

CHAPTER 4

MEDIA AND THE COURTS Hon. Cynthia Stevens Kent (ret.) Hon. Sharen Wilson

[4.1.] Introduction

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

This chapter will address the legal guidelines in the area of free press and fair trial interests. Additionally, this chapter will address the pitfalls of the capital trial and what planning the justice system should take to appropriately address those concerns.

Much of the legal focus on the First Amendment versus the Sixth Amendment battle has been in the criminal law field. Judges can begin their preparation for the capital trial by studying not only the case law, but also the guidelines from the state court. Development of a trial court checklist for media intense cases can also assist the trial judge assigned to preside. Judges should also consider various security and press management issues.

[4.2.] Statutes and Rules for Media Issues

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

If a court, on its own motion or the motion of any party, is considering allowing broadcast of the court proceedings, a hearing on such decision is recommended in civil matters and might be considered even in a criminal case. The court can certainly consider evidence and argument of the parties on how the broadcast of these proceedings may affect the rights of the parties or the ability of the court to provide a forum for the due and proper administration of justice in the case. The court should carefully consider the requests and objections which may be raised by the parties, witnesses, media representatives, other court

personnel, and other individuals as to the inclusion or exclusion of broadcasting from the courtroom. If the broadcasting of the proceedings would interfere with the ability of the court to receive honest and complete testimony of any witness, the unfair public criticism of a witness or party, or the potential for tampering with the jury or the jury pool, such factors should carefully weigh in the court's decision on the motion.

The trial judge is in charge of the courtroom and determines the extent of courtroom access to cameras and recording devices. However, the law dictates public trials. For the laws of each state visit the Radio-Television News Directors Association's website at www.rtnda.org to find a state-by-state guide on use of cameras in the courtroom.⁴¹⁴ It cites the law in each state for media use. Some states do not allow cameras in the courtroom while others leave the decision up to the specific judge. In most cases, other recording devices and reporter attendance are not restricted. Even if a state does not allow cameras in the courtroom, there will still be media considerations in a capital case. In high profile cases, such as capital cases, the media's demands for access may be intense and the trial judge should understand the options, benefits, and pitfalls of media and capital case management.

[4.3.] Court Proceedings Are Open to the Public

There are very few cases where closing court proceedings have been allowed and the overwhelming case law provides that court proceedings are public and cannot be closed. Recently, the judge in the Martha Stewart criminal case tried closing the jury *voir dire*. This decision was vigorously challenged by the media and the appellate court ruled that such closure was improper.⁴¹⁵

As a general rule, all court proceedings should be open to the public. Most states provide for open courts. It is the best rule of thumb that all proceedings in a case will be held in open court and on the record.

There are some situations where statute or case law allows for the court proceedings to be closed. Examples of proceedings which may be closed to the public include certain juvenile proceedings and mental commitment hearings. Closing criminal proceedings should be carefully considered in light of the requirements for public trial. Criminal cases generally protect the right to public and open proceedings. If any portion of a criminal hearing is closed, the judge should make extensive findings and have truly extenuating circumstances before closing the proceedings.

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

⁴¹⁴ RTNDA, *Freedom of Information: Cameras in the Court: A State-By-State Guide* (2009), http://www.rtnda.org/pages/media_items/cameras-in-the-court-a-state-by-state-guide55.php?g=45?id=55.

⁴¹⁵ See *ABC, Inc. v. Stewart*, 360 F.3d 90 (2d Cir. 2004).

support its action.⁴¹⁶

In *Globe Newspaper Co. v. Superior Court for Norfolk County*,⁴¹⁷ the U.S. Supreme Court held that the protection of witnesses from extreme embarrassment or intimidation that would traumatize them or render them unable to testify is an overriding state interest sufficient to justify partial or complete exclusion of the press or public.⁴¹⁸ No state's interest, however compelling, can sustain the exclusion of press and public from part of a trial, absent findings of necessity articulated on the record.⁴¹⁹ Before closing a trial, the judge should state on the record his or her reasons for doing so to inform the public and enable the appellate court an opportunity to review the adequacy of the reasons.⁴²⁰

