March 15, 2000

Dear Judges, Clerk-Magistrates, Media Representatives:

The **Guidelines on the Public's Right of Access to Judicial Proceedings and Records** were developed by the Supreme Judicial Court's Judiciary/Media Steering Committee in an effort to assist you in identifying relevant court rules, statutes and case law covering a variety of issues which relate to judicial proceedings. These **Guidelines** have not been promulgated by the Supreme Judicial Court or the Trial Court, and, therefore, should not be regarded as binding. The **Guidelines** are intended to aid you as an additional professional resource and are to be used with your discretion.

As Co-Chairs of the Judiciary/Media Steering Committee, we wish to acknowledge the considerable efforts of Hon. E. Susan Garsh, an Associate Justice of the Superior Court and a member of the Judiciary/Media Steering Committee, for producing these **Guidelines** on behalf of the Committee. We also wish to thank Abigail Roth, a former SJC law clerk, and Andrew Varcoe, a present clerk, for their able assistance with this project.

We hope that these **Guidelines** will be a valuable resource to the judiciary and the media for the benefit of the public. The materials may be reproduced without obtaining permission from the Judiciary/Media Steering Committee. If you have questions concerning these **Guidelines**, contact the SJC's Public Information Office at (617) 557-1114.

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GUIDELINES ON THE PUBLIC'S RIGHT OF ACCESS TO JUDICIAL PROCEEDINGS AND RECORDS

I. GENERAL PRINCIPLE OF PUBLICITY

Judicial proceedings should not be shrouded in secrecy. Access fosters informed public discussion of governmental affairs. "It is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed." Cowley v. Pulsifer, 137 Mass. 392, 394 (1884) (Holmes, J.). Only the most compelling reasons justify the closure of judicial proceedings or the nondisclosure of judicial records. Access to judicial records and proceedings shall not be restricted to any class or group of persons.[1] The media's right of access to judicial proceedings and records derives entirely from the public's right of access. The media has neither a greater nor a lesser right to be present than any other member of the public.[2]

The general principle of publicity is embodied in multiple legal authorities: the First Amendment to the United States Constitution; article XVI of the Massachusetts Declaration of Rights (as amended by article LXXVII); legislative enactments; common law; and court rules.

II. JUDICIAL PROCEEDINGS

A. Framework: There is a recognized common law and/or constitutional qualified right of access by the public to most criminal and civil proceedings.[3] When a qualified First Amendment right of access attaches to a proceeding, the proceeding cannot be closed unless specific, on the record, findings are made demonstrating that "closure is essential to preserve higher values and is narrowly tailored to serve that interest."[4] Thus, if the interest asserted is the right of the accused to a fair trial, the proceeding only shall be closed if specific findings are made demonstrating, first, that there is a substantial probability the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent[5] and, second, that reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights.[6] The trial court should consider all reasonable alternatives to closure and fashion a closure order that is no broader than necessary.[7]

B. Procedural Issues: Those who oppose the entry or maintenance of a closure order must be given an opportunity to be heard by the trial court.[8] One need not file a formal motion to intervene in order to be heard in opposition to the order.[9] The

hearing contesting closure should be completed expeditiously.[10] A closure order is immediately appealable.

C. Specific Proceedings:

1. Presumptively Open:

a. Arraignment.[11]

b. Bail hearings.[12]

c. Probable cause hearings.[13]

d. Voir dire.[14]

e. Suppression hearings.[15]

f. Trials, even during the testimony of a minor sex offense victim.[16]

g. Post-trial hearings.[17]

h. Juvenile proceedings where the Commonwealth has proceeded by indictment, or where the defendant is accused of having committed murder on or after July 27, 1996.[18]

i. Proceedings to extend control of the Department of Youth Services over a person beyond the age of eighteen.[19]

j. Plea hearings and sentencing hearings.[20]

k. Trial of paternity proceedings for children born to parents not married to one another (c. 209C), unless a party objects.[21]

2. Closed Proceedings:

a. Inquests.[22]

b. Juvenile proceedings where the Commonwealth has not proceeded by indictment and where the defendant is not accused of having committed murder on or after July 27, 1996.[23]

c. Care and protection proceedings.[24]

d. Grand jury proceedings.[25]

3. Access Made Discretionary by Statute:

a. Trial of district court criminal proceedings involving husband and wife.[26]

b. Trial for incest or rape, if either of the parties requests closure and if the defendant by a written statement waives his right to a public trial for those portions of the trial from which spectators are to be excluded.[27]

4. No Right of Attendance:

a. Depositions.[28]

b. Lobby conferences and side-bar discussions at trial.[29]

c. Hearing on application for criminal complaint presumptively closed, but if the application is one of special public significance, and if, in the opinion of the Magistrate, the legitimate interest of the public outweighs the right of privacy of the accused, the hearing may be open to the public.[30]

D. Television/Cameras/Microphones in the Courtroom:[31]

1. S.J.C. Rule 1:19(a) provides: "A judge shall permit broadcasting, televising, electronic recording, or taking photographs of proceedings open to the public in the courtroom by the news media for news gathering purposes and dissemination of information to the public," subject to certain limitations, including that "[a] judge may limit or temporarily suspend such news media coverage, if it appears that such coverage will create a substantial likelihood of harm to any person or other serious harmful consequence."[32] A trial judge must make specific findings of fact to support a decision to limit such coverage. Fear of jurors being exposed to potentially prejudicial information or of witnesses being exposed to the testimony of other witnesses generally will not be a valid basis for denying such coverage. A judge should not permit broadcasting, televising, electronic recording, or photographing of motion to suppress hearings, motion to dismiss hearings, probable cause hearings, or voir dire hearings.[33]

2. Even if the potential for harm requires that television cameras be prohibited, S.J.C. Rule 3:09, Canon 3(A)(7) clearly provides that the trial

court separately should determine whether electronic recording and/or still photography would create a substantial likelihood of harm to any person or other serious harmful consequence.

E. Sketch Artists: Sketch artists should be permitted in a courtroom, absent extraordinary circumstances in which sketching would disrupt proceedings or distract participants.[34] The trial judge, however, has discretion to restrict artists from sketching jury members.[35]

III. JUDICIAL RECORDS

A. Uniform Rules on Impoundment Procedure:

1. Scope: The Uniform Rules explicitly govern impoundment[36] of records in civil proceedings in every Department of the Trial Court. Although the Rules do not explicitly govern impoundment in criminal and juvenile proceedings, their application to criminal[37] and certain juvenile[38] proceedings has been approved by the Supreme Judicial Court.

2. Key Provisions: A request for impoundment must be made by a written motion accompanied by affidavit. Ex parte relief may be granted only upon a showing that immediate and irreparable injury may result. If any order of impoundment is granted without notice, the matter shall be set down for hearing at the earliest possible time, and in any event, within ten days. The court may order notice be given to interested third persons, such as the media. An interested third person may oppose impoundment. An order of impoundment may be entered by the court only after hearing and for good cause shown.[39] In determining good cause, the court shall consider all relevant factors including, but not limited to, the nature of the parties and the controversy, the type of information and the privacy interests involved, the extent of community interest, and the reason(s) for the request. Agreement of all parties or interested third persons in favor of impoundment is not, in itself, sufficient to constitute good cause.[40] An order of impoundment, whether ex parte or after notice, may be made only upon written findings and must specify the duration of the order.[41] A party or interested third person may move to modify or terminate an order of impoundment. An order impounding or refusing to impound material is subject to review by a single justice of the appellate court.[42] Before a party appeals to a single justice, the party should seek written findings from the trial judge.[43]

B. First Amendment Qualified Right of Access: In addition to the common law presumption of access to judicial records,[44] the First Amendment may provide an

independent qualified right of access to judicial records.[45] This right has been premised on the theory that without access to the documents underlying a judicial proceeding, the public often would not have a full understanding of the proceeding and, as a result, would not be in a position to serve as an effective check on the system, an underlying reason for the First Amendment right of access to judicial proceedings.[46] Limitations on the First Amendment right of access will be upheld where a court determines, based upon adequate findings, that an overriding interest, narrowly tailored to the circumstances, overcomes the presumptive First Amendment right.[47]

C. Prompt Rulings Required: Motions challenging an impoundment order should be heard and ruled upon expeditiously.[48]

D. Code of Professional Responsibility for Clerks of the Courts of the Commonwealth: Canon 3(A)(6) requires each Clerk-Magistrate to facilitate public access to court records that, by law or court rule, are available to the public.[49]

E. Photocopies: Access to records includes not only being able to review and make notes about judicial documents, but also being permitted to obtain photocopies at normal rates.[50]

F. Specific Records:

1. Publicly Available (unless properly impounded or sealed):

a. Alphabetical index of parties in pending criminal or civil cases.

b. Alphabetical index of parties in closed criminal or civil cases.[51]

c. Docket books.

d. Case files, including those of criminal cases in which a defendant has been acquitted, a finding of no probable cause has been made by the court, or the action has been dismissed or nolle prossed.[52]

e. Daily trial lists.

f. Judge's required statement of reasons for not imposing a committed sentence of an offense under G.L. c. 265 (which comprises crimes against the person such as murder, rape, armed robbery, and assault).[53]

g. Written determinations of probable cause, including police reports considered by a clerk in making such determination.[54]

h. Allowed applications for criminal complaint, including police reports set forth on such applications.[55]

i. Juvenile records of proceedings against youthful offenders conducted pursuant to an indictment. Youthful offenders are juveniles subject to sentence under certain enumerated circumstances for having committed, between the ages of fourteen and seventeen, a offense that would be punishable by imprisonment if they were adults. Privileged or confidential communications contained in such records are not publicly available.[56]

j. Juvenile records of proceedings where the defendant is accused of having committed murder on or after July 27, 1996.[57]

k. Parts of records of proceedings against sex offenders, including juvenile offenders, but only if the information is needed for the inquirer's own protection or for the protection of a child under age 18 or another person for whom the inquirer has responsibility, care, or custody.[58]

l. Case files for proceedings to extend control of the Department of Youth Services over a person beyond the age of eighteen.

m. Search warrants, applications for search warrants, and supporting affidavits, once the warrants and affidavits have been returned to the court.[59]

n. Records of abuse prevention cases (c. 209A) -- other than the plaintiff's current and former residential address, telephone number and workplace name, address and telephone number -- in which neither party is a minor.[60]

o. Exhibits.[61]

p. Documents filed with the court in connection with a consent decree or settlement.[62]

q. Discovery documents admitted into evidence or relied upon in connection with substantive motions.[63]

r. Names and addresses of jurors in both the grand jury and trial jury venires.[64]

s. Jury questionnaires used to supplement or in lieu of oral voir dire.[65]

t. Names of trial jurors while a case is pending.[66]

u. Names of trial jurors after mistrial or verdict.[67]

v. All papers filed in connection with actions to establish paternity or in which the paternity of a child is an issue, as well as docket entries and record books for such actions, are unavailable for public inspection only if the judge of the court where the records are kept, for good cause shown, so orders, or if the person alleged to be the father is adjudicated not to be the father of the child.[68]

w. The report and transcript from an inquest, where the district attorney certifies that no prosecution is proposed, an indictment is sought but not returned, prosecution for the death has completed, or the Superior Court determines that no criminal trial is likely.[69]

2. Not Publicly Available:

a. Cases and materials properly impounded or sealed.[70]

b. Grand Jury records, including cases automatically sealed because of grand jury "no bill."[71]

c. Dismissed first offense marijuana or Class E controlled substance cases.[72]

d. Dismissed, "not guilty," or nolle prossed controlled substance cases.[73]

e. The Commissioner of Probation is required to seal certain old records of criminal court appearances and dispositions, if requested by the person having such records and if certain conditions are met.[74]

f. Confidential juror questionnaires included with summons.[75]

g. Records relating to offenses for which the defendant has received a gubernatorial pardon.[76]

h. Affidavits made in support of an application for a search warrant are not available until the warrant has been returned.[77]

i. Plaintiff's current and former residential address, telephone number and workplace name, address and telephone number in abuse prevention cases.[78]

j. Records of care and protection proceedings.[79]

k. Financial statements required in Family Court and Probate Court actions where financial relief is requested.[80]

l. Inquest documents, where the district attorney has not certified that no proposition is proposed, an indictment has not been sought without a return, prosecution for the death has not completed, and the Superior Court has not determined that no criminal trial is likely.[81]

m. In separate support and divorce proceedings, "[w]henever adultery, any specific criminal act with a third person or allegations derogatory to the character or reputation of a third person" are charged in a pleading, the name of the person charged with committing adultery with one of the parties shall not be included in the pleading. Any affidavit alleging the name of the person charged shall be sealed and shall not be released to nonparties save by order of the court.[82]

