

Gag Orders

Gag orders related to criminal trials kept Louisiana official

James Harvey Brown,

accused would-be-

bomber **Sara Jane**

Olson, and **Terry**

Nichols from talking

publicly about their

cases. A judge's issuance of a

gag order is hardly

news these days, and

not many journalists

seem willing to

challenge them. But

the ease with which

they are obtained poses a

real threat to newsgathering,

and to the public's

understanding of the judicial

process.



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The Reporters Committee
For Freedom of the Press

Secret Justice: A continuing series

The American judicial system has, historically, been open to the public, and the U.S. Supreme Court has continually affirmed the presumption of openness. However, as technology expands and as the perceived threat of violence grows, individual courts attempt to keep control over proceedings by limiting the flow of information. Courts are reluctant to allow media access to certain cases or to certain proceedings, like jury selection. Courts routinely impose gag orders to limit public discussion about pending cases, presuming that there is no better way to ensure a fair trial. Many judges fear that having cameras in courtrooms will somehow interfere with the decorum and solemnity of judicial proceedings. Such steps, purportedly taken to ensure fairness, may actually harm the integrity of a trial because court secrecy and limits on information are contrary to the fundamental constitutional guarantee of a public trial.

The public should be the beneficiary of the judicial system. Criminal proceedings are instituted in the name of “the people” for the benefit of the public. Civil proceedings are available for members of the public to obtain justice, either individually or on behalf of a “class” of persons similarly situated. The public, therefore, should be informed—*well* informed—about trials of public interest. The media, as the public’s representative, needs to be aware of threats to openness in court proceedings, and must be prepared to fight to insure continued access to trials.

In this series, the Reporters Committee takes a look at key aspects of court secrecy and how they affect the newsgathering process. We will examine trends toward court secrecy, and what can be done to challenge it.

The first article in this indefinite “Secret Justice” series, published in Fall 2000, concerned the growing trend of anonymous juries. This second installment covers gag orders on participants in trials.

This report was researched and written by Ashley Gauthier, who is the 2000-2001 McCormick-Tribune Legal Fellow at the Reporters Committee.

Gag orders and the effect on newsgathering

By Ashley Gauthier

Gag orders on trial participants have become a significant threat to the First Amendment protection for the press. News organizations should make every effort to challenge even the most routine gag orders because they represent the slow but steady erosion of First Amendment rights.

“They have the best chance of surviving review and are routinely upheld,” said C. Thomas Dienes, a professor at George Washington University Law School and author of “Trial Participants in the Newsgathering Process.”

The proliferation of gag orders began after a 1976 U.S. Supreme Court decision in which the court ruled that an order barring the press from publishing information about a criminal case was improper. Since then, courts have understood that prior restraints on publication should not be imposed upon the press. Instead, they impose prior restraints on the sources of information, making an end-run around the rule that the press itself generally cannot be restricted. (*Nebraska Press Association v. Stuart*)

Courts have reasoned that prior restraints on individual trial participants are somehow less offensive than prior restraints on media organizations. The effect, however, is similar. The flow of information to the public is constricted.

Journalists often do not challenge gag orders on trial participants. Dienes said journalists believe they can still “get the story” because someone will voluntarily violate the gag order or they can obtain information from secondary sources. Journalists also believe they can cover what occurs in the courtroom and sacrifice interviewing the people involved in the case.

To many lawyers, however, gag orders on trial participants quickly erode fundamental First Amendment principles and present an ominous precursor to further infringements on media rights. “And I think it’s going to become much more repressive,” Dienes said.

Standing to challenge gag orders

Journalists could challenge the gag orders. Courts generally accept that media organizations or journalists have “standing” — a sufficient interest in the matter to be allowed to make arguments to the court — to challenge a gag order. However, not all arguments to support standing are successful.

First, the press may argue that it has standing to assert its own rights to gather information. This argument is almost always successful.

The Supreme Court has recognized that there is *some* newsgathering protection, although the extent of the protection has yet to be fully defined. In *Branzburg v. Hayes*, the Court stated that it does “not question the significance of free speech, press, or assembly to the country’s welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated.”

In *Journal Publishing Co. v. Mechem*, the U.S. Court of Appeals in Denver held that a newspaper had standing to challenge a gag order imposed on jurors. Specifically, the court said, “Journal Publishing alleged an injury in fact because the court’s order impeded its ability to gather news, and that impediment is within the zone of interest sought to be protected by the First Amendment.” Other cases where courts have held that the press has standing to challenge a gag order on trial participants include *Radio & Television News Ass’n v. United States Dist. Ct.* (9th Cir.); *In re Express-News Corp.* (5th Cir.); *CBS, Inc. v. Young* (6th Cir.); *Connecticut Magazine v. Moraghan* (D. Conn.); and *In the Matter of NBC, Inc. v. Cooperman* (New York).

