court, and refusal to grant it will not constitute reversible error unless the record affirmatively shows an abuse of discretion. *Stockton v. Commonwealth*, 227 Va. 124, 314 S.E.2d 371, cert. denied, 469 U.S. 873, 105 S. Ct. 229, 83 L. Ed. 2d 158 (1984).

THE TRIAL COURT MUST BE ALLOWED A WIDE DISCRETION IN DECIDING MOTIONS FOR CHANGE OF VENUE. *Looney v. Commonwealth*, 115 Va. 921, 78 S.E. 625 (1913); *Taylor v. Commonwealth*, 122 Va. 886, 94 S.E. 795 (1918); *Thompson v. Commonwealth*, 131 Va. 847, 109 S.E. 447 (1921). See *Wormeley v. Commonwealth*, 51 Va. (10 Gratt.) 658 (1953); *Poindexter v. Commonwealth*, 218 Va. 314, 237 S.E.2d 139 (1977); *Newcomer v. Commonwealth*, 220 Va. 64, 255 S.E.2d 485 (1979).

LIBERAL CONSTRUCTION. --Statutes conferring the right to a change of venue are enacted with the view of according litigants a fair and impartial trial, and being in furtherance of justice should be liberally construed so as not to defeat the right. *Ramsay v. Harrison*, 119 Va. 682, 89 S.E. 977 (1916).

QUESTIONS OF VENUE NOT RAISED AT THE TRIAL STAGE ARE WAIVED. *Loomis v. Peyton*, 323 F. Supp. 246 (W.D. Va. 1971).

THERE IS A PRESUMPTION THAT A DEFENDANT CAN RECEIVE A FAIR TRIAL from the citizens of the county or city in which the offense occurred. To overcome this presumption, the accused has the burden of clearly showing that there is such a widespread feeling of prejudice on the part of the citizenry as will be reasonably certain to prevent a fair and impartial trial. *Stockton v. Commonwealth*, 227 Va. 124, 314 S.E.2d 371, cert. denied, 469 U.S. 873, 105 S. Ct. 229, 83 L. Ed. 2d 158 (1984).

TRIAL COURT'S DISCRETION IN RULING UPON A MOTION FOR CHANGE OF VENUE WILL NOT BE DISTURBED in the absence of a clear showing of abuse. *LeVasseur v. Commonwealth*, 225 Va. 564, 304 S.E.2d 644 (1983), cert. denied, 464 U.S. 1063, 104 S. Ct. 744, 79 L. Ed. 2d 202 (1984).

II. GROUNDS FOR CHANGE.

GROUND MUST EXIST AT TIME OF TRIAL. --Conditions which obtain when the trial was had and not those which existed at the time of the homicide are looked to under this section. *Thompson v. Commonwealth*, 131 Va. 847, 109 S.E. 447 (1921); *Evans v. Commonwealth*, 161 Va. 992, 170 S.E. 756 (1933).

On a change of venue motion courts must look to the conditions at the time of the trial, not to the conditions at the time of the crime. *Newcomer v. Commonwealth*, 220 Va. 64, 255 S.E.2d 485 (1979).

MERE BELIEF OR FEARS OF DEFENDANT NOT SUFFICIENT. --The venue will not be changed for the mere belief of the party or his witnesses that he cannot have a fair trial in the county. Facts and circumstances must appear satisfying to the court. *Wormeley v. Commonwealth*, 51 Va. (10 Gratt.) 658 (1853); *Muscoe v. Commonwealth*, 87 Va. 460, 12 S.E. 790 (1891); *Bowles v. Commonwealth*, 103 Va. 816, 48 S.E. 527 (1904); *Wright v. Commonwealth*, 114 Va. 872, 77 S.E. 503 (1913).

SHEER VOLUME OF PUBLICITY IS NOT ALONE SUFFICIENT TO JUSTIFY A CHANGE OF VENUE. *LeVasseur v. Commonwealth*, 225 Va. 564, 304 S.E.2d 644 (1983), cert. denied, 464 U.S. 1063, 104 S. Ct. 744, 79 L. Ed. 2d 202 (1984).

SHOWING OF EITHER EXTENSIVE PUBLICITY OR WIDESPREAD KNOWLEDGE of the crime or the accused is insufficient by itself to justify a change of venue. *Stockton v. Commonwealth*, 227 Va. 124, 314 S.E.2d 371, cert. denied, 469 U.S. 873, 105 S. Ct. 229, 83 L. Ed. 2d 158 (1984).

FAIR TRIAL. --Under this section a change of venue should be ordered when necessary to secure a fair trial. *Evans v. Commonwealth*, 161 Va. 992, 170 S.E. 756 (1933).

MISCARRIAGE OF JUSTICE. --A criminal case ought not to be sent elsewhere for trial, unless it is made to appear to the court in which the case is pending that a trial in the vicinage is likely to result in a miscarriage of justice. *Muscoe v. Commonwealth*, 87 Va. 460, 12 S.E. 790 (1891).

LOCAL PREJUDICE of such a character as to prevent a fair and impartial trial in the county or district where the action is brought is a well recognized ground for a change of venue. *Uzzle v. Commonwealth*, 107 Va. 919, 60 S.E. 52 (1908); *Burton v. Commonwealth*, 107 Va. 931, 60 S.E. 55 (1908); *Jones v. Commonwealth*, 111 Va. 862, 69 S.E. 953 (1911); *Ramsay v. Harrison*, 119 Va. 682, 89 S.E. 977 (1916).

RACE PREJUDICE. --It was good cause for change of venue under this section that it appeared that the white people of the county were so greatly aroused against the accused, who was a black man, that it was probable that he might not obtain a fair trial. *Uzzle v. Commonwealth*, 107 Va. 919, 60 S.E. 52 (1908); *Burton v. Commonwealth*, 107 Va. 931, 60 S.E. 55 (1908).

PREJUDICE NOT SHOWN BY BREVITY OF JURY'S DELIBERATIONS. --Defendant's contention that prejudice on the part of the jury was proved by the fact they deliberated only a relatively short time was without merit. *Rees v. Commonwealth*, 203 Va. 850, 127 S.E.2d 406 (1962), cert. denied, 372 U.S. 964, 83 S. Ct. 1088, 10 L. Ed. 2d 128, rehearing denied, 373 U.S. 947, 83 S. Ct. 1533, 10 L. Ed. 2d 702 (1963).

RAISING OF FUND TO PROSECUTE PRISONER is not ground for a change of venue. *Wormeley v. Commonwealth*, 51 Va. (10 Gratt.) 658 (1853).

III. PROCEEDINGS.

WHEN MOTION FOR JURY FROM ANOTHER COUNTY SHOULD PRECEDE. --Where an application for a change of venue is based simply on the ground of difficulty in obtaining jurors in the county free from exceptions, it must be preceded by an application to summon jurors from beyond such county. But this rule has no application where the motion for a change of venue is based upon the ground that there exists such prejudice and excitement against the accused as to endanger the fairness and impartiality of a trial conducted in the county. *Wright v. Commonwealth*, 74 Va. (33 Gratt.) 880 (1880); *Joyce v. Commonwealth*, 78 Va. 287 (1884); *Waller v. Commonwealth*, 84 Va. 492, 5 S.E. 364 (1888); *Uzzle v. Commonwealth*, 107 Va. 919, 60 S.E. 52 (1908); *Burton v. Commonwealth*, 107 Va. 931, 60 S.E. 55 (1908); *Jones v. Commonwealth*, 111 Va. 862, 69 S.E. 953 (1911); *Looney v. Commonwealth*, 115 Va. 921, 78 S.E. 625 (1913).

