

**REPORT ON COURT RULES
GOVERNING MEDIA RIGHT OF ACCESS
TO JUROR INFORMATION**

**Committee on Civil Litigation
United States District Court
Eastern District of New York**

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I. Executive Summary

The Committee on Civil Litigation of the U.S. District Court for the Eastern District of New York ("Committee") was asked to review the rules governing access to jurors' personal information in the Eastern District and other large federal districts, in order to evaluate whether any amendments should be made to the policies set forth in the district's Jury Selection Plan ("E.D.N.Y. Plan"). The Committee researched constitutional and statutory rules governing disclosure of juror information, as well as relevant case law in this area. We also contacted district courts in eight large metropolitan areas to inquire about their policies concerning disclosure of juror information after trial. Our review found the Eastern District's policies to be appropriate

and in line with the practices of comparable judicial districts. The Eastern District may, however, wish to modify Section 12 of the E.D.N.Y. Plan to clarify that trial judges (and not only the Chief Judge, as the current section provides) may order juror information to be kept confidential under appropriate circumstances.

II. Existing Rule and Proposed Change

Sections 12 and 18 of the E.D.N.Y. Plan address the disclosure of jurors' personal information. Those sections currently read as follows:

§ 12 PUBLICATION OF NAMES DRAWN FROM QUALIFIED JUROR WHEELS

Names drawn from a qualified jury wheel shall not be made available to the public until the jurors have been summoned and have appeared at the courthouse, provided that the Chief Judge may order the names to be kept confidential in a case or cases when the interests of justice so require.

§ 18 MAINTENANCE AND INSPECTION OF RECORDS

After a master jury wheel is emptied and refilled, and after all persons selected to serve as jurors before that master wheel was emptied have completed such service, all records and papers compiled and maintained by the clerk before that master wheel was emptied shall be preserved in the custody of the clerk for four years or for such longer period as may be ordered by a court, and shall be available for public inspection for the purpose of determining the validity of the selection of any jury.

For reasons set forth in greater detail below, the Committee recommends adding the following language to Section 12:

§ 12 PUBLICATION OF NAMES DRAWN FROM QUALIFIED JUROR WHEELS

Names drawn from a qualified jury wheel shall not be made available to the public until the jurors have been summoned and have appeared at the courthouse, provided that the Chief Judge or the trial judge for whom a panel is drawn may order the names to be kept confidential in a case or cases when the interests of justice so require.

III. Statutory and Constitutional Framework

The rules governing disclosure of juror information depend in part on the type of information sought. Disclosure of juror names, addresses and other biographical data maintained by the clerk of court may be subject to the terms of the district court's jury selection plan enacted pursuant to the Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 *et seq.*, (the "Act"), although in many cases the trial judge will rule on the terms of disclosure. Trial judges have

discretion, subject to constitutional limits, to determine whether to prevent disclosure of information revealed in *voir dire* or other court proceedings.

District courts have a good deal of freedom to determine the circumstances under which juror information should be released to the media. While matters occurring in open court should generally be accessible to the public and the press, trial judges may determine that the circumstances of a particular case require juror information to be kept confidential. Under current Supreme Court precedent, courts may, but need not, allow the press access to juror addresses and other personal information maintained by the court.

A. Jury Selection and Service Act

The Act requires each district court to adopt a plan for the random selection of jurors. 28 U.S.C. § 1863(a). Among other things, each district court plan should “fix the time when the names [of prospective jurors summoned to appear for service] shall be disclosed to parties and to the public.” 28 U.S.C. § 1863(b)(7). The Act further provides that if the district’s plan “permits these names to be made public, it may nevertheless permit the chief judge of the district court, or such other district court judge as the plan may provide, to keep these names confidential in any case where the interests of justice so require.” *Id.* With respect to other data collected about prospective jurors, Section 1867 (f) of the Act states that the “contents of records or papers used by the jury commission or clerk in connection with the jury selection process shall not be disclosed” until after the jurors have completed service, except pursuant to a motion challenging the composition of the jury or as provided by the district court plan.

The Act thus gives district courts substantial discretion to determine whether and when to release jurors’ information to the public. The legislative history of the Act indicates that it was intended to permit “the present diversity of practice to continue. Some district courts keep juror names confidential for fear of jury tampering. Other district courts routinely publicize the names.” H.R. Rep. No. 1076, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Admin. News 1792, 1801.

