CHAPTER 26

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Motions Related to Prejudicial Publicity

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§ 26.1 GENERALLY

Intensive pretrial publicity poses a conflict between the defendant's federal[1] and state[2] due process rights to a fair trial and the constitutional guarantees of a public trial[3] and a free press.[4] This chapter first reviews circumstances in which publicity has been found to deny the defendant's due process rights, and then details the motions that may safeguard the defendant when his trial will occur in a highly publicized and charged atmosphere. It concludes with an outline of the ethical constraints on attorneys in communicating with the media.

Generally, courts have tried to select and maintain an uncontaminated jury without interfering with press access. The right to a public trial is ensured by full access to the courts and press coverage of trials.[5] This access in turn protects the individual defendant from hidden bias or prejudice by the court. The principle that justice cannot survive behind walls of silence has long been reflected in the "Anglo-American distrust for secret trials."[6]

Therefore, the courts have been unwilling to place any direct limitations on freedom traditionally exercised by the press.[6.5] "[W]hat transpires in the court room is public property. . . . And where there was no threat or menace to the integrity of the trial . . . we have consistently required that the press have a free hand, even though we sometimes deplored its sensationalism."[7]

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[1] U.S. Const. amend. 14.

[2] Mass. Const. Declaration of Rights art. 12 provides that no individual shall be deprived of his life, liberty, or estate "but by the judgment of his peers or the law of the land."

In all motions filed in the courts of the Commonwealth of Massachusetts, the Mass. Const. or Declaration of Rights should always be cited. In many instances, the S.J.C. has held the Declaration of Rights to provide an individual with greater protections than the U.S. Constitution. The defendant, however, must state that his motion is "made pursuant to Article 12 of the Massachusetts Declaration of Rights."

[3] The Sixth Amendment to the U.S. Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."

[4] U.S. Const. amend. 1; Mass. Const. Declaration of Rights art. 16.

[5] For cases on the defendant's right to public trial *see infra* § 26.3M.

[6] Sheppard v. Maxwell, 384 U.S. 333, 349 (1966); In re Oliver, 333 U.S. 257, 268 (1948). The press does not just publish information about trials but guards against the miscarriage of justice by subjecting the judicial processes to public scrutiny. "A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field." *Sheppard v. Maxwell, supra,* 384 U.S. at 350.

[6.5] *See, e.g.,* George W. Prescott Publishing Company, v. Stoughton Division of the District Court Department of the Trial Court, 428 Mass. 309 (1998) (overturning restrictions imposed by trial court against a newspaper publisher on access to certain proceedings and records in the juvenile session of a District Court and concluding that the newspaper should have had the full access that it requested).

[7] Sheppard v. Maxwell, 384 U.S. 333, 350 (1966) (quoting Craig v. Harney, 331 U.S. 367, 374, 377 (1947)). *See also* Multimedia Holdings Corp. v. Circuit Court of Florida, St. Johns County, 544 U.S. 1301, 1304 (2005) ("threat of prosecution or criminal contempt against a specific publication raises special First Amendment concerns, for it may chill protected speech much like an injunction against speech by putting that party at an added risk of liability"); Bartnicki v. Vopper, 532 U.S. 514, 527-28 (2001) (further citations omitted) ("if newspaper

Sensationalism of the press, however, may create an atmosphere in which the accused will not receive a fair trial "in a tribunal free of prejudice, passion, excitement, and tyrannical power."[8] Specifically, according to U.S. Supreme Court cases, prejudicial pretrial and trial publicity may violate a defendant's due process under the Fourteenth Amendment because: (1) it is difficult if not impossible to obtain jurors who are without preconceived opinions or knowledge about the case; (2) jurors may decide the case on prejudice and passion rather than the evidence presented at trial;[9] (3) jurors may decide the case based on information obtained in newspaper and media accounts but not presented at trial;[10] (4) witnesses may fear testifying for the defense if the cause or case is unpopular;[11] (5) witnesses may change or dramatize their testimony for the cameras or reporters;[12] and (6) jurors may fear reaching an unpopular result and their later return to the community.[13]

The strongest cases and language in this area arise from four extraordinary Supreme Court cases in which the media's behavior was outrageous, little or no effort was made by the trial judge to control the circus-like atmosphere, and each conviction was "obtained in a trial atmosphere that had been utterly corrupted by press coverage":[14] ***Irvin v. Dowd,***[15] ***Rideau v. Louisiana,***[16] ***Estes v. Texas,***[17] and ***Sheppard v. Maxwell.***[18]

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lawfully obtains truthful information about matter of public significance, state officials may not constitutionally punish publication of such information … absent a need of the highest order").

[8] Sheppard v. Maxwell, 384 U.S. 333 (1966) (quoting Pennekamp v. Florida, 328 U.S. 331, 347 (1947)).

[9] "Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice . . . but it must not be allowed to divert the trial from the very purpose of a court system . . . to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom according to legal procedures. Among these 'legal procedures' is the requirement that the jury's verdict be based on evidence received in open court and not from outside sources." Sheppard v. Maxwell, 384 U.S. 333, 351 (1966).

[10] *See* Marshall v. United States, 360 U.S. 310 (1959) (conviction set aside where jurors received extraneous information through news accounts). The court stated that the prejudice from such material may indeed be greater than when it is part of the prosecution's evidence for it is then not tempered by protective procedures. Marshall, *supra,* 360 U.S. at 313; Turner v. Louisiana, 379 U.S. 466, 472 (1965) (conviction reversed where jurors fraternized with two key police witnesses outside the courtroom; "the requirement that a jury's verdict must be based upon the evidence developed at the trial goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury"). *See also* Gamache v. California, 131 S. Ct. 591, 592 (2010) (Sotomayor, J., affirming in denial of certiorari that California Supreme Court's properly relied on Turner).

[11] Estes v. Texas, 381 U.S. 532 (1965).

[12] Estes v. Texas, 381 U.S. 532 (1965).

[13] Estes v. Texas, 381 U.S. 532 (1965).

[14] Murphy v. Florida, 421 U.S. 794, 798 (1975).

[15] 366 U.S. 717 (1961), superseded by statute on other grounds, *see* Casey v. Moore, 386 F.3d 896 (9th Cir. 2004).

[16] 373 U.S. 723 (1963).

[17] 381 U.S. 532 (1965).

[18] 384 U.S. 333 (1966). *See also* Skilling v. United States, 130 S. Ct. 2896, 2914-15 (2010) (quoting Murphy v. Florida, 421 U.S. 794, 798-99 (1975)) (characterizing *Rideau*, *Estes*,

Sheppard v. Maxwell was the first case to place primary responsibility on the trial judge to neutralize the effects of pretrial publicity. The Supreme Court squarely asserted that the courtroom and courthouse premises are subject to the control of the court.[19] The high court examined the totality of the circumstances and found that the trial court's refusal to take precautions against pretrial publicity denied Sheppard a fair trial under the due process clause.

The case involved the trial of Dr. Sam Sheppard, who was accused of bludgeoning his wife to death. Publicity surrounding the *Sheppard* case was intense and did not abate during the nine-week trial. "The fact is that bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom, hounding most of the participants in the trial, especially Sheppard."[20] Prior to trial, eight-column front-page headlines criticized the defendant's refusal to submit to a polygraph examination or truth serum; Sheppard's inquest was held in the local school gymnasium and broadcast live on television and radio; and when arrested, he was brought before a crowd of photographers and media. During the trial all the jurors were photographed, and their names and addresses were published; the judge gave interviews; the press was allowed inside the bar and was so disruptive that the defendant's attorney could not confer with his client at defense table; and side bar conferences were held in chambers and published in the newspapers. Despite repeated requests for continuances and a change of venue, the judge not only refused to take any action, but "gave the throng of newsmen gathered in the corridors of the courthouse absolute free rein."[21]

In reversing, the court held that Sheppard was deprived of "that judicial serenity and calm" to which he was entitled.[22] The court presumed that not only had some of the false and inflammatory publicity reached the jury but that it had to affect their judgment. Based on the totality of the circumstances, the Court did not require the defendant to prove actual prejudice.