3. Public Access Made Discretionary by Statute or Court Guidelines:[83]

a. Mental health examination and commitment records, other than ordinary entries on the criminal docket.[84]

b. Alcoholic commitment records, other than ordinary entries on the criminal docket.[85]

c. Names of sexual assault victims.[86]

d. After the issuance of an order by the Superior Court making public the report and transcript of an inquest, inquest documents other than the report and transcript, along with audio recordings of inquest proceedings.[87]

e. Records of abuse prevention cases where either party is a minor.[88]

f. Records of adoption proceedings, including the index of such cases.[89]

g. Cassette recordings of Probate Court and Family Court proceedings.[90]

h. A justice of the Juvenile Court has the discretion to choose whether to release to the public juvenile court records other than records (1) of "youthful offender" proceedings conducted pursuant to an indictment and (2) of proceedings where the defendant is accused of having committed murder on or after July 27, 1996. In the absence of an order releasing the records, the records shall be withheld from public inspection.[91]

i. Pending or denied applications for criminal complaints are presumptively sealed unless the clerk-magistrate or a judge concludes that the legitimate interest of the public outweighs the privacy interest of the accused.[92]

IV. RESTRAINTS ON SPEECH AND PUBLICATION

A. Overview: “[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights."[93]

B. Public: "[T]here is nothing that proscribes the press from reporting events that transpire in the courtroom."[94] A prior restraint on members of the media preventing pre-trial publicity, therefore, rarely will withstand scrutiny under the First Amendment and only can be entered if the trial judge holds a hearing and makes specific findings that: (1) release of the information will create a clear and present danger to the conduct of the trial; (2) no alternative means are available to avert the harm; and (3) the prior restraint will effectively prevent the anticipated harm. In addition, the First Amendment requires that a restrictive order may not be vague or overbroad with respect to information barred from publication.[95]

"[A]bsent the most compelling circumstances," a court cannot even issue a temporary restraining order prohibiting a newspaper from publishing certain information while it takes time to reflect on the merits of the prior restraint: "[I]t is misleading in the context of daily newspaper publishing to argue that a temporary restraining order merely preserves the status quo."[96]

C. Attorneys: The Massachusetts Rules of Professional Conduct, adopted in 1998, prohibit attorneys from engaging in certain forms of speech before and during trial. Paragraph(a) of Rule 3.6, "Trial Publicity," says that "[a] lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."[97] The same prohibition applies to lawyers who are associated in a firm or government agency with a lawyer subject to paragraph (a).[98]

The United States Supreme Court has held that a disciplinary rule using a "substantial likelihood of material prejudice" standard to restrict attorney speech does not violate the First Amendment.[99]

D. Parties: Massachusetts applies the Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976), standard to regulate prior restraints on parties' speech.[100]

E. Trial Jurors: Post-trial, unless the standard set out in Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976), can be met, judges should not forbid the media from speaking with jurors nor forbid jurors from speaking with the media.[101] It remains unresolved to what extent, if at all, a judge may limit the scope of a reporter's post-trial inquiry into jury deliberations.[102] A judge may provide a neutral area where the press can interview the jury after the verdict has been rendered and may take steps to prevent harassment of jurors by the press. A judge may inform jurors that they have a right not to speak with the press,[103] and may remind jurors of the value of their service and the crucial role that trust and confidentiality among jurors plays, in the fulfillment of their duty, by promoting frank discussion during deliberations.[104] It is preferable for a judge to make any such remarks on the record in open court in order to prevent subsequent challenges.

F. Grand Jurors and Prosecutors Presenting Cases to a Grand Jury: A judge may direct that an indictment be kept secret until after arrest. If this occurs, the clerk shall seal the indictment and no person may disclose the finding of the indictment except as is necessary for the issuance and execution of a warrant. A person performing an official function in relation to the grand jury may not disclose matters occurring before the grand jury except in the performance of official duties or when specifically directed to do so by the court.[105] In their statutory oath, Massachusetts' grand jurors swear not to divulge the testimony given to them as grand jurors, their deliberations, or their votes,[106] although there is some relaxation of this enforced silence after an indictment has come down.[107]

G. Grand Jury Witnesses: No Massachusetts statute prohibits grand jury witnesses from discussing their testimony, even before an indictment has issued.[108]

V. MISCELLANEOUS ISSUES

A. Reasonable Time and Place Limits: Access to judicial records and proceedings is subject to reasonable limitations as to time and place that may need to be imposed to avoid disrupting the orderly functioning of the courtroom or the clerk-magistrates' offices, and to protect the physical security of court records.[109] Such

concerns may not be used as an excuse to deny public access at reasonable times and places.[110]

B. Rationale for Requesting Access: Persons wishing to review records or attend public proceedings ordinarily should not be required to disclose the reason for their interest.[111]

C. Exhibits: Following a civil trial, the clerk may return exhibits to the parties after the signing of a receipt acknowledging the return of the exhibits. Whether the court can order the parties to make these records available to the media or to retain such records beyond the appeals period has not been litigated in Massachusetts.[112]

D. Tape-recorded Proceedings: A cassette copy of the original recording of an officially tape-recorded proceeding which was open to the public is available upon request, unless the record of the proceeding has been sealed or impounded.[113]

E. Courthouse Interviews: In Hearst-Argyle Stations, Inc. v. Justices of the Superior Court, SJ-98-0604 and SJ-98-0605 (Oct. 23, 1998) (Greaney, J.), a single justice vacated a provision of an order that restricted the media's ability to conduct interviews concerning a high-profile case. Under the provision, the media was barred between 8:00 a.m. and 5:00 p.m. from conducting interviews inside the courthouse or on the sidewalks adjacent to the courthouse.

VI. JUDICIARY/MEDIA COMMITTEE RESPONSE TEAM

Comprising twelve members of the Judiciary/Media Committee, the Response Team assists judges, journalists, and court personnel with court/media issues requiring timely attention. Acting in an advisory capacity, the team tries to resolve concerns or conflicts relating to such questions as court orders, court documents, courtroom access, and media coverage.

Members of the team are available during regular business hours. Before making any suggestions, a member who is contacted will consult with another member of the team. All questions and advice are "off the record," and the advice given is not binding on those who request it. By offering a perspective on an issue, the team may help diffuse potential or actual conflicts.

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VII. REFERENCE MATERIALS

1. The Reporter's Key: Rights of Fair Trial and Free Press, National Conference of Lawyers and Representatives of the Media (American Bar Association 1994). Available in Social Law Library.

To order, write: Publication Orders, American Bar Association, P.O. Box 10892, Chicago, IL 60610-0892; or call: (312) 988-5522; or fax: (312) 988-5568. The product code for ordering purposes is PC 448-0000.

2. Massachusetts Journalists' Court and Legal Handbook (Massachusetts Bar Association 1996). Available in Social Law Library.

For questions about the publication, write: Director of Media and Public Relations, Massachusetts Bar Association, 20 West Street, Boston, MA 02111-1218.

3. Communications Law (Practicing Law Institute; published annually). Available in Social Law Library.

To order, call: (212) 765-5700; or fax: (800) 321-0093. The order number is G4-3924, Dept. BAV4.

4. Media Law Reporter (Bureau of National Affairs; published weekly). Available in Social Law Library.

5. http://www.spj.org: World Wide Web site of the Society of Professional Journalists. Includes information on which states have cameras in courtrooms (http://spj.org/foia/cameras).

6. http://www.freedomforum.org/press: World Wide Web site of Freedom Forum, "a nonpartisan, international foundation dedicated to free press, free speech and free spirit for all people."

7. http://www.rcfp.org/: World Wide Web site of the Reporters Committee for the Freedom of the Press. Includes full text of "The First Amendment Handbook" (http://www.rcfp.org/handbook/viewpage.cgi); "Access to Juvenile Courts: A Reporter's Guide to Proceedings & Documents in the 50 States & D.C." (http://www.rcfp.org/juvcts/; http://www.rcfp.org/juvcts/massachusetts.html); and "Tapping Officials' Secrets" (http://www.rcfp.org/tapping/index.cgi; http://spj.org/foia/cameras?MA).

ENDNOTES

1. The public records statute, G.L. c. 66, § 10, does not apply to records of the judicial branch. Sanford v. Boston Herald-Traveler Corp., 318 Mass. 156, 157 (1945); Lambert v. Executive Director of the Judicial Nominating Council, 425 Mass. 406, 409 (1997) (reaffirming, as a matter of course, holding of Sanford).

2. Boston Herald, Inc. v. Superior Court, 421 Mass. 502, 505 (1995).

3. A quartet of Supreme Court decisions articulated a First Amendment right of access to criminal proceedings. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (First Amendment guarantees the public the right to attend criminal trials); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 603 (1982) (striking down a rule of automatic mandatory closure of the courtroom during the testimony of minor victims in sexual offense trials); Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) (First Amendment right of access to a criminal trial applied to voir dire hearing); Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) (First Amendment right of access to a criminal trial applied to a preliminary hearing). These cases articulated a two-part test for determining whether a right of access applies to a particular proceeding: (1) the proceeding must have an historic tradition of openness and (2) the public's access must play a significant positive role in the functioning of the particular process in question.

A criminal defendant has a Sixth Amendment right to a public trial. "[T]here can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public." Waller v. Georgia, 467 U.S. 39, 46 (1984).

Neither the First Amendment nor the Sixth Amendment rights are absolute. In limited circumstances the public may be barred from criminal proceedings. See, e.g., Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606-07 (1982) (citations omitted) ("[a]lthough the right of access to criminal trials is of constitutional stature, it is not absolute. But the circumstances under which the press and public can be barred from a criminal trial are limited; the State's justification in denying access must be a weighty one. Where . . . the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest").

Although the Supreme Court has not held that the First Amendment right of public access applies to civil proceedings, several federal circuit courts have recognized a First Amendment public right of access to civil trials. See, e.g.,

Publicker Industries, Inc. v. Cohen, 733 F.2d 1059 (3d Cir. 1984) (First Amendment secures to the public and the press a right of access to civil proceedings); Brown & Williamson Tobacco Corp. v. F.T.C., 710 F.2d 1165 (6th Cir.), reh'g denied, 717 F.2d 963 (6th Cir. 1983), cert. denied, 465 U.S. 1100 (1984) (same); see also Richmond Newspapers, Inc., 448 U.S. at 580 n.17 (1980) (question of whether public has a First Amendment right to attend civil trials was not raised in case, but noting "that historically both civil and criminal trials have been presumptively open"); Poliquin v. Garden Way, Inc., 989 F.2d 527, 533 (1st Cir. 1993) ("[o]pen trials protect not only the rights of individuals, but also the confidence of the public that justice is being done by its courts in all matters, civil as well as criminal"). See also NBC Subsidiary (KNBC-TV, Inc.) v. Superior Court, 86 Cal. Rptr. 2d 778, 805, 20 Cal. 4th 1178, 980 P.2d 337 (Cal. 1999) (holding that "in general, the First Amendment provides a right of access to ordinary civil trials and proceedings" and that "constitutional standards governing closure of trial proceedings apply in the civil setting"). But see Dep't of Children and Family Services v. Natural Parents of J.B.,736 So.2d 111 (Fla. Dist. Ct. App. 1999) (upholding, against claim of unconstitutionality under First and Sixth Amendments, Florida statute barring public from all hearings involving termination of parental rights), question certified to Florida Supreme Court, id. at 118; id. at 113 n.3 (citing In re Adoption of H.Y.T., 458 So.2d 1127 (Fla. 1984) (upholding statute requiring closure in adoption cases); Mayer v. State, 523 So.2d 1171 (Fla. Dist. Ct. App. 1988) (upholding statute requiring closure of dependency proceedings)). The First Circuit never explicitly has decided whether the First Amendment creates a right of public access to civil trials. See United States v. Three Juveniles, 61 F.3d 86 (1st Cir. 1995), cert. denied sub nom. Globe Newspaper Co. v. United States, 517 U.S. 1166 (1996). Cf. In re Cincinnati Enquirer, 94 F.3d 198, 199 (6th Cir. 1996) (First Amendment does not grant right of access to "summary jury trial" ordered by court in effort to persuade parties in civil suit to civil case) ("A summary jury trial proceeding is not in the nature of a court hearing or a jury trial, but is essentially a settlement proceeding. Settlement proceedings are historically closed procedures.").

In any event, “free access to civil trials is well established under the common law.” Boston Herald, Inc. v. Superior Court, 421 Mass. 502, 507 n.7 (1995). Cf. Globe Newspaper Co. v. Commonwealth, 407 Mass. 879, 884 (1990) ("[t]he tradition in the Commonwealth is that courts are open to the public. In the absence of a statute, a rule of court, or a principle expressed in an appellate opinion authorizing or directing a courtroom to be closed, the expectation is that courtrooms will be open").

G.L. c. 220, § 13, authorizes courts to exclude minors as spectators from the courtroom if it is not necessary that they be present as witnesses or parties. The constitutionality of this statute has not been tested.

4. Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510 (1984).

5. Findings demonstrating there is a "reasonable likelihood" that publicity will prejudice a defendant's fair trial rights will not justify a closure order. Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 14 (1986).

6. Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 14 (1986).

7. Alternatives to closure include searching jury voir dire, sequestration of witnesses or jurors, change of venue, emphatic jury instructions, and postponement of the trial. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 563-64 (1976). "A number of courts of appeals have held that the Sixth Amendment test [for assessing closures] laid down in Waller v. Georgia, 467 U.S. at 48, need be less stringent in the "partial" closure context; that is to say, a "substantial reason," rather than an "overriding interest," may warrant a closure which ensures at least some public access. These courts essentially conclude that a less stringent standard is warranted in the "partial" closure context provided the essential purposes of the "public trial" guarantee are served and the constitutional rights of defendants are adequately protected." United States v. DeLuca, 137 F.3d 24, 33 (1st Cir. 1998) (citations omitted). In DeLuca, the First Circuit Court of Appeals rejected a Sixth Amendment challenge to a procedure for screening spectators at the door of a courtroom by requiring written identification and recording specific facts about each person who presented identification. Following other courts of appeals, the court held that the government merely needed to show that the procedure furthered a "substantial interest." See id. at 34. "Although any courtroom closure represents a serious undertaking which ought never be initiated without prior judicial authorization, we conclude that the partial closure in this case did not contravene the Sixth Amendment, given the strong circumstantial and historical evidence that precautionary security measures were well warranted and the essential constitutional guarantees of a public trial were preserved." Id. at 35.

8. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 609 n.25 (1982) (citation omitted) ("representatives of the press and general public 'must be given an opportunity to be heard on the question of their exclusion'").

9. Globe Newspaper Co. v. Superior Court, 379 Mass. 846, 865 (1981), judgment vacated on other grounds, 457 U.S. 596 (1982) (one "need not file a formal motion to intervene").

10. Globe Newspaper Co. v. Superior Court, 379 Mass. 846, 865 (1981), judgment vacated on other grounds, 457 U.S. 596 (1982) ("the hearing should be completed

expeditiously").

11. Boston Herald, Inc. v. Superior Court, 421 Mass. 502, 505-07 (1995) (affirming single justice decision that complaint seeking injunctive relief and declaration that the press constitutionally could not be excluded from an arraignment held in a hospital room was moot, but nevertheless reiterating the principles that govern the closure of judicial proceedings). See also Foley v. Commonwealth, 429 Mass. 496, 499 (1999) (arraignment sessions, including bail hearings, may be held at correctional facilities provided that the sessions are open to the public) ("The physical layout of the place in which the arraignments are held and its accessibility to the public are important considerations in deciding whether the proceedings conducted there are properly public.").

12. In re Globe Newspaper Co., 729 F.2d 47 (1st Cir. 1984) (First Amendment right of access extends to bail hearings); Foley v. Commonwealth, 429 Mass. 496 (1999).

13. El Vocero de Puerto Rico v. Puerto Rico, 508 U.S. 147 (1993) (Puerto Rico's requirement of private preliminary hearing unless defendant requests otherwise violates First Amendment); Press Enterprise Co. v. Superior Court, 478 U.S. 1, 13-14 (1986) (citation omitted) (qualified First Amendment right of access attaches to preliminary hearings).

14. Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510 (1984) (qualified First Amendment right of access attaches to jury voir dire in criminal case); Globe Newspaper Co. v. Commonwealth, SJ-90-172 (Apr. 17, 1990) (Lynch, J.) (vacating order excluding public from voir dire proceedings). To protect the legitimate interests of prospective jurors, the general nature of the voir dire should be made known to each juror at the outset of the questioning, and those individuals believing public questioning will prove damaging to them may request an opportunity to present the problem to the judge in camera, but on the record and with counsel and the defendant present. If limited closure is ordered, the constitutional values sought to be protected by 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 jurors' privacy interests. Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 512 (1984) (if transcript of voir dire is released, a valid privacy right may rise to such a level that part of the transcript should be sealed or the name of a juror withheld). See also United States v. King, 140 F.3d 76, 83 (2d Cir. 1998) (holding that district court, in superintending trial of celebrity that resulted in mistrial, did not err in barring public access to voir dire for second trial and in withholding transcripts of voir dire for first trial until after

impanelment of jury for second trial) ("Voir dire access limitations are properly invoked only where circumstances demonstrate their need, and, even then, any limitation must be narrowly drawn and supported by findings, after alternatives have been considered. But this is that unusual case where the fairness of a trial, or at least the voir dire phase, that is usually promoted by public access is seriously at risk of being impaired unless some modest limitation on access is imposed.").

The Supreme Judicial Court has held that a defendant's right to a public trial does not require that the public be able to attend preliminary colloquies between judges and jurors concerning hardships or unusual inconveniences that may prevent the jurors from serving. See Commonwealth v. Gordon, 422 Mass. 816, 823-24 (1996). "[T]here is a critical distinction between hardship colloquies and individual examination of prospective jurors as to their qualifications to serve. . . . [J]ust as hardship colloquies need not be conducted in the presence of the defendant and defense counsel, they also need not be open to the public." Id. at 824.

15. The Supreme Court has not explicitly held that there is a First Amendment right of access to suppression hearings. But see Waller v. Georgia, 467 U.S. 39 (1984) (under the Sixth Amendment, any closure of a suppression hearing over the objections of the accused must meet the test set out in Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984), and recognizing that in Gannett Co., Inc. v. DePasquale, 443 U.S. 368 (1979), while not reaching the question, a majority of the Justices, one based on First Amendment grounds and four based on Sixth Amendment grounds, concluded the public had a qualified constitutional right to attend pre-trial suppression hearings). Several federal appeals courts have found the First Amendment extends some degree of public access to suppression hearings. See, e.g., Application of The Herald Co., 734 F.2d 93 (2d Cir. 1984); United States v. Criden, 675 F.2d 550 (3d Cir. 1982); United States v. Brooklier, 685 F.2d 1162 (9th Cir. 1982). See also United States v. White, 855 F. Supp. 13, 15 (D. Mass. 1994) ("The public has a qualified First Amendment right of access to hearings on motions to suppress and documents on which suppression decisions are based."). Cf. United States v. McVeigh, 119 F.3d 806, 813 (10th Cir. 1997) (per curiam) (affirming, in light of "extraordinary context" of Oklahoma City courthouse bombing case, district court's orders sealing parts of defendants' motions to suppress evidence and sever trials, along with parts of attached exhibits; assuming, without deciding the question, that the First Amendment guarantees a qualified right of access to judicial documents) ("[T]he right of access to suppression hearings and accompanying motions does not extend to the evidence actually ruled inadmissible in such a hearing. . . . Access to inadmissible evidence is not necessary to understand the suppression hearing, so long as the public is able to understand the circumstances that gave rise to the decision to suppress."); In re New York Times

Co., 828 F.2d 110, 114 (2d Cir. 1987)) (vacating trial court orders sealing papers filed under seal in connection with motion to suppress evidence and remanding case to trial court for more specific findings) ("Other circuits that have addressed this question have construed the constitutional right of access to apply to written documents submitted in connection with judicial proceedings that themselves implicate the right of access. We agree that a qualified First Amendment right of access extends to such documents.") (citations omitted).

16. Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (G. L. c. 278, § 16A, as construed by the Massachusetts Supreme Judicial Court to require mandatory closure during the testimony of minor sex victims, violates the First Amendment); Commonwealth v. Martin, 417 Mass. 187 (1994) (based on the decision in Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982), criminal proceedings may be closed to the public under G. L. c. 278, § 16A only if: (1) the party seeking to close the hearing advances an overriding interest likely to be prejudiced; (2) the closure is no broader than necessary to protect that interest; (3) the trial court considers reasonable alternatives to closing the proceedings; and (4) the trial court makes findings adequate to support the closure).

In narrow, very fact-specific contexts, closure has been permitted. See, e.g., People v. Ramos, 90 N.Y.2d 490, 685 N.E.2d 492, 662 N.Y.S.2d 739 (N.Y. 1997) (to prevent jeopardizing undercover officer's safety and effectiveness, trial court may close courtroom during officer's testimony); Ayala v. Speckard, 131 F.3d 62 (2d Cir. 1997) (en banc) (same); Wendt v. Wendt, 45 Conn.Supp. 208, 706 A.2d 1021 (Conn.Super. 1996) (where defendant in contested dissolution of marriage action was executive of Fortune 500 corporation, and where his testimony would likely affect others' trading and investment decisions, court held that interest in protecting stability of share prices overrode public's interest in attending proceedings or in viewing documents related to the action).

17. Globe Newspaper Co. v. Commonwealth, 407 Mass. 879, 883-86 (1990) (citation omitted) (finding a right of access to a post-verdict evidentiary hearing, noting that although the U.S. Supreme Court has not ruled on the public's right of access to post-verdict proceedings, "'[w]e find no principled basis for affording greater confidentiality to post-trial . . . proceedings than is given to pretrial matters. The primary justifications for access to criminal proceedings . . . apply with as much force to post-conviction proceedings as to the trial itself'"); Phoenix Newspapers, Inc. v. United States Dist. Court, 156 F.3d 940 (9th Cir. 1998) (holding that First Amendment grants qualified right of access to transcript of closed hearings conducted during criminal trial jury deliberations in order to determine whether threatening telephone calls were affecting the deliberations); Ex parte Greenville News, 482 S.E.2d 556

(S.C. 1997) (holding that posttrial hearing regarding alleged juror misconduct was presumptively open and granting access to transcript of closed hearing, order sealing file, and matters under seal, including juror depositions, provided that names of jurors and identifying information are redacted)

18. G.L. c. 119, §§ 65, 74.

19. New England Television Corp. v. Department of Youth Services, SJ-89-205 (May 4, 1989) (Wilkins, J.) ("[i]f . . . the prospects for treatment of the former juvenile would be adversely affected by a public hearing on the extension commitment order, the judge, on proper findings of fact, could be warranted in closing the proceedings").

20. In re Washington Post Co, 807 F.2d 383 (4th Cir. 1986) (newspaper has First Amendment right of access to plea and sentencing hearings).

21. G.L. c. 209C, § 12 ("[i]n an action to establish paternity, the court shall, upon request of any party, exclude the general public from the room where the trial is held . . .").

22. Kennedy v. Justice of Dist. Court, 356 Mass. 367, 377 (1969) (all inquests shall be closed to the public and to the news media). A court may exclude from an inquest proceeding all persons aside from certain interested parties. G. L. c. 38, § 8.

23. G.L. c. 119, § 65. Neither the U.S. Supreme Court, the First Circuit, nor the Massachusetts state courts have addressed whether the First Amendment right of public access attaches to juvenile delinquency proceedings. However, the First Circuit has construed the statute as permitting presumptive closure, provided that closure is determined on a case-by-case basis. U.S. v. Three Juveniles, 61 F.3d 86 (1st Cir. 1995), cert. denied sub nom. Globe Newspaper Co. v. United States, 517 U.S. 1166 (1996). The court stated that it was so construing the statute to avoid "potential conflict between the Act and the First Amendment." Id. at 90. Compare State v. James, 902 S.W.2d 911, 914 (Tenn. 1995) (the party seeking to close a juvenile hearing must shoulder the burden of proof and any closure order must be based on findings of particularized prejudice overriding the public's compelling interest in open proceedings, be no greater than necessary, and be entered only after consideration of reasonable alternatives to closure) with In re T.R., 52 Ohio St.3d 6, 18-19 (Ohio 1990), cert. denied, 498 U.S. 958 (1990) (juvenile court proceedings may be closed if there is a reasonable and substantial basis for believing that public access could harm the child or endanger the fairness of the proceeding, and the potential for harm outweighs the benefits of public access); Florida Pub. Co. v. Morgan, 253 Ga. 467, 473 (1984) (state may create a rule that

juvenile proceedings are presumed closed but the public/press must be given an opportunity to show that the state's or juvenile's interest in a closed hearing is not "overriding" or "compelling"); and Edward A. Sherman Pub. Co. v. Goldberg, 443 A.2d 1252, 1258 (R.I. 1982) (no First Amendment right of access to juvenile proceedings) and In re J.S., 140 Vt. 458, 466 (1981) (same).

If a judge opens juvenile proceedings to the public, the judge is not free to restrict the press from reporting fully on the case without meeting the standards for a prior restraint. George W. Prescott Pub. Co. v. Stoughton Div. of Dist. Court Dept. of Trial Court, 428 Mass. 309 (1998) (order granting access to juvenile court proceedings and records, but on condition that media and public refrain from revealing (1) names or addresses of children who had engaged in delinquent conduct connected to allegations in case, (2) names, addresses, or photographs of faces of any children who testified to their participation in such conduct, was an unlawful restraint on the press where judge made no detailed findings of fact identifying a compelling interest to be served by the restraint and demonstrating the absence of reasonable, less restrictive alternatives to the restraint).