RENEWAL OF MOTION FOR CHANGE. --Although a motion for a change of venue may have been properly overruled at one term of the court, it is renewable at a subsequent time whenever the exigencies of the situation may call it into requisition. *Looney v. Commonwealth*, 115 Va. 921, 78 S.E. 625 (1913).

THE BURDEN OF PROOF IS ON THE PRISONER to show to the satisfaction of the trial court good cause to have the trial of the case removed to a county other than that in which the crime is committed. *Slayton v. Commonwealth*, 185 Va. 371, 38 S.E.2d 485 (1946); *Rees v. Commonwealth*, 203 Va. 850, 127 S.E.2d 406 (1962), cert. denied, 372 U.S. 964, 83 S. Ct. 1088, 10 L. Ed. 2d 128, rehearing denied, 373 U.S. 947, 83 S. Ct. 1533, 10 L. Ed. 2d 702 (1963).

The burden is upon the one requesting a change of venue to show clearly that there is such a widespread feeling of prejudice on the part of the citizens of the county as will be reasonably certain to prevent a fair and impartial trial. *Farrow v. Commonwealth*, 197 Va. 353, 89 S.E.2d 312 (1955).

AFFIDAVITS AS TO PREJUDICE BY DISINTERESTED PERSONS REQUIRED. --An application by defendant for a change of venue, on the ground of general prejudice existing against him in the town or county where the cause is to be tried, should be supported by the affidavits of disinterested individuals. *Boswell v. Flockheart*, 35 Va. (8 Leigh) 364 (1837); *Wormeley v. Commonwealth*, 51 Va. (10 Gratt.) 658 (1853); *Muscoe v. Commonwealth*, 87 Va. 460, 12 S.E. 790 (1891).

STATEMENTS OF FACTS AND CIRCUMSTANCES IN AFFIDAVITS. --The affidavits in support of the motion for a change of venue, especially where opposed by counter affidavits of disinterested persons, should state the facts and circumstances tending to show that a fair and impartial trial cannot be had where the case is pending. *King v. Commonwealth*, 4 Va. (2 Va. Cas.) 78 (1817); *Ramsay v. Harrison*, 119 Va. 682, 89 S.E. 977 (1916).

WHERE THE AFFIDAVITS INTRODUCED BY THE COMMONWEALTH STAND UNCHALLENGED by counter affidavits or other evidence, the affidavits should be taken to prove what is within them. *Poindexter v. Commonwealth*, 218 Va. 314, 237 S.E.2d 139 (1977).

EFFECT OF EVIDENCE OPPOSING CHANGE. --A prisoner was indicted for murder. Several witnesses testified that not greater than the usual prejudice existed, and in their opinion a fair trial could be had. It was held, that a change of venue was properly denied. *Muscoe v. Commonwealth*, 87 Va. 460, 12 S.E. 790 (1891).

FACTS CONSIDERED AS ESTABLISHED. --Upon an application for a change of venue in a criminal case, facts stated in the petition for removal which the Commonwealth does not attempt to controvert and which the accused is not permitted to sustain by proof, must be considered as established. *Uzzle v. Commonwealth*, 107 Va. 919, 60 S.E. 52 (1908); *Burton v. Commonwealth*, 107 Va. 931, 60 S.E. 55 (1908).

EVIDENCE INSUFFICIENT. --Defendant was not entitled to a change of venue of venire where there was no evidence of inflammatory newspaper or radio coverage of the case, no evidence of mass prejudice, hostility or threat of mob action, either before the jury was sworn or during the course of the trial, nor unusual difficulty in securing an

In Newberry v. Commonwealth, 192 Va. 819, 66 S.E.2d 841 (1951) (Change of venire), Newberry was arrested for murdering his sister-in-law in Bland County. After the court was unable to seat a qualified jury from Bland County, the judge summoned fifty jurors from nearby Washington County from which a qualified panel of jurors was selected. The change of venire was made pursuant to Code § 19-187, which authorized a court in a criminal case, without consent of the accused, to summon a jury or jurors from a county or corporation other than that in which the crime is alleged to have been committed. Newberry appealed on grounds that § 19-187 violates the Virginia Constitution, section 8, which provides an accused with “a speedy trial by an impartial jury *of his vicinage*, without whose unanimous consent he cannot be found guilty.” (emphasis added). Vicinage is defined as the territorial jurisdiction of the court in which the venue of the crime is laid.) The court ruled that an accused has “the right to an impartial jury in the vicinage or jurisdiction in which the crime is alleged to have been committed, subject to the right of the court to draw a jury from, or to change the place of trial to, another jurisdiction whenever it reasonably appears that an impartial jury cannot be had in the jurisdiction in which the venue is laid.” Id. at 825.

TRIAL PUBLICITY/STATEMENTS TO MEDIA

The following is background information to help you determine what you can and should do what your trial becomes public through the media and the jury may be prejudiced.

§ 196. Generally¹⁴

Any criminal case that generates a great deal of publicity presents some risks that the publicity may compromise the right of the defendant to a fair trial. Trial courts must be especially vigilant to guard against any impairment of the defendant's right to a verdict based solely upon the evidence and the relevant law.¹⁵ Although a fair trial is not interfered with by a newspaper account which does not prejudice either party, no trial should be influenced by newspaper dictation or popular clamor.

Jury impartiality does not compel complete juror ignorance of issues and events. A juror need only be able to put aside impressions gained from publicity and decide the case on the

impartial jury. *Rees v. Commonwealth*, 203 Va. 850, 127 S.E.2d 406 (1962), cert. denied, 372 U.S. 964, 83 S. Ct. 1088, 10 L. Ed. 2d 128, rehearing denied, 373 U.S. 947, 83 S. Ct. 1533, 10 L. Ed. 2d 702 (1963).

WHEN JURY SUBSEQUENTLY SECURED AFTER REFUSAL OF MOTION THERE IS A PRESUMPTION THAT MOTION UNFOUNDED. -- *Wright v. Commonwealth*, 74 Va. (33 Gratt.) 880 (1880); *Looney v. Commonwealth*, 115 Va. 921, 78 S.E. 625 (1913); *Taylor v. Commonwealth*, 122 Va. 886, 94 S.E. 795 (1918). See also *Joyce v. Commonwealth*, 78 Va. 287 (1884); *Waller v. Commonwealth*, 84 Va. 492, 5 S.E. 364 (1888); *Bowles v. Commonwealth*, 103 Va. 816, 48 S.E. 527 (1904), overruled on another point, *Graham v. Commonwealth*, 127 Va. 808, 103 S.E. 565 (1920).

