REPORTERS COMMITTEE
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Sent via e-mail only
Bench-Bar-Media Committee
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Re: Comments on Bench-Bar-Media Committee Draft Report, August 2010

Dear Justice Moreno,

The Reporters Committee for Freedom of the Press submits the following comments in response to the August 2010 Draft Report of the Bench-Bar-Media Committee (the "Draft Report"). We thank you for this opportunity to comment.

The Reporters Committee strongly supports the proposed recommendations contained in the Draft Report. Although we are limiting our comments below to the Draft Report's first three recommendations, we believe that the Draft Report commendably articulates the reasons for implementing the remaining recommendations as well.

We also urge the BBMC to consider adopting one additional recommendation: a requirement that courts provide identifying information about jurors to the public, absent a written finding of exceptional circumstances. Courts have recognized that juror information is presumptively public, as required by the First Amendment, *see, e.g.*, *United States v.Wecht*, 537 F.3d 222, 239 (3rd Cir. 2008), and the common law, *In re Baltimore Sun Co.*, 841 F.2d 74, 76 (4th Cir. 1988). We encourage the BBMC to consider recommending the implementation of such a requirement in both civil and criminal cases.

About The Reporters Committee for Freedom of the Press
The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors working to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970, and it frequently files amicus curiae briefs in significant media law cases.

The Reporters Committee also serves as a First Amendment clearinghouse, monitoring and compiling information about significant legal and statutory developments affecting journalists' and the public's right to know, and produces several publications to inform journalists and lawyers about media law issues, including a quarterly magazine and Internet web site, which is updated several times daily.

In addition, the Reporters Committee operates a hotline to assist journalists with legal problems as they arise in their work. Often, these legal defense requests come from journalists who seek access to court proceedings, records and information. This contact with reporters, editors and media lawyers around the country drives home the importance of court access in the everyday performance of journalism.

As both a news organization and an advocate of free press issues, the Reporters Committee has a strong interest in the policies governing the rights of reporters to access information from the judicial system. It is through this dual role that the Reporters Committee can offer a unique perspective on the following recommendations.

I. Comment on Recommendation #1: Use of Cameras and Other Recording Devices in the Courtroom.

The Reporters Committee supports the BBMC's recommendations regarding the use of cameras and other devices in the courtroom. The recommendations strengthen the opportunity for meaningful public access to courtroom proceedings while appropriately protecting the interests of judges, parties, witnesses and juries.

a. The recognized right and benefit of public access to the court

Courts have long recognized that public access to courtroom proceedings offers benefits both to the judicial system and to the public. In *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982), the U.S. Supreme Court observed that the right of public access to criminal trials "plays a particularly significant role in the functioning of the judicial process and the government as a whole." The Court has noted that increased public access to judicial proceedings "enhances the quality and safeguards the integrity of the factfinding process," *id.*, by discouraging perjury, the misconduct of participants, and decisions based on secret bias or partiality. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980) (plurality opinion). Moreover, the Court has found that public access "heighten[s] public respect for the judicial process," and allows the public to "participate in and serve as a check upon the judicial process – an essential component in the structure of self-government." *Globe Newspaper Co.*, 457 U.S. at 606.

The public benefits greatly from increased access to the judicial process. The Supreme Court has noted that there is a "therapeutic value" to the community by allowing it to reconcile conflicting emotions about high profile cases. *Richmond Newspapers*, 448 U.S. at 570. Additionally, public access reassures the public that its government systems are working properly and correctly, and enhances public knowledge and understanding of the court system. *Id.*

In more recent times, the public has relied greatly on the media serving as a surrogate at courtroom proceedings. The U.S. Supreme Court recognized as much, noting that most people acquire information about the court system "chiefly through the print and electronic media." *Richmond Newspapers*, 448 U.S. at 573. Allowing cameras to take the courtroom to the people, either in part or in whole, allows the media to best-serve as public surrogates by providing unfiltered, unfettered, uncorrupted access to the judicial system. Viewing courtrooms through the lens of a camera allows the public to get as close to the courtroom as possible and directly observe the administration of justice.

Importantly, these benefits come with few strings attached. Technological advances have eliminated the concerns that cameras will create a physical disturbance in the courtroom. Cameras now operate in near silence without potentially distracting bright lights and can easily fade into the background in a courtroom setting. In fact, as the New Hampshire Supreme Court noted, a number of studies have reached the same conclusion: cameras in the courtroom cause very limited, if any, physical distractions. *In re Petition of WMUR Channel 9*, 813 A.2d 455, 459 (N.H. 2002) ("Advances in modern technology, however, have eliminated any basis for presuming that cameras are inherently intrusive. In fact, the increasingly sophisticated technology available to the broadcast and print media today allows court proceedings to be photographed and recorded in a dignified, unobtrusive manner, which allows the presiding justice to fairly and impartially conduct court proceedings"). Moreover, those same studies indicate that cameras in the courtroom ultimately affect participants in a judicial proceeding in the same way as a reporter standing outside the courtroom asking questions after a proceeding concludes. *Id*. at 460.

b. The recommended presumption of camera access will promote public access while retaining safeguards.