Sheppard indicated that the trial judge has almost unfettered discretion to control the publicity surrounding a trial. This holding has continued in a virtual unbroken line of cases. At the present time, the only limit on the trial court concerns the issue of actually closing a trial to the public.[23]

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and *Sheppard* as cases with "'a trial atmosphere that [was] utterly corrupted by press coverage'").

[19] One year before *Sheppard*, the Court held a trial court's authority to limit picketing to "near" the courthouse properly included limited control of the streets and other areas in the immediate vicinity of the courthouse so as to ensure the orderly administration of justice. "Since we are committed to a government of laws and not of men, it is of utmost importance that the administration of justice be absolutely fair and orderly. This court has recognized that the unhindered and untrammeled functioning of our courts is part of the very foundation of our constitutional democracy." Cox v. Louisiana, 379 U.S. 559, 562 (1965).

[20] Sheppard v. Maxwell, 384 U.S. 333, 355 (1966).

[21] Sheppard v. Maxwell, 384 U.S. 333, 355 (1966).

[22] Sheppard v. Maxwell, 384 U.S. 333, 354 (1966).

[23] *See* Press Enterprise v. Superior Court of California, 478 U.S. 1 (1986); Globe Newspaper Co. v. Superior Court for Norfolk County, 457 U.S. 596 (1982); Richmond Newspapers Inc. v. Virginia, 448 U.S. 55 (1980). *See also* Skilling v. United States, 130 S. Ct. 2896, 2918 (2010) (upholding discretion of trial judge to determine when to change venue due to negative publicity because trial judge is in best position to assess the effects of the publicity in the locale where it is said to have effects).

In *Rideau v. Louisiana,*[24] the high court reversed a conviction, when the trial court failed to grant a change of venue. In that case, the defendant's confession prior to his arraignment was broadcast and seen by a large segment of the population, including three members of the jury. The court held that the defendant was denied due process because his "trial" essentially occurred on that videotape without benefit of counsel, judge, or jury. Prejudice was found to be inherent in the circumstances themselves without any actual prejudice shown. The court again squarely placed the responsibility for correcting prejudicial pretrial publicity on the shoulders of the trial judge.[25]

Estes v. Texas[26] was an unusual case in which the high court banned the use of television broadcasting during a trial. The defendant was a prominent Texas politician. Massive pretrial publicity on a national level filled eleven volumes of press clippings. The first pretrial hearing was broadcast live by both television and radio.[27] By the trial, however, much of the live broadcasting was prohibited, a booth was constructed at the back of the courtroom and all filming was limited to that area. Despite these efforts, the Supreme Court found the circumstances inherently prejudicial, although no specific prejudice could be found.[28]

Although television is now allowed in Massachusetts state courts, the high court in *Estes* elicited a number of theoretical objections to television broadcasting of a trial, none of which were based on facts developed at the trial. The court was concerned that: (1) jurors involved in such a notorious case with public hostility to the accused would realize that they must return to a community that also saw the trial and might well be led "not to hold the balance nice, clear and true";[29] (2) jurors might be distracted, self-conscious, and uneasy; (3) jurors, returning home, would see portions of the trial and be subconsciously influenced by repeated portions of the trial; (4) should a retrial be necessary, it would be more difficult to obtain an impartial jury; (5) the quality of testimony would be impaired in that witnesses might be demoralized, frightened, embarrassed, overly dramatic, or cocky; (6) a sequestration order would be ineffective because witnesses could view other witnesses and become influenced; (7) some witnesses might become reluctant to appear; (8) the judge's task would become more difficult by having to ensure that television did not interfere with a fair trial; (9) a judge, selected by election, might use the telecasting of a trial as a political weapon, diverting his attention further; and (10) television is a "form of mental if not physical harassment."[30]

The court viewed television as a dangerous and powerful weapon that, focused on the infamous accused, could easily deny a fair trial. All of the above concerns appear to have been addressed by the control now exercised over televised trials. On April 1, 1980, the Supreme Judicial Court suspended Rule 3:25, § 3A, which prohibited

[24] 373 U.S. 723 (1963).

[25] The case is somewhat of an anomaly, and were it to arise today, it is unlikely that a reversal would necessarily be required.

[26] 381 U.S. 532 (1965).

[27] Unlike the single fixed camera used in courtrooms today, over 12 cameramen were in the courtroom filming and photographing the proceedings.

[28] "Television in its present state and by its very nature, reaches into a variety of areas in which it may cause prejudice to an accused. Still one cannot put his finger on its specific mischief and prove with particularity wherein he was prejudiced." Estes v. Texas, 381 U.S. 532, 544 (1965).

[29] Estes v. Texas, 381 U.S. 532, 545 (1965).

[30] Estes v. Texas, 381 U.S. 532, 549 (1965).

the use of television cameras in courtrooms and established Guidelines for an Experiment in Media Coverage in Judicial Proceedings. These guidelines allow the Court to close a hearing if it appears that a substantial likelihood of harm to any person or other serious harmful consequences will result from such coverage.[31]

In *Irvin v. Dowd,*[32] the defendant was accused of six notorious murders. His arrest, confession, and prior and pending criminal charges were highly publicized. Three requests for additional changes of venue and eight for a continuance were denied. The high court held that the defendant was denied due process and granted a reversal of his conviction. In an independent evaluation of the jury selection, the court noted that two-thirds of the venire panel believed the defendant to be guilty, even though each juror stated they could be fair and impartial. The court went beyond their blanket assertions and noted that "[n]o doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but psychological impact requiring such a declaration before one's fellows is often its father."[33]

In deciding these four cases, the U.S. Supreme Court sought to paint with broad strokes the paramount right of a defendant to a fair trial when weighed against the freedom of the press. Media coverage was so inflammatory that prejudice was presumed. Although such circumstances are unlikely to arise today because most trial courts are aware of their responsibility to control the courtroom and courthouse atmosphere, these provide the context in which a defense lawyer must file motions to aid his client. They establish at the least that "a trial judge has a large discretion in ruling on the issue of prejudice,"[34] and encourage a wide variety of motions. Each case must turn on its special facts and circumstances. A trial court should carefully examine the nature of the crime, the timing and extent of the publicity, and the remedies sought by defense counsel to protect the defendant from prejudicial trial publicity. It is the responsibility of defense counsel to muster the special facts and circumstances in each case and present proposed remedies with a compelling argument. The focus should be on safeguarding the trial, because appellate reversal is far less likely now that courts are attuned to the issue.

§ 26.2 PRELIMINARY STEPS: INFORMATION GATHERING

Any of the motions filed by the defendant seeking protection from prejudicial pretrial publicity should be accompanied by an affidavit. Because the trial court has unlimited discretion in this area and is unlikely to be reversed for exercising this discretion, defense counsel must present "real" evidence of the degree of publicity surrounding the case.

Defense counsel may also want to present information on the subject matter of the crime itself. For example, the recent explosion of media interest in the area of sexual abuse of children may support a request for careful inquiry of jurors as to their opinions and feelings about such crimes, even if the individual defendant has not been the focus of extensive publicity.

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[31] See Commonwealth v. Burden, 15 Mass. App. Ct. 666, 677–78 (1983). *See also* Code of Judicial Conduct, S.J.C. Rule 1:19 discussed *infra* § 26.3M.

[32] 366 U.S. 717 (1961).

[33] Irvin v. Dowd, 366 U.S. 717, 728 (1961).

[34] Skilling v. United States, 130 S. Ct. 2896, 2918 (2010); Marshall v. United States, 360 U.S. 310 (1959).

The following steps should be taken:[35]

1. Collect all written media accounts of this particular case as well as any publicity about the topic involved in the case. Note that on the front page of each newspaper, circulation numbers are published. The circulation manager of the paper can provide circulation numbers in the particular county where the case is scheduled to be tried. Do not ignore local newspapers, which will often file stories that are in more depth than the major dailies. Most newspapers also keep a morgue of clippings on a particular topic. Some newspapers keep such information in a computer and will, on a written request, send a list of all articles on a specific topic for the requested length of time.