Although most courts believe that the press has standing to challenge gag orders because of its right to gather news, some courts have issued restrictive rulings. For example, the U.S. Court of Appeals in Philadelphia (3d Cir.) ruled that the press would “have standing to challenge a gag order only when there is reason to believe that the individual subject to the gag order is willing to speak.” Arguably, this statement requires the media to prove that the participant would speak to the press if the gag order were lifted. (*FOCUS v. Allegheny Cty. Ct. of Common Pleas*)

The Supreme Court of Michigan similarly imposed such a requirement, denying a newspaper’s ability to challenge a gag order when the newspaper failed to identify an specific “willing speaker.” (*In re Detroit Free Press*)

In re Detroit Free Press also calls into question the assumption that the press has a broad right to gather news. Justice Corrigan denied the Free Press’ appeal of a gag order in a custody case and criticized the

paper's argument that the order infringed on its rights: "Further, while the Free Press makes much of its special first amendment right to 'gather news,' . . . it fails to acknowledge the rather limited scope of this 'right.' It is axiomatic that the press has no greater right to access information than the public at large." Justice Corrigan reasoned that, if the press' right is equivalent to the right of the public, then there is no special "freedom of the press" right to access the information subject to the trial court's gag order.

Justice Corrigan also stated "there is no general First Amendment 'right to gather data,' " relying on *Zemel v. Rusk*, a case in which the U.S. Supreme Court rejected a First Amendment claim raised by a person denied a passport to Cuba. The person alleged that he had a First Amendment right to travel to Cuba to learn about its policies, but the Court concluded that "[t]he right to speak and publish does not carry with it the unrestrained right to gather information." Corrigan therefore concluded that "a mere restriction on 'data flow' does not raise serious First Amendment concerns." (*In re Detroit Free Press*)

However, Justice Corrigan's reasoning conflicts with many cases acknowledging that the public has a right to receive information and that the media creates an effective mechanism for the public to receive that information. In *Globe Newspaper Co. v. Superior Ct.*, the U.S. Supreme Court noted that the public has a right of access to information about judicial proceedings for the sake of preserving our democracy. Then, in *Gentile v. State Bar of Nevada*, the Supreme Court recognized that most people acquire information about court cases from the media. A Supreme Court Justice had previously noted, "An informed public depends on accurate and effective reporting by the news media. No individual can obtain himself the information needed for the intelligent discharge of his political responsibilities. For most citizens the prospect of personal familiarity with newsworthy events is hopelessly unrealistic. In seeking out the news the press therefore acts as an agent of the public at large. It is the means by which the people receive the free flow of information and ideas essential to effective self-government." (*Saxbe v. Washington Post*



A far-reaching gag order imposed in 2000 in the California trial of former Symbionese Liberation Army fugitive Sara Jane Olson prevented parties, counsel and witnesses from discussing any issue in the case over an attempted car-bombing 25 years before. It was later lifted after witness Patricia Hearst violated it.

Co., Powell, J., dissenting)

The press may also try to argue that it has standing to challenge the First Amendment rights of the speakers who have been silenced, but some courts are less persuaded by that argument.

The Supreme Court has indicated that both speakers *and* listeners had an enforceable right. The Court stated, "freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both." (*Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*)

Some courts have allowed the press to challenge gag orders, following the notion that the listener has a right to hear a communication. For example, the U.S. Court of Appeals in Cincinnati (6th Cir.) ruled that a gag order on trial participants constituted "a direct prior restraint upon freedom of expression." The court noted that "[a]lthough the news media are not directly enjoined from discussing the case, it is apparent that significant and meaningful sources of information concerning the case are effectively removed from them and their representatives A more restricting ban upon freedom of expression in the trial context would be difficult if not impossible

to find." (*CBS, Inc. v. Young*)

However, other courts have rejected the argument that the press has standing to argue that gag orders infringe the free speech rights of trial participants. The U.S. Court of Appeals in Miami (11th Cir.) found that "there is a fundamental difference between a gag order challenged by the individual gagged and one challenged by a third party." Similarly, the U.S. Court of Appeals in New York (2d Cir.) concluded that "the news agencies may not assert defendants' First Amendment rights when defendants refuse to challenge that infringement themselves." (*News-Journal Corp. v. Foxman* (11th Cir.); *In re Dow Jones & Co., Inc.* (2d Cir.))

