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Free Press v. Fair Trial: Insulation Against Injustice

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zens; and culminating in the adoption of those Standards judged appropriate for the needs of that state.

So I urge you to become thoroughly familiar with the ABA Standards. Find out about the progress of implementation in your own state.[5] Take advantage of the educational materials on the Standards available from the Section of Criminal Law.[6] And, last, I urge you to consider joining the Section and becoming a partner in our nationwide implementation effort.

FREE PRESS v. FAIR TRIAL: INSULATION AGAINST INJUSTICE

In the current era of mass media and wide, rapid dissemination of news, the possibility of prejudice to the criminal process has become particularly acute. It is becoming increasingly difficult to find an impartial jury and to conduct a trial without undue publicity. An ever increasing number of verdicts have been set aside and changes of venue granted because the vote of one or more jurors was influenced by exposure to extrajudicial communication.[1]

> "[It is the goal of our legal system] that each party shall have his case, criminal or civil, adjudicated by an impartial tribunal. The attainment of this goal may be defeated by dissemination of news or comments which tend to influence judge or jury. Such news or comments may prevent

5. For more information on the ABA Standards Implementation program, contact Criminal Law Section Staff Director H. Lynn Edwards, ABA Section of Criminal Law, Room 401, 1705 DeSales Street, N.W., Washington, D.C. 20036, telephone (202) 872-8060.

6. Educational materials available on a complimentary basis from the Section Staff Office (address above) include the following: May, 1972 issue of *Judicature*, entirely devoted to discussion of ABA Standards and Implementation; "How To Do It" implementation brochure, outlining steps a state must take to implement STANDARDS; article on "ABA Standards for Criminal Justice: Prescription for an Ailing System," Justice Tom C. Clark, from *Notre Dame Lawyer*, Vol. 47, No. 3; article on "ABA Standards for Criminal Justice," Justice William H. Erickson [former Section Chairman], reprinted from *Criminal Defense Techniques* (Cipes, ed. Matthew Bender, 1972); Annual Report of the Section Chairman, 1971-72, including status report on implementation as of date of report; "Proposed Revision of Florida Procedure Rules," reprinted by Section; and Section brochure, containing membership application and order blank for ABA Standards.

1. Johnson v. Beto, 337 F. Supp. 1371 (S.D. Tex. 1972); Frazier v. Superior Ct., 5 Cal. 3d 287, 486 P.2d 694, 95 Cal. Rptr. 798 (1971); Oliver v. State, 250 So.2d 888 (Fla. 1971); State v. Mejia, 250 La. 518, 197 So.2d 73 (1967); Pulliam v. State, 491 P.2d 353 (Okla. Crim. 1971).

> prospective jurors from being impartial at the outset of the trial and may also interfere with the obligation of jurors to base their verdict solely on the evidence admitted in the trial."[2]

The courts and the legal profession have gone to great lengths in order to preserve public confidence in the judicial system. Jurors free from bias and prejudice are sought; once impaneled, they are reminded that they must decide the case solely upon the evidence presented and the arguments heard in court. That evidence is screened by the judge to make certain that nothing unduly influences the jury in deciding the guilt or innocence of the defendant. Further, so that the criminal process may proceed quietly and without "fan-fare," it is necessary that the utmost precautions be taken to keep all extraneous influences from affecting the criminal proceeding.[3]

Interest in the "fair trial-free press" controversy has been emphasized in the last decade by Congressional hearings[4] as well as by numerous books[5] and reports.[6] Further, a number of cases have been decided by the United States Supreme Court dealing with various aspects of the conflict.[7]

Freedom of speech and press are guaranteed by the first amendment;[8] the right to a fair trial is established in the sixth

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2. Louisiana State Bar Ass'n, CODE OF PROFESSIONAL RESPONSIBILITY, CANON No. 7, EC-33. (Effective July 1, 1970).

3. S. ZAGRI, FREE PRESS, FAIR TRIAL 4 (1966).

4. *Hearings on S. 290 Before the Subcomm. on Const'l Rights and Subcomm. on Improvements in the Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. (1966).