The BBMC's recommendation for creating a presumption of camera access will strengthen public access to courtroom proceedings while continuing to provide basic procedural safeguards to protect the legitimate interests in sometimes shielding a particular courtroom proceeding from the lens of a camera. A presumption of access does not prevent a court from limiting court access for good cause; it is simply a presumption in favor of access. The same procedural safeguards currently found in the current rule would remain.

Indeed, the recommended amendment preserves the strong and important protections already in place under the current formulation of the rule, requiring the judge to consider a multitude of factors including the fair trial rights of the parties, the privacy and safety of parties, witnesses and jurors, the risk of distraction, the adequacy of the courtroom's facilities, and any other factor that may influence the fair administration of justice.

c. Specific court findings on camera access promote judicial administration and the rights to appeal

The Reporters Committee also strongly supports the BBMC's recommendation to amend Rule 1.150 to require specific court findings in support of a court's allowance, prohibition or limitation on the use of cameras or other recording devices. The current rule already requires the court to consider specific factors in deciding a camera request; this recommendation would simply require the court to disclose the grounds for its decision. Such a requirement is

a net positive for both the administration of justice and the appellate process: it helps to ensure that the trial court makes well-informed decisions after hearing all interested parties and provides the parties with a means for understanding of the court's rationale for its action.

Moreover, requiring such findings would also help to ensure that the courts follow the important demands of the U.S. Supreme Court in restricting camera access to the courtroom. In *Chandler v. Florida*, the Court dismissed the claim that cameras in a courtroom unduly prejudiced the specific criminal trial before them because there was "no evidence that any participant in this case was affected by the presence of cameras" and therefore "no showing that the trial was compromised by television coverage." 449 U.S. 560, 582 (1981). By demanding basic evidentiary findings, the safeguards proposed by this committee set forth guidelines for a judge to consider the evidence the Supreme Court referred to in *Chandler*.

II. Comment on Recommendation #2: Gag Orders

The Reporters Committee strongly supports the BBMC's recommended uniform rule on the issuance of gag orders. The creation of a uniform rule would provide the parties, the court, and the media with needed guidance on the issuance of such orders. Identifying a specific procedure for third parties to challenge such orders would also streamline challenges and provide greater assurance that the media and public have a meaningful opportunity to be heard.

Restrictions on commentary about judicial proceedings are most likely to be instituted in cases that are exceedingly newsworthy because they involve politicians, famous people, or particularly egregious crimes. Suppressing the free flow of information in such cases, however, restricts the public's knowledge about politically significant issues, creating a significant First Amendment burden. *See, e.g., Bridges v. California*, 314 U.S. 252, 268-269 (1941) (noting that limits on comment about pending cases are "likely to fall not only at a crucial time but upon the most important topics of discussion" and finding no suggestion in the Constitution that "the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression.")

Gagging speech about judicial proceedings not only deprives the public of socially and politically important information, but also hides a powerful branch of government behind a veil of secrecy. When judicial actions are obscured, the actors cannot be held fully accountable. *See, e.g., In re Oliver*, 333 U.S. 257, 270-271 (1948) (". . .[T]he forum of public opinion is an effective restraint on possible abuse of judicial power. . . . Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account."); *Gentile v. State Bar*, 501 U.S. 1030, 1035 (1991) (opinion of Kennedy, J.) ("The judicial system, and in particular our criminal justice courts, play a vital part in a democratic state, and the public has a legitimate interest in their operations.")

To acknowledge the overwhelming importance of the free flow of information, courts must employ great restraint in restricting access. Because gag orders can constitute a prior restraint on speech, they must also be narrow in scope and based on a standard that safeguards the First Amendment rights of the speaker. Although the law nationally is

unsettled as to the exact standard that is appropriate for issuing gag orders to non-attorneys,[1] every federal circuit that has considered the issue has held that *some standard* is clearly necessary to protect the First Amendment rights of the parties. *See United States v. Brown*, 218 F. 3d 415, 426-427 (5th Cir. 2000) (summarizing standards from sister circuits). The rule must also be narrow enough in scope to pose the least possible amount of First Amendment harm.

