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By Judge Eric E. Younger*

The *Sheppard* Mandate Today: A Trial Judge's Perspective

I. INTRODUCTION

Writing an article on the relationship between the judiciary and the press is an unhappy task for a trial judge. With few exceptions,¹ the milestones in this subject matter range from the unfortunate² to the embarrassing.³ When a judge is confronted with a potential publicity case, the most solace he is likely to receive from looking at the efforts of his similarly situated predecessors is that they are, by and large, easy acts to follow.

But it's easier to criticize than to explain the legal system's handling of the crises that arise in highly publicized cases. Why do judges handle conflicts between the sixth and first amendments so badly? The three fundamental answers are (1) the rarity of publicity cases, (2) the lack of practical power of the judiciary, and (3) the vagueness of the *Sheppard* mandate.

II. DEALING WITH PUBLICITY CASES

A. Rarity of Cases

The first answer is abundantly simple and consists of an understanding of just how rare the so-called "publicity case" is.

A definition of the term "publicity case" as it will be used in this article is in order. Such cases are almost exclusively criminal al-

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1. Cooperation between bench and media characterized part of the Watergate litigation. In *United States v. Mitchell*, 386 F. Supp. 639 (D.D.C. 1975), Judge Gesell went to some length to assist the press in reporting the momentous events that were the subject of the trial of President Nixon's highest assistants.
2. An example of good-faith overreaction to what many would call a "gag-order fad" is provided by the criticized order of a competent judge in *Younger v. Smith*, 30 Cal. App. 3d 138, 106 Cal. Rptr. 225 (2d Dist. 1973).
3. One of the most extreme orders in recent history was the subject of *United States v. Dickinson*, 465 F.2d 496 (5th Cir. 1972), which vacated a district court order prohibiting the publication of news of events occurring in federal court during trial.

though there are occasional exceptions.⁴ The cases become nationally, or at least regionally, notorious because of the status of their *dramatis personae* (e.g., Patty Hearst)⁵ or because of the luridness of the crime (e.g., Richard Speck and the Chicago nurses' murders) or because of the combination of the two factors (e.g., the killing of Sharon Tate, *et al.*, by Charles Manson). But the case of acute local interest such as when a government official is accused of bribery or sexual misbehavior must also be included. While generally not attended by major regional or national publicity, and while often involving relatively minor charges (drunk driving trials of famous personages being prime examples) *all* the publicity issues, excepting those related to physical security of the court and its personnel, may be presented to the trial judge.

Even given this rather broad definition of "publicity cases" their rarity is striking. In Los Angeles County, California, the jurisdiction with which the author is the most familiar, there are 7,200,000 people whose cases and controversies are resolved by some 350 trial judges of the superior, municipal and federal district courts. While Californians are probably not really as bizarre as the media would lead people in other parts of the country to believe, it must be admitted that the Los Angeles area produces far more than its proportional share of publicity cases. But there have been no more than five which the author can recall in the past year. Each trial judge in Los Angeles County, then, has about one chance in seventy of seeing a publicity case in a given year and it doesn't take a mathematician to recognize that the average judge will, accordingly, *never* handle a publicity case.

This rarity dictates that no trial judge will have any "experience" at dealing with such situations. Judges deal frequently with fourth and fifth amendment issues and the better ones become quite proficient at handling them, but no such proficiency can be expected with regard to first amendment issues. If practice makes perfect, there is every reason to believe that judges will remain decidedly imperfect in this area although some assistance may be on the way.

B. Lack of Judicial Power

The second factor which contributes to the judiciary's poor record in dealing with publicity cases is the fundamental *lack of power* of the bench to deal with this type of problem. It may seem prema-

4. See *CBS, Inc. v. Young*, 522 F.2d 234 (6th Cir. 1975).

5. See *United States v. Hearst*, CR 74364 WHO (N.D. Cal., Sept. 24, 1976).

ture to discuss power—"enforcement," if you will—before discussing the substantive aspects of orders restricting the flow of information in particular or the behavior of non-party participants in trials in general, but assuming *arguendo* that such orders are sometimes needed, a few judges, but only a few, have been confronted with the question of what they can do about open defiance of such orders. The answer, surprising to most people, is "very little."

When most students of the first amendment seek recent examples of judicial use of the contempt power to enforce restrictive orders, the name of William Farr comes to mind.⁶ Farr's problems with Judge Charles Older, the Los Angeles Superior Court Judge who presided ably over the trial of Charles Manson and three of his female followers, relate not to the breaking of a restrictive order but rather to the refusal to divulge the identity of an individual who leaked certain grand jury minutes to him. After several years and an abortive effort at a criminal trial of two of the potential sources for perjury⁷ no one has ever positively determined the source of Farr's information.

Among journalists, Bill Farr is a patron saint. The reason for this status is simple. During the course of Judge Older's use of the contempt power to find out who had broken his order, Bill Farr served nearly two months in the Los Angeles County Jail. This is one of the longest terms of incarceration of any American reporter for contempt, and there seems little question but that Farr and most other aggressive reporters quickly would do another couple of months over the same or similar principles.

Most contempt citations in restrictive order cases have, in fact, arisen out of good faith efforts to test the applicable first amendment principles rather than any acrimonious ignoring of judicial power. Several years ago, the District Attorney of Los Angeles County intentionally went just beyond the boundaries of a restrictive order in a rather sensational murder case, but so clearly had endeavored to draft a statement violative of the order but not prejudicial to the defendant's right to a fair trial that even the deliberately challenged trial judge merely imposed a fine of \$50 and stayed execution.⁸ The particular district attorney, long a foe of what he believed to be the judicial tendency to respond to every highly

6. See generally *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975), *cert. denied*, 96 S. Ct. 3200 (1976).

7. See *People v. Bugliosi*, A 308 882 (Super. Ct., Los Angeles County, Oct. 3, 1974); *People v. Shinn*, A 308 882 (Super. Ct., Los Angeles County, Dec. 4, 1974).