The importance of challenging gags

While journalists often feel that it is not worth the time, effort or expense to challenge a particular gag order, media lawyers often agree that the perceived "lack of worth" is exactly why journalists should

challenge the orders.

Gag orders allow courts to circumvent the First Amendment, slowly eroding the freedom of the press in a much more subtle manner than if they gagged the media directly. When the press fails to challenge an individual gag order because the order doesn't seem important, it becomes another brick in the wall. While each separate brick may not seem, in itself, to be a threat to the flow of information, the collective wall will be.

Dienes, the law professor, contended that *U.S. v. Brown* in Louisiana exemplifies the encroachment of gag orders on First Amendment rights. "The *Brown* case in the Fifth Circuit is just terrible," Dienes said. "It's a gag on a criminal defendant, and it was challenged by the criminal defendant rather than the media, and it was still upheld."

The *Brown* case involved the prosecution of former Louisiana Gov. Edwin Edwards and Louisiana Insurance Commissioner Jim Brown for alleged insurance fraud. Judge Edith Clement imposed a gag order on all trial participants, but Brown challenged the constitutionality of the order, claiming that it violated his First Amendment right to free speech. The U.S. Court of Appeals in New Orleans (5th

Cir.) upheld the gag order and did not apply the strict scrutiny analysis typical in a First Amendment case. Instead, the court upheld the gag order based on a “substantial likelihood” that publicity could prejudice the court’s ability to conduct a fair trial. There were no specific factual findings to support such a conclusion, and the court did not require an examination of less restrictive alternatives.

The court in *Brown* was apparently not concerned that Brown was a sitting office-holder who was not able to comment on his job performance or duties of office pending the outcome of the trial. Considering that political speech has always been given the greatest protection under the First Amendment, it seems odd that the court would dismiss Brown’s First Amendment claims and impose the rather weak “substantial likelihood” test. Surely, the indifference to Brown — an office holder — as a speaker is a harbinger of even more restrictive rulings in the future.

A split among circuits

Over time, a split has arisen among federal appeals courts on the standard for evaluating a gag order on trial participants. The Second, Fourth, Fifth and Tenth Circuits have held that a trial court may gag participants if it determines that comments present a “reasonable likelihood” or “substantial likelihood” of prejudicing a fair trial. (*In re Dow Jones & Co.*; *In re Russell*; *U.S. v. Brown*; *U.S. v. Tijerina*)

Some states have followed the same rule. (*Sioux Falls Argus Leader v. Miller*; *State ex rel. Missoulian v. Montana Twenty-First Jud. Dist. Ct.*)

However, the Third, Sixth, Seventh and Ninth Circuits have imposed a stricter standard, rejecting gag orders on trial participants unless there is a “clear and present danger” or “serious and imminent threat” of prejudicing a fair trial. (*Bailey v. Systems Innovation, Inc.*; *U.S. v. Ford*; *Chicago Council of Lawyers v. Bauer*; *Levine v. U.S. Dist. Ct.*)



AP PHOTO

In a case involving charges against Louisiana official James Harvey Brown, the Fifth Circuit found that gag orders are constitutional if there is a “substantial” or even “reasonable” likelihood of an effect on a fair trial, a lower standard than other federal appeals courts use.

of Lawyers v. Bauer; *Levine v. U.S. Dist. Ct.*)

Hawaii and New York have followed this standard as well. (*Breiner v. Takao*; *People v. Fioretti*)

The “clear and present danger” test is more appropriate for analyzing a First Amendment claim, as it reflects the “strict scrutiny” standard applied in other First Amendment cases, such as *Nebraska Press Association*. In the spring issue of *Communications Lawyer* magazine, Dienes argued that the “substantial likelihood” standard used by the Fifth Circuit is grossly flawed and will lead to further trammeling on free speech rights. “One can only hope that [the “substantial likelihood” test] merely reflects the extremely political context of the cases that spawned it,” Dienes wrote. “It should be expected that appellate courts will at least use standards for justifying such orders that reflect the important First Amendment interests at stake.”

