ETHICS & PUBLICITY IN CRIMINAL TRIALS

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CHAPTER 9
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ETHICS & PUBLICITY IN CRIMINAL TRIALS

This article explores the concerns surrounding trial publicity and the mechanisms a trial court may use to balance the threat publicity poses to a litigant’s right to a fair trial against the First Amendment rights of the public, media, and trial participants.1 The article will also examine the ethical responsibilities of lawyers to minimize the influence of publicity in a case.

A criminal defendant is guaranteed a right to a fair and impartial jury by the Sixth Amendment to the United States Constitution and Article I, §10 of the Texas Constitution.2 Yet, as the courts have repeatedly observed and the Rules of Professional Conduct implicitly concede, “in a widely publicized case, the rights of the accused to trial by an impartial jury can be seriously threatened by the conduct of the news media prior to and during trial.”3

In light of the threat that media exposure may pose to a defendant’s right to due process, the Supreme Court has placed upon trial judges an “affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity.”4 Methods available to judges for controlling publicity include granting a continuance, changing venue, conducting closed hearings, issuing gag orders, removing venire members for cause, instructing the jury to avoid media accounts, and sequestering the jury.5

The Rules of Professional Conduct further dictate that trial attorneys have the duty to ensure a trial free from the taint of publicity by specifically prohibiting a lawyer from making statements that may materially prejudice an adjudicatory proceeding.6

I. PUBLICITY AND THE RIGHT TO A FAIR TRIAL

A. The Constitutional Right to a Trial Untainted By Pretrial Publicity

The Supreme Court has held that the constitutional right to a jury trial “guarantees to the criminally accused a fair trial by a panel of impartial, ‘indifferent’ jurors.”7 A juror who has formed an opinion cannot be impartial, the Court has reasoned, and the inclusion of such a juror on a panel violates “even the minimal standards of due process.”8 Thus, as the Court observed in the infamous Sheppard case:

Due 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.9

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3 See United States v. Noriega, 917 F.2d 1543, 1548 (11th Cir. 1990); see also Skilling, 561 U.S. at 380, 130 S.Ct. at 2912-13 (a “fair trial” free of “extraordinary local prejudice” constitutes “a basic requirement of due process” (quoting In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed.2d 942 (1955))); Tex. Disciplinary R. Prof’l Conduct 3.07(a) & cmt 1 (rule “is premised on the idea that preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party during trial”).


6 See Tex. Disciplinary R. Prof’l Conduct 3.07(a) & cmt 1 (in light of the important interest of a fair trial, “a lawyer’s right to free speech is subordinate to the constitutional requirement of a fair trial”).


8 Id.

9 Sheppard, 384 U.S. at 362; see also Skilling v. United States, 561 U.S. 358, 380, 130 S.Ct. 2 896, 2914, 177
Sheppard itself offers a good example of how extreme publicity can warp a trial to the extent that it violates due process. There, the victim, the defendant’s pregnant wife, was bludgeoned to death in the bedroom of her home, where the defendant claimed to have found her after he awoke from a nap. A prominent doctor, the defendant initially cooperated with police, but the media reported incorrectly that he had refused to be questioned and had refused a polygraph. Besides repeated headline stories about the case, the media began to run editorials indirectly accusing Sheppard of the murder, as well as articles suggesting that he had had illicit affairs, despite the lack of any evidence to support such a charge. The publicity grew after the defendant was indicted. Stories included publication of portions of the defendant’s signed statement denying involvement in the crime, as well as editorial cartoons and stories that erroneously claimed additional physical evidence had been discovered, falsely accused the defendant of being a homosexual, and erroneously reported that he had expressed a desire to confess. Many of the stories obviously emanated from the prosecution and contained details of the investigation that were never entered into evidence.

Once trial began, the publicity became massive. The courtroom was flooded with reporters and phone and television lines, to the extent that the families of both the defendant and the victim were limited to sharing space on one side of the last row of seats. A press table was set up inside the court bar, and the courtroom was filled with reporters who sometimes caused sufficient confusion so that trial proceedings could not be heard. The defendant and counsel frequently were forced to leave the courtroom in order to obtain privacy, and most hearings outside the jury’s presence had to be conducted in the judge’s chambers. Court participants were photographed going into and out of the courthouse, and the judge himself was interviewed by members of the media. Daily transcripts of the trial were provided to the media, and testimony in the case was published verbatim.

Jurors could not escape the publicity. At the beginning of the trial, the media published the names and addresses of the prospective jurors. These veniremen received telephone calls, letters, and even threats about the case. All but one venireman testified during voir dire that they had read about the case. Pictures of the jury appeared over 40 times in the Cleveland papers alone. Newspapers even featured stories about individual jurors. The day before the verdict, while the jury was supposedly sequestered for deliberations, the jurors were separated into groups for media photographs. To make matters worse, the trial judge never admonished the jury not to expose themselves to comments or publicity about the case. Indeed, jurors were permitted to make unsupervised phone calls during their five days of deliberations.

The Supreme Court summarized the trial as having a “carnival atmosphere,” and held that because “inherently prejudicial publicity” had “saturated the community” the defendant had not received a fair trial as guaranteed him by the Due Process Clause.11

B. The Duty to Protect a Party’s Right to a Trial Free of Harmful Publicity

As the Sheppard court emphasized in highlighting the many deficiencies of the trial judge in that case, judges should take measures to ensure a fair trial in the face of trial publicity, including granting continuances, changing venue, admonishing the jury, and sequestering the jury.12

11 See Sheppard, 384 U.S. at 358, 363; see also Charles W. Peckham & Melissa Barloco, Lawyers and the Media in High Profile Cases: The Press Calls for an Interview, Do I Say “No Comment”? 36-Dec Hous. Lawyer 18, 19-20 (1998) (discussing a number of highly publicized cases).
12 See Sheppard, 384 U.S. at 363; see also Tex. R. Civ. P 251 (continuance shall be granted upon “sufficient cause shown”); Tex. R. Civ. P. 257 (a) & (c) (change of venue may be granted upon showing “that there exists in the county where the suit is pending so great a prejudice against him that he cannot obtain a fair and impartial trial” or “that an impartial trial cannot be had in the county where the action is pending”); Tex. R. Civ. P. 282 (sequestering a jury); Tex. Code Crim. Proc. art. 31.01 (venire may be changed on motion of the court when judge “shall be satisfied that a trial, alike fair and impartial to the accused and to the State, cannot, from any cause, be had in the county in which the case is pending”); Tex. Code Crim. Proc. art. 31.02 (venire may be changed on motion of the State where a “fair and impartial trial ... cannot be safely and speedily had” due to “existing combinations or influences in favor of the accused”); Tex. Code Crim. Proc. art. 31.03(a)(1) (change of venue may be granted upon motion by defendant where “there exists in the county where the prosecution is commenced so great a prejudice against him that he cannot obtain a fair and impartial trial”); Tex. Code Crim. Proc. art. 29.03 (continuance may granted upon “sufficient cause shown”); Tex. Code Crim. Proc. art. 35.23 (trial court shall “give the jurors proper instruction with regard to their conduct as jurors”); Tex. Code Crim. Proc. art. 35.23 (court must sequester the jury on objection of the party or in its discretion); Tex. R. Civ. P. 282 (allowing court discretion to sequester jury).
Furthermore, “neither prosecutors, counsel for the defense, the accused, witnesses, court staff nor law enforcement officers coming under the jurisdiction of the court should be permitted to frustrate” due process through “prejudicial outside influences.”13 Trial courts, in fulfilling their duty to protect a defendant from inherently prejudicial publicity, may regulate the trial participants’ conduct accordingly.14

C. The Consequences of a Violation of a Defendant’s Right to a Fair Trial

Early Supreme Court cases suggested that if the publicity were sufficiently egregious or pervasive, a defendant need not demonstrate specific harm to be entitled to a reversal of her conviction.15 Later cases have distinguished these earlier holdings on the basis that the early cases concerned trials conducted “in a circus atmosphere” in which the trial became “infected” not only by pretrial publicity, but “also by a courthouse given over to accommodate the public appetite for carnival.”16 The Supreme Court has since held that absent extraordinary circumstances, a defendant must establish actual harm to obtain relief on the basis of unfair trial publicity.17

Of course, a juror need not be totally ignorant of the facts and issues involved in a case.18 If a juror can lay aside any impression or opinion and render a verdict based on the evidence introduced in court, then any trial publicity has not violated the defendant’s due process rights19 Thus, the mere existence of a preconceived notion as to the guilt or innocence of a defendant is insufficient to rebut the presumption that a potential juror will be or has been impartial.20 Rather, a defendant must demonstrate the actual existence of a juror’s opinion “as will raise the presumption” of impartiality to establish a violation of his right to a fair and impartial trial.21

For example, in *Fetterly v. Pasket*, the defendant was charged with murdering the victim and stealing his car and other belongings.22 Before trial, newspapers at least 14 times reported every element of the offense, the defendant’s prior criminal record, the defendant’s release from jail on separate charges immediately before the murder, the defendant’s confession, and the prosecutor’s vow to “nail [the defendant] to the wall.”23 The defendant moved for a change of venue, which the trial judge took under advisement during voir dire. After voir dire, the court overruled the motion as well as the defendant’s motion for continuance and a motion to select jurors from adjoining counties. On appeal, the defendant claimed that the pretrial publicity had been so extensive and pervasive and inflammatory that the jurors cannot be impartial.24

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13 *Sheppard*, 384 U.S. at 363, 86 S.Ct. at 1522
14 See id. at 362-63, 86 S.Ct. at 1524.
15 See *Rideau v. Louisiana*, 373 U.S. 723, 726-27, 83 S.Ct. 1417, 1420-21, 10 L.Ed.2d 663 (1963); *Estes v. Texas*, 381 U.S. 532, 551-52, 85 S.Ct. 1628, 1637, 14 L.Ed.2d 543 (1965); see also *Sheppard*, 384 U.S. at 363, 86 S.Ct. at 1522
16 See *Murphy v. Florida*, 421 U.S. 794, 799, 95 S.Ct. at 2031, 2036, 44 L.Ed.2d 589 (1975); see also *Leahy v. Farmon*, 177 F.Supp.2d 985, 1005 (N.D. Cal. 2001) (“Prejudice is presumed when the record demonstrates that the community where the trial was held was ‘saturated’ with prejudicial and inflammatory media publicity about the crime…. Prejudice is rarely presumed because ‘saturation defines conditions found only in extreme situations”).
17 See *Murphy*, 421 U.S. at 799, 95 S.Ct. at 2036 (early cases of presumed prejudice “cannot be made to stand for the proposition that juror exposure to information about a state defendant’s prior conviction or to news accounts of the crime . . . alone presumptively deprives the defendant of due process”); see also *Skilling v. United States*, 561 U.S. 358, 382-85, 130 S.Ct. 2896, 2914-17, 177 L.Ed.2d 619 (2010)(“A presumption of prejudice . . . attends only the extreme case,” distinguishing presumed prejudice cases on basis that the size of the communities affected by publicity were relatively small, as opposed to large metropolitan area; news stories contained “blatantly prejudicial information”; trial was conducted shortly after crime was committed, rather than years later; and jurors actually acquitted the defendant on several counts); *Leahy*, 177 F.Supp.2d at 1005 (“To establish presumed prejudice the publicity must be so pervasive and inflammatory that the jurors cannot be believed when they assert that they can be impartial”); See also *United States v. Casellas-Toro*, 807 F.3d 380, 386 (1st Cir. 2015) (*Skilling* “identifies four factors relevant to presuming prejudice: the size and characteristics of the community; the nature of the publicity, the time between the media attention and the trial, and whether the jury’s decision indicated bias”); *In re Tsarnaev*, 780 F.3d 14, 20 (1st Cir. 2015) (applying factors identified in *Skilling*; *Unites States v. McRae*, 795 F.3d 471, 481-82 (5th Cir. 2015) (same).
18 See *Skilling*, 561 U.S. at 380, 130 S.Ct. at 2914 (“Jurors . . . need not enter the box with empty heads in order to determine the facts impartially”); *Irvin*, 366 U.S. at 722, 81 S.Ct. at 1642; *Powell*, 898 S.W.2d at 826; *Ransom v. State*, 789 S.W.2d 572, 579 (Tex. Crim. App. 1989); *Russell v. State*, 146 S.W.3d 705 (Tex. App. — Texarkana 2004, pet. ref’d); see also *Adami v. State*, 524 S.W.2d 693, 704 (Tex. Crim. App. 1975) (“To require a trial of jurors who never heard of a highly publicized crime would be impractical if not impossible…. To hold otherwise would be to hold that the perpetrator of a very highly publicized crime such as the assassination of a president, a governor or any widely known person could never be tried,” quoting *Morris v. State*, 488 S.W.2d 768, 772 (Tex. Crim. App. 1973)).
19 See *Skilling*, 561 U.S. at 380, 130 S.Ct. at 2914 (quoting *Irvin*, 366 U.S. at 722, 81 S.Ct. at 1642); see also *Murphy*, 421 U.S. at 799-800, 95 S.Ct. at 2036.
20 See *Murphy*, 421 U.S. at 800, 95 S.Ct. at 2036; see also *Skilling*, 561 U.S. at 381, 130 S.Ct. at 2914-15 (“Prominence does not necessarily produce prejudice, and juror impartiality . . . does not require ignorance”).
21 *Murphy*, 95 S.Ct. at 2036 (quoting *Irvin*, 366 U.S. at 723).
22 See 163 F.3d 1144, 1146 (9th Cir. 1998).
23 Id.
damaging that the appellate court should presume harm. In the alternative, he claimed to have established actual prejudice on the record.