2. Keep track of television and radio news programs, particularly popular call-in shows. Television and radio stations will provide, under subpoena, copies of videotapes or of recordings. They also will provide the estimated number of their audience.

3. If enough funds are available, counsel can hire a pollster to conduct a public opinion poll concerning this case.

4. Information on public opinion is often available in national magazines such as *Time* or *Newsweek.* Their surveys can be used to support counsel's argument. The *Reader's Guide to Periodic Literature,* available at any public library, indexes all popular magazines by topic.

5. Media accounts of crime may be found through several computer online resources, including LEXIS-NEXIS, Westlaw, and the Internet. LEXIS-NEXIS contains numerous newspaper and television/radio transcript files in its News and Legal News Library. Similarly, Westlaw contains numerous newspaper and television/radio transcript databases via its Dialog and Dow Jones & Company gateways, as well as in its Legal Newsletter Multibase. Finally, the Internet contains numerous news sources provided by the major television and print media and other Internet information providers.

This information gives weight to an affidavit in support of motions seeking to control or rectify negative publicity. The information must be collected from the start of the case through the trial.

§ 26.3 MOTIONS

26.3A. AFFIDAVIT IN SUPPORT OF MOTIONS

An affidavit should accompany any of the following motions, even if not specifically required by the Rules of Criminal Procedure. It may be an affidavit of counsel that simply lists counsel's efforts to determine the extent of publicity and the dates and places such publicity occurred, with copies of all newspaper articles and videotapes attached as exhibits. If there are numerous articles, it is best to put them in a large bound portfolio in chronological order. Affidavits from others who heard the statements or publicity may also be submitted.[36]

[35] *See also supra* § 11.3B(3) (gathering information from media).

[36] Commonwealth v. Noxon, 319 Mass. 495, 549 (1946). *See also* Renzi v. Paredes, 452 Mass. 38, 50-53 (2008) (holding that submission of digital photographs into evidence was within trial judge's discretion).

§ 26.3B. MOTION TO DISMISS AN INDICTMENT

A motion to dismiss the indictment may be filed on the ground that pretrial publicity was so prejudicial that it was impossible for the defendant to be judged by a fair, impartial, and unbiased grand jury, as required by the Fourteenth Amendment to the U.S. Constitution and article 12 of the Massachusetts Constitution Declaration of Rights.[37] Such a motion must include an affidavit.[38]

In the past such motions have been denied because the courts have ruled that a grand juror need not "be free from bias or prejudice, provided he has the general qualifications which are required."[39] Further, the proceedings of a grand jury are conducted in secrecy, and unless the issue of pretrial publicity appeared in the grand jury minutes, prejudice would have to be presumed, which courts are increasingly unwilling to do.

On the other hand, these decisions were based on the principle that a court could not inquire into whether competent evidence was heard by the grand jury. The law has evolved to the point where the court does inquire whether perjured evidence,[40] sufficient evidence,[41] or misleading evidence[42] was presented to the grand jury. Even if such a motion to dismiss does not prevail, it demonstrates to the trial court and appellate courts the defendant's concern about the publicity surrounding his case.

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[37] *See* Commonwealth v. Lewis, 12 Mass. App. Ct. 562 (1981) (motion denied, which was accompanied by newspaper articles and request for the issuance of summonses to the individual grand jurors so they could be interrogated as to possible effects of publicity on them during the course of their deliberation); Commonwealth v. Geagan, 339 Mass. 487 (1959).

[38] Mass. R. Crim. P. 14(a)(2).

[39] Commonwealth v. Geagan, 339 Mass. 487, 499 (1959). *See supra* § 5.8C; Commonwealth v. McLeod, 394 Mass. 727, 732–34 (1985), *cert. denied sub nom.* Aiello v. Massachusetts, 474 U.S. 919 (1985) (although evidence of extensive pre-trial publicity will not, by itself, entitle defendant to a hearing on grand jury bias or prejudice, a prima facie showing of "bias or prejudice so egregious as to result in an indictment based on 'hatred or malice' " would trigger a hearing). *See also* Commonwealth v. McCowen, 458 Mass. 461, 474-75 (2010) (discussing and applying McLeod egregiousness standard).

[40] Commonwealth v. Salman, 387 Mass. 160 (1982).

[41] Commonwealth v. McCarthy, 385 Mass. 160 (1982). The SJC has held that fundamental considerations of fairness require that a court dismiss an indictment where the grand jury receives no evidence of criminality on the part of the accused. Commonwealth v. Moran, 453 Mass. 880, 883-84 (2009). *Cf.* Commonwealth v. Kater, 432 Mass. 404, 411-12 (2000) (ordinarily, reviewing court does not inquire into competency or sufficiency of evidence presented to grand jury); Commonwealth v. Mathews, 450 Mass. 858, 874-75 (2008) (improper grand jury testimony regarding accused's post-arrest silence and request for counsel did not warrant dismissal of indictment where properly-presented evidence was more than adequate to meet Commonwealth's burden of probable cause).

[42] Commonwealth v. O'Dell, 392 Mass. 445 (1984). *See also* Commonwealth v. Silva, 455 Mass. 503, 509-11 (2009) (discussing how misleading evidence presented to grand jury may or may not warrant dismissal of indictment depending on circumstances); Commonwealth v. Jewett, 442 Mass. 356, 364 (2004) (not enough for dismissal simply that false or deceptive evidence was presented to grand jury); Commonwealth v. Levesque, 436 Mass. 443, 455-56 (2002) (quoting Commonwealth v. Drumgold, 423 Mass. 230, 238 (1996) ("'[t]o justify dismissal of an indictment, a defendant must show that inaccurate or deceptive evidence was given to the grand jury knowingly and in order to obtain an indictment and that the evidence probably influenced the grand jury's determination'").

§ 26.3C. MOTION FOR A CHANGE OF VENUE [43]

Motions for a change of venue should be filed at least two weeks before the start of trial, and counsel should request a separate hearing date. Any motion for a change of venue filed the day trial is scheduled to begin is likely to be perceived by the court as an afterthought at best, and a dilatory tactic at worst.

Mass. R. Crim. P. 37(b)(1) encapsulates the common law and provides for a "transfer for trial" for prejudice as follows:

> A judge upon his own motion or the motion of a defendant or the Commonwealth made prior to trial may order the transfer of a case to another division or county for trial if the court is satisfied that there exists in the community where the prosecution is pending so great a prejudice against the defendant that he may not there obtain a fair and impartial trial.

The change in a place of trial, however, should be ordered with "great caution and only after a solid foundation of facts has been first established."[44] A defendant has a constitutional right to "the verification of the facts in the vicinity where they happen"[45] under article 12 of the Massachusetts Constitution Declaration of Rights. The Commonwealth also has such a right.[46]

A careful reading of the cases reveals that certain standards must be met before a court will grant a change of venue. *First*, pretrial publicity alone, even if extensive,[47] does not entitle the defendant to a change of venue, "nor need qualified jurors be totally ignorant of the facts and issues involved."[48] Rather, the burden is on the defendant to establish that his guilt had been so "generally and substantially prejudged by the

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[43] *See also* general discussion of venue *supra* at § 20.4E.

[44] Commonwealth v. Angiulo, 415 Mass. 502, 515 (1993) (quoting Crocker v. Justices of the Superior Court, 208 Mass. 162, 180 (1911)); Commonwealth v. Wilson, 355 Mass. 441, 445 (1969).

[45] Commonwealth v. Bonomi, 335 Mass. 327 (1957).

[46] Commonwealth v. Aldoupolis, 390 Mass. 438 (1983).

[47] Commonwealth v. Clark, 432 Mass. 1, 6 (2000); Commonwealth v. James, 424 Mass. 770, 776 (1997). In its 2011 decision of Commonwealth v. Toolan, 460 Mass. 452, 462-70 (2011), the SJC held after a detailed fact analysis that pretrial publicity in that case was not presumptively prejudicial, but that in light of the nature of the Nantucket community and the trial court's inadequate voir dire procedures, pretrial publicity caused actual prejudice. The Toolan Court cited Commonwealth v. Leahy, 455 Mass. 481, 494-95 (2005) for the proposition that "presumptive prejudice exists only in truly extraordinary circumstances."