B. Constitutional Issues

Of course, both jury selection plans and judges’ rulings on disclosure of jurors’ information must remain within constitutional limits. The First Amendment guarantees the right of the public and press to attend criminal trial proceedings, as well as the right of the press to report on judicial proceedings generally. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605-06 (1982); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492-93 (1975). While First Amendment protection encompasses both publication and newsgathering activities, the press does not have “a constitutional right of special access to information not available to the public generally.” *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972). Thus, to the extent that jurors’ personal information is available to the public, the media’s right to publish this information is subject to First Amendment protection.

On the other hand, publication of jurors' identities and other personal information may endanger a defendant's right to a fair trial. In *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966), the U.S. Supreme Court ruled that "where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial," the court must take steps to protect the defendant's rights, for example by postponing the trial, transferring it to another venue or sequestering the jury. In addition, the jurors themselves have a right to be free from embarrassment, harassment and threats to their personal safety that may arise as a result of disclosure of their personal information. See *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 511 (1984) ("*Press-Enterprise I*") (noting that *voir dire* questioning may involve "deeply personal matters that [a juror] has legitimate reasons for keeping out of the public domain").

While the balancing of these competing principles depends on the facts of each case, Supreme Court precedent distinguishes between restrictions on publication, which are almost never permitted, and restraints on access to information, which may be permitted if they are narrowly tailored to serve the countervailing interest.

1. Prior Restraints

Restrictions on the media's ability to publish information revealed in open court or otherwise available to reporters are likely to be found impermissible prior restraints. "A 'prior restraint' on speech is a law, regulation or judicial order that suppresses speech—or provides for its suppression at the discretion of government officials—on the basis of the speech's content and in advance of its actual expression." *United States v. Quattrone*, 402 F.3d 304, 309 (2d Cir. 2005). The U.S. Supreme Court has held that prior restraints are "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Protection against prior restraints has "particular force as applied to reporting of criminal proceedings." *Id.* A court considering restrictions on media coverage of a trial in order to protect the defendant's Sixth Amendment rights must take into account three factors: "(a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively the restraining order would operate to prevent the threatened danger." *Id.* at 562.

In practice, prior restraints on publication of juror information are rarely upheld. In *Quattrone*, the Second Circuit held that a district court's order barring media outlets from publishing the names of jurors that were disclosed in open court failed to meet the *Nebraska Press* test. First, the trial court did not make factual findings that pretrial publicity in the case would impair the defendant's rights, instead referring to a mistrial that had been declared because of publicity in an unrelated trial. 402 F.3d at 311. Second, the trial court failed adequately to consider alternatives to the prior restraint, such as a change of venue, postponement of the trial, "emphatic warnings to the press and parties about the impropriety of contacting jurors during trial," or sequestering the jury. *Id.* at 311-312. In addition, the fact that the jurors' names had been read in open court not only lessened the efficacy of the restraint under the third prong of the *Nebraska Press* test, but also constituted an independent constitutional violation of the media's right to publish information disclosed in open court. *Id.* at 312. The appeals court also noted that

the trial court had erred in failing to hold hearings on the prior restraint. *Id.*

Similarly, in *United States v. Brown*, 250 F.3d 907, 911, 918 (5th Cir. 2001), the Fifth Circuit ruled that a district court's orders "not to circumvent" the court's designation of an anonymous jury were impermissible prior restraints. These orders violated the First Amendment because they "interdicted the press from independent investigation and reporting about the jury based on facts obtained from sources other than confidential court records, court personnel or trial participants." *Id.* at 918.

In striking down restrictions on publication, neither the *Quattrone* nor the *Brown* courts questioned the trial court's ability to limit the media's access to jurors' personal information, whether through sequestering the jurors or designating an anonymous jury. While the right of access is also protected by the First Amendment, restrictions on this right will be subject to less exacting scrutiny than prior restraints.