The Ninth Circuit Court of Appeals rejected both assertions. The relevant publicity in the case, the court concluded, compared to the publicity in cases in which harm has been presumed, “did not measure up.” Though the publicity was comprehensive, it was “no more extensive than what usually occurs in a case such as this” and “was not likely — even in a small rural community — to so poison the well that a fair trial was not possible.” In addition, after conducting a detailed review of the individual voir dire of the jurors, the court failed to find substantial evidence of the effects of pretrial publicity. The court upheld the trial court’s rulings on the defendant’s motions.

II. METHODS FOR OBTAINING THE EFFECTS OF PRETRIAL PUBLICITY

Traditionally, the courts have had available various mechanisms available to obviate the effects of pretrial publicity on a trial: continuance; change of venue; voir dire; closing proceeding; gag orders; jury admonishments; sequestration of the jury. As critics have pointed out, some of these methods have become less effective with the advent of modern media forms.

A. Change of Venue or Continuance

Practically, as the Supreme Court has observed, the most expedient method of ensuring a fair and impartial trial in the face of pretrial publicity is to continue the case until the publicity abates or transfer it to another county not so permeated with publicity. A

24 Id.
25 Id.
26 See id.; see also Brimage v. State, 918 S.W.2d 466, 507 (Tex. Crim. App. 1996) (“heavy media coverage” of case did not violate due process where defendant failed to show any actual prejudice, defendant did not request to sequester the jury, and court instructed jurors to avoid media reports); Leahy v. Farmon, 177 F.Supp.2d 985, 1004-05 (N.D. Cal. 2001) (although publicity was “substantial,” and included 19 television reports, 31 newspaper stories, and many radio reports, level of publicity did not amount to saturation and defendant failed to show actual prejudice).
28 See Sheppard, 384 U.S. at 363, 86 S.Ct. at 1522; see also Sheppard, 384 U.S. at 362; see also Skilling v. United States, 530 U.S. 358, 378, 130 S.Ct. 2896, 2913, 177 L.Ed.2d 619 (2010) (“The Constitution’s place-of-trial prescriptions do not impede transfer of the proceeding to a different district at the defendant’s request if extraordinary local prejudice will prevent a fair trial”).
29 See Dewberry v. State, 4 S.W.3d 735, 744 (Tex. Crim. App. 1999); Brimage, 918 S.W.2d at 507.
30 See 42 George E. Dix & John M. Schmolesky, Criminal Practice and Procedure §30.4 (Texas Practice 3d ed.).
32 Ana P. Moretto, Note, Presumed Guilty: An Examination of the Media’s Prejudicial Effect on the Boston Marathon Trial, 42 New Eng. J. on Crim. & Civ. Confinement 65, 89-91 (2016) (noting that publicity surrounding Boston Marathon bombing did not decrease with time); Gary A. Hengstler, Sheppard v. Maxwell Revisited – Do the Traditional Rules Work for Nontraditional Media?, 71 J. Law & Contemp. Prosbs. 171, 172-179 (2008) (“problem” with continuance “is that, once the date is set, virtually all media will have big stories the day before the trial starts, and these stories will rehash the very same information that prompted the delay in the first place”).
33 Tex. Code Crim. Proc. arts. 29.03 and 29.08; see also Dewberry, 4 S.W.3d at 755.
jury; or that adverse publicity surrounding other charges against the defendant might prejudice the jury; or that publicity surrounding the defendant’s co-defendant might prejudice the jury; or even that publicity surrounding unrelated but similar cases might inflame the jury against the defendant. Where news reports do not mention the defendant or do not connect him to the events being reported, or the record does not establish that any of the prospective jurors were prejudiced by media reports, a trial court will not abuse its discretion in overruling a motion for change of venue as a matter of law despite his failure to object to the hearing.

If the State files contesting affidavits, then the defendant bears the “heavy” burden at the subsequent hearing to prove “the existence of such prejudice in the community that the likelihood of obtaining a fair and impartial jury is doubtful.”

supported by the defendant’s own affidavit and the affidavits of at least two “credible persons, residents of the county where the prosecution is instituted.”

A defendant’s proper motion entitles him to a change of venue as a matter of law unless the State files controverting affidavits, because without a controverting affidavit there is no issue of fact for the court to resolve. If the defendant participates in a hearing on the merits of the motion and allows the State to put on evidence during the hearing, the defendant thereby renders the issue one of fact that the court must decide.

If the State has not filed controverting affidavits, does not put on any controverting testimony at the hearing, and fails to raise a fact issue in cross-examination of the defendant’s witnesses, however, the issue is not “joined,” and the defendant is entitled to a change of venue as a matter of law despite his failure to object to the hearing.

2. Change of Venue

A trial court may grant a change of venue on the defendant’s written motion in any felony or misdemeanor case punishable by confinement if there exists in the county where the prosecution is commenced “so great a prejudice” against a defendant “that he cannot obtain a fair and impartial trial” or there is “a dangerous combination against him instigated by influential persons by reason of which he cannot expect a fair trial.” The motion must be supported by the defendant’s own affidavit and the affidavits of at least two “credible persons, residents of the county where the prosecution is instituted.”

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41 Tex. Code Crim. Proc. art. 31.03(a) (West 2006); McGuire, No. 01-14-00240-CR, 2016 WL 2747221, at * 15; Taylor, 93 S.W.3d at 495.

42 Lundstrom v. State, 742 S.W.2d 279, 281-82 (Tex. Crim. App. 1986); Taylor, 93 S.W.3d at 495.

43 Lundstrom, 742 S.W.2d at 282; Cooks v. State, 844 S.W.2d 697, 730 (Tex. Crim. App. 1992); Taylor, 93 S.W.3d at 496.

44 Taylor, 93 S.W.3d at 497; see also Adami v. State, 524 S.W.2d 693, 703 (Tex. Crim. App. 1975) (prosecution created fact issue at hearing through “vigorou" cross-examination of defendant’s witnesses).

establish that the pretrial publicity is “so pervasive and prejudicial as to create a reasonable probability that an impartial jury cannot be empaneled even with the most careful voir dire,” then due process requires a change of venue.46

Prejudice is presumed from pretrial publicity when the pretrial publicity is “prejudicial and inflammatory” and has “saturated the community” where the trial is held. 47 A presumption of prejudice does not arise, however, simply because a case has been publicized in the media.48 Extensive knowledge in the community of either the crimes or the putative criminal is not sufficient by itself to render a trial constitutionally unfair,” and thus subject to a change of venue as a matter of law.49 Rather, publicity about the case must be pervasive, prejudicial, and inflammatory. 50 When media coverage demonstrates nothing more than accurate reporting of a newsworthy occurrence, it is not in and of itself prejudicial and inflammatory. 51 Furthermore, even where coverage is prejudicial, pervasive prejudice may not be presumed simply from the content of the articles alone.52

46 See Narvaez v. State, 840 S.W.2d 415, 428 (Tex. Crim. App. 1992); see also Gonzalez v. State, 222 S.W.3d 446, 449 (Tex. Crim. App. 2007) (“To justify a change of venue based on media attention, a defendant must show that the publicity was pervasive, prejudicial, and inflammatory”); Gentry v. State, 259 S.W.3d 272, 278 (Tex. App. – Waco 2008, pet. ref’d) (accused must prove “such prejudice in the community that the likelihood of obtaining a fair and impartial jury is dubious”) (quoting Phillips v. State, 701 S.W.2d 875, 879 (Tex. Crim. App. 1995)).


48 See Buntion, 482 S.W.3d at 71; Gonzalez, 222 S.W.3d at 449 (Defendant must raise “substantial doubts” about obtaining an impartial jury”).

49 Dobbert v. Florida, 432 U.S. 282, 303, 97 S.Ct. 2290,2303, 53 L.Ed.2d 344 (1977); see also Moore v. State, 935 S.W.2d 124, 129 (Tex. Crim. App. 1996); Gonzalez, 222 S.W.3d at 449 (“Extensive knowledge of the case or defendant in the community as a result of pretrial publicity is not sufficient if there is not also some showing of prejudicial or inflammatory coverage”); Russell v. State, 146 S.W.3d 705, 710 (Tex. App. – Texarkana 2004, no pet.); Faison, 59 S.W.3d at 238; see also Skilling v. United States, 530 U.S. 358, 380, 130 S.Ct. 2896, 2912, 177 L.Ed.2d 619 (2010) (“Prominence does not necessarily produce prejudice, and juror impartiality . . . does not require ignorance”); Irvin v. Dowd, 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961) (jurors are not required to be “totally ignorant of the facts and issues involved” as “scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case”); Beets v. State, 767 S.W.2d 711, 744 (Tex. Crim. App. 1987) (“Neither party to a lawsuit is served by restricting jury service to the uninformed or uninterested”).

50 See Buntion, 482 S.W.3d at 71; Gonzalez, 222 S.W.3d at 449; Moore, 935 S.W.2d at 129; Ransom, 789 S.W.2d at 579; Phillips v. State, 701 S.W.2d 875, 879 (Tex. Crim. App. 1985); McManus v. State, 591 S.W.2d 505, 517-18 (Tex. Crim. App. 1979); Russell, 146 S.W.3d at 71-11; Faison, 59 S.W.3d at 238; Crawford v. State, 685 S.W.2d 343, 351 (Tex. App. — Amarillo 1984), aff’d, 696 S.W.2d 903 (Tex. Crim. App. 1985).

51 See Buntion, 482 S.W.3d at 71 (“news stories that are accurate and objective in their coverage are generally considered by the Court no to be prejudicial or inflammatory”); Gonzalez, 222 S.W.3d at 451; Willingham v. State, 897 S.W.2d 351, 357 (Tex. Crim. App. 1995); Faison, 59 S.W.3d at 239; see also Skilling, 530 U.S. at 382-83, 130 S.Ct. at 2916 (though news stories “were not kind” they did not contain “blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight”); Murphy v. Florida, 421 U.S. 794, 802, 95 S.Ct. 2031, 2037, 44 L.Ed.2d 589 (1975) (trial court did not err in overruling motion for change of venue where news reports appeared seven to twenty months before trial and were “largely factual in nature”); Beets, 767 S.W.2d at 744 (tabloid article did not establish “utterly corrupted” trial caused by press coverage where “story itself was factually objective once one reads past the deceptive headline”).