8. See note 2 *supra*.

publicized case with some new and more restrictive gag order, freely admitted that he intended to use the case as a vehicle to get the issue in front of the United States Supreme Court. While he failed in this objective, a learned and comprehensive opinion in the restrictive order area was produced by the California Court of Appeal.⁹

More recent cases, including the well-known and rather amazing *United States v. Dickinson*,¹⁰ have included only fines as penalties for press contempts, notwithstanding that such cases involved more serious contempts. In *Dickinson*, reporters intentionally published an account of proceedings in a public courtroom although expressly forbidden from so doing by the trial judge. The court's power to render the contempt citation became the issue before the United States Court of Appeals for the Fifth Circuit.

Three reasons for the weakness of the contempt power when used against the press should be noted. First, judges are used to incarcerating criminals and are somewhat more comfortable in that task than when incarcerating newsmen. Though many a judge has had reason to jail an individual for contempt, it is usually for some breach of the peace or outrageous behavior in the courtroom. This is a far cry from locking up a newsman who may or may not be an acquaintance of long standing of the judge, but who is probably acting in good faith, whether legally or not. Second, the trial judge in proposing to cite a restrictive order violator for contempt, may anticipate that his order will be subjected to most rigorous appellate scrutiny, if not summary reversal. Third, the "Farr" factor still remains the biggest power problem in that many reporters will readily and willingly go to jail if a jail term is threatened. They can do so with the knowledge that the best counsel procurable in the United States promptly will line up and file petitions and briefs to Justices of the United States Supreme Court before the sheriff has turned his key.¹¹

9. See *Younger v. Smith*, 30 Cal. App. 3d 138, 145, 106 Cal. Rptr. 225, 229 (2d Dist. 1973).

10. 465 F.2d 496 (5th Cir. 1972).

11. A good example of the media's readiness to move forward in the appellate courts was afforded in what ultimately became the Supreme Court case of *Nebraska Press Ass'n v. Stuart*, 96 S. Ct. 2791 (1976). While the trial court's order was before the Supreme Court of Nebraska in *State ex rel. Nebraska Press Ass'n v. Stuart*, 194 Neb. 783, 236 N.W.2d 794 (1975), the petitioners applied to Mr. Justice Blackmun, as Circuit Justice, for a stay. See *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1319 (1975); *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1327 (1975) (reapplication for stay). All of the significant events in the case before the Supreme Court of Nebraska and Justice Blackmun

In short, then, the contempt power, long viewed as the power of a judge to bring about an ordered result through the assertion of the state's might, has far more symbolic and psychological than real importance in the fair trial-free press areas. To make the point in a slightly different way, it can be said that the sanctions flowing from judicial decisions are traditionally efficacious only against litigants. A criminal defendant may go to prison upon a determination of guilt and a civil litigant may stand to lose money or other important rights as a result of judicial power. The journalist or attorney running afoul of a publicity-oriented restrictive order, however, is not within those traditionally sanctionable categories and is a target for which the weaponry of judicial power is ill-designed.

C. The Confusing *Sheppard* Mandate

Though the rarity of publicity cases and the lack of effective judicial power to enforce restrictive orders may be parts of an explanation of why judges fare so badly in this arena, they are peripheral and rather simple. The third factor—the “*Sheppard* Mandate”—is neither. This factor gives rise to the entire law of restrictive orders and spawns its central complications.

But what is the “*Sheppard* Mandate?” It is little understood by trial judges and less so by journalists. People from the bench, the bar and the press who deal frequently with the fair trial/free press subject matter have read and reread *Sheppard v. Maxwell*¹² a hundred times. Unfortunately, language in a Supreme Court case can, like giving thanks before a meal or testifying to tell the truth, become routine enough that we forget what is being said. What most judges and lawyers generally *think* *Sheppard* says is that if there is a lot of publicity about a really gruesome murder case and the judge is worrying about selecting a jury whose members haven't heard of the case through the media, he can issue orders to lawyers and police not to talk about the case and order the news media not to report anything about it.

The opinion was really about two related, but not identical, subjects. First, it dealt at length with mistakes the trial judge made *during* the conduct of the trial itself. Second, it dealt with control over the impact of pretrial publicity on the trial in general and on the jury in particular.¹³ What did the Supreme Court actually say?

had occurred between October 31 and December 2, a period of 33 days. The murder had been committed on October 18.

12. 384 U.S. 333 (1966).

13. The assumption that judges are immune from press-generated prejudice perhaps deserves scrutiny. A footnote to the *Sheppard* opinion notes:

The [trial] court's fundamental error is compounded by the holding that it lacked power to control the publicity about the trial. From the very inception of the proceedings the judge announced that neither he nor anyone else could restrict prejudicial news accounts. . . .

....

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.* And appellate tribunals have the duty to make an independent evaluation of the circumstances. Of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom. But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity. In addition, sequestration of the jury was something the judge should have raised *sua sponte* with counsel. If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. But . . . 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 prejudicial outside interferences.*¹⁴

What is clear from this language is where the buck stops. Twice in one paragraph the Court stressed that the trial judge *must* take steps to protect the trial against prejudicial outside influences. This is the "Sheppard Mandate," but what, then, is so difficult about complying with it?

To begin with, it imposes a burden almost unknown in our jurisprudence, the true *sua sponte* duty of a trial judge. The reader may well say that that's not so unusual—that trial judges are often given *sua sponte* duties in instructing juries,¹⁵ for instance. But such duties are, in reality, only nominally *sua sponte*, as one party or the other virtually always wants the jury instructed on its function or the burden of proof.

