ABA STANDARDS FOR CRIMINAL JUSTICE

FAIR TRIAL AND PUBLIC DISCOURSE

ABA
Defending Liberty
Pursuing Justice
ABA Standards for Criminal Justice

Fourth Edition

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and Public Discourse

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Current Standards Drafting Projects

Discovery (update)
Diversion and Specialized Courts (new)
Juvenile Justice (update)
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Monitors (new)
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Postconviction Remedies (update)

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INTRODUCTION

This volume represents the American Bar Association’s fourth edition of standards addressing the tensions between the fair trial and free press commitments of the U.S. Constitution. The first edition was published in 1968, shortly after the U.S. Supreme Court famously reversed the conviction of Chicago doctor Sam Sheppard on account of the trial court’s failure to protect the defendant from the massive, pervasive, and prejudicial publicity that attended his trial for murdering his wife. The Sheppard case involved facts that are difficult to imagine recurring today. During Sheppard’s trial, the courtroom was packed with representatives of the news media, whose movements in and out of the courtroom were so obstructive that the lawyers and witnesses frequently could not be heard. In the “carnival atmosphere” of the trial, reporters were permitted to set up cameras in the courthouse corridors and to broadcast images of the jurors and witnesses during the trial. The press regularly reported prejudicial information that was never introduced into evidence in the trial, including information about Sheppard’s alleged extramarital exploits and refusal to take a lie detector test. The jurors themselves were only minimally screened for their exposure to pretrial publicity, were not admonished to avoid the extensive publicity about the case during breaks, and were not sequestered until their deliberations—during which they were permitted to make telephone calls. And because their names, addresses, and photographs were repeatedly broadcast throughout the trial, jurors were

1. See U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press”); U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed”). These sometimes competing interests have been characterized as “two of the most cherished policies of our civilization.” Bridges v. California, 314 U.S. 252, 260 (1941).
2. ABA STANDARDS FOR CRIMINAL JUSTICE, FAIR TRIAL AND FREE PRESS (1st ed. 1968).
4. Sheppard, 384 U.S. at 344.
5. Id. at 358.
6. Id. at 344–45.
7. Id. at 356–57, 361.
8. Id. at 349, 353.
exposed to extrajudicial commentary about the case from both friends and strangers.  

Viewing these circumstances in their totality, the Supreme Court held that Sheppard was deprived of his right to "a trial by an impartial jury free from outside influences."  

The decision, however, did more than correct a singular injustice—it was a call to arms to trial judges to exercise their supervisory authority over their courtrooms and courthouses to protect the integrity of future trials, including by "rule and regulation." To that end, the Supreme Court endorsed a number of specific measures that the judge presiding over Sheppard's trial should have employed. For example, the Court stated that the trial court should have set greater limits on the number of reporters present during the trial and the places to which they had access so that their physical presence would be less disruptive. The court also should have taken greater care to insulate the witnesses from press accounts of other witnesses' testimony—without which the court's exclusion of the witnesses from the courtroom prior to their testimony was rendered meaningless. It should have instructed the jurors more firmly on the necessity of avoiding extrajudicial publicity about the case and queried them more rigorously about what they had seen and heard. It should have considered sequestration of the jury during the trial, given the extent of prejudicial publicity in the case, as well as a postponement of the trial until the publicity abated or transferring

9. Id. at 353.
10. Id. at 362.
11. See id. at 362 ("From the cases coming here we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent. ... Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused."). The advisory committee that drafted the first edition of the Fair Trial-Free Press Standards was created in 1964 as one of six committees charged by the ABA with drafting minimum standards in various fields relating to the administration of criminal justice. See Paul C. Reardon, Report of the Committee on Fair Trial-Free Press Standards, 54 A.B.A. J. 343, 343 (1968). The impetus to include a set of standards specifically on Fair Trial-Free Press issues came from the recommendations of the Warren Commission, which investigated the assassination of President John F. Kennedy and observed that Lee Harvey Oswald might never have received a fair trial in any venue on account of prejudicial pretrial publicity. See Edward Andrew Norwood, The Prosecutor and Pre-Trial Publicity: The Need for a Rule, 11 J. LEGAL PROF. 169 n.11, 170 (1986–87).
13. Id. at 358.
14. Id. at 359.
15. Id. at 357.
the trial to another county where the publicity was less pervasive.\textsuperscript{16} Finally, the Court suggested that the trial court might have "proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters,"\textsuperscript{17} which likely would have eliminated much of the inaccurate and inflammatory publicity that infected the trial.\textsuperscript{18} As the Court stated, none "coming under the jurisdiction of the court should be permitted to frustrate its function."\textsuperscript{19} Because the Court was confident that these procedures would have been sufficient to guarantee the fairness of Sheppard's trial, it did not reach the question of whether the trial court also could have sanctioned the press for its publication of prejudicial and frequently inaccurate information about the case.\textsuperscript{20}

The first edition of the ABA's Fair Trial and Free Press Standards heeded the Sheppard Court's call for rules and regulations designed to help courts "protect their processes from prejudicial outside inferences."\textsuperscript{21} The Standards made a series of recommendations for additions to local court rules, including a rule that would allow judges to close pretrial proceedings to the public in order to prevent the disclosure of evidence that might be inadmissible at an eventual trial.\textsuperscript{22} They provided detailed guidance regarding motions for change of venue or continuance, voir dire, sequestration of juries and witnesses, cautionary jury instructions, and judicial decorum, which they encouraged courts to adopt as standards.\textsuperscript{23} They also suggested a change to the Code of Professional Responsibility for lawyers,\textsuperscript{24} imposing a duty

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\textsuperscript{16} Id. at 363.
\textsuperscript{17} Id. at 361.
\textsuperscript{18} Id.
\textsuperscript{19} Id. at 363.
\textsuperscript{20} Id. at 358.
\textsuperscript{21} Id. at 363.
\textsuperscript{22} ABA Standards for Criminal Justice, Fair Trial and Free Press, Standard 3.1 (1st ed. 1968).
\textsuperscript{23} Standards 3.2-3.5 (1st ed. 1968).
\textsuperscript{24} Previously, Canon 20 of the ABA Canons of Professional Ethics addressed extrajudicial statements by attorneys but in terms that were deemed too vague to be useful. The Canon also had never been enforced. \textit{See generally} Reardon, \textit{supra} note 11, at 344. \textit{See also} C. Wolfram, Modern Legal Ethics \textsection\ 2.6.2 (1986) (discussing the limited effectiveness of the Canons of Professional Responsibility in general). Canon 20 provided that "[n]ewspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the courts and otherwise prejudice the due administration of justice. Generally they are to be condemned." \textit{ABA Canons of Professional Ethics}, Canon 20 (1908). The Canon also discouraged anonymous statements to the public and ex parte statements beyond quotations from the papers on file in the court. \textit{Id.}
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on any lawyer "not to release or authorize the release of information or opinion for dissemination by any means of public communication, in connection with pending or imminent criminal litigation with which he is associated, if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice." Following this general rule, the Standards enumerated specific subjects that lawyers associated with either the prosecution or the defense should not address publicly, including an accused's prior criminal record, the existence or contents of any confession, the performance of any tests or examinations or the accused's failure to submit to such tests, the possibility of a guilty plea, and any personal opinion as to the accused's guilt or the merits of the case. The Standards contemplated that violation of this new rule would be the grounds for disciplinary action and, in serious cases, disbarment. The Standards also recommended that law enforcement agencies and courts adopt internal guidelines prohibiting employees from making extrajudicial statements and disclosures of information that would interfere with the fairness of a trial. As described in the introduction to the second edition of the Fair Trial Free Press Standards, the first edition of the Standards "relied almost entirely on the conceptual framework established in Sheppard." The first edition of the Fair Trial and Free Press Standards had a significant impact. In 1969, the ABA adopted a new Model Code of Professional Responsibility to replace the 1908 Canons of Professional Ethics. As recommended by the Standards, the Model Code included a new rule of professional responsibility for extrajudicial statements by attorneys that was modeled on the 1968 Standards. The new rule

26. Id. The Standards also set forth the types of information that lawyers generally could discuss without running afoul of the Standards, such as an announcement of the time and circumstances of an arrest, the identity of the investigating agency, a description of evidence seized, the scheduling or result of any state of the judicial process, and quoting or referring without comment to public records of the court in the case. Id. Requests for assistance in obtaining evidence also were permitted. Id.
27. Standard 1.3 (1st ed. 1968).
28. Id. at 2.1–2.4.
29. ABA STANDARDS FOR CRIMINAL JUSTICE, FAIR TRIAL AND FREE PRESS 4 (2d ed. 1980).
was both strict and concrete, providing guidance as to what lawyers could and could not discuss publicly during the pendency of a criminal case. By 1972, all but three states had adopted the ABA’s Model Code of Professional Responsibility. Applying the new rules and Sheppard, judges across the country started to impose broad gag orders enjoining any extrajudicial comment about pending cases. Around the country, members of the press also entered into voluntary agreements with courts known as “bench-bar-press” guidelines governing reporting on criminal cases.

Yet before long, the bar became concerned that the first edition of the Standards, and the Rules of Professional Responsibility that they inspired, had gone too far in restricting attorney speech and otherwise had “led to a serious distortion of first amendment values in high-publicity cases.” This concern led the ABA to revise its Fair Trial and Free Press Standards in a second edition that was approved by the ABA House of Delegates in 1978 and published in 1980. Just as the first edition reflected the influence of the Sheppard decision, the second edition reflected the influence of the Supreme Court’s 1976 decision in Nebraska Press Association v. Stuart. Nebraska Press Ass’n involved a sensational multiple murder case and the trial court’s efforts to protect the fairness of the trial in the face of intense media interest. The trial court entered an order that enjoined members of the press from disseminating several categories of information adduced at pretrial hearings, including certain oral and written statements by the defendant and testimony suggesting that the murders were committed in the course of a sexual assault. The order applied only until

32. See Wolfram, supra note 24, § 2.6. The Model Code acquired the force of law in a state when adopted by state authority, typically the state’s highest court. Id.
33. ABA Standards for Criminal Justice, Fair Trial and Free Press ix (3d ed. 1992) (citing Report to the ABA House of Delegates Standing Committee on Association Communications 2 (1972)).
37. Id. at 543–44.
the jury was impaneled.\textsuperscript{38} Nevertheless, the Supreme Court reversed the trial court's order, holding that it was inconsistent with the First Amendment.\textsuperscript{39} Citing the disfavored status of prior restraints\textsuperscript{40} and the significant First Amendment value of reporting on public judicial proceedings,\textsuperscript{41} the Court found that the record was insufficient to justify the trial court's order. Although pretrial publicity might in fact make it more difficult for the defendant to obtain a fair trial from an unbiased jury, the Court was not persuaded that the trial court's order actually would have made a critical difference in that regard,\textsuperscript{42} or that other measures, including those enumerated in \textit{Sheppard}, would not have been sufficient to protect the defendant's fair trial right.\textsuperscript{43} Thus, \textit{Nebraska Press Ass'n} addressed one of the questions that had been left open by \textit{Sheppard}—namely whether prior restraints on the press were among the options available to a trial court to protect the fairness of a trial. In \textit{Nebraska Press Ass'n}, the Court definitively answered that question in the negative. Although the opinion nominally left open the possibility that the record in another case might be sufficient to meet the high burden required to justify a prior restraint on the press,\textsuperscript{44} the Court did observe that the "practical problems of managing and enforcing restrictive orders will always be present"\textsuperscript{45} and that therefore "the record now before us is illustrative rather than exceptional."\textsuperscript{46}

The second edition of the ABA Fair Trial-Free Press Standards thus contained a new Standard not present in the first edition that was directly responsive to \textit{Nebraska Press Ass'n}. This Standard categorically prohibited judicial orders restraining "representatives of the news media from broadcasting or publishing any information in their possession relating to a criminal case."\textsuperscript{47} The Commentary explained that,

\textsuperscript{38} \textit{Id.} at 543.
\textsuperscript{39} \textit{Id.} at 570.
\textsuperscript{40} \textit{Id.} at 556–59.
\textsuperscript{41} \textit{Id.} at 559.
\textsuperscript{42} \textit{Id.} at 566–69. Among other practical difficulties that called into question the practical efficacy of the order, the Court noted that it was unlikely that the trial court could assert jurisdiction to enforce a broad order enjoining publication of the information at large. \textit{See id.} at 565–66.
\textsuperscript{43} \textit{Id.} at 569.
\textsuperscript{44} \textit{Id.}
\textsuperscript{45} \textit{Id.}
\textsuperscript{46} \textit{Id.}
\textsuperscript{47} \textit{ABA Standards for Criminal Justice, Fair Trial and Free Press}, Standard 8-3.1 (2d ed. 1980).
although the categorical bar on prior restraints was not mandated by the Supreme Court’s decision in *Nebraska Press Ass’n*, given that the Court had so limited the circumstances under which prior restraints could be imposed, "it is preferable to close the door entirely" to prior restraints on the press rather than "invite courts to probe the limits of the first amendment in this area and thereby intensify conflicts with the press."  

In other ways, the second edition of the Standards also reflected a recalibration of the Fair Trial-Free Press balance. Whereas the first edition created a near-categorical restriction on extrajudicial statements by lawyers involved in a criminal case regarding certain subject matters and—for all other statements—a standard based on a "reasonable likelihood" of interference with a fair trial or other "prejudice [to] the due administration of justice," the second edition narrowed the restriction such that lawyers' extrajudicial statements would only violate the standards if they posed a "clear and present danger to the fairness of the trial," regardless of the subject matter. The second edition also imposed stricter requirements on the closure of pretrial proceedings and records to the public and the press, subjecting such closure orders to the same clear and present danger test and narrow tailoring requirements that the Supreme Court had announced in *Nebraska Press Ass’n* for prior restraints on the media. On the latter point, the second edition was prescient. Although in 1979, in *Gannett Co. v. DePasquale*, the Supreme Court held that the public did not have a right under the Sixth Amendment's public trial guarantee or pursuant to the First Amendment to attend criminal trials, the Court subsequently reversed that position just one year later in *Richmond Newspapers v. Virginia*. Ever since, the Court has carefully scrutinized orders closing any stage of a criminal trial, including pretrial proceedings, finding that they

48. *Id.* at 29.


50. Standards 8-4 and 8-1.1 (2d ed. 1980). The Commentary to the revised Standard 8-1.1 explained that this shift to the clear and present danger test for lawyers' speech was prompted by consideration of several judicial decisions, most notably *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975). *ABA Standards* at 10–11 (2d ed. 1980).


impinge upon either First Amendment or Sixth Amendment interests, or both.\textsuperscript{54}

While the second edition of the ABA Fair Trial-Free Press Standards was in the drafting process, the ABA also was in the midst of its work on a new set of professional model rules to replace the 1969 Code of Professional Responsibility. This new text, the Model Rules of Professional Responsibility (the Model Rules), was adopted by the ABA in 1983.\textsuperscript{55} Model Rule 3.6, which addressed extrajudicial statements by lawyers, reflected the influence of the second edition of the Fair Trial-Free Press Standards. Although Model Rule 3.6 did not adopt the second edition’s “clear and present danger” test for restrictions on attorney speech, still the restriction it adopted was narrower than the first edition’s “reasonable likelihood” test.\textsuperscript{56} Under the Model Rule 3.6 formulation, as the Rule was adopted in 1983, a lawyer should not make a statement that “a reasonable person would expect to be disseminated by means of public communication” if the lawyer “knows

\textsuperscript{54} See, e.g., Presley v. Georgia, 558 U.S. 209, 213 (2010) (declining to address the extent to which the First and Sixth Amendment public trial rights are coextensive but finding that defendant had Sixth Amendment right to have voir dire open to the public); Press-Enterprise Co. v. Superior Court of Cal., County of Riverside, 478 U.S. 1 (1986) (preliminary hearings presumptively must be open to the public under the First Amendment); Press-Enterprise Co. v. Superior Court of Cal., Riverside Cty., 464 U.S. 501 (1984) (voir dire of prospective jurors presumptively must be open to the public under First Amendment); Waller v. Georgia, 467 U.S. 39 (1984) (Sixth Amendment right to public trial extends to pretrial suppression hearing). See generally Jocelyn Simonson, The Criminal Court Audience In a Post-Trial World, 127 Harv. L. Rev. 2174, 2195–2222 (2014) (tracing expansion of public right of access from trials to pretrial and post-trial proceedings like sentencing pursuant to First and Sixth Amendment); Eugene Cerruti, Dancing in the Courthouse: The First Amendment Right of Access Opens a New Round, 29 U. Rich. L. Rev. 237, 266–69 (1995) (tracing expansion of Richmond right of access in lower courts to non-judicial proceedings and documents). The right of access delineated in these cases is qualified rather than absolute and can be overcome upon a sufficient finding of prejudice to an overriding interest.

\textsuperscript{55} See \textit{Wolfram, supra} note 24, \S 2.6. In 1982, the ABA also adopted a new standard to add to the Fair Trial-Free Press Standards regarding the broadcasting of courtroom proceedings. The new standard was first published in a 1982 supplement to the standards. Previously, the Fair Trial-Free Press Standards were silent on the issue of broadcasting, televising, or photographing courtroom proceedings. Canon 3A(7) of the ABA Code of Judicial Conduct had represented the ABA position on cameras in court, which was to oppose them. Responding to the U.S. Supreme Court’s decision in \textit{Chandler v. Florida}, 449 U.S. 560 (1981), in which the Court held that television coverage of a trial did not per se violate due process, the new standard contemplated that cameras could be invited into the courtroom but subject to judicial limitations and the right to a fair trial. The standard did not prescribe precisely what those limitations should be but cited the need to protect witnesses and other trial participants. This standard was carried over unchanged into the third edition of the Fair Trial-Free Press Standards.

\textsuperscript{56} ABA Standards for Criminal Justice, Fair Trial and Free Press, Standard 1.1 (1st ed. 1968).
or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding."\textsuperscript{57} After setting forth this general standard, Model Rule 3.6—like the second edition of the Fair Trial Free Press Standards—then listed categories of statements generally likely to violate the general standard, followed by a so-called safe-harbor\textsuperscript{58} provision permitting attorneys to make certain statements "without elaboration."\textsuperscript{59} The items enumerated in both of these categories were substantially similar to the items enumerated in the first and second editions of the Standards and in the 1969 Model Code of Professional Responsibility.\textsuperscript{60} The safe-harbor provision included statements about "the general nature of the claim or defense" and "information contained in a public record."\textsuperscript{61} Most states eventually adopted the Model Rules of Professional Conduct in the place of the 1969 Model Code of Professional Responsibility,\textsuperscript{62} although a few that adopted the Model Rules nevertheless retained the stricter Model Code rule for extrajudicial statements by attorneys.\textsuperscript{63}

In 1992, the ABA published a third edition of the Fair Trial-Free Press Standards.\textsuperscript{64} This third edition attempted yet again to recalibrate the balance between Fair Trial and Free Press interests. The intention was to place the Standards in a more middle ground position, to render them "less categorical and absolute"\textsuperscript{65} than either of the two prior editions. As the commentary explained, "[w]hile each of the two previous editions perceived a need to emphasize one set of interests over the other, these standards are dedicated to accommodating an essentially judicious balancing of the two."\textsuperscript{66} To that end, the third edition retreated from the second edition's absolute bar on prior restraints on the news media from broadcasting information in their position

\textsuperscript{57} \textit{Model Rules of Prof'l Conduct} R. 3.6 (1983).
\textsuperscript{59} \textit{Model Rules of Prof'l Conduct} R. 3.6 (1983).
\textsuperscript{60} \textit{See Lafave et al.}, supra note 30, § 23.1(b) (discussing similarities and the few differences).
\textsuperscript{61} \textit{Model Rules of Prof'l Conduct} R. 3.6 (1983).
\textsuperscript{62} \textit{See Lafave et al.}, supra note 30, § 23.1(b).
\textsuperscript{63} \textit{Id.}
\textsuperscript{64} \textit{ABA Standards for Criminal Justice, Fair Trial and Free Press} (3d ed. 1992).
\textsuperscript{65} \textit{Id. at x.}
\textsuperscript{66} \textit{Id.}
relating to a criminal case. Consistent with Richmond Newspapers v. Virginia, the third edition also loosened the second edition's effective bar on courts' ability to close proceedings or documents to the public to preserve the fairness of the trial, providing that proceedings should be presumptively open to the public but could be closed upon appropriate findings. The third edition also conformed the standard on extrajudicial speech by attorneys to the phrasing adopted in Model Rule 3.6 (i.e., the substantial likelihood of prejudice test). In other respects, the third edition retained much of the substance of the prior two editions.

Just as the third edition of the Fair Trial-Free Press Standards was nearing completion, the U.S. Supreme Court decided Gentile v. State Bar of Nevada, which involved a defense attorney who called a press conference to rebut the charges in an indictment against his client. In Gentile, the Supreme Court for the first time ruled on the constitutionality of a state bar's rule prohibiting certain extrajudicial speech by lawyers involved in a matter. The Nevada rule that the Court considered in Gentile was essentially identical to Model Rule 3.6 and the standard for extrajudicial speech contained in the third edition of the Fair Trial-Free Press Standards. It generally prohibited extrajudicial speech that a lawyer knows or should know would have a substantial likelihood of materially prejudicing an adjudicative proceeding. The Nevada rule then also set forth a list of subject matters that generally would violate the rule, followed by a safe harbor for those statements that would be permissible "notwithstanding" the general rule.

67. Standard 8-3.1 (3d ed. 1992) (replacing prior standard prohibiting any prior restraint on the media with a "clear and present danger to the fairness of a trial or other compelling interest" standard).
69. See Standard 8-3.2 (3d ed. 1992) (replacing prior standard prohibiting closing court proceedings or records to the public absent a showing of a "clear and present danger to the fairness of the trial" with a standard allowing closure upon a proper showing that access would pose a "substantial probability of harm to the fairness of the trial or other overriding interest which substantially outweighs the defendant's right to a public trial," that closure would effectively prevent the threatened harm, and that no less restrictive alternatives are reasonably available).
72. Id. at 1033 (describing Nevada Supreme Court Rule 199 as "almost identical to ABA Model Rule of Professional Conduct 3.6").
73. Id. at 1048.
case resulted in a fractured Court. Justice Kennedy wrote the opinion for the Court holding that the rule was void for vagueness as applied to *Gentile*, on account of its failure to provide notice of which statements, arguably falling with the safe harbor, nevertheless were subject to sanction. Justice Rehnquist wrote a separate opinion for the Court holding that the "substantial likelihood of material prejudice" standard set forth in the Nebraska rule satisfied the First Amendment and that the speech of lawyers representing clients in pending cases could be regulated under a less demanding standard than the "clear and present danger" test required for regulation of the press.

In response to *Gentile*, the ABA amended Model Rule 3.6. The revised version, adopted by the ABA in 1994, reflected several important changes. First, the language that the Supreme Court had found unconstitutionally vague—that is, the words "without elaboration" and "general"—were removed from the safe-harbor provision.74 Thus, pursuant to the revised version, a lawyer could state the "defense" the lawyer planned to pursue without worrying whether he or she was doing so in a sufficiently "general" way or "without elaboration." Second, the revised rule no longer contained a section setting forth the types of statements that ordinarily would violate the rule, moving the list instead to the commentary accompanying the rule. Although not directly responsive to *Gentile*, the shift evidently reflected a concern that the list might be in tension with the revised safe-harbor provision and chill more speech than was necessary.75 Third, the revised rule's safe-harbor provision contained a new "right of reply" authorizing an attorney to make a statement that "a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client."76 The right of reply was limited, however, to "such information as is necessary to mitigate the recent adverse publicity."77 This new provision responded directly to comments made by Justice Kennedy in that portion of his opinion that did not command a majority of the Court, in which Justice Kennedy discussed the important role of

74. See Model Rules of Prof'l Conduct R. 3.6 (1994). See also generally, LaFave et al., supra note 30, § 23.1(b) (describing 1994 amendments).
75. See LaFave et al., supra note 30, § 23.1(b).
76. Model Rules of Prof'l Conduct R. 3.6(c) (1994).
77. Id.
the defense attorney in defending a client’s reputation and reducing the adverse consequences of indictment. At the same time that the ABA made these amendments to Rule 3.6, it also amended Rule 3.8, which governs prosecutors. The amendment imposed on prosecutors the duty to refrain from making “extrajudicial statements that have a substantial likelihood of heightening public condemnation of the accused.” This addition to the rule on prosecutors’ conduct was designed to minimize the need for defense counsel to resort to the right of reply.

Notwithstanding Gentile, many states did not amend their model rule on extrajudicial statements to comport with the ABA’s 1994 amendments. Today, as between the two versions of Model Rule 3.6 (the original 1983 version and the 1994 version), the states are relatively evenly divided, and some still retain provisions based on the more restrictive 1969 Code of Professional Responsibility. Many of the states that did amend their rules to conform to the ABA’s 1994 revisions did not adopt the amendment to Rule 3.8 for prosecutors.