24. G.L. c. 119, § 38.

25. Globe Newspaper Co. v. Commonwealth, 407 Mass. 879, 887 (1990) (noting that public has no constitutional or any other right of access to grand jury proceedings); Douglas Oil Co. of California v. Petrol Stops Northwest, 441 U.S. 211, 218 n.9 (1979) ("Since the 17th century, grand jury proceedings have been closed to the public, and records of such proceedings have been kept from the public eye. The rule of grand jury secrecy was imported into our federal common law and is an integral part of our criminal justice system.") (citation omitted); Jones v. Robbins, 74 Mass. (8 Gray) 329, 324 (1857) (Shaw, C.J.).

26. G. L. c. 278, § 16B (presiding justice of a district court may exclude the general public from the court room during the trial of "any" criminal proceedings involving husband and wife). This statute may be unconstitutional in light of Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (holding G.L. c. 278, § 16A, unconstitutional).

27. G. L. c. 278, § 16C (trial judges may exclude spectators from the court room during a trial for incest or rape, or during the portions of the trial when direct testimony is to be presented, if either of the parties requests it and if the defendant by a written statement waives his right to a public trial for those portions of the trial from which spectators are to be excluded). This statute may be unconstitutional in light of Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (holding G.L.

c. 278, § 16A, unconstitutional).

[28] Globe Newspaper Co. v. Commonwealth, 407 Mass. 879, 887 (1990) (noting, in dictum, that public has no constitutional nor any other right of access to depositions). Of course, should the deposition be introduced at trial, its contents would automatically become public. Moreover, in the absence of a protective order, a deposition transcript may be made available to any third party.

[29] Globe Newspaper Co. v. Commonwealth, 407 Mass. 879, 887 (1990) (noting, in dictum, that public has no constitutional nor any other right of access to lobby conferences and side-bar discussions at trial). "The cases explicitly recognize," however, "that although in some situations it may be appropriate to exclude the public and the press from chambers proceedings, a proceeding that would be subject to a right of access if held in open court does not lose that character simply because the trial court chooses to hold the proceeding in chambers." NBC Subsidiary (KNBC-TV, Inc.) v. Superior Court, 86 Cal. Rptr. 2d 778, 807, 20 Cal. 4th 1178, 980 P.2d 337 (Cal. 1999) (footnote omitted). See also In re Times-World Corp., 7 Va.App. 317, 373 S.E.2d 474 (Va.App. 1988) (ordering trial judge to grant access to closed proceedings held in his chambers where judge had already held closed voir dire and evidentiary hearings in chambers). In any case, there is a presumptive right of access to a transcript of side-bar conferences or to any recorded lobby conference.

[30] See District Court Standards of Judicial Practice, The Complaint Procedure §§ 3.15 and 3:16 (1975). The Standards are not mandatory in application in the sense of statutes or rules. The question of access to hearings on applications for criminal complaints has not been ruled upon by an appellate court.

[31] There is no Federal constitutional right to broadcast, photograph, or electronically record any judicial proceeding or portion thereof. Boston Herald, Inc. v. Superior Court, 421 Mass. 502, 507, n. 8 (1995). Rule 53 of the Federal Rules of Criminal Procedure bans the photographing or broadcasting of courtroom judicial proceedings in federal criminal cases. See United States v. McVeigh, 931 F. Supp. 753 (D. Colo. 1996) (public distribution of audio tapes of proceedings, where tapes were made as "backup system" to record made by official court reporter, violates Rule 53).

[32] S.J.C. R. 1:19(a) ("Cameras in the Courts"). The text of Rule 1:19 is identical to that of former Canon 3(A)(7) of the Code of Judicial Conduct, S.J.C. R. 3:09. Subsection (A)(7) was eliminated from Canon 3 on November 2, 1998, the same day that Rule 1:19 went into effect. Two Supreme Judicial Court single justice decisions interpreting former Canon 3(A)(7)(a) provide insight into how this rule should be

applied.

In The Hearst Corp. v. Justices of the Superior Court, SJ-96-0047 (Feb. 1, 1996) (Wilkins, J.), a single justice denied relief under G. L. c. 211, § 3, finding the trial court judge had not abused her discretion and was not wrong, as a matter of law, in closing an entire trial to electronic recording. The single justice found the judge's decision was warranted by the "special circumstances" of the case, which were: (1) "an established pattern of disruptive conduct by the defendant," a problem which was expected to continue throughout the entire trial, and (2) "a basis for concluding that there [was] a substantial likelihood of harm to witnesses, surviving victims, and others." The single justice found a fear of jurors being exposed to prejudicial information would not be an adequate basis for limiting electronic media coverage of a trial: While it is a valid concern, "[t]he cure is jury adherence to the judge's instructions not to watch, listen to, or read about the trial until the case is over." Similarly, an agreement by the defense and prosecution that electronic media would create a substantial likelihood of harm is not a sufficient reason to limit electronic media coverage.

Despite his ruling, the single justice emphasized that the "strong presumption" of the Canon "is that no media will be excluded from the courtroom," and a trial judge must make specific findings of fact to support any decision to limit electronic news media coverage. Moreover, although the Canon does not expressly order judges to adopt the least restrictive means of achieving the protection they are seeking when they invoke the exception to limit or suspend media coverage, "[i]mplicitly [] the rule requires a limitation or suspension of media coverage only to the extent necessary to eliminate the substantial likelihood of harm or other serious consequence." In addition, the single justice warned that the circumstances of the California case of People v. Simpson "should not be permitted to influence the operation of our Massachusetts rule."

In The Hearst Corp. v. Justices of the Superior Court, SJ-96-0076 (Feb. 29, 1996) (Greaney, J.), a single justice vacated provisions of a trial court order which had excluded television cameras and recording devices from a trial except for during opening statements, closing arguments, charge, verdict, and sentencing.

The single justice emphasized S.J.C. Rule 3:09, Canon 3(A)(7)(a), "favors coverage by the broadcast media, indeed creates a strong presumption in that direction, [and therefore] any limitation of coverage must have a well-documented showing of a substantial likelihood of harm or harmful consequences." The single justice did not find the trial judge's concerns about the jury being influenced by the media presence to be sufficiently documented to justify limiting the cameras or devices: While acknowledging the jury will be aware of the cameras, the single justice stated "the answer is not to bar coverage, but to instruct the jury, as often as necessary, on their role and responsibilities, and to arrange with the media to make

[the camera and recording devices] as unobtrusive as possible." There also was not sufficient support for the trial judge's prediction that a witness sequestration order might be impaired by television cameras and recording devices: Witnesses should be instructed to avoid any exposure to media coverage of the trial before they testify. Moreover, with the print media and electronic media reporters in the courtroom, witnesses will have the opportunity to learn of actual testimony if they desire. Finally, the single justice was not swayed by the argument that the media's intense interest in the case made it necessary to limit the electronic media: "The fact that the order was entered in a case that has sparked intense media interest is of marginal relevance. For the most part, the electronic media will only want to broadcast the testimony in trials that are noteworthy, and as to which there has been considerable publicity."

Rule 1:19 was amended effective January 3, 2000, to require parties to provide a representative of the Associated Press with notice of any motions to prevent camera or electronic coverage of court proceedings. The amended rule also allows a judge to defer acting on a media request for camera or electronic access to a proceeding until notice of the request is given to the parties to the proceeding and to a designated Associated Press representative. See R. 1:19(h)-(j).

[33] S.J.C. Rule 1:19(b). The rule also calls for the following limitations on the media: During a jury trial, a judge should not permit recording or close-up photographing or televising of bench conferences, conferences between counsel, or conferences between counsel and client; frontal or close-up photography of the jury panel usually should not be permitted; all equipment must be of the type, and positioned and operated in a manner, that does not detract from the dignity and decorum of the proceeding; only one stationary, mechanically silent video or motion picture camera and one silent still camera should be permitted in the courtroom at one time; the equipment and its operator usually should be in place and remain so as long as the court is in session and movement should be kept to a minimum, particularly in jury trials; a judge should require reasonable advance notice from the news media of their request to be present to broadcast, to televise, to record electronically, or to take photographs at a particular session, and in the absence of such notice, may refuse to admit them; and a judge should not make an exclusive arrangement with any person or organization for news media coverage of proceedings in the courtroom. S.J.C. Rule 1:19(c)-(g).

[34] See, e.g., KTTC Television, Inc. v. Foley, 7 Media L. Rep. 1094 (Minn. 1981) (sketch artists should be permitted in courtroom absent extraordinary circumstances in which sketching would disrupt proceedings or distract participants). See also Transcript, Ruling on Physical Barrier in Jury Box; Ruling on Identification of Jurors,

United States v. McVeigh and In the Matter of Petition of Colorado- Oklahoma Media Representatives, 96-CR-68, 97-X-29, 1997 WL 202233, *3 (D. Colo. April 26, 1997) (trial judge in Oklahoma City bombing case designed barrier between jury box and rest of courtroom, in part, "to prevent sketch artists from drawing jurors").

35. KPNX Broadcasting Co. v. Arizona Superior Court, 459 U.S. 1302, 1308 (Rehnquist, Circuit Justice 1982) (denying stay of an order requiring sketch artists to clear all juror drawings with court prior to broadcast, finding trial judge was trying to protect the defendant's right to a fair trial, had searched for alternatives to prior restraint, and the restraint was not so "demonstrably impermissible" as to warrant a stay at this point, noting that "of all conceivable reportorial messages that could be conveyed by reporters or artists watching [criminal] trials, one of the least necessary to appreciate the significance of the trial would be individual juror sketches"); Tsokalas v. Purtill, 756 F. Supp. 89 (D. Conn. 1991) (court order prohibiting the publication of identifiable sketches of jurors did not prohibit the media from exercising any First Amendment access right and was a reasonable time, place, and manner restriction, given the court's legitimate concern about unwanted pressure being put on jurors); cf. KPNX Broadcasting v. Superior Court, 139 Ariz. 246 (1984) (order requiring prior court approval of all jury sketches before broadcast an unconstitutional prior restraint, since order was entered without making a showing that it met the Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) test).

36. "Impoundment" means the act of keeping some or all of the papers, documents, or exhibits from a case separate and unavailable for public inspection; it includes the act of keeping dockets, indices, and other records unavailable for public inspection. The Uniform Rules apply to settlement agreements filed with the court. H.S. Gere & Son, Inc. v. Frey, 400 Mass. 326 (1987).

37. Globe Newspaper Co. v. Commonwealth, 407 Mass. 879, 886-87 (1990) (if judge determines portion of transcript from post-trial hearing in a criminal matter should be redacted, judge must make written findings of fact in support of that determination, consistent with the provisions of the Uniform Rules on Impoundment Procedure); Newspapers of New England, Inc. v. Clerk-Magistrate of the Ware Div. of the Dist. Court Dept., 403 Mass. 628, 632 (1988), cert. denied, 490 U.S. 1066 (1989) (citing Uniform Rules on Impoundment Procedure when reviewing a trial court's order impounding an affidavit filed in support of a search warrant issued in the course of a criminal investigation); see also The Boston Herald, Inc. v. Superior Court, 95-J-245 (Apr. 10, 1995) (Laurence, J.) (in the context of a criminal case impounding names and addresses of jurors, transcripts of certain lobby conferences, and trial exhibits, suggesting court should have used formal impoundment procedures under

the Uniform Rules on Impoundment Procedure, and objections to impoundment should be made pursuant to these rules).

38. News Group Boston, Inc. v. Commonwealth, 409 Mass. 627, 629 (1991) (procedural history of case reflects that single justice of Supreme Judicial Court had granted plaintiff access to probable cause portion of juvenile transfer hearing "without prejudice to any party seeking impoundment pursuant to the Uniform Rules on Impoundment Procedure Rules 7 and 8 of the Trial Court Rules").

39. When documents concern a public official's conduct in office, they may be impounded only on a showing of "overriding necessity" based on specific findings. George W. Prescott Pub. Co. v. Register of Probate for Norfolk County, 395 Mass. 274, 279, 282 (1985).

40. Citizens First Nat. Bank of Princeton v. Cincinnati Ins. Co., 178 F.3d 943, 945 (7th Cir. 1999) (holding invalid protective order allowing parties to designate as confidential any document believed to contain trade secrets or other confidential or governmental information) ("The determination of good cause cannot be elided by allowing the parties to seal whatever they want, for then the interest in publicity will go unprotected unless the media are interested in the case and move to unseal. The judge is the primary representative of the public interest in the judicial process and is duty-bound therefore to review any request to seal the record (or part of it). He may not rubber stamp a stipulation to seal the record.") (citation omitted).