5. A. FRIENDLY, R. GOLDFARB, CRIME AND PUBLICITY (1967); D. GILLMOR, FREE PRESS AND FAIR TRIAL (1966); W. HACHTEN, THE SUPREME COURT ON FREEDOM OF THE PRESS (1968); G. HAY, AN ESSAY ON THE LIBERTY OF THE PRESS (1970); F. SIEBERT, W. WILCOX, G. HOUGH III, FREE PRESS AND FAIR TRIAL (1970); S. ZAGRI, FREE PRESS, FAIR TRIAL (1966).

6. *E.g.*, the *Reardon Report*, with its suggested standards was adopted by the American Bar Association's House of Delegates in 1968, cited as ABA COMM. ON FAIR TRIAL AND FREE PRESS, THE RIGHTS OF FAIR TRIAL AND FREE PRESS, AN INFORMATION MANUAL FOR THE BAR, NEWS MEDIA, LAW ENFORCEMENT OFFICIALS AND COURTS (1969) [hereinafter cited as *Reardon Report*].

7. Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965); Rideau v. Louisiana, 373 U.S. 723 (1963); Irvin v. Dowd, 366 U.S. 717 (1961); Janko v. United States, 366 U.S. 716 (1961); Marshall v. United States, 360 U.S. 310 (1959); Bridges v. California, 314 U.S. 252 (1941).

8. U.S. CONST. amend I: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

amendment.[9] It is because of the considered equality of these two rights[10] that the American Bar Association (ABA) minimum standards of criminal justice for free press-fair trial are of a voluntary nature. These standards are divided into essentially four areas of recommendation concerning: 1) the conduct of attorneys; 2) the conduct of law enforcement officers, judges, and judicial employees; 3) the conduct of judicial proceedings, and 4) the exercise of the court's contempt power in situations of potentially prejudicial publicity.[11] It is the goal of the drafters of the standards that they serve as a guide for lawyers, law enforcement officers and the news media in determining the types of information which should be released promptly as well as information which the courts have held to be potentially prejudicial. The desired result is the creation of self-imposed voluntary restraints by the news media, and law enforcement agencies in particular, in those areas considered to be the potentially prejudicial aspects of crime news coverage. The legal profession has established controls and guidelines by means of its Code of Professional Responsibility and applicable disciplinary rules.[12]

Assuring that the guilt or innocence of each accused is determined only by the evidence adduced in court is a responsibility limited not just to police agencies and courts, lawyers, jurors and witnesses; it is also a responsibility of the news media as they disseminate information to the public.[13] The United States Supreme Court in *Sheppard v. Maxwell*[14] aptly stated the news media role:

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9. *Id.* amend VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." Interpreted in a strict sense, this language could be used as the authority for imposing strict rules governing release of information and access to courtroom proceedings over changes of venue where otherwise an impartial trial could not be held in ". . . the district wherein the crime shall have been committed." *Id.*

10. Bridges v. California, 314 U.S. 252, 260 (1941): "[F]ree speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them."

11. *Reardon Report* appendix A at ii.

12. *E.g.*, Louisiana State Bar Ass'n, CODE OF PROFESSIONAL RESPONSIBILITY, CANON No. 7, EC-33, DR 7-107 (Effective July, 1970) (covers sanctions against trial publicity).

13. *Reardon Report* 7.

14. 384 U.S. 333 (1966).

> "A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism. This Court has, therefore been unwilling to place any direct limitations on the freedom traditionally exercised by the news media for '[w]hat transpires in the court room is public property.' The 'unqualified prohibitions laid down by the framers were intended to give to liberty of the press . . . the broadest scope that could be countenanced in an orderly society.'" [Citation omitted.][15]

With the current recognition of the need to find an acceptable accommodation of the basic rights to a free press and a fair trial, state bar and media organizations have formed panels of lawyers and journalists in order to consider their respective responsibilities.[16] Louisiana was one of the first sixteen states[17] to adopt a voluntary guide to news media and bar relations on fair trial-free press principles.[18] The guide was adopted to pro-

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15. *Id.* at 350.
16. *Reardon Report* 1.
17. *Id.* appendix D at 22.
18. The following "Guide to News Media and Bar Relations" was adopted by both the Louisiana Bar and the Board of Directors of the Louisiana Press Association, at Bossier City, Louisiana in April, 1964:

A GUIDE TO NEWS MEDIA AND BAR RELATIONS

Preface

It should be noted that the Statement of Principles for the Bar would not in any manner bind the News Media, and that the Statement of Principles for the News Media, would have no binding effect on members of the Bar. Each statement is designed to guide the members of the respective profession in fulfilling their responsibility without impairment of the administration of justice or freedom of speech.