[48] Commonwealth v. Jackson, 388 Mass. 98, 108 (1983). *Accord* Skilling v. United States, 130 S. Ct. 2896, 2925 (2010) (jurors "need not enter the box with empty heads in order to determine the facts impartially"); Commonwealth v. Stroyny, 435 Mass. 635, 639 (2002) (trial court not required to question each prospective juror individually concerning bias from pretrial publicity); Commonwealth v. James, 424 Mass. 770, 777 (1997); Delle Chiaie v. Commonwealth, 367 Mass. 527, 532 (1975); Dobbert v. Florida, 432 U.S. 282 (1977). "Obviously it is not necessary in the interests of a fair trial that all citizens who have read of or been interested in a crime be excluded from the jury or that a trial take place where few such citizens will be found." Commonwealth v. Blackburn, 354 Mass. 200, 204 (1968). *See also* Dobbert v. Florida, *supra,* stating that "intelligent persons read and take an interest in events; because of the same endowments they are likely to give due regard to the evidence and to disregard rumor, report and suspicion when in the solemnity of a courtroom a defendant is tried and his reputation and his liberty or his life are at stake."

residents of the county that an unbiased tribunal . . . could not be obtained."[49] This requires that the defendant show that the jury not only read but remembered and believed the prejudicial publicity.[50] Although a showing that a large percentage of the venire was excused for bias is relevant to the likelihood of impaneling an impartial jury, it is not conclusive under the "totality of circumstances" test applied by the court.[51]

Second, in determining whether an unbiased jury can be obtained in the county, the court will consider the timing of the publicity and whether it has dissipated before the trial;[52] the quantity of the pretrial publicity;[53] and the nature of the publicity — specifically, is it factual reporting as opposed to inflammatory rhetoric.[54] Other relevant

[49] Commonwealth v. Turner, 371 Mass. 803, 807 (1977) (motion for change of venue properly denied where jury carefully screened). *Accord* Commonwealth v. James, 424 Mass. 770, 777 (1997); Commonwealth v. Dean, 6 Mass. App. Ct. 781 (1979); Commonwealth v. Millen, 289 Mass. 441, 464 (1935). *See also* Commonwealth v. Toolan, 460 Mass. 452, 466-70 (2011) ("given the nature of the publicity, especially in combination with the circumstance of the trial taking place within the small island community of Nantucket and the victim's connection to it, we simply cannot say with confidence that the defendant was tried by an impartial adjudicator and found guilty based solely on evidence presented at trial"); Commonwealth v. Morales, 440 Mass. 536, 540-42 (2003) (publicity must be both "extensive and sensational" to justify change of venue).

[50] Delle Chiaie v. Commonwealth, 367 Mass. 527 (1975).

[51] *See* Commonwealth v. Angiulo, 415 Mass. 502, 515 (1993) (fact that 42 percent of the venire excused for bias does not raise presumption of jury bias; many disqualified prospective jurors "knew" of defendant from varied sources, including personal contacts, rather than from pretrial publicity). *See also* Commonwealth v. Toolan, 460 Mass. 452, 463 (2011) (citing Rideau v. Louisiana, 373 U.S. 723, 724-26 (1963) and Irvin v. Dowd, 366 U.S. 717, 726-28 (1961)) ("Prejudice against the defendant sufficient to preclude a fair and impartial trial may exist because the entire jury pool is tainted by exposure to pretrial publicity[; and in] such circumstances, the venire is considered presumptively prejudiced, regardless of the details of the voir dire process, and even if individual members of the jury expressly assert their belief that they can be "fair and impartial."); Commonwealth v. Morales, 440 Mass. 536, 540-41 (2003) ("media coverage not so inflammatory or sensational as to require a presumption of prejudice"); Commonwealth v. Clark, 432 Mass. 1, 6-7 (2000) (rejecting defendant's argument that it was impossible to empanel impartial jury where more than one-third of panel was prejudiced by pretrial publicity).

[52] Pretrial publicity that occurred fourteen months before, Commonwealth v. Morales, 440 Mass. 536, 539 (2003); eight months before, Commonwealth v. Turner, 371 Mass. 803 (1977); 10 months before, Commonwealth v. Scott, 360 Mass. 695 (1971), and even nine weeks before trial, Delle Chiaie v. Commonwealth, 367 Mass. 527 (1975), did not require a finding that the defendant had been so prejudged that an unbiased tribunal could not be found in the original county of venue. *See also* Commonwealth v. Toolan, 460 Mass. 452, 465 (2011) (lapse of almost three years between victim's death and the trial "likely to have blunted the initial impact of media coverage").

[53] See Commonwealth v. Jackson, 388 Mass. 98 (1983), (216 newspaper articles and 3 magazine articles published over four years not sufficient proof of an inability to obtain an impartial jury). See also Commonwealth v. Toolan, 460 Mass. 452, 462-65 (2011) (impact of massive pretrial publicity on small Nantucket community).

[54] Commonwealth v. Jackson, 388 Mass. 98 (1983); Commonwealth v. Blackburn, 354 Mass. 200, 204 (1968) ("there was nothing so shocking and repellant in the crime or circumstances as to suggest that community opinion might be set against the persons accused"); Commonwealth v. Sielicki, 391 Mass. 377, 379 (1984) (motion for change of venue denied where "virtually everything reported in the newspapers was later introduced into evidence at

factors include whether the court adopted other safeguards to prevent jury bias, such as exploring the impact of publicity on voir dire, excusing jurors on that ground, and granting a defense request for sequestration.[55]

Third, if a change of venue is required, it must be effective to remedy the problem. In *Irvin v. Dowd*,[56] the defendant's conviction was reversed and a new trial granted when the defendant's only change of venue was to an adjoining rural county that had been equally saturated with inflammatory sensationalist publicity as the original county of venue. The defendant was entitled to an impartial jury, not one in which two-thirds of the jury members believed, after careful questioning, that the defendant was guilty without hearing any evidence.

Even if the crime is of great public interest, most courts will still attempt to impanel an impartial jury. It is usually assumed that the jury will follow the court's instructions and decide the case solely on the evidence presented. Although this may be a somewhat optimistic view of human nature, only one case in Massachusetts has been reversed for failure to grant a change of venue, and that reversal was framed narrowly by the court as being based on showing of actual prejudice due to massive pretrial publicity in the "small, socially interconnected community of Nantucket," and improperly conducted voir dire that failed to assure that each juror could be impartial.[57] To win at the trial level, a defendant's request for a change of venue must be presented strongly, with adequate affidavits and copies of newspaper articles, audio and videotapes when available.

§ 26.3D. MOTION TO EMPANEL JURY IN ANOTHER COUNTY

Rather than request a change of venue, which may cause difficulty with witnesses, support services and expenses, a defendant may request that jurors be selected and empanelled in another county and brought to and sequestered in the original county where the indictment is pending. The following criteria are to be reviewed by the Court in determining whether empanelling jurors from another county serves the interest of justice: (1) the inability to obtain an impartial jury in the county of origin; (2) the

trial"). *See also* United States v. Angiulo, 897 F.2d 1169, 1181 (1st Cir. 1990) (newspaper reporting of case against alleged organized crime figures was not so inflammatory or sensational as to support presumption of prejudice, where coverage was largely factual in nature, although references were made to "reputed crime figure" and "mafia boss"). In Morales, *supra* note 49, the SJC adopted the Angiulo factors, requiring publicity to be both "extensive and sensational." 440 Mass. at 540-42.

[55] *See, e.g.,* Commonwealth v. James, 424 Mass. 770, 775–77 (1997) (no abuse of discretion in denial of change of venue where judge conducted individual voir dire of prospective jurors on pretrial publicity, excused several jurors on the ground, and allowed sequestration; also, jury verdicts demonstrated ability to discriminate among codefendants); *see generally infra* § 26.3. *But see* Commonwealth v. Stroyny, 435 Mass. 635, 639 (2002) (trial court not required to question each prospective juror individually concerning bias from pretrial publicity, but could question entire venire and follow up with those who indicated some exposure).