52 See Mayola, 623 F.2d at 998-99 (requiring “circulation figures or other evidence of the degree of community exposure to the prejudicial content of offensive news coverage” before concluding that the community was
While the courts have considered internet blogs and posted comments on media websites in addition to traditional media coverage, they have given little weight to these types of evidence; as one court has observed: “unsolicited, unreviewed, largely anonymous online comments [do] not rise to the level of saturated, prejudicial media coverage . . . . we believe that any readers of the comments would value those comments at their true worth and not as ‘news coverage’ at all.”\(^{53}\)

Though the Court of Criminal Appeals has suggested in passing that a case may arise in which prejudice may be presumed and venue must be changed as a matter of law,\(^{54}\) the court has apparently never encountered such a case, as it has never held that venue should have been changed as a matter of law on the basis of presumed prejudice. The Supreme Court has presumed prejudice in a number of cases, as have several federal courts of appeals, but only in “rare,”\(^{55}\) and “extreme” cases.\(^{56}\) Indeed, prejudice has not been presumed in such high-profile cases as:

- the trial of the Oklahoma City bomber Timothy McVeigh;\(^ {57}\)
- the trial of My Lia massacre commander Lt. William Calley;\(^ {58}\)
- the trial of Watergate conspirator H.R. Haldeman;\(^ {59}\)
- the “Helter Skelter” trial of Tate and La Bianca murderer Charles Manson;\(^ {60}\)
- the trial of Enron executive Jeffery Skilling;\(^ {61}\)
- the trial of the Boston Marathon bomber Dzhokhar Tsarnaev.\(^ {62}\)

If pretrial publicity is not so shattering that prejudice must be presumed, the trial court has discretion to grant or overrule the motion for change of venue.\(^ {63}\) That is, the trial court’s decision concerning venue will not be disturbed on appeal “so long as it was within the realm of reasonableness given the facts presented” to it.\(^ {64}\)

Some of the relevant factors a court should consider in determining whether publicity has affected the community to such a degree that the climate of

\[\text{F.2d} 1487, 1540 (11th Cir. 1985) (press “saturated” community with “overwhelming” evidence of defendant’s guilt, including facts and evidence that were not admissible at trial); United States ex rel. Bloeth v. Denno, 313 F.2d 364, 372-73 (2d Cir 1963) (publicity “was in its nature highly inflammatory, in volume great, and accessibility universal”); see also Pamplin v. Mason, 364 F.2d 1, 6-7 (5th Cir. 1966) (trial court reversibly erred in failing to hold venue hearing where there was publicity surrounding the case).

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opinion has become so inherently suspect as to warrant a change of venue are:

1. the nature of the pretrial publicity and the particular degree to which it has circulated in the community;
2. the connection of government official with the release of the publicity;
3. the length of time between the dissemination of the publicity and the trial;
4. the severity and notoriety of the offense;
5. the area from which the jury panel is to be drawn;
6. other events occurring in the community that either affect or reflect the attitude of the community or individual venire members toward the defendant; and
7. any factors likely to affect the candor and veracity of the prospective jurors on voir dire.65

A trial court is not precluded from using voir dire to help gauge the community’s attitudes and opinions concerning a defendant.66 The successful qualification of a jury panel must not be the sole criterion in determining the merits of a motion to change venue, however.67

65 Henley, 576 S.W.2d at 71-72; McGuire, No. 01-14-00240-CR, 2016 WL 2747221, at * 15; Ryser v. State, 453 S.W.3d 17, 33 (Tex. App. – Houston [1st Dist.] 2015, pet. ref’d); Russell, 146 S.W.3d at 711 (Tex. App. – Texarkana 2004, no pet.); Crawford, 685 S.W.2d at 350; see also Skilling, 561 U.S. at 398-99, 130 S.Ct. at 2925 (examining nature of publicity, length of time between dissemination and trial, severity and notoriety of offense, area panel drawn from, number of victims affected, and number of jurors excused due to publicity).

66 See Freeman, 340 S.W.3d at 724 (“The two primary means for discerning whether publicity is pervasive are a hearing on a motion to change venue and the voir dire process”); Gonzalez, 222 S.W.3d at 449 (same); see also Henley, 576 S.W.2d at 71; Bell, 938 S.W.2d at 46; Adami v. State, 524 S.W.2d 693, 703 (Tex. Crim. App. 1975); Gentry v. State, 259 S.W.2d 272, 278 (Tex. App. – Waco 2008, pet. ref’d); Russell, 146 S.W.3d at 711; Taylor v. State, 93 S.W.3d 487, 497 (Tex. App. – Texarkana 2002, pet. ref’d); Neumuller v. State, 953 S.W.2d 502, 509-10 (Tex. App. – El Paso 1997, pet. ref’d); see also Coleman, 778 F.2d at 1541 n.25; Pamplin, 364 F.2d at 6 n.9; see also Fetterly v. Paskett, 163 F.3d 1144, 1147-48 (9th Cir. 1998) (court of appeals detailed review of the voir dire establishes that the defendant did not suffer actual prejudice because of media coverage).

67 See Bell, 938 S.W.2d at 46 (explaining that voir dire might demonstrate that though it is possible to pick a jury, “there were community influences which could affect the answers on voir dire or the testimony of witnesses at trial, or that for any other reason a fair and impartial trial could not be had”); Henley, 576 S.W.2d at 71 (“Prejudice is a sinister quality. It may possess a man and he is not aware of it; or being aware of it, he may purposely conceal it, in order that he may vent his revenge”); Randle v. State, 34 Tex. Crim. R. 43, 28 S.W. 953 (1894) (“the prejudice in the county may be such that jurors will qualify themselves who are not impartial”); Russell v. State, 146 S.W.3d at 705, 711 (Tex. App. – Texarkana 2004, no pet.) (voir dire should not be the sole criterion “since conscious or subconscious juror prejudice can affect answers obtained on voir dire”); Taylor, 93 S.W.3d at 497 (same); see also Fields v. State, 627 S.W.2d 714, 719 (Tex. Crim. App. 1982); Silva v. State, 64 S.W.3d 430, 433 (Tex. App. – San Antonio 2001, no pet.).

In using voir dire to ascertain the effect of pretrial publicity, trial courts must be careful to employ procedures that will elicit more than mere “conclusory protestations of impartiality” from potential jurors.68 Where jurors have prior knowledge of the case and there is “voluminous, inflammatory pre-trial publicity,” venire members should be questioned individually outside the presence of others.69 The court, too, should solicit areas of inquiry from the parties before the start of voir dire and incorporate questions posed by the parties into voir dire as much as possible.70 Finally, and perhaps most importantly, both the judge and counsel in the case should insure that prospective jurors are not simply asked leading questions with conclusory answers but inquiries “calculated to elicit the disclosure of the existence of actual prejudice, the degree to which the jurors [have] been exposed to prejudicial publicity, and how such exposure [has] affected the jurors’ attitude towards the trial.”71

68 See Coleman, 778 F.2d at 1542-43.

69 See Skilling v. United States, 561 U.S. 358, 389, 130 S.Ct. 2896, 2919, 177 L.Ed.2d 619 (2010); Silverthorne v. United States, 400 F.2d 627, 639-40 (9th Cir. 1968); see also Irvin v. Dowd, 366 U.S. 717, 728, 81 S.Ct. 1639, 1645, 6 L.Ed.2d 751 (1961) (“No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one’s fellows is often its father”); Patton v. Yount, 467 U.S. 1025, 104 S.Ct. 2885, 2890 n. 10, 81 L.Ed.2d 847 (1984) (comparing favorably trial court’s individual voir dire to voir dire of panel together as a whole); Coleman, 778 F.2d at 1542 (criticizing trial court’s failure to conduct individual voir dire outside the presence of other potential jurors); but see United States v. Abello-Silva, 948 F.2d 1168, 1178 (10th Cir. 1991) (individual voir dire not necessary where publicity, though great, was not “voluminous”).

70 See Skilling, 561 U.S. at 389, 130 S.Ct. at 2919; Abello-Silva, 948 F.2d at 1178.

71 See Skilling, 561 U.S. at 389, 130 S.Ct. at 2919 (“The District Court did not simply take venire members who proclaimed their impartiality at their word” but “followed up with each individually to uncover concealed bias”); United States v. Angiulo, 897 F.2d 1169, 1181 (1st Cir. 1990) ("Where the percentage of the venire admits to a disqualifying prejudice, a court may properly question the remaining jurors’ avowals of impartiality"); Coleman, 778 S.W.2d at 1542.
Several Texas courts of appeals have held that a trial court’s failure to change venue in the face of harmful pretrial publicity is subject to constitutional harmless error analysis under Texas Rule of Appellate Procedure 44.2(a). In finding the error harmful, one court noted that numerous jurors were excused for cause due to the publicity. It further observed that despite the defendant’s use of all his peremptory strikes and the State’s reduction of its own strikes to empanel a juror from the venire, most of the jurors knew the defendant and had knowledge of his crimes either through the media or through conversations with members of the community who had been exposed to media accounts. Under such circumstances, the court concluded that it could not determine that the failure to change venue did not contribute to the conviction or punishment and held the error to be harmful.

In light of the fact that only change of venue, rather than conducting an evidentiary error analysis after ruling that the trial court’s reliance on voir dire to determine the merits of a motion for change of venue, rather than conducting an evidentiary hearing, was erroneous. In light of the fact that only two or three of the potential jurors even recognized the defendant or his crimes, the error was held to be harmless under Rule 44.2(a).

B. Limiting Public Access to Proceedings

Two obvious ways of limiting the harmful effect of trial publicity is to curtail the press and public’s access to proceedings or to restrict the dissemination of information by the media or the trial participants. Though disfavored as an intrusion upon the First Amendment, the Supreme Court has nevertheless suggested that a court may appropriately close hearings or issue gag orders as part of its duty to protect a defendant from prejudicial publicity. Texas courts, in interpreting Article 1.24 of the Code of Criminal Procedure, have generally been hostile to the idea of conducting closed hearings, but have recognized that in extreme circumstances there may be exceptions to the general prohibition of the practice.

1. Closing proceedings or court records
   a. Closing proceedings

   The public enjoys a First Amendment right to attend trials, while a defendant enjoys a parallel Sixth Amendment right to a public trial in all criminal prosecutions, as well as under the Texas Constitution and the Code of Criminal Procedure. The United States Supreme Court has affirmed an analogous constitutional “right of access” or “right to gather information” for the media regarding trials, though this right is no greater than the right of the public to sit, listen, watch, and report on a trial. The media’s right of access to trials extends to pretrial proceedings, including voir dire and suppression hearings, through the right is based upon common law and not the constitution.


81 See Richmond Newspapers, 448 U.S. at 576, 100 S.Ct. at 2827; In re Houston Chronicle Publ’g Co., 64 S.W.3d 103, 107 (Tex. App. — Houston [14th Dist.] 2001, orig. proceeding).

82 See Richmond Newspapers, 448 U.S. at 580, 100 S.Ct. at 2829; see also Nixon v. Warner Communications, Inc., 435 U.S. 589, 609, 98 S.Ct. 1306, 1318, 55 L.Ed.2d 570 (1978); see also Pell v. Procunier, 417 U.S. 817, 829-35, 94 S.Ct. 2800, 2807-10, 41 L.Ed.2d 495 (1974) (First Amendment does not provide press an unfettered “right of access to sources of what is regarded as newsworthy information” regardless of other concerns).

Closed proceedings in a trial are not absolutely prohibited constitutionally, but they “must be rare and only for cause shown that outweighs the value of openness.” The right to attend trials or to gather information is not absolute and may be overridden in situations where the rights of others are seriously threatened. A trial court may close proceedings, but only after making specific findings that demonstrate the “closure is essential to preserve higher values and is narrowly tailored to serve that interest.”

To overcome the presumption of openness in a proceeding, a trial court must:

1. identify an overriding or compelling interest;
2. make findings, sufficiently specific for review, that the exclusion of the public and/or media is essential to preserve higher values; and
3. consider whether alternatives to total exclusion or closure are available in order to narrowly tailor the solution to serve the identified interest or value.

Where the interest asserted is the right to a fair trial, the hearing or proceeding may be closed “only if specific findings are made demonstrating that, first, there is a substantial probability that the defendant’s right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant’s fair trial rights.” The First Amendment right of access cannot be overcome merely by a conclusory assertion that publicity might deprive the defendant of his right to a fair trial.