But the *Sheppard* Mandate is truly *sua sponte* because the trial judge must discharge it and, conversely, may be in the position of

In an unsworn statement, which the parties agreed would have the status of a deposition, made 10 years after Sheppard's conviction and six years after [the trial judge's] death, Dorothy Kilgallen asserted that Judge Blythin had told her: "It's an open and shut case . . . he is guilty as hell." It is thus urged that Sheppard be released on the ground that the judge's bias infected the entire trial.

384 U.S. at 358 n.11.

For a recent look at the publicity-prejudice issue in a military (nonjury) setting see *Calley v. Callaway*, 519 F.2d 184 (5th Cir. 1975).

14. 384 U.S. at 357, 362-63 (emphasis added).

15. See, e.g., CAL. PENAL CODE § 1127 (West 1970).

sole guardian of first amendment interests even against the express wishes of both parties. It is a rare situation in which a trial judge's decision on *any* issue enjoys the support of *both* parties all the way through United States Supreme Court argument and is unanimously reversed. *Nebraska Press Association v. Stuart*¹⁶ was, of course, such a case.

This, from the trial judge's point of view, is a uniquely difficult burden. We have travelled a long way as a nation on the adversary system's road, and leaving it can lead to a bumpy and obscure path. The judge, in our system, is to do independent research, to be sure, and not facilely rely on the briefs of the parties. Often they both miss the heart of the matter as he sees it, but rarely is he expected to go counter to their mutual points of view, except on such mundane administrative or economic issues as continuances.

Emotionally and intellectually, the burden on a trial judge who is asked to go counter to the wishes of a defendant in a capital case on a major constitutional point *where the State joins in the defense position* is almost unbelievable. Any judge with courage is accustomed to risking reversal on a "tough call" where he thinks he is right, but here we ask him to run with the bulls at Pamplona with swim fins on. He might still win, but he would have designed the contest differently if he had been consulted in advance.

A second major problem of the *Sheppard* Mandate is its vagueness as to the power of the judge. Some analysts point to its implicit acknowledgment that direct action against the press is possible. In speaking of an inflammatory editorial critical of the defense's legal tactics, the Court said, "The article was called to the attention of the court but no action was taken."¹⁷ What "action" could the court have taken, one wonders? Or, speaking of inaccurate coverage, what is the meaning of the statement "the judge should have at least warned the newspapers to check the accuracy of their accounts"?¹⁸

On balance, however, the most honest characterization of the direct restraint issue is that the Court tantalizingly hinted at it as a possibility¹⁹ and failed to say that direct restraint is forbidden when it plainly had the opportunity. Note that several times it even quoted with implicit disapproval²⁰ the trial judge's statements that he was unable to control the press directly. Students of the opinion

16. 96 S. Ct. 2791 (1976).

17. 384 U.S. at 346.

18. *Id.* at 360.

19. *See id.* at 350.

20. *See id.* at 357.

wondered for a decade whether the crack left in the door was real or imaginary. It is now clear that it was intended to be real,²¹ but narrow enough to shed very little light.

It should be borne in mind that the criminal justice setting is critical here. The Supreme Court has expressly indicated the possibility of direct prior restraint of the press in the national security context.²²

But, if there is a mandate to the trial judge and yet his potential for directly restraining the press is questionable, what suggestions does the Supreme Court make? With all due respect, the justices' traditional lack of trial court service (commendably remedied by the author of the *Sheppard* opinion, Justice Clark, after retiring from the Court) is abundantly clear in the proffered list, which is treated with amazement, anger or laughter by trial judges.²³

The Court listed continuances, changes of venue, jury sequestration and new trials as "palliatives," but indicated that "the cure lies in those remedial measures that will prevent the prejudice at its inception."²⁴ Several of the "remedial measures" plainly relate to the conduct of the trial itself²⁵ and are not the subject of this article. What is very much its subject, and the subject of the overwhelming majority of the literature in this field, is the assertion that "the court should have made some effort to control the release of leads, information, and gossip to the press by police officers, witnesses, and the counsel for both sides."²⁶

This latter assertion was, as a practical matter, the birth of the "gag order" as the press and bar generally call it. It is important to note that this terminology is also used to describe the far less common but constitutionally more onerous order directly restraining the press from publishing information it has received.²⁷ The Court did provide some guidelines:

21. See *Nebraska Press Ass'n v. Stuart*, 96 S. Ct. 2791, 2808 (1976).

22. See *New York Times Co. v. United States*, 403 U.S. 713, 718 (1971).

23. The author has observed the indicated responses while addressing two separate groups of judges at the National College of the State Judiciary, in Reno, Nevada.

24. 384 U.S. at 363.

25. These include restriction of the media from certain areas of the courtroom, restrictions on the handling of exhibits by newsmen and on conduct within the court, and the insulation of witnesses from one another and from news accounts of the case. *Id.* at 358-61.

26. *Id.* at 359.

27. See *Nebraska Press Ass'n v. Stuart*, 96 S. Ct. 2791 (1976); cf. *United States v. Dickinson*, 465 F.2d 496 (5th Cir. 1972); *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Near v. Minnesota*, 283 U.S. 697 (1931).

[T]he trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, such as the refusal of Sheppard to submit to interrogation or take any lie detector tests; any statement made by Sheppard to officials; the identity of prospective witnesses or their probable testimony; any belief in guilt or innocence; or like statements concerning the merits of the case

[T]he court could also have requested the appropriate city and county officials to promulgate a regulation with respect to dissemination of information about the case by their employees.²⁸

In addition, the Court implied that the *voir dire* examination of the jurors could have been better.²⁹ Not much is made of the issue in the *Sheppard* holding, but the Court has stressed the importance of *voir dire* as a pretrial prejudice-reducer ever since the trial of Aaron Burr.³⁰

What makes the proffered measures so unsatisfactory? After all, we have just noted six suggestions which in no way require direct prior restraint of the press.