2. *Press-Enterprise* and the Right of Access to *Voir Dire*

In *Press Enterprise I*, the U.S. Supreme Court ruled that the First Amendment right of access to criminal trial proceedings extends to *voir dire* examinations. 464 U.S. at 510. The Court based its holding on historical practice and the benefits of open proceedings on the integrity of the criminal justice system. *Id.* at 505-10. The presumption of open *voir dire* "may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id.* at 510. In ordering closure of *voir dire*, the judge must identify the competing interest at stake, "along with findings specific enough that reviewing court can determine whether the closure order was properly entered." *Id.* See *United States v. Antar*, 38 F.3d 1348, 1361 (3d Cir. 1994) (trial court erred by sealing the transcript of *voir dire* proceedings without "placing findings on the record which clearly established that closure was necessary to protect an overriding interest").

To accommodate jurors' privacy interests, the Court in *Press-Enterprise I* suggested that trial judges inform prospective jurors that they may request an *in camera* hearing with the judge and counsel to avoid publicly disclosing embarrassing information. 464 U.S. at 512. The Court further noted that following *voir dire*

the constitutional values sought to be protected by holding open proceedings may be satisfied later by making a transcript of the closed proceedings available within a reasonable time if the judge determines that disclosure can be accomplished while safeguarding the jurors' valid privacy interests. Even then a valid privacy right may rise to a level that part of the transcript should be sealed or the name of a juror withheld, to protect the person from embarrassment. *Id.*

After *Press-Enterprise I*, some lower courts have found concealment of jurors' identities to be a less restrictive – and therefore constitutionally preferable – alternative to closure of *voir dire* proceedings. In *ABC, Inc. v. Stewart*, 360 F.3d 90, 101 (2d Cir. 2004), the Second Circuit ruled that the trial judge failed to meet the *Press-Enterprise* test

when it excluded the media from *voir dire* in the trial of Martha Stewart. The appeals court found that the closure order was not narrowly tailored, because the trial court could have concealed the identity of the jurors without closing the *voir dire*. *Id.* at 104. See also *United States v. King*, 140 F.3d 76, 82 (2d Cir. 1998) (closure of *voir dire* justified because of widespread publicity and racially sensitive nature of questioning; less restrictive measures, such as referring to jurors by number, would have been insufficient to guarantee juror candor).

In *United States v. Edwards*, 823 F.2d 111, 117 (5th Cir. 1987), the Fifth Circuit held that there was no presumptive right of access to midtrial questioning of jurors regarding allegations of juror misconduct. Citing *Press-Enterprise I*, the Fifth Circuit ruled that the transcript of the closed proceeding had to be released “within a reasonable time,” but the court could redact the jurors’ names, since the “usefulness” of releasing the names was “highly questionable” and there were no restrictions placed on the ability of the press to interview the jurors once the trial was completed. *Id.* at 118-120.

C. Access to Juror Names and Information Maintained by Court

The *Press-Enterprise I* decision did not specify whether the First Amendment right of access extends to jurors’ personal information in addition to the *voir dire* proceedings themselves. Several state courts have ruled that such a right of access exists, see *In re Disclosure of Juror Names & Addresses*, 592 N.W.2d 798, 808 (Mich. Ct. App. 1999); *State ex. rel. Beason Journal Publishing Co.*, 781 N.E.2d 180, 192 (Ohio 2002), while others, including New York, have reached the opposite conclusion. See *Newsday, Inc. v. Sise*, 71 N.Y.2d 146, 153 n.4, 524 N.Y.S.2d 35, 518 N.E.2d 930 (N.Y. 1987) (disclosure of juror names and addresses not required under First Amendment or state public records laws); *Gannett Co., Inc. v. State*, 571 A.2d 735, 748, 751 (Del. 1989) (same). Most federal courts have avoided deciding the constitutional question, relying on their circuit’s historical practice or the district’s jury selection plan. While some circuits are more protective of jurors’ personal information than others, most courts consider factors such as the type of information sought, the timing of the request and the existence of special circumstances counseling in favor of confidentiality.

1. Type of Information Disclosed

Because “there is nothing that proscribes the press from reporting events that transpire in the courtroom,” *Sheppard*, 384 U.S. at 362-63, courts generally grant media requests for information that was revealed in open court. See *In re Bay City Times*, 143 F. Supp. 2d 979, 982 (E.D. Mich. 2001) (court ordered release of names and communities of residence of jurors because this information had been solicited during *voir dire*).