Publicity concerning pretrial suppression hearings poses special risks, as the whole purpose of these hearings is to screen out unreliable or illegally obtained evidence and to insure that the evidence does not become known to the jury. Though publicity concerning a suppression hearing could influence public opinion and inform potential jurors of inculpatory information that is inadmissible, the risk of prejudice does not automatically justify refusing public or press access to hearings on every motion to suppress. Other alternatives, such as identifying tainted venire persons in voir dire, must be explored by a court before resorting to closing the proceedings, even if neither party offers any alternatives. Furthermore, the hearing should be closed only for so long as is absolutely necessary to preserve the defendant’s right to a fair trial.

To determine what constitutes a substantial reason to support a finding of closure, factors such as the age of the witness, the nature of the alleged offense, and the potential for harm to the witness should be weighed.

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84 Press-Enterprise, 464 U.S. at 509, 104 S.Ct. at 823; see also Presley, 558 U.S. at 213, 130 S.Ct. at 724; Lerma v. State, 172 S.W.3d 219, 229 (Tex. App. — Corpus Christi 2005, no pet. h.); see also Globe Newspaper Co. v. Superior Ct for Norfolk Co., 457 U.S. 596, 606, 102 S.Ct. 2613, 2620, 73 L.Ed.2d 248 (1982) (“Although the right of access to criminal trials is of constitutional stature, it is not absolute . . . But the circumstances under which the press and public can be barred from a criminal trial are limited; the State’s justification in denying access must be a weighty one”).

85 See Presley-Enterprise, 478 U.S. at 9, 106 S.Ct. at 2741 (defendant’s right to fair trial); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 6-7-10, 102 S.Ct. 2613, 2620-22, 73 L.Ed.2d 248 (1982) (protection of victims of sex crimes from trauma and embarrassment, but only on a case-to-case basis); Lily v. State, 365 S.W.3d 321, 331 (Tex. Crim. App. 2012) (“The right to a public trial is not absolute and may be outweighed by other competing rights or interests, as interests in security, preventing disclosure of non-public information, or ensuring a defendant receives a fair trial”).

86 Press-Enterprise, 478 U.S. at 14, 106 S.Ct. at 2743 (quoting Press-Enterprise, 464 U.S. at 510, 104 S.Ct. at 824); see also Waller v. Georgia, 467 U.S. 39, 47, 104 S.Ct. 2210, 2216, 81 L.Ed.2d 31 (1984) (test for closing hearing under Sixth Amendment the same as that under First Amendment); see also Lerma, 172 S.W.3d at 229 (court must make “findings adequate to support the closure”).

87 See Presley, 558 U.S. at 214, 130 S.Ct. at 724 (quoting Waller, 467 U.S. at 47, 104 S.Ct. at 2216); Lily v. State, 365 S.W.3d at 331; Crapitto, 907 S.W.2d at 105; Lerma, 172 S.W.3d at 229.

88 See Gannett, 443 U.S. at 378, 99 S.Ct. at 2905.
89 See Press-Enterprise, 478 U.S. at 14-15, 106 S.Ct. at 2743; see also Lerma, 172 S.W.3d at 229.
90 See Presley, 558 U.S. at 213, 130 S.Ct. at 724; Press-Enterprise, 478 U.S. at 14, 106 S.Ct. at 2743.
91 See Presley, 558 U.S. at 214, 106 S.Ct. at 2743.
92 See Lerma, 172 S.W.3d at 229; Mosby v. State, 703 S.W.2d 714, 716 (Tex. App. — Corpus Christi 1985, no pet.); see also United States v. Farmer, 32 F.3d 369, 371 (8th Cir. 1994); Woods v. Kuhlmann, 977 F.2d 74, 77 (2d Cir. 1994); United States v. Sherlock, 962 F.2d 1349, 1357 (9th Cir 1992); Nieto v. Sullivan, 879 F.2d 743, 753 (10th Cir. 1995).
In addition to First and Sixth Amendments of the United States Constitution and Article 1, section 10 of the Texas Constitution, Texas courts are prohibited from conducting closed hearings under Article 1.24 of the Code of Criminal Procedure, which “plainly and unequivocally mandates”: “The proceedings and trials in all courts shall be public.”

The statute has been characterized by the Court of Criminal Appeals as a legislative implementation of constitutional principles; presumably, then, the applicable constitutional tests and exceptions apply to the statute, too. While several intermediate courts have implicitly recognized that a stated interest may outweigh the interests in having an open trial or proceeding, only once has a trial court’s order closing a hearing been sustained.

Article 1.24 applies not only to actual trials but to pretrial proceedings, competency hearings, and habeas corpus proceedings. Third parties have standing in a mandamus action to assert the requirements of Article 1.24.

A violation of a defendant’s Sixth Amendment right to a public trial constitutes structural error and thus does not require a showing of harm. To prevail on such a claim, a defendant must show that the trial was, in fact, closed to the public. If the defendant’s trial was closed, a reviewing court must then determine whether the closure was proper.

b. Closing the court’s records

(i) Temporarily closing or restricting access to court records

The right to a public trial includes the presumption that judicial records will be open to inspection by the public and press. As with the right to access in general, this presumption may be overcome, and a court may place reasonable time, place, and manner restrictions upon the press’s common law right of access to judicial records. A court may further refuse to allow the media to inspect documents not a matter of public record.

In a criminal case, a court may seal judicial records after trial without violating the constitution, but in doing so it must balance the public’s common law right to access against the interests favoring nondisclosure. The decision to seal a record is within the trial court’s discretion and will be reviewed under an abuse of discretion standard. Because of the specific

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98 S.W.2d at 867.
99 See 102, 856 S.W.2d 477, 478 (Tex. App. — Guillry v. State objected and record lacked “an proof of its necessity”); closing habeas hearing to the public erroneous where parties Pub. Co. v. McMaster, 598 S.W.2d at 867 (court’s order thus did not violate Article 1.24).
100 99, 630 S.W.2d at 927, 932 (Tex. App. 1982).
101 That the child testified was “sufficiently weighty to justify partial or complete exclusion of public from pre-trial hearing,” and thus did not violate Article 1.24 with Houston Chronicle Pub. Co. v. McMaster, 598 S.W.2d at 867 (court’s order closing habeas hearing to the public erroneous where parties object and record lacked “an proof of its necessity”); Guiltry v. State, 856 S.W.2d at 477, 478 (Tex. App. — Houston [1st Dist.] 1993, pet. ref’d) (court’s closing child’s competency hearing to the public violated Article 1.24 because the trial court “did not articulate a state interest that outweighed [defendant’s] interest in public scrutiny of the hearing”).
102 Shaver, 630 S.W.2d at 932-33 (applying statute to Jackson v. Denno hearing).
105 See Cameron v. State, 482 S.W.3d 576, 580 (Tex. Crim. App. 2016); Lilly, 365 S.W.3d at 331; De La Fuente, 432 S.W.3d at 427.
107 See S.E.C. v. Van Waeysbergh, 990 F.2d 845, 848 (5th Cir. 1993); Belo Broadcasting Corp. v. Clark, 654 F.2d 423, 429 (5th Cir. 1981).
109 See Nixon, 435 U.S. at 597, 98 S.Ct. at 1312; Van Waeysbergh, 990 F.2d at 848; Belo Broadcasting, 654 F.2d at 434; see also Express-News Corp. v. MacRae, 787 S.W.2d 451, 452 (Tex. App. — San Antonio 1990, orig. proceeding) (“presumption of openness may be overcome by a countervailing interest, such as a defendant’s right to a fair trial, but the reason for closure or sealing must be apparent and clearly articulated”).
wording of Article 18.01 of the Code of Criminal Procedure, which authorizes the issuance of search warrants, a trial court may not seal or close any search warrant that may have been executed in a case.111

Though the standards for sealing civil records are not directly applicable in criminal cases, criminal courts may look to the civil standards for guidance. The conditions under which civil court records may be sealed are set out in Rule 76a of the Rules of Civil Procedure.112 Subject to certain limited exceptions,113 “court records” include “all documents of any nature filed in connection with any matter before a civil court.”114 The term does not generally encompass unfiled discovery but does include discovery “not filed of record, concerning matters that have a probable adverse effect on the general public health or safety, or the administration of public office, or the operation of government.”115

Court records may be sealed only upon a showing that “a specific, serious, and substantial interest ... clearly outweighs” the presumption of openness and any probable adverse effect that the sealing will have upon public health and safety, “and no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted.”116 The court must hold an oral hearing, open to the public, and advanced notice of the hearing must have been posted at least 14 days before the hearing.117 The court’s order sealing the records must be made open to the public and must state:

- the style and cause number of the case;
- the specific reasons for finding and concluding whether the requisite showing had been made;
- the specific portions of the records that are to be sealed; and
- the time period for which the sealed portions of the record are to remain sealed.118

The party seeking to have the records sealed bears the burden of proving the necessary elements by a preponderance of the evidence.119 Discovery documents that have not been filed in a case do not constitute “court records,” unless subject to the exceptions of Rule 72a(2)(c), and thus are not subject to the strict standards of Rule 76a.120 Moreover, Article 39.14 specifically restricts the dissemination of discovery provided under the statute, providing that a defendant or his attorney “may not disclose to a third party any documents, evidence, materials, or witness statements received from the state under” the statute unless the court orders disclosure upon “good cause” after a hearing or the information has already been publically disclosed.121

Discovery not covered by Article 39.14 may be barred from disclosure as well. Rule 166b(5)(c) a court, “for good cause shown” may order the results of discovery “sealed or otherwise adequately protected ... its distribution be limited, or that its disclosure be restricted.”122 A trial court may thus issue protective orders shielding, among other things, trade secrets contained in discovery upon a mere showing of good cause.123 This lower standard for material that does not constitute “court records” comports with constitutional protections.124

111 See Houston ChroniclePubl’g Co. v. Edwards, 956 S.W.2d 813, 817 (Tex. App. — Beaumont 1997, orig. proceeding); Houston ChroniclePubl’g Co. v. Woods, 949 S.W.2d 492, 499 (Tex. App. — Beaumont 1997, orig. proceeding); Tex. Code Crim. Proc. art. 18.01(b) (“A sworn affidavit setting forth substantial facts establishing probable cause shall be filed in every instance in which a search warrant is requested. The affidavit is public information if executed, and the magistrate’s clerk shall make a copy of the affidavit available for public inspection in the clerk’s office during normal business hours”).

112 See Tex. R. Civ. P. 76a; see also Houston Chronicle Publ’g Co. v. Edwards, 956 S.W.2d at 816; Woods, 949 S.W.2d at 496 (the requirements of Rule 76a do not apply to criminal actions or the sealing of criminal records).

113 The exceptions are: (1) documents filed with a court in camera solely for the purpose of obtaining a ruling on their discoverability; (2) documents in court files to which access is otherwise restricted by law; and (3) documents in an action originally arising under the Family Code. See Tex. R. Civ. P. 76a(2)(a); see also Compaq Computer Corp. v. Lapray, 75 S.W.3d 669, 673 n.3 (Tex. App. — Beaumont 2002, no writ).

114 General Tire, Inc. v. Kepple, 970 S.W.2d 520, 523 (Tex. 1998) (quoting Tex. R. Civ. P. 76a(2)(a)); Lapray, 75 S.W.3d at 672 (quoting Tex. R. Civ. P. 76a(2)(a)).

115 Kepple, 970 S.W.2d at 523 (quoting Tex. R. Civ. P. 76a(2)(c)); Lapray, 75 S.W.3d at 672 (quoting Tex. R. Civ. P. 76a(2)(c)).

116 See Kepple, 970 S.W.2d at 523; Lapray, 75 S.W.3d at 672; see also Tex. R. Civ. P. 76a(1)(a); Tex. R. Civ. P. 76a(3); Tex. R. Civ. P. 76a(4).

117 See Kepple, 970 S.W.2d at 523; Tex. R. Civ. P. 76a(3) & (4).

118 See Kepple, 970 S.W.2d at 523; Tex. R. Civ. P. 76a(6).

119 See Lapray, 75 S.W.3d at 672; Eli Lilly & Co. v. Biffle, 868 S.W.2d 806, 808 (Tex. App. — Dallas 1993, no writ.); Tex. R. Civ. P. 76a(7).