Turning first to the list of "pallatives," we find the Supreme Court of the United States in the curious position of endorsing *continuances*, probably the most universally agreed-upon villain of the court administration process,³¹ and one which, especially without the consent of the defendant, is expressly forbidden by statute in many states³² and, now, in the federal system as well. The last measure which a legal system conscious of its image needs is to attempt to create fairness in its most celebrated cases by keeping them around for long periods of time.

The second suggestion, *change of venue*, makes sense in some cases. As previously noted, there is a category of cases in which the publicity is intense but highly geographically localized. The public official allegedly caught in an illegal homosexual episode or driving under the influence is an excellent example, and his trial may be in a more dispassionate setting some distance from his home area. There are, however, at least three problems with venue changes. The really sensational criminal case, given the pervasiveness of modern media and the incredible tendency of some of our most sensational crimes to occur on live television, simply is not geographi-

28. 384 U.S. at 361.

29. See *Sheppard v. Maxwell*, 384 U.S. 333, 345 (1966).

30. See *United States v. Burr*, 25 Fed. Cas. 49 (No. 14,692g) (C.C. Va. 1807); *Murphy v. Florida*, 421 U.S. 794 (1975).

31. See, e.g., ABA ADVISORY COMM. ON THE CRIMINAL TRIAL, STANDARDS RELATING TO SPEEDY TRIAL § 1.3 (1968); NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS, Standard 4.12 (1973).

32. See, e.g., CAL. PENAL CODE § 1382 (West 1970); 18 U.S.C. § 3161 (1970).

cally manipulable.³³ If Lee Harvey Oswald had lived, would his defense have been an easier task in San Antonio than Dallas? Would Jack Ruby have fared better in Houston, or, for that matter, in Anchorage? In case after case, it is recognized that change of venue does little for the really notorious defendant. Second, many states have statutes prohibiting changes to counties other than those surrounding the county in which a crime occurs. In trying Simants for the infamous Lincoln County, Nebraska, murder of the Kellie family, Judge Stuart fully comprehended this difficulty. He noted that Lincoln County was by far the largest of the legal possibilities, and that all of the others were in the same media area.³⁴ Even though these statutes' constitutionality has been put in serious question,³⁵ requiring a trial court to proceed in flat contravention of applicable statutes in a case wherein the whole world may be watching is asking quite a bit. Last, but by no means least, is the expense factor, a dramatic one for a rural county and a substantial one for even a good-sized jurisdiction.³⁶

Jury sequestration, while an important tactic for the judge to employ in publicity case situations, does little to reduce the impact of *pretrial* material, and, moreover, reduces substantially both the number and desirable cross-section of people who realistically can be expected to serve on trial juries. This reduction is surely contrary to the modern trend to increase the broadness and representative quality of jury panels.³⁷

The Supreme Court's last "palliative" is that of granting a new trial. This remedy is totally illusory, and merely goes to say that mistakes in this area need not be fatal. Suffice to say that in terms

33. See *People v. Manson*, 61 Cal. App. 3d 102, 177, 132 Cal. Rptr. 265, 310 (2d Dist. 1976).

34. Telephone interview by the author with Judge Hugh Stuart, July 18, 1976.

35. See *Groppi v. Wisconsin*, 400 U.S. 505 (1971).

36. Contra Costa County, California, an affluent county of 500,000 persons, was faced with trying the case of *People v. Remiro*, A 320 019 (Super Ct., Los Angeles County, Aug. 9, 1976), on a change-of-venue basis, because of publicity surrounding the defendants, self-proclaimed members of the Symbionese Liberation Army. Judge H. Ross Bigelow, who presided at the trial, informed the author on September 16, 1976 that the cost to Contra Costa County for the trial was approximately \$500,000.

37. Note, for example, the broadness of the provisions on jury panels in the amendments, effective in 1976, of the California statute that virtually eliminates categorical excuses from service. See CAL. CIV. PRO. CODE § 200 (West Supp. 1976). See also ABA ADVISORY COMM. ON THE CRIMINAL TRIAL, STANDARDS RELATING TO TRIAL BY JURY § 2.1 (1968).

of dollar cost of the "publicity trial" and the loss of public confidence attendant upon holding a new trial for any reason other than a hung jury, the remedy is probably worse than the disease.

Voir dire may not sound like an important addition to the list, but may be the most effective remedy short of the "gag order." Most laymen probably understate the importance of *voir dire*, but effective lawyers and judges know that it *can* have tremendous impact in the hands of talented practitioners. Many attorneys, especially in the criminal and personal injury fields, get reputations for winning their cases during *voir dire*. It should be emphasized that a trial judge who is willing to encroach on that distance which the robe and bench tend to put between him and the jurors can not only *question* jurors with pretty fair efficacy, but, more important, can also *educate* them as to the need to reject certain influences. An explanation of the difference between questions of fact and law, and the reasons for unswerving allegiance to the trial judge's decisions on the latter as they relate to appellate review can have tremendous impact on jury room deliberation. Such explanations should and can be in nonlegalistic, everyday language, and can go a long way toward impressing appellate courts with the fairness of a jury panel.³⁸

III. USE OF GAG ORDERS

But what of the gag orders? We are using the term, for the moment, to refer to those orders against parties, witnesses, court personnel and attorneys that amount to "censorship at the source," rather than those directing that the press not print.

A. Impact of *Sheppard*

Sheppard, as noted above, suggested that such orders may be used, whenever there is a "reasonable likelihood that prejudicial news prior to trial will prevent a fair trial."³⁹ Experts often point to the fact that the widely criticized "reasonable likelihood" language, anathema to the press as appearing to be a dramatically lower standard than the "clear and present danger" test of traditional first amendment free speech cases,⁴⁰ goes to the previously mentioned list of "palliatives" rather than to the gag order suggestions. This point is true as far as it goes, but fails to perceive that the gag order suggestion is clearly the one preferred by the *Sheppard* Court as it is set apart from the unenthusiastically recom-

38. See *Murphy v. Florida*, 421 U.S. 794 (1975).

39. 384 U.S. at 363 (emphasis added).