While jurors do not typically state their full addresses on the record during *voir dire*, several courts have concluded that addresses as well as names may be made public because of the historical origins of the jury system in communities where “everybody knew everybody on the jury.” *In re Baltimore Sun Co.*, 841 F.2d 74, 75 (4th Cir. 1988); see also *Globe Newspaper Co. v. Hurley*, 920 F.2d 88, 93 n.6 (1st Cir. 1990). On the other hand, the American Bar Association recommends that to protect jurors’ privacy.

“the court should keep all jurors’ homes and business addresses and telephone numbers confidential and under seal unless good cause is shown to the court which would require disclosure.” ABA Principles for Juries and Jury Trials (2005), Principle 7.A.8.

Questionnaires completed by prospective jurors may be subject to different standards depending upon whether they are considered administrative records governed by the district’s jury selection plan or part of the *voir dire* proceedings presumptively accessible under *Press-Enterprise I*. Citing 28 U.S.C. § 1867(f) and historical practice, the Fourth Circuit in *Baltimore Sun* ruled that biographical information such as occupation and marital status on a “venire list” prepared by the clerk should not be released to the press. 841 F.2d at 76. In contrast, the district court in *Washington Post v. George*, No. 92-301 (RCL), 1992 WL 233354, at *2-*4 (D.D.C. July 23, 1992) relied on *Press-Enterprise I* to hold that an entire questionnaire given to jurors during *voir dire* should be released, redacting only “portions of prospective jurors’ answers which contain deeply personal and private information that the prospective jurors would wish to keep out of the public domain.”

2. Disclosure of Juror Information During Trial

The timing of the request is an important factor in evaluating whether juror information should be disclosed. Although “stronger reasons to withhold juror names and addresses will often exist *during* trial than *after* a verdict is reached,” *Globe Newspaper*, 920 F.2d at 91 (emphasis in original), several courts have ordered juror names and addresses disclosed to the press before the beginning of trial. In *Baltimore Sun*, the Fourth Circuit ruled that after the jury had been selected, the trial court was required to release the names and addresses of jurors and members of the venire not selected for the jury. 841 F.2d at 75. The court noted that there were no “realistic threats of violence or jury corruption.” *Id.* at 76 n.5. In *Washington Post*, the district court released completed copies of a jury questionnaire provided to the venire pool, stating that it “expect[ed]” that the press would not attempt to contact the jurors until a final verdict was reached. 1992 WL 233354 at *6.

Other courts, notably the Fifth Circuit, have taken a more restrictive position. In *United States v. Gurney*, 558 F.2d 1202, 1210 (5th Cir. 1977), the Fifth Circuit upheld a district court’s decision not to disclose jurors’ names and addresses to the media during trial. The court stated that the trial judge “was following a well-established practice” by refusing to disclose the names and addresses, and “protection of the privacy of the jurors was clearly permissible, and certainly appropriate in a trial which attracted public attention.” *Id.*, n.12. While *Gurney* was decided prior to the *Press-Enterprise* decisions, the Fifth Circuit cited it favorably in *Edwards*, 823 F.2d at 120, and *Brown*, 250 F.3d at 921.

3. Disclosure of Juror Information After Trial

Most federal courts addressing the issue have ruled that juror names and addresses may be provided to the media after trial, subject to certain limitations. In *Globe Newspaper*, the First Circuit ruled that the District of Massachusetts’ jury selection plan

requires disclosure of juror names and addresses “unless the presiding judge identifies specific, valid reasons necessitating confidentiality in the particular case.” 920 F.2d at 91. The Massachusetts plan (like the E.D.N.Y. Plan) provides that after persons called for jury service appear in court, a judge may order their names kept confidential “if the interests of justice so require.” *Id.* at 92. The First Circuit acknowledged but declined to decide the constitutional issues implicated by disclosure of juror identities, instead interpreting the jury plan’s “interests of justice” standard to allow withholding of juror names and addresses “only upon a finding of exceptional circumstances peculiar to the case.” *Id.* at 97. Such “exceptional circumstances” would include “a credible threat of jury tampering, a risk of personal harm to individual jurors, and other evils affecting the administration of justice;” but not, as in the instant case, “the mere personal preferences or views of the judge or jurors.” *Id.*