Cases cited:

- Bailey v. Systems Innovation, Inc.*, 852 F.2d 93 (3d Cir. 1988)
- Branzburg v. Hayes*, 408 U.S. 665 (1972)
- Breiner v. Takao*, 835 P.2d 637 (Ha. 1992)
- CBS, Inc. v. Young*, 522 F.2d 234 (6th Cir. 1975)
- Chicago Council of Lawyers v. Bauer*, 552 F.2d 242 (7th Cir. 1975)
- Connecticut Magazine v. Moraghan*, 676 F. Supp. 38 (D. Conn. 1987)
- FOCUS v. Allegheny Cty. Ct. of Common Pleas*, 75 F.3d 834 (3d Cir. 1996)
- Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991)
- Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596 (1982)
- In re Detroit Free Press*, 620 N.W.2d 10 (Mich. 2000)
- In re Dow Jones & Co., Inc.*, 842 F.2d 603 (2nd Cir. 1988)
- In re Express-News Corp.*, 695 F.2d 807 (5th Cir. 1982)
- In re Russell*, 726 F.2d 1007 (4th Cir. 1984)
- In the Matter of NBC, Inc. v. Cooperman*, 501 N.Y.S.2d 405 (Ct. App. 1986)
- Journal Publishing Co. v. Mechem*, 801 F.2d 1233 (10th Cir. 1986)
- Levine v. U.S. Dist. Ct.*, 764 F.2d 590 (9th Cir. 1985)
- Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976)
- News-Journal Corp. v. Foxman*, 939 F.2d 1499 (11th Cir. 1991)
- People v. Fioretti*, 516 N.Y.S.2d 422 (N.Y. Sup. 1987)
- Radio & Television News Ass’n v. United States Dist. Ct.*, 781 F.2d 1443 (9th Cir. 1986)
- Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974)
- Sioux Falls Argus Leader v. Miller*, 610 N.W.2d 76 (S.D. 2000)
- State ex rel. Missoulian v. Montana Twenty-First Jud. Dist. Ct.*, 933 P.2d 829 (Mont. 1997)
- U.S. v. Brown*, 218 F.3d 415 (5th Cir. 2000)
- U.S. v. Ford*, 830 F.2d 596 (6th Cir. 1987)
- U.S. v. Tijerina*, 412 F.2d 661 (10th Cir. 1969)
- Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976)
- Zemel v. Rusk*, 381 U.S. 1 (1965)

A survey of the law

The imposition of gag orders on trial participants is a relatively modern phenomenon in the law. Below is a circuit-by-circuit and state-by-state listing of cases that have directly addressed the issue of gag orders on trial participants. Only about half of all states have directly addressed the issue in reported cases.

FEDERAL COURTS

Supreme Court

Gentile v. State Bar of Nevada, 501 U.S. 1030, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1990) (a restriction on attorney speech could potentially be valid, although the specific restriction at issue was invalid).

Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966) (speech can be restricted to avoid prejudice to fair trial).

First Circuit

In re Perry, 859 F.2d 1043 (1st Cir. 1988) (gag order issued during administrative proceeding and applicable to union organizing efforts was improper under First Amendment standards).

Second Circuit

U.S. v. Salameh, 992 F.2d 445 (2nd Cir. 1993) (gag order that prevented any comments about the case invalid).

In re New York Times Co., 878 F.2d 67 (2nd Cir. 1989) (gag order invalid).

In re Dow Jones & Co., 842 F.2d 603 (2nd Cir. 1988) (affirming gag order where there were findings of substantial likelihood that fair trial would be prejudiced).

Third Circuit

Bailey v. Systems Innovation, Inc., 852 F.2d 93 (3rd Cir. 1988) (vacating gag order).

Fourth Circuit

In re Russell, 726 F.2d 1007 (4th Cir. 1984) (gag order on witnesses was valid).

Fifth Circuit

U.S. v. Brown, 218 F.3d 415 (5th Cir. 2000) (trial court may impose gag order on trial participants based on substantial likelihood that extrajudicial commentary will undermine a fair trial).

Sixth Circuit

U.S. v. Ford, 830 F.2d 596 (6th Cir. 1987) (gag order invalid).

CBS, Inc. v. Young, 522 F.2d 234 (6th Cir. 1975) (vacating gag order).

Seventh Circuit

Chicago Council of Lawyers v. Bauer, 552 F.2d 242 (7th Cir. 1975) (gag order invalid without serious or imminent threat to fair trial).

Chase v. Robson, 435 F.2d 1059 (7th Cir. 1970) (gag order invalid without serious or imminent threat to fair trial).

How to challenge a gag order

Challenging a gag order does not need to be difficult, nor does it necessarily require an attorney. Of course, an attorney would be able to prepare a motion to challenge a gag order easily, and an attorney would be familiar with the procedural requirements for filing a motion. If you have access to an attorney, you should use one. But in an emergency, a reporter at the courthouse can challenge a gag order.