40. See, e.g., *Schenk v. United States*, 249 U.S. 47, 52 (1918).

mended "palliative" list. Is it possible that the Court would require a higher standard of danger for using the *preferred* remedy than for using those about which it is admittedly unenthusiastic? One may suggest that the standard-of-proof issue was not paramount in the minds of the Justices or even that the standard might be different today if the same question were reexamined,⁴¹ but it seems unrealistic to argue that the "reasonable likelihood" test does not apply to the gag order suggestions.

Sheppard immediately became the focus for a great deal of bench, bar and press activity, almost all directed at the gag order suggestions. The most significant result of that activity was the *Reardon Report* named for the Justice of the Massachusetts Supreme Judicial Court who chaired the American Bar Association committee on the subject, and the 1968 American Bar Association's *Standards Relating to Fair Trial and Free Press*.⁴²

The *ABA Standards* contain four basic sections which relate to the conduct of attorneys, the conduct of law enforcement officers and court employees, the judicial proceedings themselves, and the use of the contempt power. The first two sections contain identical proscriptions against the release of six types of information: (1) the accused's record and character, (2) confessions, (3) tests or refusals to submit to them, (4) identity and other details about witnesses other than the victim, (5) possibility of a plea and (6) opinions as to guilt. By contrast, the law enforcement agency provisions expressly *permit* the divulgence of certain matters such as the fact and circumstance of arrest, the names of the officers, the nature of the charges and physical evidence and requests to the public for assistance.

The *ABA Standards* section relating to attorneys' conduct recommends "reprimand or suspension from practice"⁴³ for violations,

41. As authority, the author can only cite dozens of conversations, most of them informal, with experts in this field, along with testimony at the October 1975 hearings of the ABA Legal Advisory Committee on Fair Trial and Free Press, on the then-proposed *ABA Recommended Court Procedure to Accommodate Rights of Fair Trial and Free Press*, in Washington, D.C. Considering the traditional acceptance of the "clear and present danger" test, pressure in the press (and probably in the legal) community for its adoption, and the absence of any justification for the lower standard, adoption of the higher standard would seem a likely result of re-examination by the courts.

42. ABA LEGAL ADVISORY COMM. ON FAIR TRIAL AND FREE PRESS, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS, APPROVED DRAFT (1968).

43. See *id.* § 1.3.

and similar sanctions relating to law enforcement officers⁴⁴ and court personnel.⁴⁵

In addition, since the promulgation of the *ABA Standards*, "Bench/Bar/Media Agreements" providing statements of mutually agreed proprieties in the coverage of major publicity trials have been created in nearly half the states.⁴⁶ Though surveys have shown that many individuals from all three disciplines have never heard of the agreements even in the states in which they purport to be in force,⁴⁷ it would be inaccurate to say that none of the agreements has improved relations between the institutions, or that no crises have been averted. Media and legal professionals in the Seattle area, for example, point with pride to cooperative handling of publicity case situations which they believe would have been crises elsewhere.⁴⁸

But it should be no surprise that the *ABA Standards* and state Bench-Bar-Media agreements have become most famous by serving as the *content* of gag orders.⁴⁹ Notwithstanding the efforts of the American Bar Association's Legal Advisory Committee on Fair Trial and Free Press, and of countless Bench-Bar-Media groups across the country, the decade since *Sheppard v. Maxwell* has seen a proliferation of gag orders in questionable situations and a resulting bitterness of the press toward the courts.⁵⁰

Some of the bitterness is justified, but part of it arises from the press's lack of comprehension that a trial judge, once he has determined in his own mind what course of action the appellate cases dictate, must follow that course. It is difficult for the press to understand that a frank acknowledgment by a trial judge that a Supreme Court opinion seems unwise does not entitle the trial judge to do it *his* way instead of the *Supreme Court's* way if there is a conflict. The use of the term "*Sheppard Mandate*" is, in part, an effort to emphasize this key difference between the trial judge, who must be guided by the law as he intellectually perceives it rather than as he would wish it and the reporter, whose only guide, in the last analysis, is himself. Most reporters in the United States have the highest

44. See *id.* § 2.1(d).

45. See *id.* § 2.3.

46. See ABA LEGAL ADVISORY COMM. ON FAIR TRIAL AND FREE PRESS, FAIR TRIAL/FREE PRESS VOLUNTARY AGREEMENTS 10 (1974).

47. *Id.* at 49-51.

48. See generally *id.* at 10.

49. Landau & Roney, *Fair Trial and Free Press: A Due Process Proposal*, 62 A.B.A.J. 55, 59 (1976).

50. *Id.*

of standards, but they should recognize that they, along with the reading public and their editors, serve as their own supreme court.

An example will illustrate the point: Woodward and Bernstein's *All the President's Men*⁵¹ recounts the quandary faced by the authors when their investigations seemed to require the revealing of one of their sources, an F.B.I. man, in a manner that would clearly violate journalistic ethics, and would likely get the man fired. After some soul-searching, but, little reference to some equivalent of the *United States Supreme Court Reports*, the reporter went ahead and broke the rule knowingly.⁵² What judge hasn't been confronted with a motion to suppress evidence which clearly has been seized in a rather technical violation of the Supreme Court's interpretation of the fourth amendment by officers who were conscientiously trying to do their duty. Hasn't every judge had to let a known narcotics dealer "get off" through his decision in such a situation? The point is not whether the reporter's decision to break the rule for a perceived higher goal is *better or worse* than the judge's to follow it. The point is that *law*, in our society, requires that a judge or a narcotics officer or even the pedestrian whose progress is slowed by an inconvenient red light adhere to rules of a different sort than the *ethics* of the journalist. A clearer recognition by the journalist and the judge that their opposites in the publicity case situation may be marching conscientiously to the beat of a different drummer would go a long way to improving understanding.