[4.4.] Cameras in the Courtroom

In 1935, a judge allowed still photography in the courtroom for the famous Lindbergh Baby Kidnapping trial.⁴²¹ There were about 700 reporters and 132 photographers in the courtroom during the trial, the media agreed not to show newsreels until after the trial, but during the trial they published and showed newsreels. Following this trial, the American Bar Association adopted Canon 35 of the Code of Judicial Conduct which made it unethical for a judge to allow broadcasting or still photography of courtroom proceedings.⁴²²

The trial of *Estes v. Texas*⁴²³ demonstrated the problems which could occur with television coverage of a trial. During this trial, the television crews constructed a television booth in the courtroom, requiring cables to be snaked throughout the courtroom. As a result, the defendant appealed his conviction claiming a denial of due process. The U.S. Supreme Court reversed the conviction stating that the defendant's due process rights had been violated and that the defendant did not have to show actual prejudice in order to obtain a reversal. Essentially, the U.S. Supreme Court banned cameras in the courtroom except for ceremonial purposes. This was the first U.S. Supreme Court decision addressing the issue of in-court broadcasting but the numerous concurring and dissenting opinions in the plurality decision left the guidelines and full impact of this decision unclear.

In the *Estes* opinions, Justice Clark listed several ways that broadcasting

⁴¹⁶ *Waller v. Georgia*, 467 U.S. 39, 47 (1984) (citing *Press-Enterprise Co. v. Superior Court of California, Riverside County*, 464 U.S. 501 (1984)).

⁴¹⁷ 457 U.S. 596 (1982).

⁴¹⁸ *Id.* at 606.

⁴¹⁹ *Id.*

⁴²⁰ *Rovinsky v. McKaskle*, 722 F.2d 197, 200 (5th Cir. 1984).

⁴²¹ *State v. Hauptmann*, 180 A. 809 (N.J. 1935).

⁴²² The text of A.B.A. Canon 35 is as follows: Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the courtroom, during sessions of the court or recesses between sessions, and the broadcasting of such proceedings are calculated to detract from the essential dignity of the proceedings, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted. (A.B.A. 1937, pgs. 1134-1135).

⁴²³ 381 U.S. 532 (1965).

trial proceedings could influence jurors:

1. Pre-trial announcements of the intention to televise the trial could affect potential jurors;
2. Awareness of the camera's presence could distract the jury from the evidence;
3. Non-sequestered juries could be affected by the interpretation of the trial by the media coverage; and
4. Broadcast could jeopardize any retrial due to jurors' exposure to clips from the first trial.⁴²⁴

Further, Justice Clark expressed concern about the effect of the cameras on the witnesses and their discomfort at testifying not only before the judge and jury, but also before the entire viewing television audience, invocation of the rule of witnesses as well as a fear that individuals with evidence that would not come forward for fear of becoming famous overnight.⁴²⁵ He also expressed concern over the effect of broadcasting on the burden of the trial judge with the additional responsibility of supervising the cameras and the conduct of the reporters, as well as concerns about the judge and lawyers "playing" to the cameras.⁴²⁶

Finally, Justice Clark was concerned about the harm to the defendant in the form of mental harassment in having a trial televised and the possible creation of community bias.⁴²⁷ Justice Clark directly held the trial judge responsible for the protection of the individual's right to a fair trial by an independent court system under the rule of law.⁴²⁸

Following the *Estes* trial many courts began to prohibit any cameras in the courtroom. The trial of *Sheppard v. Maxwell*⁴²⁹ was another case where the trial judge permitted cameras in the courtroom. The situation was described as "bedlam reigned at the courthouse. People were standing on the counsel table taking photographs, defense counsel could not confer with his client without being overheard, exhibits were picked up and taken out – it was unbelievable."⁴³⁰ This trial resulted in a ruling from the U.S. Supreme Court that defined the notion of fair trial within the context of prejudicial media coverage.

In *Chandler v. Florida*,⁴³¹ the U.S. Supreme Court held that permitting radio, television, and photographic coverage of criminal proceedings over the defendant's objections was constitutional absent a showing of abuse or actual prejudice. This decision has been challenged repeatedly, but the U.S. Supreme Court has consistently held that the First Amendment protection of a free press does not require unlimited access to the courtroom.

In the *Chandler* decision, the U.S. Supreme Court found that

⁴²⁴ *Id.* at 545.

⁴²⁵ *Id.* at 547.

⁴²⁶ *Id.* at 548.