[56] 366 U.S. 177 (1961).

[57] Commonwealth v. Toolan, 460 Mass. 452, 466-470 (2011). *See also* Commonwealth v. Colon, 408 Mass. 419, 435–37 (1990); Commonwealth v. Dean, 6 Mass. App. Ct. 781 (1978); Commonwealth v. Turner, 371 Mass. 803 (1977); Delle Chiaie v. Commonwealth, 367 Mass. 527 (1975); Commonwealth v. Scott, 360 Mass. 695 (1971); Commonwealth v. Smith, 357 Mass. 168 (1970); Commonwealth v. Blackburn, 354 Mass. 204 (1968); Commonwealth v. Ries, 337 Mass. 565 (1958); Commonwealth v. Bonomi, 335 Mass. 327 (1957).

consent of the defendant; (3) the costs of transporting witnesses and court personnel; (4) the substantial financial hardship incurred by the defendant in preparing for trial far from his residence, counsel, and witnesses, and far from where the events at issue allegedly occurred; and (5) the ability of the defendants to prepare their defenses effectively. [58]

§ 26.3E. MOTION FOR A CONTINUANCE

Although most trial courts dislike granting a continuance, a request for a continuance should be filed well in advance of trial, supported by affidavits and exhibits.[59]

A defendant does have a right to a speedy trial under the Sixth and Fourteenth Amendments to the U.S. Constitution and article 11 of the Massachusetts Constitution Declaration of Rights, and any request for a continuance due to adverse publicity should clearly be discussed with and approved of by the defendant.[60]

§ 26.3F. MOTION TO EXCLUDE JURY MEMBERS FROM A PARTICULAR AREA

If a change of venue is not allowed and the defendant has evidence through local newspapers, local television, or affidavits that a particular city or town within a county is inflamed with prejudice, a motion to exclude jurors from this area may be made.[61]

§ 26.3G. MOTION FOR SPECIAL VOIR DIRE QUESTIONS PROPOSED BY THE DEFENDANT[62]

A motion requesting specific voir dire questions is the single most effective tool defense counsel has available to combat prejudicial publicity. It is the motion that will most likely be granted and that will have the most impact in the selection of a fair and impartial jury. Any other remedies such as a change of venue or a continuance are unlikely to be allowed until a court has first attempted to question a pool of jurors.

G.L. c. 234, § 28, requires a court to ask four statutory questions of a juror ("whether he is related to either party or has an interest in the case, or has expressed or formed an opinion, or is sensible of any bias or prejudice therein") as well as questions designed to learn whether a juror understands the presumption of innocence, burden of guilt, and that the defendant has no burden to present evidence. In addition, most courts will ask the general all-inclusive question as to whether any juror has any reason they cannot be fair and impartial in deciding this case.[63]

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[58] *See* discussion in Commonwealth v. Aldoupolis, 390 Mass. 438, 448–49 (1983).

[59] See supra ch. 21.

[60] *See* Commonwealth v. Golston, 373 Mass. 249 (1977) (motion for continuance due to then current atmosphere of racial violence in city denied without a showing of specific public interest focused on this case); Commonwealth v. Gilday, 367 Mass. 474 (1975) (first trial date requested continued for 10 months).

[61] Commonwealth v. Kendrick, 404 Mass. 298 (1989) (judgment affirmed); Commonwealth v. Kendrick, 26 Mass. App. Ct. 48 (1988) (judgment reversed).

[62] *See* discussion of jury selection generally *infra* at ch. 30.

[63] *See, e.g.,* Commonwealth v. Bonomi, 335 Mass. 327, 334 (1957).

The form and number of questions is a matter of discretion.[64] There is no absolute requirement for individual voir dire except in certain specific circumstances, such as interracial sexual offenses;[65] or where it appears that "as a result of the impact of considerations which may cause a decision or decisions to be made in whole or in part upon issues extraneous to the case, including but not limited to, community attitudes, possible exposure to potentially prejudicial material or possible preconceived opinions toward the credibility of certain classes of persons, the juror may not stand indifferent."[66] The judge has discretion in determining whether a proper foundation has been laid necessitating individual voir dire,[67] and a case is unlikely to be reversed for failure to ask detailed questions on voir dire.[68]

A motion for voir dire questions in a highly publicized case should include a list of specific questions counsel wants the court to ask, as well as a request that these questions be asked of each juror individually, separate and apart from other members of the venire.[69] Many courts are reluctant to ask individual questions because of the time involved. Counsel should stress that there is the danger that jurors will be intimidated should they have to provide answers in front of a group. In the same manner, counsel

[64] Commonwealth v. Millen, 289 Mass. 441 (1935). *See also* Skilling v. United States, 130 S. Ct. 2896, 2918 n.20 (2010) (quoting Mu'Min v. Virginia, 500 U.S. 415, 425-26 (1991)) ("'To be constitutionally compelled, however, it is not enough that such questions might be helpful. Rather, the trial court's failure to ask these questions must render the defendant's trial fundamentally unfair.'").

[65] *See, e.g.,* Commonwealth v. Hobbs, 385 Mass. 863 (1982) (interracial sexual offenses against children); Commonwealth v. Sanders, 383 Mass. 637 (1981) (interracial rape). *Cf.* Commonwealth v. Stephens, 15 Mass. App. Ct. 461 (1983) (interracial relationship between procurer and prostitute involving physical violence). *See* full discussion *infra* at section 30.1B.

[66] G.L. c. 234, § 28. *See also* Commonwealth v. Seguin, 421 Mass. 243, 249 (1995) (insanity defense); Commonwealth v. Flebotte, 417 Mass. 348, 353-56 (1994) (sexual offense against minors); Commonwealth v. Dickerson, 372 Mass. 783 (1977). *Cf.* Commonwealth v. Lao, 443 Mass. 770, 775-78 (2005) (trial judge in domestic violence case did not abuse discretion by failing to conduct an individual voir dire of potential jurors upon request).

[67] Commonwealth v. Hennessey, 17 Mass. App. Ct. 160, 166 (1983).

[68] *See* Commonwealth v. McCoy, 456 Mass. 838, 841-42 (2010) (scope of voir dire rests in the sound discretion of the trial judge, and a determination by the judge that jury is impartial will not be overturned on appeal in the absence of a clear showing of abuse of discretion or that the finding was clearly erroneous); Commonwealth v. Cimeno, 65 Mass. App. Ct. 1125 (2006) (unpublished 1:28 decision) (judge in uttering false inspection sticker case did not abuse his discretion by declining to ask the defendant's proposed questions; claims of bias were generalized and speculative, and defendant demonstrated no actual evidence of bias); Commonwealth v. Duddie Ford, Inc., 409 Mass. 387, 389–93 (1991) (no abuse of discretion to ask jurors generally about bias, but not specifically about exposure to pretrial publicity); Commonwealth v. Burden, 15 Mass. App. Ct. 666, 673 (1983) ("Traditionally we have held that it is within the wide discretion of the trial judge whether to refine or improve on the subjects of G.L. c. 234 § 28 by going into more detail . . . If trial by jury is not to break down by its own weight, it is not feasible to probe more than the upper levels of a juror's mind"). *See also* Commonwealth v. Harrison, 368 Mass. 366, 371 (1975); United States v. Dennis, 183 F.2d 201, 227 (2d Cir. 1950); Mu'Min v. Virginia, 500 U.S. 415 (1991) (no constitutional right to voir dire questions on the *content* of pretrial publicity to which prospective jurors have been exposed).