¹⁴ 75 Am Jur 2d TRIAL § 196

¹⁵ *Chandler v Florida*, 449 US 560, 66 L Ed 2d 740, 101 S Ct 802, 7 Media L R 1041.

evidence presented. Pretrial publicity may, however, be so prejudicial as to require that a conviction be set aside.

The usual remedy for adverse pretrial publicity is a change of venue, and this should be so whether the adverse publicity is in the form of a printed newspaper or television exposure.¹⁶

§ 200. Generally¹⁷

A court has the power to control the publicity about a trial. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, trial courts must take strong measures to insure that the balance is never weighed against the accused.¹⁸ Indeed, courts may take appropriate action where newspaper and other publications are calculated or intended to cause substantial prejudice to litigants. Thus, in a criminal case, the court should make an effort to control the release of leads, information, and gossip to the press by such persons as police officers, the coroner, witnesses, and the counsel for both sides, and can warn reporters who write or broadcast prejudicial stories as to the impropriety of publishing material not introduced in the proceedings.

An absolute constitutional ban on broadcast coverage of trials cannot be justified simply because there is a danger that, in some cases, prejudicial broadcast accounts of pretrial and trial events may impair the ability of jurors to decide the issue of guilt or innocence uninfluenced by extraneous matter. The risk of juror prejudice in some cases does not justify an absolute ban on news coverage of trials by the printed media; so also the risk of such prejudice does not warrant an absolute constitutional ban on all broadcast coverage. A case attracts a high level of public attention because of its intrinsic interest to the public and the manner of reporting the event. The risk of juror prejudice is present in any publication of a trial, but the appropriate safeguard against such prejudice is the defendant's right to demonstrate that the media's coverage of his case, be it printed or broadcast, compromised the ability of the particular jury that heard the case to adjudicate fairly.

§ 201. Gag orders¹⁹

¹⁶ In the face of intense public interest, a client's right to a fair trial must be protected. To accomplish this, counsel must know how to keep the press from hurting him. Counsel's job is threefold: First, upon entering as counsel, the client must be told what to expect in terms of publicity. Second, counsel must stress that the responsibility for dealing with the press now rests with counsel. Not only can publicity surrounding a case influence the trial of the client, but it can affect his post-trial life as well. Counsel must make it clear that he will not be able to adequately protect the client's right to an impartial trial unless the client leaves public and press relations totally in counsel's hands. The third prong of counsel's role with the press is learning to deal with the media in a straightforward and confident manner.

¹⁷ 75 Am Jur 2d TRIAL § 200

¹⁸ Sheppard v Maxwell, 384 US 333 (1966).

¹⁹ 75 Am Jur 2d TRIAL § 201

A pretrial order forbidding public comment about a pending criminal case by the attorneys, defendants, and witnesses has been held valid under the First, Fifth, and Sixth Amendments to the United States Constitution.²⁰

Similarly, in civil cases, a restraining order has been upheld on the rationale that public comment by counsel could have had a detrimental impact on the integrity of the trial, although preservation of the trial's integrity has also provided a rationale for courts to quash orders imposing prior restraints on parties or their counsel, finding no justification for such orders unless the party seeking restraint was able to demonstrate that publicity would influence the jury or otherwise adversely impact on the proceedings. At least one court has used the rationale that extrajudicial communications about the proceedings interfered with contractual relationships to uphold an order restraining such communications.

Limitations placed upon lawyers, litigants, and officials directly affected by court proceedings may be made at the court's discretion for good cause to assure fair trials. Muzzling lawyers who may wish to make public statements to gain public sentiment for their clients has long been recognized as within the court's inherent power to control professional conduct. A constant spotlight of public attention focused on public officials during litigation makes it imperative that they be more subject to judicial restrictions against inflammatory and prejudicial statements than other persons. It is in no way objectionable for a trial court to issue an order governing matters such as extrajudicial statements by parties or witnesses which would seem likely to interfere with the rights of the accused to a fair trial by an impartial jury.

In a state murder case tried before a jury, the trial judge may proscribe extrajudicial statements by any lawyer, party, witness, or court official which divulge prejudicial matters, such as the refusal of the defendant to submit to interrogation or take lie detector tests, any statement made by the defendant to officials, the identity of prospective witnesses or their probable testimony, any belief in guilt or innocence, or like statements concerning the merits of the case. However, the reviewing court vacated the order of the District Court barring counsel in a criminal prosecution from speaking to members of the press between the time jury selection began and the time the jury returned its verdict, where there was no showing that prejudice could result from the statements made to the press by counsel, and where there had been no showing that statements were likely to be made at all.

²⁰ *Levine v United States Dist. Court for Cent. Dist. (CA9)* 764 F2d 590, 11 Media L R 2289, reh den, en banc (CA9) 775 F2d 1054, 12 Media L R 1458, cert den 476 US 1158, 90 L Ed 2d 719, 106 S Ct 2276 and later proceeding (CA9 Cal) 781 F2d 1443, 12 Media L R 1739; *Re Russell (CA4)* 726 F2d 1007, 10 Media L R 1359, cert den 469 US 837, 83 L Ed 2d 74, 105 S Ct 134; *Chase v Robson (CA7 Ill)* 435 F2d 1059; *United States v Tijerina (CA10 NM)* 412 F2d 661, 5 ALR Fed 935, cert den 396 US 990, 24 L Ed 2d 452, 90 S Ct 478; *Hamilton v Municipal Court for Berkeley-Albany Judicial Dist. (1st Dist)* 270 Cal App 2d 797, 76 Cal Rptr 168, 33 ALR3d 1029, cert den 396 US 985, 24 L Ed 2d 449, 90 S Ct 479. For a summary of the efforts of the organized bench and bar, as well as certain government agencies, to formulate effective rules and policies in this area, see 5 ALR Fed 948 § 2 [a]. For recommendations relating to conduct of attorneys in criminal cases, with respect to public discussion of pending or imminent criminal litigation, see ABA Standards, Fair Trial and Free Press § § 1.1-1.3; for recommendations relating to the conduct of law enforcement officers, judges, and judicial employees in criminal cases, see ABA Standards, Fair Trial and Free Press § § 2.1-2.4. As to pretrial publicity in criminal cases, generally, see 21 Am Jur 2d, Criminal Law § 236.

§ 202. CHECKLIST: REMEDIES OF ACCUSED TO CONTROL PUBLICITY²¹

There are several measures which the accused may take, with the concurrence of the court, to control publicity, and if the accused fails to take such remedies, there is no reason not to affirm his conviction even though tainted by pretrial publicity.