There is nothing in the Statement of Principles for the News Media which would forbid publication of any formal or official statement issued by an officer of law or a recognized official engaged in the administration of justice.

Louisiana's Bill of Rights provides both for fair trials and for freedom of the press. These rights are basic and unqualified. They are not ends in themselves but are necessary guarantors of freedom for the individual and the public's rights to be informed. The necessity of preserving both the right to a fair trial and the freedom to disseminate the news is of concern to responsible members of the legal and journalistic professions

mote better understanding between the bar and the news media, especially in their *mutual* efforts to reconcile the constitutional guarantee of freedom of the press and the right to a fair, im-

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and is of equal concern to the public. At times these two rights appear to be in conflict with each other.

In an effort to mitigate this conflict, the News Media and Bar Committee of Louisiana has adopted the following statement of the principles to keep the public fully informed without violating the rights of any individual.

PREAMBLE

1. To promote closer understanding between the Bar and the News Media, especially in their efforts to reconcile the constitutional guarantee of freedom of the press and the right to a fair, impartial trial, the following mutual and voluntary statement of principles is recommended to all members of both professions.
2. Both Professions, recognizing that freedom of the press (free flow of news) is one of the fundamental liberties guaranteed by the First Amendment to the United States Constitution, agree that this fundamental freedom must be zealously preserved and responsibly exercised subject only to those restrictions designed to safeguard equally fundamental rights of the individual.
3. It is likewise agreed that both the News Media and the Bar are obliged to preserve the principle of the presumption of innocence for those accused of wrongdoing pending a finding of guilty.
4. The News Media and the Bar concur on the importance of the natural right of the members of an organized society to acquire and impart information about their common interests.
5. It is further agreed, however, that the inherent right of society's members to impart and acquire information should be exercised with discretion at those times when public disclosures would jeopardize the ends of justice, public security and other rights of individuals.
6. News Media and the Bar recognize that there may arise circumstances in which disclosures of names of individuals involved in matters coming to the attention of the general public would result in personal danger, harm to the reputation of a person or persons or notoriety to an innocent third party.
7. Consistent with the principles of this preamble, it is the responsibility of the Bar, no less than that of the News Media to support the free flow of information.

FOR THE NEWS MEDIA

News Media in publishing or broadcasting accounts of crime should keep in mind that the accused may be tried in a court of law.

To preserve the individual's rights to a fair trial, news stories of crime should contain only a factual statement of the arrest and attending circumstances.

The following should be avoided:

1. Publication of interviews with subpoenaed witnesses after an indictment is returned.
2. Publication of the criminal record or discreditable acts of the accused after an indictment is returned or during the trial unless made part of the evidence in the court record. The defendant is being tried on the charge for which he is accused and not on his record. (Publication of a criminal record could be grounds for a libel suit.)
3. Publication of confessions after an indictment or bill of information is returned unless made a part of the evidence in the court record.
4. Publication of testimony stricken by the court unless reported as having been stricken.

partial trial. Emphasis was placed upon the voluntariness aspect of the statement of principles.[19] With no punitive measures, however, to date it has received little apparent notice or use.[20]

> "[It is, of course, known that] the effectiveness of a voluntary code [or statement of principles] will depend upon how successful they are in accomplishing their objectives. In turn, this will depend upon how fully the press and broadcasting media in a given jurisdiction agree to abide by them. Much will depend too upon the cooperation of members of the bar and law enforcement officials. Ultimately, the decision [may] rest with the courts in each jurisdiction to decide, in the light of the experience [observing the agreement in operation] whether or not it [will be] necessary to apply the [recommended ABA] standards by rules of court."[21]

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5. Editorial comment preceding or during trial, tending to influence judge or jury.
6. The publication of any "leaks," statements or conclusions as to the innocence or guilt, implied or expressed, by the police of prosecuting authorities or defense counsel.
7. Good taste should prevail in the selection, printing and broadcasting of the news. Morbid or sensational details of criminal behavior should not be exploited.

FOR THE BAR

To preserve the individual's rights to a fair trial in a court of law the following guide lines are prescribed for the Bar.