⁴²⁷ *Id.* at 549.

⁴²⁸ *Id.*

⁴²⁹ 384 U.S. 333 (1966).

⁴³⁰ *Id.* at 355.

⁴³¹ 449 U.S. 560 (1981).

broadcasting is not inherently prejudicial; rather, due to technological improvements, it is rarely prejudicial.⁴³² In fact, the U.S. Supreme Court found that camera coverage of a trial, when properly structured, does not create a significant adverse effect on the participants in the trial. The U.S. Supreme Court stated that to show a legally sufficient claim of denial of due process caused by broadcast coverage of a trial, the complaining party must meet a high standard by demonstrating either: (1) the coverage compromised the ability of the jury to judge fairly, or (2) the coverage had an adverse impact on the trial participants sufficient to constitute a denial of due process.⁴³³

Thus, the *Chandler* court not only found that broadcast coverage was not presumptively unconstitutional or inherently prejudicial, it also reiterated the finding that a media organization does not have a First Amendment right to broadcast court proceedings. Further, the U.S. Supreme Court found that a defendant does not have a Sixth Amendment right to a publicly broadcasted trial. Rather, the U.S. Supreme Court found that the trial court had the discretion as to whether or not to allow in-court broadcast after balancing the procedure for such broadcasting and the fundamental right to a fair trial. Most state courts now allow for the broadcast of court proceedings under the discretion of the trial court. A total of 47 states now permit broadcast coverage and only three states prohibit broadcast coverage altogether.⁴³⁴

[4.5.] Restricting Access to Jurors and Juror Information

The courts have held that the unwarranted prior restraint on freedom of the press violates the First Amendment even when there existed a threat of harassment to the jurors if their names were disclosed during the trial.⁴³⁵ The courts have stated that where the prohibition of the release of jurors' names is in violation of free press right and where the jury list was a public record, the prior restraint on the publication of the jury list was illegal.

However, there is case law which supports a judge's careful exercise of discretion to forbid news media from publishing the names and addresses of jurors in criminal cases. In the case of *Schuster v. Bowen*,⁴³⁶ the U.S. District Court, District of Nevada, held, under the exceptional circumstances of that case, the prohibition on the publication of the names of jurors was necessary to protect the integrity and impartiality of the jury. The U.S. District Court, District of Nevada, held that the public's right to know was irrelevant since the names would be released on the last day of trial and the only imaginable public member who might make use of the information was the one who wished to tamper with the jury.

⁴³² *Id.* at 583.

⁴³³ *Id.* at 581.

⁴³⁴ See Todd Piccus, *Demystifying the Least Understood Branch: Opening the Supreme Court to Broadcast Media*, 71 TEX. L. REV. 1053, 1063 (1993).

⁴³⁵ See *Des Moines Register & Tribune Co. v. Osmundson*, 248 N.W.2d 493 (Iowa 1976); *State ex rel. New Mexico Press Ass'n v. Kaufman*, 648 P.2d 300 (N.M. 1982).

⁴³⁶ 347 F. Supp. 319 (D. Nev. 1972).

In *U.S. v. Gurney*,⁴³⁷ the Fifth Circuit Court of Appeals found the trial judge did not abuse his discretion in restricting the press access to the jury panel lists, since there were full findings as to a balanced use of discretion and release of those names which were called in open court.

The decisions in *Nebraska Press Ass'n v. Stuart*,⁴³⁸ and *Nixon v. Warner Communications, Inc.*⁴³⁹ provide guidance for entering restrictive orders dealing with the names and addresses of jurors. The U.S. Supreme Court set out the following determination to be made by the trial court:

1. The nature and extent of pre-trial news coverage;
2. Whether other measures would be likely to mitigate the effects of unrestrained pre-trial publicity; and
3. How effectively a restraining order would operate to prevent the threatened danger.⁴⁴⁰

Many states have laws which specifically provide for the confidentiality of juror information. Strict protection of this right should be provided by the courts.