120 See Kepple, 970 S.W.2d at 525.


122 Kepple, 970 S.W.2d at 523 (quoting Tex. R. Civ. P. 166b(5)).

123 See Kepple, 970 S.W.2d at 523.

124 See Seattle Times Co. v. Rhinehart, 467 U.S. 20, 37, 104 S.Ct. 2199, 2209, 81 L.Ed.2d 17 (1984) (protective order for information obtained only through discovery constitutional where it is issued upon showing of good cause, limited to civil discovery, and did not restrict the dissemination of information if gained from other sources).
When a party seeks a protective order to restrict the dissemination of unfiled discovery, and no party or intervenor contends that the discovery is a “court record,” a trial court need not conduct a hearing or render findings on that issue.\textsuperscript{125} If a party or intervenor contends that the discovery is a court record under Rule 76a, or the court raises the issue on its own motion, a court must make a threshold determination on the issue.\textsuperscript{126} Notice and a public hearing are required only if the documents are “court records,” and the special procedures of Rule 76a should be followed only after the court has determined that the records are indeed court records for purposes of the rule.\textsuperscript{127}

(ii) Barring access to trial exhibits

The media does not enjoy an absolute right to inspect or copy court exhibits.\textsuperscript{128} The right of the media to report what occurs in open court does not include “guarantee[ing] the press ‘access’ to — meaning the right to copy and publish — exhibits and materials displayed in open court.”\textsuperscript{129} A trial court may exercise its discretion to prohibit the media from inspecting exhibits in light of the relevant facts and circumstances of the particular case.\textsuperscript{130} As with a decision to seal judicial records in a criminal case, a court must balance the public’s common law right of access against the interests favoring non-disclosure.\textsuperscript{131}

C. Gag Orders

The Supreme Court has found that a trial court’s issuance of a gag order in fulfilling its duty to protect a defendant from prejudicial publicity is not only permissible but appropriate in some cases.\textsuperscript{132} A court must carefully weigh the constitutional issues at stake, however.\textsuperscript{133}

1. Gag orders directed to the press

A trial court may bar the media from disseminating information made public before trial or disclosed in open court, but only under circumstances in which the court could restrict the public from making similar statements.\textsuperscript{134} A court may prohibit media speech or publication about a particular pending trial only upon a showing of a clear and present danger that unrestrained coverage will cause a malfunction in the criminal justice system.\textsuperscript{135} In addition, a court must assess whether means other than prior restraint would be likely to mitigate the effects of unrestrained pretrial publicity and how effectively a restraining order would operate to prevent the threatened danger.\textsuperscript{136} Given such a high standard, a trial court practically may not directly order the media not to publish information already disclosed in open court.\textsuperscript{137}

2. Gag orders directed to the parties or their attorneys

While prior restriction of the press is discouraged, the courts have recognized that gag orders aimed at trial participants can be an effective and necessary device to temper the effect of pretrial publicity.\textsuperscript{138}

a. The federal standard

The Supreme Court has acknowledged that there is “a distinction between participants in the litigation and strangers to it” that allows for a less stringent standard for gag orders against trial participants than gag orders issued against the media.\textsuperscript{139} The Court has

\textsuperscript{125} See Kepple, 970 S.W.2d at 525.
\textsuperscript{126} See id.
\textsuperscript{127} See id.
\textsuperscript{130} Belo Broadcasting, 654 F.2d at 430 (quoting Nixon, 435 U.S. at 599, 98 S.Ct. at 1312-13); but see Dallas Morning News, 842 S.W.2d at 659 (assuming without deciding that higher standard is applicable).
\textsuperscript{131} See Nixon, 435 U.S. at 609, 98 S.Ct. at 1317.
\textsuperscript{132} See Sheppard v. Maxwell, 384 U.S. 333, 361, 86 S.Ct. 1507, 1521, 16 L.Ed.2d 600 (1966) (“More specifically, the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters”).
\textsuperscript{133} See id.
\textsuperscript{135} See Gentile, 501 U.S. at 1071, 111 S.Ct. at 2743; Benton, 980 S.W.2d at 430; see also United States v. Brown, 218 F.3d 415, 425 (5th Cir. 2000) (prior restraint proper only when “the activity restrained poses either a clear and present danger or a serious and imminent threat to a protected competing interest”).
\textsuperscript{136} See Nebraska Press Ass’n v. Stuart, 427 U.S. 539, 562, 96 S.Ct. 2791, 2804, 49 L.Ed.2d 683 (1976); see also Brown, 218 F.3d at 425 (prior restraint must be “narrowly drawn and ... the least restrictive means available”).
\textsuperscript{137} Nebraska Press Ass’n, 427 U.S. at 570, 96 S.Ct. at 2808 (under United States Constitution); Star-Telegram, Inc. v. Walker, 834 S.W.2d 54, 58 (Tex. 1992) (orig. proceeding) (under Texas Constitution).
\textsuperscript{138} See Sheppard, 384 U.S. at 361, 86 S.Ct. at 1521-22; Seattle Times Co. v. Rhinehart, 467 U.S. 20, 32 n.18, 104 S.Ct. 2199, 2207 n. 18, 81 L.Ed.2d 17 (1984); Brown, 218 F.3d at 424; In re Houston Chronicle Publ’g Co., 64 S.W.3d 103, 109-110 (Tex. App. — Houston [14th Dist.] 2001, orig. proceeding).
\textsuperscript{139} See Gentile v. State Bar of Nevada, 501 U.S. 1030, 1071-74, 111 S.Ct. 2720, 2743-45, 111 L.Ed.2d 888 (1991);
justified this lesser standard on the basis that lawyers representing the parties in a case are “key participants” in the justice system, and the courts may demand “some adherence to the precepts of that system.”140 In addition, because of ethical obligations, counsel has a fiduciary responsibility not to engage in public debate that might harm the accused or obstruct the fair administration of justice.141 Furthermore, because lawyers have special access to information through discovery and client communications, “their extrajudicial statements pose a threat to the fairness of a pending proceeding since lawyers’ statements are likely to be received as specially authoritative.”142

Parties to litigation, no less than their lawyers, “are privy to a wealth of information that, if disclosed to the public, could easily jeopardize the fair trial rights of all parties.”143 The problems a trial court attempts to avoid by placing restrictions on the lawyers before the court do not depend upon the identity of the speaker as either a lawyer or a party; the interests (and dangers) of the lawyer and his client in “trying the case in the media” are the same.144 There is therefore no reason to distinguish between the two groups in evaluating the propriety of an order restricting their public comments about the case.145

In Gentile v. State Bar of Nevada,146 a criminal defense lawyer called a press conference hours after his client had been indicted on criminal charges.147 Through a prepared statement and in a question-and-answer period afterward, he criticized the prosecution, accused a police detective in the case of being the thief, suggested that the detective was a cocaine addict, complained that the State’s witnesses were either drug addicts or drug dealers trying to “work themselves out of something,” and asserted that they were only testifying in response to police pressure.148 He candidly admitted later that his primary motive was to counteract publicity surrounding the supposed exoneration of two officers after polygraph tests.

The Nevada Bar Association filed a complaint against him as a result of his comments, contending that he had violated a Nevada disciplinary rule that prohibited a lawyer from making “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.”149 The Bar sanctioned the attorney, and the Nevada courts upheld the reprimand.

In a splintered plurality opinion, the Supreme Court determined that the “safe harbor” provision of the Nevada Bar rule, which provided that a lawyer “may state without elaboration … the general nature of the defense,” was unconstitutionally vague, as it was so imprecise that discriminatory enforcement was a “real possibility.”150 The danger of discriminatory enforcement was of particular concern, “when one of the classes most affected by the regulation is the criminal defense bar, which has the professional mission to challenge actions of the State.”151 The Court therefore overturned the lawyer’s sanction.

More significantly, a separate plurality of the court went on to address whether the bar’s rule against making statements “the lawyer knows or reasonably should know … will have a substantial likelihood of materially prejudicing an adjudicative proceeding” violated the First Amendment.152 The plurality reasoned that “the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press”153 and concluded that the “substantial likelihood of material prejudice” standard “constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and in the State’s interest in fair trials.”154

Though observing that the standard for review may be less demanding than that used in evaluating gag orders aimed at the media, since *Gentile* the Supreme Court has not mandated a constitutional minimum necessary to justify judicially imposed restrictions on an attorney’s speech. Similarly, the Court has not directly addressed what standard to apply when evaluating gag orders directed at non-attorney trial participants. Rather, a plurality of the court has merely approved of disciplinary rules prohibiting a lawyer from making extrajudicial statements that the attorney knew or should have known would “have a substantial likelihood of materially prejudicing an adjudicative proceeding,” while suggesting that lawyers representing clients in pending cases may be regulated under a less stringent standard.

The federal circuit courts have split over the issue of the appropriate minimum standard. Some require a finding of a “serious and imminent” threat of prejudicing a fair trial before a gag order may be issued, while others mandate only a determination that a participant’s comments present a “reasonable likelihood” of prejudicing a fair trial before a trial court may retrain the participant’s speech. Lacking any additional guidance from the Supreme Court, the Fifth Circuit and the Texas Supreme Court have assumed that the *Gentile* standard of “substantial likelihood of material prejudice” constitutes the appropriate federal constitutional standard for a trial court to apply.

As with gag orders directly aimed at the media, a determination that pretrial publicity poses a serious threat to the conduct of a trial is alone insufficient to support a trial court’s restriction of speech of the parties and their counsel. The court’s order must also be narrowly tailored to achieve the substantial interest in a fair trial. Thus, under the First Amendment, if a trial court determines that there is a substantial likelihood that extrajudicial commentary by trial participants will undermine a fair trial, it may impose a gag order on the participants, but only if the order is also narrowly tailored and the least restrictive means available.

**b. The state standard**

The Texas Supreme Court has additionally imposed a higher standard under the Texas Constitution for evaluating the propriety of a gag order against trial participants. In *Davenport v. Garcia*, the trial court appointed a guardian ad litem to represent more than 213 children among the numerous plaintiffs who had brought suit concerning exposure to toxic waste from a dump in Harris County. After the adult plaintiffs settled the action and withdrew their claims for reimbursement of the children’s future medical expenses, the *ad litem* withdrew. The court appointed another ad litem after a six-month delay, but over a year and a half later a new presiding judge took over the case and questioned the need for a guardian ad

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155 See *Gentile*, 501 U.S. at 1074, 111 S.Ct. at 2744 (plurality opinion of Rehnquist, C.J.).
156 See *Brown*, 218 F.3d at 427.
157 See *Brown*, 218 F.3d at 427.
158 See *Gentile*, 501 U.S. at 1074, 111 S.Ct. at 2744; see also *Benton*, 980 S.W.2d at 431 (“*Gentile* left open the possibility that the ‘substantial likelihood of material prejudice’ test may in fact give lawyers’ speech more protection than the First Amendment requires”); *Brown*, 218 F.3d at 426 (“In *Gentile*, the Supreme Court merely approved Nevada’s ‘substantial likelihood’ standard when applied to gag orders imposed on attorneys, but did not mandate it as a constitutional minimum necessary to justify a judicially-imposed restriction on attorney speech”); see also Erwin Chemerinsky, *Silence Is Not Golden: Protecting Lawyer Speech Under the First Amendment*, 47 Emory L. J. 859, 887 (1998) (arguing that *Gentile* was wrongly decided and that strict scrutiny should be the standard).
160 *Benton*, 980 S.W.2d at 431 (“Because we are loathe to act on this possibility [that the *Gentile* standard may provide more protection than constitutionally required] in the absence of a more definitive pronouncement from the Supreme Court ... we will assume that the *Gentile* standard is a constitutional minimum”); *Brown*, 218 F.3d at 427 (“We conclude that a district court may in any event impose an appropriate gag order on parties and/or their lawyers if it determines that extrajudicial commentary by those individuals would represent a ‘substantial likelihood’ of prejudicing the court’s ability to conduct a fair trial”).
162 See *Gentile*, 501 U.S. at 1076, 111 S.Ct. at 2745 (opinion of Rehnquist, C.J.); see also *Procurier v. Martinez*, 416 U.S. 396, 413, 94 S.Ct. 1800, 1811, 40 L.Ed.2d 224 (1974) (“the limitation of First Amendment Freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved”).
163 See *Brown*, 218 F.3d at 428; see also *United States v. Scarfo*, 263 F.3d 80, 93 (3d Cir. 2001).
164 See *Benton*, 980 S.W.2d at 434-35; see also *In re Benton*, 238 S.W.3d 587, 593-94 (Tex. App. – Houston [14th Dist.] 2007, orig. proceeding) (“Texas courts have consistently applied a higher standard when reviewing prior restraints of speech”). For a discussion of *Davenport* and the Texas Supreme Court’s “foray” into “new federalism” see Charles W. Rhodes, *A Proposal for Interpreting Corresponding United States and Texas Constitutional Guarantees in the New Millennium*, 51 Baylor L. Rev. 269, 277-302 (1999).
165 See *Davenport v. Garcia*, 834 S.W.2d 4, 6 (Tex. 1992) (orig. proceeding).
166 See id.
litem. After a hearing, the trial judge found that the appointment of an ad litem to oversee a medical monitoring program originally proposed by the plaintiffs was unnecessary and entered a protective order forbidding the ad litem from discussing the case either publicly or privately with anyone, including the minors involved in the case.