1. A factual statement of the arrest and circumstances and incidents thereof of a person charged with a crime is permissible, but the following should be avoided:
   (A) Statements or conclusions as to the innocence or guilt, implied or expressed, by the prosecuting authorities or defense counsel.
   (B) Out-of-Court statements by prosecutors or defense attorneys to news media in advance of or during trial, stating what they expect to prove, whom they propose to call as witnesses or public criticism of either judge or jury.
   (C) Issuance by the prosecuting authorities, counsel for the defense or any person having official connection with the case of any statements relative to the conduct of the accused, statements, "confessions," or admissions made by the accused or other matters bearing on the issue to be tried.
   (D) Any other statement or press release to the news media in which the source of the statement remains undisclosed.
2. At the same time, in the interest of fair and accurate reporting, news media have a right to expect the cooperation of the authorities in facilitating adequate coverage of the law enforcement process. [Hereinafter cited as GUIDE.]

19. *Id.* Preamble § 1.

20. A survey by the author of all newspapers and television stations in the city of Baton Rouge evidenced a general lack of knowledge or reference to the above mentioned agreement.

21. *Reardon Report, supra* note 6, at 30.

The current standards recommended by the ABA were designed to complement rather than supersede state voluntary codes and agreements. Thus the ABA standards and the state agreement are to be viewed solely as guidelines through which the bar and media can jointly protect the fairness of trial and prevent miscarriages of justice resulting from prejudicial publicity, and simultaneously maintain the right and duty of the press to inform the public about crime and law enforcement.[22]

In taking a new look at the Louisiana "Guide to News Media and Bar Relations," it seems that it would be advantageous to form permanent joint bar-media committees in each state and locality. These committees could serve a valuable purpose in identifying violations of the agreement principles by the media and bar and in noting any punitive measures that may exist, such as the Ethical Canons and Disciplinary Rules governing disclosures by the bar. In addition, such a committee could be effective in providing a forum through which uncertainties in application of the principles to specific situations could be considered, and issues or grievances resolved as they arise. The existence of the committee would, in essence, create an open avenue for communication and mutual education between the bar and the news media.[23]

The United States Supreme Court in *Sheppard*,[24] while avoiding guidelines for control of the media, did suggest measures for the courts to take when faced with fair trial-free press problems. The Court advocated rules and regulations to prevent the flow of prejudicial information from its source, *i.e.*, to limit dissemination to the press by parties, counsel, court officials, and others actively participating in judicial proceedings.[25] The Court prescribed much broader measures, however, stating that a prejudicial atmosphere during trial can be avoided because the courtroom and courthouse premises are subject to control of the court.[26] The presence of the press at judicial proceedings, the Court suggested, can be limited when it becomes apparent that the accused might be prejudiced or disadvantaged. Further, when members of the press are in the courtroom, their conduct

22. *Id.* at 29.
23. *Id.*
24. Sheppard v. Maxwell, 384 U.S. 333 (1966).
25. *Id.* at 358.
26. *Id.*

can be regulated.[27] Also the court can insulate the witnesses and prohibit extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, *i.e.*, any statements made by an accused to officials, the identity of prospective witnesses and probable testimony, a statement of belief as to innocence or guilt, or any like statements concerning the merits of the case.[28] The Supreme Court in prescribing the above measures made special note of the then ABA Canons of Professional Ethics governing the conduct of attorneys as providing sanctions for such conduct.[29]

Beyond the above measures, the Court stated that the trial court, in the face of *potential* prejudicial publicity, can *request* appropriate city and county officials to promulgate a regulation controlling dissemination of information about the case by their employees.[30] In reference to the press, it was recommended that reporters who wrote or broadcast prejudicial stories could be warned or perhaps forewarned as to the impropriety of publishing material not introduced in the trial proceedings.[31] The Court, cognizant of the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, urged the trial courts to take strong measures to ensure that the balance is never weighed against the accused. Nevertheless, the Court did note that no law exists that prevents the press from reporting events that transpire in the courtroom.[32] Consequently, it directed its "suggestions" solely to the trial courts, either to continue the case or to transfer it to another

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27. *Id.* LOUISIANA CANONS OF JUDICIAL ETHICS art. XXIII states: "The taking of photographs in the courtroom during the progress of judicial proceedings or during any recess thereof and the transmitting or sound-recording of such proceedings for broadcasting by radio or television introduce extraneous influences which tend to have a detrimental psychological effect on the participants and to divert them from the proper objectives of the trial; they should not be permitted. The purpose of judicial proceedings is to ascertain the truth. Such proceedings should be conducted with fitting dignity and decorum, in a manner conducive to undisturbed deliberation, indicative of their importance to the people and to the litigants, and in an atmosphere that bespeaks the responsibilities of those who are charged with the administration of justice." *See also* Dorfman v. Meiszner, 430 F.2d 558 (7th Cir. 1970).