[4.6.] Discharge Contact with and Instructions to Capital Jurors

Most federal courts have local rules which severely limit, if not prohibit, post verdict contact with jurors. Before an attorney may contact a juror, counsel must file a motion with the court, show good cause, and obtain specific permission for the contact. Such permission is seldom granted. The historical purpose of these rules is to prevent the impeachment of jury verdicts and the harassment and manipulation of jurors to second guess their jury decisions. At least 51 of the 94 federal district courts "have adopted local rules governing whether and how attorneys may obtain post-verdict interviews with jurors."⁴⁴¹ Even where there is no local rule against contact with jurors, the appellate courts have restricted such contact by counsel.⁴⁴² The American Bar Association has also provided in its Code of Professional Conduct that a lawyer should not ask questions of or comment to a juror which might influence future jury service.⁴⁴³

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

⁴³⁷ 558 F.2d 1202 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978).

⁴³⁸ 427 U.S. 539 (1976).

⁴³⁹ 435 U.S. 589 (1977).

⁴⁴⁰ *Nebraska Press Ass'n*, 423 U.S. at 562.

⁴⁴¹ Benjamin M. Lawsky, *Limitations on Attorney Post-verdict Contact with Jurors: Protecting the Criminal Jury and Its Verdict at the Expense of the Defendant*, 94 COLUM. L. REV. 1950, 1956 (1994).

⁴⁴² *See Id.*

⁴⁴³ *See* MODEL RULES OF PROF. CONDUCT R. 3.5 (2002).

results unduly depending on the relative resources of the party."⁴⁴⁴

Some states allow communication between the parties, counsel, and discharged jurors, provided that the communication complies with the state code of professional responsibility. Communications with jurors must not be calculated merely to harass or embarrass the juror or to influence the juror's actions in future jury service. Look to your state statutes for laws which provide for criminal penalties for tampering with a witness or informant, jury tampering, and bribery of a juror.

The trial judge may provide the jury with discharge instructions. Variations on these instructions assist the court in protecting the jury from undue press attention or adverse public criticism. The jury members can be instructed that they are free to talk to anyone they want to about the case, but are also entitled to refuse to talk about the case and their verdict. If the jurors report any threat or other security concern, the sheriff's office stands ready to assist the jurors and their families in maintaining their privacy and peace from outside threat, harassment, or intimidation. An example of discharge instructions is located at Appendix 4.5.

[4.7.] Practical Applications in a Capital Case

The issue of the public's right to know the news and the media's job to report it, and the right of the litigants to a fair and impartial trial must be weighed and balanced carefully by the judge. The attorneys in any litigation should be focused on the actual preparation and trial of their cause of action and not on creating publicity which could influence the outcome of a particular trial. Unfortunately, there are attorneys who believe that their cases should be tried in the court of public opinion instead of the court of law. Additionally, even in a case where the court and counsel are completely focused on the professional disposition of a case in the courtroom, the press may take an interest in a case and create a media focus which might adversely affect the due and proper administration of justice in a case.

A capital case will attract interest at the time of the alleged incident, the filing of the case, pre-trial hearings and the trial. Normally, pre-trial hearings will not attract significant media interest unless one of the parties or attorneys is improperly fanning the fire of media interest. However, capital cases are different and every hearing will generate some type of media comment or focus, particularly in smaller counties. Because of the unique attention of the media to capital cases, the trial court should carefully manage and limit the number and timing of pre-trial hearings. The trial court should enter appropriate pre-trial orders and discuss with counsel the need to limit pre-trial hearings which could unduly affect the potential jury pool.

A cautious trial court will enter a detailed pre-trial and trial management order with specific deadlines for discovery, hearings, jury selection and trial.

⁴⁴⁴ U.S. v. McDougal, 47 F.Supp.2d 1103 (E.D. Ark. 1999); Haeberle v. Texas Intern. Airlines, 739 F.2d 1019 (5th Cir. 1984).

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

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

The trial court should promptly issue pre-trial orders, restrictive and protective orders, orders on conduct of counsel, and such other security or media orders necessary to focus counsel, the parties, and the witnesses on organization of the case for trial in a courtroom and not in the press. The entry of such orders and limitations on the number of pre-trial hearings and motions heard by the court may help protect the jury pool from damaging and prejudicial pre-trial publicity. The trial court should stand ready to enforce its orders through appropriate sanctions against the witnesses, parties, and counsel who seek to improperly influence the outcome of a case through the press.