Since Gentile, the Supreme Court has not addressed the constitutionality of restrictions on attorney speech in order to preserve the

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78. See Gentile, 501 U.S. 1030, 1043–44 (Kennedy, J.) (“An attorney’s duties do not begin inside the courtroom door. He or she cannot ignore the practical implications of a legal proceeding for the client. . . A defense attorney may pursue lawful strategies to obtain a dismissal of an indictment or reduction of charges, including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried.”).

79. This provision is now found in Model Rules of Prof’l Conduct R. 3.8(f) (2014).

80. See LaFave et al., supra note 30, § 23.1(b).

81. In 2002, as part of the comprehensive review of the Model Rules of Professional Conduct known as “Ethics 2000,” the ABA made two additional changes to Model Rule 3.6 of lesser significance. First, the “reasonable person” was changed to a “reasonable lawyer” for purposes of analyzing whether the speaker would anticipate that the statement would be publicly disseminated. Second, the scienter standard for the prejudicial impact of the statement was changed from “would expect” to “knows or reasonably should know.” See Mattei Radu, The Difficult Task of Model Rule of Professional Conduct 3.6: Balancing the Free Speech Rights of Lawyers, the Sixth Amendment Rights of Criminal Defendants, and Society’s Right to the Fair Administration of Justice, 29 CAMPELL LAW REVIEW 497, 520–21 (2007) (citing American Bar Association, Annotated Model Rules of Professional Conduct 377 (15th ed. 2003)).

82. See id.

83. Id.
fairness of criminal trials. The validity and wisdom of such rules nevertheless remain the subjects of considerable debate among commentators. The Richmond Newspapers framework for the public’s right to attend criminal proceedings and to view related documents has proven durable and has been supplemented in most jurisdictions by “open records” laws. Notwithstanding this relatively stable legal environment, the ABA decided several years ago that it was time for a revised fourth edition to this set of standards, primarily in light of

84. Some commentators have argued that the Supreme Court’s decision in Republican Party of Minnesota v. White, 536 U.S. 765 (2002) calls into question the constitutionality of Model Rules 3.6 and 3.8, at least as applied to elected prosecutors. See, e.g., Abigail H. Lipman, Extrajudicial Comments and the Special Responsibilities of Prosecutors: Failings of the Model Rules in Today’s Media Age, 47 AM. CRIM. L. REV. 1523, 1543 (2010); R. Michael Cassidy, The Prosecutor and the Press: Lessons (Not) Learned from the Mike Nifong Deble, 71 LAW & CONTEMP. PROBS. 67, 76–83 (Autumn 2008). In White, the Court held by a vote of 5–4 that a state rule prohibiting judicial candidates from announcing their views on “disputed legal or political issues” violated the First Amendment. White, 536 U.S. at 768. The Court held that this judicial canon constituted a content-based restriction on speech and, as such, was subject to strict scrutiny. Even positing that the canon was designed to avoid partiality and that the avoidance of partiality was a compelling state interest, the Court held that the rule was vastly under-inclusive (and therefore failed strict scrutiny) because it failed to address speech about the parties to a dispute, as opposed to the issues in the case. White has since been applied to strike down other rules on judicial conduct. See Cassidy at 78 and n.76; Wendy Weiser, Regulating Judges’ Political Activity After White, 68 ALB. L. REV. 651, 653 n.10 (2005) (summarizing cases striking down judicial canons based on White). However, White has not yet been applied to strike down rules governing lawyers’ extrajudicial speech about pending cases.

85. In the decades since Gentile, commentators have never ceased to debate the constitutionality and wisdom of such rules. See, e.g., Margaret Tarkington, Lost in the Compromise: Free Speech, Criminal Justice, and Attorney Pretrial Publicity, 66 FLA. L. REV. 1873 (2014) (arguing for the constitutionality of greater restrictions on prosecutorial speech than defense attorney speech); Cassidy, supra note 84 (arguing that certain restrictions on the speech of elected prosecutors might be unconstitutional); Erwin Chemerinsky, Silence Is Not Golden: Protecting Lawyer Speech Under the First Amendment, 47 EMORY L.J. 859 (1998) (arguing that most restrictions of attorney speech are unconstitutional and, therefore, that attorneys should only be prohibited from making statements they know to be false); Eileen Minneci, Looking for Fair Trials in the Information Age: The Need for More Stringent Cog Orders Against Trial Participants, 30 U.S.F.L. REV. 95 (1995) (arguing in favor of stringent restraints on trial participant speech prior to trial); Esther Berkowitz-Caballero, In the Aftermath of Gentile: Reconsidering the Efficacy of Trial Publicity Rules, 68 N.Y.U. L. REV. 494 (1993) (arguing in favor of rules that give defense attorneys greater latitude to present their side of the story to the public); Scott M. Matheson, Jr., The Prosecutor, The Press, and Free Speech, 58 FORDHAM L. REV. 865 (1990) (suggesting that some regulations on prosecutors’ extrajudicial speech would be consistent with the First Amendment). Some of the debate stems from the split opinions in Gentile and precisely what legal principles, if any, they articulate. See W. Bradley Wendel, Free Speech for Lawyers, 28 HASTINGS CONST. L. Q. 305, 356–58 (2000–01) (observing that “Gentile is frequently misinterpreted by lower courts” and that the opinion “is a pastiche of dicta from other cases, which themselves are susceptible to misinterpretation”).

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dramatic changes in the technological landscape that have altered the Fair Trial-Free Press relationship. In some respects, the changes have made the balancing of these two interests easier. For example, technological advances have made cameras and other recording equipment smaller and less obtrusive than they were in the days of Sheppard. In states that do allow cameras in the courtroom, the cameras can be practically invisible and the footage shared by a pool of journalists, reducing the risk of a carnival-like atmosphere. Courts' use of electronic filing has made it far easier for documents to be accessed by the public, with far less of a burden imposed on court administrators. Such advances make it easier for the public to have access to the judicial system, without significantly burdening fair trial interests.

On the other hand, technological changes have made it harder to seat a jury that has not been exposed to extrajudicial information about a case and to keep the jury untainted. The sources of information available to jurors have multiplied exponentially since Sheppard. In addition to broadcast and cable television (with some stations now devoted exclusively to coverage of criminal cases), jurors may learn about a case by listening to conventional or satellite radio, reading a newspaper or magazine in print or on the Internet, or by reading a blog, Facebook, or Twitter post that may or may not be authored by a professional journalist associated with a traditional media institution. This explosion in sources of information reflects the new media reality, where the divisions that once existed between the


88. See Paul Hannaford Agor & Nicole Water, The Jury System in the Information Age, 27 THE COURT MANAGER, JURY NEWS No. 3 65 (discussing how a number of courts now provide online access to court documents); Sellers, The Circus Comes to Town, supra note 87, at 193.

89. A blog is a “series of web posts from a single web address with a common author or set of authors, often integrated with commentary on the post itself or on other blogs.” Larry E. Ribstein, From Bricks to Pajamas: The Law and Economics of Amateur Journalism, 48 WM. & MARY L. REV. 185, 187 (2006).

90. As described in one recent bar journal account, “Twitter allows registered users to answer the question ‘what’s happening’ with a message of no more than 140 characters. Apart from the character limit, however, Twitter functions like a conventional blog. Messages posted on Twitter, known as ‘tweets,’ are available instantaneously.” Esther Seitz, #Oyez, #Oyez: Why Judges Should Let Reporters Tweet from the Courtroom, 101 ILL. B. J. 38 (2013) (quoting http://twitter.com/about)).

91. On the differences between “institutional” and “noninstitutional media,” see Marcy Wheeler, How Noninstitutionalized Media Change the Relationship Between the Public and Media Coverage of Trials, 71 LAW & CONTEMP. PROBS. 135 (Autumn 2008).
institutional press and the public have been substantially broken down. This diffusion of the sources of information has made voluntary "bench-bar-press" agreements harder to enforce.\(^2\)

Further complicating the picture, this plethora of information generally is available to jurors on hand-held devices that they carry with them continuously in their daily lives, including into the courthouse. Jurors' relationship to these sources of information and their electronic devices is such that many find it extremely difficult not to research the case, or communicate about it, even when instructed not to do so.\(^3\) Because information never disappears on the Internet, jurors who once would have had to spend considerable time and effort to find information about a crime that occurred long ago now are able to do so within seconds.\(^4\) They also are able to obtain information about crimes that occurred in other jurisdictions without going to a library.\(^5\) These developments have made some of the traditional remedies for pretrial publicity, like an adjournment or change of venue, less effective than they once were. Although there always have been jurors who were willing to violate their oath and access extrajudicial information about a case, today it is far more likely that those who are so inclined will have the opportunity and means to do so. These same developments also have increased the reputational and economic risks

\(^{92}\) See Gary A. Hengstler, Sheppard v. Maxwell Revisited—Do the Traditional Rules Work for Non-traditional Media?, 71 LAW & CONTEM. PROBS. 171, 173 (Autumn 2008) (before the Internet, journalists "tended to respect boundaries because they knew any short-term gain by disrupting the status quo to get a story today could have long-term negative effects with sources down the road. No more.").

\(^{93}\) See Nicole L. Waters & Paula Hannaford-Agor, Jurors 24/7: The Impact of New Media on Jurors, Public Perceptions of the Jury System, and the American Criminal Justice System (noting that some jurors' "reliance on these technologies for everyday tasks has become so ingrained that it would require conscious effort to refrain from doing so for the duration of the trial."). Some jurors report that they use technology to research the case because they take their fact-finding role seriously and feel unprepared to decide the case without additional information. See Thaddeus Hoffmeister, Google, Gadgets, and Guilt: Juror Misconduct in the Digital Age, 83 U. Col. L. REV. 409, 419–20 (2012).

\(^{94}\) See generally Paul Hannaford-Agor, Google Mistrials, Twittering Jurors, Juror Blogs, and Other Technological Hazards, 24 THE COURT MANAGER, JURY NEWS NO. 2 42 (2009); see also Caren Myers Morrison, Jury 2.0, 62 HASTINGS L.J. 1579, 1588 (2011) (describing the ease with which jurors can obtain information online that would take considerable time and expense to learn in the "analog world.").

\(^{95}\) Even conscientious jurors who do not wish to view extrajudicial information about a case may find it difficult to avoid such information, since information frequently is pushed at them on their hand-held devices or through other electronic means. See supra note 93 and sources cited therein.
for those caught up in the criminal justice system, whether as named targets of investigations, defendants, or witnesses. In this new media environment, defense attorneys increasingly espouse the view that "no comment" is not a viable defense strategy, and some attorneys make active use of new media in the service of their clients' case. In particularly high-profile cases, it is now fairly common for defendants also to hire public relations specialists.

This fourth edition of these Standards attempts to address these new realities. To begin, one of the most significant changes from prior editions is the new title, which reflects the breakdown in the past two decades between the traditional press and the public. Whereas the three prior editions of these Standards were entitled Fair Trial and Free Press, this fourth edition drops "Press" from the title. It is entitled Fair Trial and Public Discourse: Communications with the Public in Criminal Matters. The new title recognizes that it is no longer practicable, nor in many instances necessary, for purposes of First and Sixth Amendment concerns, to distinguish between the "press" and the "public" or to privilege the institutional press. Anyone with access to the Internet can widely disseminate information that can inform the public but can also be prejudicial to fair trial interests.


99. See James F. Haggerty, Working with Public Relations Experts in High-Profile Criminal Cases, and Kendall Coffey, Defense Perspective on Media and the Court of Public Opinion, both in MEDIA COVERAGE IN CRIMINAL JUSTICE CASES (Andrew E. Taslitz, ed. 2013) (discussing the value of working with public relations firms and media specialists in high-profile cases).

100. Historically, the press was viewed as the agent of the public. See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 586 n.2 (1980) (Brennan J., concurring in judgment); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491-92 (1975) (individual in modern society relies upon press for knowledge of government functions).
As reflected in the title, the new edition also expands the scope of concerns addressed by the standards to include the quality of our public discourse about criminal matters. This shift came about as a result of the ABA's decision in recent years to reorient the Criminal Justice Standards. Instead of providing the blueprint for binding state bar rules, many of the Standards have been reframe as aspirational.  

This recasting allows the standards on extrajudicial speech by lawyers to sweep more broadly than they did in prior editions. As set forth in the first standard of the fourth edition, the ABA has adopted the position that lawyers have a duty not only to help ensure that trials are conducted fairly but also to promote respect for and confidence in the criminal justice system and not to aggravate reputational harm. Because the standards are now more restrictive of attorney speech than is Model Rule 3.6, lawyers who engage in conduct that is violative of the standards will not necessarily be in violation of Model Rule 3.6. That discrepancy is intended. At this point in their evolution, the Standards and the Model Rules serve different functions. The former set aspirational goals while the latter may serve as the basis for professional discipline. Lawyers involved in the criminal justice system who wish to comport with the highest standards of the profession should consult these standards, not only the Model Rules and the rules that are binding in their jurisdiction.

Consistent with the Standards' shift in focus, this new edition reflects the following changes of significance to the standards governing the conduct of lawyers. First, the new edition begins with a definitions section that defines certain terms of general applicability such as the lawyers to whom these standards apply and the duration of their applicability in the life of a particular criminal case. Second, the fourth edition breaks with the three prior editions by differentiating between statements by prosecutors and defense attorneys so as to provide


102. See Chair's Introduction, ABA Commission on the Evaluation of the Rules of Professional Conduct (Ethics 2000) (August 2002) (explaining that, in revising the Model Rules as part of the comprehensive Ethics 2000 project, the ABA "retained the primary disciplinary function of the Rules, resisting the temptation to preach aspirationally about 'best practices' or professionalism concepts" in this text).

more detailed guidance that is tailored to their distinct roles. In that regard, the standards for defense lawyers specifically address coordination with third parties such as public relations specialists. Third, the standards for the first time impose an affirmative duty on both prosecutors and defense lawyers to exercise reasonable care to ensure that investigators and others working with them do not make extrajudicial statements that the lawyers would be prohibited from making under the standards. Fourth, the standards caution both prosecutors and defense lawyers to consult with supervisors before making any extrajudicial statements. Fifth, the new edition provides a brand new standard for legal commentators, a field that did not exist when prior editions were written. The overall goal of these revisions is to provide guidance that is as specific as possible to the particular role played by an individual lawyer while also impressing upon all lawyers the need to consider and take responsibility for the consequences of their conduct and the conduct of those working with them.

Consistent with new developments in information technology, the new edition contains the following changes of significance with respect to the administration of criminal trials. First, it provides a checklist of 11 mechanisms available to the trial court that can be deployed, alone or in combination, to mitigate the dangers associated with publicity. Whereas prior editions discussed a number of these mechanisms in different standards, the fourth edition consolidates these measures in a single standard for ease of reference. It also ranks them in ascending order of their burdensomeness. Second, the new edition places special emphasis on the cautionary instructions that judges give to jurors regarding publicity. It encourages courts to give such instructions from the outset of jury selection—when potential jurors otherwise may be tempted to research the case while they wait—in language that directly references the types of technology and devices that jurors are most likely to use in their ordinary lives and to explain the reasoning behind the instructions. Third, the new edition encourages courts to adopt standing plans for accommodating public interest in criminal cases and detailed case-specific orders whenever it becomes apparent that public interest in a matter will be particularly acute. The experience of recent decades has been that courts, litigants, and the public all are best served when courts act proactively in this regard, anticipating and planning for public interest in a case before the crush of public attention descends in full force.
This new edition embraces technology and the ways in which it has afforded the public direct access to our criminal justice system in ways that the drafters of the earlier editions of these standards could not have imagined. It also acknowledges the special risks created by such unprecedented and constant access to information. The best approach when faced with such enormous change is to address it head-on. This edition of the standards attempts to do just that, without unnecessarily changing standards from the third edition that did not require it. Thus, the standards in this edition represent the best of the third edition, updated as appropriate, and some new standards that are specifically responsive to the changed media environment. Citations to related ABA Criminal Justice Standards and other related sources of authority and professional guidance also are included in this volume. Finally, because not every nuance can be captured in the black letter of the standards, readers are encouraged to read the accompanying commentary for additional guidance.
BLACK LETTER

PART I. GENERAL DEFINITIONS AND PURPOSES

Standard 8-1.1. Purposes of the Standards

(a) These Standards have three primary goals:

(i) First, they are intended to provide a guide to best practices for lawyers and other professionals involved in criminal cases, including investigators and members of law enforcement, with respect to communications with the public;

(ii) Second, they are intended to provide a guide to best practices for lawyers who provide public commentary or consult on criminal cases in which they are not personally involved;

(iii) Third, they are intended to provide a guide to best practices for judges and judicial employees in anticipating and responding to public interest in criminal cases, and ensuring that jurors are not exposed to extrajudicial information about a case.

(b) With respect to each of these goals, these Standards reflect the views of the ABA that:

(i) a transparent and open criminal justice system is of critical importance in our democracy;

(ii) lawyers and others involved in the criminal justice system have a duty to ensure that criminal cases are conducted fairly and that verdicts are rendered solely on the basis of the evidence presented in court;

(iii) lawyers and others involved in the criminal justice system also have a duty to promote respect for and confidence in the criminal justice system; and

(iv) developments in information technology and in how individuals obtain information have made it unnecessary for purposes of these Standards to differentiate between members of the general public and those who are members of the traditional "Press" or "News Media." This represents a departure from prior editions
of these Standards, which were entitled "Fair Trial and Free Press."

(c) While these Standards are intended to provide a basis for the formulation of internal guidelines within lawyers' offices, the courts, and law enforcement agencies, they are not intended to serve as the basis in and of themselves for the imposition of professional discipline, to create substantive or procedural rights for accused or convicted persons, to create a standard of care for civil liability, or to serve as a predicate for a motion to suppress evidence or dismiss a charge.

Standard 8-1.2. Definitions of Terms Used in These Standards

For purposes of these Standards:

(a) An "extrajudicial statement" is any oral or written statement that is not made or presented in a courtroom in the course of judicial proceedings or in court filings or correspondence with the court or counsel in connection with a criminal matter. A "public extrajudicial statement" is any extrajudicial statement that a reasonable person would expect to be disseminated to the public or otherwise made available by means of public communication.

(b) A "criminal matter" ordinarily begins when an individual or entity has been publicly identified as a subject of a criminal investigation, arrested, or named in criminal charges, whichever is earliest, and ordinarily ends with a dismissal or verdict; provided, however, that if the charges are not dismissed and no verdict is reached, or a verdict has been reached but there is nevertheless a reasonable likelihood of a new trial, a "criminal matter" continues until the charges are dismissed or a verdict is reached in the new trial.

(c) A "lawyer participating in a criminal matter" is:

(i) any lawyer who is participating or who has participated in the investigation or litigation of the criminal matter;
(ii) any lawyer who is representing or who has represented a witness or likely witness in connection with the criminal matter; or
(iii) any lawyer who works for the same firm or government agency as a lawyer described in subsection (i) or (ii).
PART II. CONDUCT OF ATTORNEYS

Standard 8-2.1. Conduct by Lawyers Participating in a Criminal Matter

(a) Subject to any additional limitations imposed by local or professional rules, during the pendency of a criminal matter, a lawyer participating in that criminal matter should not make, cause to be made, condone or authorize the making of a public extrajudicial statement if the lawyer knows or reasonably should know that it will have a substantial likelihood of:

(i) influencing the outcome of that or any related criminal trial or prejudicing the jury venire, even if an untainted panel ultimately can be found;
(ii) unnecessarily heightening public condemnation of a defendant or a person or entity who has been publicly identified in the context of a criminal investigation, or of a witness or victim; or
(iii) undermining the public's respect for the judicial process.

As a general matter, lawyers participating in a criminal matter should consult with their supervisors prior to making any public extrajudicial statements.

(b) During the pendency of a criminal matter, a lawyer participating in that criminal matter should make reasonable efforts to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the lawyer from making a public extrajudicial statement that the lawyer would be prohibited from making under these Standards or other applicable rules of professional conduct, or engaging in conduct prohibited by these Standards.

(c) This Standard should not be construed as prohibiting a lawyer participating in a criminal matter from releasing or authorizing the release of a record or document that the lawyer is required to release under state open records laws or the federal Freedom of Information Act, upon receipt of a proper request. A lawyer participating in a criminal matter should not place statements or evidence into
the court record or into a document that is deemed an open record under applicable law solely for the purpose of circumventing this Standard. If the lawyer has reason to believe that the public release of a record or document would create a substantial probability of harm to the fairness of a trial or other overriding interest, the lawyer should consider seeking a sealing order pursuant to Standard 8-5.2.

(d) Nothing in these Standards is intended to preclude the formulation or application of more restrictive rules relating to the release of information about juvenile offenders or other protected categories of offenders, victims or witnesses, to preclude the holding of hearings or the lawful issuance of reports by legislative, administrative, or investigative bodies, or to preclude any lawyer from replying to charges of misconduct publicly made against him or her.

Standard 8-2.2. Specific Guidance Regarding Prosecutorial Statements

(a) Statements regarding the following subject areas, when made by prosecutors, pose a particular risk of violating Standard 8-2.1(a) and therefore ordinarily should be avoided by a lawyer participating in a criminal matter as a prosecutor during the pendency of that matter:

(i) the prior criminal record of a defendant or a person or entity who has been publicly identified in the context of a criminal investigation;

(ii) the character, credibility, or reputation of a defendant or a person or entity who has been publicly identified in the context of a criminal investigation, or the race, ethnicity, creed, religion, or sexual orientation of such person unless such information is necessary to apprehend a suspect or fugitive;

(iii) the personal opinion of the prosecutor as to the guilt or innocence of a defendant or a person or entity who has been publicly identified in the context of a criminal investigation;

(iv) the existence or contents of any confession, admission, or statement given by a defendant or a person or entity who has been publicly identified in the context of a criminal investigation, or the refusal or failure of such person to make a statement;
(v) the performance or results of any examinations or tests, or the refusal or failure to submit to an examination or test by a defendant or a person or entity who has been publicly identified in the context of a criminal investigation;

(vi) the nature of physical evidence expected to be presented;

(vii) the identity, race, ethnicity, creed, religion, or sexual orientation, expected testimony, criminal record, character, reputation, or credibility of prospective witnesses other than the victim, and the race, ethnicity, creed, religion, sexual orientation, expected testimony, criminal record, character, reputation, or credibility of the victim;

(viii) the possibility of a plea of guilty to the offense charged, or other disposition; and

(ix) information that the lawyer knows or has reason to know would be inadmissible as evidence in a trial.

(b) Public statements regarding the following subjects by a lawyer participating in a criminal matter as a prosecutor ordinarily will not violate Standard 8-2.1(a):

(i) statements necessary to inform the public of the nature and extent of the prosecutor's action, such as:

(A) the existence of an investigation in progress, including the general length and scope of the investigation, and the identity of the investigating officer or agency;

(B) the facts and circumstances of an arrest, including the time and place, and the identity of the arresting officer or agency;

(C) the identity of the victim, when the release of that information is not otherwise prohibited by law or would not be harmful to the victim; and

(D) the general nature of the charges against a defendant, provided that the statement explains that the charge is an accusation and that the defendant is presumed innocent until and unless proven guilty;

(E) the name, age, residence, and occupation of a defendant;

(F) the scheduling or result of any stage in the judicial proceeding, and information necessary for the
public to locate documents contained within the public court record of the matter.

(ii) statements that serve a legitimate law enforcement purpose, such as:
(A) statements reasonably necessary to warn the public of any ongoing dangers that may exist or to quell public fears; and
(B) statements reasonably necessary to obtain public assistance in solving a crime, obtaining evidence, or apprehending a suspect or fugitive.

Standard 8-2.3. Specific Guidance Regarding Defense Statements

(a) Public statements regarding the following subjects by a lawyer participating in a criminal matter as a defense attorney, if made after a criminal charge has been filed, pose a particular risk of violating Standard 8-2.1(a) and therefore ordinarily should be avoided by a lawyer participating in a criminal matter as a defense lawyer after a charge has been filed:

(i) the personal opinion of the defense attorney as to the guilt or innocence of the defendant;
(ii) the existence or contents of any confession, admission, or statement given by the defendant;
(iii) the performance or results of any examinations or tests, or the defendant’s willingness to submit to an examination or test;
(iv) the nature of physical evidence expected to be presented;
(v) the identity, race, ethnicity, creed, religion, or sexual orientation, expected testimony, criminal record, character, reputation, or credibility of alleged victims or prospective witnesses;
(vi) the offer or refusal of a plea agreement or other disposition; and
(vii) information that the lawyer knows or has reason to know would be inadmissible as evidence in a trial.

(b) Public statements regarding the following subjects by a lawyer participating in a criminal case as a defense lawyer ordinarily will not violate Standard 8-2.1(a):
(i) the general nature of the defense;
(ii) the name, age, residence, and occupation of the defendant or a person or entity who has been publicly identified in the context of a criminal investigation;
(iii) the facts and circumstances of an arrest, including the time and place;
(iv) the scheduling or result of any stage in the judicial proceeding, and information necessary for the public to locate documents contained within the public court record of the case; and
(v) a request for assistance in obtaining evidence.