28. Sheppard v. Maxwell, 384 U.S. 333, 358, 361 (1966).

29. *Id.* Reference was made to ABA CANONS OF PROFESSIONAL ETHICS, No. 20 (now CODE OF PROFESSIONAL RESPONSIBILITY EC 7-33, DR 7-107 (1970)).

30. Sheppard v. Maxwell, 384 U.S. 333, 362 (1966).

31. *Id.*

32. *Id.* at 362-63.

venue not permeated with prejudicial publicity.[33] In addition the Court added that the sequestration of the jury should be raised *sua sponte* with counsel, or even a new trial ordered.[34] In emphasizing the role expected of the trial court the Court concluded:

> "But we must remember that reversals are but pallaitives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudical outside interferences. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation but is highly censurable and worthy of disciplinary measures."[35]

While perhaps adequate rules and regulations do exist or can be created affecting the bar, members of court and law enforcement agencies, attempts by courts to censor the press for potential prejudicial reports by the use of contempt power have

33. Louisiana Code of Criminal Procedure article 712 places the granting of a motion for continuance in the discretion of the court, in any case where there is good ground therefor. See State v. Montgomery, 248 La. 713, 181 So.2d 756 (1966), where it was held that the record on appeal from a murder conviction established that community feelings which existed prior to trial *permeated the trial atmosphere* and prejudiced the defendant and substantial rights of the defendant suffered as a result of the denial of his motion for continuance. Article 622 requires that a change of venue *shall* be granted when an applicant proves that by reason of prejudice existing in the public mind or because of undue influence, or for any other reason, a fair and impartial trial cannot be obtained in the parish where the prosecution is pending. The article further directs the court to consider whether prejudice, influence, or other factors will affect the answers of jurors on the voir dire examination or the testimony of witnesses at trial. *See* State v. Washington, 256 La. 233, 236 So.2d 23 (1970); State v. Poland, 255 La. 746, 232 So.2d 499 (1970); State v. Scott, 237 La. 71, 110 So.2d 530 (1959).

34. Sheppard v. Maxwell, 384 U.S. 333, 362, 363 (1966). Louisiana Code of Criminal Procedure article 791 states that the jury *shall* be sequestered and secluded from outside communication in capital cases and in all noncapital cases, after the courts charge, and *may* be sequestered at any time upon order of the court. Article 794 provides for the removal of the jury upon the request of the state or defendant during matters to be decided by the court alone, and at *anytime* when the court feels it would be in the interest of justice. State v. Goins, 232 La. 238, 94 So.2d 244 (1957); State v. Green, 221 La. 713, 60 So.2d 208 (1952). Article 851, "Motion for a New Trial," states in part that a new trial shall be granted on defendant's motion when: "(4) The defendant has discovered, since the verdict or judgment of guilty, a prejudicial error or defect in the proceedings that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before; (5) The court is of the opinion that the ends of justice would be served by granting a new trial . . . ."

35. Sheppard v. Maxwell, 384 U.S. 333, 363 (1966).

not met with much success.[36] The Supreme Court in *Bridges v. California*,[37] noted that freedom of speech and press is secured against federal abridgment by the first amendment and similarly, against state abridgment by the fourteenth amendment. The Court held that both state and federal courts have the power to protect themselves from disturbances and disorder in the courtroom and in the immediate surroundings by the use of contempt power.[38] However, the power of the courts to inflict summary punishment for contempt does not extend beyond those immediate surroundings.[39] The likelihood that a substantial prejudicial effect and obstruction of justice will result cannot *alone* justify a restriction on freedom of speech or press by use of contempt power; the disturbances themselves must be substantial, serious, and present imminent danger of disruption.[40] Even under those circumstances it would seem that contempt procedure may still not be justified. The ABA standards recommend use of contempt procedure only when it is shown that one has disseminated an extrajudicial statement that is "wilfully designed by that person to affect the outcome of the trial, and that seriously threatens to have such an effect."[41] In two recent cases,[42] the trial judge attempted to hold reporters in contempt for reporting pre-trial proceedings in direct contravention of his order banning any