If you know that a party is seeking a gag order before the order is actually imposed, a reporter can file a motion to intervene. The motion should note:

1. the name of the reporter;
2. the reporter's employer (or, if the reporter is freelance, who would be expected to publish the story);
3. the fact that the reporter is filing the motion *pro se*;
4. that the reporter has learned that a party is seeking a gag order;
5. the fact that the reporter has an interest in the case. Specifically, the motion should say that the reporter has an interest in gathering the news, which includes speaking to the trial participants; the reporter has an interest in hearing what the speaker has to say; the public has an interest in learning about the case and hearing what the speaker

has to say; and the reporter acts as a conduit to get information from the speaker to the public;

6. that the First Amendment provides the speaker the right to speak freely and provides the reporter some right to gather news;

7. when the First Amendment rights are compared to the interest in a fair, impartial, and efficient trial, the First Amendment rights should prevail because there is no proof that trial participants' speech would harm the fairness, impartiality or efficiency of the trial;

8. that less restrictive means should be considered and employed before a gag order is issued; and

9. that the reporter (or the organization) would like to intervene for the purpose of contesting the proposed gag order.

If you do not know what a motion should look like, peruse other court files to see samples of motions. A court clerk *will not* give you legal advice or explain what a motion should contain, but usually will let you look at public records and you can see samples of what other people have filed. A motion usually contains the name and location of the court, the name of the case, the title of the motion, and the name, address and telephone number of the person filing the motion.

Once the motion is filed, the court should let you know when the hearing will be held, and you may attend. Normally, if the court has granted your motion to intervene, you will be permitted to speak at the hearing and explain your position.

If you do not know about a gag order until after it has been issued, you may still make a motion to intervene and ask the court to repeal the gag order. The motion would contain the same information as above, except that you would note that a gag order has already been imposed rather than stating that a party is seeking a gag order.

If you live in a jurisdiction that has case law applying a strict standard of review to gag orders, you may note the relevant case in your motion. Jurisdictions with favorable case law include federal courts in the First, Second, Third, Sixth and Seventh circuits, and the following states: California, Florida, Hawaii, Kansas, Maryland, Massachusetts, New Mexico, New York, North Carolina, Ohio and Texas. (A list of cases, both favorable and unfavorable, can be found on the following pages.)

As always, if you would like additional information, call the Reporters Committee hotline at 800-336-4243.

Eighth Circuit

There are apparently no Eighth Circuit cases directly addressing the merits of gag orders on trial participants.

Ninth Circuit

Levine v. U.S. Dist. Ct., 764 F.2d 590 (9th Cir. 1985) (gag order overbroad; but note that second gag order, revised after remand, was upheld in *Radio & Television News Assoc. v. U.S. Dist. Ct.*, 781 F.2d 1443 (9th Cir. 1986)).

Tenth Circuit

Journal Pub. Co. v. Mechem, 801 F.2d 1233 (10th Cir. 1986) (media had standing

to challenge gag order on jurors).

U.S. v. Tijerina, 412 F.2d 661 (10th Cir. 1969) (gag order did not violate defendants' rights of free speech).

Eleventh Circuit

The News-Journal Corp. v. Foxman, 939 F.2d 1499 (11th Cir. 1991) (collateral federal court challenge of gag order issued by state court dismissed for lack of jurisdiction).

D.C. Circuit

There are apparently no D.C. Circuit cases directly addressing the merits of gag orders on trial participants.

STATE COURTS

Alaska

In re Dissolution of Marriage of Alaback, 997 P.2d 1181 (Alaska 2000) (gag order acceptable when it's in the "best interests of the child").

Arizona

KPNX Broadcasting v. Superior Court In and For Maricopa County, 678 P.2d 431 (Ariz. 1984) (gag order limiting direct contact to media and establishing a "media liaison" for the trial was valid method of preserving fair trial).

Good judges, denying gags

By Ashley Gauthier

Gag orders may sometimes seem like an inevitable part of a reporter's life. In hundreds of cases — high profile or not — judges routinely issue gag orders in the name of "preserving a fair trial" or "ensuring an untainted jury pool." In fact, a computer search turned up hundreds of cases in which gag orders were issued, but in about 25 instances judges denied a request to gag the participants.