41. Globe Newspaper Co. v. Commonwealth, 407 Mass. 879, 887 (1990) (stating that if Rule 8 written findings are not made, it would be impossible to conduct effective review of an order redacting a portion of a transcript); Boston Herald, Inc. v. Superior Court, 95-J-245 (Apr. 10, 1995) (Laurence, J.) (stating in dictum that if case had been brought as a Rule 8 motion and the trial judge had not made the required written findings, the single justice would have remanded the case to the trial judge to hold a hearing and make the requisite findings). For a good discussion on the kind of specificity that should be included in any order impounding records, see Newspapers of New England, Inc. v. Clerk-Magistrate of the Ware Div. of the Dist. Court Dept., 403 Mass. 628, 638-39 (1988) (Wilkins, J., concurring) (citations omitted), cert. denied, 490 U.S. 1066 (1989) ("[n]o general principle, articulated in support of impoundment, can justify an impoundment without case-specific fact-finding. Here, the judge's reason in support of impoundment was based solely on the threat to the criminal defendant's right to a fair trial. . . . The motion judge had to support such a conclusion by showing what facts would be unfairly prejudicial and how the criminal defendant's rights could not be reasonably protected other than by

impoundment. . . . The facts the judge relied on [the sparsity of the local population; the fact the warrant was issued on only a showing of probable cause; and the fact that certain information in the affidavits came from many sources, would be suppressible, or would be inadmissible at trial] do not, without more, justify the impoundment").

42. Under the procedure provided by the Uniform Rules, the media no longer have to file a complaint against the clerk of courts in order to secure access to impounded judicial records. See Ottaway Newspapers, Inc. v. Appeals Court, 372 Mass. 539 (1977) (strangers to an action seeking relief against an impoundment order may bring a civil action in the court which issued it, by joining the clerk of that court in his official capacity and the parties to the action; the action will end in a judgment capable of appeal).

43. Boston Herald, Inc. v. Superior Court, 95-J-245 (Apr. 10, 1995) (Laurence, J.) (single justice stating that if he had been presented with a Rule 8 impoundment order without any written findings, he would have remanded the case to the trial judge to hold a hearing and make the required findings; the fact-sensitive nature of an impoundment decision dictates that the resolution of all factual issues underlying the decision be made by a trial, not an appellate, judge).

44. Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978) (recognizing an historically-based, common law right to inspect and copy judicial records and documents); San Jose Mercury News, Inc. v. U.S. Dist. Court, 187 F.3d 1096, 1102 (9th Cir. 1999) ("Federal appellate courts have uniformly concluded that this common law right extends to both criminal and civil cases."). "Both the First Amendment and the common law standards require consideration of comparable factors in deciding the issue of impoundment." United States v. Salemme, 985 F. Supp. 193, 194 n.4 (D. Mass. 1997) (applying common-law principles to require unsealing documents submitted by defendants in connection with motion to dismiss, but not certain other documents obtained in discovery subject to prior protective order). Cf. Siedle v. Putnam Investments, Inc., 147 F.3d 7, 11 (1st Cir. 1998) (holding that district court abused its discretion in applying common-law presumption of access by ordering unsealing of plaintiff's filings, some of which defendant claimed were protected by attorney-client privilege, where district court did not identify and balance the interests at stake or endeavor to determine whether filings "actually fell within the ambit of the . . . privilege"). The Uniform Rules on Impoundment Procedure incorporate many of the common law principles surrounding the right to inspect and copy judicial records. H.S. Gere & Sons, Inc. v. Frey, 400 Mass. 326, 332 (1987). See also San Jose Mercury News, 187 F.3d at 1101-02 (holding that both the common law and the

Federal Rules of Civil Procedure afford the public a presumptive right of access to court records in civil cases before judgment).

45. Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) (First Amendment right of access to transcript of voir dire proceeding, based on right of access to voir dire proceeding itself); Globe Newspaper Co. v. Pokaski, 868 F.2d 497 (1st Cir. 1989) (a blanket restriction on access to the records of cases ending in acquittal, dismissal, nolle prosequi, or a finding of no probable cause violates the First Amendment, but a blanket restriction on access to records of cases ending in "no bill" does not violate the First Amendment, since the public has no right to attend grand jury proceedings and therefore has no right to grand jury records); In re Globe Newspaper Co., 729 F.2d 47, 52 (1st Cir. 1984) (establishing a First Amendment right of access to records submitted in connection with criminal proceedings); Oregon Publishing Co. v. United States Dist. Court, 920 F.2d 1462 (9th Cir. 1990) (extending qualified right of access to plea agreements and related documents in criminal cases).

Claims of access have not been decided under the Massachusetts Declaration of Rights.

46. Globe Newspaper Co. v. Pokaski, 868 F. 2d 497, 502 (1st Cir. 1989); In re Globe Newspaper Co., 729 F.2d 47, 52 (1st Cir. 1984); see also United States v. Antar, 38 F.3d 1348, 1359-60 (3d Cir. 1994) (emphasizing that right of access to voir dire proceedings includes both concurrent access to live proceedings and later access to a written record, stating "[i]t would be an odd result indeed were we to declare that our courtrooms must be open, but that transcripts of the proceedings occurring there may be closed, for what exists of the right of access if it extends only to those who can squeeze through the door?").

47. Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510 (1984).

48. Globe Newspaper Co. v. Pokaski, 868 F.2d 497, 507 (1st Cir. 1989) (“even a one to two day delay impermissibly burdens the First Amendment”); Anderson v. Cryovac, Inc., 805 F.2d 1, 9 (1st Cir. 1986) (“[u]ndue delay in responding to requests for relief from protective orders may indeed constitute an infringement of the First Amendment”); Ottaway Newspapers, Inc. v. Appeals Court, 372 Mass. 539, 551 (1977) (stating special expedition may be needed at every stage of a proceeding challenging an impoundment order).

49. A written or oral complaint may be filed with the Committee on Professional Responsibility for Clerks of Court.

50. "In this day and age, the right of access to a document generally includes the right to make a copy of it." New Boston Garden Corp. v. Board of Assessors of Boston, 24 Mass. App. Ct. 122, 125 (1987). See also Direct-Mail Service, Inc. v. Registrar of Motor Vehicles, 296 Mass. 353, 356 (1937) ("The right to inspect commonly carries with it the right to make copies without which the right to inspect would be practically valueless.").

51. Globe Newspaper Co. v. Fenton, 819 F. Supp. 89 (D. Mass. 1993) (the Massachusetts Criminal Offender Records Information System violates the First Amendment insofar as it denies public access to court-maintained alphabetical indices of defendants in closed criminal cases without an individualized judicial determination that a particular defendant's name must be sealed or impounded to serve a compelling state interest).

52. Globe Newspaper Co. v. Pokaski, 868 F.2d 497, 510 (1st Cir. 1989) (public must have access to records of criminal cases ending in dismissal or nolle prosequi unless trial court makes specific findings on the record showing closure is necessary to achieve a compelling interest; the provision of G. L. c. 276, § 100C, which automatically seals records of cases ending with acquittal or a finding of no probable cause is unconstitutional).

53. G.L. c. 265, § 41.

54. Trial Court Rule XI, Uniform Rule for Probable Cause Determinations for Persons Arrested Without a Warrant (e)(1)-(3).

55. See Administrative Office of the District Court, A Guide to Public Access to District Court Records 11 (1998).

56. G.L. c. 119, §§ 52, 60A. See also Commonwealth v. Williams, 427 Mass. 59, 63 (1998) (ordering that record be unimpounded pursuant to § 60A).

57. G.L. c. 119, § 74.

58. G.L. c. 6, §§ 178I, 178J. See Doe v. Attorney General (No. 1), 425 Mass. 210 (1997) (sex offender registration statute overrides, in part, G.L. c. 119, § 60A, which otherwise protects the confidentiality of juvenile records). The Supreme Judicial Court has repeatedly required changes in the administration of the statute, see, e.g., Doe v. AttorneyGeneral (No. 5), 430 Mass. 155 (1999), the constitutionality of which has not been definitively decided. See id. at 158 n.8.

59. G.L. c. 276, § 2B. See also Newspapers of New England, Inc. v. Clerk-Magistrate of the Ware Div. of the Dist. Court Dept., 403 Mass. 628 (1988), cert. denied, 490 U.S. 1066 (1989) (affidavit in support of a search warrant is a public document once it is returned to the court under both G. L. c. 276, § 2B, and the common law, but there is no First Amendment right of access to the affidavit).

60. G.L. c. 209A, § 8. This provision was recently amended. See 1999 Mass. Acts ch. 127, § 156 (H.B. 4900). The amendment provides, in part, that the "plaintiff's current residential address, former residential address, residential telephone number and workplace name, address and telephone number, shall be kept confidential from the defendant and defendant's attorney and shall be withheld from public inspection except by order of the court."

61. See, e.g., United States v. White, 855 F. Supp. 13 (D. Mass. 1994) (ordering that media be given access to exhibit, containing transcript of conversation intercepted by electronic surveillance, that criminal defendant had introduced at suppression hearing and court had impounded at government request). Courts are divided as to how to deal with requests for permission to copy audio and video tapes that were admitted into evidence. See, e.g., United States v. McDougal, 103 F.3d 651 (8th Cir. 1996) (affirming district court order denying media organizations' request for access to videotape recording of U.S. President's deposition testimony in criminal case); United States v. Edwards, 672 F.2d 1289, 1294 (7th Cir. 1982) (requiring the trial court to start with "a strong presumption" in favor of access, which can be overcome, but only "on the basis of articulable facts known to the court"); United States v. Criden, 648 F.2d 814, 823 (3d Cir. 1981) (there is a "strong presumption that material introduced into evidence . . . [should be accessible] for copying and broader dissemination"); Belo Broadcasting Corp. v. Clark, 654 F.2d 423, 434 (5th Cir. 1981) (adopting a general balancing test that characterizes the public's right of access as typically subordinate to a defendant's competing fair trial rights, stating "we read the [Supreme] Court's pronouncements as recognizing that a number of factors may militate against public access. In erecting such stout barriers against those opposing access and in limiting the exercise of the trial court's discretion, our fellow circuits have created standards more appropriate for protection of constitutional than common law rights"); In re National Broadcasting Co., Inc., 653 F.2d 609, 613 (D.C. Cir. 1981) (courts should deny access only if "justice so requires"); In re National Broadcasting Co., 635 F.2d 945, 952 (2d Cir. 1980) ("it would take the most extraordinary circumstances to justify restrictions on the opportunity of those not physically in the courtroom to see and hear the evidence when it is in a form that readily permits sight and sound reproduction").

62. F.T.C. v. Standard Financial Management Corp., 830 F.2d 404 (1st Cir. 1987) (relevant documents which are submitted to and accepted by a court in the course of adjudicatory proceedings become documents to which the common law presumption of public access applies). But see Savannah College of Art & Design v. School of Visual Arts, Inc., 270 Ga. 791, 515 S.E.2d 370 (Ga. 1999) (holding that access to confidential settlement agreement document should be limited and that document should not have been ordered unsealed, even though document had been filed with trial court as exhibit to motion).

63. Poliquin v. Garden Way, Inc., 989 F.2d 527, 533 (1st Cir. 1993) (videotape deposition admitted into evidence at trial and excerpts from interrogatory answers read into the record cannot be sealed after trial except for the most compelling of reasons; the ordinary showing of good cause which is adequate to protect discovery material from disclosure cannot justify protecting such material after it has been introduced at trial since "only the most compelling showing can justify post-trial restriction on disclosure of testimony or documents actually introduced at trial"). See also United States v. Salemme, 985 F. Supp. 193 (D. Mass. 1997) (ordering unsealing, without any redactions, of (1) criminal defendants' motion to dismiss indictments and related attachments containing information derived from discovery documents subject to protective order and (2) defendant's notice of intent to claim defense, but denying defense request for disclosure of discovery documents or information which had been referred to in submissions but not yet admitted into evidence at hearing, and which was subject to protective order). A different standard is applied to discovery documents that have not been offered into evidence or even filed with the court. See, e.g., In re Associated Press, 162 F.3d 503, 511-13 (7th Cir. 1998) (videotaped testimony of Illinois governor as defense witness in criminal trial, not yet offered into evidence, is "deposition" testimony to which press need not be given access). Cf. Anderson v. Cryovac, Inc., 805 F.2d 1, 7, 13 (1st Cir. 1986) (there is no First Amendment public right of access or common law presumption of access to documents submitted to a court in connection with discovery motions and, therefore, the court may deny public access if good cause is shown).

