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REMEDIES FOR PREJUDICIAL PUBLICITY: A BRIEF REVIEW

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I. INTRODUCTION

WHAT HAVE COME to be called the rights of "fair trial and free press" have received much attention in recent years,[1] especially because of several highly publicized decisions handed down in the midst of the Warren Court years.[2] Since those decisions, although few cases in this area have reached the United States Supreme Court and many issues remain unresolved, a number of preventive and curative measures have been fashioned or suggested for dealing with the problems of pretrial and midtrial publicity.[3]

The whole area of prejudicial publicity has not lent itself to many clear-cut rules, being somewhat amorphous both in terms of

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1. This article will discuss the problem of prejudicial publicity as it affects the petit jury. For a discussion of the possibility of challenging a grand jury as being tainted by pretrial publicity, *see* Ranney, *Grand Juries in Pennsylvania,* 37 U. PITT. L. REV. 1, 12-13 (1975).

2. Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965); Rideau v. Louisiana, 373 U.S. 723 (1963); Irvin v. Dowd, 366 U.S. 717 (1961) (first decision striking down a state conviction on the ground of prejudicial publicity).

3. For the leading effort to resolve some of the difficult problems in this area, *see* ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS (Approved Draft 1968) [hereinafter cited as ABA STANDARDS]. *See generally* Stanga, *Judicial Protection of the Criminal Defendant Against Adverse Press Coverage,* 13 WM. & MARY L. REV. 1 (1971). For a collection of articles on the recommendations of the ABA advisory committee on fair trial and free press, *see Symposium,* 42 NOTRE DAME LAW. 857 (1967). For a judicial study of the problems, *see Report of the Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue,* 45 F.R.D. 391 (1968).

defining the problem and in terms of devising appropriate remedies. Aside from the obvious uncertainties created by the tensions between first amendment freedoms and the sixth amendment right to a fair trial by an impartial jury, one partial explanation for the difficulties in developing precise rules in this area is that different levels of actual or potential prejudice are generally required in order to invoke the various remedies. Furthermore, different remedies may be particularly appropriate for specific types of prejudicial publicity.[4]

The choice as to the proper remedy for prejudicial publicity[5] is within the discretion of the trial court, and the judge's decision will not be reversed absent an abuse of discretion which prejudices the accused.[6] Since this choice "involves the balancing of fundamental rights — the defendant's right to a fair trial before an impartial jury and the rights associated with a free press — this discretion must be exercised with care."[7] Most courts have established an outer parameter to the operation of the constitutional limitations in this area, holding that dismissal of charges is not a proper remedy for prejudicial publicity even where the normal remedies such as voir dire, a continuance, and a change of venue are unlikely to be effective.[8]

In spite of the difficulty of deriving general principles regarding the impact of prejudicial publicity, several broad propositions have

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4. *See, e.g.,* Groppi v. Wisconsin, 400 U.S. 505, 509–11 (1971) (remedies of continuance and careful jury selection procedures not always sufficient to alleviate prejudice such that change of venue may be required). *See also* notes 50 & 51 and accompanying text *infra.*

5. Sometimes a claim of error in the denial of a request for one remedy will be deemed harmless if counsel fails to use or request one or more other available remedies. *See* note 63 *infra.* Similarly, the granting of one or more remedies may be held to render harmless the failure to grant another. *See* Nebraska Press Ass'n v. Stuart, 96 S. Ct. 2791 (1976), wherein the Court stated:

> Appellate evaluations as to the impact of publicity take into account what other measures were used to mitigate the adverse effects of publicity. The more difficult prospective or predictive assessment that a trial judge must make also calls for a judgment as to whether other precautionary steps will suffice.

Id. at 2805.

6. *See* Commonwealth v. Bruno, ___ Pa. ___, 352 A.2d 40 (1976), where the court stated:

> The procedure to be followed to ensure a fair trial in the face of prejudicial publicity is clearly within the sound discretion of the trial court . . . .
>
> . . . .
>
> Although the proper precautions are inevitably dictated by the circumstances of each case, they must reasonably ensure that no prejudice will occur.

Id. at ___, 352 A.2d at 48; *cf.* Margoles v. United States, 407 F.2d 727, 733 (7th Cir.), *cert. denied,* 396 U.S. 833 (1969).

7. Commonwealth v. Bruno, ___ Pa. ___, ___, 352 A.2d 40, 48 (1976); *cf.* Groppi v. Wisconsin, 400 U.S. 505 (1971).

8. *See, e.g.,* Commonwealth v. Douglas, 461 Pa. 749, 337 A.2d 860 (1975); State v. Thompson, 273 Minn. 1, 139 N.W.2d 490 (1966). *But see* United States v. Abbott Labs., 505 F.2d 565, 571–72 (4th Cir. 1974), *cert. denied,* 420 U.S. 990 (1975). *See generally* Stanga, *supra* note 3, at 22–23.

maintained a somewhat uneasy coexistence for some time now. First, qualified jurors need not be completely ignorant of the facts and issues involved in a case.[9] Second, a juror's assurances of impartiality despite exposure to prejudicial publicity are not dispositive of the accused's rights, and the defendant remains free to demonstrate "the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality."[10] Finally, although a clearer case of reversible error is presented when evidence in the voir dire record shows actual jury prejudice due to publicity, such prejudice will be presumed where the probability of unfairness is sufficiently great.[11]

9. In Irvin v. Dowd, 366 U.S. 717 (1961), the Supreme Court stated:

> It is not required . . . that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Id. at 722–23 (citations omitted); *accord,* Murphy v. Florida, 95 S. Ct. 2031 (1975) (juror exposure to news accounts about defendant's prior felony conviction and certain facts about the crime charged did not create presumption of prejudice); Commonwealth v. Martin, ___ Pa. ___, 348 A.2d 391 (1975).

10. Irvin v. Dowd, 366 U.S. 717, 723 (1961). In *Irvin,* as a result of massive and extremely prejudicial publicity, 8 of the 12 jurors actually seated thought defendant was guilty. The Court commented:

> [I]t would be difficult to say that each could exclude this preconception of guilt from his deliberations . . . . No 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. Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight.

Id. at 727–28. *See also* Murphy v. Florida, 95 S. Ct. 2031, 2036 (1975) (dictum).

11. Commonwealth v. Pierce, 451 Pa. 190, 195, 303 A.2d 209, 212 (1973) (the release by police of both the defendant's prior criminal record and his confession to being "triggerman," and the staging of a reenactment were held to be inherently prejudicial); *see* Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965); Rideau v. Louisiana, 373 U.S. 723 (1963). In *Rideau,* where a 20-minute film of the defendant's murder confession was broadcast three times in 3 days and three jury members had seen the broadcast, the Court noted:

> [W]e do not hesitate to hold, without pausing to examine a particularized transcript of the *voir dire* examination of the members of the jury, that due process of law in this case required a trial before a jury drawn from a community of people who had not seen and heard Rideau's televised 'interview.'

Id. at 727.

In *Estes,* where the Court held that televising criminal proceedings over defense objections violated due process, a plurality of the Court agreed as follows:

> It is true in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process.