Usually, judges issue gag orders because a criminal defendant has a Sixth Amendment right to a fair trial and the judge fears that pre-trial publicity will jeopardize that right. However, gag orders should be imposed only when there is a compelling reason — such as when the right to a fair trial is imminently threatened — and when no less restrictive means could prevent harm. A judge has many less restrictive alternatives to choose from, including extensive voir dire, changes of venue and admonishments to the jury to stay away from news reports. Nevertheless, many judges choose to impose gag orders.

Judges in at least eight states have diverged from the common practice of issuing gag orders. The small number of them make the decisions of these members of the bench noteworthy.

The largest number of gag order denials found in our search was from **Florida**.

The most recent example involved Kathie Lee Gifford's lawsuit against the *National Examiner*. The *Examiner* claimed that Gifford's 10-year old son was a "monster," and Gifford sued for libel.

Gifford sought a gag order barring the parties from speaking publicly about the

case, fearing it would lead to "frenzied media interest." Circuit Judge Timothy McCarthy denied the request and quipped, "you should have been here during the election."

Martin Reeder, an attorney for the *Palm Beach Post*, attended the hearing in West Palm Beach and told the Reporters Committee that the judge did not believe it was necessary to issue a gag order when the parties could, on their own initiative, simply refuse to answer questions from the press. The judge did not feel obligated to formally endorse the parties' decision to avoid publicity, Reeder said.

Another recent case in Orlando, Fla., involved the divorce of a descendant of John D. Rockefeller. A great-great-grandson, George O'Neill, sought a gag order after his wife Amy O'Neill granted an interview to *Vanity Fair* magazine. Orange County Circuit Judge Jay Cohen denied the gag order, although he cautioned the parties that media attacks on each other could backfire when the court determines who gets custody of their children.

In 1997, Circuit Judge Sherra Winesett denied a gag order in a sexual abuse case brought in Punta Gorda, Fla., against a Catholic priest and the local diocese. The church's attorneys asked for a gag order, but the judge ruled that there was no evidence of a "reasonable likelihood of prejudice." Winesett reminded the lawyers to follow the ethical rules pertaining to pre-trial publicity.

Similarly, in 1996, Circuit Judge Donald Pellicchia denied a gag order sought in the murder case against Jason Simons because he found no factual basis to support it. The *Sarasota Herald-Tribune* had intervened in that case and argued that a gag order would

violate its First Amendment right to gather news.

In 1995, Circuit Judge Robert Young, in Bartow, Fla, denied a gag order in the case of a man accused of sodomizing and smothering to death an 8-year-old boy. The judge held that "the record before the court does not yet show the kind of pervasive and vilifying publicity which would justify the Draconian measures sought" by the defendant. The judge cautioned the lawyers to comply with the ethical rules regarding pretrial publicity, but rejected the request to place a gag order on the sheriff's officials who stated that "the public has a right to know what's going on."

Circuit Judge Richard Tombrink Jr. denied a gag order in a contentious 1994 lawsuit between the Hernando County School Board and a contractor. The school board accused the contractor of shoddily constructing two schools, and the contractor accused the school board of using news coverage to influence the outcome of the case. The judge denied the gag order, apparently agreeing with arguments that the news coverage came from regular school board meetings. Gagging the parties would have not only limited access to the public trial but also to school board decisions.

Gainesville Circuit Judge Stan Morris denied a gag order in the notorious 1992 case of Danny Rolling, who was charged with killing five students. In asking for a gag order, Rolling's attorney said there had already been massive media coverage of the case and the defendant's right to a fair trial was compromised. However, the judge ruled that the request was "too broad and premature."

Arkansas

Arkansas Democrat-Gazette v. Zimmerman, 20 S.W.3d 301 (Ark. 2000) (gag order was too broad).

California

Hurvitz v. Hoefflin, 101 Cal.Rptr.2d 558 (Cal.App. 2000) (gag order impermissible; victim's privacy is insufficient reason to impose gag order).

Connecticut

State v. Grant, 1999 WL 773567 (Conn.Super. 1999) (gag order too broad; should prohibit only statements that raise a "reasonable likelihood of prejudicial impact").

Florida

Rodriguez ex rel. Posso-Rodriguez v. Feinstein, 734 So.2d 1162 (Fla.App. 1999) (gag order invalid where the court made no findings that it was necessary to ensure a fair trial and where the judge had not narrowly tailored the order to preclude only extra-judicial statements that are substantially likely to materially prejudice the trial).

Hawaii

Breiner v. Takao, 835 P.2d 637 (Ha. 1992) (gag order invalid where court failed to find serious threat to right of fair trial or consider other alternatives).