The Texas Supreme Court found that the gag order violated “the guarantee of free expression contained in” Article I, §8 of the Texas Constitution, which provided broader speech protections than the First Amendment of the United States Constitution. Under this broader guarantee, “it has been and remains the preference of this court to sanction a speaker after, rather than before, the speech occurs.” Prior restraint is presumptively unconstitutional under the Texas Constitution and permissible “only when essential to the avoidance of an impending danger.” Thus a gag order will be subject to a higher standard of constitutional scrutiny under the Texas Constitution than under the United States Constitution.

Under Davenport, a gag order will withstand constitutional scrutiny only where there are specific findings supported by evidence that: (1) an imminent and irreparable harm to the judicial process will deprive litigants of a just resolution of their dispute, and (2) the judicial action represents the least restrictive means to prevent that harm.

In resolving both whether the alleged harm is imminent and irreparable and whether the proposed judicial action is the least restrictive means to prevent that harm, a court must look to the injury asserted, the underlying evidence. Speculative testimony of mere fear, apprehension, or the possibilities of harm is not sufficient to establish an “imminent and irreparable” injury. Rather, there must be clearly established evidence in the record of the media coverage, as well as evidence of the potential and actual threats to the rights of the parties.

Though Davenport was originally a civil case and addressed the propriety of a gag order against counsel, the test has been applied to criminal cases and to restrictions aimed at the parties as well as their attorneys.

At least one Texas court has refused to extend the Davenport standard to media attacks upon a gag order aimed only at the trial participants. Defendant Andrea Yates was accused of having drowned her five children. The case garnered considerable media attention and despite the judge’s warnings and admonishments, the parties to the case continued to grant media interviews and comment publicly upon the upcoming trial.

The judge grew concerned about the effect the media interviews would have upon the defendant’s right to a fair trial and issued a gag order after notice to the parties and a hearing. A local newspaper appeared at the hearing and requested an opportunity to present arguments concerning the proposed gag order. The court refused, noting that the paper was neither a party to the action nor a subject of the gag order.

The paper sought a mandamus, alleging that the gag order constituted an unconstitutional restraint on its ability to gather news by effectively denying access to trial participants. The Houston Court of Appeals acknowledged that the media had standing to attack the gag order but concluded that because the order instructing trial participants not to discuss the case with the media did not violate the newspaper’s right of access to the courtroom, the order did not violate its First Amendment rights. The court specifically declined to extend the heightened test in Davenport to order unconstitutional where trial court failed to identify any specific, imminent harm and fails to articulate why any harm cannot be cured by remedial action.

167 See id.
168 See id.
170 Id. at 9.
171 Id.
172 See id. at 10.
173 See id.; see also Grisby v. Coker, 904 S.W.2d 619, 620-21 (Tex. 1995) (applying Davenport to juvenile proceedings).
174 See Ex parte Tucci, 859 S.W.2d 1, 5-6 (Tex. 1993) (orig. proceeding).
176 See id.; In re Houston Chronicle Publ’g Co., 64 S.W.3d 103, 109 (Tex. App. — Houston [14th Dist.] 2001, orig. proceeding); see also Davenport, 834 S.W.2d at 12 (gag proceedings).
179 See In re Houston Chronicle, 64 S.W.3d at 109-110. See id. at 105.
180 See id.
181 See id.
182 See id. at 108; see also Application of Dow Jones & Co. Inc., 842 F.2d 603, 609 (2d Cir. 1988) (concluding that though media had standing to contest gag order imposed upon trial participants, it could not assert the defendant’s First Amendment rights when the defendant had refused to do so).
the media where it was not directly restrained by the gag order.\(^\text{183}\)

The Court of Criminal Appeals has recently submitted the issue of whether Davenport applies to Texas criminal cases, but has yet to issue a decision.\(^\text{184}\)

D. **Voir dire**

As a number of courts have observed, a judge may evaluate the pervasiveness and effect of pretrial publicity during voir dire and assess what measures may be necessary to limit any threat to the integrity of the trial.\(^\text{185}\) Obviously, one of the means available to ensure a fair and impartial jury is to refuse to seat those venire persons who have formed a bias or prejudice in the case on the basis of pretrial publicity.\(^\text{186}\)

A juror may not be challenged for cause in a criminal case merely because he has heard news reports about the crime or the suspect.\(^\text{187}\) The Code of Criminal Procedure provides that a juror is subject to a challenge for cause only if “from hearsay or otherwise, there is established in the mind of the juror such a conclusion as to the guilt or innocence of the defendant as would influence him in his action in finding a verdict.”\(^\text{188}\) The statute specifies that in order to “ascertain whether this cause of challenge exists, the juror shall first be asked whether, in his opinion, the conclusion so established will influence his verdict.”\(^\text{189}\)

Failure to even ask this statutory question waives error, if any.\(^\text{190}\)

Article 35.16(a)(10) further specifies that if the potential juror answers in the affirmative, “he shall be discharged without further interrogation by either party or the court.”\(^\text{191}\) On the other hand, if he answers in the negative, he shall be further examined “as to how his conclusion was formed, and the extent to which it will affect his action.” If it “appears to have been formed from reading newspaper accounts, communications, statements, reports or mere rumor or hearsay, and if the juror states that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence, the court, if satisfied that he is impartial and will render such a verdict, may, in its discretion, admit him as competent to serve in such case.”\(^\text{192}\)

If the court is not satisfied that the venireperson will be impartial, it should discharge him.\(^\text{193}\)

The statute is consistent with due process. The Supreme Court has observed that the “constitutional standard of fairness requires that a defendant have a ‘panel of impartial, ‘indifferent’ jurors.’”\(^\text{194}\) Qualified jurors “need not … be totally ignorant of the facts and issues involved,” however.\(^\text{195}\) Indeed, as the court has admitted, “to hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror’s impartiality would be to establish an impossible standard.”\(^\text{196}\) It is

\(^\text{183}\) See In re Houston Chronicle, 64 S.W.3d at 109; In re Benton, 238 S.W.3d 587, 593-94 (Tex. App. – Houston [14th Dist.] 2007, orig. proceeding) (finding prior restraint did not even meet requirements of Gentile, much less Davenport); see also Dow Jones, 842 F.2d at 610 (applying the lower standard of “reasonable likelihood” to media’s complaint that gag order was unconstitutional); see also Karlene S. Dunn, Casenote, When Can an Attorney Ask: “What Were You Thinking?” – Regulation of Attorney Post-Conviction Communication with Jurors after Commission for Lawyer Discipline v. Benton, 40 S. Tex. L. Rev. 1069-1076-1085 (1999) (discussing Davenport and Gentile as “the most recent pronouncements of the high courts on the standard applicable to attorney speech before and during trial”).

\(^\text{184}\) See In re Reyna, No. WR-83,719-01, 2015 WL 4880411, at *1 (Tex. Crim. App. August 13, 2015). See Henley, 576 S.W.2d at 71; see also Coleman, 778 F.2d at 1541 n.25; Pamplin, 364 F.2d at 6 n.9.

\(^\text{185}\) See Beets v. State, 767 S.W.2d 711, 745 (Tex. Crim. App. 1988) (trial court not required to grant change of venue after voir dire where court excused those venire members who admitted that they had developed a firm opinion on guilt or innocence based upon media reports).

\(^\text{186}\) See Ladd v. State, 3 S.W.3d 547, 561 (Tex. Crim. App. 1999); Macias v. State, 733 S.W.2d 192, 193 (Tex. Crim. App. 1987); see also Skilling v. United States, 561 U.S. 358, 380, 130 S.Ct. 2896, 2914, 177 L.Ed.2d 619 (2010) (“our decisions, however, ‘cannot be made to stand for the proposition that juror exposure . . . to news accounts of the crime . . . alone presumptively deprives the defendant of due process’” quoting Murphy v. Florida, 421 U.S. 794, 798-99, 95 S.Ct. 2031, 2036, 44 L.Ed.2d (1975)); Irvin v. Dowd, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961) (“scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case”); Beets, 767 S.W.2d at 744 (“Neither party to a lawsuit is served by restricting jury service to the uninformed or uninterested”).

\(^\text{187}\) See In re Houston Chronicle, 64 S.W.3d at 109; In re Benton, 238 S.W.3d 587, 593-94 (Tex. App. – Houston [14th Dist.] 2007, orig. proceeding) (finding prior restraint did not even meet requirements of Gentile, much less Davenport); see also Dow Jones, 842 F.2d at 610 (applying the lower standard of “reasonable likelihood” to media’s complaint that gag order was unconstitutional); see also Karlene S. Dunn, Casenote, When Can an Attorney Ask: “What Were You Thinking?” – Regulation of Attorney Post-Conviction Communication with Jurors after Commission for Lawyer Discipline v. Benton, 40 S. Tex. L. Rev. 1069-1076-1085 (1999) (discussing Davenport and Gentile as “the most recent pronouncements of the high courts on the standard applicable to attorney speech before and during trial”).

\(^\text{188}\) See In re Reyna, No. WR-83,719-01, 2015 WL 4880411, at *1 (Tex. Crim. App. August 13, 2015). See Henley, 576 S.W.2d at 71; see also Coleman, 778 F.2d at 1541 n.25; Pamplin, 364 F.2d at 6 n.9.

\(^\text{189}\) See Beets v. State, 767 S.W.2d 711, 745 (Tex. Crim. App. 1988) (trial court not required to grant change of venue after voir dire where court excused those venire members who admitted that they had developed a firm opinion on guilt or innocence based upon media reports).

\(^\text{190}\) See Ladd v. State, 3 S.W.3d 547, 561 (Tex. Crim. App. 1999); Macias v. State, 733 S.W.2d 192, 193 (Tex. Crim. App. 1987); see also Skilling v. United States, 561 U.S. 358, 380, 130 S.Ct. 2896, 2914, 177 L.Ed.2d 619 (2010) (“our decisions, however, ‘cannot be made to stand for the proposition that juror exposure . . . to news accounts of the crime . . . alone presumptively deprives the defendant of due process’” quoting Murphy v. Florida, 421 U.S. 794, 798-99, 95 S.Ct. 2031, 2036, 44 L.Ed.2d (1975)); Irvin v. Dowd, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961) (“scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case”); Beets, 767 S.W.2d at 744 (“Neither party to a lawsuit is served by restricting jury service to the uninformed or uninterested”).

\(^\text{191}\) Tex. Code Crim. Proc. art. 35.16(a)(10); see also Curry v. State, 910 S.W.2d 490, 493 (Tex. Crim. App. 1995); Ladd, 3 S.W.3d at 561.