Estes v. Texas, *supra* at 542–43. *Compare* Murphy v. Florida, 95 S. Ct. 2031 (1975) (where voir dire transcript indicated that no juror had fixed opinion as to guilt, the

II. RESTRICTION OF PUBLIC STATEMENTS AND PRESS PUBLICATION

Focusing first upon the preventive action which may be undertaken, one significant area lies in the restriction of public statements by those involved in the trial. In *Commonwealth v. Pierce,*[12] the Pennsylvania Supreme Court ruled:

> [P]olicemen and members of the staffs of the office of District Attorneys shall not release to the news media: (a) the existence or contents of any statement or confession given by the accused, or his refusal to give a statement or to take tests; (b) prior criminal records of the accused, including arrests and convictions; (c) any inflammatory statements as to the merits of the case, or the character of the accused; (d) the possibility of a plea of guilty; (e) nor shall the authorities deliberately pose the accused for photographs at or near the scene of the crime, or in photographs which connect him with the scene of the crime.[13]

A violation of the *Pierce* strictures does not, however, necessarily dictate a new trial, for it "must also appear that the news accounts [are] so 'inherently prejudicial' that the possibility of a fair trial [is] questionable."[14] Obviously, the appropriate pretrial remedy for a *Pierce* violation would be a change of venue.[15] Although the Court in *Pierce* did not specifically so provide, it would seem that an exception to its dictates will be recognized for statements to the press which are necessary to aid in the accused's apprehension, to warn the public of any dangers, or otherwise to aid in the investigation.[16]

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fact that some jurors remembered the crime and had knowledge of accused's criminal background held to be insufficient evidence of actual or inherent prejudice), *with* Commonwealth v. Bruno, ___ Pa. ___, 352 A.2d 40 (1976) (failure of trial judge to sequester jury or question jurors to ensure that they had not been exposed to prejudicial publicity held to be reversible error).

12. 451 Pa. 190, 303 A.2d 209 (1973).

13. *Id.* at 200, 303 A.2d at 215, *citing* ABA STANDARDS, *supra* note 3, at §§ 1.1, 2.1.

14. Commonwealth v. Nahodil, 462 Pa. 301, 306, 341 A.2d 91, 93 (1975) (newspaper articles referring, *inter alia,* to defendant's confession deemed to be not of this category, such that denial of a change of venue was not error where the jury selection process eliminated any biased jurors); *see* Commonwealth v. Kichline, ___ Pa. ___, 361 A.2d 282 (1976); Commonwealth v. Jones, 452 Pa. 299, 308, 304 A.2d 684, 688 (1973); Commonwealth v. Palmer, 225 Pa. Super. 370, 310 A.2d 360 (1973); Annot., 22 A.L.R. Fed. 556 (1975).

15. In *Pierce,* the court stated that "a change of venue should have been granted." 451 Pa. at 192, 303 A.2d at 211.

16. *See* ABA STANDARDS, *supra* note 3, at §§ 1.1(a), 1.1(b)(1), 2.1(a), 2.1(c)(1). An interesting question lies in whether an exception might also be recognized for use of such statements to "smoke out" a dangerous confederate.

The propriety of further restrictions upon statements by counsel has been the subject of some dispute, especially as applied to statements by defense counsel.[17] The *ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Fair Trial and Free Press (ABA Standards)* set forth standards dealing with such statements by counsel, these standards having been adopted, with minor change, in the ABA Code of Professional Responsibility (ABA Code),[18] which is applicable in Pennsylvania courts.[19] The *ABA Standards* and the ABA Code deal with statements by counsel during pending investigations,[20] between the time of arrest and trial,[21] during both

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17. Sections 1.1 and 2.1 of the *ABA Standards* have been the focus for discussion. *See* 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 595 (1971). As to the permissibility of prohibiting public discussion of the case by parties, witnesses, jurors, and judicial employees, *see* text accompanying notes 27–32 *infra*.

18. ABA CODE OF PROFESSIONAL RESPONSIBILITIES AND CODE OF JUDICIAL CONDUCT DR 7-107 (1975) [hereinafter cited as the ABA CODE].

19. PA. R. CIV. P. 205.

20. ABA STANDARDS, *supra* note 3, at § 1.1; ABA CODE, *supra* note 17, at DR 7-107(A). The disciplinary rule states in pertinent part:

> (A) A lawyer participating in or associated with the investigation of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that does more than state without elaboration:
>
> (1) Information contained in a public record.
>
> (2) That the investigation is in progress.
>
> (3) The general scope of the investigation including a description of the offense and, if permitted by law, the identity of the victim.
>
> (4) A request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto.
>
> (5) A warning to the public of any dangers.

Id.

21. ABA STANDARDS, *supra* note 3, at § 1.1; ABA CODE, *supra* note 17, at DR 7-107(B)-(C). This portion of the rule states:

> (B) A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the commencement of the trial or disposition without trial, make, or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to:
>
> (1) The character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.
>
> (2) The possibility of a plea of guilty to the offense charged or to a lesser offense.
>
> (3) The existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement.

the jury selection and the trial,[22] and after the trial.[23] However, one circuit court has held that court rules based upon the ABA Code unconstitutionally infringe free speech to the extent that the rules proscribed statements by counsel having only a "reasonable likeli-

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(4) The performance or results of any examinations or tests or the refusal or failure of the accused to submit to examinations or tests.
(5) The identity, testimony, or credibility of a prospective witness.
(6) Any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.

(C) DR 7-107(B) does not preclude a lawyer during such period from announcing:
(1) The name, age, residence, occupation, and family status of the accused.
(2) If the accused has not been apprehended, any information necessary to aid in his apprehension or to warn the public of any dangers he may present.
(3) A request for assistance in obtaining evidence.
(4) The identity of the victim of the crime.
(5) The fact, time and place of arrest, resistance, pursuit, and use of weapons.
(6) The identity of investigating and arresting officers or agencies and the length of the investigation.
(7) At the time of seizure, a description of the physical evidence seized, other than a confession, admission, or statement.
(8) The nature, substance, or text of the charge.
(9) Quotations from or references to public records of the court in the case.
(10) The scheduling or result of any step in the judicial proceedings.
(11) That the accused denies the charges made against him.

Id. For a case dealing with a first amendment challenge to DR 7-107, *see* Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975), *cert. denied,* 96 S. Ct. 3201 (1976).

22. ABA STANDARDS § 1.1; ABA CODE, *supra* note 17, at DR 7-107(D). The rule states:

(D) During the selection of the jury or the trial of a criminal matter, a lawyer or law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial, except that he may quote from or refer without comment to public records of the court in the case.

Id.; see Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 255-56 (7th Cir. 1975), *cert. denied,* 96 S. Ct. 3201 (1976) (phrase in the rule "or other matters" held unconstitutionally vague).

23. ABA STANDARDS, *supra* note 3, at § 1.1; ABA CODE, *supra* note 17, at DR 7-107(E). The rule provides:

(E) After the completion of a trial or disposition without trial of a criminal matter and prior to the imposition of sentence, a lawyer or law firm associated with the prosecution or defense shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by public communication that is reasonably likely to affect the imposition of sentence.

Id.

See Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 257 (7th Cir. 1975), *cert. denied,* 96 S. Ct. 3201 (1976), in which this provision was held unconstitutional.

hood" of prejudicing a fair trial as opposed to posing a "serious and imminent threat" of interference with the fair administration of justice.[24] Furthermore, since a common sense presumption of guilt accompanies an indictment, and because of other differences between the position of the prosecution and the defense, the *ABA Code* provision dealing with pre-arrest statements was held applicable only to the prosecution, to guard against prejudice to the defendant's case.[25] Certainly, where the court does issue an order limiting statements by counsel about the case, such action will generally be a factor supporting denial of a change of venue.[26]

The rules of criminal procedure provide that in a widely publicized or sensational case, the trial court, on motion of either party or on its own motion, may issue a special order restricting extrajudicial statements by parties and witnesses when such statements would be likely to interfere with the rights of the accused to a fair trial by an impartial jury.[27] Both free speech and fair trial interests

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See also United States v. Gregorio, 497 F.2d 1253 (4th Cir. 1974) (news articles reporting that prosecutor intended to request maximum 70-year sentence for convicted drug pusher held no basis for new trial where district court said it would impose sentence solely on the facts heard at trial, the presentence report, and counsel's arguments).

24. Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975), *cert. denied,* 96 S. Ct. 3201 (1976).

25. *Id.* at 252–53. The court in *Bauer* noted:

> Only slight reflection is needed to realize that the scales of justice in the eyes of the public are weighed extraordinarily heavy against the accused after his indictment. A bare denial and a possible reminder that a charged person is presumed to be innocent until proved guilty is often insufficient to balance the scales.

Id. at 250. The court in *Bauer* did not attempt to articulate precisely what standards could constitutionally be applied to defense counsel at the pre-arrest stage. *See id.;* 6 HARV. CIV. RIGHTS-CIVIL LIB. L. REV. 595, 599 (1971) (both free speech and fair trial interests infringed by silence order).

26. *See* note 5 *supra.*

27. PA. R. CRIM. P. 326; *see* Commonwealth v. Bruno, ____ Pa. ____, ____, 352 A.2d 40, 49 (1976) (rule 326 cited with approval in dictum). The obligation of the court to restrict such statements was made clear in Sheppard v. Maxwell, 384 U.S. 333, 357 (1966), wherein the Supreme Court stated:

> [T]he 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 . . . .
>
> . . . .
>
> More specifically, the 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 . . . .
>
> . . . .
>
> Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function.

Id. at 359–63 (citations omitted).

of an accused may be infringed by an overly broad order of this kind which is not necessary to meet a serious and imminent threat to the fair administration of justice arising out of the publicity.[28] The rules also prohibit public discussion of pending or imminent criminal litigation by court personnel unless the matter is merely part of the public records of the court.[29] Likewise, the trial judge must refrain from any conduct or making any statement that might interfere with the right of the people or of the defendant to a fair trial.[30] Both prospective jurors during jury selection[31] and trial jurors[32] should be told not to express any opinion upon any subject connected with the trial until retiring for deliberations.

The tensions between the sixth amendment right of an accused to a fair trial by an impartial jury and the first amendment right to free press are undoubtedly greatest in the area of court-imposed controls on actual press publications.[33] In the landmark decision of *Nebraska Press Association v. Stuart*,[34] the United States Supreme Court declined the invitation to establish a fixed priority between these two rights. The Court found instead that on the specific facts of *Nebraska Press* the traditionally heavy presumption against the constitutional validity of a prior restraint on speech and publication posed a formidable barrier to the validity of a court order restraining pretrial publicity in the context of a criminal case.[35] This barrier was not hurdled where the record failed to show either the probable ineffectiveness of less restrictive measures or the probable efficacy of

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28. *See* Chase v. Robson, 435 F.2d 1059 (7th Cir. 1970); *cf.* Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 96 S. Ct. 3201 (1976); CBS, Inc. v. Young, 522 F.2d 234 (6th Cir. 1975). *But see* United States v. Tijerina, 412 F.2d 661 (10th Cir.), *cert. denied*, 396 U.S. 867 (1969) ("reasonable likelihood" standard held sufficient). *See generally* ABA STANDARDS, *supra* note 3, at § 3.5(c); Landau, *Fair Trial and Free Press: A Due Process Proposal*, 62 A.B.A.J. 55 (1976); Annot., 5 A.L.R. Fed. 948 (1970); Annot., 33 A.L.R.3d 1041 (1970); 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 595 (1971).

29. PA. R. CRIM. P. 327.

30. ABA STANDARDS, *supra* note 3, at § 2.4.

31. UNIFORM RULE OF CRIMINAL PROCEDURE 512(a)(1); *see* Hostetler v. Kniseley, 322 Pa. 248, 254–55, 185 A. 300, 303 (1936).

32. UNIFORM RULE OF CRIMINAL PROCEDURE 513(b)(1); *see* Hostetler v. Kniseley, 322 Pa. 248, 185 A. 300 (1936).

33. For a discussion of the propriety of television coverage of the trial, *see* text accompanying notes 106–09 *infra*. As to the exclusion of the press and the general public from certain pretrial and trial proceedings, *see* text accompanying notes 47–49 and 106–12 *infra*.

34. 96 S. Ct. 2791 (1976).

35. *Id.* The order prohibited the reporting to the police or third parties (except to the press) of the existence or nature of confessions and other facts "strongly implicative" of the accused. *Id.* at 2796.

such prior restraints on publication.[36] The Court, noting that first amendment rights have never been deemed absolute, did not "rule out the possibility of showing the kind of threat to fair trial rights that would possess the requisite degree of certainty to justify restraint."[37] The Court also determined that to the extent the restraining order prohibited the reporting of evidence adduced at a preliminary hearing which was open to the public, it was plainly unconstitutional.[38] Finally, the Court held that part of the order prohibiting publication of information "strongly implicative" of the accused to be unconstitutionally vague and overbroad.[39] Thus, especially after the *Nebraska Press Association* decision, where there is no clear threat or menace to the integrity of the trial, the courts should refrain from controlling news coverage of a case, and the failure to control press publication in such a case will not serve as the basis for the granting of a new trial.[40]

Any attempt to control the press by means of the contempt power will encounter serious first amendment objections. The courts

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36. Justices Brennan, Stewart, and Marshall, concurring, would have held more broadly that courts can never impose prior restraints on the reporting of or commentary upon pending criminal cases. They found no "conflict" with the sixth amendment but only a "tension," and felt that "judges possess adequate tools, short of injunctions against reporting, for relieving that tension." *Id.* at 2809, 2828 (Brennan, Stewart & Marshall, JJ., concurring). Justice Stevens felt no need to choose between the majority approach and the concurring view, although he indicated that he might favor the latter. *Id.* at 2830. It can be questioned whether Justice Brennan's view is sufficiently sensitive to the possibility of undisclosed jury prejudice and the "possibility of an injustice unredressed" or redressed only belatedly. *Id.* at 2801; *cf.* Sheppard v. Maxwell, 384 U.S. 333 (1966) (conviction reversed after 12 years of imprisonment).

37. 96 S. Ct. at 2808. Justice Powell, in his concurring opinion, elaborated upon the possible nature of this showing:

> In my judgment a prior restraint properly may issue only when it is shown to be necessary to prevent the dissemination of prejudicial publicity that otherwise poses a high likelihood of preventing, directly and irreparably, the impaneling of a jury meeting the Sixth Amendment requirement of impartiality. This requires a showing that (i) there is a clear threat to the fairness of trial, (ii) such a threat is posed by the actual publicity to be restrained, and (iii) no less restrictive alternatives are available. Notwithstanding such a showing, a restraint may not issue unless it is shown that previous publicity or publicity from unrestrained sources will not render the restraint inefficacious. The threat to the fairness of the trial is to be evaluated in the context of Sixth Amendment law on impartiality, and any restraint must comply with the standards of specificity always required in the First Amendment context.

Id. (Powell, J., concurring).

38. *Id.* at 2807.