[4.8.] Restrictive and Protective Order

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

The court should consider promptly issuing a restrictive and protective order to prevent counsel, parties, and potential witnesses from adversely influencing the jury pool or impeding the due and proper administration of justice. This order should be issued timely, copies served on counsel, the parties, and witnesses and amended as needed. Copies should also be available for the media. A sample restrictive and protective order is contained in Appendix 4-1.

In *Nebraska Press Ass'n v. Stuart*,⁴⁴⁵ the U.S. Supreme Court held that the state court's restraining order prohibiting the media from reporting accounts of the case was in violation of the First Amendment. These prior restraint orders are normally found to be in violation of the Constitution and should not be entered. However, the court is permitted to enter appropriate protective orders

⁴⁴⁵ 427 U.S. 539 (1976).

controlling the dissemination of information from attorneys, parties, witnesses, court staff, and law enforcement agencies where the orders are necessary and appropriate for due process protection of rights.

The U.S. Supreme Court has held that the media has the same right of access to criminal trials as the public and that absent an overriding interest articulated in a finding, the trial of a criminal case must be open to the public.⁴⁴⁶ Therefore, any restrictive order must be based on specific findings and articulate the overriding interest that made the basis of the restrictions.

[4.9.] Court Information Officer

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

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

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

The court information officer should develop an open dialogue with the media to problem solve and yet maintain compliance with the court's orders. This will allow the media to obtain information and the court to maintain the proper dignity and decorum for judicial decision making.

[4.10.] Retaining an Expert

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

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

⁴⁴⁶ See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

court to respond through the media expert. For expert assistance a good source is the Reynold's National Center for Courts and the Media.⁴⁴⁷

[4.11.] Effectively Communicating and Working with the Media

Sometimes you want the media to communicate your message, not just cover the trial. Your message is the good things you are doing or the goals you are trying to accomplish. Sometimes the media wants you to give them a story. Whatever you do, don't let the media overwhelm you – it provides you the opportunity to broadcast your message. We are all afraid of getting bad press. Your reputation and your relationship with reporters, as well as your skill in the mechanics of media, encourage them to cover your story the way you want it covered.

[4.12.] Suggestions for Dealing with the Media

- ✓ Stay with your message. You should know exactly what you want the media to cover before you talk to them. It should not change. Until you have a good idea of your message, you are not ready to talk to the media. You have many resources to assist you in preparing your message, and it's important you take the time to do it BEFORE you talk to a reporter.
- ✓ They can ask any question they want to ask. And you can answer any question you want to answer, even the one that "should have been asked." How often in a broadcast do you see the question being used? Look past the reporter to the public.
- ✓ Learn to talk in sound bites. Make a direct statement, elaborate a few key phrases and stop. The average sound bite is seven seconds.
- ✓ First, start with a declarative sentence. Say what you mean.
- ✓ Then, elaborate on your point. Add a brief explanation.
- ✓ Now, stop. STOP.
- ✓ Don't say more than you want to. Reporters have their ways of encouraging people to say more than they should. When you are finished with your answer, stop. Saying more than is necessary usually is a mistake.
- ✓ Don't say anything to a reporter that you don't want to see in print. There are no exceptions to this rule.
- ✓ Reporters are never off duty. See above.
- ✓ You can always call back. If a reporter asks a question that attempts to knock you off your guard, stop and

⁴⁴⁷ See <http://courtsandmedia.org>.

- think. If you are off guard, say you need to check and call back. Whatever the question, there's one answer that works, "Let me get back to you on that one."
- ✓ Know the reporter's deadline. You can call the reporter back before the deadline. Make sure you know when it is. Don't miss having a good quote in the paper because you missed the deadline. If you know the deadline, you can also use that to miss a deadline, if you don't want to be quoted.
 - ✓ Get the facts straight. Never say anything that isn't positively true. If you have made an error, call back with a correction. Reporters rely on you for correct information. Once you let them down with incorrect facts, they will be skeptical of you as a knowledgeable source.
 - ✓ Don't let them put words in your mouth. When you get a "don't you think" question from a reporter, stop. Then repeat your own statement. Reporters will often repeat back to you something close to what you said by using a more inflammatory word. Then they attribute the inflammatory words to you.

[4.13.] When the Media Calls

Whenever a call is received from any media person, have your staff ask the following questions:

1. Name?
2. Media organization?
3. Will Judge _____ be familiar with you?
4. What topics will you address?
5. When do you need a response?
6. Phone number?