(c) If the mere filing of a criminal charge is likely to cause grave harm to the defendant's business, career, employment, or financial condition prior to the resolution of the criminal case, which harm will not likely be substantially repaired by later exoneration of the defendant, the lawyer may participate in the formulation of a response to the charge by the defendant or the defendant's other representatives to mitigate the harm that includes an accurate public extrajudicial statement concerning:

(i) the performance of any examinations or tests, or the defendant's willingness to submit to an examination or test;
(ii) the nature of physical evidence expected to be presented; or
(iii) the identity, expected testimony, or credibility of prospective witnesses.

The decision to participate in the formulation of such a response should not be made lightly. When such a statement is issued, it should be limited to such information as is necessary to mitigate the harm caused by the charge.

**Standard 8-2.4. Statements by Legal Commentators and Consultants**

(a) A lawyer may serve an important role of educating the public regarding the criminal justice system by providing legal commentary with respect to a criminal case. A lawyer may also legitimately provide consulting services to a newsgathering entity or individual about a criminal case. A lawyer who is participating in a criminal matter should not undertake either of these roles—commentator or consultant—with respect to that criminal matter.
(b) A lawyer who is serving as a legal commentator should strive to ensure that the lawyer’s commentary enhances the public’s understanding of the criminal matter and of the criminal justice system generally, promotes respect for the judicial system, and does not materially prejudice the fair administration of justice, in the particular case or in general. To that end, a legal commentator should:

(i) have an understanding of the law and facts of the matter so as to be competent to serve as a commentator;

(ii) refrain from providing commentary designed to sensationalize a criminal matter; and

(iii) prior to providing commentary, disclose to the public or the entity or individual requesting commentary any interests the lawyer has in the proceedings, including:

(A) the representation of a client, past or present, who may be affected by the proceedings;

(B) any relationships with the lawyers, judge, victim, witnesses or parties in the proceedings; and

(C) the fact that the lawyer is being compensated for providing commentary, if that is the case, and the source of such compensation.

(c) A lawyer serving as a commentator should exercise great caution if asked to express personal opinions regarding the performance of the participants or the likely outcome of the proceedings. If the lawyer chooses to respond to such inquiries, the lawyer should identify with specificity the basis for any such opinions.

(d) A lawyer serving as a legal commentator or consultant should not help provide information:

(i) that is under seal;

(ii) that was obtained in violation of a protective order;

(iii) that is grand jury information that has not been released; or

(iv) the disclosure of which would violate the lawyer’s duty of confidentiality or loyalty.
PART III. CONDUCT OF LAW ENFORCEMENT OFFICERS AND EMPLOYEES IN CRIMINAL CASES

Standard 8-3.1. Extrajudicial Statements and Disclosure of Information by Law Enforcement Officers and Employees of Law Enforcement Agencies

(a) Subject to any additional limitations imposed by local or professional rules, law enforcement officers and employees of law enforcement agencies should not make, cause to be made, condone or authorize the making of a public extrajudicial statement that a lawyer would be prohibited from making pursuant to Standards 8-2.1 and 8-2.2.

(b) Law enforcement officers and employees of law enforcement agencies should not disclose, cause to be disclosed, or condone or authorize the disclosure of information, images, or documents relating to a criminal matter that are not part of the public court record. This Standard should not be construed as prohibiting law enforcement officers and employees of law enforcement agencies from releasing or authorizing the release of a record or document that the agency is required to release under state open records laws or the federal Freedom of Information Act, upon receipt of a proper request. A law enforcement officer or employee of a law enforcement agency should not place statements or evidence into the court record or into a document that is deemed an open record under applicable law solely for the purpose of circumventing this Standard.

(c) Nothing in this standard is intended to preclude any law enforcement officer or employee of a law enforcement agency from replying to charges of misconduct that are publicly made against him or her or from participating appropriately in any legislative, administrative, or investigative hearing.

Standard 8-3.2. Conduct with Respect to an Individual in Custody

(a) Law enforcement officers and employees of law enforcement agencies should not exercise their authority over an individual in a
manner deliberately designed to increase the likelihood that images of the individual in custody will be disseminated to the public or otherwise made available by means of public communication.

(b) Law enforcement officers and employees of law enforcement agencies who receive a request for an interview with an individual in their custody should transmit that request to the individual only upon the approval of the individual’s lawyer, where that individual is represented by counsel in a pending challenge to his confinement.
PART IV. CONDUCT OF JUDGES AND COURT PERSONNEL IN CRIMINAL CASES

Standard 8-4.1. Extrajudicial Statements and Disclosure of Information by Court Personnel

(a) Subject to any additional limitations imposed by the applicable rules of judicial conduct or other local or professional rules, court personnel, including judges and law clerks, should not make, cause to be made, or condone or authorize the making of any public extrajudicial statement about a criminal matter other than one concerning the processing of the case.

(b) Court personnel, including judges and law clerks, should not disclose, cause to be disclosed, or condone or authorize the disclosure of information, images, or documents relating to a criminal matter that are not part of the public court record. This Standard should not be construed as prohibiting court personnel from releasing or authorizing the release of a record or document that the court is required to release under state open records laws or the federal Freedom of Information Act, upon receipt of a proper request.
PART V. CONDUCT OF JUDICIAL PROCEEDINGS
IN CRIMINAL CASES

Standard 8-5.1. Prior Restraints

(a) Protecting the fairness of a criminal trial is by itself an insufficient basis for rules or judicial orders prohibiting members of the public from disseminating or otherwise making available by means of public communication any information in their possession relating to a criminal matter.

(b) If a lawyer participating in a criminal matter, or other person subject to these Standards, has repeatedly violated these Standards, a judicial order restraining such persons from making further public statements or disclosing non-public information in violation of these Standards may be appropriate. Such orders should be used sparingly and, when used, should be specific in describing to whom the order applies and what statements are prohibited. Prior to issuing such an order, the court should provide notice and an opportunity to be heard to those who would be affected by the proposed order and the public. Any such order should include written findings sufficient to justify its issuance, including that continued violations create a substantial danger to the fairness of the trial or other compelling interest, that the proposed order will effectively prevent or substantially lessen the potential harm, and that there is no less restrictive alternative reasonably available to prevent that harm.

Standard 8-5.2. Public Access to Judicial Proceedings and Related Documents and Exhibits

(a) Subject to the limitations set forth below, in any criminal matter, the public presumptively should have access to all judicial proceedings, related documents and exhibits, and any record made thereof not otherwise required to remain confidential. A court may impose reasonable time, place and manner limitations on public access.

(b) A court may issue a closure order to deny access to the public to specified portions of a judicial proceeding or to a related document or exhibit only after:
(i) conducting a hearing after reasonable notice and an opportunity to be heard on the proposed order has been provided to the parties and the public; and

(ii) setting forth specific written findings on the record that:

(A) public access would create a substantial probability of harm to the fairness of the trial or other overriding interest which substantially outweighs the defendant's or the public's interest in public access;

(B) the proposed closure order will effectively prevent or substantially lessen the potential harm; and

(C) there is no less restrictive alternative reasonably available to prevent that harm, including any of the measures listed in Standard 8-5.3 or permitting access to one or more representatives of the public.

(c) In determining whether a closure order should issue, the court may accept the items for which a seal is being requested under seal, in camera or in any other manner designed to permit a party to make a prima facie showing without public disclosure of that matter. The motion seeking to close access to those items must itself, however, be filed in open court unless the requirements of subsection (b) are met.

(d) If the court issues a closure or sealing order, the court should consider imposing a time limit on the duration of that order and requiring the party that sought the order to report back to the court within a specified time period as to whether continued closure or sealing is justified pursuant to the requirements set forth in subsection (b). If those requirements are no longer met, the documents or transcripts of any sealed proceeding should be unsealed.

Standard 8-5.3. Mitigating the Effects of Publicity on the Fairness of a Trial

If a case has been the subject of significant publicity, the court should consider the following options, to the extent available under applicable law in the jurisdiction and subject to the standards elaborated below, as means of mitigating the prejudicial effects of such publicity. The court should select the most effective option or options in light of the circumstances presented that will be the least disruptive to the proceedings and to jurors. The options include:
(a) ordering a continuance;
(b) conducting voir dire as to pretrial publicity;
(c) providing clear cautionary instructions to the jury from the outset of jury selection;
(d) providing clear cautionary instructions to court personnel, parties, lawyers, and witnesses;
(e) providing lawyers with additional peremptory challenges;
(f) impaneling additional alternate jurors;
(g) importing jurors from another district or locality;
(h) ordering a severance;
(i) impaneling an anonymous jury;
(j) sequestering the jury; and
(k) ordering a change of venue.

Standard 8-5.4. Voir Dire

If it is likely that any prospective jurors have been exposed to prejudicial publicity, they should be individually questioned to determine what they have read and heard about the case and how any exposure has affected their attitudes toward the trial. Questioning should take place outside the presence of other chosen and prospective jurors and in the presence of counsel. A record of prospective jurors’ examinations should be maintained and any written questionnaires used should be preserved as part of the court record.

Standard 8-5.5. Cautionary Jury Instructions

(a) The court should instruct potential jurors and jurors that they must:
   (i) avoid any extrajudicial information about the case;
   (ii) not seek out any extrajudicial information related directly or indirectly to the case;
   (iii) not communicate about the case with anyone except as authorized by the court; and
   (iv) immediately inform the court if they become aware that any other juror has violated the court’s instructions.

(b) The court’s instructions should explain the rationale for these prohibitions and specifically address how the prohibitions relate to the types of information sources and means of communication that
the jurors and potential jurors may be accustomed to using in their daily lives.

(c) These instructions should be given:

(i) to potential jurors at the beginning of jury selection, and, as warranted, throughout the jury selection process until a jury has been selected and sworn; and

(ii) to jurors at the conclusion of every trial day, and before breaks if the court deems it appropriate.

(d) If, during the trial, the court determines that information has been disseminated or otherwise made publicly available that goes beyond the record on which the case is to be submitted to the jury and raises serious questions of prejudice, the court may on its own motion or on the motion of either party question each juror, out of the presence of the others, about exposure to that information. The examination should take place in the presence of counsel, and a record of the examination should be kept. If the court determines that a juror is no longer likely to be able to render a fair and impartial verdict based solely on the evidence in the trial, the court should excuse the juror.

(e) The court should consider providing post-verdict guidance to jurors concerning any inquiries they may receive about the case including their right to respond or not respond to inquiries about the case and cautioning them about related risks, including the potential prejudice to subsequent related proceedings.

Standard 8-5.6. Court Plans for Accommodating Public Interest in a Criminal Matter

(a) Standing rules for the jurisdiction. To the extent practicable, jurisdictions should adopt standing orders or rules of court for accommodating public interest in any particular criminal matter. These standing orders should include general provisions concerning:

(i) the procedures to be followed for individuals and entities to request official designation as representative sources of coverage, including but not limited to recording or broadcasting by electronic or other media of judicial proceedings in the criminal matter;

(ii) the extent to which such coverage, including recording or broadcasting by electronic or other media, is
authorized by applicable statute and rules of court, in courtrooms, immediately adjacent areas, and in other parts of the courthouse and its environs;

(iii) conditions, limitations, and guidelines that will allow such coverage as is permitted to take place in a manner that will be unobtrusive, will not distract or otherwise adversely affect witnesses, jurors, or other trial participants, and will not otherwise interfere with the administration of justice, including:

(A) how seats in the courtroom will be allocated if sufficient seating is not available to accommodate all those with interest in attending, and any alternative arrangements that can made be made to accommodate overflow interest;

(B) how documents and other exhibits will be made available; and

(C) any applicable rules limiting the public dissemination of visual images of jurors, judges, witnesses, or other trial participants, and any other restrictions on the dissemination of information about jurors, judges, witnesses, or other trial participants.

(b) Matter-specific rules. For matters in which there is likely to be significant public interest, the trial judge court should adopt and make available specific orders to effectuate subsection (a)(iii) of this standard at the earliest practicable time.
Standard 8-1.1. Purposes of the Standards

(a) These Standards have three primary goals:

(i) First, they are intended to provide a guide to best practices for lawyers and other professionals involved in criminal cases, including investigators and members of law enforcement, with respect to communications with the public;

(ii) Second, they are intended to provide a guide to best practices for lawyers who provide public commentary or consult on criminal cases in which they are not personally involved;

(iii) Third, they are intended to provide a guide to best practices for judges and judicial employees in anticipating and responding to public interest in criminal cases, and ensuring that jurors are not exposed to extrajudicial information about a case.

(b) With respect to each of these goals, these Standards reflect the views of the ABA that:

(i) a transparent and open criminal justice system is of critical importance in our democracy;

(ii) lawyers and others involved in the criminal justice system have a duty to ensure that criminal cases are conducted fairly and that verdicts are rendered solely on the basis of the evidence presented in court;

(iii) lawyers and others involved in the criminal justice system also have a duty to promote respect for and confidence in the criminal justice system; and

(iv) developments in information technology and in how individuals obtain information have made it unnecessary
for purposes of these Standards to differentiate between members of the general public and those who are members of the traditional "Press" or "News Media." This represents a departure from prior editions on these Standards, which were entitled "Fair Trial and Free Press."

(c) While these Standards are intended to provide a basis for the formulation of internal guidelines within lawyers' offices, the courts, and law enforcement agencies, they are not intended to serve as the basis in and of themselves for the imposition of professional discipline, to create substantive or procedural rights for accused or convicted persons, to create a standard of care for civil liability, or to serve as a predicate for a motion to suppress evidence or dismiss a charge.

Commentary

This first Standard is wholly new. It sets forth the general purposes of the fourth edition. It also alerts the reader to several major shifts in the ABA's approach to the subject matter covered by these Standards since the last edition was issued in 1991. First, consistent with other recent editions of related Criminal Justice Standards, these Standards are aspirational; they seek to provide guidance as to best practices for lawyers and others involved with the criminal justice system in their interactions with the public. Most lawyers are subject to rules of professional conduct and rules of court in their jurisdiction that may, in some instances, be less restrictive than these Standards. Accordingly, conduct that is inconsistent with these Standards may not necessarily lead to professional discipline. That is not to say that the conduct necessarily constitutes best practices.

Second, these Standards explicitly set forth the ABA's view that lawyers and others involved in our criminal justice system have a duty to promote certain institutional interests, not just the narrow interests of their clients. These include our society's interest in a transparent

and open criminal justice system;\(^2\) in ensuring that criminal cases are conducted fairly and verdicts rendered solely on the basis of the evidence presented in court; and in promoting respect for and confidence in the criminal justice system. There may be times when these interests are in tension with a lawyer’s duty of zealous advocacy. What the proper course is in a particular situation will depend on the facts and circumstances presented, and the particular role served by the lawyer in that case (e.g., prosecutor, defense lawyer, lawyer for a witness, or commentator). The goal in articulating these various interests is to remind lawyers, and others working with them, that they should consider the broader impact of their statements and conduct beyond the particular case that is pending.

Third, these Standards explicitly acknowledge that we have entered a new era in information technology. Members of the public are no longer dependent on traditional institutional media for information about matters of public concern.\(^3\) Anyone who has access to the Internet can disseminate information widely and obtain information disseminated by others without going through established media institutions.\(^4\) And

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2. See Gentile v. State Bar of Nevada, 501 U.S. 1030, 1035 (1991) (“The judicial system, and in particular our criminal justice courts, play a vital part in a democratic state, and the public has a legitimate interest in their operations”); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575 (1980) (“[l]t would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted.”); In re Oliver, 333 U.S. 257, 270-71 (1948) (The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power”).

3. In 2012, 39 percent of news consumers accessed news online or from a mobile device as compared to 34 percent who did so in 2010. Jane Sassee, Kenny Olmstead & Amy Mitchell, Digital: As Mobile Grows Rapidly, the Pressures on News Intensify, STATE OF THE MEDIA (2013), available at http://stateofthemedia.org/2013/digital-as-mobile-grows-rapidly-the-pressures-on-news-intensify/ (last visited December 21, 2014). The percentage increased to 60 percent when younger users were considered in isolation. Id. Moreover, 31 percent of American adults owned a tablet computer as of 2013, and about 45 percent owned a Smartphone; 64 percent of tablet owners got news from their tablet weekly, and 37 percent got news from their tablet daily; 62 percent of Smartphone users got news on their device weekly, and 36 percent got it daily. Id. These statistics are indicative of a “historic transformation” in how Americans get news. See Adam Cohen, The Media That Needs Citizens: The First Amendment and the Fifth Estate, 85 S. CAL. L. REV. 1, 3 (2011) (“Newspapers, network and local television news, radio news, and other old media are in retreat. As the Fourth Estate ebbs, an Internet-based Fifth Estate is emerging, including solo blogs, group-discussion websites, Twitter news bulletins, crowd-sourced news research, and Wiki Leaks disclosures, among others.”). See also Chip Babcock & Luke Gilman, Social Media: Use of Social Media in Voir Dire, 60 THE ADVOCATE 44 (2012) (citing recently conducted media research in finding that “91% of today’s online adults use social media regularly.”).

4. Commentators universally accept the premise that the Internet and social media have dramatically transformed the way Americans receive news. See, e.g., Lili Levi, Social Networks and the Law: Social Media and the Press, 90 N.C.L. REV. 1531, 1533–34 (2012) (“The Internet and social media
information—regardless of its source—is available continuously.\(^5\) On account of this transformation, this edition dispenses with the term "press" in its title and throughout these Standards.\(^6\) Whereas the prior

are transforming news as we knew it. Journalists now rely on Twitter, crowd sourcing is available through social media, facts and stories are googled, traditional print newspapers have websites and reporter blogs, 'open newsrooms' invite community participation in the editorial process itself, video from citizen journalists is commonly used in mainstream media storytelling, bloggers consider themselves journalists, and media consolidation marries entities like AOL and the Huffington Post.

Interestingly, not only do we receive news changed, but our relationship with news has changed as well. See id. ("[P]eople's relationship to news is becoming portable, personalized, and participatory. In turn, changes in the news-access practices of readers are increasingly influencing the length, breadth, and subjects of reporting, whether online or in print.") (citing KRISTEN PURCELL ET AL., P E W I N T E R N E T & A M. L I F E P R O J E C T, U N D E R S T A N D I N G T H E P A R T I C I P A T O R Y N E W S C O N S U M E R, P E W I N T E R N E T 2 (M a r c h 1, 2010), a v a i l a b l e a t h t t p : / / w w w . p e w i n t e r n e t . o r g / 2 0 1 0 / 0 3 / 0 1 / u n d e r s t a n d i n g - t h e - p a r t i c i p a t o r y - n e w s - c o n s u m e r / ( l a s t v i s i t e d D e c e m b e r 2 1 , 2 0 1 4 ). C e n t r a l t o t h e s e c h a n g e s i s t h e I n t e r n e t ' s "g en e r a t i v i t y : " [ t ] h e I n t e r n e t p r o m o t e s i n n o v a t i o n b y m a k i n g b a r r i e r s t o e n t r y l o w , e x p e r i m e n t a t i o n e a s y , a n d t h e c o s t o f f a i l u r e m i n i m a l . J o u r n a l i s t i c e n t e r p r i s e s e x i s t t h a t w o u l d h a v e b e e n i m p o s s i b l e f e w y e a r s a g o , f r o m a n o n l i n e a r c h i v e o f p o l i c e b r u t a l i t y v i d e o s t o e a r t h q u a k e J a p a n , a T w i t t e r n e w s f e e d s e t u p a f t e r t h e M a r c h 2 0 1 1 d i s a s t e r ."") Adam Cohen, supra note 3, at 1. Additionally, Internet news sources are not bound by the significant expense constraints inherent to traditional media. See Marvin Ammori & Luke Pelican, Media Diversity and Online Advertising, 76 A L B . L . R e v . 6 6 5 , 6 7 7 (2012) ("[P]rint, television, and radio . . . are bound by limitations of page space, broadcasting minutes, and channel capacity [and] constrained by enormous input costs required to print a daily paper or broadcast a nightly news program. Online news websites—whether affiliated with a traditional outlet or independent—do not have those aforementioned limitations.") (citing STEVEN WALDMAN & T H E W O R K I N G G R O U P O N I N F O R M A T I O N N E eeds o f C o m m u n i t i e s , F C C , T H E I N F O R M A T I O N N E eeds o f C o m m u n i t i e s : T h e C h a n g i n g M e d i a L a n d s c a p e i n a B r o a d b a n d A g e 1 1 8 (2011), a v a i l a b l e a t h t t p : / / t r a n s i t i o n . f c c . g o v / o s p / i n c - r e p o r t / T h e _ I n f o r m a t i o n _ N e e d s _ o f _ C o m m u n i t i e s . p d f ).

5. See Levi, supra note 4 (citing KRISTEN PURCELL ET AL., P E W I N T E R N E T & A M. L I F E P R O J E C T, U N D E R S T A N D I N G T H E P A R T I C I P A T O R Y N E W S C O N S U M E R 2 (2010), a v a i l a b l e a t h t t p : / / w w w . p e w i n t e r n e t . o r g / 2 0 1 0 / 0 3 / 0 1 / u n d e r s t a n d i n g - t h e - p a r t i c i p a t o r y - n e w s - c o n s u m e r / ("W t h t h e n o t a b l e m o v e t o m o b i l e n e w s a c c e s s , n e w s h a s n o w b e c o m e o m n i p r e s e n t — a v a i l a b l e o n e v e r y p l a t f o r m a t a n y t i m e .") (l a s t v i s i t e d D e c e m b e r 2 1 , 2 0 1 4 ) ; M a r y F l o o d , W i n d o w s O p e n i n g a n d D o o r s C l o s i n g — H o w t h e I n t e r n e t I s C h a n g i n g C o u r t r o o m s a n d M e d i a C o v e r a g e o f C r i m i n a l T r i a l s , 5 9 S Y R A C U S E L . R e v . 4 2 9 (2 0 0 9 ) (a r t i c u l a t i n g h o w t h e I n t e r n e t h a s e n a b l e d c o u r t s a n d t h e m e d i a t o m a k e i n f o r m a t i o n a b o u t c o u r t c a s e s m o r e r e a d i l y a c c e s s i b l e t o t h e p u b l i c ). N o t o n l y i s i n f o r m a t i o n m o r e a v a i l a b l e f o r t h o s e w h o e n d e a v o r t o f i n d i t ( c o i n e d "p u l l t e c h n o l o g y "), b u t a l s o "p u s h t e c h n o l o g y " a l l o w s u s e r s t o d i r e c t t h a t c e r t a i n c o n t e n t t h e a u t o m a t i c a l l y d e l i v e r e d t o t h e m . S e e L a u r e n A. R i e d e r s , N o t e , O l d P r i n c i p l e s , N e w T e c h n o l o g y , a n d t h e F u t u r e o f N o t i c e i n N e w s p a p e r s , 3 8 H O F S T R A L . R e v . 1 0 0 9 , 1 0 1 1 n . 1 8 (2 0 1 0 ) ; B a r r i e G u n t e r , N e w s a n d t h e N e t 2 6 (2 0 0 3 ) . I n f a c t , 7 5 p e r c e n t o f t h o s e w h o g e t n e w s f r o m t h e I n t e r n e t h a v e a t l e a s t s o m e o f t h a t n e w s f o r w a r d e d t o t h e m v i a e - m a i l o r s o c i a l n e t w o r k i n g p o s t s . K R I S T E N P U R C E L L E T A L . , P E W I N T E R N E T & A M. L I F E P R O J E C T, U N D E R S T A N D I N G T H E P A R T I C I P A T O R Y N E W S C O N S U M E R 2 (2 0 1 0 ) .