39. *Id.*

40. *Cf.* Margoles v. United States, 407 F.2d 727, 733 (7th Cir.), *cert. denied,* 396 U.S. 833 (1969).

have long held that utilization of the contempt power is justified only where the out-of-court speech or publication constitutes a clear and present danger to the administration of justice.[41] However, the *ABA Standards* recommend the use of contempt sanctions in specific situations: when the press publishes a statement about the case "wilfully designed . . . to affect the outcome of the trial, and that seriously threatens to have such an effect";[42] and when the public has been excluded from the courtroom but the press has been granted access on certain conditions which the press subsequently violates.[43]

Pennsylvania has two ancient and nearly forgotten statutes dealing with contempt by publication. One statute provides that no out-of-court publication concerning the conduct of the judges, court personnel, or participants in any case shall be construed to be a contempt of court.[44] The other statute provides that if any such publication

> shall improperly tend to bias the minds of the . . . court . . . jurors, witnesses or any of them, on a question depending before the court, it shall be lawful for any person who shall feel himself aggrieved thereby to proceed against the author . . . and publisher thereof . . . by indictment . . . .[45]

Regardless of the constitutional propriety of certain controls upon press publication, the ABA Legal Advisory Committee on Fair Trial and Free Press has proposed that the press be allowed notice and a pretrial hearing before imposition of a judicial restriction on publication.[46]

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41. Wood v. Georgia, 370 U.S. 375 (1962), and cases cited therein; *see* Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183, 208–19 (1971); Stanga, *supra* note 3, at 38–43. *See also* Shaffer, *Direct Restraint on the Press*, 42 NOTRE DAME LAW. 865, 874–80 (1967).

42. ABA STANDARDS, *supra* note 3, at § 4.1(a)(i); *see* Commonwealth v. Martin, ___ Pa. ___, ___ n.3, 348 A.2d 391, 398 n.3 (1975).

43. ABA STANDARDS, *supra* note 3, at § 4.1(b); *see* text accompanying notes 47–49 & 106–08 *infra*.

44. PA. STAT. ANN. tit. 17, § 2044 (1962).

45. *Id.* § 2045; *see* Commonwealth v. Conroy, 69 PITT. LEG. J. 373 (Clearfield Co. 1920) (expansive interpretation of statute in denying motion to quash indictment). *See generally* T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION, 158–63 (1969); Shaffer, *supra* note 41, at 875–80 (favoring use of such a statute instead of general contempt power). However, it may be argued that this statute is unconstitutional due to vagueness problems. *Cf.* Nebraska Press Ass'n v. Stuart, 96 S. Ct. 2791 (1976).

46. *See* Landau, *supra* note 28; Roney, *The Bar Answers the Challenge*, 62 A.B.A.J. 60 (1976); *cf.* United States v. Schiavo, 504 F.2d 1 (3d Cir.), *cert. denied*, 419 U.S. 1096 (1974).

III. EXCLUSION OF THE PUBLIC FROM PRETRIAL HEARINGS

Although the rules of criminal procedure provide for exclusion of the public from pretrial suppression hearings at the defendant's request,[47] no general provision yet exists specifically relating to such exclusion from part or all of any preliminary hearing, bail hearing, or other pretrial hearing in a criminal case. The *ABA Standards* recommend adoption of such a rule and would permit exclusion of the public on the ground that dissemination of evidence or argument adduced at the hearing might disclose matters that would be inadmissible in evidence at trial, such that there would be a substantial likelihood of interference with the right to a fair trial by an impartial jury.[48] In a case where exclusion is ordered, the *ABA Standards* also provide for creation of a complete record of the proceedings which would be made available to the public after disposition of the case.[49]

IV. CHANGE OF VENUE AND CONTINUANCES

Although a change of venue will not always remedy prejudicial publicity problems, as where pretrial publicity is statewide[50] or of such a nature that it will merely follow the defendant,[51] and a change may even impinge upon an accused's right to a speedy trial of the vicinage,[52] under some circumstances removal of a case may be the only remedy "sufficient to assure the kind of impartial jury guaran-

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47. PA. R. CRIM. P. 323(f); *see* PA. R. CRIM. P. 323(g) (providing for impoundment of the record from such hearing and nondisclosure except to the parties and unless the interests of justice require otherwise).

48. ABA STANDARDS, *supra* note 3, at § 3.1; *see* State v. Meek, 9 Ariz. App. 149, 450 P.2d 115 (1968) (upholding constitutionality of rule providing for mandatory exclusion from preliminary hearing at defendant's request). *See also* Stanga, *supra* note 3, at 36–38, 61–62; Annot., 49 A.L.R.3d 1007 (1973). The Supreme Court has commented on the problem of publicity arising from preliminary proceedings. In Estes v. Texas, 381 U.S. 532 (1965), the Court observed:

> It is contended that this two-day pretrial hearing cannot be considered in determining the question before us. We cannot agree. Pretrial [publicity] can create a major problem for the defendant in a criminal case. Indeed, it may be more harmful than publicity during the trial for it may well set the community opinion as to guilt or innocence.

Id. at 536; *see* Sheppard v. Maxwell, 384 U.S. 333, 358 (1966).

49. ABA STANDARDS, *supra* note 3, at § 3.1; *see* PA. R. CRIM. P. 323(g).

50. *See* United States v. Bando, 244 F.2d 833 (2d Cir. 1975); United States v. Cohn, 230 F. Supp. 589 (S.D.N.Y. 1964); People v. Speck, 41 Ill. 2d 177, 242 N.E.2d 208 (1968); State v. Thompson, 273 Minn. 1, 139 N.W.2d 490 (1966).

51. *See* Sheppard v. Maxwell, 346 F.2d 707, 725 (6th Cir. 1965), *rev'd on other grounds,* 384 U.S. 333 (1966); United States v. Hoffa, 156 F. Supp. 495, 498–508 (S.D.N.Y. 1957).

52. PA. CONST. art. 1, § 9; *see* Commonwealth v. Reilly, 324 Pa. 558, 569, 188 A. 574, 579 (1936) ("vicinage must expand itself" to meet need for an impartial jury).

teed by the Fourteenth Amendment."[53] Application for a change of venue may be made by the defense counsel, the prosecution, or the court on its own motion, when it is determined after hearing that a fair and impartial trial cannot be obtained in the county in which the complaint was filed.[54] It is settled that the grant or refusal of a change of venue is within the sound discretion of the trial court.[55] Aside from several somewhat conclusory rules of thumb as to the impact of prejudicial publicity,[56] appellate courts have considered the following factors in assessing whether this discretion has been abused: the length of time between the arrest and the trial;[57] the nature and extent of the publicity (whether "inflammatory" or basically factual; whether referring to matters which are or are likely to be inadmissible at trial);[58] the prosecution's responsibility for the publicity;[59]

53. Groppi v. Wisconsin, 400 U.S. 505, 510–11 (1971) (a continuance might be ineffective and conflicts with the right to a speedy trial, and careful jury selection might not guarantee an impartial jury). It has been noted that despite the fact that a change of venue will often be especially effective, there is much judicial hesitancy to allow a venue change due to its expense, inconvenience, delay and negative psychological impact upon the original forum. *See* Note, *The Efficacy of a Change of Venue in Protecting a Defendant's Right to an Impartial Jury,* 42 NOTRE DAME LAW. 925, 942 (1967) [hereinafter cited as *Efficacy*].