[4.14.] Building a Relationship with Reporters

You have a professional relationship with reporters. That means they will never really be your friends. Remembering the rules of politeness will go a long way to keep them from being enemies.

- ✓ Reporters are people too. Learn about their personal interests. It's safe to discuss topics you'd talk to your neighbor about. Don't tell jokes – they are rarely funny in print or broadcast. Don't say anything about politics or policy that you don't want to see in the newspaper.
- ✓ Let them know on what you are working.
- ✓ Give them facts they can use.

- ✓ Say thanks wherever it's warranted. Praise them for an interesting or well-researched story or mention a major piece they wrote where your name did not appear.

Don't pick a fight with someone who buys ink by the barrel and paper by the ton. Don't say anything you don't want your grandkids to see on YouTube. The media always has the last word. Even if you think you've been unfairly treated by the media, avoid making enemies. If there are serious errors in the coverage, contact the reporter who covered you to calmly discuss the story. Offer to clarify a point or fact. Ask for a correction, not a retraction. Ask for the opportunity to write or broadcast an editorial representing your viewpoint.

[4.15.] Media Management Order

A well written and edited media management order is essential to handle the press of the capital case. This order should be developed with input from the media expert, attorneys, sheriff, facility plant manager at the courthouse, court clerk, court information officer, and the trial court. The trial judge must sign the order and be willing to enforce its provisions. A model media management order is contained at Appendix 4-12.

[4.16.] Media Room

If the case is a capital case, the court should consider setting up a media room. This room may prove very useful in diverting the media professionals from the courtroom to a place more accessible to them, more convenient to conduct their writing and reporting tasks, and to a location which does not distract the court, counsel, litigants, witnesses, and most importantly, the jury from the trial focus and work in the courtroom. Many courthouses will not have adequate space for a proper media room, but if the judge looks at surrounding buildings, a media room space might be conveniently located adjacent to the courthouse. If the case is capital, many courthouses will cooperatively work to provide a media room in the courthouse with a little advanced planning.

The media room should contain sufficient space, tables, chairs, telephone lines, cable access (preferably high speed), a copier, and an interview area. Most media plans will have the media committee allocate the expense of such a set up among the media members requesting media room access passes. It is important to have the cooperation of the facility plant manager at the courthouse, the sheriff's office, and the presiding judge to set up the media room arrangements.

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

Organizations such as truTV⁴⁴⁸ are extremely efficient in setting up the pooling arrangements and the gavel to gavel feed to the media room. This setup

⁴⁴⁸ Formerly Court TV.

normally will take one day of advance work by an experienced court television organization.

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

[4.17.] Reserved Seating Plan

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

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

The court must assign seats for the general public to ensure compliance with the spirit of the open courts provisions of many state constitutions. The media will always request courtroom seating, but the media professionals seldom utilize all of the seating made available to them. This is especially true if the court is allowing gavel to gavel coverage which is delivered by closed circuit to the media room. The media will generally prefer to remain in the media room to snack, drink, work, talk, and watch the trial at the same time.

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

[4.18.] Press Conferences

If the case is extremely high profile, there will be an interest in daily press conferences or press briefings. If the trial court can limit the attorney's ability to give press conferences, the trial will progress quicker with the attorneys, witnesses, and jurors focused on their jobs and not publicity. The appointment of a court information officer can help provide the press with accurate information on scheduling, legal terminology interpretation, and logistical information. This may help relieve the media pressure upon the

attorneys and allow them greater freedom to focus on their cases. Following the trial verdict, the press will be extremely interested in interviewing the attorneys, witnesses, parties, and the jurors. At the conclusion of the trial, counsel should make themselves available to address questions in an ethical and professional manner. This may help foster public confidence in the justice system. Counsel should be careful not to be critical of the jurors so as not to improperly influence future jury pools.

[4.19.] Media Truck Parking

An enormous distraction to the jurors, witnesses, attorneys, and the general public is the parking of satellite trucks around the courthouse. The court should consider designated parking areas for the satellite trucks at a location which is not noticeable to jurors and others coming to the courthouse. Early direction, court orders, and constant enforcement of these parking restrictions is important to provide a quiet atmosphere and proper courthouse decorum for decision making in the case. The court's security and media order should address media truck parking. Cooperation by the local police department is needed to enforce these orders. The media will quickly forget and violate these orders unless promptly enforced by the police.