6. It is becoming harder and harder to distinguish between members of the press and citizens who participate in generating news. See Levi, supra note 4, at 1548–55 (explaining the rise of the "citizen journalists" and the blurring of the lines between them and the institutional press). See also Cohen, supra note 3, at 3 (describing the new media sector as a "many-to-many" model "in which anyone with a computer and Internet access can produce and disseminate news"); ROBERT A. ARGAMONI, Bloggers, Other Alternative Media, and Access to Press Conferences, 27 C O M M. L A W Y E R 12 (2 0 1 1 ) ("T h e p r e s s i s d e c e n t r a l i z i n g . W h e r e a s o n c e b r a n d n a m e n e w s o u t l e t s p o s s e s s e d n e a r m o n o p o l i e s o v e r i n f o r m a t i o n , t h e I n t e r n e t h a s o f f e r e d a n o p e n i n g f o r s m a l l e r n i c h e o p e r a t i o n s t o r i v a l

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editions were entitled “Fair Trial and Free Press,” this edition is entitled “Fair Trial and Public Discourse: Communications with the Public in Criminal Matters.” The new title reflects not only the changed reality in how information is published and consumed but also the shift in the ABA’s identified area of concern in these Standards. As discussed in the preceding paragraph and further in Standard 8-2.1 and its accompanying commentary, these Standards seek to discourage conduct with deleterious effects beyond potentially prejudicing the outcome of a particular criminal trial. Thus, these Standards reflect a concern about the fairness of criminal trials and also about the quality of our public discourse about criminal matters, on the view that the latter is important even if it cannot be shown to affect the outcome of any particular trial.

these giants.”). Because the public now disseminates and contributes to news in addition to consuming it (Cohen, supra note 3, at 4), courts and scholars have been forced to struggle with formalistic and outdated definitions of the “press.” See Benjamin J. Wischnowski, Bloggers with Shields: Reconciling the Blogosphere’s Intrinsic Editorial Process with Traditional Concepts of Media Accountability, 97 IOWA L. REV. 327 (2011) (noting that courts are now struggling in deciding to what degree independent bloggers should receive protections historically granted only traditional reporters). While multiple conceptions of the press have been presented to address the current landscape, there is ample support for the notion that the lines have become too blurred. Compare Frederick Schauer, Towards an Institutional First Amendment, 89 MINN. L. REV. 1256 (2005) (defining the “press” through an institutional lens); and Eugene Volokh, Freedom for the Press as an Industry, or for the Press as a Technology?: From the Framing to Today, 160 U. PENN. L. REV. 459 (2012) (defining the “press” through a technological lens) and David A. Anderson, Freedom of the Press, 80 TEX. L. REV. 429, 446–47 (2002) (defining the “press” through a functional lens) with Scott Gant, We’re All Journalists Now: The Transformations of the Press and Reshaping of the Law in the Internet Age 89 (2007) (defining “press freedoms” as “a personal right, which can be exercised by people who do not devote themselves professionally or exclusively to journalism”) and Dan Gillmor, We the Media: Grassroots Journalism by the People, for the People (2d ed. 2006) and W. Lance Bennett, The Twilight of Mass Media News: Markets, Citizenship, Technology, and the Future of Journalism, in Freeing the Presses: The First Amendment in Action 111, 112 (Timothy E. Cook ed., 2005) (“Today, anyone with a computer or a mobile phone is a potential reporter and publisher.”).

7. Although much legal and social science scholarship has been dedicated to understanding the effect of pretrial publicity on jurors’ ability to be fair and impartial during criminal trials, the actual effect of pretrial publicity on jurors remains a subject of considerable dispute. Much of the recent empirical research has focused on the indirect effects of exposure to prejudicial publicity. For example, Christine Ruva and Cathy McEvoy have studied the results of mock jury trials to conclude that exposure to prejudicial publicity impacts jurors’ perceptions of defendants’ credibility, jurors’ perceptions of the prosecuting and defense attorneys, and jurors’ incorrect perception of information obtained through pretrial publicity as having been learned through presentation of evidence curing trial. Christine L. Ruva & Cathy McEvoy, Negative and Positive Pretrial Publicity Affect Juror Memory and Decision Making, 14 J. EXPERIMENTAL PSYCHOL.: APPLIED 226 (2008); see also Valerie P. Haas, Juror Bias Is a Special Problem in High-Profile Trials, 5 INSIGHTS ON L. & SOC’Y 15, 15 (2005) (citing research studies demonstrating that (1) those who have been exposed to pretrial publicity tend to prejudge the defendant’s guilt to a greater extent compared to those have not; and (2) once exposed to pretrial publicity, jurors
Standard 8-1.2.  Definitions of Terms Used in These Standards

For purposes of these Standards:
(a) An "extrajudicial statement" is any oral or written statement that is not made or presented in a courtroom in the course of judicial proceedings or in court filings or correspondence with the court or counsel in connection with a criminal matter. A "public extrajudicial statement" is any extrajudicial statement that a reasonable person would expect to be disseminated to the public or otherwise made available by means of public communication.

are more likely "to see the evidence against the defendant as stronger, are more apt to make negative character judgments about the defendant, and are more persuaded by antidefendant arguments during the jury deliberation."; Lorraine Hope, Amina Memon & Peter McGeorge, Understanding Pretrial Publicity: Predicisional; Distortion of Evidence by Mock Jurors, 10 J. EXPERIMENTAL PSYCHOL.: APPLIED 111 (2004) (identifying elevated rates of guilty verdicts amongst mock jurors exposed to negative pretrial publicity); Terry M. Hones, E.A. Charmona, and M. Levi, Factual and Affective/Evaluative Recall of Pretrial Publicity: Their Relative Influence on Juror Reasoning and Verdict in a Simulated Fraud Trial, 33 JOURNAL OF APPLIED PSYCHOLOGY 1494 (2003) (what jurors remember about pretrial publicity affects their subsequent reasoning when presented with trial evidence); Nancy Methrens Steblay, Jasmina Besirevic, Solomon M. Fulero, and Bela Jimenez-Lorente, The Effects of Pretrial Publicity on Juror Verdicts: A Meta-Analytic Review, 23 LAW & HUMAN BEHAVIOR No. 2 219 (1999) (both laboratory studies and community survey research support the hypothesis that pretrial publicity has a significant effect on subjects' judgments regarding the guilt of the defendant). Scholars such as Andrew Taslitz have suggested that the impact of our "high-tech, fast-paced modern culture" has been to compromise jurors' ability to critique negative and inaccurate pretrial publicity and reduce the empathy that jurors must have to treat defendants fairly. Andrew E. Taslitz, Information Overload, Multi-Tasking, and the Socially Networked Jury: Why Prosecutors Should Approach the Media Gingerly, 37 J. LEGAL PROF. 89, 93-118 (2012); Andrew E. Taslitz, A Discourse on the ABA's Criminal Justice Standards: Prosecution and Defense Functions: The Incalculable Media, Free Speech, and the Unfair Trial: Why Prosecutors Need More Realistic Guidance in Dealing with the Press, 62 HASTINGS LJ. 1285, 1288-94 (2011); see also Christina Studebaker & Stephen Penrod, Pretrial Publicity: The Media, The Law and Common Sense, 3 PSYCHOL. PUB. POL'y & L. 428 (1997) (predicting that as media coverage becomes more extensive and accessible, the availability of jurors not exposed to relevant pretrial publicity will decrease). These recent studies suggest that there are costs to exposure to pretrial publicity, even if the science is unable to predict whether specific publicity will alter the verdict in a specific case. Of course, there are numerous examples of high-profile trials that were the subject of sustained, national media attention that resulted in acquittals, leading some commentators to question where publicity actually hurts criminal defendants. See, e.g., Erwin Chemerinsky, Lawyers Have Free Speech Rights, Too: Why Gag Orders on Trial Participants Are Almost Always Unconstitutional, 17 LOYOLA ENTERTAINMENT LAW JOURNAL 311, 312 (1997) (discussing high-profile acquittals); Steven Helle, Publicity Does Not Equal Prejudice, 85 ILL. B. J. 16 (same). Some of the earlier research suggested that pretrial publicity did not have much of an effect on trial outcomes. See, e.g., Rita J. Simon, Does the Court's Decision in Nebraska Press Association Fit the Research Evidence on the Impact on Jurors of News Coverage?, 29 STAN. L. REV. 515 (1979) (reviewing studies, including the author's own, on mock jurors and concluding that jurors are able to put aside what they have learned prior to trial and decide the case based on the evidence introduced in court); but see Carroll et al., Free Press and Fair Trial: The Role of Behavior Research, 10 LAW & HUMAN BEHAVIOR 187 (1986) (questioning Simon's methodology, reviewing additional studies, and concluding that empirical research to date was inconclusive).
(b) A "criminal matter" ordinarily begins when an individual or entity has been publicly identified as a subject of a criminal investigation, arrested, or named in criminal charges, whichever is earliest, and ordinarily ends with a dismissal or verdict; provided, however, that if the charges are not dismissed and no verdict is reached, or a verdict has been reached but there is nevertheless a reasonable likelihood of a new trial, a "criminal matter" continues until the charges are dismissed or a verdict is reached in the new trial.

(c) A “lawyer participating in a criminal matter” is:

(i) any lawyer who is participating or who has participated in the investigation or litigation of the criminal matter;

(ii) any lawyer who is representing or who has represented a witness or likely witness in connection with the criminal matter; or

(iii) any lawyer who works for the same firm or government agency as a lawyer described in subsection (i) or (ii).

Related Standards
ABA Model Rules of Professional Conduct R. 3.6 (2014)

Commentary
This Standard provides definitions of the following terms used throughout this set of Standards: a “public extrajudicial statement,” a “criminal matter,” and a “lawyer participating in a criminal matter.” Providing these definitions at the beginning of this edition of the Standards will help the reader understand the scope of the Standards from the outset, including the persons to whom they apply and the time frame in which they apply. None of the prior editions of these standards contained a general definitions section. The third edition defined certain terms, including a “criminal case,” but only for purposes of the standard governing public access to judicial proceedings and related documents and exhibits.⁸

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Paragraph (a)

The Standards define a "public extrajudicial statement" as an extrajudicial statement that "a reasonable person would expect to be disseminated to the public or otherwise made available by means of public communication." This formulation is consistent with prior versions of these Standards and Model Rule of Professional Conduct 3.6, which addresses statements that the lawyer "knows or reasonably should know will be disseminated by means of public communication." The new definition provides a shorthand for referring to such statements (i.e., a "public extrajudicial statement"); it also expands the concept slightly to embrace not only those statements that a reasonable person would expect to be disseminated by means of public communication but also those that a reasonable person would expect to be "otherwise made available by means of public communication." The difference between "disseminated" and "otherwise made available" is slight, but the addition ensures that communications that are not actively "disseminated" through conventional news media such as print newspapers and television but are instead "made available" to audiences (e.g., by being posted on a website that readers must take steps to access) are still covered.

An "extrajudicial statement," which was not defined in any prior edition of these Standards—and is not defined in Model Rule 3.6—is defined as "any oral or written statement that is not made or presented in a courtroom in the course of judicial proceedings or in court filings or correspondence with the court or counsel in connection with a criminal matter." This definition is intended to clarify what statements Standard 8-2.1, which is the heart of the Standards, covers. Prior editions of these Standards, and Model Rule 3.6, have been understood as applying to extrajudicial statements such as those made in press conferences. They have been understood as not applying to statements made in a courtroom in the course of judicial proceedings. The definition clarifies that less formal extrajudicial statements—such as those made during a recess in trial proceedings, made in a courthouse hallway, or made off-the-record—also are subject to the Standards if a reasonable person would expect that the statement would be disseminated or otherwise made available to the public.

Each situation is fact-specific, but in the context of an overheard remark, the presence of other persons in the vicinity would be relevant. Where the speaker was aware of the presence of another person, or deliberately spoke to such a person, that person’s identity, occupation, and reason for being present (and the speaker’s knowledge of the same) also would be relevant. In general, lawyers and others involved in the criminal justice system should be wary of making any extrajudicial statements about criminal matters. This is truer now than in the past, given the increased likelihood that a casual remark to an acquaintance, or an overheard remark in a courthouse, could be made available to the public via the Internet. Of course, a lawyer’s deliberate public extrajudicial statements about a case—whether on or off the record, on the courthouse steps, or on a website, on a blog, or via any other form of media—also would be covered by these Standards.

Paragraph (b)

Paragraph (b) addresses the time frame to which the Standards apply when considered in connection with a particular criminal case through its definition of a “criminal matter.” Previously, the Standards did not specify the time frame to which the Standards governing extrajudicial statements applied. Although proximity to trial is an important factor in evaluating the risk posed by a particular extrajudicial statement, in general it is appropriate for lawyers and others involved in criminal matters to exercise caution before making any public extrajudicial statements about a matter once charges have been filed or a particular individual or entity\textsuperscript{10} has been publicly identified as a subject of investigation. The risk of prejudicing the outcome of the trial, or making it harder to seat an unbiased jury, may be attenuated.

\textsuperscript{10} Whereas the prior editions of these Standards did not explicitly address corporate defendants, the fourth edition expressly includes within its coverage statements that affect corporate defendants or subjects of investigation as well as individuals. Not all rights provided in the Bill of Rights necessarily apply to corporations. See generally Brandon L. Garrett, The Constitutional Standing of Corporations 163 U. Pa. L. Rev. 95, 97 (2014). Although the U.S. Supreme Court has never explicitly addressed whether a corporation has a right to a fair and impartial jury under the Sixth Amendment, it has implicitly ruled that corporations enjoy a Sixth Amendment right to trial by jury. See Southern Union Co. v. United States, 132 S. Ct. 2344 (2012) (holding that under Apprendi v. New Jersey, 530 U.S. 466 (2000), defendant corporation was entitled to jury determination of facts that increased maximum potential fine). It is hard to imagine that a right to trial by jury means anything less than a right to a fair and impartial jury. Even if corporations were not entitled to a fair and impartial jury trial, the other concerns identified in Standard 8-2.1 would be present with regard to extrajudicial statements about corporations.
if the statements are made long before trial, but they are still present. Moreover, the other concerns identified by Standard 8-2.1 often will be present long before trial. For this reason, these Standards apply once charges have been filed or before charges have been filed if a person or entity has otherwise been publicly identified as a subject of a criminal investigation. This approach is consistent with the aspirational nature of these Standards and the broad range of concerns they address.

The Standards generally cease to apply once a verdict is reached or the case is dismissed. In capital cases, the Standards would apply until a verdict was reached in the sentencing phase of the trial. If no verdict were reached, because the jury hung or the court declared a mistrial for any other reason, the Standards would apply until a verdict was reached in the new trial or the charges were dismissed.

In some cases, the Standards will continue to apply even after a verdict is reached where there is a “substantial likelihood of a new trial.” The mere fact that a defendant who was convicted has filed a motion for a new trial or an appeal does not create a significant likelihood of a new trial. However, where a pending motion for a new trial or an appeal presents a significant issue that has a reasonable likelihood of success—such as when a witness has immediately recanted or there is a substantial question of juror misconduct—the Standard would apply at least until the motion for a new trial is resolved or at the latest until the first level of appellate review is complete. If the motion or appeal results in a new trial, the Standards would apply until the conclusion of the new trial. As a general matter, the following types of pending petitions would not extend the application of the Standards: a petition for rehearing en banc, for discretionary review by the highest court of the jurisdiction, for certiorari by the U.S. Supreme Court, or for collateral review. Although it is always possible that further review

11. See Gentile v. State Bar of Nevada, 501 U.S. 1030, 1044 (1991) (observing that a statement made on the eve of voir dire would be more likely to cause difficulties in securing an impartial jury, whereas a statement made six months before trial is unlikely to do so, “the content fading from memory long before the trial date”).

12. This time frame is consistent with that utilized in Department of Justice guidelines for release of information by DOJ personnel and in National District Attorneys Association Prosecution Standards governing public extrajudicial statements. See 28 C.F.R. § 50.2 (b)(1) (“These Guidelines shall apply to the release of information to news media from the time a person is the subject of a criminal investigation until any proceeding resulting from such an investigation has been terminated by trial or otherwise.”); National District Attorneys Association Prosecution Standards § 2-14.4 (3d ed. 2009) (articulating standards that apply “from the commencement of a criminal investigation until the conclusion of trial”).

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would result in a new trial, the likelihood of such a result becomes more remote with each additional layer of review. In the event that a reviewing court did grant a defendant a new trial—whether on direct or collateral review—the Standards would apply once the decision was announced granting the new trial, until the new trial was concluded or the charges dismissed. In this regard, the Standards attempt to strike a reasonable balance between allowing lawyers to speak freely about matters that may be of considerable public interest and the competing concerns that warrant greater circumspection when a matter is active.

Paragraph (c)

Paragraph (c) defines a "lawyer participating in a criminal matter." It includes any lawyer who is participating or has participated in the investigation or litigation of the matter, any lawyer who is or has represented a witness or likely witness in connection with the matter, and any lawyer who works in the same firm or government agency as a lawyer falling within one of the prior clauses. Those who fall within this definition are subject to Standards 8-2.1 through 8.2-3 (which provide general guidance for lawyers participating in a criminal matter, followed by specific guidance for prosecutors and defense lawyers, respectively). Other lawyers are subject to Standard 8-2.4, which is a new standard for legal commentators and consultants. The prior edition of these Standards did not differentiate among lawyers. It applied generally to "any lawyer." 13

The Standards distinguish between lawyers who are participating in a criminal matter and all other lawyers because the former have a heightened obligation to ensure that the matter is conducted fairly. Because these lawyers have access to non-public information about the case, it is especially important that they take greater care in their public extrajudicial statements lest they inadvertently release non-public, prejudicial information. And, because the public may assume that the lawyers in the case have greater access to information about the case, the public may view their speech as particularly authoritative and therefore give it greater weight when forming views about

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the case. The same rationales support extending the Standards to lawyers who previously participated in the matter, even if they are not currently involved, as well as to lawyers who work in the same firm or governmental agency as lawyers directly participating in the matter. Lawyers representing witnesses or potential witnesses also are included, since they too may have access to non-public information and may be associated in the public mind with the case.

14. See Gentile, 501 U.S. at 1074–75 ("Because lawyers have special access to information through discovery and client communications, their extrajudicial statements pose a threat to the fairness of a pending proceeding since lawyers' statements are likely to be received as especially authoritative").
PART II. CONDUCT OF ATTORNEYS

Standard 8-2.1. Conduct by Lawyers Participating in a Criminal Matter

(a) Subject to any additional limitations imposed by local or professional rules, during the pendency of a criminal matter, a lawyer participating in that criminal matter should not make, cause to be made, condone or authorize the making of a public extrajudicial statement if the lawyer knows or reasonably should know that it will have a substantial likelihood of:

(i) influencing the outcome of that or any related criminal trial or prejudicing the jury venire, even if an untainted panel ultimately can be found;

(ii) unnecessarily heightening public condemnation of a defendant or a person or entity who has been publicly identified in the context of a criminal investigation, or of a witness or victim; or

(iii) undermining the public’s respect for the judicial process.

As a general matter, lawyers participating in a criminal matter should consult with their supervisors prior to making any public extrajudicial statements.

(b) During the pendency of a criminal matter, a lawyer participating in that criminal matter should make reasonable efforts to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the lawyer from making a public extrajudicial statement that the lawyer would be prohibited from making under these Standards or other applicable rules of professional conduct, or engaging in conduct prohibited by these Standards.

(c) This Standard should not be construed as prohibiting a lawyer participating in a criminal matter from releasing or authorizing the release of a record or document that the lawyer is required to release under state open records laws or the federal Freedom of Information Act, upon receipt of a proper request. A lawyer participating in a criminal matter should not place statements or evidence into
the court record or into a document that is deemed an open record under applicable law solely for the purpose of circumventing this Standard. If the lawyer has reason to believe that the public release of a record or document would create a substantial probability of harm to the fairness of a trial or other overriding interest, the lawyer should consider seeking a sealing order pursuant to Standard 8-5.2.

(d) Nothing in these Standards is intended to preclude the formulation or application of more restrictive rules relating to the release of information about juvenile offenders or other protected categories of offenders, victims or witnesses, to preclude the holding of hearings or the lawful issuance of reports by legislative, administrative, or investigative bodies, or to preclude any lawyer from replying to charges of misconduct publicly made against him or her.

Related Standards
28 C.F.R. § 50.2 (2014)
National District Attorneys Association National Prosecution Standards 2-14.2 and 2-14.6 (3d ed. 2009)
ABA Standards for Criminal Justice, Prosecution Function, 3-1.10, 3-1.13, 3-3.2, and Defense Function 4-1.10 (4th ed. 2014)
ABA Standards for Criminal Justice, Prosecutorial Investigations 1.3 and 1.5 (2008)

Commentary
Paragraph (a)

This Standard, and in particular subsection (a), is the heart of this set of Standards. The message is undeniably one of restraint. It cautions lawyers participating in a criminal case not to make public extrajudicial statements that they know or reasonably should know will have a substantial likelihood of (i) influencing the outcome of that or any related criminal trial or prejudicing the jury venire, even if an untainted panel ultimately can be found; (ii) unnecessarily heightening public condemnation of a defendant or a person or entity who has been publicly identified in the context of a criminal investigation, or of a witness or victim; or (iii) undermining the public's respect for the judicial process. This Standard represents a significant departure from
the standard regarding attorney speech in the prior edition, which cautioned only against extrajudicial statements that lawyers know or reasonably should know would have "a substantial likelihood of prejudicing a criminal proceeding."\textsuperscript{15} It also represents a significant departure from Model Rule of Professional Conduct 3.6, which provides that "[a] lawyer who is participating or has participated in the investigation of litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."\textsuperscript{16}

Any statement that would violate the third edition Standard 8-1.1(a), or Model Rule of Professional Conduct 3.6, will violate the revised Standard. The revised Standard assumes that "prejudicing a criminal proceeding" means, at its core, influencing the outcome of a particular trial. That core is reflected in the new Standard in paragraph (a)(i), which prohibits statements that would influence the outcome of a pending or any related criminal trial.\textsuperscript{17} But the revised Standard sweeps more broadly. It also applies to statements that would make it harder to seat an unbiased jury; statements that would unnecessarily heighten public condemnation of a person or entity who has been publicly identified in the context of a criminal investigation,\textsuperscript{18} whether it be as a subject of an investigation, a defendant, a victim, or a witness; and statements that would undermine the public's respect for

\textsuperscript{15} See ABA STANDARDS FOR CRIMINAL JUSTICE, FAIR TRIAL AND FREE PRESS, Standard 8-1.1(a) (3d ed. 1992).


\textsuperscript{17} An example of a related criminal trial would be the trial of a co-defendant that was severed or of a separately indicted defendant where the charges grew out of the same initial investigation and involved substantially similar facts and witnesses. Lawyers involved in the first trial should not make public extrajudicial statements that would tend to make it harder to impanel an untainted panel in the second or subsequent trials or that would tend to unnecessarily heighten public condemnation of those involved in the subsequent trials.

\textsuperscript{18} See generally Susan Hanley Duncan, Pretrial Publicity in High Profile Trials: An Integrated Approach to Protecting the Right to a Fair Trial and the Right to Privacy, 34 OHIO N.U.L. REV. 755 (2008) (discussing the privacy interests implicated by publicity in criminal cases). The expanded scope of the Standards is consistent with recent guidelines for prosecutors counseling against statements that tend to heighten public condemnation of an accused. See MODEL RULES OF PROF'L CONDUCT R. 3.8(f) (2014); NATIONAL DISTRICT ATTORNEYS ASSOCIATION NATIONAL PROSECUTION STANDARDS 2-14.2 (3d ed. 2009) ("The prosecutor should refrain from making extrajudicial comments before or during trial that promote no legitimate law enforcement purpose and that serve solely to heighten public condemnation of the accused.").
the judicial process. The expanded scope of the Standard releases lawyers from the necessity of determining whether a particular statement actually poses a substantial likelihood of influencing the outcome of a particular trial—something that is inherently very difficult and may be particularly so in the early stages of a case, or where a case already has received considerable public attention. The revised Standard also acknowledges that some statements should not be made (including some statements falling into categories that were presumptively deemed to pose a substantial likelihood of prejudicing a criminal proceeding under the prior edition of these Standards and in the commentary to Model Rule of Professional Conduct 3.6) not because they necessarily pose a substantial danger of influencing the outcome of a particular trial, but because they impinge upon other important interests.

Recognizing that lawyers still may have difficulty determining which statements run afoul of this Standard, the Standards explicitly encourage lawyers to consult with their supervisors—who generally will have greater experience in this regard—prior to making any public extrajudicial statements. Standards 8-2.2 and 8-2.3 also respond to this uncertainty by providing concrete guidance for prosecutors and defense lawyers, respectively, of the types of statements that generally pose a particular risk of violating this Standard and those that conversely generally will not.

Notably, the Standard requires not only that lawyers personally refrain from making public extrajudicial statements that would violate the Standard; it also requires that they refuse to condone or authorize the making of such statements by others. The prior edition of these Standards provided that lawyers should neither make nor authorize the making of a statement that would violate the restrictions on lawyers’ extrajudicial speech. By adding “condone” to this list, the revised Standard recognizes that there may be situations in which the

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19. See, e.g., Attorney Grievance Comm’n v. Frost, 437 Md. 245, 268 (Md. 2012) (sanctions on lawyer who knowingly made false allegations of corruption against judges and prosecutor involved in criminal proceeding against him appropriate to protect “the public’s confidence in the legal profession” and to “prevent damage to the integrity of the judicial system”); Office of Disciplinary Counsel v. Wrona, 908 A.2d 1281 (Pa. 2006) (attorney disbarred for falsely accusing a judge in an internet post of numerous crimes); John Schwartz, As Jurors Turn to Web Mistrials Are Popping Up, N.Y. TIMES (March 2009), http://www.nytimes.com/2009/03/18/us/18juries.html (Florida Disciplinary Commission imposed a fine and reprimanded a criminal defense attorney for criticizing a judge on a criminal defense blog).
lawyer neither makes the statements personally nor authorizes another to make it, but nevertheless does not take a clear stance against the making of the statement by someone else who has sought the lawyer’s counsel about the statement, such as the client or the client’s other representatives such as a public relations firm. The revised Standard contemplates that the lawyer will communicate that the lawyer does not condone the making of the statement, if the lawyer views the statement as violative of this Standard. Ultimately, the lawyer’s advice may not be followed. A lawyer would not be in violation of the Standard if, despite having communicated the lawyer’s disapproval, the statement nevertheless was made. As explained below, Paragraph (b) sets forth a more expansive duty of care with respect to public extrajudicial statements by investigators and others working directly with the lawyer in connection with the criminal matter.