Illinois

In re J.S., 640 N.E.2d 1379 (Ill.App. 1994) (gag order acceptable to protect privacy of minor victim).

Indiana

South Bend Tribune v. Elkhart Circuit Court, 691 N.E.2d 200 (Ind.App. 1998) (gag order acceptable where court found that there was a reasonable likelihood that publicity would prejudice murder trial).

Kansas

State v. Alston, 887 P.2d 681 (Kan. 1994) (gag order invalid where judge did not make requisite finding of necessity).

Arizona judges also seem to give consideration to First Amendment concerns. Gag orders were denied in two high-profile cases last year.

Special Master Eino Jacobson refused to issue a gag order in a fight between large utility companies. Southwest Gas and Southern Union Co. were parties in a Phoenix lawsuit over the control of Southwest Gas. Attorneys for Southwest Gas sought a gag order because someone was anonymously posting information about the case on the Internet and because Southern Union had issued press releases about the case. Southwest Gas was particularly concerned about the release of discovery information to the public.

Jacobson noted that discovery information is generally not protected by the First Amendment, but he nevertheless ruled that one must still show "good cause" before imposing a prior restraint on the media or preventing the parties from discussing the case. Jacobson ruled that no "good cause" was shown and therefore refused to issue the gag order.

Another recent case in Phoenix involved the death of Arizona State University student John Jardine IV. Jardine's family sued various defendants, claiming that Jardine died because he was handcuffed and suffocated during an epileptic seizure. Newspapers had written extensively about the case and the ABC program "20/20" taped a segment discussing the incident. The defendants sought a gag order to prevent the Jardine family from speaking to the media, but Judge Barry Schneider denied the request.

The family's attorney claimed in motion papers that the defendants were seeking a gag order as an excuse to not talk to the media about the case. "Defendants can either respond to (media) inquiries or

not as they see fit. They cannot, however, ask the court to take over their public relations work by entering a prior restraint order gagging all parties and their counsel," he wrote.

In 1993, Maricopa County Judge John Sticht twice denied a gag order in a lawsuit between two state employees. Donna Beletz alleged that she was fired from her job with the Department of Education because she would not do campaign work on state time for Superintendent of Public Instruction C. Diane Bishop. Bishop's lawyers contended that Beletz gave discovery information to the media and requested a gag order. Sticht refused to issue an order and also refused to seal the depositions.

Gag orders were denied in other high-profile cases in other states:

In **California**, the Cannabis Buyer's Club case, which was argued before the U.S. Supreme Court this term, was initially filed in Alameda County Superior Court in Oakland. The attorney general sought a gag order claiming that pretrial publicity could prejudice potential jurors. However, Judge Larry Goodman denied the gag order because there was no evidence of any prejudice to the jury pool. The judge also noted that the attorney general had publicized the case, which perhaps weakened the attorney general's plea.

A Bentonville, **Arkansas**, judge denied a gag order in the case against Davis Carpenter for murder and rape. Carpenter and his lover, Joshua Brown, were arrested for raping and killing a 13-year-old boy. Brown admitted to the crimes, but claimed Carpenter forced him to do it. Circuit Judge David Clinger denied a gag order that would have prevented all parties from speaking to the media about the case.

Similarly, a **West Virginia** judge in Fairmont denied a gag order in the August 2000 murder trial of two 17-year-olds charged

with killing a gay black man. Circuit Judge Rodney Merrifield said, "I have not and will not issue a gag order." Merrifield also met with reporters to explain trial procedure and rules for attending the trial.

In Atlanta, **Georgia**, last October, the murder trial of Wesley Harris was kept open. Superior Court Judge Melodie Snell Conner allowed the media to attend the trial and refused to enter a gag order, despite requests from defense counsel.

In Beaumont, **Texas**, a lawsuit was filed in federal court against Compaq Computer that alleged the company knowingly made computers with a flaw that might corrupt data stored on disks. Compaq sought a gag order restricting all public statements about the case, but U.S. District Judge Thad Heartfield denied the request.

Finally, in 1997, a judge in **New York** denied a gag order sought by defense counsel in a burglary case. The defense lawyer argued that the prosecutor was speaking to the media to drum up public support for a severe sentence. The lawyer asked the judge to impose a gag order on the prosecutor. Nassau County Judge Paul Kowtna reasoned that a judge may not issue a prior restraint unless there is a "showing of necessity for such restraint." The judge found that there was no reason for a gag order because there had been no "public clamor" against the defendant. Furthermore, the judge correctly noted that the sentencing would be determined by a judge, and the Rules of Judicial Conduct require a judge to make decisions without regard to partisan interest, public clamor, or fear of criticism. The judge therefore believed that the prosecutor's efforts would not make a difference. The case, *People v. Hepworth*, was reported in the *New York Law Journal*.