54. PA. R. CRIM. P. 313(a); *see* Commonwealth v. Reilly, 324 Pa. 558, 88 A.2d 574 (1936) (upholding constitutionality of change of venue upon prosecutor's request). *Compare* PA. R. CRIM. P. 313(a) (when it is determined that fair trial cannot be had in the county), *with* ABA STANDARDS, *supra* note 3, at § 3.2(c) (when evidence indicates a reasonable likelihood that fair trial cannot be had in the county).

55. Commonwealth v. Martin, ___ Pa. ___, ___, 348 A.2d 391, 398 (1975) (collecting cases). *Compare id., with* Rideau v. Louisiana, 373 U.S. 723 (1963) (trial court's refusal to grant defendant's request for change of venue held to be denial of due process where public was exposed to televised confession by defendant prior to jury selection).

56. *See* notes 9–11 *supra.*

57. *See* Commonwealth v. Nahodil, 462 Pa. 301, 341 A.2d 91 (1975) (6 months); Commonwealth v. Stolzfus, 462 Pa. 43, 337 A.2d 873 (1975) (trial occurred 1 year after the crime and 3 months after codefendant's trial); Commonwealth v. Hoss, 445 Pa. 98, 283 A.2d 58 (1971) (5 months). *See generally* Beck v. Washington, 369 U.S. 541, 556 (1962); United States v. Pfingst, 477 F.2d 177 (2d Cir.), *cert. denied,* 412 U.S. 941 (1973); United States v. Persico, 425 F.2d 1375 (2d Cir.), *cert. denied,* 400 U.S. 869 (1970).

58. *See* Murphy v. Florida, 95 S. Ct. 2031, 2037 (1975) (references to defendant's prior criminal record and certain facts about crime held to be "largely factual in nature"); Sheppard v. Maxwell, 384 U.S. 333 (1966) (dissemination of clearly inadmissible evidence by prosecutor); Estes v. Texas, 381 U.S. 532 (1965) (highly publicized pretrial hearing); Stroble v. California, 343 U.S. 181 (1952) (prior publication of defendant's confession not prejudicial where confession was subsequently used at preliminary hearing); United States v. Persico, 425 F.2d 1375 (2d Cir.), *cert. denied,* 400 U.S. 869 (1970) (publicity as to matters brought out at trial as competent evidence); Commonwealth v. Martin, _ Pa. ___, ___, 348 A.2d 391, 399 (1975) (while publicity was extensive, it was basically "factual in nature"); Commonwealth v. Nahodil, 462 Pa. 301, 307, 341 A.2d 91, 93 (1975) (despite reference to defendant's confession, pretrial publicity held to be "wholly lacking in inflammatory content"); Commonwealth v. Hoss, 445 Pa. 98, 283 A.2d 58, 63 (1971) (*semble*).

59. *See* Sheppard v. Maxwell, 384 U.S. 333, 361 (1966); United States v. Bonanno, 177 F. Supp. 106, 122 (S.D.N.Y. 1959); text accompanying notes 12–26 *supra.*

the community atmosphere;[60] the nature of the crime;[61] the percentage of prospective jurors who were unaware of the publicity or who had not become unalterably biased against the defendant;[62] the defendant's use of at least a substantial portion of his allotted peremptory challenges due to the amount of publicity;[63] the number of jurors seated who had heard or seen the publicity;[64] the trial court's efforts to abate publicity;[65] other precautionary or curative measures taken;[66] and the probable efficacy of a change of venue.[67] It should be noted that a claim that venue should have been changed is not waived by waiver of a jury trial or by failure to exercise all per-

60. *See* Sheppard v. Maxwell, 384 U.S. 333 (1966) (fact that trial took place 2 weeks before a hotly contested election at which both the chief prosecutor and the judge were candidates for judgeships was one of the factors considered); United States v. Bonanno, 177 F. Supp. 106 (S.D.N.Y. 1959) (loation within a less cosmopolitan and more closely knit community may result in greater concentration of publicity); *cf.* Nebraska Press Ass'n v. Stuart, 96 S. Ct. 2791, 2806 (1976) (semble); Stanga, *supra* note 3, at 14–15.

61. *See* Commonwealth v. Smith, 353 Mass. 487, 232 N.E.2d 915 (1968) (responsibility to guard against prejudicial publicity is particularly serious in first degree murder cases because of double function of jury to determine guilt or innocence and to recommend the death penalty). Pennsylvania law provides for a change of venue in the second trial of any felonious homicide where publicity as to the first trial causes exhaustion of the regular panel of jurors without obtaining a jury. PA. STAT. ANN. tit. 19, § 551 (1964). The application of this statute has been held to be discretionary, not mandatory, with the trial court. Commonwealth v. Yount, 455 Pa. 303, 313–14, 314 A.2d 242, 247–48 (1974).

62. *See* Commonwealth v. Martin, ___ Pa. ___, 348 A.2d 391 (1975) (97 out of 107 prospective jurors questioned had some information about case, and 23 out of 221 admitted to having fixed opinions concerning guilt); Commonwealth v. Stoltzfus, 462 Pa. 43, 337 A.2d 873 (1975) (31 of 139 prospective jurors admitted having formed opinions as to guilt). Prospective jurors' claims of impartiality are not controlling. *See* Murphy v. Florida, 95 S. Ct. 2031, 2037 (1975); text accompanying note 10 *supra*. Appellate courts frequently consider both ease and difficulty of jury selection as positive factors, with the former being viewed as indicative of an impartial panel of prospective jurors and the latter being viewed as a measure of the trial court's diligence in ensuring a fair jury. *See Efficacy, supra* note 53, at 934.

63. *See, e.g.,* Commonwealth v. Martinolich, 456 Pa. 136, 144, 318 A.2d 680, 685 (1974) (fact that counsel exercised only 11 of 20 peremptory challenges held to weigh against change of venue request due to prejudicial publicity); *see Efficacy, supra* note 53, at 934–35. *But see* Commonwealth v. Dobrolenski, 460 Pa. 630, 636–37, 334 A.2d 268, 271–72 (1975) (dictum that a change of venue claim is not waived by failure to exercise all peremptory challenges).

64. *See* Murphy v. Florida, 95 S. Ct. 2031 (1975); Rideau v. Louisiana, 373 U.S. 723 (1963); Beck v. Washington, 369 U.S. 541 (1962); Irvin v. Dowd, 366 U.S. 717 (1961); Commonwealth v. Hoss, 445 Pa. 98, 283 A.2d 58 (1971).

65. *See* Commonwealth v. Martin, ___ Pa. ___, ___, 348 A.2d 391, 398 (1975) (restrictions upon counsel and news media noted as a factor); Commonwealth v. Hoss, 445 Pa. 98, 104, 109 n.7, 283 A.2d 58, 62, 64 n.7 (1971).

66. *See* Commonwealth v. Bruno, ___ Pa. ___, ___, 352 A.2d 40, 51 (1976) (dictum); Commonwealth v. Martin, ___ Pa. ___, ___ n.4, 348 A.2d 391, 399 n.4 (1975) (jurors immediately sequestered upon selection); Commonwealth v. Nahodil, 462 Pa. 301, 307, 341 A.2d 91, 93–94 (1975) (careful jury selection procedures and use of cautionary instructions to jurors); note 5 *supra*. *But see* Groppi v. Wisconsin, 400 U.S. 505, 509–11 (1971) (continuance and jury selection procedures may be inadequate to render change of venue unnecessary).