B. ABA Due Process Proposal

But such understanding would clearly not make the problem go away, so the ABA Legal Advisory Committee on Fair Trial and Free Press was asked by the American Bar Association to come up with some solutions. The result of the Committee's work is the *Recommended Court Procedure to Accommodate Rights of Fair Trial and Free Press*,⁵³ which provides for the adoption, by a given court, of standing guidelines and special orders. The two-step process and the distinction between those two steps is the key to the *ABA Procedure*. The standing guidelines would be the generally agreed standards of reportage and release of information applicable to criminal trials, but would be merely of the ethically compelled or advisory variety, not enforceable by a contempt order. Though

51. R. WOODWARD & C. BERNSTEIN, *ALL THE PRESIDENT'S MEN* (1974).

52. *Id.* at 190.

53. ABA LEGAL ADVISORY COMM. ON FAIR TRIAL AND FREE PRESS, *RECOMMENDED COURT PROCEDURE TO ACCOMMODATE RIGHTS OF FAIR TRIAL AND FREE PRESS* (1976).

members of the press would probably have it otherwise, it is likely that many courts would turn to the *ABA Standards* for their guidelines, albeit perhaps with some modification. But only in the extreme case, where a trial judge has determined the necessity therefor, should the second part, the special order, be put into effect. Not only disclaiming a position on the question of *when* a special order is necessary, the Committee stated:

A few caveats are necessary. First, by recommending the procedure for adoption of standing guidelines and special orders, the committee wishes to stress that it does not intend to recommend or encourage the use of judicial restrictive orders.⁵⁴

The distinction between guidelines, which are statements of what is desirable, and the special order, which is enforceable and specifically tailored to a particular publicity case situation, should get courts away from the presently extant and probably unwise situation in which general rules, purporting on their face to be enforceable by the contempt power but in fact virtually never enforced and unknown to the bar if not the bench, are on the books in a great many places, including virtually all federal courts.⁵⁵

The most important feature of the *ABA Procedure*, however, would appear to be what its initial draftsman, Supreme Court correspondent Jack C. Landau, refers to as "due process for the press":

The proposal provides essentially that any interested party, including news media personnel, be given notice and an opportunity to be heard either before a court enters an order concerning pretrial and trial publicity of criminal proceedings or in the event of an emergency ex parte order, immediately thereafter. Expedited judicial review should be provided before the issues involved become moot. The proposal also requires the court to set forth facts and reasons to explain the necessity for a proposed restrictive order.⁵⁶

The proposal should have value, but a large segment of the press is still adamantly against it, as it would be against *any* statement by the American Bar Association short of one that the first amendment bars any "censorship," either direct or at-the-source, of the reporting of criminal trials.⁵⁷ Other segments of the press seem *reasonably* satisfied with the proposal as, at least, a good faith effort.⁵⁸

54. *Id.* at Preamble.

55. Landau & Roney, *supra* note 49, at 56.

56. *Id.* at 60.

57. *Id.*

58. See *id.* at 59; note 41 *supra*. The Southern California Radio and Television News Directors Association, for example, passed a resolution and directed it to the ABA hearings, see note 41 *supra*, expressly endorsing the *ABA Procedure* in material part.

One value that the *ABA Procedure* has is not related to diffusing the press-bench controversy. It provides something of a cookbook on how to handle a publicity case in which the *Sheppard* Mandate seems to the trial judge to be applicable. Notwithstanding that the 10:00 a.m.-to-3:30 p.m. day, often alleged to be that of the judge, is in most cases utter nonsense, it can at least be said that most court business is transacted during the daytime. The *Sheppard* Mandate has an uncanny habit of striking a trial judge at 3:00 a.m. on a Sunday and requiring decisions in a matter of minutes. In the true publicity case, the maxim "not to decide is to decide" applies.

C. The Nebraska Press Case

The procedure also has a sense of logic to it. District Judge Hugh Stuart, of Lincoln County, Nebraska, when confronted with the obviously extreme publicity case issues of the Kellie murders, was also confronted with an already extant gag order imposed by the local magistrate. In that respect, Judge Stuart was in a slightly different position than the judge confronted with the *initial* emergency. Nebraska's legal requirement⁵⁹ and practice of holding a really prompt preliminary hearing very quickly put the ball in Judge Stuart's court (the pun, for which apology is offered, being almost unavoidable here). Judge Stuart felt the initial order overbroad and narrowed it.

Judge Stuart, whose ability to discuss the *Simants* case frankly with the author was circumscribed by the pendency of the appeal of the murder case, was honestly seeking the points of view of all interested parties prior to the reforming of the gag order. Though this article is not intended to go into the necessity for the order in the first place, it can be said that the factors present in the *Simants* case (i.e., an unusually brutal murder of an entire family, a small county jury pool size, a pervasive although short-lived climate of terror, confessions, and immediate media coverage) make as good a case for an order as is ever likely to exist, with the possible exceptions of Presidential assassinations or their close kin (e.g., Sirhan's assassination of Senator Robert F. Kennedy). Judge Stuart has, understandably, become an expert in this area by now and cannot realistically sort out the extent to which the *ABA Proposal* itself, of which he was aware, influenced him to consult with press people and make findings about the extent of publicity, the potential for prejudice, and the need for restrictive orders prior to his taking final action.⁶⁰

59. NEB. REV. STAT. § 29-504 (Reissue 1975).

60. See note 34 *supra*.

Judge Stuart's order was of the most extreme kind—a *direct prior restraint* against the press's printing of certain material. The battle was immediately joined and, if he thought the press coverage of the murder itself was massive, it must have seemed halfhearted by comparison to the publicity flowing from state and national media after the order. After a hearing in which the initial magistrate had testified and various news clippings had been taken into evidence, Judge Stuart held that "there is a clear and present danger that pre-trial publicity could impinge upon the defendant's right to a fair trial."⁶¹ Accordingly, he specifically barred the reporting of (1) defendant's confessions to law enforcement officers; (2) defendant's statements to others; (3) the contents of a note written by the defendant the night of the crime; (4) certain medical evidence; (5) the identity of the victims of the alleged sexual assault and the nature of the assault; and (6) the exact nature of the order itself⁶² (an odd-sounding, but probably necessary, addition).