Among the remedies which the accused may take are a motion for--

- ?? a change of venue;
- ?? continuance until the prejudice from publicity has abated;
- ?? disqualification for cause of jurors prejudiced by pretrial publicity;
- ?? the selection of a panel of jurors from a division of the district other than the division in which the prosecution is pending;
- ?? closure of a pretrial suppression hearing, or even of the **trial** itself; or
- ?? sequestration of the jury, although separation of the jury is ordinarily held to be within the discretion of the court.^{22 23}

§ 203. CHECKLIST: TECHNIQUES FOR AVOIDING PUBLICITY²⁴

Litigation publicity seems to be inevitable. Any altercation involving a trial stimulates some publicity. Unless a trial has absolutely no public interest, it is highly improbable that all publicity can be avoided. There are, however, steps that can be taken to limit the amount of publicity that a case receives. The following steps involve techniques of stopping publicity at its various sources, that is, the parties and their attorneys, the court records, and the trial itself:

- ?? Make no statement to any media of communication (even if the client and counsel agree to say nothing to the press, this does not insure that the opposing party or his counsel will not reveal the facts of the case in an unfavorable light, although it is conceivable that in some cases both parties want no publicity, and an agreement could be reached between the parties and their counsel as to what news is to be given or withheld).
- ?? Determine whether access to public judicial records can be restricted (generally, the right to inspect public records has been so firmly established that attempted restrictions of the right are seldom successful) (the procedure for obtaining a court order restricting access to these records is to make a motion, filed with the pleadings, that the records be sealed; the motion is more likely to be granted if both parties join in it).

²¹ Irwin J. Schiffres, et al., TRIAL

²² 9 Federal Procedure, L. Ed., Criminal Procedure § 22:809.

²³ The trial court did not err in denying defendant's motion for a change of venue of his first-degree murder trial based on pretrial publicity where (1) newspaper articles and a videotape of news coverage submitted by defendant in support of his motion were primarily factual accounts of the murder, the arrest of defendant, and a two-day search in a national forest for the codefendant, and (2) although a number of prospective jurors indicated that they had read or heard of the crime, each juror who actually served on the jury stated unequivocally that he or she had formed no opinion about the case, could be fair and impartial, and would decide the issues based solely upon the evidence presented at trial. State v. Bel (1994) 338 NC 363, 450 S.E.2d 710.

²⁴ Irwin J. Schiffres, et al., TRIAL

- ?? The trial lawyer should make it abundantly clear that he has no quarrel with the district attorney per se; he is concerned only with the facts, the evidence, the judge, and the jurors. The attorney should never belittle a policeman unless he is positive that the policeman is wrong.
- ?? Publicity deriving from the trial itself may also be restricted by a statute permitting in camera trials, or through a motion to exclude the public from the courtroom.²⁵
- ?? There are methods whereby the type of publication can be limited (these methods generally involve court orders restricting the extent of publication, or statutes specially limiting the publication of certain matters concerning a trial. The use of these methods is limited, due to their tendency to restrain freedom of speech).
- ?? Secure an agreement not only among the parties and their counsel, but also with mass publication media not to publicize certain aspects of the case, or to limit the amount or type of publicity that a case receives.²⁶

§ 198. PRESENCE OF CAMERAS IN COURTROOM²⁷

The presence of cameras in the courtroom is not inherently prejudicial.²⁸ The decision whether to allow cameras in the courtroom in a particular case is submitted to the sound discretion of the trial court.²⁹

Observation: Publicity in civil trials in federal court is largely regulated by local District Court rules. In accordance with recommendations of the Judicial Conference of the United States, many District Courts have promulgated rules which prohibit photography in, or television or radio broadcasting from, courtrooms or their environs during the progress of or in connection with judicial proceedings, regardless of whether the court is actually in session.³⁰

No doubt the very presence of a camera in the courtroom makes the jurors aware that the trial is thought to be of sufficient interest to the public to warrant coverage, but the defendant must show with specificity that the presence of cameras impairs the ability of the jurors to decide the case on only the evidence before them or that the trial has been effected adversely by the impact on the participants of the presence of cameras and the prospect of broadcast.³¹ The mere fact of a televised trial does not constitute evidence that the pre-trial publicity surrounding the

²⁵ As to closure of proceedings, generally, see § § 206 et seq.

²⁶ Controlling Trial Publicity, 1 Am. Jur. Trials 303 § 39.

²⁷ Irwin J. Schiffres, et al., TRIAL

²⁸ King v. State (Fla.) 390 So.2d 315; Diehl v. Commonwealth, 9 Va. App. 28, 384 S.E.2d 801; State v. Hanna (W.Va.) 378 S.E.2d 640, 17 Media L.R. 1411.

Platte, TV in the Courtrooms: Right of Access? 3 Com Law 11 (Winter, 1981).

State v. McNaught, 238 Kan. 567, 713 P.2d 457, 12 Media L.R. 1890.

²⁹ Diehl v. Commonwealth, 9 Va. App. 28, 384 S.E.2d 801.

³⁰ 33 Federal Procedure, L. Ed., **Trial** § 77:186.

³¹ People v. Spring (4th Dist.) 153 Cal. App. 3d 1199, 200 Cal. Rptr. 849; State v. Harries (Tenn.) 657 S.W.2d 414, habeas corpus proceeding (M.D. Tenn.) 589 F. Supp. 362, later op (M.D. Tenn.) 594 F. Supp. 949 later proceeding (M.D. Tenn.) 609 F. Supp. 1432, 85 A.L.R. Fed. 723, app dismd, remanded (CA6 Tenn.) 788 F.2d 356, later proceeding (CA6 Tenn.) 829 F.2d 581, post-conviction proceeding (Tenn Crim) 1990 Tenn Crim App LEXIS 606, reh den (Tenn Crim) 1990 Tenn Crim App LEXIS 730.

defendant's trial was joined by media theatrics sufficient to convert the totality of courtroom circumstances into a "circus" and thereby deprive the appellant of his right to courtroom calm.³²

The courts have cautioned that there may be circumstances under which broadcast or photographic coverage should be prohibited, particularly when it would have a substantial adverse effect on a trial participant. Whether broadcast or photographic coverage of court proceedings, particularly criminal trials, violates the constitutional rights of trial participants, particularly criminal defendants, depends upon the circumstances under which such coverage takes place. Suggested relevant circumstances are the location of the broadcasters' photographic equipment in the courtroom; the degree of distraction or disruption, if any, caused by the presence; and the effect of the presence and use of such equipment on the defendant's ability to present his case.³³

Practice guide : The problem of media audio and television coverage of a preliminary hearing, as distinguished from a trial proceeding, is somewhat different, because a preliminary hearing is a pretrial proceeding for the determination of probable cause, and trial jurors are not present so as to be personally affected by the media coverage of the preliminary hearing. It is well recognized, however, that adverse publicity at a preliminary hearing may endanger the ability of a defendant to receive a fair trial in situations where prospective trial jurors read or hear the adverse publicity and are affected in their judgment should they later sit as jurors.^{34 35}

§ 197. DEMONSTRATION OR PRESUMPTION OF PREJUDICE³⁶

Where juror exposure to pretrial publicity can be shown, the defendant must also demonstrate that actual prejudice resulted,³⁷ although prejudice is presumed when the record demonstrates

³² Brooks v. State, 244 Ga. 574, 261 S.E.2d 379, vacated, in part on other grounds 446 U.S. 961. 64 L. Ed. 2d 821, 100 S.Ct. 2937.

³³ State v. McNaught, 238 Kan. 567, 713 P.2d 457, 12 Media L.R. 1890.

³⁴ State v. McNaught, 238 Kan. 567, 713 P.2d 457, 12 Media L.R. 1890.