67. *See* notes 50 & 51 and accompanying text *supra*.

emptory challenges.[68] Under the rules of criminal procedure, a motion for a change of venue must be made no less than 10 days prior to trial, unless opportunity therefor did not exist or the defendant or his attorney was unaware of the grounds to so move.[69] Thus, although some courts have viewed a motion for change of venue prior to voir dire as premature,[70] defense counsel must be sure to make any motion for a change of venue in timely fashion prior to trial. A renewal of the motion after void dire is also good practice.[71] If a renewed motion is made after jury selection, the fact that a jury satisfying the usual standards of acceptability has been selected ought not to be controlling if there is a sufficient likelihood that the jury still might not be impartial.[72] A motion for a change of venue may be supported by qualified public opinion surveys of individuals' opinion testimony,[73] and is customarily supported by newspaper clippings, video tapes, radio scripts, press releases and other evidence.[74]

The rules of criminal procedure allow prompt appellate review of an order changing venue by either the prosecution or the defendant.[75] In an extraordinary case, an order denying a change of venue may be reviewed through an interlocutory appeal[76] or extraordinary relief in the nature of mandamus.[77] Where a venue change is granted, the choice of a new venue is generally within the court's discretion.[78]

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68. Commonwealth v. Dobrolenski, 460 Pa. 630, 636–37, 334 A.2d 268, 270–72 (1975).

69. PA. R. CRIM. P. 305; *see* Commonwealth v. Mervin, 230 Pa. Super. 552, 562, 326 A.2d 602, 607–08 (1974) (where the "vast majority" of the publicity occurred long before defendant came to trial, motion for change of venue was not entitled to consideration); *cf.* Commonwealth v. Martin, ____ Pa. ____, ____ n.2, 348 A.2d 391 n.2 (1975).

70. *See, e.g.*, United States v. Addonizio, 451 F.2d 49, 61 (3d Cir. 1971), *cert. denied*, 405 U.S. 936 (1972).

71. *Cf.* Maine v. Superior Court, 68 Cal. 2d 375, 438 P.2d 373, 66 Cal. Rptr. 724 (1968) (noting the practice of permitting the trial court to defer its final ruling on a motion for change of venue until the jury is impaneled); *Efficacy, supra* note 53, at 935 n.76. *But see* ABA STANDARDS, *supra* note 3, at § 3.2(d).

72. ABA STANDARDS, *supra* note 3, at § 3.2(d); *see* notes 10 & 11 *supra*.

73. ABA STANDARDS, *supra* note 3, at § 3.2(c).

74. A. AMSTERDAM, B. SEGAL, & M. MILLER, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES § 256 (3d ed. 1974).

75. PA. R. CRIM. P. 313(a).

76. PA. STAT. ANN. tit. 17, § 211.501(b) (1970) (must obtain permission of trial and appellate court); PA. R. APP. P. 1311–23. *But see* Commonwealth v. Swanson, 424 Pa. 192, 225 A.2d 231 (1967) (normally no interlocutory appeal from denial of change of venue).

77. Commonwealth *ex rel.* Specter v. Martin, 426 Pa. 102, 232 A.2d 729 (1967); PA. R. APP. P. 1502; *see* Marine v. Superior Court, 68 Cal. 2d 375, 438 P.2d 373, 66 Cal. Rptr. 724 (1968) (mandamus available even before jury voir dire). *See also* Stanga, *supra* note 3, at 52–57; Comment, *The Writ of Prohibition in Pennsylvania*, 80 DICK. L. REV. 472, 485–87 (1976); 26 WASH. & LEE L. REV. 89 (1969).

78. *See* State v. Thompson, 266 Minn. 385, 123 N.W.2d 378 (1968) (dictum); Note, *Change of Venue in Criminal Cases: The Defendant's Right to Specify the County of Transfer*, 26 STAN. L. REV. 131 (1973) (arguing that present law uncon-

If more than one change of venue is necessary in order to guarantee the defendant's right to an impartial jury, such multiple removal is required.[79]

Much of the preceding discussion regarding a request for a change of venue is applicable to a motion for a continuance, since a great many cases deal with the propriety of a denial of both a continuance and a change of venue. Thus it has been repeatedly held that "the grant or refusal of a change of venue or of a continuance is within the sound discretion of the trial [c]ourt."[80]

Under the rules of criminal procedure, the court may, in the interests of justice, grant a continuance on its own motion or on application of either party.[81] An application for continuance on behalf of the defendant must be made no later than 48 hours before the time set for trial, a later application being allowable only when the opportunity to apply did not previously exist, when the defendant was unaware of the grounds for the application, or when the interests of justice require it.[82] An accused's failure to seek a change of venue is not necessarily fatal to a claim of improper denial of a continuance.[83] There are decided limits on the use of a continuance to remedy prejudicial publicity since continuances, particularly if they are repeated, work against the important values implicit in the constitutional guarantee of a speedy trial.[84]

V. THE JURY AND PREJUDICIAL PUBLICITY

Compliance with the sixth amendment rights to an impartial jury has given rise to various procedures designed to preserve this impartiality. In some cases, the defendant may wish to waive this right to a jury trial entirely. In Pennsylvania, this waiver is permitted, with the approval of the trial court, provided such waiver is "know-

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stitutionally chills assertion of the right to a change of venue). *See also* 1 F. WHARTON, CRIMINAL PROCEDURE § 48 (12th ed. C. Torcia 1975).

79. Irvin v. Dowd, 366 U.S. 717, 720–21 (1961); *see* ABA STANDARDS, *supra* note 3, at § 3.2(e). A closely related alternative is the impaneling of a special panel of prospective jurors from outside the county. *See* note 93 and accompanying text *infra*.

80. *See, e.g.*, Commonwealth v. Martin, _ Pa. ____, ____, 348 A.2d 391, 398 (1975); Commonwealth v. Lopinson, 427 Pa. 284, 294–96, 234 A.2d 552, 559–60 (1967), *vacated on other grounds and remanded*, 392 U.S. 647 (1968).

81. PA. R. CRIM. P. 301(a); *cf.* Margoles v. United States, 407 F.2d 727, 731–32 (7th Cir.), *cert. denied*, 396 U.S. 833 (1969) (court's failure to grant continuance sua sponte found not to be error).

82. PA. R. CRIM. P. 301(b).

83. Delaney v. United States, 199 F.2d 107, 116 (1st Cir. 1952) (defendant's failure to forego constitutional right to trial in original district held not to prejudice claim of improper denial of continuance).

84. Groppi v. Wisconsin, 400 U.S. 505, 510 (1971); *see* United States v. Abbott Labs., 505 F.2d 565, 573 (4th Cir. 1974), *cert. denied*, 420 U.S. 990 (1975).

ing and intelligent."[85] The *ABA Standards* recommend that a defendant be permitted to waive a jury in a criminal case whenever there is reason to believe that, as a result of the dissemination of potentially prejudicial material, the waiver is required to increase the likelihood of a fair trial.[86]

Careful jury selection procedures may be utilized effectively in an effort to ensure the impaneling of an impartial jury. Whenever there is believed to be a significant possibility that prospective jurors will be ineligible to serve because of exposure to prejudicial publicity, voir dire inquiry as to whether they have read or heard anything about the case must be allowed.[87] It is preferable that such voir dire take place outside the presence of other chosen and prospective jurors, especially once a prospective juror has admitted to some knowledge of the case.[88] Such voir dire inquiry into pretrial publicity may be properly limited to questions designed to discover whether a prospective juror has a "fixed opinion" that the accused is guilty or innocent.[89] Knowledge of the case generally is a ground for challenge for cause only where a prospective juror has such a fixed opinion.[90]

A trial court's utilization of careful jury selection procedures may obviate the need for a change of venue.[91] However, especially

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85. PA. R. CRIM. P. 1101. The trial judge must conduct a colloquy to determine that the waiver is properly made, and the colloquy must appear on the record. *Id.; see* Commonwealth v. Williams, 454 Pa. 368, 312 A.2d 597 (1973) (colloquy required).