[69] *See* Commonwealth v. Seabrooks, 433 Mass. 439, 442 (2001); Commonwealth v. Estrema, 383 Mass. 382, 389 (1981); Commonwealth v. Richard, 377 Mass. 64 (1979). *Contra* Commonwealth v. Vitello, 367 Mass. 224, 237 (1975).

must insist on more direct questioning when a juror provides a simplistic statement of impartiality.[70]

The defendant should be aware of and personally approve of the special questions concerning pretrial publicity, as there is the risk that the questions will draw the jury's attention to the publicity.[71]

Each case turns on its own facts and counsel should be careful to submit questions tailored to the unique facts of each case and the circumstances of the pretrial publicity. Some suggested questions, gleaned from prior cases, follow:

1. What newspapers do you read?
2. Have you read about this case in the newspapers or heard about it over the radio or on television?
3. What have you read or heard?
4. Have you conversed with any other person about this case?
5. Have you formed or expressed an opinion with regard to this case?
6. Do you have any interest in this case?
7. Have you read in the newspapers or heard over the radio or on television about _____ during the months of _____?
8. What did you read or hear?
9. Have you formed an opinion or developed an attitude as a result of this information that would affect your decision in this case?[72]
10. If you serve as a juror on this case, will your judgment be affected or your verdict in any way influenced by any articles you have read or may read or by any publicity that the case has received or shall receive?
11. Will anything you may have heard or read regarding this case or anything you may read in the future prevent you from returning a fair unbiased, impartial verdict according to the law and the evidence?
12. Has your mind or judgment been so affected by anything you have read or heard concerning this case that you will thereby be unable to render a fair and impartial verdict?
13. Are you able to eliminate or put out of your mind anything you have heard or read concerning this case so that you are satisfied that despite what you may have heard or read you will be able to render a fair and impartial verdict according to the law and the evidence?

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[70] *See, e.g.,* Irvin v. Dowd, 366 U.S. 717, 728 (1961); Sheppard v. Maxwell, 384 U.S. 333, 351 (1966) ("At the same time, we did not consider dispositive the statement of each juror 'that he would not be influenced by the news articles, that he could decide the case only on the evidence of a record, and that he felt no prejudice against petitioner as a result of the articles' "). In Commonwealth v. Estrema, 383 Mass. 382, 390 (1981), one juror responded to the general question posed to the venire whether anyone had formed an opinion about the facts of the case, and no jurors responded to the question whether any juror was conscious of any bias or prejudice, but a number of jurors responded to reading something about the case and were then questioned individually. It is, however, totally within the judge's discretion whether "to accept, without more, the declaration of the jurors as to their disinterest and freedom from emotional or intellectual commitment." *See also* Commonwealth v. Leahy, 445 Mass. 481, 497-99 (2005); Commonwealth v. Gilday, 367 Mass. 474, 492 (1975); Commonwealth v. Subilosky, 352 Mass. 153, 159 (1967). *But see* Commonwealth v. Morales, 440 Mass. 536, 548-49 (2003) (judges not bound to ask the questions requested by defendant during individual voir dire).

[71] Commonwealth v. Kendrick, 26 Mass. App. Ct. 48 (1988), *rev'd,* 404 Mass. 298 (1989).

[72] Commonwealth v. Estrema, 383 Mass. 382, 389 n.7 (1981).

14. Are you able to eliminate and put out of your mind anything and everything you have read or heard concerning this case so that if, when the case is closed, you have a reasonable doubt as to the guilt of the defendant, you will give him the benefit of that doubt and return a verdict of not guilty?

15. If after hearing the evidence and applying the law as given you by the court, you entertain a reasonable doubt as to the guilt of this defendant, will you give him the benefit of that doubt and return a verdict of not guilty?

16. If after hearing the evidence and the law as given you by the court you have a reasonable doubt as to the guilt of this defendant, would you permit or allow that doubt to be overcome or affected in any way by any bias or prejudice you might have toward this defendant?

17. If after hearing the evidence and the law as given you by the court you have a reasonable doubt as to the guilt of this defendant, would you permit or allow that doubt to be affected in any way by any impressions you may have received from anything you may have heard or read outside the court room?

18. Are you satisfied that you are able to render a fair and impartial verdict according to the law and the evidence and to give the defendant the benefit of a reasonable doubt and find him not guilty if you have such a doubt?[73]

§ 26.3H. MOTION FOR ADDITIONAL PEREMPTORY CHALLENGES[74]

If it becomes apparent that many of the prospective jurors are knowledgeable about the case, a defendant may orally request additional peremptory challenges. If a defendant does not do so, the issue of prejudicial pretrial publicity will not be preserved for appeal.[75] This motion is discretionary with the Court.

§ 26.3I. MOTION TO EXCUSE FOR CAUSE

As in any jury selection process, a defendant has the right to orally request the court excuse the juror for cause. Be wary of the experienced trial judges who lead a suggestible juror through a litany of self-serving questions to establish their fairness and impartiality.[76] Establish a clear record for appeal by listing the defendant's

[73] Commonwealth v. Bonomi, 335 Mass. 327, 334 (1957).

[74] *See* discussion of jury selection generally, *infra* at ch. 30.

[75] Commonwealth v. Blackburn, 354 Mass. 204 (1968); Commonwealth v. Turner, 371 Mass. 803 (1977); Delle Chiaie v. Commonwealth, 367 Mass. 527 (1975) (defendant in each case failed to request additional peremptory challenges, thereby indicating he was content with the jury as fair and impartial); Commonwealth v. Barnes, 40 Mass. App. Ct. 666, 670 (1996) (relief refused where defendant's exhaustion of peremptory challenges was "strategic rather than real"). *See also infra* section 30.3A; *and see* Commonwealth v. Toolan, 460 Mass. 452, 466 (2011) (SJC discussed failure of defendant to exhaust peremptory challenges weighed against bias due to pretrial publicity), *and* Commonwealth v. Morales, 440 Mass. 536, 542-43 (2003) (same).

[76] Should a court do this, defense counsel must be prepared with some follow-up questions, such as:

> 1. Were you in [the defendant's] place, and he in yours, seated on the jury with your opinion, would you want him on your jury?
>
> 2. Looking at [the defendant], right now, knowing only the charges against him and nothing more, would you find him not guilty?
>
> 3. Do you believe [the defendant] is innocent?

objection to the juror including a description, where applicable, of the juror's tone of voice, physical demeanor, and attitude in answering questions. Request to make such an objection outside the presence of that particular juror and other prospective jurors. If the court insists on counsel making objections within the presence of the juror, it would be appropriate to use a peremptory challenge and request an additional peremptory, arguing that the juror should have been excused by the Court.

§ 26.3J. MOTION FOR SEQUESTRATION OF JURORS

Where the publicity continues unabated during the trial, counsel should move to sequester the jury during the trial.[77] Defense counsel should be aware, however, that due to the expense, many courts will require a six-day trial week. Defense counsel may also move for sequestration during jury deliberation. (The issue of sequestration is addressed *infra* at § 36.1A).

§ 26.3K. MOTION FOR PRELIMINARY JURY INSTRUCTIONS

A motion requesting that the jurors be instructed to ignore any publicity about this case in newspapers, on radio, or on television may be made on the swearing in of the jury. Such an instruction should also be requested at the close of each trial day.

§ 26.3L. PUBLICITY DURING TRIAL: MOTIONS FOR MISTRIAL, INDIVIDUAL VOIR DIRE, AND IMMEDIATE INSTRUCTION

Publicity may continue and even increase during the trial of a notorious case, and despite instructions by the trial court, jurors may see or hear news reports about this case. It is extremely important that counsel be alert to such reports and be prepared with a specific offer of proof. Any newspaper articles must be marked for identification for purposes of preserving the issue on appeal.

Although a trial judge has broad discretion to deal with this issue,[78] a procedure has been established by the Supreme Judicial Court in *Commonwealth v. Jackson.*[79]

First, the court should ascertain the scope of the article and whether it was merely fair reporting of prior trial testimony,[80] or whether it provided highly prejudicial information such as publication of a defendant's criminal record.[81]

If the court finds that the material raises a serious question of prejudice, a voir dire of the jurors should be conducted in the presence of the defendant [81.5] Only

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4. Would it take evidence to overcome your belief in the defendant's guilt?