³⁵ Allowing public access to videotape of state governor's deposition used in criminal trial did not violate rule banning cameras in federal courtroom; videotape was more akin to judicial record than taking of photographs in open court, and videotape was different from standard deposition only in its form. U.S. v. Berger, 9990 F. Supp. 1054 (C.D. Ill. 1998)..

Although the trial court erred in applying the rules regarding electronic media coverage of defendant's trial by failing to inform the jury that coverage of jurors is expressly prohibited at any stage of a judicial proceeding, by failing to ensure that electronic equipment was completely obscured from view in the courtroom, and by permitting a microphone to be placed at the bench to allow electronic media coverage of bench conferences, such error was not prejudicial to defendant where defendant made no specific allegations that media coverage impaired the jury's ability to decide the case on the evidence or had an adverse impact on trial participants sufficient to constitute a denial of due process. State v. Hudson (1992) 331 N.C. 122, 415 S.E.2d 732..

³⁶ Irwin J. Schiffres, et al., TRIAL, AMJUR 2D.

³⁷ United States v. Reynolds (CA7 Ill.) 821 F.2d 42, later proceeding (ND Ill) 1988 US Dist LEXIS 2640, post-conviction proceeding (ND Ill) 1990 US Dist LEXIS 7560.

In the prosecution of defendant, the leader of a "family," for murder, publicity from an alleged robbery of gun shop during the trial by a group of defendant's followers to obtain guns to rescue him by taking the judge and prosecutor

that the community where the trial was held was saturated with prejudicial and inflammatory media publicity about the crime. Under such circumstances, it is not necessary to demonstrate actual bias. The presumed prejudice principle is rarely applicable, however, and is reserved for an extreme situation.³⁸

To demonstrate prejudice in a specific case a defendant must show something more than juror awareness that the trial is such as to attract the attention of broadcasters.³⁹

Observation: The jury selection system is without the capacity to determine whether the influences of substantial pre-trial publicity may be extinguished from a given juror's mind. Elementary principles of group psychology, as well as empirical findings, make clear that, where questions are put to the panel as a whole, the average potential juror will be extremely reluctant to disclose his biases. He knows that he is supposed to be fair and impartial. Knowing that, and being subject to the peer pressure of the courtroom setting, not to mention the intimidating nature of the whole experience to the first time juror, he will be unlikely to admit that he cannot give the accused a fair hearing, even though he suspects that to be the fact. For these and other reasons, voir dire, even when most skillfully performed, is often ineffective to discover the extent to which a juror's vote may be affected by what he has heard about a case.^{40 41}

hostage, did not deny defendant a fair trial and due process of law, where it was clear from the trial court's interrogation of the jurors following the incident that some of them had very slight knowledge of the news media stories about the gun shop robbery and such slight knowledge had no effect whatsoever on their ability to sit in judgment fairly and impartially, where the trial judge excused one juror due to the facts that she had read the news article in violation of the court order and that she was in a very emotional state resulting from a killing in her apartment house, and where defendant's lawyer appeared to be satisfied with the interrogation of the jurors conducted by the court. *People v. Manson* (2nd Dist) 71 Cal. App. 3d 1, 139 Cal. Rptr. 275, cert den 435 U.S. 953, 55 L. Ed. 2d 803, 98 S.Ct. 1582.

³⁸ *Harris v. Pullley* (CA9 Cal.) 885 F.2d 1354 cert den (US) 107 L. Ed. 2d 848, 110 S.Ct. 854 later proceeding (CA 9) 901 F.2d 724 motion to vacate den (US) 108 L. Ed. 2d 781, 110 S.Ct. 1799 habeas corpus proceeding (CA9 Cal.) 913 F.2d 606 remanded (CA9) 91 CDOS 2231, 91 Daily Journal DAR 3441, reported at, amd (CA9) 91 Daily Journal DAR 3605.

Observation: One court has explained that many whose views may be substantially affected by pre-trial publicity may not know that they are incapable of sitting as fair and impartial jurors, and many who allow bias and prejudice to affect their relationships with an attitude toward their fellow man may believe quite sincerely that they are impartial and fair minded persons. Most of us, the court stated, do not include among those to whom justice is due every individual within the constitution. The court is not required to leave its common sense at home when approaching judicial resolution of such questions, and, the court continued, common sense informs the court that there may be cases where the likelihood of impaneling, in the county of a capital murder, a jury which is in fact fair and impartial is so doubtful that the prosecution should be saddled with a heavy burden of showing why venue should not be changed; in such cases doubt should be presumed, although rebuttably so. *Fisher v. State* (Miss) 481 So.2d 203.

³⁹ *Chandler v. Florida*, 449 U.S. 560, 66 L. Ed. 2d 740, 101 S.Ct. 802, 7 Media L.R. 1041; *People v. Spring* (4th Dist.) 153 Cal. App. 3d 1199, 200 Cal. Rptr. 849.

⁴⁰ *Fisher v. State* (Miss.) 481 So.2d 203.

⁴¹ Passage of 15 months, between presumptively prejudicial publication of newspaper article revealing that murder suspect had prior murder conviction, and trial, attenuated taint of pretrial publicity and supported trial court's denial of motion for change of venue. *Commonwealth v. Carter* (1994, Pa) 643 A.2d 61 digest op at (Pa) 17 PLW 155.

§ 204. CHECKLIST: TECHNIQUES FOR TRIAL COURT TO MITIGATE EFFECTS OF PRETRIAL PUBLICITY⁴²

The trial court is charged with the responsibility of mitigating the effects of pretrial publicity by,

- ?? asking prospective jurors on voir dire if they could remain impartial despite being exposed to pretrial publicity;
- ?? ordering parties, counsel, and witnesses not to comment about the pending case;⁴³
- ?? instructing the jurors to remain impartial, to disregard all matters other than the evidence presented, or to refrain from reading certain publicity which appeared before the trial;⁴⁴
- ?? interrogating the jurors during the trial as to whether they have read newspaper articles pertaining to the alleged crime or the trial.^{45 46}

§ 1005. Pretrial publicity, generally⁴⁷

Pretrial publicity adverse to the accused may be sufficient to amount to a denial of a fair trial.⁴⁸ The trial judge has an affirmative duty to guard against prejudicial pretrial publicity in a criminal case.⁴⁹ The prejudice standard can be satisfied by a finding of either actual or presumed

⁴² Irwin J. Schiffres, et al., TRIAL, AMJUR 2D.

⁴³ As to gag orders, see § 201

⁴⁴ As to jury instructions, generally, see § § 1077 et seq.

⁴⁵ 9 Federal Procedure, L. Ed., Criminal Procedure § 22:809.

⁴⁶ During the penalty phase of a capital trial, the defendant was not unduly prejudiced by the trial court's refusal to give the defendant's proposed jury instruction on why resentencing was necessary, because even if the jurors knew of the previous death sentence from pretrial publicity, the court conducted individual voir dire to weed out prospective jurors who had been unduly influenced by that publicity and instructed the jury correctly with the standard instructions. *Hitchcock v. State* (1990, Fla.) 578 So.2d 685, 16 F.L.W. 23, petition for certiorari filed (Aug 12, 1991).