Following the *Globe Newspaper* ruling, Massachusetts district courts have ordered the names and addresses of jurors to be released only after a waiting period of a week or more in order to accommodate the jurors’ privacy interests. *See United States v. Butt*, 753 F. Supp. 44, 45 (D. Mass. 1990) (court would continue pre-*Globe* practice of releasing juror names and addresses seven days after verdict); *Sullivan v. National Football League*, 839 F. Supp. 6, 7 (D. Mass. 1993) (jurors’ names and addresses could be revealed 10 days after verdict); *United States v. Sampson*, 297 F. Supp. 2d 348, 349 (D. Mass. 2003) (juror names and addresses disclosed seven days after verdict). Courts in several other districts have adopted the same approach. *See United States v. Espy*, 31 F. Supp. 2d 1, 2 (D.D.C. 1998) (juror names would be sealed for seven days following the verdict); *In re Indianapolis Newspapers, Inc.* 837 F. Supp. 956, 958 (S.D. Ind. 1992) (disclosure of juror names and addresses one week after the verdict appropriately balanced the requirements of the First Amendment with the privacy interests of the jurors).

Some courts have ruled that limitations on access to juror information imposed during trial should remain in place after the verdict. In *Brown*, 250 F.3d at 918, the Fifth Circuit upheld the district court’s refusal to release the names, addresses and places of employment of anonymous jurors following the verdict. The circuit court ruled that “[w]hile a denial of access to confidential court information may hamper newsgathering, this burden is thought to be incidental when strong governmental interests are involved Ensuring that jurors are entitled to privacy and protection against harassment, even after their jury duty has ended, qualifies as such an interest in this circuit.” *Id.* *See also Edwards*, 823 F.2d at 120 (releasing transcript of sealed proceeding with jurors’ names redacted).

IV. Policies in Other District Courts

A. Southern District of New York

Article IV.C of the Southern District of New York’s jury selection plan, like Section 12 of the E.D.N.Y. Plan, provides that the names of prospective jurors

shall not be made public until the jurors have been summoned and have

appeared at the courthouses. Even then the Chief Judge or the trial judge for whom a panel is drawn may order the names kept confidential if the interests of justice so require.

Amended Plan for the Random Selection of Grand and Petit Jurors in the United States District Court for the Southern District of New York (April 11, 2002) (“S.D.N.Y. Plan”).

In addition, Article X of the S.D.N.Y. Plan provides that, with the exception of challenges to the validity of the jury selection: “the contents of records or papers used in connection with the jury selection process shall not be disclosed . . . until after . . . all persons selected to serve as jurors . . . have completed such service.” Article XI of the S.D.N.Y. Plan provides for the preservation of records relating to jury selection in terms nearly identical to Section 18 of the E.D.N.Y. Plan.

B. Other Districts

The Committee requested information concerning juror disclosure policies from the district courts for the District of Massachusetts, the District of Columbia, the Northern District of Georgia, the Southern District of Florida, the Northern District of Illinois and the Northern and Central Districts of California. The responses to these inquiries are summarized below.

The Central District of California, which includes Los Angeles, responded that the clerk’s office does not release any juror information without a court order. The request for an order is made to the trial judge and the order specifies the information to be released. Similarly, the District of Massachusetts replied that the clerk’s office does not routinely release juror information, and requests are directed to a liaison judge.

The District of Columbia reported that they do “not release juror information and nothing in their [jury selection] plan refers to the release of names or other information.” District of Columbia Local Criminal Rule 24.2(b) provides that a *party or attorney* may request leave of court to speak with a juror after trial, but does not address requests from the media or the public in general.

V. Recommendations

The policies concerning disclosure of juror information set forth in the E.D.N.Y. Plan are generally consistent with the legal principles described above and with the policies of other large district courts. As set forth *supra* at pp. 1-2, the Committee does, however, recommend that Section 12 of the E.D.N.Y. Plan be modified to state that “the Chief Judge *or the trial judge for whom a panel is drawn* may order the names to be kept confidential in a case or cases when the interests of justice so require.” (revised text in italics). This revision, which tracks the language in Article IV.C of the S.D.N.Y. Plan, reflects the reality that the trial judge is often in the best position to determine whether juror information should be kept confidential. Like any modification to the E.D.N.Y. Plan, this proposed change must be submitted to Second Circuit for approval. See E.D.N.Y. Plan § 19; 28 U.S.C. § 1863(a).

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