[77] Commonwealth v. Ries, 337 Mass. 565 (1958); Commonwealth v. Golston, 373 Mass. 249 (1977). Sequestration of the jury is in the judge's discretion. Commonwealth v. McCowen, 458 Mass. 461, 466, 475 (2010); Commonwealth v. Clark, 432 Mass. 1, 10 (2000).

[78] Commonwealth v. Eagan, 357 Mass. 585 (1970).

[79] 376 Mass. 790 (1978). *See also* Commonwealth v. McCowen, 458 Mass. 461, 486-87 (2010); Commonwealth v. Sumner, 18 Mass. App. Ct. 349, 355 (1984); Commonwealth v. Cameron, 385 Mass. 660 (1982). This issue is more fully addressed *infra* at § 36.1B.

[80] Commonwealth v. Balakin, 356 Mass. 547, 554 (1969).

[81] Commonwealth v. Crehan, 345 Mass. 609 (1963).

[81.5] Commonwealth v. Mimless, 53 Mass. App. Ct. 534, 535-536 (2002).

collective questioning is called for at this point under the *Jackson* procedure.[82] If any juror responds affirmatively, "an individual voir dire, outside the presence of other jurors, *must* be conducted to determine the effect of the material on the juror's ability to render an impartial decision."[83] A juror should be asked about the publicity, her impression of it, whether it would affect her judgment, and whether it has been discussed with other jurors. It is critical that open-ended questions be asked rather than questions that lead the juror into the "correct" responses. If it appears that the juror is intimidated or does not appear impartial, defense counsel must move to remove the juror.[83.5] A mistrial should also be requested, as the process has now been contaminated by extraneous influences.

If mistrial is denied, a motion for forceful, specific, and immediate jury instructions should follow.[84] The instructions must be "strong," "rigorous and emphatic," and in "plain, unmistakable language."[85] The damage is done at this point, but appellate courts continue to indulge in the fiction that "jurors are expected to follow instructions to disregard matters withdrawn from their consideration."[86]

§ 26.3M. MOTION TO EXCLUDE CAMERAS

Estes v. Texas, supra, established for many years the principle that television was a powerful and corrupting medium that should be kept from a courtroom. Since that time, however, most states including Massachusetts have allowed television and other cameras in court.

Massachusetts rules require judges to permit broadcasting, televising, electronic recording, and taking photographs of most court proceedings, subject to specified limitations.[87] Such coverage may be excluded "if it appears that [it] will

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[82] Commonwealth v. Francis, 432 Mass. 353, 371 (2000); Commonwealth v. Ali, 43 Mass. App. Ct. 549, 564-65 (1997).

[83] Commonwealth v. Jackson, 376 Mass. 790, 801 (1978). If evidence of juror wrongdoing or bias is uncovered by the judge, further interrogation of the jurors under oath by defense counsel may be required. Commonwealth v. Mimless, 53 Mass. App. Ct. 534, 537 (2002).

[83.5] If the juror asserts that she remains impartial, the judge may rely on that assertion and deny the motion. Commonwealth v. Clark, 432 Mass. 1, 11 (2000). If the juror is discharged, it is in the discretion of the judge whether to conduct a voir dire of the other deliberating jurors. Commonwealth v. Francis, 432 Mass. 353, 370 (2000). The defendant has a constitutional right to be personally present during any questioning of the jurors by the judge. Commonwealth v. Sleeper, 435 Mass. 581, 588-90 (2002); Commonwealth v. Martino, 412 Mass. 267, 286 (1992); Commonwealth v. Dosanjos, 52 Mass. App. Ct. 531, 535 (2001). Cf. Commonwealth v. Zimmerman, 441 Mass. 146, 151-52 (2004).

[84] *See. e.g.,* Commonwealth v. Crehan, 345 Mass. 609, 613 (1963) (general cautionary instructions given at the close of evidence eight days later insufficient to overcome prejudicial effect of newspaper article revealing defendant's criminal record). *See also* Commonwealth v. Stanley, 363 Mass. 102, 105 (1973).

[85] The instruction must advise the jurors that the reason for the discharge of one of their number was for personal reasons and had nothing to do with the discharged juror's view of the case or that juror's relationship with the other deliberating jurors. Commonwealth v. Connor, 392 Mass. 838, 845-846 (1984); Commonwealth v. Dosanjos, 52 Mass. App. Ct. 531, 536-537 (2001).

[86] Commonwealth v. Cameron, 385 Mass. 660, 668 (1963).

[87] S.J.C. Rule 1:19.

create a substantial likelihood of harm to any person or other serious harmful consequence."[88] Also excluded is electronic coverage of hearings of motions to suppress or to dismiss or of probable cause or voir dire hearings.[89] Television and photographic coverage is to be accomplished by one or two pooled cameras.[90] If there is or might be a serious question of identification, counsel should request the court at arraignment to bar the media from photographing the defendant's face, which might prejudice proper identification of the defendant in the future.[91] Most courts, however, take the position that the electronic media are free to report anything that occurs in a courtroom that a spectator could see.[92]

§ 26.3N. MOTION FOR CLOSURE

Motions to close any part of the pretrial proceedings of a notorious case must be made with great caution and the relief sought must be narrowly drawn. A line of decisions by the U.S. Supreme Court stresses the long history and need for open and public trials in this country.[93] The public has an implicit right under the First Amendment to attend a trial and have it reported by the media.[94] Although the public's right is subject to greater restriction at certain pretrial stages,[95] any request for closure

[88] Commonwealth v. Clark, 432 Mass. 1, 7 (2000); S.J.C. Rule 1:19(a). A judge may limit or temporarily suspend all news media coverage of courtroom proceedings on the same criterion. Commonwealth v. Cross, 33 Mass. App. Ct. 761, 761–63 & n.3 (1992) (judge need not conduct voir dire of prospective jurors as to impact of television cameras, but "it may be advisable" to instruct jurors prior to trial to inform the court if the presence of cameras interferes with their ability to concentrate and remain impartial).

[89] S.J.C. Rule 1:19(b).

[90] S.J.C. Rule 1:19(d).

[91] *See also* S.J.C. Rule 1:19(c) (in jury trials judge should not permit recording or close-up photographing or televising of, inter alia, conferences between counsel and client).

[92] *Cf.* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975). *But see* Gannet Co. v. DePasquale, 443 U.S. 368 (1979) (defendant has the right to closure from media of a pretrial suppression hearing).

[93] Press-Enterprise Co. v. Superior Court of California, 478 U.S. 1 (1986); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).

[94] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980). Also, the defendant's right to public trial may be infringed by closure of proceedings without his consent. *See* Waller v. Georgia, 467 U.S. 39, 46–47 (1984) (closure infringing defendant's right to public trial must meet the First Amendment test of *Press-Enterprise*); Commonwealth v. Martin, 417 Mass. 187 (1994); Commonwealth v. Marshall, 356 Mass. 432 (1969). The First Amendment right of access does not extend to administrative hearings. Doe v. Sex Offender Registry Board, 459 Mass. 603, 626-27 (2011). Defendant's explicit consent to closure waives his right to public trial and may leave him without standing to raise the public's First Amendment right of access. Commonwealth v. Adamides, 37 Mass. App. Ct. 339 (1994).

[95] *See* Rivera-Puig v. Garcia-Rosario, 983 F.2d 311, 322–25 (1st Cir. 1992) (press constitutionally entitled to access to preliminary hearings in Puerto Rico) (citing Press Enterprise v. Superior Court of California, 478 U.S. 1 (1986) (media have right to transcript of "trial-like" preliminary hearing). *But see* Commonwealth v. Gordon, 422 Mass. 816, 823–24 (1996) (closure during colloquies between judge and prospective jurors seeking to be excused on account of hardship did not violate defendant's right to public trial); In the Matter of a John Doe Grand Jury Investigation, 415 Mass. 727 (1993) (denying access by news media to video- and audio-tapes of lineup ordered by grand jury, even though both grand jury investigation and

or protective measures will likely be viewed as an attempt at prior restraint of free speech.[96] Generally, public access to judicial proceedings may not be abridged absent "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."[97] Closure may occur if the following four "*Waller* requirements" are met:

> [1] the party seeking to close the hearing must advance an overriding interest[98] that is likely to be prejudiced, [2] the closure must be no broader than necessary to protect that interest,[99] [3] [the judge] must consider reasonable alternatives to closing the proceeding, and [4] [the judge] must make findings adequate to support the closure.[100]

There is a heavy presumption against the constitutional validity of such restraint on the press and public.[101] However, as discussed in the next section, "gag

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subsequent criminal proceedings were concluded, many of the details of the lineup had already been publicly revealed in investigative reports, and several directly interested individuals consented); Gannett Co. v. Depasquale, 443 U.S. 368 (1979) (suppression hearing may be closed). *See also* S.J.C. Rule 1:19(b).