During the penalty phase of a capital trial, the defendant was not unduly prejudiced or denied a fair hearing by the special security measures, and publicity about those measures, taken to guard 8 death row inmates who testified on his behalf, where the trial court conducted individual voir dire regarding publicity and scrupulously guarded the defendant's right to an impartial jury, and where the only prospective juror called by the defense stated merely that he had observed police cars, officers and weapons, but that he did not know what was happening and did not ask, nor was he told, about what was taking place. *Hitchcock v. State* (1990, Fla.) 578 So.2d 685, 16 F.L.W. 23 petition for certiorari filed (Aug 12, 1991).

⁴⁷ 21A Am Jur 2d CRIMINAL LAW § 1005

⁴⁸ *Pedini v. Bowles*, 940 F. Supp. 1020 (N.D. Tex. 1996); *Pruett v. Norris*, 959 F. Supp. 1066 (E.D. Ark. 1997), rev'd on other grounds, 153 F.3d 579 (8th Cir. 1998); *In re Willon*, 47 Cal. App. 4th 1080, 55 Cal. Rptr. 2d 245, 24 Media L. Rep. (BNA) 2121 (6th Dist. 1996), review denied, (Nov. 20, 1996); *State v. Alston*, 256 Kan. 571, 887 P.2d 681, 23 Media L. Rep. (BNA) 1321 (1994); *State v. Smart*, 136 N.H. 639, 622 A.2d 1197 (1993). If due to pretrial publicity, an impartial jury cannot be seated, the defendant's right to a fair trial is violated. *Arkansas Gazette Co. v. Goodwin*, 304 Ark. 204, 801 S.W.2d 284, 18 Media L. Rep. (BNA) 1576 (1990).

⁴⁹ *Pedini v. Bowles*, 940 F. Supp. 1020 (N.D. Tex. 1996); *U.S. v. Hill*, 893 F. Supp. 1039 (N.D. Fla. 1994); *Arkansas Gazette Co. v. Goodwin*, 304 Ark. 204, 801 S.W.2d 284, 18 Media L. Rep. (BNA) 1576 (1990); *People v. Buttafuoco*, 158 Misc. 2d 174, 599 N.Y.S.2d 419 (County Ct. 1993).

prejudice.⁵⁰ Prejudice exists when the trial is conducted in a circus like atmosphere,⁵¹ the actual jurors possess fixed opinions that prevent them from judging impartially the guilt or innocence of the defendant,⁵² inflammatory publicity so saturates a community that it is almost impossible to draw an impartial jury,⁵³ or so many jurors admit to a disqualifying prejudice that the trial court may legitimately doubt the avowals of impartiality by the remaining jurors.⁵⁴ Pretrial publicity is not necessarily prejudicial to a criminal defendant.⁵⁵ A conviction will ordinarily be upheld where no prejudicial effect on the trial jury is shown to have resulted from such publicity.⁵⁶ The determinative inquiry is not the amount of publicity, but the effect of the publicity on the jurors. Mere exposure to publicity, standing alone, does not establish actual prejudice, nor is it sufficient to give rise to a presumption that the defendant will be deprived of his or her right to be tried by a fair and impartial jury. Even extensive knowledge in the community of either the crime or the accused is not sufficient by itself to render a trial constitutionally unfair. Moreover, where news coverage is factual, rather than inflammatory, it does not ordinarily affect the right to a fair trial.

Every claim of potential jury prejudice due to publicity must turn upon its own facts. The trial judge has broad discretion in ruling on the issue of prejudice resulting from a jury's exposure to news articles. It is for the trial judge to decide whether news accounts are actually prejudicial, whether jurors were probably exposed to publicity and whether jurors would be sufficiently influenced by bench instructions alone to disregard publicity. Where such prejudicial effect is disclosed by the record, however, failure to afford appropriate relief constitutes an abuse of discretion on the part of the trial judge. On the other hand, relief may be denied an accused on the ground that he or she did not exhaust available procedural remedies in this respect. Thus, failure to move for continuance or change of venue or to take full advantage of the opportunities available on voir dire or to exhaust peremptory challenges that might have been made may furnish a sufficient basis for denial of relief.

Pretrial publicity will not warrant dismissal of the indictment.

⁵⁰ Troiani v. Poole, 858 F. Supp. 1051 (S.D. Cal. 1994), as amended, (July 14, 1994); Mills v. Singletary, 63 F.3d 999 (11th Cir. 1995), cert. denied, 517 U.S. 1214, 116 S. Ct. 1837, 134 L. Ed. 2d 940 (1996); Oryang v. State, 642 So. 2d 989 (Ala. Crim. App. 1994); State v. Eastlack, 180 Ariz. 243, 883 P.2d 999 (1994); State v. Crafts, 226 Conn. 237, 627 A.2d 877 (1993); State v. Small, 328 N.C. 175, 400 S.E.2d 413 (1991); Shultz v. State, 811 P.2d 1322 (Okla. Crim. App. 1991). As to the standard of actual prejudice see § 1006. As to presumed prejudice, see § 1007.

⁵¹ U.S. v. Pasciuti, 803 F. Supp. 563 (D.N.H. 1992); Shultz v. State, 811 P.2d 1322 (Okla. Crim. App. 1991).

⁵² U.S. v. Pasciuti, 803 F. Supp. 563 (D.N.H. 1992); Shultz v. State, 811 P.2d 1322 (Okla. Crim. App. 1991).

⁵³ U.S. v. Pasciuti, 803 F. Supp. 563 (D.N.H. 1992); State v. Smart, 136 N.H. 639, 622 A.2d 1197 (1993); Shultz v. State, 811 P.2d 1322 (Okla. Crim. App. 1991).

⁵⁴ U.S. v. Pasciuti, 803 F. Supp. 563 (D.N.H. 1992); State v. Smart, 136 N.H. 639, 622 A.2d 1197 (1993); Shultz v. State, 811 P.2d 1322 (Okla. Crim. App. 1991).

⁵⁵ State v. McNair, 491 N.W.2d 397 (N.D. 1992); Rule v. State, 890 S.W.2d 158 (Tex. App. Texarkana 1994), petition for discretionary review refused, (Mar. 8, 1995).

⁵⁶ Hammer v. Bowlen, 934 F. Supp. 911 (M.D. Tenn. 1996); Heard v. State, 141 Ga. App. 666, 234 S.E.2d 83 (1977); State v. Woodington, 31 Wis. 2d 151, 142 N.W.2d 810, Blue Sky L. Rep. (CCH) P 70716 (1966). No prejudice from pretrial publicity was shown where the defendant waived his right to trial by jury. State v. Cotton, 673 A.2d 1317 (Me. 1996). Showing of pervasive, adverse pretrial publicity does not inevitably lead to an unfair trial under Sixth Amendment; where the defendants sought widespread media coverage of their actions leading to their arrest, they cannot then complain that the very fact of publicity they wanted interfered with their right to fair trial. Khaalis v. U. S., 408 A.2d 313 (D.C. 1979).