Paragraph (b)

Paragraph (b) imposes on lawyers who are participating in a criminal matter an affirmative duty to make “reasonable efforts” to prevent investigators and others working with the lawyer from making public extrajudicial statements that the lawyer would be prohibited from making under these Standards or other applicable rules of professional conduct, or engaging in conduct prohibited by these Standards. The prior edition imposed no such obligation on lawyers. The revised Standard is consistent with Model Rule of Professional Conduct 3.8(f), which requires prosecutors to “exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.”

Even with respect to those working directly for them, lawyers will not always be able to prevent public extrajudicial statements or conduct that would violate these Standards. Thus, all that is required

20. See Model Rules of Prof'l Conduct R. 3.8(f) (2014). The National District Attorneys Association Guidelines also calls upon prosecutors to take responsibility for the training of law enforcement personnel with regard to the release of information about pending criminal matters, urging that prosecutors “assist: law enforcement and other investigative agencies in understanding their statutory responsibilities with respect to the release of criminal justice information” and assist in the training of agencies within their jurisdictions “on subject matters to avoid when discussing pending criminal investigations or prosecutions with the media.” See National District Attorneys Association National Prosecution Standards 2-14.6 (2d ed. 2016).
is a "reasonable effort." What is reasonable will depend on the circumstances. However, there are a number of recurrent situations that lawyers reasonably can anticipate in advance. For example, prosecutors reasonably can anticipate the possibility that the police department or other law enforcement agency may leak non-public information about a case or stage a "perp walk" upon arresting an individual. Defense attorneys reasonably can anticipate that their investigators may leak non-public information about a government witness. Accordingly, lawyers should institute policies and practices within their offices to ensure that all persons who work with them on criminal matters are instructed in advance about the impropriety of such conduct. Moreover, as soon as possible upon the commencement of a criminal case, lawyers should remind the particular law enforcement personnel, investigators, and any other individuals working with them to refrain from engaging in any such activity, and such instructions should be repeated as necessary throughout the course of the matter to ensure that they are reasonably effective. To the extent that a lawyer becomes aware of a plan to engage in such activity, the lawyer should make a reasonable effort to prevent the activity by contacting those involved and, if necessary, their supervisors. If a lawyer becomes aware that such conduct has already occurred, the lawyer should take steps to see that those involved are appropriately sanctioned.

Paragraph (c)

Paragraph (c) recognizes that lawyers, most frequently prosecutors, are required under open records laws to release certain documents upon receipt of a proper request. Most states have open records laws, and the federal Freedom of Information Act applies to federal agencies. Lawyers do not violate these standards by complying with

21. Most states have open record laws requiring government records to be made available to the public absent a specific exemption protecting that record from disclosure. See Reporters COMM. FOR FREEDOM OF THE PRESS, POLICE RECORDS: A REPORTER’S STATE-BY-STATE ACCESS GUIDE TO LAW ENFORCEMENT RECORDS 4 (2008), available at http://www.rcfp.org/rcfp/orders/docs/POLICE.pdf (last visited December 21, 2014). The majority of such state laws are modeled on the federal Freedom of Information Act (FOIA), codified at 5 U.S.C. § 552 (2012). Ira P. Robbins, "Bad Juror" Lists and the Prosecutor’s Duty to Disclose, 22 CORNELL J.L. & PUB. POL’Y 1, 8 (2012). Pursuant to FOIA, records compiled for law enforcement purposes are not subject to disclosure if they fall into one of six enumerated categories. 5 U.S.C.§ 552(b)(7). These categories of exempted records include, among others, records that reasonably could be expected to interfere with enforcement proceedings, to deprive a person of a fair trial, to constitute an unwarranted invasion of personal privacy, to disclose a confidential source, or to endanger human life. Id. While state open record laws vary as
such requests. However, most open records laws contain exemptions for material that would be prejudicial to an ongoing enforcement proceeding, to the fairness of a trial, or that would constitute an unwarranted intrusion on personal privacy. The purpose of this paragraph is to remind lawyers that they must be familiar with the open records laws in their jurisdiction, including the exceptions pertinent to these Standards. If the lawyer believes that all or part of a document falls within such an exception, the lawyer should withhold such material if its release would violate these standards. In such a situation, the lawyer should promptly provide notice to the party requesting the information so that the lawyer’s decision can be subject to judicial review. 22

On the other side of the coin, lawyers should not insert information into a document that is deemed an open record solely to circumvent these Standards. 23 Nor should lawyers make a statement during a judicial proceeding, or include information in a public court filing, solely to circumvent these Standards. If a lawyer is aware that certain information contained in a court filing, or that will be adduced at a hearing, poses a significant danger to the fairness of the trial or other overriding interest that would warrant sealing, the lawyer should consider applying for a sealing order for that filing or proceeding, in whole or in part. Thus, this paragraph cross-references Standard 8-5.2, which provides guidance regarding the sealing of documents and proceedings.


22. See United States v. Loughner, 807 F. Supp. 2d 828, 836 (D. Ariz. 2011) (quoting City of Hartford v. Chase, 942 F.2d 130, 135 (2d Cir. 1991)) ("a federal court’s power to seal documents takes precedence over FOIA rules that would otherwise allow those documents to be disclosed").

23. The status under open records laws of material exchanged in criminal discovery is unclear. See Plafondi, supra note 21 (concluding that specifically as to law enforcement records involved in criminal discovery, "[t]wenty-three states deny access outright through case law, a rule of procedure, or a public records exemption, [f]our states are unclear as to whether access is either granted or denied, and twenty-two states fail to mention any standard that can be or has been applied to grant or deny public access to criminal discovery."). The survey concluded that only the state of Florida provided access to such records.)
Paragraph (d)

A version of Paragraph (d) appeared in the three prior editions of these Standards. This paragraph makes clear that it is not the intent of the Standards to preempt the formulation of more restrictive rules regarding the release of information in certain situations where the balancing of interests is different from the typical case (such as with respect to juvenile offenders or the release of victim-witness information). Nor do the Standards intend to inhibit lawyers’ ability to comply with requests for information from legislative, administrative, or investigative bodies, or to respond to allegations of misconduct made against them.

The prior edition of these Standards also provided in this paragraph a statement to the effect that a lawyer could make “an otherwise permissible statement which serves to educate or inform the public concerning the operations of the criminal justice system.” That sentence was removed from this version of the Standards. Any statement that simply educates the public about the operations of the criminal justice system, without additional commentary about the case, would not run afoul of these Standards.

Standard 8-2.2. Specific Guidance Regarding Prosecutorial Statements

(a) Statements regarding the following subject areas, when made by prosecutors, pose a particular risk of violating Standard 8-2.1(a) and therefore ordinarily should be avoided by a lawyer participating in a criminal matter as a prosecutor during the pendency of that matter:

(i) the prior criminal record of a defendant or a person or entity who has been publicly identified in the context of a criminal investigation;

(ii) the character, credibility, or reputation of a defendant or a person or entity who has been publicly identified in the context of a criminal investigation, or the race, ethnicity, creed, religion, or sexual orientation of such person unless such information is necessary to apprehend a suspect or fugitive;

(iii) the personal opinion of the prosecutor as to the guilt or innocence of a defendant or a person or entity who
has been publicly identified in the context of a criminal investigation;

(iv) the existence or contents of any confession, admission, or statement given by a defendant or a person or entity who has been publicly identified in the context of a criminal investigation, or the refusal or failure of such person to make a statement;

(v) the performance or results of any examinations or tests, or the refusal or failure to submit to an examination or test by a defendant or a person or entity who has been publicly identified in the context of a criminal investigation;

(vi) the nature of physical evidence expected to be presented;

(vii) the identity, race, ethnicity, creed, religion, or sexual orientation, expected testimony, criminal record, character, reputation, or credibility of prospective witnesses other than the victim, and the race, ethnicity, creed, religion, sexual orientation, expected testimony, criminal record, character, reputation, or credibility of the victim;

(viii) the possibility of a plea of guilty to the offense charged, or other disposition; and

(ix) information that the lawyer knows or has reason to know would be inadmissible as evidence in a trial.

(b) Public statements regarding the following subjects by a lawyer participating in a criminal matter as a prosecutor ordinarily will not violate Standard 8-2.1(a):

(i) statements necessary to inform the public of the nature and extent of the prosecutor’s action, such as:

(A) the existence of an investigation in progress, including the general length and scope of the investigation, and the identity of the investigating officer or agency;

(B) the facts and circumstances of an arrest, including the time and place, and the identity of the arresting officer or agency;

(C) the identity of the victim, when the release of that information is not otherwise prohibited by law or would not be harmful to the victim; and
(D) the general nature of the charges against a defendant, provided that the statement explains that the charge is an accusation and that the defendant is presumed innocent until and unless proven guilty;

(E) the name, age, residence, and occupation of a defendant;

(F) the scheduling or result of any stage in the judicial proceeding, and information necessary for the public to locate documents contained within the public court record of the matter.

(ii) statements that serve a legitimate law enforcement purpose, such as:

(A) statements reasonably necessary to warn the public of any ongoing dangers that may exist or to quell public fears; and

(B) statements reasonably necessary to obtain public assistance in solving a crime, obtaining evidence, or apprehending a suspect or fugitive.

Related Standards
28 C.F.R. § 50.2 (2014)
National District Attorneys Association National Prosecution
Standards 2-14.2 to 2-14.4 (3d ed. 2009)
ABA Standards for Criminal Justice, Prosecution Function 3-1.10
(4th ed. 2014)
ABA Standards for Criminal Justice, Prosecutorial Investigations 1.3
and 1.5 (2008)

Commentary
This Standard provides specific, concrete guidance for lawyers who participate in criminal matters as prosecutors as to the types of public extrajudicial statements that ordinarily pose a particular risk of violating Standard 8-2.1(a) and those that do not. The prior edition of these Standards also provided a list of generally impermissible statements and generally permissible statements, although the list applied equally to all attorneys. The lists set forth in this revised Standard are specific to prosecutors and reflect the prosecutor’s unique role in our criminal justice system. A separate Standard with guidance

24. See Berger v. United States, 295 U.S. 78, 88 (1935) (describing role of prosecutor as “servant of the law” whose obligation is to see that “justice shall be done”); Attorney Grievance Comm’n of
specific for defense lawyers is provided in Standard 8-2.3. Although there is considerable overlap, the lists of generally impermissible and generally permissible statements for prosecutors and defense lawyers are not identical.\footnote{25}

Model Rule of Professional Conduct 3.6, which applies equally to all lawyers (and also applies to civil matters), provides a list of generally permissible statements in its text but relegates a discussion of the types of statements that generally pose a risk of materially prejudicing a proceeding to its accompanying commentary. A number of commentators have called for more specific guidelines for prosecutors and defense lawyers regarding public extrajudicial statements in criminal cases.\footnote{25}

\textbf{Paragraph (a)}

Paragraph (a) sets forth the list of subject areas that prosecutors generally should avoid during the pendency of a criminal matter because they pose a particular risk of violating Standard 8-2.1(a).
Some items on the list are self-evident, like information that the lawyer knows or reasonably should know would be inadmissible as evidence at trial. Releasing such information to the public clearly jeopardizes a defendant’s right to a fair trial and makes it more difficult to seat an untainted jury. Other items on the list represent specific types of evidence that are likely to be inadmissible, or at least the subject of a motion to suppress or exclude—such as the defendant’s prior criminal record, the contents of a confession or a defendant’s refusal to make a statement, certain types of scientific examinations, physical evidence, and the existence of plea discussions. Many of these items have been shown to have a statistically significant prejudicial effect on potential jurors. 27 If the prosecutor releases information about such subjects before trial, the efficacy of a judicial decision to exclude the evidence—or an instruction limiting the jury’s consideration of it to a particular purpose—will be undermined. Other items, such as statements about character, reputation, or credibility, generally are inappropriate subjects for public comment because they may represent inadmissible evidence and tend to unnecessarily heighten public condemnation of an accused, victim or witness. Statements conveying the prosecutor’s personal opinion about a person or entity’s guilt or innocence are inappropriate because they constitute inadmissible evidence, can be highly prejudicial, and tend to undermine the public’s respect for the judicial process. Statements about a defendant or other publicly identified person’s race, ethnicity, creed, religion, or sexual orientation generally are discouraged because they frequently pose a real risk of prejudice and generally are not relevant to any legitimate prosecutorial purpose—except when necessary to apprehend a suspect or fugitive, a circumstance specifically carved out from the rule’s application.

There is substantial overlap between the list set forth in this Standard and that contained in the commentary to Model Rule of Professional Conduct 3.6. There is also substantial overlap with federal regulations governing extrajudicial speech by federal prosecutors.

27. See Margaret Tarkington, Lost in the Compromise, 66 Fla. L. Rev. 1873, 1917-18 (2014), (discussing studies showing prejudicial effect of exposure to information about the accused’s prior criminal record, confession, results of tests implicating the accused, and statements about the accused’s character); Taslitz, Information Overload, supra note 110, at 124–25 (citing studies showing prejudicial effect of statements about defendant’s character and criminal record).

set forth in 28 C.F.R. 50.2. All three sources—this Standard, Model Rule 3.6’s commentary, and 28 C.F.R. 50.2—are in agreement that prosecutors generally should refrain from statements about a defendant’s criminal record; character; confessions, statements, or lack thereof; scientific examinations or the defendant’s refusal to submit to such examinations; identity, testimony, or credibility of prospective witnesses; the possibility of a plea; and the opinion of the prosecutor as to the defendant’s guilt. Where the revised Standard is broader than the other sources is in its general prohibition on statements about the race, ethnicity, creed, religion, or sexual orientation of an accused or other person publicly identified in the course of a criminal matter. The other notable difference that makes the revised Standard significantly more restrictive—at least more so than Model Rule 3.6 and the National District Attorneys Association Guidelines—is that the revised Standard does not provide an exception for statements contained in a public record. Nor does Standard 8-2.2 provide an exception for statements by prosecutors that are made in response to statements by defense counsel or any other party. The following paragraphs discuss those decisions in greater depth.

Paragraph (b)

Paragraph (b) sets forth a list of topics that are generally permissible for prosecutors to discuss publicly. These include basic facts about the existence of an investigation in progress, an arrest, the filing of charges, and the scheduling and result of judicial proceedings. Statements that provide more detail may also be permissible when they serve a legitimate law enforcement purpose, such as warning the public of ongoing dangers or quelling public fears, or enlisting the public’s help in solving a crime or apprehending a fugitive. For example, if a sniper has been terrorizing a community, it would be appropriate for the prosecutor to disclose the positive results of a ballistics match in connection with an arrest to assure the public that the threat is

29. The National District Attorneys Association Guidelines similarly provide that prosecutors generally should not make public extrajudicial statements about these same subjects, with the exception of the prosecutor’s personal opinion about the guilt of an accused. See NDAA Guidelines Standard 2-14.4.
over.30 If a fugitive is at large, statements about the suspect’s race and ethnicity may be relevant to efforts to locate that person.

Unlike the prior edition of these Standards, the revised edition does not give prosecutors blanket permission to repeat “information contained within a public record, without further comment.”31 The rationale for deleting such an exception is that the exception in too many instances will swallow the rule.32 It also poses interpretative problems—and therefore leads to uncertainty—without an a priori definition of what constitutes a “public record.”33 Moreover, the dangers posed by prosecutorial statements about the matters identified in Standard 8-2.2(a) are not diminished due to the fact that such information also is contained in a public record. Eliminating the exception for information contained in a public record diminishes the opportunity for the creation of the video or audio “sound bite” that tends to be played repeatedly in various media forms.

Similar reasons motivated the decision not to include in this edition of the Standards an exception for prosecutorial statements that are responsive to statements by another party or source. No such exception appeared in the prior edition, although a version of it appears in Model Rule 3.6. Such responsive statements invite an arms race of extrajudicial statements.34 However, should a prosecutor personally be accused of misconduct, the prosecutor would be permitted to respond, pursuant to Standard 8-2.1(d).


31. National District Attorneys Association National Prosecution Standards, Standard 8-1.1(c)(9) (3d ed. 2009). The prior edition of these Standards specifically provided that, “[i]n[withstanding the general rule against prejudicial extrajudicial statements], statements relating to the following may be made . . . information contained within a public record, without further comment.” Standard 8-1.1(c)(9) (3d ed. 1992).


33. See Attorney Grievance Commission v. Gansler, 835 A.2d 548, 567, 569 (Md. 2003) (citing vagueness concerns, holding for Gansler’s case only that “public record” safe harbor provision of Model Rule 3.6 encompasses “anything in the public domain, including public court documents, media reports and comments made by police officers,” but prospectively would be understood as including only “quotations from or references to public government records.”)

Standard 8-2.3. Specific Guidance Regarding Defense Statements

(a) Public statements regarding the following subjects by a lawyer participating in a criminal matter as a defense attorney, if made after a criminal charge has been filed, pose a particular risk of violating Standard 8-2.1(a) and therefore ordinarily should be avoided by a lawyer participating in a criminal matter as a defense lawyer after a charge has been filed:

(i) the personal opinion of the defense attorney as to the guilt or innocence of the defendant;
(ii) the existence or contents of any confession, admission, or statement given by the defendant;
(iii) the performance or results of any examinations or tests, or the defendant's willingness to submit to an examination or test;
(iv) the nature of physical evidence expected to be presented;
(v) the identity, race, ethnicity, creed, religion, or sexual orientation, expected testimony, criminal record, character, reputation, or credibility of alleged victims or prospective witnesses;
(vi) the offer or refusal of a plea agreement or other disposition; and
(vii) information that the lawyer knows or has reason to know would be inadmissible as evidence in a trial.

(b) Public statements regarding the following subjects by a lawyer participating in a criminal case as a defense lawyer ordinarily will not violate Standard 8-2.1(a):

(i) the general nature of the defense;
(ii) the name, age, residence, and occupation of the defendant or a person or entity who has been publicly identified in the context of a criminal investigation;
(iii) the facts and circumstances of an arrest, including the time and place;
(iv) the scheduling or result of any stage in the judicial proceeding, and information necessary for the public to locate documents contained within the public court record of the case; and
(v) a request for assistance in obtaining evidence.

(c) If the mere filing of a criminal charge is likely to cause grave harm to the defendant's business, career, employment, or financial
condition prior to the resolution of the criminal case, which harm will not likely be substantially repaired by later exoneration of the defendant, the lawyer may participate in the formulation of a response to the charge by the defendant or the defendant's other representatives to mitigate the harm that includes an accurate public extrajudicial statement concerning:

(i) the performance of any examinations or tests, or the defendant's willingness to submit to an examination or test;

(ii) the nature of physical evidence expected to be presented; or

(iii) the identity, expected testimony, or credibility of prospective witnesses.

The decision to participate in the formulation of such a response should not be made lightly. When such a statement is issued, it should be limited to such information as is necessary to mitigate the harm caused by the charge.

Related Standards
ABA Model Rules of Professional Conduct R. 3.6 (2014)
ABA Standards for Criminal Justice, Defense Function 4-1.10 (4th ed. 2014)

Commentary
This Standard provides specific guidance for lawyers participating in criminal matters as defense counsel. There are three ways in which this Standard differs from the Standard for prosecutors. First, this Standard focuses on the time period after the filing of charges, whereas the Standard for prosecutors applies at the outset of a criminal matter, defined in Standard 8-1.2(b) as beginning "when an individual or entity has been publicly identified as a subject of a criminal investigation, arrested, or named in criminal charges, whichever is earliest." The rationale for the distinction is that defense attorneys should be afforded some greater leeway to make extrajudicial statements prior to the filing of charges, in an effort to protect their client's reputation and to dissuade the filing of charges. Moreover, as a practical matter, prefiling extrajudicial statements by defense counsel occur less frequently than similar statements by those on the law enforcement side.

Once charges have been filed, the interest in protecting the fairness of the trial weighs more heavily in favor of restraint. Even then,
however, the Standards afford defense attorneys greater leeway in the subject matter of their extrajudicial statements than they do prosecutors.35 This is the second difference between the Standard for defense counsel and prosecutors: the list of matters that defense lawyers are cautioned to avoid because they pose a particular risk of violating Standard 8-2.1(a) does not include the following items, although they are included on the list for prosecutors: statements about the defendant’s race, ethnicity, prior criminal record, or reputation. Usually, there will be little strategic advantage for the defense in alluding publicly to these subjects. But if the defense believes that it is advantageous to do so—for example, to state publicly that the defendant has no criminal record and enjoys a good reputation in the community—then the Standards take the position that such statements, if true, ordinarily would be permissible. While statements by the prosecution about a defendant’s criminal record do pose a danger of prejudicing the fairness of the trial and heightening public condemnation, it is unlikely that defense statements about the absence of such a record would have a similar effect.

Third, and perhaps most significantly, in paragraph (c), the Standards afford defense counsel leeway to participate in the formulation of an extrajudicial statement by the defendant or the defendant’s other representatives, such as a public relations firm, in certain circumstances even after the filing of charges. With the intent that it should be invoked sparingly, this paragraph acknowledges that there may be instances in which the mere filing of a criminal charge is likely to cause immediate, grave harm to the defendant’s professional or financial condition, which harm will not likely be substantially repaired by later exoneration. For example, a doctor alleged to have committed child molestation is likely to lose his professional practice overnight if the charges are not addressed. A company alleged to have engaged in the distribution of misbranded products may lose all of its business in short order and have to file for bankruptcy. In such circumstances, the Standards take the position that the defense lawyer personally still should not make a public extrajudicial statements beyond what is authorized under paragraphs (a) and (b).

35. See Gentile v. State Bar of Nevada, 501 U.S. 1030, 1043 (1991) (plurality opinion by Kennedy, J.) ("A defense attorney may pursue lawful strategies to obtain a dismissal of an indictment or reduction of charges, including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried.").
Whereas the defense lawyer otherwise would be precluded from doing so, paragraph (c) provides that a defense lawyer may participate in the preparation of a response by the defendant and his or her other representatives, provided that the statement is accurate, mitigates the anticipated harm, and is limited to the following matters: the performance of any examinations or tests, or the defendant’s willingness to submit to an examination or test; the nature of physical evidence expected to be presented; and the identity, expected testimony, or credibility of prospective witnesses. This paragraph seeks to strike a balance between the lawyer’s duty to protect the institutional interests identified in Standard 8-2.1(a) and the lawyer’s duty to zealously safeguard the client’s interests, broadly understood. In the modern media environment, a complete lack of response on the part of the defense will not be an option in some circumstances if the defendant is to survive professionally or economically through the end of the criminal process. Recognizing that reality, the Standards afford the lawyer the opportunity to participate in the defense response in appropriate circumstances, in the expectation that the lawyer’s involvement will help ensure that the response is handled in a professional manner that does not jeopardize the client’s interests in the criminal case (for example, by resulting in damaging admissions) and that does not unduly risk prejudicing the jury venire, heightening public condemnation of another defendant or person publicly identified in the course of the case, or undermining the public’s respect for the judicial process.

**Standard 8-2.4. Statements by Legal Commentators and Consultants**

(a) A lawyer may serve an important role of educating the public regarding the criminal justice system by providing legal commentary with respect to a criminal case. A lawyer may also legitimately provide consulting services to a newsgathering entity or individual about a criminal case. A lawyer who is participating in a criminal matter should not undertake either of these roles—commentator or consultant—with respect to that criminal matter.

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36. *Id.* ("An attorney’s duties do not begin inside the courtroom door. He or she cannot ignore the practical implications of a legal proceeding for the client.").

37. *See id.* ("a defendant cannot speak without fear of incriminating himself and prejudicing his defense").
(b) A lawyer who is serving as a legal commentator should strive to ensure that the lawyer's commentary enhances the public's understanding of the criminal matter and of the criminal justice system generally, promotes respect for the judicial system, and does not materially prejudice the fair administration of justice, in the particular case or in general. To that end, a legal commentator should:

(i) have an understanding of the law and facts of the matter so as to be competent to serve as a commentator;

(ii) refrain from providing commentary designed to sensationalize a criminal matter; and

(iii) prior to providing commentary, disclose to the public or the entity or individual requesting commentary any interests the lawyer has in the proceedings, including:

(A) the representation of a client, past or present, who may be affected by the proceedings;

(B) any relationships with the lawyers, judge, victim, witnesses or parties in the proceedings; and

(C) the fact that the lawyer is being compensated for providing commentary, if that is the case, and the source of such compensation.