\(^\text{194}\) Tex. Code Crim. Proc. art. 35.16(a)(10)

\(^\text{195}\) Tex. Code Crim. Proc. art. 35.16(a)(10)

\(^\text{196}\) Tex. Code Crim. Proc. art. 35.16(a)(10)
sufficient under due process “if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.”\textsuperscript{197}

Given the trial court’s wide discretion, appellate courts have consistently upheld a trial court’s overruling of a challenge for cause under Article 35.16(a)(1) where the prospective juror has declared that he can set aside his opinion formed from pretrial publicity and decide the case on the evidence adduced.\textsuperscript{198} Though more rarely, the courts have also upheld a trial court’s decision to grant a challenge for cause on the basis that a venire member has been unduly influenced by media coverage.\textsuperscript{199}

E. Jury Admonishments

Instructing the jury to avoid media accounts is an obvious and time-honored method of limiting the effect of publicity, though it may be limited in its effectiveness depending upon how pervasive the publicity has been.\textsuperscript{200}

Texas courts have long maintained that the preferred method for dealing with the problem of juror exposure to publicity in criminal trials is to “instruct the venire and juror panels not to read about or listen to anything concerning the trial.”\textsuperscript{201} Besides a court’s inherent power to control the fair and orderly conduct of trial,\textsuperscript{202} authority for instructions to jurors not to expose themselves to media accounts of a trial stems from Article 35.23 of the Code of Criminal Procedure.\textsuperscript{203} The statute requires that in any case in which the jury is allowed to separate, the court “shall first give the jurors proper instruction with regard to their conduct as jurors when so separated,” and has been interpreted to authorize the trial court to instruct venire panels as well as the final jury panel to avoid exposure to media accounts of the trial.\textsuperscript{204} A court is not required under Article 35.23 to give the instruction each time the jury separates.\textsuperscript{205}

F. Sequestration

While largely ineffective for limiting the effect of pretrial publicity, sequestration has long been held to be an effective deterrent to the negative effects of publicity during trial.\textsuperscript{206}

The Code of Criminal Procedure permits a trial court at its discretion to allow the jury to separate until the court has given its charge to the jury.\textsuperscript{207} Without any showing that jurors failed to follow the court’s instruction to avoid reading the newspapers or listening to media reports about the case, a trial court does not abuse its discretion in declining to sequester a jury before submission of the charge.\textsuperscript{208}

Once the charge has been submitted to the jury for deliberation, however, the court must sequester the jury if a party requests it or if the court deems it necessary.\textsuperscript{209} Error in permitting jurors to separate over objection is subject to harmless error analysis.\textsuperscript{210}

\textsuperscript{197} Murphy, 421 U.S. at 800, 95 S.Ct. at 2036 (quoting Irvin, 366 U.S. at 723, 81 S.Ct. at 1642).


\textsuperscript{199} See Mowbray v. State, 788 S.W.2d 658, 666 (Tex. App. — Corpus Christi 1990, pet. ref’d) (trial court properly sustained challenge to venire member who stated that she had heard about the case in the newspaper, had discussed it with her friends, and had concluded that the defendant was not guilty, and that the idea might stay in her mind).

\textsuperscript{200} 207 Tex. Code Crim. Proc. art. 35.23 (“When jurors have been sworn in a felony case, the court may, at its discretion, permit the jurors to separate until the court has given its charge to the jury”); see also Nethery v. State, 692 S.W.2d 686, 712 (Tex. Crim. App. 1985) (“Whether to grant a motion to sequester the jury is a matter within the discretion of the trial court”).

III. TRIAL PUBLICITY & THE TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

As the Supreme Court observed in Sheppard, avoiding the dangers of media coverage is not simply of constitutional concern. There is an ethical element to preventing prejudicial publicity as well: “Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation [by the courts], but is highly censurable and worthy of disciplinary measures.”

A. The State Bar Rules

1. Rule 3.07(a)

Rule 3.07(a) of the Texas Disciplinary Rules of Professional Conduct provides:

In the course of representing a client, 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 adjudicatory proceeding. A lawyer shall not counsel or assist another person to make such a statement.

Under the rule, an attorney violates his ethical duty if he makes “extrajudicial statements” that he might expect the media to disseminate and that he knows or reasonably should know will have a “substantial likelihood of materially prejudicing an adjudicatory proceeding.” By the very wording of Rule 3.07(a), the prohibition does not apply to private statements that the attorney could not have known would become public.

Additionally, the rule appears to apply only to statements made “in the course of representing a client,” suggesting that it governs only a lawyer’s public comments about cases in which he is involved. It therefore may not apply to the speech of lawyers who are not involved in the litigation. Furthermore, the Texas Supreme Court has expressed some reservations as to whether the standard of “substantial likelihood of material prejudice” is constitutionally sound under such circumstances.

As comment 1 to Rule 3.07 explains, the rule is premised on the theory that “preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party to trial.” Without such limits, the drafters speculate, “the results would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence.”

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210 See Casias, 36 S.W.3d at 900-01 (error in permitting juror, a diabetic, to go to her car to retrieve medication harmless where juror was accompanied by deputy sheriff, she testified that she had no discussion about the case with anyone, and remaining jurors followed court’s instruction not to deliberate until juror returned); Jackson, 931 S.W.2d at 47 (error in permitting juror to go to the hospital for medical attention harmless where juror was gone only for an hour, she testified that she did not discuss the case with anyone, and remaining jurors did not deliberate until juror’s return).

211 See Sheppard, 384 U.S. at 363, 86 S.Ct. at 1522.

attempts to balance competing rights: a defendant’s right to due process against an attorney’s First Amendment rights.\textsuperscript{218}

Rule 3.07 does not specifically define the term “materially prejudicing.” “Material” as used in Rule 3.03(a)(1) (which prohibits an attorney from making false statements of “material fact”) has been interpreted to encompass “matters represented to a tribunal” that the trier of fact “would attach importance to and would be induced to act on in making a ruling.”\textsuperscript{220} A representation need not be “outcome determinative” in order to be “material” under the rule.\textsuperscript{221} By analogy, an extrajudicial statement has the potential to materially prejudice a proceeding if it concerns matters that potential jurors “would attach importance to” and upon which they might act during deliberations.\textsuperscript{222} The statement is not required to be of such force that it will control or determine the result in the case.\textsuperscript{223}

Subsection (b) of Rule 3.07 lists a number of statements that ordinarily will have a substantial likelihood of prejudicing a proceeding “in the absence of exceptional extenuating circumstances.”\textsuperscript{224} The list clearly reflects the desire to protect “forensic decorum and the exclusionary rules of evidence.” For example, subsection (b)(1) declares:

A lawyer ordinarily will violate paragraph (a), and the likelihood of a violation increases if the adjudication is ongoing or imminent, by making an extrajudicial statement of the type referred to in that paragraph when the statement refers to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness; or the expected testimony of a party or witness.

One of the five types of statements specifically prohibited under the rule applies expressly to criminal cases. Subsection (b)(4) bars an attorney from expressing “any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration.”

The remaining types of statements deal with situations and evidence that may arise in either a civil or criminal trial but may more often be violated in a criminal setting.\textsuperscript{225} Subsection (b)(1) restricts counsel from commenting on the “character, reputation or criminal record” of a party, suspect in a criminal investigation, or witness, as well as the anticipated testimony either might present. Subsection (b)(2) prohibits a lawyer from commenting in a criminal case on the “possibility of a plea of guilty to the offense; 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.” Subsection (b)(3) prohibits the disclosure of “the performance, refusal to perform, or results of any examination or test; the refusal or failure of a person to allow or submit to an examination or test; or the identity or nature of physical evidence expected to be presented.” The last subsection, (b)(5) warns attorneys not to convey “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.”

Subsection (c) of the Rule provides a “safe harbor” for an attorney, listing a number of statements that can be made without fear of discipline “in the absence of exceptional aggravating factors.”\textsuperscript{226} Many of these “safe harbor” provisions are obvious and commonsense. For example, subsections (c)(2) and (3) provide:

A lawyer ordinarily will not violate paragraph (a) by making an extrajudicial statement of the type referred to in that paragraph when the lawyer merely states:

(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, claim or defense involved.

Similarly, subsection (c)(1) observes that a lawyer will not be subject to discipline for making statements regarding “the general nature of the claim or


\textsuperscript{220} \textit{Cohn v. Comm’n for Lawyer Discipline}, 979 S.W.2d 694, 698 (Tex. App. — Houston [14th Dist.] 1998, no writ).

\textsuperscript{221} See \textit{Cohn}, 979 S.W.2d at 698.

\textsuperscript{222} \textit{Cf. Cohn}, 979 S.W.2d at 698.

\textsuperscript{223} \textit{Cf. Cohn}, 979 S.W.2d at 698.

\textsuperscript{224} Tex. Disciplinary R. Prof’l Conduct 3.07 cmt. 4.

\textsuperscript{225} See Fred C. Zacharias, \textit{The Professional Discipline of Prosecutors}, 79 N. C. L. Rev. 721, 741-43 (2001) (classifying prosecutor’s violation of pretrial publicity rules as one of “most likely candidates for discipline” by grievance panels).

\textsuperscript{226} Tex. Disciplinary R. Prof’l Conduct 3.07(c) cmt. 4.
defense.”227 Subsection (c)(4) permits counsel to reveal the “identity of persons involved in the matter,” except when prohibited by law, while subsection (c)(5) allows an attorney to explain “the scheduling or result of any step in litigation.”

Subsections (c)(6) and (7) are more vague and provide little real guidance as to what may be permissible under the rule. Subsection (6) states that a lawyer will not ordinarily be subject to discipline if she “merely states … a request for assistance in obtaining evidence, and information necessary thereto.” The rule, perhaps necessarily, fails to outline what information may be necessary to reveal to seek assistance in obtaining evidence.

Subsection (c)(7) addresses threats to the public health and welfare and permits counsel to make warnings “of danger concerning the behavior of a person involved,” but only when “there is a reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest.” The rule does not expressly require that substantial harm be imminent and bears a relatively low degree of certainty: a mere “reason to believe.”

Subsection (c)(8) is the only “safe harbor” provision that addresses criminal cases directly. The section specifically outlines four types of information that may be properly conveyed by counsel about a criminal case:

1. the identity, residence, occupation and family status of the accused;
2. if the accused has not been apprehended, information necessary to aid in his apprehension;
3. the fact, time and place of the accused’s arrest; and
4. the identity of the investigating and arresting officers or agencies and the length of the investigation.228

The comments to the Rule 3.07, however, warn that “neither paragraph (b) or (c) is an exhaustive listing,” so that a lawyer may violate the rule even if the statement does not expressly fit into any particular category.229

The interplay of subsections (a), (b), and (c) can be seen in Wilson v. State.230 There, a gambling raid in which 18 persons were arrested constituted a “significant event in Hale County” and was duly reported in the media.231 As part of the news coverage, the district attorney’s office and the sheriff’s office revealed that a number of the persons arrested had prior criminal records and were the subject of multiple arrest warrants. However, neither entity discussed the specific persons arrested nor were the details of the accuseds’ criminal records revealed.