§ 169. ADVOCATE'S PUBLIC COMMENT ON PENDING LITIGATION⁵⁷

- (2) In representing a client in a matter before a tribunal, a lawyer may not make a statement outside the proceeding that a reasonable person would expect to be disseminated by means of public communication when the lawyer knows or reasonably should know that the statement will have a substantial likelihood of materially prejudicing a juror or influencing or intimidating a prospective witness in the proceeding. However, a lawyer may in any event make a statement that is reasonably necessary to mitigate the impact on the lawyer's client of substantial, undue, and prejudicial publicity recently initiated by one other than the lawyer or the lawyer's client.
- (3) A prosecutor must, except for statements necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused.^{58, 59}

⁵⁷ Representing Clients in Litigation, RESTATEMENT OF THE LAW THIRD, Mar. 21, 1997.

⁵⁸ .. **Rationale.** Limitations on an advocate's statements to communications media about a pending litigated matter originated in a professional tradition in which such comment was sternly disapproved for reasons of decorum and tradition. Some judges and lawyers continue to find all trial publicity distasteful. However, those considerations are not a basis for a prohibition broader than necessary to protect against taint of a lay fact finder or witness.

Professional limitations on trial publicity responded to recurring instances of prejudicial publicity, primarily in sensational criminal cases. Modern attempts to regulate date from the decision of the United States Supreme Court in Sheppard v. Maxwell, 384 U.S. 333 (1966), in which the Court reversed a criminal conviction because of highly prejudicial publicity adverse to the accused. On the other hand, restrictive provisions of the lawyer codes have sometimes also been successfully attacked on constitutional grounds.

Restrictions on the out-of-court speech of advocates seek to balance three interests. First, the public and the media have an interest in access to facts and opinions about litigation because litigation has important public dimensions. Second, litigants may have an interest in placing a legal dispute before the public or in countering adverse publicity about the matter, and their lawyers may feel a corresponding duty to further the client's goals through contact with the media. Third, the public and opposing parties have an interest in ensuring that the process of adjudication will not be distorted by statements carried in the media, particularly in criminal cases. The free-expression rights of advocates, because of their role in the ongoing litigation, are not as extensive as those of either non-lawyers or lawyers not serving as advocates in the proceeding.

Regulation of advocate comment must be justified by a compelling state interest and narrowly tailored to achieve that interest. One such compelling state interest is preventing pretrial and trial comment from becoming an improper basis for fact finders' decisions. ...

c. **Substantial likelihood of material prejudice to litigated matter.** Subsection (1) prohibits trial comment only in circumstances in which the lawyer's statement entails a substantial likelihood of material prejudice, that is, where lay fact finders or a witness would likely learn of the statement and be influenced in an inappropriate way. If the same information is available to the media from other sources, the lawyer's out-of-court statement alone ordinarily will not cause prejudice. For example, if the lawyer for a criminal defendant simply repeats to the media outside the courthouse what the lawyer said before a jury, the lawyer's out-of-court statement cannot be said to have caused prejudice. However, the fact that information is available from some other source is not controlling; the information must be both available and likely in the circumstances to be reported by the media.

There may be a likelihood of prejudice even if the tribunal can sequester the jury because sequestration may be imposed too late and, in any event, inflicts hardship on members of a jury. Taint of a lay jury is of most concern prior to trial, when publicity will reach the population from which the jury will be called. When a statement is made

after a jury has rendered a decision that is not set aside, taint is unlikely, regardless of the nature of the statement. Additional considerations of timing may be relevant....

...e. **Prosecutors and other government lawyers.** Lawyers who serve as prosecutors or otherwise as government lawyers have significantly diminished free-expression rights to comment publicly on matters in which they are officially involved as advocates. Accordingly, prohibitions against pretrial and trial comment by such lawyers can be more extensive. When the position of the governmental lawyer is filled by popular election, restriction may be particularly necessary to prevent extra-judicial comment for vote-getting purposes. In all events, prosecutors must observe the heightened limitations on extrajudicial comment stated in Subsection (2).

f. **Remedies.** The prohibitions of this Section are drawn from the lawyer codes and are enforced primarily through professional discipline...

⁵⁹ Comment b. Rationale. The provisions of DR 7-107 of the ABA Model Rules of Professional Responsibility (1969) on "trial publicity" are lengthy. The scheme of the DR is to set out presumably exhaustive lists of statements that may be made by a lawyer or a lawyer's firm involved in: "the investigation of a criminal matter" (DR 7-107(A)); "the prosecution or defense of a criminal matter" (DR 7-107(B) and (C)); "a civil action" (DR 7-107(G)); and "an administrative proceeding" (DR 7-107(H)). (The first two sets of regulations on criminal matters also apply to professional disciplinary proceedings and juvenile disciplinary proceedings (DR 7-107(F).) The "list" approach is of doubtful constitutionality (see Comment c). That precise point was left undecided in *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1058 n. 3 (1991), although a majority of the Court held that particular items in the list in question were void due to vagueness of some terms. Two complementary parts of the Disciplinary Rule state more general standards dealing with criminal jury trials and sentencing: DR 7-107(D) states that "during the selection of a jury or the trial of a criminal matter," a lawyer may not make a statement "reasonably likely to interfere with a fair trial, except that [the lawyer] may quote from or refer without comment to public records of the court in the case"; and DR 7-107(E) states that after trial but before imposition of sentence in a criminal matter, a lawyer may not make a statement "that a reasonable person would expect to be disseminated by public communication and that is reasonably likely to affect the imposition of sentence." DR 7-107(I) in effect exempts a lawyer from the trial publicity restrictions in two situations: when "replying to charges of misconduct publicly made" against the lawyer; and when "participating in the proceedings of legislative, administrative or other investigative bodies." DR 7-107(J) required a lawyer to "exercise reasonable care to prevent . . . employees and associates" from making trial publicity statements that the lawyer would be prohibited from making.

The breadth of DR 7-107 was inspired by *Sheppard v. Maxwell*, 384 U.S. 333 (1966), in which the Court reversed a criminal conviction because of highly prejudicial adverse publicity. The ABA Model Code was also significantly influenced by the suggestions of the ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Fair Trial and Free Press 80-97 (1968). Probably due to oversight, DR 7-107(A) limits pre-indictment press comment to a lawyer "participating in or associated with the investigation of a criminal matter. . . ." (Emphasis supplied.) Courts have held that on its face the language does not apply to a criminal defense lawyer who cannot be considered to be so participating or associated. See *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 253 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976); *In re Axelrod*, 549 A.2d 653, 654-55 (Vt. 1988). That limitation does not exist in the Model Rules, which plainly apply to both prosecutors and defense counsel.

Rule 3.6 ("Trial Publicity") of the ABA Model Rules of Professional Conduct (1983) is narrower than the Model Code in certain respects. See generally ABA/BNA Lawyers' Manual on Professional Conduct 61:1009-1010 (1993 supp.); 1 G. Hazard & W. Hodes, *The Law of Lawyering* s 3.6:102 (2d ed. 1990). As originally enacted, Model Rule 3.6(a) stated a general standard restricting trial-publicity statements:

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

Rule 3.6(b) then provided what was in effect a list of statements that presumptively would have the effect described in Rule 3.6(a). That presumptive effect apparently did not take into account the actual circumstances involved in the case in question. The list applied, however, only to "a civil matter triable to a jury, a criminal matter, or any other

proceeding that could result in incarceration." Finally, Rule 3.6(c) listed seven "safe harbor" statements, described in the Comment. The Model Rules rather surprisingly contained no equivalent to DR 7-107(I) on self-defensive statements. Rules equivalent to DR 7-107(J) are Model Rules 5.1 and 5.3.