The Reporters Committee believes that the BBMC's recommended rule will establish necessary parameters for ensuring that any gag orders meet those requirements. Specific findings by a court on the need for a gag order, consistent with the standards outlined in *Hurvitz v. Hoefflin*, 84 Cal. App. 4th 1232 (2000),[2] will assist the parties, public and any reviewing court in understanding the issuing court's reasoning, and provide a means for assessing whether the order is sufficiently tailored. Establishing a uniform procedure for providing the public with notice and an opportunity to be heard on any gag order will similarly help to promote the rights of non-parties to challenge the issuance of orders that will affect their access to information.

III. Comment on Recommendation #3: Orders Sealing Records

The Reporters Committee also supports the BBMC's recommendation on the sealing of court records. Current law already creates a presumption of open access to court records, which counsels against the sealing of records absent good cause. *See* California Rule of Court § 2.550; *Hurvitz*, 84 Cal. App. 4th at 1246-47 (court records are publicly available absent an "overriding public interest to justify the dissemination . . ."); *see also In re Washington Post Co.*, 807 F.2d 383, 388-390 (4th Cir.1986) (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), in explaining that the First Amendment right of access to criminal trial, extends to documents submitted in the course of a trial as well as other pretrial proceedings and filings).

As with the BBMC's recommendations on camera access and gag orders, requiring that the public have notice and opportunity to be heard on a court action that could limit public access would help to effectuate the presumption of open court access and ensure that interested parties have an opportunity to be heard.

Authorizing the award of attorney fees for successful challenges to sealing orders or sealing requests would also help to ensure that parties take into account the presumption of open

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[1] The United States Supreme Court held in *Gentile v. State Bar*, 501 U.S. 1030 (1991), that court limitations on *attorney* speech do not violate the attorney's First Amendment rights where there is "a substantial likelihood of material prejudice." *Id.* at 1063.

[2] The California Court of Appeals' decision in *Hurvitz* adopts the "clear and present danger or serious and imminent threat to a protected competing interest" standard, which the Third, Sixth, Seventh and Ninth Circuits have also followed, as well as other states. *See, e.g., Johnson v. Eighth Judicial Dist.*, 182 P.2d 94, 98 (Nev. 2008) (adopting the "clear and present danger" standard for both civil and criminal matters). This standard is the most consistent with the strict scrutiny approach used by the U.S. Supreme Court in other free speech and press issues, and is also the most consistent with the *Hurvitz* court's recognition of free speech as "one of the cornerstones of our society." 84 Cal. App. 4th at 1241.

court access and not attempt to seal records without good cause. A successful challenge to the sealing of records is a vindication of the public's right of court access; the prohibitive costs that can be associated with such a legal challenge should not be barrier to such a challenge. For the same reason, the Reporters Committee also supports the recommendation of a simple form for pro per challenge.

IV. Consistent with State and Federal law, courts should provide juror identification information upon request, absent individualized findings of exceptional circumstances.

Although section 230 of the California Code of Civil Procedure already provides a presumption of public access to juror identification information prior to a final verdict, some local court practices are in conflict. We urge this Committee to recommend that juror identification information cannot be withheld by way of a blanket local order, but rather must be presumed to be public absent specific findings of exceptional circumstances.

It is our understanding that the current practice in Los Angeles Superior Courts is to refer to jurors in criminal cases only by number and to hide juror information from the public. This practice conflicts with established constitutional and common-law principles, and it conflicts with state statutory law as well. It also fails to take into account the benefits of public knowledge of court proceedings.

The public and press have a presumptive First Amendment right of access to judicial proceedings in criminal cases. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (plurality opinion) ("a presumption of openness inheres in the very nature of a criminal trial under our system of justice"). The Supreme Court explicitly extended this constitutional presumption of openness to voir dire proceedings in *Press-Enterprise Co. v. Superior Court* (*Press-Enterprise I*), 464 U.S. 501, 505 (1984). In these and many other cases, courts have relied on this presumption in striking down restrictions on access to state court records. *See, e.g., Bellas v. Sup. Court*, 85 Cal. App. 4th 636, 642 (2000) (describing *Press-Enterprise I* as "explicitly exalt[ing] the right of public access to criminal proceedings over the privacy right of jurors generally.")