36. Bridges v. California, 314 U.S. 252 (1941); United States v. Dickinson, 465 F.2d 496 (5th Cir. 1972); State v. Sperry, 79 Wash. 2d 69, 483 P.2d 608 (1971); Graham v. Jones, 200 La. 137, 7 So.2d 688 (1942). Louisiana Code of Criminal Procedure article 17 gives a court broad inherent contempt powers to ensure criminal proceedings are conducted with dignity and to ensure that justice is done. However, article 23 defining constructive contempt essentially tracts the language of Louisiana Code of Civil Procedure article 224, but it specifically omitted as ground for contempt clause (8), which states: "Comment by a newspaper or other medium for the dissemination of news upon a case or proceeding, then pending and undecided, which constitutes a clear, present, and imminent danger of obstructing or interfering with the orderly administration of justice, by either influencing the court to reach a particular decision, or embarrassing it in the discharge of its judicial duties."

37. 314 U.S. 252 (1941).

38. *Id.*; Dorfman v. Meisner, 430 F.2d 558 (7th Cir. 1970).

39. Bridges v. California, 314 U.S. 252 (1941).

40. *Id.*

41. *Reardon Report* part IV § 4.1 (a)(i). The Superior Court of Massachusetts, reversing a lower court, adopted the "wilful design" requirement of the *Reardon Report* where a reporter and newspaper publisher had been found in contempt for publishing an article commenting on a pending trial on the ground that it failed to show either had any wilful design to affect the trial. Worcester Tel. & Gazette, Inc. v. Commonwealth, 354 Mass. 578, 579-80, 238 N.E.2d 861, 862 (1968).

42. United States v. Dickinson, 465 F.2d 496 (5th Cir. 1972); State v. Sperry, 79 Wash. 2d 69, 483 P.2d 608 (1971).

publication whatsoever. The judgments of contempt were reversed as unconstitutional infringements upon the reporters' first amendment rights. In *United States v. Dickinson*,[43] the Fifth Circuit held censorship in any form, including judicial censorship, to be incompatible with the dictates of the Constitution and the concept of a free press.[44] Certainly any blanket ban on the publication of court proceedings transgresses first amendment freedom.[45] Tracking the language in *Bridges v. California*[46] and *Craig v. Harney*,[47] the court in *Dickinson* emphasized that before first amendment freedoms can be abridged, the substantial evil must be extremely serious; the danger must not be remote or probable, but must immediately imperil the proceedings.[48] Furthermore, any inconvenience or expense to state or defendant resulting from the granting of a continuance or change of venue would simply not be enough to justify an absolute ban on reporting details of evidence taken at judicial hearings.[49]

The implication seems clear that alternative remedies must be sought for avoiding prejudicial publicity which are less disruptive of constitutional freedoms than bans on publication. Changes of venue,[50] continuances, or granting new trials must first be used before any sanctions against the press and media

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43. 465 F.2d 496 (5th Cir. 1972). In *Dickinson*, a hearing was held in federal district court for non-jury determination of whether elected state officials had "trumped up" charges against an individual solely because of his race and political civil rights activities. There was no carnival atmosphere as in *Sheppard*. *See* note 34 *supra*. The district court's order absolutely prohibiting two reporters, whose conduct was unobtrusive, from reporting details of evidence taken at the hearing was held violative of the constitutional right of free press.

44. *Id.* at 507.

45. *Id.* at 500.

46. 314 U.S. 252 (1941). *See also* Estes v. Texas, 381 U.S. 532, 541-42 (1965): "[R]eporters of all media, including television . . . are plainly free to report whatever occurs in open court through their respective media."

47. 331 U.S. 367, 374 (1947): "A trial is a public event . . . . Those who see and hear what transpires can report it with impunity."

48. United States v. Dickinson, 465 F.2d 496, 508 (5th Cir. 1972).

49. *Id.* at 509.