Leaving the exact nature of the Alphonse/Gaston courtesies between the Supreme Court of Nebraska and Justice Blackmun to other articles, it can be said that the order was pared down by the state supreme court to include only confessions and other facts "strongly implicative" of the defendant.⁶³ The order was carefully limited in time; it expired by its own terms when the jury was impaneled and sequestered.

Other articles have covered the United States Supreme Court opinion in the case extensively; this one will not. Suffice it to say that a unanimous⁶⁴ Court reversed the Nebraska supreme court's decision to uphold at least parts of the trial court's order.

The question that everyone wanted answered was "Can a direct order against the press ever be upheld in the criminal justice setting?" The answer lies buried somewhere in the five opinions. Justices Brennan, Stewart, and Marshall answered the question "no,"⁶⁵ and Justice White said he thought he agreed.⁶⁶ The main opinion

61. 96 S. Ct. at 2795.

62. *Id.*

63. *See id.* at 2796.

64. When the author was attempting to reach Judge Stuart by long-distance telephone, he first encountered Mrs. Stuart, an articulate and pleasant woman, who indicated that she and Judge Stuart had always known that the United States Supreme Court might overturn the order because of the complexity, importance, and uncertainty of the issues. Her only real complaint, a perfectly reasonable one for any judge's wife, was, "Did they have to make it unanimous?"

65. *See Nebraska Press Ass'n v. Stuart*, 96 S. Ct. 2791, 2809 (1976) (concurring opinion).

66. *Id.* at 2808 (White, J., concurring).

of Chief Justice Burger and Justices Blackmun and Rehnquist still tantalizes the scholar and trial judge with statements that the first amendment's rights are not absolute ones. The opinion thus left open the possibility of prior restraint being proper in some cases, but agreed with Justice Powell⁶⁷ that *Simants* was not that case.

Justice Stevens's concurring opinion, only one paragraph in length, makes one of the most interesting side-points by agreeing with the "absolute" position of the Brennan opinion, with the possible exception of cases in which information was gained by "shabby or illegal" means or was "demonstrably false" and published for a "perverse" motive.⁶⁸ *Quaere*, hasn't Justice Stevens described the facts of *Sheppard v. Maxwell* perfectly?

The main opinion has to have hurt Judge Stuart emotionally. He tried faithfully to comply with the *Sheppard* Mandate and considered all of the "palliatives," rejecting each one for perfectly logical reasons. His "failure," in the last analysis, was in not expressing, *in writing*, findings which caused the rejection of each.⁶⁹ The feeling must be like the members of a championship team finding out at the end of the season that one of its players was academically ineligible.

But forgetting post-mortems, what is the status of the *Sheppard* Mandate today? What is the impact of the post-*Sheppard* cases, the *ABA Procedure*, and *Nebraska Press Association v. Stuart* on the duty of the trial judge?

Supreme Court and court of appeals cases have answered some questions, although they are considered far more exhaustively elsewhere.⁷⁰ The assumption of many defendants which Charles Manson demonstrated by displaying to the jury a headline trumpeting a purported Presidential declaration of his guilt, is that if one becomes famous enough he becomes untriable. This assumption was expressly rejected in *Murphy v. Florida*.⁷¹ That the media have standing to raise first amendment issues not affecting the parties themselves is well settled.⁷² The free speech (not press) rights of participants, including attorneys, must be considered in any court rules designed to prevent prejudice or accomplish other goals.⁷³

Significantly, the power of the courts to deal with perceived abuses of their processes through the use of the contempt power has

67. *Id.* (Powell, J., concurring).

68. *Id.* at 2830 (Stevens, J., concurring).

69. *See id.* at 2807.

70. *See* Landau & Roney, *supra* note 49, at 59.

71. 421 U.S. 794, 799 (1975).

72. *See* CBS, Inc. v. Young, 522 F.2d 234, 237-38 (6th Cir. 1975).

73. *See* Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 249 (7th Cir. 1975).

been re-endorsed in a case where the legal position of the trial court was most questionable.⁷⁴ We are given, in *United States v. Dickinson*, a reminder that an order of a court of competent jurisdiction is to be obeyed or tested legally, not ignored, regardless of the *bona fides*, or even the legal accuracy, of the respondent's doubts.⁷⁵

Through all, there has been no inroad on the *Sheppard* Mandate itself. The *Nebraska Press Association* case impinges on only one mechanism for implementing it. All of the duties of the trial court discussed at the outset of this article persist.

Any order the trial judge makes in an effort to limit pretrial publicity must be accompanied by an expansive record and findings of fact regarding the potential of publicity to deny the accused a fair trial. While the *Nebraska Press Association* case itself deals only with *direct* restraint, the experience of the last decade is that *any* *restrictive order* waves a red flag, and encourages deliberate and carefully conceived challenge⁷⁶ and only slight hope of being upheld on appeal.⁷⁷

IV. CONCLUSION AND SUGGESTIONS

The *Sheppard* Mandate is clear enough, but the Supreme Court's suggestions as to how to discharge the duty it creates are cloudy. The platform offered by the *Nebraska Law Review*, from which even a lowly trial judge can critically scrutinize the highest court in the land, obligates the author to offer some suggestions based on a reading of the cases, three years' service on the ABA Committee, and the opportunity to run with the ball a time or two in publicity case games (perhaps most significantly by handling the arraignment and certain pretrial motions in the case of *People v. William and Emily Harris*⁷⁸ the defendants being Patty Hearst's abductors or associates, depending on when one asks).