In determining whether the presumption of openness applies to particular records or proceedings, the Supreme Court requires a consideration of "whether the place and process have historically been open to the press and general public" and "whether public access plays a significant positive role in the functioning of the particular process in question." *Press-Enterprise Co. v. Superior Court* (*Press-Enterprise II*), 478 U.S. 1, 8 (1986) (citations omitted). Where a constitutional presumption of access applies, the court may close proceedings only after making specific, on-the-record findings: (1) that closure is necessary to further a compelling governmental interest; (2) the closure order is narrowly tailored to serve that interest; and (3) that no less restrictive means are available to adequately protect that interest. *Id*. at 14.[3]

[3] Relying on *Press-Enterprise I* and *Waller v. Georgia*, 467 U.S. 39 (1984), the U.S. Supreme Court earlier this year reaffirmed the demanding showing required to exclude the public from the

The decision to empanel an anonymous jury is "a drastic measure, which should be undertaken only in limited and carefully delineated circumstances." *United States v. Krout*, 66 F.3d 1420, 1427 (5th Cir. 1995). The scope of a trial court's discretion to empanel an anonymous jury remains unsettled nationally, but federal and state courts throughout the country have recognized a "limited or qualified right" to juror names and addresses, either under either a common law right or "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." *In re Disclosure of Juror Names and Addresses*, 592 N.W.2d 798, 799 (Mich. App. 1999) (citations omitted); *see also, e.g., United States v. Wecht*, 537 F.3d 222, 239 (3rd Cir. 2008) (the "presumptive First Amendment right of access to the identities of jurors attaches no later than the swearing and empanelment of the jury"); *United States v. Blagojevich*, 612 F.3d 558, 563 (7th Cir. 2010) (the "common-law right of access by the public to information that affects the resolution of federal suits" creates a "presumption in favor of disclosure" of juror names); *In re Baltimore Sun Co.*, 841 F.2d 74,76 (4th Cir. 1988) (recognizing a common-law presumption in favor of access to juror and alternate juror names and addresses after the jury is impaneled, noting that the "risk of loss of confidence of the public in the judicial process is too great to permit a criminal defendant to be tried by a jury whose members may maintain anonymity.").

In addition, the Los Angeles courts' blanket practice of referring to jurors solely by number not only conflicts with the First Amendment, but is also at odds with state law. California Code of Civil Procedure § 237(a) provides:

> The names of qualified jurors drawn from the qualified juror list for the superior court shall be made available to the public upon request unless the court determines that a compelling interest, as defined in subdivision (b), requires that this information should be kept confidential or its use limited in whole or in part.

A local court practice cannot stand if it conflicts with state statute. *Erickson v. Sup. Court*, 55 Cal. App. 4th 755, 758 (1997).

We recognize that the California Court of Appeals decided thirteen years ago that the Los Angeles practice – which the court emphasized was meant to be an "interim measure" – was "not fatally inconsistent with any statute and thus not invalid," and also did not violate the defendants' right to a public trial. *People v. Goodwin*, 59 Cal. App. 4th 1084, 1091, 1092-93 (1997). But we respectfully disagree that the court's decision justifies the local practice, for two reasons. First, the *Goodwin* court incorrectly reasoned that a system in which jurors remained anonymous to the public did not constitute an "anonymous jury" as long as the parties and their counsel knew the jurors' identities. This analysis misses the point of California Civil Procedure Code § 237(a), which instructs courts to release the names of jurors "to the public."

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jury selection process in a criminal trial, reversing a conviction in which the trial court did not consider alternatives to closing the *voir dire* process and did not identify any "any overriding interest likely to be prejudiced." *Presley v. Georgia*, 130 S. Ct. 721, 724-25 (2010) (per curiam).

Second, the *Goodwin* opinion also expressly relied on the fact that there was no record to indicate that "interested members of the public or the news media were precluded from ascertaining jurors' names during the trial." *Id*. at 1093 n.6. Regardless of the record in that case, it is beyond peradventure that the Los Angeles court practice has in fact prevented reporters and the public from learning the names of jurors in criminal cases, as members of this Committee are no doubt aware.

The juror numbering system used by the Los Angeles courts casts secrecy over the entire proceedings and undermines the presumption of openness required by the U.S. Supreme Court in *Richmond Newspapers, Inc. v. Virginia* and *Press-Enterprise I.* As the Third Circuit recently observed, a "criminal jury trial vests twelve randomly-selected citizens with the power to decide the fate of someone who the state has targeted for prosecution." *Wecht*, 537 F.3d at 238. It is hard to "reconcile the Supreme Court's conclusion that the public has the right to see the process in which this power is exercised (*Richmond Newspapers*) and to see the process that selects those who will exercise the power (*Press-Enterprise I*), with the conclusion that the public has no right to know who ultimately exercises this power." *Wecht*, 537 F.3d at 238.

That is the exact result of the local Los Angeles court practice. We urge the BBMC panel to consider an additional recommendation to remedy this practice.

V. Conclusion

We thank you for the opportunity to comment on the Committee's proposed recommendations. The Reporters Committee supports the proposed recommendations while also urging the adoption of a new recommendation to disallow the use of anonymous juries absent a specific showing of exceptional need.

Respectfully submitted,
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