(c) A lawyer serving as a commentator should exercise great caution if asked to express personal opinions regarding the performance of the participants or the likely outcome of the proceedings. If the lawyer chooses to respond to such inquiries, the lawyer should identify with specificity the basis for any such opinions.

(d) A lawyer serving as a legal commentator or consultant should not help provide information:

(i) that is under seal;

(ii) that was obtained in violation of a protective order;

(iii) that is grand jury information that has not been released; or

(iv) the disclosure of which would violate the lawyer's duty of confidentiality or loyalty.

Related Standards

National Association of Criminal Defense Lawyers, Ethical Considerations for Criminal Defense Attorneys Serving as Legal Commentators (1999)\(^\text{38}\)

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\(^{38}\) This NACDL news release was reprinted in the Mercer Law Review and is available at 50 Mercer L. Rev. 777 (1999).
Commentary

This Standard, which is wholly new, acknowledges that lawyers can play an important role as legal commentators in educating the public about the criminal justice system. Recognizing that the demand for legal commentators in various media, including television cable channels, is unlikely to subside any time soon, the aim of this Standard is to provide concrete guidance for lawyers who wish or are asked to undertake the role of legal commentator on how to do so in a professional and responsible manner. Until now, such commentators have lacked clear guidance from the bar.\footnote{Nearly two decades ago, two law professors proposed a voluntary Code of Ethics for Legal Commentators similar to this Standard. See Erwin Chemerinsky & Laurie Levenson, The Ethics of Being a Commentator, 9 S. CAL. L. REV. 1303 (1996); Erwin Chemerinsky & Laurie Levenson, The Ethics of Being a Commentator II, 37 SANTA CLARA L. REV. 913 (1997); Erwin Chemerinsky & Laurie Levenson, The Ethics of Being a Commentator III, 40 MERCER L. REV. 737 (1999).}

The guidance that is provided for legal commentators is fairly straightforward. First, commentators must ensure that they are competent to provide commentary, by familiarizing themselves with the applicable laws and facts. Second, they must disclose any potential conflicts of interests, including relationships with the parties, and any compensation and its source that is being provided for the commentary. Even with full disclosure, however, the Standards take the position that lawyers who are participating in a particular criminal matter should not serve as commentators with respect to that case.

Implementing disclosure in some instances will be fairly easy. For example, a law professor who writes an op-ed in a newspaper, or posts an analysis of a legal issue pertinent to a pending case on a blog, should disclose in that writing any financial compensation that the lawyer is receiving in connection with the case or the opinion offered. In other cases, the lawyer may not have complete control over the disclosure. For example, a lawyer who is providing paid commentary for a television station ideally should disclose on air any relationships with the parties, such as having previously served as a prosecutor in the same office with the prosecutor in the case, and the fact that the lawyer is a paid consultant. The commentator likely will not have complete editorial control over what information is in fact conveyed to the viewer but should make reasonable efforts through initial negotiations with the station to ensure that this information is conveyed to the public in some form—if not through the commentator's own
comments, then as part of the introduction of the commentator or on a text band on the screen. Disclosure is important so that the public has the information it needs to assess the objectivity of the commentator’s analysis. It also helps the commentator become aware of how these conflicts may impact his or her commentary.\textsuperscript{40}

The commentator Standard also states that legal commentators have a duty to promote respect for the judicial system and the fair administration of justice. To that end, commentators are cautioned to refrain from commentary designed to “sensationalize” a criminal matter. Criminal cases are frequently dramatic and evoke strong emotions. While legal commentators appropriately may help explain legal proceedings and principles, they should not be fanning public emotions. And while criminal trials are by their nature adversarial, trials are not a sporting match. Accordingly, the Standard specifically cautions against the expression of “personal opinions regarding the performance of the participants or the likely outcome of the proceedings.” Recognizing, however, that commentators frequently are asked to express such views, the Standard suggests that, “if the lawyer chooses to respond to such inquiries, the lawyer should identify with specificity the basis for any such opinions.” Thus, for example, if a judge rules that a critical piece of evidence will be excluded from the trial, a commentator may explain that the ruling likely will make it difficult for the prosecution to prove its case. If a critical defense witness is shown on cross-examination to have given inconsistent testimony about an important event, the commentator can explain how the witness’s inconsistency may hurt the defense’s case.

Finally, the commentator Standard cautions that the legal and ethical constraints that generally govern lawyers’ conduct follow lawyers into their role as legal commentators. Thus, they may not, while acting as a consultant or commentator, disclose client confidences or help an entity obtain information that is under seal, that was obtained in violation of a protective order, or that is grand jury information that has not been released.

\textsuperscript{40} See generally Laurie Levenson, Law Professors, in Media Coverage in Criminal Justice Cases: What Prosecutors and Defenders Should and Should Not Say 317 (Andrew E. Taslitz, ed. 2013).
PART III. CONDUCT OF LAW ENFORCEMENT OFFICERS AND EMPLOYEES IN CRIMINAL CASES

Standard 8-3.1. Extrajudicial Statements and Disclosure of Information by Law Enforcement Officers and Employees of Law Enforcement Agencies

(a) Subject to any additional limitations imposed by local or professional rules, law enforcement officers and employees of law enforcement agencies should not make, cause to be made, condone or authorize the making of a public extrajudicial statement that a lawyer would be prohibited from making pursuant to Standards 8-2.1 and 8-2.2.

(b) Law enforcement officers and employees of law enforcement agencies should not disclose, cause to be disclosed, or condone or authorize the disclosure of information, images, or documents relating to a criminal matter that are not part of the public court record. This Standard should not be construed as prohibiting law enforcement officers and employees of law enforcement agencies from releasing or authorizing the release of a record or document that the agency is required to release under state open records laws or the federal Freedom of Information Act, upon receipt of a proper request. A law enforcement officer or employee of a law enforcement agency should not place statements or evidence into the court record or into a document that is deemed an open record under applicable law solely for the purpose of circumventing this Standard.

(c) Nothing in this standard is intended to preclude any law enforcement officer or employee of a law enforcement agency from replying to charges of misconduct that are publicly made against him or her or from participating appropriately in any legislative, administrative, or investigative hearing.

Related Standards
28 C.F.R. § 50.2 (2014)
**Commentary**

This Standard applies to law enforcement officers and employees of law enforcement agencies, such as clerks and administrative personnel in police departments. The premise of this Standard is that such persons, like lawyers involved in the criminal justice system, have a duty to promote the fair administration of justice. While Standard 8-2.1 provides that lawyers have a duty to make reasonable efforts to ensure that those working with them, including law enforcement officers, abide by the Standards applicable to the lawyers, this Standard imposes a duty directly on the law enforcement personnel themselves.

Paragraph (a) provides that law enforcement personnel are subject to the same Standards that govern prosecutors' public extrajudicial statements, as set forth in Standards 8-2.1 and 8-2.2. Thus, the specific guidance set forth in Standard 8-2.2 regarding the types of public extrajudicial disclosures that normally would violate Standard 8-2.1 if undertaken by a prosecutor applies to law enforcement personnel as well. Consequently, once a person has been publicly identified as a subject of a criminal investigation, arrested, or named in criminal charges, law enforcement personnel must exercise caution in making statements that would have a tendency to make it harder to seat an unbiased jury, that would unnecessarily heighten public condemnation of that person, or that would tend to undermine the public's respect for the criminal justice system. Like prosecutors, law enforcement personnel may advise the public of the existence of an ongoing investigation, or of the fact and circumstances of an arrest. They also may enlist the public's help in locating a suspect or fugitive and may make statements regarding the specifics of an arrest, or regarding the results of examinations, if it is necessary to do so to quell public fears.

The third edition of these Standards similarly provided that the standards governing lawyers' extrajudicial statements applied to law enforcement officers but simply incorporated the Standard governing lawyers' statements by reference. The new edition expressly sets forth the limitations on law enforcement personnel.

Paragraph (b) of this Standard is new. It specifically addresses the disclosure by law enforcement personnel of documents, images, and other information not included in the public court record of a criminal case. The Standards take the position that, although law enforcement
agencies must comply with applicable open records laws, during the pendency of a criminal matter they should not release any material that is not either (i) subject to release pursuant to an open records law or (ii) already part of the public court record of the case. For example, booking photographs of an individual who has been taken into custody should not be released to the public unless they are treated as an open record under the locally applicable open records laws or have been filed with the court as part of the publicly available court record for the criminal matter. Paragraph (b) contains the same caveat that appears in the Standard governing prosecutors—namely that law enforcement personnel should not place statements or evidence into the court record or into a document that is deemed an open record under applicable law solely for the purpose of circumventing this Standard.

**Standard 8-3.2. Conduct with Respect to an Individual in Custody**

(a) Law enforcement officers and employees of law enforcement agencies should not exercise their authority over an individual in a manner deliberately designed to increase the likelihood that images of the individual in custody will be disseminated to the public or otherwise made available by means of public communication.

(b) Law enforcement officers and employees of law enforcement agencies who receive a request for an interview with an individual in their custody should transmit that request to the individual only upon the approval of the individual’s lawyer, where that individual is represented by counsel in a pending challenge to his confinement.

**Related Standards**

28 C.F.R. § 50.2 (2014)


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41. The status of booking photographs under the federal Freedom of Information Act (FOIA) is the subject of a circuit split. The 10th and 11th Circuits have held that such photographs are exempted from disclosure under the FOIA exemption for materials compiled for law enforcement purposes. The release of which could reasonably be expected to constitute an unwarranted invasion of individual’s personal privacy. See World Pub’g Co. v. United States Dep’t of Justice, 672 F.3d 825 (10th Cir. 2012); Karantsalis v. United States Dep’t of Justice, 635 F.3d 497, 499 (11th Cir. 2011), cert denied, 132 S. Ct. 1141 (U.S. Jan. 23, 2012). But see Detroit Free Press, Inc. v. Dep’t of Justice, 73 F.3d 93 (6th Cir. 1996).
Commentary

This Standard addresses two particular situations that may arise while a person is in custody that the ABA believed merited specific discussion: the "perp walk" and interviews of persons in custody. The prior edition contained a Standard addressing these issues that was substantially similar. The text has been updated to reflect the changed media environment (i.e., the prior edition spoke of deliberate exposure of a person in custody to "representatives of the new media" for the purpose of photography or an interview). The concerns, however, remain the same. With regard to paragraph (a), the concern is that images of a person in custody (the "perp walk") will be widely disseminated, leading to unnecessarily heightened condemnation of the individual and making it harder, at a minimum, to seat a jury that has not been prejudiced by viewing such images.\(^{42}\) Although law enforcement personnel need not conceal the fact that an individual is in custody, neither should they deliberately exploit their custodial authority to increase the likelihood that images of the person in custody will be made available to the public. For example, police should not alert members of the public or media as to the precise timing and

\(^{42}\) While the Supreme Court has not addressed the propriety of law enforcement initiated "perp walks," the Second Circuit Court of Appeals has sustained the use of "perp walks" under a Fourth Amendment seizure analysis. See Caldarola v. County of Westchester, 343 F.3d 570 (2d Cir. 2003) (holding that although videotaping a defendant walking through a Department of Corrections parking lot constituted a seizure under the Fourth Amendment, the defendant had a minimal expectation of privacy and that publication of the arrest served legitimate government purposes). Nevertheless, the use of staged "perp walks" has been critiqued on a number of constitutional and policy grounds. See, e.g., Tarkington, supra note 27, at 1915; Ryan Haglund, Constitutional Protections Against the Harms to Suspects in Custody Stemming from Perp Walks, 7 Miss. L.J. 1757 (2012) (criticizing the restrictive Fourth Amendment analysis currently used to justify the use of "perp walks"); Kyle J. Kaiser, Note, Twenty-First Century Stocks and Pillory: Perp Walks as Pretrial Punishment, 88 Iowa L. Rev. 1205 (2003) (describing "perp walks" as a method to punish the suspect and facilitate deterrence, and consequently subject to due process restraints on pretrial punishment); Ernest F. Lidge III, Perp Walks and Prosecutorial Ethics, 7 Nev. L.J. 55 (2006) (suggesting that "perp walks" have the potential of violating a prosecutor's ethical duties under the Model Rules of Professional Conduct); Palma Paciocco, Pilloried in the Press: Rethinking the Constitutional Status of the American Perp Walk, 16 New Crim. L. Rev. 50 (2013) (describing "perp walks" as "pillorying" the defendant in the press, implicating fair trial protections). Not surprisingly, the media's attention has also focused on the practice, especially after its use in highly visible cases. See Andrew Cohen, Hey France, You Are Right About the Perp Walk, The Atlantic (May 20, 2011) (addressing the use of the "perp walk" during the arrest of Dominique Strauss-Kahn), available at http://www.theatlantic.com/politics/archive/2011/05/hey-france-you-are-right-about-the-perp-walk/239158/ (last visited December 21, 2014).
circumstances of an arrest or transfer of a person in custody for the purpose of facilitating photographs of that event.

Paragraph (b) reminds law enforcement personnel of the necessity of scrupulously honoring the constitutional rights of those in custody to the assistance of counsel and against compelled self-incrimination. Before transmitting a request for an interview to a person in their custody, law enforcement personnel first must determine whether the individual is represented by counsel in connection with the cause of the current confinement. If so, then the request may be transmitted to the individual only upon approval of counsel.
PART IV. CONDUCT OF JUDGES AND COURT PERSONNEL IN CRIMINAL CASES

Standard 8-4.1. Extrajudicial Statements and Disclosure of Information by Court Personnel

(a) Subject to any additional limitations imposed by the applicable rules of judicial conduct or other local or professional rules, court personnel, including judges and law clerks, should not make, cause to be made, or condone or authorize the making of any public extrajudicial statement about a criminal matter other than one concerning the processing of the case.

(b) Court personnel, including judges and law clerks, should not disclose, cause to be disclosed, or condone or authorize the disclosure of information, images, or documents relating to a criminal matter that are not part of the public court record. This Standard should not be construed as prohibiting court personnel from releasing or authorizing the release of a record or document that the court is required to release under state open records laws or the federal Freedom of Information Act, upon receipt of a proper request.

Related Standards
ABA Standards for Criminal Justice, Special Functions of the Trial Judge 6-1.2 (3d ed. 2000)

Commentary
This Standard addresses public extrajudicial statements and disclosures of information by judges and their employees, including law clerks and court personnel. The prior edition had one standard for judges, which provided only that judges should "refrain from any conduct or the making of any statements that may be prejudicial to the right of the prosecution or of the defense to a fair trial."43 The third edition contained another standard for court personnel that did not address extrajudicial statements but provided solely that court

personnel "should not disclose to any unauthorized person information relating to a pending criminal case that is not part of the public records of the court and that may be prejudicial" to the right of either party to a fair trial. The latter standard specifically directed court personnel to take particular care not to disclose any information subject to a closure order.

The revised edition replaces these two standards with a single standard that addresses both public extrajudicial statements and disclosures of information by judges and court personnel. Paragraph (a) makes clear that judges and law clerks should not make any public extrajudicial statements about a criminal matter other than those "concerning the processing of the case." Speech about pending matters by judges, particularly the judge presiding over a matter, poses a particular danger to the fairness of the proceedings. Recent years have seen a number of instances in which judicial personnel have made public extrajudicial statements about pending cases in interviews or on social media that raised concerns about the fairness of the proceedings. Accordingly, the Standards take the view that judges, and other

44. Id.

45. See Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 555 (1976) ("What the judge says about a case, in or out of the courtroom, is likely to appear in newspapers and broadcasts").

46. See John G. Browning, Why Can't We Be Friends? Judges' Use of Social Media, 68 U. Miami L. Rev. 487, 497-503 (2014) (collecting instances of judicial misconduct involving social media). For example, in In re Disqualification of Saffold, 981 N.E.2d 869, 870 (Ohio 2010), a judge was removed from a trial after online comments regarding the proceeding were linked to the judge's online account. See also Parker B. Potter, Jr., Law Clerks Gone Wild, 34 Seattle U. L. Rev. 173 (2010) (discussing a myriad of ethical missteps by federal law clerks); Nathanael J. Mitchell, Note, A New Approach to Judicial Ethics in the Age of Social Media, 2012 Utah L. Rev. 2127, 2157-58 (2012) ("For the judiciary, social media presents a paradox. On the one hand, the independence and integrity of the judiciary depends upon the public's perception—a perception increasingly shaped by new media. Social media provide an invaluable tool for public outreach, allowing courts and judicial candidates to inform the public about the role of the courts, recent judicial decisions, or even judicial campaigns. On the other hand, a judge's use of that media can jeopardize the public's perception of a verdict, decision, or even the judiciary itself. The rare instance of egregious misconduct could quickly embed in the popular consciousness."). These concerns are certain to perpetuate as more and more state judges report using social media. Regina Koehler & Christopher J. Davey, 2012 CCPIO New Media Survey, CONF. OF CT. PUB. INFO. OFFICERS 5 (2012), available at http://www.ccpio.org/wp-content/uploads/2012/08/CCPIO-2012-New-Media-ReportFINAL.pdf (last visited December 21, 2014) (finding that 46.1 percent of state judges have Facebook accounts). In 2013, the ABA issued a formal ethical opinion addressing judicial use of social networking platforms. ABA Formal Opinion 462, Feb. 21, 2013, available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_462.authcheckdam.pdf ("A judge may participate in electronic social networking, but as with all social relationships and contacts, a judge must comply with relevant provisions of the Code of Judicial Conduct and avoid any conduct that would undermine the judge's independence, integrity, or impartiality, or create an appearance of impropriety.").
judicial personnel, should refrain from any public extrajudicial speech about a pending criminal matter, other than those related solely to its processing.

Paragraph (b) similarly takes a similar bright-line approach with regard to the release of information by judges and court personnel. Whereas the prior edition of these Standards provided that court personnel should not disclose information relating to a pending criminal case that was not part of the public records of the court and that may be prejudicial to the fair trial rights of the parties, the revised version deletes the second element of the prior standard. Accordingly, court personnel, including judges, are advised not to release any information to the public that is not included in the public court record, unless required to do so by an applicable open records law. This prophylactic rule dispenses with the need for individual judges and clerks to make an assessment of the likely impact of the release of the information on the fairness of the trial.
PART V. CONDUCT OF JUDICIAL PROCEEDINGS
IN CRIMINAL CASES

Standard 8-5.1. Prior Restraints

(a) Protecting the fairness of a criminal trial is by itself an insufficient basis for rules or judicial orders prohibiting members of the public from disseminating or otherwise making available by means of public communication any information in their possession relating to a criminal matter.

(b) If a lawyer participating in a criminal matter, or other person subject to these Standards, has repeatedly violated these Standards, a judicial order restraining such persons from making further public statements or disclosing non-public information in violation of these Standards may be appropriate. Such orders should be used sparingly and, when used, should be specific in describing to whom the order applies and what statements are prohibited. Prior to issuing such an order, the court should provide notice and an opportunity to be heard to those who would be affected by the proposed order and the public. Any such order should include written findings sufficient to justify its issuance, including that continued violations create a substantial danger to the fairness of the trial or other compelling interest, that the proposed order will effectively prevent or substantially lessen the potential harm, and that there is no less restrictive alternative reasonably available to prevent that harm.

Related Standards
ABA Standards for Criminal Justice, Special Functions of the Trial Judge 6-4.1 to 6-4.3 (2000)

Commentary
This Standard addresses prior restraints.47 Paragraph (a) addresses prior restraints on members of the public, as distinguished from

47. The term “prior restraints” refers to “administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur. Temporary restraining orders and permanent injunctions (i.e., court orders that actually forbid speech activities) are classic examples of prior restraints.” Alexander v. United States, 509 U.S. 544, 550
lawyers participating in a criminal matter or other persons such as law enforcement officers or judicial employees who are subject to these Standards. Paragraph (a) reflects the view that prior restraints on members of the public cannot be justified solely by the interest in protecting the fairness of the trial. This represents a departure from the prior version of this Standard, which authorized a prior restraint upon a showing of a "clear and present danger" to the fairness of the trial. See Standard 8-3.1 (3d ed. 1992) ("Absent a clear and present danger to the fairness of a trial or other compelling interest, no rule of court or judicial order should be promulgated that prohibits representatives of the news media from broadcasting or publishing any information in their possession relating to a criminal case.")

In *Nebraska Press Ass'n v. Stuart*, the Supreme Court held unconstitutional a prior restraint on the media's dissemination of a defendant's confession and other incriminating materials until the jury was impaneled in a community of 850 people. The Court credited that the record developed in the district court demonstrated that "there was indeed a risk that pretrial news accounts, true or false, would have some adverse impact on the attitudes of those who might be called as jurors." Nevertheless, the Court was not persuaded that further publicity would make it impossible to seat an impartial jury, given the availability of other remedial measures such as voir dire, or that a prior restraint would serve its intended purposes. Although *Nebraska Press Ass'n* nominally left the door open to the possibility that a prior restraint could be justified based on the danger to the fairness of a trial, the decision strongly suggests that the requisite showing will be virtually impossible. The revised Standard therefore takes the position that trial courts should not issue prior restraints against members of the public in order to safeguard the fairness of the trial, on the view that it is so unlikely that the circumstances justifying such an order would be present that a bright-line rule is warranted. This is

(1993) (quotation omitted). "[T]he elimination of prior restraints on free speech was a leading purpose in the adoption of the First Amendment," *Carroll v. Pres. and Commrs. of Princess Anne*, 393 U.S. 175 n.3 (1968) (internal quotation marks and citation omitted).

49. *Id.* at 569.
50. *See id.* at 569–70 ("However difficult it may be, we need 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. This Court has frequently denied that First Amendment rights are absolute and has consistently rejected the proposition that a prior restraint can never be employed.").
particularly so given that, notwithstanding *Nebraska Press Ass’n*, trial courts on occasion still issue prior restraints against the media in high-profile cases to preserve the fairness of the trial. Where subjected to further review, such prior restraints generally have been held unconstitutional.\(^{51}\) But in an environment in which institutional media face severe resource constraints, due in part to the challenges presented by new media,\(^{52}\) one cannot expect that such orders invariably will be challenged.

Paragraph (b) addresses the issuance of case-specific prior restraints on lawyers participating in a criminal matter or other persons such as law enforcement officers or judicial employees who are subject to these Standards. Such orders, popularly known as "gag orders," have become common in recent years in high-profile cases,\(^ {53}\) possibly in reaction to the changed media environment.\(^ {54}\) The prior edition

\(^{51}\) See, e.g., United States v. Quattrone, 402 F.3d 304 (2d Cir. 2005) (reversing trial court’s order restraining publishing of names of jurors disclosed in open court); Toledo Blade Company v. Henry County Court of Common Pleas, 926 N.E.2d 634 (Ohio. 2010) (reversing trial court’s order prohibiting media from reporting on one defendant’s criminal trial until after the impaneling of a jury in a second defendant’s trial).


\(^{54}\) See Flood, supra note 52.
of these Standards did not address such orders. Although the U.S Supreme Court has never addressed the constitutionality of such orders, Gentile suggests that the speech of lawyers who are participating in a criminal matter may be regulated under a less demanding standard than that applicable to the general public and the press. Indeed, that distinction was critical to the Court’s decision that the Nevada disciplinary rule enforced against Gentile, which required a showing of a “substantial likelihood of material prejudice,” was consistent with the First Amendment. Accordingly, it follows that case-specific prior restraints on lawyers participating in the case will be constitutional in certain circumstances.

Unfortunately, recent decades have seen trial courts impose broad gag orders on trial participants, including lawyers, in circumstances that are constitutionally suspect. There are ample reports of trial courts preemptively enjoining lawyers from having any communications

55. Although the black letter of the prior edition of these Standards did not address case-specific prior restraints on lawyers, the commentary stated that nothing in the Standards was intended “to preclude courts from issuing case-specific restrictive orders which would be punishable by contempt.” See ABA STANDARDS FOR CRIMINAL JUSTICE, FAIR TRIAL AND FREE PRESS, Commentary to Standard 8-1-2 at 12 (3d ed. 1992).

56. See Gentile, 501 U.S. at 1074 (Rehnquist, C.J., opinion for the Court) (“the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press in Nebraska Press Ass’n . . . . Lawyers representing clients in pending cases are key participants in the criminal justice system, and the State may demand some adherence to the precepts of that system in regulating their speech as well as their conduct.”). See also id. (“[I]ls officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice.”) (quoting Nebraska Press Ass’n., 427 U.S. at 601 n.27).

57. See id. at 1074–75 (“We agree with the majority of the States that the “substantial likelihood of material prejudice” standard constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State’s interest in fair trials”).