An intellectual checklist for the judge handling a publicity case includes the following points:

1. *Do not try to restrain the press directly.* The odds of a direct prior restraint passing appellate review are too small and life is too short.
2. *Begin with a presumption against any orders.* The vast majority of publicity cases require none and the record, in terms of

74. See *United States v. Dickinson*, 465 F.2d 496, 513 (5th Cir. 1972).

75. *Id.* at 513.

76. See note 2 *supra*.

77. See Landau & Roney, *supra* note 49, at 59.

78. A 321 099 (Super Ct., Los Angeles County, Aug. 9, 1976).

the *Sheppard* Mandate, can be well protected by findings that other methods can afford the defendant a fair trial. In that one-in-a-million case, if a judge's own initial tendencies have been against issuing pretrial publicity orders, and he ultimately decides he must do so, he will have created tough enough hurdles for the orders eventually made that they will likely pass appellate muster as well.

3. *Hold a "hearing" even though the proceeding may be very informal and at an odd hour.* Even if it is unlikely that any order will be issued, the trial or arraignment judge should make a record to show that the *Sheppard* Mandate was considered and consciously satisfied in his mind. The *ABA Procedure*, including the use of standing guidelines (allowing persons attending the hearing to have a common knowledge base as to what the issues are in advance), and notice to the relevant press, make excellent sense here.

4. *Make express findings.* In line with items 2 and 3, findings are required whether any orders are made or not. If orders are made, the *Nebraska Press Association* kind of analysis (i.e., why wouldn't less restrictive alternatives suffice?) will surely be used to attack even nondirect restraining orders in the future. If orders are not made, the findings should be used to thwart reversal of the case-in-chief on *Sheppard* grounds.

5. *Admit considerable evidence.* Several persons close to the litigation have indicated to the author that part of the problem faced in *Nebraska Press Association* was the failure of the court to admit massive quantities of evidence, in the form of newspaper clippings, transcripts of broadcasts, and perhaps even opinion polls, to support the order. A sample may not be enough, so if there is "massive" publicity, compile a massive evidence file.

6. *Be certain that the "palliatives" and voir dire will be used to their greatest possible effect.* The initial judge in a multi-judge or multi-level jurisdiction has the problem that certain measures are not practically available to, or controllable by, him. These measures may include change of venue, the subject of later motions, or *voir dire*, not used until the trial itself. The initial judge should, however, do all he can to guarantee the use of the measures in *Sheppard* and to persuade subsequent judges handling the case to do the same. Though direct communication on this issue between the judges may be ethically questionable, a public on-the-record declaration should be made at the time the case first reaches a court that thorough *voir dire* will help protect the defendant.

7. *Be cooperative with the press.* A major problem is the mutual distrust in which the courts and the press often hold one an-

other, especially in big cities. An overtly cooperative attitude on the part of a judge can go further toward improving the propriety of coverage of a crime and trial than is often imagined.⁷⁹ When the court and press are able to work together to increase the public's knowledge, not only of the particular trial, but of the system in general, progress is possible.

8. *Consider physical planning.* Remember that part of the criticism of the trial court in *Sheppard* was the circus-like setting of the trial, with reporters filling the counsel table area. The ABA Committee and the National College of the State Judiciary, in Reno, have made a list of excellent planning suggestions arising out of the federal experience in Watergate and other situations available to trial judges and court administrators.

9. *Support good regulations and practices of law enforcement agencies and court personnel.* The key point is to be certain that those agencies are aware of the *ABA Standards* or similar guidelines. Also, encourage them to be effective in disseminating proper information concerning cases; this not only aids the press in informing the public, but can also diffuse terrifying rumors following a crime.

10. *If an order is necessary, it should be as narrow as possible.* The item to which an order might most often (though rarely) be properly directed seems to be a confession. This is likely to be the area in which the balance between the dramatic prejudice to the defendant and the press's rights and the public's right to know a great deal about even the most sordid events is tipped most heav-

79. At the time of the September 1975 arraignment of William and Emily Harris by the author, so many inquiries were coming in from the press that it seemed advisable to permit reporters into chambers to ask procedural questions about the two living "ring-leaders" of the Symbionese Liberation Army. Personnel of the Los Angeles County Marshal's Office, and the author at the beginning of the session with the press, announced that only questions of a procedural nature would be answered, and that the substance of the case involving the defendants themselves or Patricia Hearst, their celebrated alleged partner, would be off-limits. Approximately 30 members of the press crowded into chambers and asked several questions, none of which was inappropriate. Though no cause-and-effect relationship is claimed, the author subsequently reviewed accounts of the initial court proceedings in three major newspapers, two national news magazines, and on the three major television networks, and found no significant errors in the reporting of that day's events. Reaction from members of the press present at the in-chambers discussion was good. It should be noted that neither the author nor any court attaché issued any sort of release or made any sort of prepared statement.

ily in the direction of the former. At the other extreme is the "taste" issue. Judge Stuart's very understandable desire to protect the family and friends of the murder victims from accounts of necrophilia and other shocking aspects of the *Simants* case was a legal regulation of good taste pretty clearly proscribed by the first amendment. In the last analysis, the media, not the courts, are going to decide what the public should and shouldn't hear when it comes to gruesome details.

11. *Control the trial itself carefully and concentrate on voir dire and instructions.*