50. State v. Mejia, 250 La. 518, 527, 197 So.2d 73, 76 (1967): "[T]hough the removal . . . was contrary to the cited provision of the Code of Criminal Procedure [LA. R.S. 15:293 (1950)], the removal was made necessary when the accused contended in his application for the second change of venue that he could not be granted a fair and impartial trial . . . [in the parish to which the prosecution was initially removed]. A finding that an impartial jury could not be selected to try the accused is the strongest reason for disregarding a legislative pronouncement which would deny the removal."

will be tolerated.[51] Further, these alternatives must be sought only upon a showing that prejudicial material has actually reached the jury, not upon any proof of the effect on the jury.[52] Otherwise, a reversal on appeal could result.[53] In light of the above it should be noted that three-fourths of the ABA standards in the free press-fair trial area concern suggestions for controls over the conduct of attorneys, law enforcement officers, judges and judicial employees as well as the judicial proceedings in criminal cases themselves, rather than sanctions against the media.[54]

It is submitted that caution should be used by the courts both in imposing restraints upon the news media not demanded by the requirements of courtroom dignity, and in creating overly strict rules which could inhibit discovery and other procedural devices.[55] Before the above restraints are deemed necessary, all other possible solutions to the free press-fair trial controversy should be fully explored in order to avoid direct, or in the case of strict court-imposed procedural rules, indirect limitations on the freedom of the press.

The following steps are suggested as guidelines to bring about a better understanding of the fair trial-free press controversy:

> "(1) Mutual education of lawyers and news media, and in the law and journalism schools, to achieve wider understanding of the problems and how they can be alleviated;
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> "(2) Encouragement of continuing bar-media groups to consider voluntary compliance and to discuss ways to deal with particular local problems as they arise;
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> "(3) Adoption by trial courts of appropriate court rules applying the standards to lawyers and court personnel;

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51. *See, e.g.*, State *ex rel.* Superior Ct. v. Sperry, 79 Wash. 2d 69, 78, 483 P.2d 608, 613, *cert. denied*, 404 U.S. 939 (1971): "To sustain a judgment of contempt in the above circumstances would be to say that the mere possibility of prejudicial matter reaching a juror outside the courtroom is more important in the eyes of the law than is a constitutionally guaranteed freedom of expression."

52. Rideau v. Louisiana, 373 U.S. 723 (1963); Janko v. United States, 366 U.S. 716 (1961); Marshall v. United States, 360 U.S. 310 (1959).

53. *See* note 52 *supra.*

54. *Reardon Report* appendix A.

55. It is submitted that any greater restriction of access to information would place undue burden on discovery in criminal proceedings for defense counsel and constitute a denial in that regard of due process.

"(4) The exercise of caution on the part of the courts to avoid going beyond the intent of the standards and to guard against imposing upon the news media restraints not contemplated by the standards and not demanded by the requirements of courtroom decorum, and

"(5) Voluntary action by law enforcement agencies to acquaint their personnel with the limitations of the standards, and also to avoid withholding from the news media information about crime which the standards intend should be released promptly."[56]

Only recently have the bar and press considered the problem together and, in Louisiana, an agreement of principles has been reached. It should be the duty of the bar associations to continue discussion with the news media, constantly seeking compatibility between first and sixth amendment rights of fair trial and free press. It is a responsibility shared by all which requires continued attention if the fundamental constitutional rights of fair trial-free press are to be equally protected.[57]

Elliott W. Atkinson, Jr.

APPELLATE REVIEW OF SENTENCING

"Early in 1960 a 32 year old man was committed to a Federal prison upon his conviction of forging a $58.40 check. He was unemployed at the time of his offense, his wife had just suffered a miscarriage, and they needed money for food and rent. He was a veteran who had been honorably discharged from the Army in 1952. . . .

"At about the same time there was also committed to prison a 36 year old man who had been convicted of forging a check for $35.20. He was also unemployed, and his wife had left him. . . . A year prior to his forgery charge he had been committed to jail for 30 days for drunk driving, and shortly thereafter sentenced to 6 months in the county jail for failing to provide for the child that had been born to his marriage.

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56. *Reardon Report, supra* note 6, at 32-33.
57. Ainsworth, *Fair Trial and Free Press*, 15 LA. B.J. 13 (June 1967).