86. ABA STANDARDS, *supra* note 3, at § 3.3; *cf.* Singer v. United States, 380 U.S. 24, 37–38 (1964). *But cf.* United States v. Wright, 491 F.2d 942 (6th Cir.), *cert. denied,* 419 U.S. 862 (1974); Thwing v. South Dakota, 470 F.2d 351 (8th Cir. 1972), *cert. denied,* 411 U.S. 937 (1973); United States v. Harris, 314 F. Supp. 437 (D. Minn. 1970); United States v. Daniels, 282 F. Supp. 360 (N.D. Ill. 1968). *See generally* Annot., 51 A.L.R.2d 1346 (1957); 1971 WIS. L. REV. 626.

87. *See* Commonwealth v. Hoss, 445 Pa. 98, 107–08, 283 A.2d 56, 63–64 (1971); *cf.* United States v. Armocida, 515 F.2d 29, 48–49 (3d Cir.), *cert. denied,* 423 U.S. 858 (1975); Commonwealth v. Bruno, ___ Pa. ___, 352 A.2d 40 (1976). *But cf.* Commonwealth v. Mamon, 449 Pa. 249, 297 A.2d 471 (1972).

88. Commonwealth v. Johnson, 440 Pa. 342, 269 A.2d 752 (1970) (failure to permit such "private" voir dire held to be an abuse of discretion in view of pervasive publicity); *see* United States v. Addonizio, 451 F.2d 49 (3d Cir. 1971), *cert. denied,* 405 U.S. 936 (1972). *Compare* Commonwealth v. Bruno, ___ Pa. ___, ___, 352 A.2d 40, 52 (1976) (failure of trial judge to question jurors individually, out of presence of other jurors, as to their exposure to publicity held to be reversible error), *with* Commonwealth v. Martinolich, 456 Pa. 136, 146–47, 318 A.2d 680, 686, *cert. denied,* 419 U.S. 1065 (1974) (decision to exclude selected jurors from courtroom during voir dire is within discretion of trial judge, which discretion is not abused when voir dire discloses no actual or potential prejudice, and jurors are not so excluded).

89. Commonwealth v. Martin, ___ Pa. ___, ___, 348 A.2d 391, 403 (1975); *see* Commonwealth v. Johnson, 452 Pa. 130, 136, 305 A.2d 5, 8 (1973).

90. Commonwealth v. Martinolich, 456 Pa. 136, 147–48, 318 A.2d 680, 686–87, *cert. denied,* 419 U.S. 1065 (1974); *see* ABA STANDARDS, *supra* note 3, at § 3.4(b); note 9 *supra.*

91. *See, e.g.,* Commonwealth v. Nahodil, 462 Pa. 301, 307, 341 A.2d 91, 93–94 (1975); *see* note 66 and accompanying text *supra.*

in view of the limitations upon voir dire, the method of jury selection may not always be adequate to guarantee an impartial jury.[92] Finally, where there has been such prejudicial pretrial publicity that it will be difficult to impanel a truly impartial jury, the trial court may have a duty to draw jurors from other counties not so infected.[93]

Sequestration of jurors as they are accepted and until their discharge is a remedy particularly appropriate for a criminal case that has attracted and is likely to continue to attract much news media attention. In such circumstances, the trial court is afforded broad discretion in determining whether to order such sequestration.[94] Although sequestration isolates jurors only after they have been accepted, it can mitigate the impact of pretrial publicity and impress upon the jurors the importance of their oath.[95] However, since sequestration of a jury may create resentment and may not always be conducive to calm deliberations, sequestration need not and ordinarily should not be ordered sua sponte.[96] Nevertheless, where sequestration of the jury has been ordered, a mistrial due to midtrial publicity may be avoided.[97] In fact, under the rules of criminal procedure, even witnesses in a widely publicized or sensational case may be sequestered on the motion of either party or on the court's own motion.[98]

The trial court on its own motion, or at counsel's request, should caution prospective jurors during jury selection, and the trial jurors throughout the trial, not to read, listen to, or view any news reports

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92. *See* Groppi v. Wisconsin, 400 U.S. 505, 510 (1971) (change of venue may be required); *cf. Efficacy, supra* note 53, at 933–37. The remedy of dismissal of charges is not usually required. *See* note 9 and accompanying text *supra.*

93. ABA STANDARDS, *supra* note 3, at § 4.3(c); *cf.* Sheppard v. Maxwell, 384 U.S. 333, 362 (1962) (court must take "strong measures" to protect the accused); Irvin v. Dowd, 366 U.S. 717 (1961) (statutory limitation on change of venue held unconstitutional); United States v. Holovachka, 314 F.2d 345 (7th Cir.), *cert. denied,* 374 U.S. 809 (1963 (discussing the propriety of drawing jurors from other counties).

94. PA. R. CRIM. P. 1111; *see* Commonwealth v. Bruno, ___ Pa. ___, 352 A.2d 40 (1976); Commonwealth v. Cohen, 203 Pa. Super. 34, 199 A.2d 139, *cert. denied,* 379 U.S. 902 (1964).

95. Nebraska Press Ass'n v. Stuart, 96 S. Ct. 2791, 2805 (1976).

96. *See* Margoles v. United States, 407 F.2d 727, 733 (7th Cir.), *cert. denied,* 396 U.S. 833 (1969). *But see* Sheppard v. Maxwell, 384 U.S. 333 (1966) (sequestration should have been raised sua sponte). For a discussion of the disadvantages of sequestration, *see* R. CIPES, CRIMINAL DEFENSE TECHNIQUES § 9.08(2) (1969).

97. *See* Commonwealth v. Martin, ___ Pa. ___, ___ n.4, 348 A.2d 391, 399 n.4 (1975).

98. PA. R. CRIM. P. 326. There appears to be no hard and fast rule as to what degree of exposure to publicity is necessary in order to warrant the sequestration of witnesses. *See* Sheppard v. Maxwell, 384 U.S. 333 (1966) (holding that trial court should have insulated the witnesses due to pretrial newspaper and radio interviews of prospective witnesses); *cf.* United States v. Zeiler, 470 F.2d 717 (3d Cir. 1972) (witness who was exposed to extensive pretrial publicity identifying defendant held not to be disqualified).

concerning the case,[99] and to decide the issues only on the evidence presented at trial.[100] The giving of such an instruction may obviate the need for a new trial.[101]

Where, in spite of whatever precautions may have been taken to assure that prejudicial pretrial and trial publicity does not reach the attention of the jurors, and to assure that they will disregard any such information, it nevertheless appears that one or more jurors has heard, read, or seen something prejudicial about the case, the trial court must, upon request, question the jurors about their exposure to such material.[102] When highly prejudicial material is publicized during the trial, such inquiry should be conducted out of the presence of the other jurors, particularly when the jury has not been sequestered.[103] It may be more prejudicial for the jury to become aware of inadmissible evidence from outside sources than from an erroneous evidentiary ruling during trial because of the absence of any procedural safeguards.[104] Thus, where a juror has been exposed to such potentially prejudicial material, he must, upon challenge, be excused if reference to the material in question at the trial itself would have required declaration of a mistrial.[105]

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99. *See* UNIFORM RULE OF CRIMINAL PROCEDURE 512(a)(3), 513(b)(3); *cf.* United States v. Miles, 483 F.2d 1372, 1374 n.2 (8th Cir. 1973), *vacated on other grounds,* 415 U.S. 970 (1974); Commonwealth v. Bruno, ___ Pa. ___ n.12, 352 A.2d 40, 50 n.12 (1976).