[4.20.] Local versus National Media Interest and Compliance

Generally, the court will have better success in having local media comply with the court's orders, because local media may need access to other cases in the future. Many times the national media anticipate this is the one and only time it will need access to that court and, therefore, its vested interest in compliance is directly related to how much access it is deprived of if it violates the court's order. Some organizations, such as truTV,⁴⁴⁹ have developed an excellent reputation for cooperative and professional work. The key is to provide information to these media organizations about what the rules of access are and that they will be enforced.

[4.21.] Courtroom and Courthouse Violations of Orders

The trial judge must be committed to enforcing the courtroom and courthouse orders. If violators go unsanctioned, the violations will grow exponentially. Many judges will not relish the responsibility of enforcing orders against the media, but this is critical to an orderly trial. The maximum penalty is not needed for all violations; however, quick, decisive, and firm direction, correction, and response are needed when a violation occurs. The media should have a vested interest in working within the court's orders, not around them. If the media wants access to cameras in the courtroom, reserved seating, a media room, and the other arrangements which the court can provide in a carefully structured media order, then it must abide by the rules and restrictions which provide such open access.

⁴⁴⁹ Formerly Court TV.

[4.22.] Jury Room and Jury Break Management

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

Special pre-trial orders as to secure areas can help protect the jury from press exposure. The trial court should work with the local sheriff to help escort the jurors and keep others away from the jury room, break area, and ingress and egress from the courthouse. The court's bailiff should arrange snacks, drinks, and stretch breaks for the jury. Accommodations for rest rooms, smoke breaks, and meals should be planned so that the jury is not paraded in front of the press, witnesses, or litigants.

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

[4.23.] Witness Ready Room and Instructions

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

[4.24.] Scheduling of Trial Day

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

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

[4.25.] Preparing the Judge and Court Staff for a Capital Case

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

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

- ✓ Limit casual remarks to jurors, other staff, and even friendly attorneys;
- ✓ Show no emotion or physical reaction to testimony or to events in the courtroom or to the jury at any time;
- ✓ Always be courteous and professional especially in the stress of the capital case;
- ✓ Jury panel processing and trial are open to the public even when jury empanelling is in a remote location;
- ✓ Always communicate problems and concerns to the judge as they arise; and
- ✓ Review in detail the plans for jury, media, and witness rooms and restrictive and protective orders.

[4.26.] Conclusion

This is not an all inclusive list of suggestions and thoughts, but these are some concluding thoughts to help you identify the focus and additional work that will accompany the capital case.

1. It takes a strong judge, professional and ethical attorneys, and lots of preparation and good luck to

- provide a calm, reflective atmosphere in and around the trial proceedings to assure the proper decorum and adjudicatory environment for proper decision making.
2. The media may try hard to be responsive to the court's orders but some may try to push the limits to get the best shot, sound bite, or journalistic advantage. There will be some media members who will agree to abide by the orders and then violate them. Even when orders are specific and direct, some members of the media may read them with an eye to approving behavior in which they wish to engage and explaining away any prohibition on conduct they intend to perform irrespective of the court's orders.
 3. The trial judge should communicate clearly the expectation that the attorneys will prepare their cases so that the trial of a capital case is tried in a timely and efficient manner. Delays, unnecessary recesses, hearings outside the presence of the jury, and unavailability of witnesses interrupt the trial's momentum and provide fertile ground for mistrials, jury misconduct, and media mischief. Plan and prepare the trial court's schedule before trial and organize the work days for a smooth trial presentation flow. Encourage counsel to communicate with the court and opposing counsel regarding problems with witness availability and needed bench hearings. Bench hearings should be held after the jury is recessed for the day. Jury work days should be full and focused. Contested evidentiary issues should be raised before trial or the evening before that issue arises before the jury.
 4. Limit press contact before the trial and during the trial. There are situations where refusing to communicate with the media will dry up the high profile nature of the case and result in a calm forum for disposition of the factual and legal issues in the case. However, sometimes the high profile nature of the proceedings is not going away and so limited, managed, focused, and professional response regarding the case may give the media its sound bite without adversely affecting the jury pool or jury.