Compare Public Citizen v. Liggett Group, Inc., 858 F.2d 775 (1st Cir.1988) (although there is no constitutional or common law right to public access to discovery materials, the Federal Rules of Civil Procedure create a presumption in favor of public access of pre-trial materials; district court did not abuse its discretion in ordering public disclosure of tobacco industry documents after dismissal of case where no good cause had been shown for a protective order prohibiting disclosure), with Harris-Lewis v. Mudge, No. CIV. A. 96-2349-F, 9 Mass.L.Rptr. 698, 1996 WL 140169, *1 (Mass. Super. Ct. March 11, 1999) (Fremont Smith, J.) (denying media motion for order requiring the parties to file all pre-trial discovery, "including

deposition transcripts, exhibits, interrogatory responses and answers to document requests," with the clerk of court); id. at n.4 (noting that the Massachusetts Rules of Civil Procedure, unlike the Federal Rules, presumptively forbid filing of pre-trial discovery documents with clerks of court); id. at *5 n.10 (ordering that media may have access to pre-trial materials filed in connection with future pre-trial motions).

Rule 26(c) of the Massachusetts Rules of Civil Procedure authorizes a court in a civil action, on motion by a party or by a person from whom discovery information is sought, to enter a protective order for good cause shown limiting public access to any documents and information produced in discovery. Rule 26(c)(6) allows a court to order that a deposition, after being sealed, be opened only by order of the court. Rule 26(c)(8) allows a court to order "that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court." In Seattle v. Rhinehart, 467 U.S. 20 (1984), the United States Supreme Court upheld a state rule with nearly identical language against a First Amendment challenge.

64. G.L. c. 234A, § 67 (not later than ten days in advance of scheduled appearances by jurors, the Office of the Jury Commissioner is required to send to appropriate clerks of court a list containing the name, address, and date of birth of each juror expected to appear for service and, unless the court orders otherwise, these lists shall be available for public inspection).

65. There is no Massachusetts case law on access to jury questionnaires used to supplement or in lieu of oral voir dire. Several courts in other jurisdictions have held that, because there is a presumptive right of access to the voir dire itself, there is a corresponding presumptive right of access to nonstatutory jury questionnaires designed for a particular case. See, e.g., United States v. George, 786 F. Supp. 56 (D.D.C. 1992) (public may have access to thirty-six page juror questionnaires for those individuals who appeared for individual voir dire, after deeply personal and private information that the court believed the prospective jurors would wish to keep confidential was redacted); Copley Press, Inc. v. San Diego County Superior Court, 228 Cal. App. 3d 77, cert. denied, 502 U.S. 909 (1991) (court shall provide public access to the questionnaire of an individual juror when the juror is called to the jury box for oral voir dire, but the public shall not have access to questionnaires of venire persons who are not called to the jury box since these questionnaires do not play any part in the voir dire); see also Capital City Press v. Erwin, 619 So.2d 533 (La. 1993) (holding, without providing reasoning, that trial court shall make jury questionnaires of those jurors who appeared for individual voir dire public, although “intensely personal information” shall be redacted). See also United States v. King, 140 F.3d 76 (2d Cir. 1998) (upholding limits, in trial of celebrity, on immediate press

access to prospective jurors' responses to voir dire questionnaires).

66. The names of jurors are usually announced in open court during the voir dire as the jurors are seated. The addresses may be derived by review of the venire list. G.L. c. 234A, §67. Because of due process requirements, a trial judge may not empanel an anonymous jury unless the judge "has first determined on adequate evidence that anonymity is truly necessary" -- "necessary to protect the jurors from harm or improper influence" -- "and has made written findings on the question." Commonwealth v. Angiulo, 415 Mass. 502, 527 (1993). On the right of access to trial juror names and addresses, compare, e.g., Gannett Co., Inc. v. State, 571 A.2d 735 (Del. 1989), cert. denied, 495 U.S. 918 (1990) (no First Amendment right of public access to the names of trial jurors while trial is pending; trial court's decision to order court personnel to keep jurors' names confidential was within its discretion) with In re Baltimore Sun Co., 841 F.2d 74 (4th Cir. 1988) (after a jury has been seated, public is entitled to names and addresses of jurors; decision based on common law, rather than constitutional grounds). See also Unabom Trial Media Coalition v. U.S. Dist. Court, 183 F.3d 949 (9th Cir. 1999) (dismissing for mootness press appeal of district court decision to withhold identities of jurors in trial of "Unabomber" Theodore Kaczynski until Kaczynski ended pretrial proceedings by pleading guilty). No reported decision from the Massachusetts courts has addressed the propriety of sealing the transcript of a voir dire proceeding in order to prevent the public from ascertaining juror names, the propriety of using juror numbers instead of names during the voir dire, or the issue of access to the judicial record containing the names of seated jurors.

67. Whether and under what circumstances the names of trial jurors can be impounded after mistrial or verdict has been contested in the trial courts of the Commonwealth. See Commonwealth v. Longo, 92-1699 (Lauriat, J.) (denying access to names of jurors who had deliberated in a criminal trial); Commonwealth v. Kater, 85-2731 (Dec. 31, 1992) (Lauriat, J.) (interests of justice required denying requests for names and addresses of trial jurors after trial ended in a mistrial; mandated disclosure might have a chilling effect on the court's "ability to secure willing, impartial and unbiased jurors for the next trial of [the] case"). Interestingly, in Longo and Kater the judge did not impound the transcript of the voir dire, and thus provided the public with an alternative, albeit indirect, route of access to the names and addresses of the trial jurors; cf. Memorandum from Chief Justice Robert L. Steadman to Justices of the Superior Court, Aug. 1, 1989 ("[s]ome members of the press have expressed concern over their inability to obtain the names and addresses of jurors from the various session clerks. . . . These lists are . . . to be available for public inspection upon request, unless the court orders otherwise"). Although a

single justice of the Appeals Court has suggested the trial court cannot impound the names and addresses of jurors without conducting a hearing under Rule 8 of the Uniform Rules and making the particularized findings required by those rules, Boston Herald, Inc. v. Superior Court, 95-J-245 (Apr. 10, 1995) (Laurence, J.), and although a single justice of the Supreme Judicial Court has denied a petition to vacate an order which denied access to the names of jurors after trial, News Group Boston, Inc. v. Superior Court Depart. of the Trial Court, SJ-94-0046 (Mar. 10, 1994) (Lynch, J.) (denying relief from order issued in Commonwealth v. Longo), there are no Massachusetts full court appellate decisions on this issue.

In In re Globe Newspaper Co., 920 F.2d 88 (1st Cir. 1990), the First Circuit reversed the trial judge's decision to deny public access to the names and addresses of jurors after the trial had concluded, holding that under the Jury Selection and Service Act of 1968, 28 U.S.C. § 1861, and the District of Massachusetts Plan for Random Selection of Jurors, Massachusetts had chosen to allow jurors' names and addresses to be made public after summons and appearance and, thereafter, to permit impoundment only upon a judge's determination that the "interests of justice" so require. The First Circuit found that a credible threat of jury tampering or a risk of personal harm to individual jurors would meet the "interests of justice" standard, but that jurors' desires for privacy and the trial judge's distaste for exposing the jurors to press interviews did not meet that standard. This holding clearly is limited to federal court cases. However, a Massachusetts federal district court judge has held that there is a First Amendment right to the names and addresses of jurors, wholly apart from the Jury Selection and Service Act and the District of Massachusetts Plan for Random Selection of Jurors. United States v. Doherty, 675 F. Supp. 719, 724-25 (D. Mass. 1987) (Young, J.) (public has a First Amendment right of access to identity of jurors in criminal cases, but balancing this right against jurors' privacy interests justifies delaying access for seven days to permit sequestered jurors to rejoin their families, resume their personal lives, and reflect on their service). Assuming that there is a constitutional right of access to the names and addresses of jurors, the degree to which the release of the names can be delayed is a matter that also has been litigated. See, e.g., Sullivan v. National Football League, 839 F. Supp. 6 (D. Mass. 1993) (delaying access to jury list for ten days after verdict in a civil case, finding delay would not hinder the values espoused by the First Amendment, while giving jurors time to reflect on the experience of jury service and determine what, if anything, they wished to discuss with the press); United States v. Butt, 753 F. Supp. 44 (D. Mass. 1990) (delaying access to jury list for one week after trial without making particularized findings that such a delay is warranted by the individual facts of the case).

See also In re Disclosure of Juror Names and Addresses, 233 Mich.App. 604, 605-06, 592 N.W.2d 798, 799 (Mich.App. 1999) (holding that newspaper has

qualified First Amendment right of access postverdict to names and addresses of jurors, subject to trial court's discretion to fashion order taking into account juror safety and other interests, and remanding for specific findings as to juror safety) ("Most federal and state courts that have addressed this issue have articulated a limited or qualified right to such access, premised on the Press-Enterprise rationale that openness in all aspects of our justice system promotes fairness to litigants and promotes public faith in our jurisprudence.") (footnote omitted); id., 233 Mich.App. at 630, 592 N.W.2d at 809 ("Privacy concerns alone, unaccompanied by safety concerns, are not sufficient to justify total denial of media access to jurors' names.").

In Commonwealth v. Woodward, Crim. No. 97-433 (Mass. Super. 1997), affirmed on other grounds, 427 Mass. 659 (1998), an access ruling in a homicide case that attracted attention throughout the world, the trial judge denied a press motion following the verdict for access to the telephone numbers and addresses of jurors. Publication of the numbers and addresses, the court said, would present "a clear and present danger that individuals other than the media will, in one way or another, communicate with the juror in a manner which the juror is reasonably likely to find highly offensive and threatening. . . . The concern here . . . is the vulnerability of the jurors to undue and unfair intellectual, moral, and physical pressure, by way of threats and otherwise." By statute, all information inserted by jurors in their questionnaires may not be released unless the court orders otherwise. G.L. c. 234, §§ 22-23.

68. G.L. c. 209C, § 13.

69. Upon completion of an inquest, the inquest documents shall remain impounded and the inquest judge shall transmit his report and a transcript of the evidence received by him to the appropriate clerk of the Superior Court. If the District Attorney certifies that no prosecution is proposed, an indictment has been sought but not returned, a prosecution for the death has been completed, or the Superior Court determines that no criminal trial is likely, then upon order of the Superior Court, the report and transcript shall be made public. See Kennedy v. Justice of Dist. Court, 356 Mass. 367, 377-78 (1969).

Following the Superior Court order, "any other inquest documents in the possession of the District Court, including audio copies of the electronic recording of the proceedings," may be opened to the public in the discretion of the inquest judge or a district court judge if the former is not reasonably available. "[S]uch discretion should be governed by the
[Uniform Rules on Impoundment Procedure], and by applicable constitutional requirements governing public access to court records." District Court Standards of

Judicial Practice, Inquest Proceedings § 4.04 (1990), cited in Administrative Office of the District Court, A Guide to Public Access to District Court Records 19 (1998). In In re: Inquest into the Death of Michelle Walton, No. Crim. 95-11470 (Mass. Super. Ct. Dec. 15, 1995) (Volterra, J.), the court held that inquest documents other than an inquest transcript and report are protected from public disclosure by a qualified privilege. The court agreed to review inquest documents in camera to determine what parts of the documents needed to be redacted or withheld.

70. See Commonwealth v. Doe, 420 Mass. 142 (1995) (approves use, for hearing petitions to seal record of criminal case under second paragraph of G. L. c. 276, § 100C, of two-stage proceeding set up in Globe Newspaper Co. v. Pokaski, 868 F.2d 497 (1st Cir. 1989), but states that defendant need not show an actual likelihood of immediate harm in order to obtain sealing); In the Matter of Mel Dahl, 429 Mass. 1009, 1010 (1999) (where attorney subject to discipline submitted materials in discipline proceeding that made allegations against his former client, single justice acted within his discretion in impounding materials "in order to protect the former client's privacy"); Virmani v. Presbyterian Health Services Corp., 515 S.E.2d 675 (N.C. 1999) (in physician's suit against hospital, closure of proceedings and sealing of confidential medical peer review committee records did not violate First Amendment).

71. Mass. R. Crim. P. 5(d); Globe Newspaper Co. v. Pokaski, 868 F.2d 497, 509-10, n. (1st Cir. 1989) (upholding prohibition in G.L. c. 276, § 100C, on access to the records of “no bills” returned by a grand jury); Matter of Doe Grand Jury Investigation, 415 Mass. 727 (1993) (videotape of a line-up requested by and recorded for grand jury investigating a shooting incident not subject to public disclosure even after investigation and prosecution concluded and even though convicted defendants consented to disclosure; disclosure would "disserve the important public interests of encouraging free disclosure of information to the grand jury and free deliberations"); United States v. Smith, 123 F.3d 140 (3d Cir. 1997) (affirming district court order denying access to (1) sentencing memorandum submitted by government to court in grand jury proceeding; (2) briefs submitted by parties concerning extent to which memorandum contained grand jury materials; (3) hearing on whether government violated grand jury secrecy by releasing memorandum to public); Daily Journal Corp. v. Superior Court, 86 Cal.Rptr.2d 623, 628, 20 Cal.4th 1117, 979 P.2d 982 (Cal. 1999) (trial court erred in ordering release of all testimony and documents presented to grand jury in course of criminal investigation; "absent express legislative authorization, a court may not require disclosure" of grand jury materials). Cf. WBZ-TV4 v. District Attorney for the Suffolk District, 408 Mass. 595 (1990) (affirming, in particular circumstances of ongoing

grand jury investigation, denial of television station's request for injunctive relief permitting access to videotape of lineup and tape-recorded statement of witness used in investigation). The District of Columbia Circuit Court of Appeals has held that the press has no First Amendment right of access to proceedings "ancillary" to grand jury investigations. See In re Motions of Dow Jones & Co., 142 F.3d 496 (D.C.Cir. 1998). See also In re Grand Jury Subpoena, 103 F.3d 234 (2d Cir. 1996) (although press might have qualified First Amendment right of access to hearing and sealed papers related to motion to compel government to disclose alleged illegal electronic surveillance, government's interest in maintaining secrecy of grand jury process overcame any such right, insofar as motion was related to and affected grand jury proceedings).