100. *See* Nebraska Press Ass'n v. Stuart, 96 S. Ct. 2791, 2805 (1976).

101. *Compare* Commonwealth v. Bruno, ___ Pa. ___, ___, 352 A.2d 40, 50–51 (1976) (precautionary instructions to jurors *suggesting* that they refrain from reading or observing accounts of the trial criticized for equivocality in reversal of defendant's murder conviction), *with* Commonwealth v. Nahodil, 462 Pa. 301, 307, 341 A.2d 91, 93 (1975) (instruction to jurors that they refrain from observing broadcast or newspaper reports concerning the trial considered as a factor in affirmance of conviction).

102. Commonwealth v. Bruno, ___ Pa. ___, 352 A.2d 40 (1976). A trial court's failure to so question the jurors may constitute reversible error. *Id.; see* ABA STANDARDS, *supra* note 3, at § 3.5(f) (court may also act sua sponte). *But see* United States v. Vento, 533 F.2d 838 (3d Cir. 1976) (refusal to allow defendants to interrogate jurors held not to be reversible error where there was no basis for the belief that jurors had been exposed to prejudicial information); Gordon v. United States, 438 F.2d 858 (5th Cir.), *cert. denied,* 404 U.S. 828 (1971) (refusal to poll jurors was not reversible error where trial court exercised sound discretion in finding news accounts not to be prejudicial to defendant).

103. Commonwealth v. Bruno, ___ Pa. ___, ___, 352 A.2d 40, 52 (1976). *Compare id., with* United States v. Solomon, 422 F.2d 1110, 1116 (7th Cir.), *cert. denied,* 399 U.S. 911 (1970) (separate and private interrogation of jurors who admit exposure to publicity held to be required).

104. Commonwealth v. Bruno, ___ Pa. ___, ___, 352 A.2d 40, 49 (1976).

105. *Id.; see* United States *ex rel.* Doggett v. Yeager, 472 F.2d 229 (3d Cir. 1973). *But see* United States v. DeLarosa, 450 F.2d 1957, 1061–62 (3d Cir. 1971), *cert. denied,* 405 U.S. 929 (1972); ABA STANDARDS, *supra* note 3, at § 3.5(f). *See also* Murphy v. Florida, 95 S. Ct. 2031 (1975); Commonwealth v. Dukes, 460 Pa. 180, 331 A.2d 478 (1975); Commonwealth v. Martinolich, 456 Pa. 136, 318 A.2d 680, *cert. denied,* 419 U.S. 1065 (1974).

VI. CONTROL OF ACTIVITIES IN OR NEAR THE COURTROOM

The rules of criminal procedure provide that in a widely publicized or sensational case the trial court, on motion of either party or on its own motion, may regulate the seating and conduct of spectators and news media representatives in the courtroom.[106] Failure to do so may result in reversible error in an extreme case.[107] The rules also prohibit photography and broadcasting in the courtroom or its environs during the progress of, or in connection with, any judicial proceedings.[108] A violation of these rules might be reversible error even without a showing of isolable prejudice.[109]

In addition to any other circumstances which may warrant exclusion of the general public from the courtroom during a trial,[110] the public, including the news media, may be excluded from all or part of a trial at defendant's request if it is likely that the defendant's right to a fair trial cannot otherwise be ensured.[111] Exclusion of the public is most likely to be necessary where hearings are held outside the jury's presence and dissemination of evidence or argument adduced at the hearing is likely to interfere with the defendant's right to an impartial jury.[112]

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106. PA. R. CRIM. P. 326; *see* ABA STANDARDS, *supra* note 3, at § 3.5(a).

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

108. PA. R. CRIM. P. 328. "Environs" is defined as "the area immediately surrounding the entrances and exits to the courtroom." *Id.; see In re* Mack, 386 Pa. 251, 126 A.2d 679 (1957); Dorfman v. Meiszner, 430 F.2d 558 (7th Cir. 1970); *cf.* United States v. CBS, Inc., 497 F.2d 102 (5th Cir. 1974). *See also* PA. R. CRIM. P. 27(a)(1) (similar prohibition applicable to preliminary hearing and summary trial).

109. *See* Estes v. Texas, 381 U.S. 532 (1965) (televising of trial over defendant's objection held to be a violation of due process despite lack of showing of isolable prejudice); *cf.* Sheppard v. Maxwell, 384 U.S. 333 (1962). *But cf.* Bradley v. Texas, 470 F.2d 785, 787–88 (5th Cir. 1973). *See generally* Monroe, *The Case for Television in the Courtroom,* 42 NOTRE DAME LAW. 920 (1967); Stanga, *supra* note 3, at 29–34.

110. *See, e.g.,* Commonwealth v. Stevens, 237 Pa. Super. 457, 352 A.2d 509 (1975) (exclusion to protect young rape victim); Commonwealth v. Waiters, 233 Pa. Super. 83, 334 A.2d 731 (1975) (exclusion to prevent retaliation against defendant).

111. UNIFORM RULE OF CRIMINAL PROCEDURE 714 (also providing for deferred public access to a full transcript or sound recording of the trial); *see* ABA STANDARDS, *supra* note 3, at § 3.5(d); *cf.* Commonwealth *ex rel.* Paylor v. Cavell, 185 Pa. Super. 176, 138 A.2d 246 (1958) (defendant's right to public trial may be waived). The Court in *Nebraska Press Ass'n* did not reach the constitutionality of such exclusion. Nebraska Press Ass'n v. Stuart, 96 S. Ct. 2791, at 2805 n.8.

112. ABA STANDARDS, *supra* note 3, at § 3.5(d); *see* notes 47–49 and accompanying text *supra.*

VII. CONCLUSION

Clearly, if all else fails and "[i]f publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered."[113] A motion for mistrial[114] must be made as soon as the basis therefor is apparent or it will be deemed waived.[115] Where the claim of prejudicial publicity has not been waived, competent evidence showing that there is a substantial likelihood that the vote of one or more jurors was influenced by exposure to prejudicial publicity will necessitate a new trial.[116]

The multiplicity of possible remedies for prejudicial publicity and the sometimes complex interrelationship between them help to make the problems in this area among the most troublesome and sensitive faced by attorneys and judges in criminal cases. However, it is hoped that the heightened awareness of these problems will result in the increasing use of the various options available to courts and practitioners to ensure the proper safeguarding of clients' rights.

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113. Sheppard v. Maxwell, 384 U.S. 333, 363 (1966); *see* Commonwealth v. Bruno, ___ Pa. ___, ___, 352 A.2d 40, 49 (1976).

114. *See* PA. R. CRIM. P. 1118.

115. Miller v. Kentucky, 40 F.2d 820 (6th Cir. 1930).

116. ABA STANDARDS, *supra* note 3, at § 3.6; *see* Mattox v. United States, 146 U.S. 140 (1892).