58. The various Courts of Appeals are split on the precise standard that applies to gag orders on lawyers appearing in a particular case, with the Second, Fourth, and Tenth Circuits requiring a showing of a “reasonable likelihood of prejudice.” See In re Morrissey, 168 F.3d 134 (4th Cir. 1999); United States v. Cutler, 58 F.3d 825 (2d Cir. 1995); In re Application of Down Jones, 842 F.2d 603 (2d Cir. 1988); United States v. Tijerina, 412 F.2d 661 (10th Cir. 1969). The Third and Fifth Circuits require a “substantial likelihood of prejudice.” See United States v. Scarfo, 263 F.3d 80 (3d Cir. 2001); United States v. Brown, 218 F.3d 415 (5th Cir. 2000). The Sixth, Seventh, and Ninth Circuits require a “clear and present danger of material prejudice.” See United States v. Ford, 830 F.2d 596 (6th Cir. 1987); Levine v. United States, 764 F.2d 590 (9th Cir. 1985); Chicago Counsel of Lawyers v. Bauer, 522 F.2d 333 (1966). The Standard adopted here of “substantial danger to the fairness of the trial or other compelling interest” is intended to be at least as high as that reflected in the intermediate “substantial likelihood of prejudice” test, and at least as high as the standard approved in Gentile and now effectively embodied in Model Rule of Professional Conduct 3.6 (“substantial likelihood of materially prejudicing an adjudicative proceeding.”).
about a case with the media, even without a showing that the lawyers previously have engaged in public extrajudicial speech that endangers the fairness of the trial, or that such a blanket order otherwise is warranted. Although this edition of the Standards takes the view that lawyers voluntarily should refrain from much public extrajudicial speech that is pervasive today, it is another matter for lawyers to be broadly enjoined from engaging in such speech on pain of being held in contempt of court. Accordingly, paragraph (b) urges courts to impose such orders sparingly, and only in writing,59 with appropriate findings, after providing those affected with the opportunity to be heard. It further urges courts to narrowly tailor such orders to the dangers that are presented in the particular case, rather than sweep in broad strokes.

Standard 8-5.2. Public Access to Judicial Proceedings and Related Documents and Exhibits

(a) Subject to the limitations set forth below, in any criminal matter, the public presumptively should have access to all judicial proceedings, related documents and exhibits, and any record made thereof not otherwise required to remain confidential. A court may impose reasonable time, place and manner limitations on public access.

(b) A court may issue a closure order to deny access to the public to specified portions of a judicial proceeding or to a related document or exhibit only after:

(i) conducting a hearing after reasonable notice and an opportunity to be heard on the proposed order has been provided to the parties and the public; and

(ii) setting forth specific written findings on the record that:

(A) public access would create a substantial probability of harm to the fairness of the trial or other

59. The requirement that such orders be reduced to writing serves multiple purposes, including providing clear notice to those subject to such orders of what is covered and facilitating appellate review. The process of writing also serves a disciplinary function in and of itself, which may result in a court deciding against issuing such an order. See Andrew E. Taslitz, The Incautious Media, Free Speech, and the Unfair Trial: Why Prosecutors Need More Realistic Guidance in Dealing with the Press, 62 Hastings L.J. 1285, 1318–19 (2011) (“Ample social science suggests that the mere need to justify your actions to others acts as a restraint on inaccurate and excessive behavior”).
overriding interest which substantially outweighs
the defendant's or the public's interest in public
access;
(B) the proposed closure order will effectively prevent
or substantially lessen the potential harm; and
(C) there is no less restrictive alternative reasonably
available to prevent that harm, including any of
the measures listed in Standard 8-5.3 or permitting
access to one or more representatives of the public.

(c) In determining whether a closure order should issue, the
court may accept the items for which a seal is being requested under
seal, in camera or in any other manner designed to permit a party to
make a prima facie showing without public disclosure of that mat-
ter. The motion seeking to close access to those items must itself,
however, be filed in open court unless the requirements of subsec-
tion (b) are met.

(d) If the court issues a closure or sealing order, the court should
consider imposing a time limit on the duration of that order and
requiring the party that sought the order to report back to the court
within a specified time period as to whether continued closure or
sealing is justified pursuant to the requirements set forth in subsec-
tion (b). If those requirements are no longer met, the documents or
transcripts of any sealed proceeding should be unsealed.

Related Standards
ABA Standards for Criminal Justice, Special Functions of the Trial
Judge 6-1.8 (3d ed. 2000)

Commentary
Paragraph (a)
This Standard adopts a broad presumption of public access to
criminal proceedings and related documents that is substantively
unchanged from the prior edition of these Standards. In Nixon v.
Warner Communications,60 the Supreme Court held that judicial docu-
ments are covered by a common law right of access and are therefore
presumptively available to the public. Then, beginning with Richmond

Newspapers Inc. v. Virginia,61 the Supreme Court has consistently held that the public has a broad First Amendment right of access to the workings of the criminal justice system.62 The Courts of Appeals and state supreme courts have accepted and extended the holdings of Richmond Newspapers and its progeny to a variety of contexts.63 Many

61. See Richmond Newspapers Inc. v. Virginia, 448 U.S. 555, 571 (1980) (“Civilized societies withdraw both from the victim and the vigilante the enforcement of criminal laws, but they cannot erase from people’s consciousness the fundamental, natural yearning to see justice done—or even the urge for retribution. The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is done in a corner [or] in any covert manner.”) (citations omitted).

62. See Press Enterprises Co. v. Superior Court, 478 U.S. 1 (1986) [Press Enterprises I!] (acknowledging the necessity of public access to criminal trials and the selection of jurors to the proper functioning of the criminal justice system in holding that the First Amendment’s right of access applied to preliminary hearings in criminal trials); Press Enterprises Co. v. Superior Court, 464 U.S. 501, 508 (1984) [Press Enterprises II] (articulating, in the course of recognizing the press’s right of access to voir dire proceedings, that “[t]he value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.”); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982) (identifying the historical and policy justifications for protecting the public’s access to criminal trials under the First Amendment: “[i]n sum, the institutional value of the open criminal trial is recognized in both logic and experience.”). See generally Jocelyn Simonson, The Criminal Court Audience in a Post-Trial World, 127 Harv. L. Rev. 2173, 2195–2222 (2014) (tracing expansion of public right of access from trials to pretrial and post-trial proceedings like sentencings pursuant to First and Sixth Amendment); Eugene Cerruti, Dancing in the Courthouse: The First Amendment Right of Access Opens a New Round, 29 U. Rich. L. Rev. 237, 266–69 (1995) (tracing expansion of Richmond right of access in lower courts to non-judicial proceedings and documents).

63. See, e.g., United States v. Wecht, 537 F.3d 222 (3d Cir. 2008) (First Amendment right of access applied to the names of both trial jurors and prospective jurors); United States v. Alcantara, 396 F.3d 189 (2d Cir. 2005) (trial court erred in conducting sentencing and guilty plea proceedings in the judge’s robing room rather than in open court, recognizing that “[m]embers of the public have a strong interest in attending sentencing proceedings, and their attendance is important to the proper functioning of the judicial proceedings.”); United States v. Rajaratnam, 708 F. Supp. 2d 371 (S.D.N.Y. 2010) (acknowledging First Amendment right of access to pretrial suppression hearing and supporting documents); Ex parte Consolidated Pub. Co., 601 So. 2d 423 (Ala. 1992) (holding that First Amendment right of public access attaches to pretrial hearings and court files to ensure the fair and impartial administration of justice guaranteed by open process). See also In re Hearst Newspapers, L.L.C., 641 F.3d 168, 181 (5th Cir. 2011) (First Amendment right of access to sentencing proceedings); United States v. Ladd (In re Associated Press), 62 F.3d 503, 506 (7th Cir. 1998) (noting the well-established right of the public to access court proceedings and documents); Oregonian Pub’g Co. v. United States Dist. Court, 920 F.2d 1462 (9th Cir. 1990) (press and public have First Amendment right to court proceedings and documents); United States v. Haller, 837 F.2d 84, 87 (2d Cir. 1988) (First Amendment right of access to plea hearings and documents filed in connection with those hearings); In re Washington Post Co., 807 F.2d 383, 390 (4th Cir. 1986) (same); In re New York Times Co., 828 F.2d 110, 114 (2d Cir. 1987) (First Amendment right of access to written documents filed in connection with pretrial motions); In re Applications of NBC, 828 F.2d 340, 344 (6th Cir. 1987) (same, specifically finding First Amendment right of access to motions to
states also have open records laws that supplement this case law to ensure public access to judicial documents and proceedings. Certain types of proceedings and documents, such as grand jury materials and jury deliberations, which historically have been secret, and for which secrecy serves an important function, still generally may be kept confidential. According to the Standard, the view that the

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64. See supra note 21.

65. In *Press Enterprises II*, the Supreme Court established a two-part test for determining whether the public has a presumptive First Amendment right of access to particular proceedings. It asks first whether the place and process in question historically have been open to the press and public; and second whether public access would play a "significant positive role" in the proceedings. *See Press Enterprises II*, 478 U.S. at 10. Although the Supreme Court has never addressed whether the First Amendment right applies to court documents as opposed to proceedings, "a number of circuits have concluded that the logic of *Press-Enterprises II* extends to at least some categories of court documents and records, such that the First Amendment balancing test there articulated should be applied before such qualifying documents and records can be sealed." *United States v. McVeigh*, 119 F.3d 806, 811 (10th Cir. 1997). *See, e.g.*, *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 93 (2d Cir. 2004) (First Amendment's "qualified right of access to judicial documents" is "a necessary corollary of the capacity to attend the relevant proceedings"); *DiPetro v. United States*, No. 02 Cr. 1237-01, 2009 WL 808169, at *2 (S.D.N.Y. Mar. 24, 2009) ("The right of access to judicial documents stems from the right of access to criminal trials."). Both tests—under the common law right of access and the First Amendment—ultimately involve a balancing test, with rights afforded by the First Amendment entitled to more protection than the common law right. *See McVeigh*, 119 F.3d at 812; *Center for Constitutional Rights v. Lind*, 954 F. Supp. 2d 389, 401 (D. Md. 2013). While the common law presumptive right of access can be rebutted if outweighed by competing interests, a document that falls within the First Amendment presumptive right of access can be withheld "only on the basis of a compelling government interest, and only if the denial is narrowly tailored to serve that interest." *Lind*, 954 F. Supp. at 401 (internal quotation marks and citations omitted). In the following cases, courts have applied the *Press Enterprises II* test to find no presumptive right of access. See *In re Subpoena to Testify Before Grand Jury*, 864 F.2d 1559, 1562 (11th Cir. 1989) (public access to grand jury materials frustrates grand jury functions); *In re Motions of Dow Jones & Co.*, 142 F.3d 496 (D.C. Cir. 1998) (district court proceedings ancillary to grand jury proceeding not historically open to public); *Times Mirror Co. v. United States*, 873 F.2d 1210, 1213–14 (9th Cir. 1989) (issuance of pre-indictment search warrants and other pre-indictment materials traditionally confidential); *In re N.Y. Times Co.* to Unseal Wiretap and Search Warrant Materials, 577 F.3d 401, 409–10 (2d Cir. 2009) (public access to wire-tap applications not supported by compelling public policy reasons); *United States v. Corbitt*, 879 F.2d 224, 229 (7th Cir. 1989) (public access to confidential pre-sentence report hinders probation officer's performance in providing court with comprehensive information about defendant's character); *In re Boston Herald, Inc.* 321 F.3d 174 (1st Cir. 2003) (Criminal Justice Act documents not traditionally open to press and access would have negative effect); *United States v. Gonzalez*, 150 F.3d 1246, 1259–60 (10th Cir. 1998) (same as to Criminal Justice Act proceedings).
public presumptively should have access to all judicial proceedings and related documents and exhibits, and records made thereof, not otherwise required to be confidential, for the duration of any criminal matter.

In contrast with the previous edition of this Standard, this Standard does not define "judicial proceedings" or "related documents and exhibits," leaving those terms to be construed broadly in accordance with their ordinary meaning and in light of Richmond Newspapers and its progeny. However, the definitions used in the prior edition remain instructive. They defined a "judicial proceeding" as including "all legal events that involve the exercise of judicial authority and materially affect the substantive or procedural interests of the parties, including courtroom proceedings, applications, motions, plea-acceptances, correspondence, arguments, hearings, trials and similar matters."66 The prior edition defined "related documents and exhibits" as "all writings, reports, and objects, to which both sides have access, relevant to any judicial proceeding in the case which are made a matter of record in the proceeding."67 The new edition contemplates that all of these enumerated events and documents still would fall within the standard. But whereas the prior edition also explicitly provided that the definition of "judicial proceeding" did not include "bench conferences or conferences on matters customarily conducted in chambers," today this caveat seems less than fully supportable as a blanket statement. Depending on the subject matter discussed at the bench conference or in chambers, there may indeed be a First Amendment or common law right of public access at least to the transcript of the proceedings.68 That is not to say that all communications with counsel in the ordinary course of managing litigation, no matter how minor, must be open to the public. Nevertheless, the general presumption ought to be in favor of openness.

Acknowledging the public's right of access does not, however, imply that the trial judge does not have discretion in imposing reasonable time, place, and manner restrictions on that access. For example, certain brief evidentiary arguments may need to take place

67. Id. Standard 8-3.2(d)(3).
68. Indeed, the prior edition acknowledged as much, noting in the commentary that such matters only "ordinarily" would not fall within the standard. See id. at 33.
at sidebar, rather than in open court, during a jury trial. The public may not immediately have access to that argument, but it will once the transcript is made available. The Standards contemplate that such delayed access is reasonable, in order to prevent the trial from grinding to a halt. Similarly, trial exhibits, including physical evidence, videotapes, and audiotapes, may not be immediately available to the public upon being admitted into evidence but should be made available as soon as reasonably practicable thereafter—for example, by the next business day after they were published to the jury. Frequently, courts can work with members of the public and the media to make such documents available on a pool basis. Electronic filing also has lessened many of the practical and financial burdens associated with making documents widely available. Documents can be scanned by a court clerk and posted electronically on the court’s website, allowing those who wish to access them to do so directly. It is expected that advances in technology will make it ever easier and less expensive for courts to provide public access to a variety of materials.

69. See, e.g., United States v. Valenti, 987 F.2d 708, 713–14 (11th Cir. 1993) (trial court may conduct closed bench conference without first making specific findings justifying closure, when conference is conducted on the record and transcript made available thereafter absent findings justifying closure); United States v. Edwards, 823 F.2d 111, 116–17 (5th Cir. 1987). See also Press-Enterprises I, 464 U.S. at 512 ("the constitutional value sought to be protected by holding open proceedings may be satisfied later by making a transcript of the closed proceeding available within a reasonable time"); Richmond Newspapers, 448 U.S. at 598 n.23 (Brennan, J., concurring) ("[W]hen engaging in interchanges at the bench, the trial judge is not required to allow public or press intrusion upon the huddle.").

70. See Lind, 954 F. Supp. 2d at 399 (trial court need not "disrupt" ongoing trial and can attend to duty to afford public access "as expeditiously as it can, giving all necessary attention to the conduct of the trial") (quoting In re Time Inc., 182 F.3d 270, 272 (4th Cir. 1999)). How long a delay in releasing the transcripts is reasonable is an open question. See, e.g., In re Associated Press, 172 Fed. Appx. 1, 2006 WL 752044 (4th Cir. Mar. 22, 2006) (finding that prompt release of transcripts of bench conferences at the conclusion of the trial was satisfactory); United States v. Smith, 787 F.2d 114–15 (3d Cir. 1986) (holding that public has at least a common law right to review transcripts of bench conferences involving evidentiary hearings but not opining on when such access must be provided).

71. For example, in the trial of Zacarias Moussaui for participating in the September 11, 2001, attacks on the World Trade Center and the Pentagon, the Court of Appeals for the 4th Circuit approved a plan to have exhibits admitted into evidence made available to the press no later than 10:00 a.m. on the day after the exhibit was published to the jury. See In re Associated Press, 172 Fed. Appx. 1 (4th Cir. 2006).

72. See id. (endorsing proposal that one copy of each exhibit be made available through either the parties or the court, with additional copies being made at the expense of the entity making the request for a copy).

73. See Jerry Markon, Federal Court Posts Online Nearly All Evidence from Moussaui Trial, Washington Post (Aug. 1, 2006) (describing unprecedented posting online of nearly all evidence introduced in Moussaui trial, including audio recordings).
Paragraph (b)

Paragraph (b) sets forth the considerations and procedures that a court should heed before closing a proceeding or sealing a document or transcript, or portion thereof, that would otherwise presumptively be open to the public. As was true of paragraph (a), the substance is largely the same as the prior edition of these Standards and derives from the Supreme Court's decisions in Richmond Newspapers and Press-Enterprises I and II.74 First, before issuing a closure order, the court must afford reasonable notice and an opportunity to be heard to the parties and the public (unless such notice in and of itself would cause the harm that the closure seeks to avoid, a situation addressed in paragraph (c) of the Standard).75 Second, after providing such an opportunity, the court should issue a closure order only if it finds that public access would create a substantial probability of harm to the fairness of the trial76 or another overriding interest77 that substantially outweighs the defendant or the public's interest in public access. Courts have found the following additional interests sufficient to justify full or partial closure: the privacy rights and safety of jurors,78


75. The standard is designed to be flexible. What constitutes adequate notice and opportunity to be heard will depend upon the circumstances. As a general matter, the public filing of a motion to close a proceeding or seal a document, docketed reasonably in advance of the time of the hearing on the motion, should be adequate to satisfy the notice requirement. Those opposing closure should be afforded an opportunity to present their arguments against closure, including an opportunity to present alternatives to closure. See In re Knight Publishing Co., 743 F.2d 231 (4th Cir. 1984); Baltimore Sun Co. v. Colbert, 593 A.2d 224, 229 (Md. 1991).

76. See Press-Enterprises I, 464 U.S. at 510–11; In re Providence Journal Co., 293 F.3d 1, 13–14 (1st Cir. 2002) (fair trial interests justified closure of public access to certain materials); United States v. Gerena, 869 F.2d 82, 86 (2d Cir. 1989) (fair trial interests justified sealing of wire-tapped conversations); United States v. Edwards, 303 F.3d 606, 617 (5th Cir. 2002) (right to fair trial justified closure of hearing on whether to empanel anonymous jury); United States v. McVeigh, 119 F.3d 806 (10th Cir. 1997) (fair trial interests justified sealing of suppressed evidence and inadmissible interview notes and severance documents).

77. As the Second Circuit noted in United States v. Doe, the Supreme Court "has used an array of terms to describe the type of interest that a party must advance in order to justify closure of a criminal proceeding. The Court has at different times held that the interest advanced must be 'compelling,' Globe Newspaper, 457 U.S. at 607, 'overriding,' Waller, 467 U.S. at 48, or a 'higher value[ ],' Press-Enterprise I, 464 U.S. at 510, without apparently intending substantive distinctions among the terms." Doe, 63 F.3d at 128 n. 3.

78. See, e.g., United States v. Calabrese, 515 F. Supp. 2d 880 (N.D. Ill. 2007) (denying media request for names of anonymously seate[d] jurors to protect jurors' safety); United States v. Bruno, 700 F. Supp. 2d 175 (N.D.N.Y. 2010) (denying media request for access to jurors' home addresses and
witnesses,\textsuperscript{79} and defendants,\textsuperscript{80} the continuing nature of government investigations,\textsuperscript{81} the security of government buildings,\textsuperscript{82} and national security interests more broadly.\textsuperscript{83} Proceedings involving juveniles also are frequently subject to closure.\textsuperscript{84}

Third, the court must find that the closure order is narrowly tailored to address the threatened harm—that is, that it will effectively

jury questionnaires to protect jurors’ privacy); United States v. Brown, 250 F.3d 907 (5th Cir. 2001) (upholding district court order denying media request for jurors’ identifying information and questionnaires to protect jurors’ privacy).

79. See, e.g., United States v. Petters, 663 F.3d 375, 382–83 (8th Cir. 2011) (government interest in integrity of witness protection program and safety of witness justified partial closure of pretrial hearing); United States v. Brice, 649 F.3d 793, 796–97 (D.C. Cir. 2011) (protection of victims from invasion of privacy justified sealing of material witness proceedings); Rodriguez v. Miller, 537 F.3d 102, 110 (2d Cir. 2007) (protection of undercover agent’s safety justified exclusion of defendant’s family members from courtroom during officer’s testimony); Bell v. Jarvis, 236 F.3d 149, 168 (4th Cir. 2000) (protection of adolescent rape victim justified closure during victim’s testimony); United States v. Jones, 965 F.2d 1507, 1513 (8th Cir. 1992) (protection of undercover agent’s safety justified screening from general public).

80. See, e.g., United States v. Haller, 837 F.2d 84, 88 (2d Cir. 1988) (sealing portion of plea agreement detailing defendant’s cooperation to protect defendant and ongoing investigation); United States v. Zazi, No. 09 Cr. 663, 2010 WL 2710605 (E.D.N.Y. June 30, 2010) (refusing to seal cooperation agreements and related documents to protect cooperating defendants and ongoing investigations, but noting that “[a]t another time, under different circumstances, the government’s arguments” in favor or sealing may justify sealing); United States v. Ketner, 566 F. Supp. 2d 568 (W.D. Tex. 2008) (sealing portion of plea minutes and cooperation agreements to protect cooperating defendants from intimidation and ongoing government investigations).

81. See, e.g., Am. Civil Liberties Union v. Holder, 673 F.3d 245, 252–55 (4th Cir. 2011) (sealing provisions of False Claims Act narrowly tailored to protect integrity of ongoing investigations); In re Search Warrant for Secretarial Area, 855 F.2d 569, 574 (8th Cir. 1988) (protection of ongoing investigation justified sealing of search warrant application); In re Tribune Co., 784 F.2d 1518, 1522–23 (11th Cir. 1986) (protection of ongoing criminal investigations justified partial sealing of transcripts of bench conferences that contained references to ongoing government investigations); United States v. Steinger, 626 F. Supp. 2d 1231 (S.D. Fla. 2009) (sealing of various filings warranted to protect ongoing grand jury investigation).

82. See, e.g., United States v. Smith, 426 F.3d 567, 572–74 (2d Cir. 2005) (security and prevention of terrorism justified identification cards for public prior to granting entry to public trial).


84. As a general matter, the U.S. Supreme Court has never decided whether the public has a constitutional right of access to juvenile court proceedings. Since the creation of juvenile courts in the late nineteenth century, such proceedings traditionally have been closed to the public on the view that youthful offenders should not be forever stigmatized by a single youthful mistake. See, e.g., United States v. Three Juveniles, 61 F.3d 86, 86–91 (1st Cir. 1995) (closure justified to protect juvenile defendants from stigma and public scrutiny); United States v. A.D., 28 F.3d 1353 (3d Cir. 1994) (federal courts may grant access to juvenile proceedings and records on case-by-case basis); United States v. Three Juveniles, Globe Newspaper Co., 862 F. Supp. 651 (D. Mass. 1994), aff’d 61 F.3d 86 (1st Cir. 1995) (Federal Juvenile Delinquency Act creates a presumption that juvenile court proceedings and records will be closed to the public).
prevent or substantially lessen the potential harm and that no less restrictive alternative is available. In this regard, the Standard specifically directs courts to consider the various remedial measures set forth in Standard 8-5.3 (Mitigating the effects of publicity on the fairness of a trial), as well as the possibility of permitting access to one or more designated representatives of the public. Trial courts also should not take an all-or-nothing approach to proceedings or documents but should seal only those portions for which closure is justified, leaving the remainder open to the public, subject to redactions as appropriate.85 Fourth, the court should clearly set forth its written findings on the record,86 so that they may be subject to appellate review.

Paragraph (c)

Paragraph (c) makes clear that a party seeking a closure or sealing order for an item may file the item under seal or in camera, pending the court’s determination on the application.87 If the application is denied, the item must be publicly filed. The motion seeking the sealing or closure order should, however, be filed publicly, unless the requirements for sealing that application are met (i.e., the filing of the motion would cause the harm sought to be avoided).88 This substance of this paragraph also is unchanged from the prior edition.

Paragraph (d)

Paragraph (d) is new. It urges courts to consider imposing time limits on sealing orders and requiring the party that sought the sealing order to report back to the court within a specified time period as to the continued necessity for sealing. Absent such time limits, materials may remain under seal indefinitely. Since indefinite sealing generally will be unwarranted, the Standard suggests building into the original sealing order a mechanism whereby the ongoing necessity of sealing

85. See, e.g., United States v. Loughner, 807 F. Supp. 2d 828 (D. Ariz. 2011) (Mar. 9, 2011 order) (ordering that search warrants and supporting affidavits be unsealed following indictment, but ordering limited redactions of property inventory and affidavits “likely to be inflammatory and difficult to forget, or inadmissible at trial”).

86. As noted supra, the process of justifying one’s decision also frequently serves as a disciplining mechanism. See Taslitz, supra note 59.

87. See, e.g., United States v. Valenti, 987 F.2d 708, 713–14 (11th Cir. 1993); Globe Newspapers, Inc., 457 U.S. at 609 n.25 (reaffirming “traditional authority of trial judges to conduct in-camera conferences”).