In November 1994, the U.S. Court of Appeals in Washington, D.C., not only denied *The Wall Street Journal* access to a final report by Whitewater special counsel Robert Fiske, above, but it also barred the newspaper from reporting that access had been denied. The court lifted the prohibition a month later when it unsealed the order. The *Journal* did not know whether such a report existed, but assumed Fiske filed one when he was replaced by Kenneth Starr.

Ohio

State Ex Rel. Nat'l Broadcasting Co., Inc. v. Court of Common Pleas, 556 N.E.2d 1120 (Ohio 1990) (gag order invalid without specific findings demonstrating that gag order is necessary to preserve compelling interest and is narrowly tailored to serve that interest).

Pennsylvania

Commonwealth v. Carter, 643 A.2d 61 (Pa. 1994) (pre-trial publicity was entitled to a presumption of prejudice, but there was no need for a gag order when there was a 15-month "cooling off" period between prejudicial newspaper articles and trial).

South Dakota

Sioux Falls Argus Leader v. Miller, 610 N.W.2d 76 (S.D. 2000) (gag order did not violate First Amendment).

Tennessee

State v. Hartman, 703 S.W.2d 106 (Tenn. 1985) (gag order on attorneys was acceptable where judge was concerned about effect of statements on prospective jurors).

Texas

Davenport v. Garcia, 834 S.W.2d 4 (Tex. 1992) (gag order unconstitutional in civil case where there was no finding of imminent harm).

Vermont

State v. Schaefer, 599 A.2d 337 (Vt. 1991) (order prohibiting lawyers and law enforcement officers from commenting on merits of case was unjustified without finding that officers and lawyers would make improper disclosure absent the order).

Virginia

Commonwealth v. Starkey, 1992 WL 884421 (Va. Cir.Ct. 1992) (court ordered that prosecutors and other law enforcement avoid comments on defendant and case, admonishing them to comply with ethical rule regarding pre-trial publicity).

Washington

State v. Bassett, 911 P.2d 385 (Wash. 1996) (gag order invalid because it was overbroad; may only restrict statements that threaten a fair trial).

Maryland

Keene Corp. v. Abate, 608 A.2d 811 (Md.App. 1992) (gag order on litigant advertising was unconstitutional; cannot ban speech unless there is a grave danger to a fair trial).

Massachusetts

Clermont v. Sheraton Boston Corp., 1993 WL 818763 (Mass.Super. 1993) (gag order denied where there was no showing that statements to media would prejudice trial).

Michigan

In re Midland Pub. Co., Inc., 362 N.W.2d 580 (Mich. 1984) (gag orders on defendant, victim, counsel and court personnel are permissible).

Montana

State ex rel. Missoulian v. Montana Twenty-First Jud. Dist. Ct., 933 P.2d 829 (Mont. 1997) (before issuing a gag order, the court must find that there is a substantial probability of harm to the trial).

New Jersey

Matter of Hinds, 449 A.2d 483 (N.J. 1982) (rejecting "clear & present danger" test in favor of "reasonableness" test for restrictions on attorney speech about a trial).

New Mexico

Albuquerque Journal v. Jewell, 17 P.3d 437 (N.M. 2001) (gag order was procedurally deficient).

Twobig v. Blackmer, 918 P.2d 332 (N.M. 1996) (gag order invalid where there was no factual foundation for finding a substantial likelihood of prejudice or clear and present danger to an impartial trial).

New York

People v. Buttafuoco, 599 N.Y.S.2d 419 (N.Y. Co. Ct. 1993) (an order directing attorneys to comply with ethical rule regarding pre-trial publicity is not a "gag order").

New York Times Co. v. Rothwax, 533 N.Y.S.2d 73 (N.Y.A.D. 1988) (gag order was improper without factual showing of necessity).

People v. Fioretti, 516 N.Y.S.2d 422 (N.Y. Sup. 1987) (gag order may be upheld only if it is clearly established that there is a serious and imminent threat to a fair trial and order is narrowly drawn).

North Carolina

Sherrill v. Amerada Hess Corp., 504 S.E.2d 802 (N.C. App. 1998) (gag order was unconstitutional; no evidence that there was prejudice to fair trial).