[96] The presumptive right of public access applies to judicial proceedings held in noncourtroom settings. Boston Herald, Inc. v. Superior Court Dep't of the Trial Court, 421 Mass. 502 (1995) (court must try to find reasonable alternative to closure of arraignment held in hospital intensive care unit).

[97] Boston Herald, Inc. v. Superior Court Dep't of the Trial Court, 421 Mass. 502, 505 (1995) (citing Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 13 (1986)). *See also* Martin v. Bissonette, 118 F.3d 871, 876 (1st Cir. 1997) (rejecting proposition that exclusion of defendant's family member from trial triggers heightened standard).

In cases of "partial" rather than "complete" closure, the government need not show an "overriding interest," but only a "substantial reason." United States v. DeLuca, 137 F.3d 24, 32–33 (1st Cir. 1998) (upholding security measure of screening and identifying trial spectators).

[98] *See* Commonwealth v. Martin, 39 Mass. App. Ct. 44, 46–48 (1995) (where the closure is temporary and partial, and where members of the press are not excluded, a "substantial reason" for closure rather than an "overriding interest" will suffice); United States v. DeLuca, 137 F.3d 24, 32–33 (1st Cir. 1998) (upholding security measure of screening and identifying trial spectators, under "substantial reason" test).

[99] *See* Martin v. Bissonette, 118 F.3d 871, 875 (1st Cir. 1997) (given proof of intimidation by other members of defendant's family, judge was not required to make express findings regarding witness's fear of defendant's mother before excluding her).

[100] Commonwealth v. Clark, 432 Mass. 1, 8 (2000); Commonwealth v. Martin, 417 Mass. 187, 194 (1994) (quoting Waller v. Georgia, 467 U.S. 39, 48 (1984)).

[101] Capital Cities Media, Inc. v. Toole, 463 U.S. 1303 (1983). A trial is deemed to be a public event and "those who see and hear what transpired can report it with impunity." Craig v. Harney, 331 U.S. 367, 374 (1947).

Only one statute, G.L. c. 278, § 16A, allowed closure of a criminal trial to the public during the testimony of a child victim in a case of sexual assault. This statute was challenged, and in Globe Newspaper Co. v. Superior Court for Norfolk County, 457 U.S. 596 (1982), the Court held that such closure may be ordered only on a case by case basis and only if the state's justification in denying access was compelling, the order was narrowly tailored to serve that interest and after notice to the representative of the press. *See* Commonwealth v. Cohen, 456 Mass. 94, 107-08 (2011) (upholding trial judge's authority to make determinations on case-by-case basis); Commonwealth v. Martin, 417 Mass. 187, 191 (1994) (because judge's findings under four-part *Waller* test, *supra*, were inadequate, closure of trial during minor complainant's testimony violated defendant's Sixth Amendment right to public trial; findings must relate to

orders" directed to the parties, including the prosecution, the police, and their agents, might be treated differently.

Courts in the past, however, have requested that reporters voluntarily cooperate with the court in not reporting information excluded at trial.[102] It is unlikely, however, that any such voluntary cooperation could be enforced by the court's contempt powers.[103]

§ 26.4 COUNSEL'S STATEMENTS TO THE MEDIA

The role of the defense counsel in a case where there is substantial publicity must be an aggressive one. Cases are rarely reversed at the appellate level because the trial court did not properly exercise its discretion. The time and place to advocate for the protection of a defendant is at the earliest pretrial stages and at trial. This does not mean, however, that defense counsel is free to "fight fire with fire" by embarking on press conferences or public interviews during trial. Nor is it appropriate or ethical for the prosecutor to announce with proper gravity the strength of the government's case on the six o'clock news. In appropriate cases, counsel should consider requesting a court order barring the prosecution[104] and law enforcement agents[105] from disclosing prejudicial information. This will give defense counsel a forum for immediate preventive action should it become necessary.

Mass. R. Prof. C. 3.6 provides the guidelines that both sides are to follow. In general, lawyers may not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing the trial. Notwithstanding this prohibition, lawyers may state the offense or defense involved and the identity of persons involved, including the defendant's identity, residence, occupation and family status; information contained in a public record; that an investigation is in progress; a request for assistance in obtaining evidence and information necessary thereto; if the accused has not been apprehended, information necessary to aid in his apprehension and that warns of dangers; the fact,

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particular complainant, not minor complainants in general). *See also* United States v. Three Juveniles, 61 F.3d 86 (1st Cir. 1995), *cert. denied,* 116 S. Ct. 1564 (1996) (in light of long tradition of confidentiality, closure of juvenile delinquency proceedings is not subject to analysis under *Globe Newspaper* test; discretionary closure in this case under federal Juvenile Delinquency Act upheld).

[102] *See, e.g.,* Commonwealth v. Crehan, 345 Mass. 609 (1963).

[103] *Cf.* Pennekamp v. Florida, 328 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941).

[104] *See* Aversa v. United States, 99 F.3d 1200, 1203, 1216 (1st Cir. 1996), (disciplinary referral of federal prosecutor for making "totally false" and "outrageous" statements to media about defendant; prosecutor's role in making statements to the press "is strictly limited by [her] overarching duty to do justice") (quoting Souza v. Pina, 53 F.3d 423, 427 (1st Cir. 1995)).

[105] Extrajudicial publicity generated by the police can be extremely prejudicial. The police are not directly bound by professional disciplinary rules, but Mass. R. Prof. C. 3.8(e) requires the prosecutor to "exercise reasonable care" to prevent law enforcement personnel from making improper statements. In addition, a court arguably has inherent power to order the police, as potential witnesses, to comply with gag orders. *See* Sheppard v. Maxwell, 384 U.S. 333, 361 (1966). *But see* LAFAVE AND ISRAEL, CRIMINAL PROCEDURE § 22.1(b) (1984), questioning existence of the power.

time and place of arrest; the identity of investigating and arresting officers or agencies and the length of the investigation. Also, a lawyer may make a statement reasonably required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or her client, and to reply to public charges of misconduct.

The American Bar Association has promulgated similar standards for criminal justice concerning these issues.[106] Not all pretrial publicity is bad, but it rarely benefits a defendant. More often, it is the prosecutor who is able to summons the news media and provide a one-sided view of the case. The impact of this publicity on potential jurors may be enormous, but it can be mitigated by aggressive litigation at the trial court level. It is simply too late to win these issues on appeal.

[106] *See* ABA Standards on Criminal Justice, standard 8-1.1. In Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991), a criminal defense attorney successfully attacked the constitutionality of Bar disciplinary sanctions imposed for making extrajudicial statements on behalf of his client. A splintered Supreme Court found a portion of the Nevada rule — which was identical to ABA Model Rule 3.6, on which the analogous Massachusetts rule is based — void for vagueness. Members of the Court also disagreed on whether a lower First Amendment standard applies to restrictions on attorney speech than to the speech of ordinary citizens and, if so, whether defense attorneys enjoy more protection than prosecutors. *But see* In re Cobb, 445 Mass. 452, 475 & n.7 (2005) (finding reliance on Gentile misplaced because "first, that case involved Rule 177 of the Nevada Supreme Court Rules, which has no application to Massachusetts; and second, the safe harbor principle applies only to extrajudicial statements, not to statements made by attorneys in court").