88. See, e.g., United States v. Aref, 533 F.3d at 82; In re N.Y. Times Co., 828 F.2d at 116.
will be reevaluated, with the proponent of the sealing order bearing
the burden of reporting back to the court and demonstrating the ongo-
ing need for sealing. Absent a showing of a continued need for seal-
ing, the materials would be unsealed and available for public review.

Standard 8-5.3. Mitigating the Effects of Publicity
on the Fairness of a Trial

If a case has been the subject of significant publicity, the court
should consider the following options, to the extent available under
applicable law in the jurisdiction and subject to the standards
elaborated below, as means of mitigating the prejudicial effects of
such publicity. The court should select the most effective option or
options in light of the circumstances presented that will be the least
disruptive to the proceedings and to jurors. The options include:

(a) ordering a continuance;
(b) conducting voir dire as to pretrial publicity;
(c) providing clear cautionary instructions to the jury from
the outset of jury selection;
(d) providing clear cautionary instructions to court person-
nel, parties, lawyers, and witnesses;
(e) providing lawyers with additional peremptory challenges;
(f) impaneling additional alternate jurors;
(g) importing jurors from another district or locality;
(h) ordering a severance;
(i) impaneling an anonymous jury;
(j) sequestering the jury; and
(k) ordering a change of venue.

Related Standards
ABA Standards for Criminal Justice, Trial by Jury 15-1.4, 15-2.4,
ABA Standards for Criminal Justice, Joinder and Severance 13-3.2 and
13-4.2 (1978)
ABA Principles for Juries & Jury Trials 7, 9, 11, and 18 (2005)

89. See, e.g., United States v. Strevell, No. 05 Cr. 477, 2009 WL 57791 (N.D.N.Y. Mar. 4, 2009) (order-
ing certain documents pertaining to a cooperating defendant’s sentencing be sealed for 12 months).
Commentary

This Standard provides a list of 11 mechanisms for mitigating the effects of publicity on the fairness of a trial. They are arranged in ascending order of the burden they impose on the judicial system and the community. Thus, the first alternative, ordering a continuance until the publicity subsides, is considered the least burdensome mechanism. The second-to-last alternative, sequestering the jury, is considered very burdensome and today is rarely used except in the most highly publicized cases because of the fiscal cost and the resentment it can engender among jurors.\textsuperscript{90} The last alternative, ordering a

\textsuperscript{90} See Thaddeus Hoffmeister, \textit{Google, Gadgets, and Guilt: Juror Misconduct in the Digital Age}, 83 U. Col. L. Rev. 409, 441–42 (2012) (discussing sequestration’s disfavored status because of the burdens it places on jurors and court budgets). A number of courts have experimented in recent years with “virtual sequestration” as an alternative to physical sequestration. Under this approach, jurors are required to give up their electronic devices for the duration of the trial day or during deliberations, or—in the alternative—to consent to having their electronic communications monitored. See Zachary Mesenbourg, \textit{Voir Dire in the #LOL Society: Jury Selection Needs Drastic Updates to Remain Relevant in the Digital Age}, 47 John Marshall L. Rev. 459, 479 (2013) (reviewing virtual sequestration practices being utilized in various jurisdictions); see also Meghan Dunn, \textit{Jurors’ Use of Social Media During Trials and Deliberations: Report to the Judicial Conference Committee on Court Administration and Case Management} 9, Federal Judicial Center (Nov. 22, 2011) (reporting that 25 percent of judges surveyed reported confiscating cell phones and other electronic devices, some at the start of each day of trial and some during deliberations); United States Judicial Conference, \textit{Considerations in Establishing a Court Policy Regarding the Use of Wireless Communication Devices} (March 2011), available at www.uscourts.gov (surveying various courts’ approaches and ultimately giving individual courts discretion to determine their policy). \textit{See also Florida Bar, Florida Rules of Judicial Administration Part IV, Judicial Proceedings and Records} (2014), Rule 2.451 (giving trial court discretion to remove electronic devices from jurors at any time during the trial and during sequestration); United States v. Blagojevich, 612 F.3d 558 (7th Cir. 2010) (discussing possibility of virtual sequestration as alternative to anonymous jury, but noting that jurors likely would prefer the latter). The effectiveness of virtual sequestration has not yet been evaluated. There are obvious practical concerns associated with it, including additional burdens for courthouse officials who must safeguard jurors’ electronic devices, the probability that jurors who are not also physically sequestered will utilize other electronic devices at home, and the risk of further alienating jurors who already may be reluctant to serve. See Caren Myers Morrison, \textit{Jury 2.0, 62 Hastings L. J. 1579, 1611} (2011) (observing that one danger of virtual sequestration is the risk that it will make jury service more “unpalatable than it is now. . . . There is little doubt that if jurors were forced to sit idly in courtrooms, unable to contact work except by payphone, and then were separated from family and friends for the duration of every trial, large numbers of people would refuse to participate.”). Acknowledging some of these practical difficulties, a number of courts also have experimented with juror “pledges” and statements of compliance with the court’s instructions regarding extrajudicial communications and research. See Meghan Dunn, \textit{Jurors’ Use of Social Media During Trials and Deliberations}, supra, at 8 (0.6 percent of judges surveyed reported requiring jurors to sign a written pledge agreeing not to use social media while serving as a juror; .06 percent reported requiring jurors to sign a statement of compliance). For example, in the international weapons trafficking trial of Viktor Bout, the trial judge utilized a juror pledge, subject to penalty of perjury, observing “I can’t seize their computers and their Blackberries. . . . I can’t lock
change of venue, is considered the most burdensome and least desirable alternative. In today's media environment, it also may be of limited utility. The prior edition of these Standards discussed several of these mechanisms but did not present a comprehensive list or any indication of the relative burdens they impose. The goal in providing the list in this format is to provide trial courts with a checklist of alternatives that should be considered in order, in combination and as appropriate, to preserve the fairness of the trial, and some indication of their relative costs. The only mechanism presented in this list that was not discussed in the prior edition of these standards is the impaneling of additional alternate jurors. In the event that multiple members of the jury must be excused due to exposure to prejudicial extrajudicial publicity, the presence of additional alternates may enable the trial to be completed.

Unlike the prior edition of these Standards, this edition does not articulate the legal standards for most of these mechanisms. Only voir dire and jury instructions—on which this edition places great reliance—are individually addressed in this volume. The legal standards governing the other measures are well developed in each jurisdiction and are also discussed in other ABA Standards such as Trial by Jury and the ABA Jury Principles. Some of the measures, such as impaneling an anonymous jury, also may be appropriate for reasons other than preserving

them up. I can try to intimidate them." Colin Moynihan, Judge Considers Pledge for Jurors on Internet Use, N.Y.Times at A23 (Sept. 19, 2011) (quoting United States District Judge Shira A. Scheindlin of the Southern District of New York). See also Hon. Amy J. St. Eve & Michael A. Zuckerman, Ensuring an Impartial Jury in the Age of Social Media, 11 Duke L. & Tech. Rev. 1 (2012) (reviewing courts' use of pledges and statements of compliance). While the effectiveness of such pledges and statements of compliance has not been evaluated, “the affirmative act of actually signing a specific pledge may more dramatically impress jurors with their duty and increase the likelihood of obedience.”

Id. (quoting N.Y.U Law School Professor Stephens Gillers). On the other hand, it could potentially be off-putting to jurors, who may feel that they are being unfairly presumed to be willing to violate their oath and the court's instructions. See St. Eve & Zuckerman at 25–26 (discouraging resort to “blanket technology bans, or throwing jurors in jail, either of which may impact jurors' willingness to serve”); cf. Myers Morrison, supra, at 1612 (marginal deterrent value of courts' holding jurors in contempt and imposing fines for media use during trial likely outweighed by "the potential for deliberations to be adversely affected by increased mistrust and resentment among jurors."). Nevertheless, subject to local court rules, all of these innovations are worthy of trial courts' consideration, particularly as their effectiveness is subjected to further study.

91. Despite its burdensomeness, change of venue will be appropriate in some cases where publicity has been particularly acute in the place where the crime occurred or where the emotional impact of the crime is particularly intense in the community where it occurred. See, e.g., United States v. McVeigh, 918 F. Supp. 1467 (W.D. Okla. 1996) (trial for bombing of federal building in Oklahoma City, Oklahoma, that resulted in deaths of 168 people moved to Denver, Colorado).
the fairness of the trial in light of prejudicial publicity. For example, if jurors would be in physical danger or subject to intimidation or retaliation (as in organized crime cases), it may be appropriate to keep their names and identifying information from the public. However, in light of the judicial precedents setting forth a right of access to voir dire, the use of an anonymous jury should be justified by sufficient findings, subject to the procedures set forth in Standard 8-5.2(b).

Standard 8-5.4. Voir Dire

If it is likely that any prospective jurors have been exposed to prejudicial publicity, they should be individually questioned to determine what they have read and heard about the case and how any exposure has affected their attitudes toward the trial. Questioning should take place outside the presence of other chosen and prospective jurors and in the presence of counsel. A record of prospective jurors' examinations should be maintained and any written questionnaires used should be preserved as part of the court record.

Related Standards

Commentary
The voir dire examination of prospective jurors traditionally has been considered one of the most important safeguards of a fair trial.

92. See Reporters Committee for Freedom of the Press, The First Amendment Handbook, Access to Courts, available at http://rcfp.org/first-amendment-handbook (explaining that, "until fairly recently, anonymous juries ... were rarely used and limited primarily to cases where a credible threat to the safety or well-being of jurors existed" but that increasingly judges have ordered them, citing only the privacy interests of the jurors). Consistent with the traditional approach, anonymous juries were used in the trials of 9/11 co-conspirator Zacarias Moussaoui; the Branch Davidian survivors in Waco, Texas; Oliver North; Ted Kaczynski (the Unabomber); and the 1993 World Trade Center bombers. See id.; see also Jerry Markon, Federal Court Posts Online Nearly All Evidence from Moussaoui Trial, WASH. POST (Aug. 1, 2006). Evidencing the modern trend, the trial courts presiding over the decidedly white-collar trials of Martha Stewart and Frank Quattrone ordered anonymous juries, but both orders were overturned on appeal. Id. See NBC v. Stewart, 360 F.3d 90 (2d Cir. 2004); U.S. v. Quattrone, 402 F.3d 304 (2d Cir. 2005).

93. See United States v. Blagojevich, 612 F.3d 558 (7th Cir. 2010) (in corruption trial of former Illinois governor Rod Blagojevich, remanding to trial court to hold hearing on whether jurors names should be released before end of trial, finding trial court's order insufficiently supported).

94. For an early discussion of voir dire, see Connors v. United States, 158 U.S. 408 (1895).
Although there is considerable debate about jurors’ ability to accurately diagnose their partiality, there is no question that voir dire about exposure to pretrial publicity is a necessary component of judicial efforts to preserve the fairness of the trial. The Standard does not dictate the precise content of the voir dire but calls for a substantive voir dire examination that elicits the content of information to which the jurors have been exposed, the medium through which the jurors were exposed, the frequency of exposure, and the effects of that exposure on the jurors’ attitudes toward the case. Such examination may be assisted by the use of jury questionnaires.

The Standard does not contemplate that a juror’s own statements about his or her ability to be fair and impartial will be the final word on whether the juror should be seated. That decision, which is entrusted to the trial court’s discretion, must be based on a combination of the juror’s answers, the juror’s demeanor, and the trial court’s own familiarity with the quality and quantity of the pretrial publicity and the facts of the case. Particularly in extremely high-profile cases, it is rare that an entire jury can be seated of people who have had no pretrial exposure to the facts of the case. That is not the standard that is required, nor is it necessarily desirable. Instead, the goal should be to seat jurors who are free from exposure to the types of publicity that have been shown to be the most prejudicial and who demonstrate an understanding of the requirement that they decide the case based solely on the evidence adduced in court.

Procedurally, the Standard calls for the voir dire examination to be done on the record, so as to facilitate appellate review, and in the presence of counsel. Jurisdictions vary as to whether the trial court or the lawyers conduct the voir dire examination. There are advantages to both approaches, and the Standard does not adopt a position on which is better. However, the presence of the lawyers during the voir dire at a minimum enables lawyers to participate in the formulation of follow-up questions and also observe potential jurors’ demeanor. The Standard also adopts the position that the examination about exposure to publicity about the case should be done outside the presence of other prospective jurors. The advantages of conducting the examination this way—namely, minimizing the likelihood that other prospective jurors will be tainted—exceed the costs in terms of time and inconvenience. The lawyers’ presence also will enable them to exercise their peremptory challenges in an informed manner, including
striking jurors who were exposed to publicity but were not excused for cause.95

Standard 8-5.5. Cautionary Jury Instructions

(a) The court should instruct potential jurors and jurors that they must:

(i) avoid any extrajudicial information about the case;
(ii) not seek out any extrajudicial information related directly or indirectly to the case;
(iii) not communicate about the case with anyone except as authorized by the court; and
(iv) immediately inform the court if they become aware that any other juror has violated the court's instructions.

(b) The court's instructions should explain the rationale for these prohibitions and specifically address how the prohibitions relate to the types of information sources and means of communication that the jurors and potential jurors may be accustomed to using in their daily lives.

(c) These instructions should be given:

(i) to potential jurors at the beginning of jury selection, and, as warranted, throughout the jury selection process until a jury has been selected and sworn; and
(ii) to jurors at the conclusion of every trial day, and before breaks if the court deems it appropriate.

(d) If, during the trial, the court determines that information has been disseminated or otherwise made publicly available that goes beyond the record on which the case is to be submitted to the jury and raises serious questions of prejudice, the court may on its own motion or on the motion of either party question each juror, out of the presence of the others, about exposure to that information. The examination should take place in the presence of counsel, and a record of the examination should be kept. If the court determines that a juror is no longer likely to be able to render a fair and impartial verdict based solely on the evidence in the trial, the court should excuse the juror.

(e) The court should consider providing post-verdict guidance to jurors concerning any inquiries they may receive about the case including their right to respond or not respond to inquiries about the case and cautioning them about related risks, including the potential prejudice to subsequent related proceedings.

Related Standards
American College of Trial Lawyers, Jury Instructions Cautioning Against Use of the Internet and Social Networking (2010)

Commentary
This Standard provides guidance regarding the cautionary instructions that trial courts give to jurors and potential jurors about having any extrajudicial communications about the case or researching the case on their own. The Standard updates the prior edition’s Standard to make it more explicitly tailored to jurors’ use of electronic communications, as well as more traditional forms of communications. Because the most popular devices and platforms unquestionably will change every few years (if not sooner), the Standard does not incorporate any particular forms of social media or electronic device into the black letter. However, judges are encouraged to include in their instructions a discussion of the types of devices and social media that the jurors before them are likely to use. Many courts already are doing precisely that,96 prompted by a realization that jurors must be explicitly instructed not to use these devices and forms of

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96. See, e.g., Judicial Conference Committee on Court Administration and Case Management, Proposed Model Jury Instructions, The Use of Electronic Technology to Conduct Research on or Communicate About a Case (June 2012) (encouraging federal judges to give the following instruction, in pertinent part: “I know that many of you use cell phones, Blackberries, the internet and other tools of technology. You also must not talk to anyone at any time about this case or use these tools to communicate electronically with anyone about the case … [including] through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, including Facebook, Google+, My Space, LinkedIn or YouTube.”); Meghan Dunn, Jurors’ Use of Social Media During Trials and Deliberations: Report to the Judicial Conference Committee on Court Administration and Case Management, 9 Federal Judicial Center (Nov. 22, 2011) (39 percent of judges surveyed reported that they remind jurors at voir dire to refrain from using social media while serving as a juror). See also Myers Morrison, supra note 90, at 1603 (collecting state jury instructions incorporating mention of specific types of media); John G. Browning, When All That Twitters Is Not Told, 73 Tex. B. J.
communication that have become second nature to them.97 Courts are also encouraged to give the instructions often,98 and from the outset of jury selection, since one challenging new feature of the new media landscape is potential jurors’ ability to research and communicate about the case through handheld devices while waiting in the courtroom. If the courthouse has adopted a policy of allowing potential jurors to bring their devices into the courthouse, such risks are real and must be addressed as soon as the potential jurors are called into the courtroom.

The Standards also for the first time recommend that judges instruct jurors that they must immediately inform the court if they become aware that any other juror has violated the court’s instructions. Detecting jurors’ inappropriate use of social media during the trial or deliberations is inherently difficult.99 Impressing upon jurors that not only do they have a duty to refrain from such conduct themselves but also each of them has a duty to report any such conduct by other jurors may further impress upon jurors the seriousness of the issue and serve as a deterrent. It may also be the most effective way to find out when inappropriate juror conduct has occurred notwithstanding the judge’s instructions. On the occasions when judges have learned of inappropriate juror use of social media conduct,


97. See Nicole L. Waters & Paula Hannaford-Agor, Jurors 24/7: The Impact of New Media on Jurors, Public Perceptions of the Jury System, and the American Criminal Justice System (noting that some jurors’ “reliance on these technologies for everyday tasks has become so ingrained that it would require conscious effort to refrain from doing so for the duration of the trial.”). See also St. Eve & Zuckerman, supra note 193, at 26–27 (2012) (calling for specific instructions regarding social media, in light of jurors’ engrained habits).

98. See St. Eve & Zuckerman, supra note 193, at 21 (“our key takeaway from the informal survey [of approximately 140 actual jurors, who participated voluntarily and anonymously] is that courts should routinely and frequently instruct jurors not to communicate about the case through social networking services”). The St. Eve and Zuckerman survey found that the overwhelming majority of jurors who responded to the survey reported no temptation to communicate about the case through social media, and cited the judge’s instructions as the reason. Id. at 24. Those who reported a temptation to so communicate cited the judge’s instructions as the reason they did not. Id. at 24–25. The authors found these reports significant, as well as the fact that the jurors even “remembered the judges’ social media instructions, as this suggests that the instructions made impressions on the jurors.”). Id. at 25 (emphasis in original).

99. See Myers Morrison, supra note 94, at 1612 (“There is reason to suspect that there is widespread underreporting of juror misconduct, since to come to the attention of the court in the first place, a juror has to come forward and admit their own wrongdoing or inform on one of their colleagues.”).
it has not infrequently been brought to the court's attention by a fellow juror.\textsuperscript{100}

Like the prior edition, the Standard also recommends that judges explain to jurors the rationale for the prohibition on conducting their own research and communicating with others about the case. Unlike the prior edition, however, the black letter of the Standard in this new edition does not set forth a particular instruction to be given in this regard, leaving the precise formulation to individual courts. The experience of many trial judges, which is supported by empirical studies,\textsuperscript{101} has been that jurors are more compliant with their instructions, and less resentful of the restrictions to which the jurors are subject, if the basis for these restrictions is explained to them.\textsuperscript{102} Already, many judges provide such an explanation. For example, the federal Judicial Conference Committee on Court Administration and Case Management recommends that jurors be given the following explanation:

\begin{quote}
You may not use these electronic means to investigate or communicate about the case because it is important that you decide this case based solely on the evidence presented in this courtroom. Information on the internet or available through social media might be wrong, incomplete, or inaccurate. You are only permitted to discuss the case with your fellow jurors during deliberations because they have seen and heard the same evidence you have. In our judicial system, it is important that you are not influenced by anything or anyone outside of this courtroom. Otherwise, your decision may be based on information known only by you and not your fellow jurors or the parties in the case. This would unfairly and adversely impact the judicial process.\textsuperscript{103}
\end{quote}

The final paragraph of this Standard is new. It advises courts to consider giving the jury, once discharged, instructions about

\textsuperscript{100} See Dunn, supra note 90, at 4 (in survey of federal judges, of the 28 judges who indicated how they learned of an incident of inappropriate use of social media, most (13) said another juror had reported it).

\textsuperscript{101} See David Alan Sklansky, Evidentiary Instructions and the Jury as Other, 65 Stan. L. Rev. 407, 439 (2013) ("evidentiary instructions work, albeit imperfectly, and they work better when the judge gives the jury a reason to follow them") (citing findings in Nancy Steblay et al., The Impact on Juror Verdicts of Judicial Instruction to Disregard Inadmissible Evidence: A Meta-Analysis, 30 Law & Hum. Behav. 469, 488 (2006)).

\textsuperscript{102} See St. Eve & Zuckerman, supra note 90, at 28 (recommending instruction that includes explanation). See also Jury Committee, American College of Trial Lawyers, Jury Instructions Cautioning Against Use of the Internet and Social Networking (Sept. 2010).

\textsuperscript{103} Judicial Conference Committee on Court Administration and Case Management, PROPOSED MODEL JURY INSTRUCTIONS, THE USE OF ELECTRONIC TECHNOLOGY TO CONDUCT RESEARCH ON OR COMMUNICATE ABOUT A CASE (June 2012).
post-trial communications about the case. Jurisdictions have different rules about post-trial contact with jurors. Jurors may be unaware of such rules and—even in jurisdictions where such contact is permitted—and may be unaware of their right to refuse any such communications. They also may not be aware of the possibility that their communications about the case could risk prejudice to a subsequent proceeding, such as a retrial of the same matter or a related case. Accordingly, judges are advised to inform jurors regarding these various issues, particularly in high-profile cases that generated a great deal of publicity.

Standard 8-5.6. Court Plans for Accommodating Public Interest in a Criminal Matter

(a) Standing rules for the jurisdiction. To the extent practicable, jurisdictions should adopt standing orders or rules of court for accommodating public interest in any particular criminal matter. These standing orders should include general provisions concerning:

(i) the procedures to be followed for individuals and entities to request official designation as representative sources of coverage, including but not limited to recording or broadcasting by electronic or other media of judicial proceedings in the criminal matter;

(ii) the extent to which such coverage, including recording or broadcasting by electronic or other media, is authorized by applicable statute and rules of court, in courtrooms, immediately adjacent areas, and in other parts of the courthouse and its environs;

(iii) conditions, limitations, and guidelines that will allow such coverage as is permitted to take place in a manner that will be unobtrusive, will not distract or otherwise adversely affect witnesses, jurors, or other trial participants, and will not otherwise interfere with the administration of justice, including:

(A) how seats in the courtroom will be allocated if sufficient seating is not available to accommodate all those with interest in attending, and any alternative arrangements that can made be made to accommodate overflow interest;
(B) how documents and other exhibits will be made available; and
(C) any applicable rules limiting the public dissemination of visual images of jurors, judges, witnesses, or other trial participants, and any other restrictions on the dissemination of information about jurors, judges, witnesses, or other trial participants.

(b) Matter-specific rules. For matters in which there is likely to be significant public interest, the trial judge court should adopt and make available specific orders to effectuate subsection (a)(iii) of this standard at the earliest practicable time.

Related Standards
ABA Standards for Criminal Justice, Special Functions of the Trial Judge 6-3.2, 6-3.5, 6-3.10, and 6-4.1 (3d ed. 2000)

Commentary
This Standard urges courts to adopt (i) standing rules for the jurisdiction regarding the accommodation of public interest in criminal cases in general; and (ii) case-specific orders, to be issued by the trial judge, for accommodating particularly heavy public interest in specific cases as soon as it becomes apparent that the court is presented with such a case. The goal is for courts to prepare prospectively for such interest, not reactively. Many jurisdictions already have developed such standing rules, and many individual trial judges have implemented case-specific orders in cases generating exceptional public interest, with considerable success.104 If properly prepared, courts can avoid or at least minimize the necessity of litigating issues about public access.

While encouraging courts to think institutionally and proactively about these issues, the Standards take no position on certain difficult questions that courts necessarily must address in their policies, such

104. For example, in the child molestation trial of Penn State football coach Jerry Sandusky, the trial judge entered a series of decorum orders giving the public and the media advance notice of the court's intended procedures for allocating seats in the courtroom and making evidence available for public view, where within the courthouse environs interviews could be conducted, and what electronic devices would be permitted and when. See Commonwealth v. Sandusky, No. 1269 MDA 2012 (2013 PA Super 182) available at http://www.pacourts.us/assets/opinions/Superior/out/j-s34046-130%20-%20201014841031657137.pdf (last visited December 23, 2014).
as how courts should allocate seats in the courtroom when demand exceeds capacity and what types of recording and broadcasting media, if any, should be permitted from the courtroom.105 These are issues that individual jurisdictions are best suited to address based on their experiences, subject to governing statutes.106 But whatever policies a court chooses to adopt, it should set forth those policies in a publicly available order.

105. See Richard M. Goehler et al., *The Legal Case for Twitter in the Courtroom*, 27 COMM. LAW. 14 (Apr. 2010) (surveying different state and federal courts’ decisions as to whether to allow the media to blog or tweet from the courtroom).

106. For example, Federal Rule of Criminal Procedure 53 provides that “Except as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom.” At least one federal court had held that this rule precluded journalists from using Twitter from the courtroom. See United States v. Shelnutt, No. 4:09 CR-14 (CDL), 2009 U.S. Dist. LEXIS 101427 (M.D. Ga. Nov. 2, 2009).