On appeal, the defendant complained that the State had violated Rules 3.07(a) and 3.09(e). The court of appeals rejected the contention, noting that the “complained-of comments were general comments not intended to prejudice appellant’s rights to a fair trial.”232 Without specifically citing Rule 3.07(c), the court concluded: “We do not read Rules 3.07 and 3.09 as prohibiting district attorneys or police officers from discussing background events surrounding arrests or the commission of crimes.”233 The court additionally opined that the proper remedy for the defendant’s real complaint—that the publicity surrounding the arrests had prejudiced his right to a fair trial—was simply a change of venue.234

227 Wording very similar to that in Rule 3.07(c)(1) has been found to be void for vagueness by the United States Supreme Court. Gentile v. State Bar of Nevada, 501 U.S. 1030, 1048-51, 111 S.Ct. 2720, 2731-32, 115 L.Ed.2d 888 (1991) (opinion of Kennedy, J.) (finding the “safe harbor” provision of Nev. R. Prof. Conduct. 177(1), which allowed attorney’s to “state without elaboration … the general nature of the defense,” to be unconstitutionally vague). Furthermore, though changes have been made to the wording of Rule 3.07 as a result of the decision in Gentile, it is possible that other portions of the rule will be found unconstitutional, since language similar to that used in Rule 3.07 has been held “fatally vague” in Rule 3.06(d) by the Texas Supreme Court. See Comm’n for Lawyer Discipline v. Benton, 980 S.W.2d 425, 440-41 (Tex. 1998) (finding portions of Rule 3.06(d) unconstitutional as overly vague); Robert P. Schwerk & John F. Sutton, Commentary on the Texas Disciplinary Rules of Professional Conduct, in Tex. Young Lawyer’s Assoc., Texas Lawyer’s Professional Ethics 1-1, 1-81 (3rd ed. 1997) (discussing changes to the rule as a result of the Supreme Court’s decision in Gentile v. State Bar of Nevada); Note, Speaking Out: Lawyers and Their Right to Free Speech, 18 Rev. Litig. 671, 677-680 (1999) (discussing other possible vagueness challenges to Rule 3.06(d) that may also be applicable to Rule 3.07); Casenote, When Can an Attorney Ask: “What Were You Thinking?” – Regulation of Attorney Post-Trial Communication with jurors after Commission for Lawyer Discipline v. Benton, 40 S. Tex. L. Rev. 1069, 1100-1112 (1999) (discussing possible vagueness challenges to Rule 3.06(d) that may be equally applicable to Rule 3.07).

229 Tex. Disciplinary R. Prof’l Conduct 3.07(1).
231 Wilson, 854 S.W.2d at 275.
232 See id.
233 Id.; see also Tex. Disciplinary R. Prof’l Conduct 3.07(c)(2) & (8)(iii) (attorney may make extrajudicial statement stating “the information contained in a public record” and “in a criminal case … the fact, time, and place of arrest”).
234 See Wilson, 854 S.W.2d at 275.
The comments to Rule 3.07 caution that though the rule represents an attempt to strike a balance between the competing interests of a fair trial and the rights of free expression, the obligations imposed on a lawyer by the rule “are subordinate to” any rights under the First Amendment. The scope of the rule is thus limited to regulating a lawyer’s exercise of free speech only insofar as any statement might demonstrate either his “inability to represent clients competently and honestly” or “conduct which interferes with the processes of the administration of justice,” such as bribery of jurors, subordination of perjury, misrepresentations to a court, the tainting of a jury panel, or any other conduct that undermines the legitimacy of the judicial processes.

In Polk v. State Bar of Texas, for example, an attorney was a defendant in a DWI case. The lawyer was subsequently jailed and his bond revoked after he failed to appear for trial on the charge. Upon release, he issued a statement to the media, accusing the court and the district attorney of colluding to have him jailed after having agreed to reset the trial date, and asserting that the revocation of his bond represented “one more awkward attempt by a dishonest and unethical district attorney and a perverse judge to assure me an unfair trial.”

The State Bar reprimanded the attorney for issuing the statement, and the reprimand was upheld on appeal in state court. Before publication of the reprimand, however, the attorney sought an injunction in federal court on the grounds that issuance of the reprimand would violate the First Amendment. The United States District Court agreed, holding that the critical statements issued by the attorney “were remarks in response to the manner in which he was treated as a citizen and not as an attorney.” Because there had been no showing that the attorney’s conduct was “probative of any inability to represent clients or that this statement would interfere with the processes of the administration of justice,” the state had “no more interest to punish Polk for his conduct as a private citizen than it does to punish a mechanic, business man or other non-lawyer for the same conduct.”

There was some question, when Rule 3.07 first became effective, as to whether the level of threatened harm employed by the rule—a “substantial likelihood of material prejudice”—was constitutionally sufficient to justify curtailing a lawyer’s First Amendment rights. But the standard of “substantial likelihood of material prejudice,” though less demanding than the standard of “clear and present danger” used to evaluate whether a court may control media coverage of a trial, nevertheless has been found to pass constitutional muster. Furthermore, as the Texas Supreme Court has recently observed, because the United States Supreme Court has not adopted this standard as “defining the outer limit on the restrictions of lawyer’s speech,” the standard “may in fact give lawyers’ speech more protection than the First Amendment requires.”

Obviously, whether a statement will have a substantial likelihood of materially prejudicing an adjudicatory hearing will depend upon the circumstances surrounding the statement. Statements made immediately before or during a trial are more likely to affect the proceedings than statements made well in advance of trial. Similarly, other

238 See id.
239 Id.
240 See id. at 787.
241 See id. at 787-88.
242 Id. at 788.
circumstances to be considered are the extent to which the information has been previously circulated; the nature of the statement; the status of the speaker; and the nature of the proceeding.

Often, one additional circumstance that must be taken into account is the opposing party’s breach of the rule. According to the comments to the rule, a lawyer may make statements that ordinarily might violate Rule 3.07 if the statements constitute a response “reasonably calculated to counter the unfair prejudicial effect of another public statement.” This rule appears to be a corollary to the rule in closing argument that permits counsel to argue outside the record in response to opposing counsel’s argument outside the record. Presumably, the scope of this exception to Rule 3.07 is as narrow as the exception in closing argument: Counsel’s response may go no further than the scope of the invitation itself—that is, an attorney may not use the other party’s violation of the rule as carte blanche for his own wholesale violations.

In addition to not making prejudicial statements himself, a lawyer is prohibited from “counseling or assisting” a non-lawyer, such as his client, from making statements that the lawyer could not. The rule does not appear to impose an affirmative obligation on lawyers to discourage impermissible statements by others.

2. Rule 3.09(e)

A prosecutor bears a further “special responsibility” under Rule 3.09(e) to “exercise reasonable care to prevent persons employed or controlled by the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.07.” Reading Rules 3.09(e) and 3.07 together, as the rules indicate one must, a prosecutor violates his ethical duties under the Disciplinary Rules if he “counsels or assists” a non-lawyer to refer to matters that he knows or reasonably should know will have a substantial likelihood of materially prejudicing an adjudicatory proceeding, or if he fails to exercise reasonable care in keeping those “employed or controlled” by him from making such public statements.

Rule 3.09(e), unlike Rule 3.07(a), provides that a prosecutor should “exercise reasonable care to prevent persons employed or controlled by the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.07.” Rule 3.09(e), in contrast to Rule 3.07(a), places an affirmative duty on prosecutors to ensure that persons under their control do not make statements that might prejudice a trial.

Rule 3.09(e), however, does not require prosecutors to take measures to prevent “investigators, law enforcement personnel or other persons assisting or associated with the prosecutor” from making statements prohibited under Rule 3.07. These persons are not employed by or “under the control” of the prosecutor, and thus State’s counsel may not be subject to discipline for their remarks.

comments to press, made during trial was “critical”; Henslee v. United States, 246 F.2d 190, 192-93 (5th Cir. 1957) ("motion" in parallel civil case filed on day criminal trial began, setting out "prejudicial" information regarding defendant); United States v. Bingham, 769 F. Supp. 1039, 1044-45 (N.D. Ill. 1991) (statements made by defense counsel on eve of trial) with Stroble v. California, 343 U.S. 181, 195, 72 S.Ct. 872 (1952) (no due process nature of the statement; the status of the speaker; 3.07 if the statements constitute a response "reasonably calculated to counter the unfair prejudicial effect of another public statement.") See also Skilling v. United States, 561 U.S. 358, 383, 130 S.Ct. 2896, 2915, 177 L.Ed.2d 619 (2010) (citing time lapse between publicity and trial as a factor in determining whether harm must be presumed); but see Gentile, 501 U.S. at 1079, 111 S.Ct. at 2747(1991) (Rehnquist, C.J., dissenting) (statements made early in case "were timed to have maximum impact, when public interest in the case was at its height immediately after [the defendant] was indicted").

249 See Hirschkop v. Snead, 594 F.2d 356, 367 (4th Cir. 1979) (posing a hypothetical in which prejudicial information had been released earlier, but cautioning that finding examples is "not easy").


251 See Gentile, 501 U.S. at 1055, 111 S.Ct. at 2734-35 (Kennedy, J., dissenting) (suggesting that statement by defense counsel less likely to prejudice a trial).

252 See Hirschkop v. Snead, 594 F.2d at 373 (free speech should not be as restricted in civil as criminal case); Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 257 (7th Cir. 1975) (less danger of statements prejudicing a case where trial to the bench); Shaddid v. Jackson, 521 F.Supp. 85, 87 (E.D. Tex. 1981) (civil trial not subject to strict restraints upon attorneys’ free speech).

253 Tex. Disciplinary R. Prof’l Conduct 3.07 cmt. 3; see also Gentile, 501 U.S. at 1042-43, 1051; see also Margaret Tarkington, Lost in the Compromise: Free Speech, Criminal Justice, and Attorney Pretrial Publicity, 66 Fla. L. Rev. 1873, 1878-1895 (2014) (suggesting stricter rules for prosecutors’ pre-trial statements, but acknowledging right to respond).


255 See, e.g., id. at 117.


258 Comments from employees may warrant a grant of a new trial, however. See United States v. Coast of Maine Lobster
comments to Rule 3.09 nevertheless encourage prosecutors to “make reasonable efforts to discourage statements from” such persons.

B. The Consequences of a Violation of the State Bar Rules

As with any violation of the State Bar rules, violation of Rule 3.07 or 3.09 may result in sanctions against the offending attorney as severe as disbarment or as mild as a private reprimand, as well as payment of attorneys’ fees and all direct expenses associated with the disciplinary proceeding.259

However, because the Disciplinary Rules do not afford a criminal defendant any affirmative rights, the mere violation of a Disciplinary Rule, without more, will not entitle a defendant to affirmative relief from conviction.260 Violations of ethical rules alone are dealt with by the administrative process specifically established to deal with such conduct and will not entitle a defendant to a reversal of his conviction absent a showing of prejudice.261

On the other hand, if a defendant can establish that an alleged disciplinary rule violation affected his substantial rights or deprived him of a fair trial, he will be entitled to a reversal of his conviction and a new trial.262 This is substantially the same burden he would bear in proving a constitutional violation under Sheppard and similar cases.263

C. Other Applicable Rules

The balance between the First Amendment and the right to a fair trial is approached in a slightly different fashion in Article 2.03(b) of the Code of Criminal Procedure. The statute provides:

It is the duty of the trial court, the attorney representing the accused, the attorney representing the state and all peace officers to so conduct themselves as to insure a fair trial for both the state and the defendant, not to impair the presumption of innocence, and at the same time afford the public the benefits of a free press.

The Code, like the Disciplinary Rules, places importance upon a “fair trial,” and implicitly cautions that a defendant’s rights should not be impaired by trial publicity.264

But the statute, unlike the State Bar Rules, explicitly acknowledges the right of the public to be informed about ongoing criminal proceedings and suggests that counsel should take positive steps to accommodate the “public’s right to know.” Rule 3.07 on the whole appears to discourage trial publicity as an impediment to other ethical duties that counsel bears. In contrast, Article 2.03(b) frames trial publicity as an important “duty” that counsel must balance against the other responsibilities with which he has been entrusted. Prosecutors and defense counsel would be wise, both ethically and practically, to treat trial publicity as the latter.

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261 House, 947 S.W.2d at 253; Brown v. State, 921 S.W.2d 227, 230 (Tex. Crim. App. 1995); Armstrong v. State, 897 S.W.2d 361, 366 n.5 (Tex. Crim. App. 1995); Pannell, 666 S.W.2d at 98; Wilson, 854 S.W.2d at 275-76; Randell v. State, 770 S.W.2d 644, 647 (Tex. App. — Amarillo 1989, pet. ref’d); see also Charles W. Peckham & Melissa Barloco, Lawyers and the Media in High Profile Cases: The Press Calls for an Interview, Do I Say “No Comment”? 36-Dec Hous. Lawyer 18, 19-20 (1998) (liability for defamatory statements made outside the courtroom even when the comments have been related to a case, and thus arguably privileged under the judicial privilege).

262 House, 947 S.W.2d at 253; Brown v. State, 921 S.W.2d at 230.

263 See Brimage, 918 S.W.2d at 507.

264 See Tex. Code Crim. Proc. art. 2.03(b).