In 1994, stimulated by the decision of the Supreme Court in *Gentile*, supra, the ABA amended Model Rule 3.6 extensively. Paragraph (a) was amended to apply only to a lawyer who is participating in or has participated in the investigation or litigation of a matter. The list of statements ordinarily likely to have a prejudicial effect was moved from paragraph (b) to the Comment section of the Rule. The paragraph (c) listing of ordinarily acceptable, safe-harbor statements was moved to a new paragraph (b), deleting terms that confined statements to those made without elaboration and of a general nature. A new paragraph (c) provides for a lawyer's limited right of retaliatory response to protect a client from substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the client. The amendment also adds a new paragraph (d) on imputation, making the Rule applicable to other lawyers in the lawyer's firm or government agency....

Cases decided under the lawyer codes have disagreed over the fundamental issue concerning which of the following constitutional standards should be employed to test application of the codes: (1) "reasonable likelihood" of material prejudice to the proceeding (derived from a statement in *Sheppard v. Maxwell*, supra, concerning when a judicial officer should change venue to avoid the effects of pretrial publicity; it was employed in *Hirschkop v. Snead*, 594 F.2d 356, 365-70 (4th Cir. 1979), as the appropriate constitutional test of the breadth of DR 7-107 on advocate comment to the media); (2) "serious and imminent threat" of prejudice (employed as the minimal constitutional test in *Chicago Council of Lawyers v. Bauer*, supra; e.g., *Breiner v. Takao*, 835 P.2d 637, 641-42 (Hawaii 1992) (reviewing authority)); or (3) "clear and present danger" of prejudice (required by *Markfield v. Association of the Bar of the City of New York*, 370 N.Y.S.2d 82 (N.Y. App. Div.), appeal dismissed, 337 N.E.2d 612 (N.Y. 1975)). On the general requirement of balancing of interests, see, e.g., *Stern, The Right of an Accused to a Public Defense*, 18 Harv. C.R.-C.L. L. Rev. 53 (1983) (lawyer's function to protect client's reputational interests by making press statements). The "substantial likelihood" standard of Subsection (1) contains elements of both of the first two standards, but is essentially the first. It is employed in ABA Model Rule 3.6(a) and was found to be a constitutionally sufficient standard in *Gentile*, supra, 501 U.S. at 1075.

Comment c. Substantial likelihood of material prejudice to litigated matter. The leading decision is *Gentile v. Nevada State Bar*, 501 U.S. 1030 (1991) (criminal defense lawyer had First Amendment right to speak, at press conference following client's indictment and several months before trial, about evidence in case, potential witnesses, and motives of witnesses and police detective). A majority of the Court in *Gentile* held that the "substantial likelihood of material prejudice" standard of Model Rule 3.6(a) was constitutionally permissible under the First Amendment, and that the "clear and present danger" test or its equivalent was not required in the case of lawyers making press comments in representing a client. A different majority of the Court held, however, that, as applied, the safe-harbor provisions of the Nevada rule (which closely followed the pre-1994 version of the ABA Model Rules) created a trap such that application of the rule to the petitioner was prohibited by the void-for-vagueness doctrine of the First Amendment. That holding focused upon the fact that the actual words uttered at the press conference had accused public officials (the police) of responsibility for the crime for which the client, who was later acquitted, was charged....

On the relevance of the fact that other sources of the information exist, see, e.g., *In re Sullivan*, 586 N.Y.S.2d 322 (N.Y. App. Div. 1992) (defense lawyer's statements were only few of many made by all participants); *In re Grand Jury Investigation*, 492 N.E.2d 459 (Ohio Ct. App. 1985) (prosecutor repeated statements made in open court); cf. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 568 (1976) (unconstitutional to restrain press from reporting facts from public judicial record).

Comment d. Other restrictions on media or other publicity. E.g., *In re Friend*, 444 N.Y.S.2d 782 (N.Y. App. Div. 1981) (contempt sanctions against lawyer for removing sealed grand jury report from judge's chambers without authorization and furnishing to newspaper reporter); *In re Ojala*, 289 N.W.2d 108 (Minn. 1979) (discipline of lawyer who publicized documents wrongfully removed from adversary lawyer's law office).

Comment e. Prosecutors and other government lawyers. E.g., *United States v. Simon*, 664 F. Supp. 780, 795-96 (S.D.N.Y. 1987), *aff'd*, 842 F.2d 603 (2d Cir. 1988) (citing authority) (government has no right to speak to press

about pending criminal case if statements go beyond matters contained in indictment or otherwise already part of public record); *In re Lasswell*, 673 P.2d 855 (Or. 1983) (prosecutor has greater burden to demonstrate unconstitutionality of trial comment prohibition). A new trial has been granted even with respect to extraneous material included in a paper filed by the prosecutor in the criminal case, where the material would predictably be published by the media producing apparent prejudice to a fair trial. See *Henslee v. United States*, 246 F.2d 190, 193 (5th Cir. 1957).

As amended in 1994, the ABA's version of Model Rule 3.8(g) provides that a prosecutor shall, "except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused." The amended ABA rule employs the same "substantial likelihood" standard of Model Rule 3.6(a) but employs a test different from that of "materially prejudicing an adjudicative proceeding in the matter." Amended Rule 3.8, Comment § [5], states that Rule 3.8(g) does not restrict statements that a prosecutor may make within the safe-harbor provisions of Rule 3.6(b) or the retaliatory-publicity provisions of Rule 3.6(c).

Comment f. Remedies. On contempt, see, e.g., *United States v. Cutler*, 58 F.3d 825 (2d Cir. 1995); *United States v. Bingham*, 769 F. Supp. 1039 (N.D. Ill. 1991); see also, e.g., *State v. Ross*, 304 N.E.2d 396 (Ohio. Ct. App. 1973), appeal dismissed, 415 U.S. 904 (1974) (trial court did not abuse discretion in denying admission pro hac vice to lawyer for threatened non-compliance with trial comment rule); *Stern v. State ex rel. Ansel*, 869 S.W.2d 614 (Tex. Ct. App. 1994) (prosecutor removed from office). On challenges to assertedly overbroad regulations, see, e.g., *Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979); *Twohig v. Blackmer*, 918 P.2d 332 (N.M. 1996) (striking down gag order against discussions with media). On changing venue or sequestering the jury, see, e.g., *United States v. Hill*, 893 F. Supp. 1039 (N.D. Fla. 1994); *In re Manners*, 542 N.Y.S.2d 485 (N.Y. Co. Ct. 1989) (closure of pretrial proceedings to media to counter adverse prosecutor publicity). On recovery under civil rights statutes, see *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993) (allegedly false statements of prosecutor at press conference announcing prosecution covered only by qualified, not absolute, immunity). On reversal and new trial, see, e.g., *United States v. Coast of Maine Lobster Co.*, 538 F.2d 899 (1st Cir. 1976); *Hughes v. State*, 437 A.2d 559 (Del. 1981).