72. G.L. c. 94C, § 34. The constitutionality of this mandatory sealing statute has not been tested. In Globe Newspaper Co. v. Pokaski, 868 F.2d 497 (1st Cir. 1989), the court held that the provision of G. L. c. 276, § 100C, which called for automatic sealing of cases ending in acquittal or a finding of no probable cause violated the First Amendment, and that the provision of § 100C which called for the sealing of cases ending in nolle prosequi or dismissal where the court finds "substantial justice would best be served" by the sealing is constitutional only if the records are sealed after a court makes specific findings that sealing is necessary to effectuate a compelling governmental interest. St. 1973, c. 1102, § 1, provides for mandatory sealing of the record of conviction for first-offense possession of marijuana upon the defendant's petition if the defendant was convicted prior to July 1, 1972. This statute may be unconstitutional in light of Globe Newspaper Co. v. Pokaski, 868 F.2d 497 (1st Cir. 1989). See Administrative Office of the District Court, A Guide to Public Access to District Court Records 33 (1998).

73. G.L. c. 94C, § 44. The constitutionality of this mandatory sealing statute has not been tested. But see Globe Newspaper Co. v. Pokaski, 868 F.2d 497 (1st Cir. 1989).

74. G.L. c. 276, § 100A (Commissioner “shall” comply with a request to seal records provided: (1) that said person’s court appearance and court disposition records, including termination of court supervision, probation, or sentence for any misdemeanor, occurred not less than ten years prior to said request; (2) that said person’s court appearance and court disposition records, including termination of court supervision, probation, or sentence for any felony, occurred not less than fifteen years prior to said request; (3) that said person had not been found guilty of any criminal offense within the Commonwealth in the ten years preceding such request, except motor vehicle offenses in which the penalty does not exceed a fine

of fifty dollars; and (4) the petitioner has not been convicted of any criminal offense in any other state, United States possession, or in a court of federal jurisdiction, except such motor vehicle offenses, as aforesaid, and has not been imprisoned in any state or county within the preceding ten years). This provision does not apply to certain specified offenses. The constitutionality of this statute has not been tested. But see Globe Newspaper Co. v. Pokaski, 868 F.2d 497 (1st Cir. 1989).

75. G.L. c. 234A, §§ 22 & 23 (juror questionnaires are not public records and "[e]xcept for disclosures made during voir dire or unless the court orders otherwise, the information inserted by jurors in the questionnaires shall be held in confidence by the court, the clerk or assistant clerk, the parties, trial counsel, and their authorized agents").

76. G.L. c. 127, § 152. Paragraph 3 of G.L. c. 127, § 152, provides that a pardon petition "shall" be filed with the parole board prior to its presentation to the governor, and that the petition "shall thereupon become a public record." It would thus appear that petitions for pardon are exempt from the sealing requirement of G.L. c. 127, § 152.

77. G.L. c. 276, § 2B. Cf. In the Matter of 2 Sealed Search Warrants, 710 A.2d 202, 210 (Del. 1997) ("the press does not have a First Amendment right of access to pre-indictment search warrants and documentation").

78. G.L. c. 209A, § 8.

79. District Court Special Rule 212(e), cited in Administrative Office of the District Court, A Guide to Public Access to District Court Records 18 (1998).

80. Supplemental Probate Court Rule 401(d). See also Domestic Relations Procedure Rule 1.

81. Upon completion of an inquest, the inquest documents shall remain impounded and the inquest judge shall transmit his report and a transcript of the evidence received by him to the appropriate clerk of the Superior Court. If the District Attorney certifies that no prosecution is proposed, an indictment has been sought but not returned, a prosecution for the death has been completed, or the Superior Court determines that no criminal trial is likely, then upon order of the Superior Court, the report and transcript shall be made public. See Kennedy v. Justice of Dist. Court, 356 Mass. 367, 377-78 (1969).

Following the Superior Court order, "any other inquest documents in the possession

of the District Court, including audio copies of the electronic recording of the proceedings," may be opened to the public in the discretion of the inquest judge or a district court judge if the former is not reasonably available. "[S]uch discretion should be governed by the procedures governing impoundment, Trial Court Rule VIII [Uniform Rules on Impoundment Procedure], and by applicable constitutional requirements governing public access to court records." District Court Standards of Judicial Practice, Inquest Proceedings § 4.04 (1990), cited in Administrative Office of the District Court, A Guide to Public Access to District Court Records 19 (1998). In In re: Inquest into the Death of Michelle Walton, No. Crim. 95-11470 (Mass. Super. Ct. Dec. 15, 1995) (Volterra, J.), the court held that inquest documents other than an inquest transcript and report are protected from public disclosure by a qualified privilege. The court agreed to review inquest documents in camera to determine what parts of the documents needed to be redacted or withheld.

82. Supplemental Probate Court Rule 404.

83. Court guidelines are not mandatory in application in the sense of statutes or rules.

84. G.L. c. 123, § 36A ("[a]ll reports of examinations made to a court pursuant to sections one to eighteen, inclusive, section forty-seven and forty-eight shall be private except in the discretion of the court. All petitions for commitment, notices, orders of commitment and other commitment papers used in proceedings under sections one to eighteen and section thirty-five shall be private except in the discretion of the court . . .; provided that nothing in this section shall prevent public inspection of any complaints or indictments in a criminal case, or prevent any notation in the ordinary docket of criminal cases concerning commitment proceedings . . . against a defendant in a criminal case"). Cf. G.L. c. 123, § 35 (specifying procedure for commitment of alcoholic persons). See also In re Times-World Corp., 488 S.E.2d 677, 681 (Va.App. 1997) (holding that First Amendment and cognate provision of Virginia Constitution accord the public a qualified right of access to attend criminal competency hearings); United States v. Kaczynski, 154 F.3d 930 (9th Cir. 1998) (affirming district court order, based on common-law right of access to judicial records, releasing redacted psychiatric report as to competency of defendant).

85. G.L. c. 123, § 36A. The issue of access to reports of drug dependency examinations and rehabilitation, see G.L. c. 111E, §§ 10-11, has not been tested. See Administrative Office of the District Court, A Guide to Public Access to District Court Records 22 n.76 (1998) ("unclear" whether such reports are available). The

reports are required to be reported to the court, and the court is required to consider them in determining whether to grant requests for assignment to a drug treatment facility. Quarterly reports on progress made in treatment by defendants are required to be provided to the assigning court.

86. G.L. c. 265, § 24C (that portion of court records which contains the name of the victim in an arrest, investigation, or complaint for rape or assault with intent to rape "shall" be withheld from public inspection, except with the consent of a justice of such court where the complaint or indictment is or would be prosecuted).

87. Upon completion of an inquest, the inquest documents shall remain impounded and the inquest judge shall transmit his report and a transcript of the evidence received by him to the appropriate clerk of the Superior Court. If the District Attorney certifies that no prosecution is proposed, an indictment has been sought but not returned, a prosecution for the death has been completed, or the Superior Court determines that no criminal trial is likely, then upon order of the Superior Court, the report and transcript shall be made public. See Kennedy v. Justice of Dist. Court, 356 Mass. 367, 377-78 (1969).

Following the Superior Court order, "any other inquest documents in the possession of the District Court, including audio copies of the electronic recording of the proceedings," may be opened to the public in the discretion of the inquest judge or a district court judge if the former is not reasonably available. "[S]uch discretion should be governed by the procedures governing impoundment, Trial Court Rule VIII [Uniform Rules on Impoundment Procedure], and by applicable constitutional requirements governing public access to court records." District Court Standards of Judicial Practice, Inquest Proceedings § 4.04 (1990), cited in Administrative Office of the District Court, A Guide to Public Access to District Court Records 19 (1998). In In re: Inquest into the Death of Michelle Walton, No. Crim. 95-11470 (Mass. Super. Ct. Dec. 15, 1995) (Volterra, J.), the court held that inquest documents other than an inquest transcript and report are protected from public disclosure by a qualified privilege. The court agreed to review inquest documents in camera to determine what parts of the documents needed to be redacted or withheld.

88. G.L. c. 209A, § 8 (records of cases “where the plaintiff or defendant is a minor shall be withheld from public inspection except by order of the court . . .”).

89. G.L. c. 210, § 5C ("All petitions for adoption, all reports submitted thereunder and all pleadings, papers or documents filed in connection therewith, docket entries in the permanent docket and record books shall not be available for inspection, unless

a judge of probate of the county where such records are kept, for good cause shown, shall otherwise order. . . . This section shall apply to the index of the court of all such entries, a separate index of which shall be provided.").

90. Supplemental Probate Court Rule 201(3). See also Domestic Relations Procedure Rule 1.

91. G.L. c. 119, §§ 52, 60A. G.L. c. 276, § 100B, provides that an individual may request that the Commissioner of Probation seal his or her delinquency file and "[t]he commissioner shall comply with such request provided (1) that any court appearance of disposition including court supervision, probation, commitment or parole, the records for which are to be sealed, terminated not less than three years prior to said requests; (2) that said person has not been adjudicated delinquent or found guilty of any criminal offense within the commonwealth in the three years preceding such request, except motor vehicle offenses in which the penalty does not exceed a fine of fifty dollars nor been imprisoned under sentence or committed as a delinquent within the commonwealth within the preceding three years; and (3) . . . the petitioner . . . has not been adjudicated delinquent or found guilty of any criminal offense in any other state, United States possession or in a court of federal jurisdiction, except such motor vehicle offenses aforesaid, and has not been imprisoned under sentence or committed as a delinquent in any state or county within the preceding three years." The constitutionality of this statute has not been tested. But see Globe Newspaper Co. v. Pokaski, 868 F.2d 497 (1st Cir. 1989).

92. See District Court Standards of Judicial Practice, The Complaint Procedure §§ 3.15 and 3:16 (1975), cited in Administrative Office of the District Court, A Guide to Public Access to District Court Records 16 (1998). The status of pending or denied applications has not been ruled upon by an appellate court.

93. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976); see also CBS Inc. v. Davis, 510 U.S. 1315, 1317 (Blackmun, Circuit Justice 1994) (citations omitted) ("Although the prohibition against prior restraints is by no means absolute, the gagging of publication has been considered acceptable only in 'exceptional cases.' Even where questions of allegedly urgent national security, or competing constitutional interests, are concerned, we have imposed this 'most extraordinary remed[y]' only where the evil that would result from the reportage is both great and certain and cannot be mitigated by less intrusive measures."); New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam) (citations omitted) ("'[a]ny system of prior restraints on expression comes to this Court bearing a heavy presumption against its constitutional validity,'" and the state "'carries a heavy

burden of showing justification for the imposition of such a restraint'"); Procter & Gamble Co. v. Bankers Trust Co., 78 F.3d 219, 227 (6th Cir. 1996) (noting the Supreme Court never has upheld a prior restraint, even when faced with the competing interests of national security or the Sixth Amendment right to a fair trial). For a rare example of a case in which a prior restraint was approved, see State-Record Co., Inc. v. State, 504 S.E.2d 592, 594, 332 S.C. 346 (1998) (upholding, "[u]nder the extremely limited factual circumstances of this case," prior restraint on publication of contents of videotape of privileged conversation between murder defendant and his attorney where conversation had been surreptitiously recorded), cert. denied sub nom. State-Record Co., Inc. v. Quattlebaum, 119 S.Ct. 1355 (U.S. 1999).

94. Sheppard v. Maxwell, 384 U.S. 333, 362-63 (1966); see also Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 495 (1975) (the First Amendment prevents a state from prohibiting the press from publishing the name of a rape victim where that information had been placed "in the public domain on official court records").

95. Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976). Prior restraints on publishing the identities of witnesses appear to be unconstitutional. See, e.g., State v. Montgomery, 929 S.W.2d 409, 412 (Tenn.Crim.App. 1996) ("when there is an open, public trial, the media has an absolute right to publish any information that is disseminated during the course of the trial"). But in at least one case, a court upheld the part of a challenged order that forbade the media from publishing the names and addresses of prospective jurors and seated jurors for a criminal trial. See Sunbeam Television Corp. v. State, 723 So.2d 275 (Fla. Dist. Ct. App. 1998) (en banc), review denied, 740 So.2d 529 (Fla. 1999).

96. In the Matter of Providence Journal Co., 820 F.2d 1342, 1351, modified on reh'g by 820 F.2d 1354 (1st Cir. 1986), cert. granted, 484 U.S. 814 (1987), and cert. dismissed, 485 U.S. 693 (1988); see also Procter & Gamble Co. v. Bankers Trust Co., 78 F.3d 219 (6th Cir. 1996) (same).

97. S.J.C. R. 3:07, Mass. Rules of Professional Conduct Rule 3.6(a). The official Comment to Rule 3.6 provides guidance as to what subjects are likely to violate the substantial likelihood standard. Paragraph 5 of the Comment enumerates "certain subjects which are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

"1. the character, credibility, reputation or criminal

record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

"2. in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

"3. the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

"4. any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

"5. information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

"6. the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty."

Paragraph (b) creates exceptions to paragraph (a) for certain specific subjects: "Notwithstanding paragraph (a), a lawyer may state:

"1. the claim, offense, or defense involved, and, except when prohibited by law, the identity of the persons involved;

"2. the information contained in a public record;

"3. that an investigation of the matter is in progress;

"4. the scheduling or result of any step in litigation;

"5. a request for assistance in obtaining evidence and information necessary thereto;

"6. a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

"7. in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation, and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time, and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation."

Also notwithstanding paragraph (a), paragraph (c) allows a lawyer to make statements in order to protect a client "from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyers' client." Such statements must be "limited to such information as is necessary to mitigate the recent adverse publicity." Further, paragraph (e) allows a lawyer to make statements in order to reply to public misconduct charges against the lawyer and to participate "in the proceedings of a legislative, administrative, or other investigative body."

For a decision upholding sections of a federal district court's local rule that

forbids lawyers from making public statements regarding the identity, testimony, or credibility of prospective witnesses and from giving any opinion as to the merits of a pending case, see In re Morrissey, 168 F.3d 134 (4th Cir. 1999), cert. denied, 119 S.Ct. 2394 (U.S. 1999).

98. S.J.C. R. 3:07, Mass. Rules of Professional Conduct Rule 3.6(d).

99. In Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991), the Supreme Court held that a Nevada Supreme Court rule prohibiting a lawyer from making extrajudicial statements to the press that he knows or reasonably should know have a "substantial likelihood of materially prejudicing" an adjudicative proceeding (although void for vagueness as interpreted by the Nevada Supreme Court) provides a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the state's interest in fair trials. A majority of the Court reasoned that the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than the "clear and present danger" test established for regulation of the press in Nebraska Press Ass'n. v. Stuart, 427 U.S. 539 (1976), in part because lawyers' extrajudicial statements are likely to be received as especially authoritative since lawyers have special access to information through discovery and client communication.

100. In Care and Protection of Edith, 421 Mass. 703 (1996), the Supreme Judicial Court vacated an order that directed the parties not to "discuss any aspect of the ongoing proceedings with any member of the media . . . if it is reasonable to believe that the information communicated will lead to the identity of the subject children," finding it was an unconstitutional prior restraint on the right of the father to comment on the judicial proceedings and on the conduct of the Department of Social Services. (Although the order included a prior restraint on both the parties and the parties' attorneys and agents, the court's holding was based on the father's challenge to the order). Citing Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976), the court held that any attempt to restrain speech must be justified by a compelling state interest to protect against a serious threat of harm. Any order seeking to enjoin speech must be based on detailed findings of fact that (a) identify the compelling interest that the restraint will serve and (b) demonstrate that no reasonable, less restrictive alternative to the order is available.

See Seattle Times Co. v. Rhinehart, 467 U.S. 20, 32-33 (1984) (citation omitted) (a newspaper, which was itself a defendant in a libel action, could be restrained from publishing material about the plaintiffs and their supporters to which it had gained access through court-ordered discovery; "[a]lthough litigants do not 'surrender their First Amendment rights at the courthouse door,' those rights may be

subordinated to other interests that arise in this setting," for example, "on several occasions [the court has] approved restriction on the communications of trial participants where necessary to ensure a fair trial for a criminal defendant"); Levine v. United States Dist. Ct., 764 F.2d 590, reh'g denied, 775 F.2d 1054 (9th Cir. 1985) (en banc), cert. denied, 476 U.S. 1158 (1986) (gag order on trial participants - attorneys and parties and their agents and representatives - in criminal espionage trial was not an unconstitutional prior restraint, because serious and imminent threat to the administration of justice existed and trial court had correctly found that alternatives of voir dire, change of venue, postponement, and sequestration would either be ineffective or counterproductive); cf. In re Russell, 726 F.2d 1007 (4th Cir.), cert. denied, 469 U.S. 837 (1984) (protective order gagging individuals who may be called as prosecution witnesses from making any extra-judicial statements was not an unconstitutional prior restraint, but rather was a restriction on trial participants permitted by Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) and Sheppard v. Maxwell, 384 U.S. 333 (1966)).

101. See, e.g., Contra Costa Newspapers v. Superior Court, 61 Cal.App.4th 862, 72 Cal.Rptr.2d 69 (Cal.App. 1998) (invalidating trial court order forbidding press from communicating with jurors who told judge that they did not wish to discuss their deliberations); Journal Pub. Co. v. Mechem, 801 F.2d 1233 (10th Cir. 1986) (granting newspaper's petition for writ of mandamus directing district court to dissolve its post-trial order prohibiting press interviews with jurors in a civil case, finding it was overbroad and therefore an unconstitutional prior restraint); In re Express-News Corp., 695 F.2d 807 (5th Cir. 1982) (local district court rule which prohibited any person from interviewing any juror concerning the deliberations or verdict of the jury, except by leave of court, unconstitutional as applied, because a court rule cannot restrict the journalistic right to gather news unless it is narrowly tailored to prevent a substantial threat to the administration of justice; the burden is on the government to demonstrate the need for curtailment); United States v. Sherman, 581 F.2d 1358, 1361 (9th Cir. 1978) (press has presumptive constitutional right to conduct post-verdict interviews of jurors and government's burden in overcoming presumption is to show "clear and present danger" or "serious and imminent threat to a protected competing interest"); Ohio ex rel. Beacon Journal Pub. Co. v. McMonagle, 8 Media L. Rep. 1927 (Ohio App. 1982) (trial court cannot, at conclusion of criminal trial, require jurors to remain silent concerning trial); cf. Haeberle v. Texas Intern. Airlines, 739 F.2d 1019 (5th Cir. 1984) (trial court properly denied losing party leave to interview jurors about basis for civil verdict, since juror privacy and public interest in well-administered justice "plainly outweigh" First Amendment rights of litigant and its counsel, but drawing explicit distinction between attorney interviews of jurors designed to "satisfy curiosity" and improve advocacy

techniques, and press interviews of jurors).

102. See, e.g., United States v. Cleveland, 128 F.3d 267, 269 (5th Cir. 1997) (affirming district court order forbidding anyone, "absent a special order by me," from interviewing jurors "concerning the deliberations of the jury") (distinguishing In re Express-News Corp., supra); United States v. Harrelson, 713 F.2d 1114 (5th Cir. 1983), cert. denied, 465 U.S. 1041 (1984) (constitutionally permissible for trial court in highly publicized murder trial to prohibit persons from inquiring into the specific vote of any juror other than the juror being interviewed and from making repeated requests for interviews once a juror has refused to be interviewed); see also United States v. Franklin, 546 F. Supp. 1133, 1144 (N.D. Ind. 1982) ("[t]here . . . is very respectable authority within the federal judiciary which manifests a broad reading of federal judicial power in regard to regulating post-verdict communication with jurors"); United States v. Antar, 38 F.3d 1348, 1363-64 (3d Cir. 1994) (prohibitions against "repeated" juror contacts and against any attempt to resume a juror interview after a juror expresses a desire to conclude it cannot stand in the absence of any finding by the court that harassing or intrusive interviews are occurring or are intended and that the prohibitions are the least restrictive means of preventing harassment; however, even though court of appeals could not ascertain after the fact whether the restriction had been appropriate one year earlier - since the trial court did not provide an explanation for imposing the restriction - it let stand an order forbidding inquiry into the "specific votes, statements, opinions or other comments" of any other juror, since such a restriction is appropriate in certain specific cases). See, e.g., Abraham S. Goldstein, Jury Secrecy and the Media: The Problem of Post-verdict Interviews, 1993 U. Ill. L. Rev. 295; Robert L. Raskopf, A First Amendment Right of Access to a Juror's Identity: Toward a Fuller Understanding of the Jury's Deliberative Process, 17 Pepp. L. Rev. 357 (1990).

103. In re Globe Newspaper Co., 920 F.2d 88, 98 (1st Cir. 1990) ("[n]othing compels or encourages a juror to be interviewed. To the contrary, a juror may well feel it is better and fairer to his or her fellows to decline to discuss what has occurred, and, in particular, to decline to reveal his fellow juror's comments during deliberations").

104. See United States v. Antar, 38 F.3d 1348, 1363-64 (3d Cir. 1994).

105. Mass. R. Crim. P. 5(d).

106. G. L. c. 277, § 5 (promising that "the commonwealth's counsel, your fellows' and your own, you shall keep secret").

107. Opinion of the Justices, 373 Mass. 915, 919-20 (1977) (citing New Hampshire Fire Ins. Co. v. Healey, 151 Mass. 537 (1890)).

108. See Opinion of the Justices, 373 Mass. 915, 920 (1977), citing Silverio v. Municipal Court of Boston, 355 Mass. 623 (1969); cf. Butterworth v. Smith, 494 U.S. 624 (1990) (insofar as a Florida statute prohibits a grand jury witness from disclosing his own testimony after the term of the grand jury has ended, it violates the First Amendment).

109. See Globe Newspaper Co. v. Pokaski, 868 F.2d 497, 505 (1st Cir. 1989) (time, place, or manner restrictions only need to be reasonable to survive First Amendment scrutiny); United States v. Webbe, 791 F.2d 103, 107 (8th Cir. 1986) (judge may consider administrative burden and potential violation of defendant's right to a fair trial in evaluating mid-trial request for immediate copies of videotapes introduced as evidence); United States v. Gurney, 558 F.2d 1202, 1210 & n.13, reh'g denied, 562 F.2d 1257 (5th Cir. 1977), cert. denied, 435 U.S. 968 (1978) (permissible to condition inspection of trial exhibits upon clerk's availability). Cf. Barber v. Conradi, 51 F. Supp.2d 1257 (N.D.Ala. 1999) (rejecting First Amendment challenge to county court clerk's decision to allow citizen no more than two hours per week for requesting case files where citizen's aim was to examine roughly 4,200 files and clerk's office was busy). Cf. Hearst-Argyle Stations, Inc. v. Justices of the Superior Court, SJ-98-0604 and SJ-98-0605 (Oct. 23, 1998) (Greaney, J.) (vacating provision of order forbidding media from conducting interviews concerning high-profile case inside courthouse or on sidewalks adjacent to courthouse between 8:00 a.m. and 5:00 p.m.).

110. See, e.g., United States v. Peters, 754 F.2d 753, 763-64 (7th Cir. 1985) (although trial judge has the discretion to manage his courtroom and to control access to trial exhibits if that aids in the conduct of an orderly trial, the arbitrary exclusion of a single reporter from access to exhibits goes beyond efficient courtroom management). But see Los Angeles Times v. County of Los Angeles, 956 F. Supp. 1530 (C.D.Cal. 1996) (rejecting First Amendment challenge to court program providing paying subscribers with exclusive access to daily electronic submissions compiled from automated civil case management systems).

111. Cf. Doe v. Registrar of Motor Vehicles, 26 Mass. App. Ct. 415, 427 n.22 (1988) (requester's motivation is irrelevant in determining the public interest served by disclosure, but may be relevant to whether private interests could be harmed by disclosure).

112. See Littlejohn v. Bic Corp., 851 F.2d 673, 683 (3d Cir. 1988) (once case had settled, trial judge had dismissed action with prejudice, trial exhibits had been returned to the parties, and there had been no appeal, the exhibits were no longer a part of the judicial record and "[n]either the First Amendment nor the common law right of access empower[ed] the district court to require that litigants return such exhibits to the court for the purposes of copy and inspection by third parties"; court noted its analysis was based on more than the change of custody, since if the exhibits had not been returned to the parties, they would have been destroyed by the clerk according to the local rules).

113. District Court Special Rule 211(A)(5)(a).