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Protecting the Defendant's Right to a Fair Trial in the Information Age

Erika Patrick*

I. Introduction to the Power of the Internet

The United States Supreme Court has called the right to a fair trial “the most fundamental of all freedoms.”¹ The court has also explained that “[a] fair trial in a fair tribunal is a basic requirement of due process.”² Voir dire—the process of securing a jury free from exception—is the most important process in a capital murder trial and securing an impartial jury is the paramount concern for defense counsel. The search for an impartial jury can necessitate a change of venue or venire to mitigate the effects of publicity surrounding a case which has created heightened local prejudice against a defendant.³ The Internet’s current national and even international influence on information-gathering by the public at large renders it a significant consideration when choosing a jury and venue for trial.

The Supreme Court has noted that “[l]egal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper.”⁴ The advent of the television and the Internet has increased the media in which a trial of public opinion can affect the outcome of a legal trial. Defense counsel must be vigilant to protect defendants from the impermissible negative influences that public access to pretrial information can have on a defendant’s case.

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1. *Estes v. Texas*, 381 U.S. 532, 540 (1965).

2. *In re Murchison*, 349 U.S. 133, 136 (1955).

3. See VA. CODE ANN. § 19.2-251 (Michie 2000) (describing procedure and standard for change of venue); VA. CODE ANN. § 8.01-358 (Michie 2000) (describing procedure for summoning jurors from other jurisdictions).

4. *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966) (internal quotation omitted) (reversing denial of defendant’s habeas corpus petition, concluding that Sheppard had not received a fair trial under the Due Process Clause of the Fourteenth Amendment, in part because of the intense pretrial publicity surrounding the case).

Voir dire that fails to recognize the vast amount and varied content of information to which potential jurors may be exposed on-line will not adequately ensure the selection of an impartial jury. Even a change of venue is an imperfect protection against juror partiality in highly-publicized cases because information posted on the Internet has the potential to reach future veniremen in other regions. A change of venire may be even less effective than a change of venue because members of bordering localities can access information regarding a case of regional interest on the Internet even though their local news outlets do not cover the story. Therefore, defense counsel should exercise an aggressive strategy in guarding against the seating of a jury with hidden biases and unexplored preconceived notions of the case.

In Virginia, a criminal defendant's right to an impartial jury at trial is guaranteed by Article I, Section 8 of the Virginia Constitution and the Sixth Amendment of the United States Constitution.⁵ Impartiality is determined by the juror's "mental attitude."⁶ Voir dire questions must be fashioned to elicit truthful responses from the potential juror which provide defense counsel an opportunity to ferret out hidden biases and exposure to the details of the pending case.⁷ Use of the Internet has become so commonplace and natural in some people's daily lives that specific questions about what potential jurors may have seen on-line is required to elicit honest and complete answers about information to which veniremen may have been exposed.⁸

5. U.S. CONST. amend. VI. The Sixth Amendment of the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Id. Article I, Section 8 of the Virginia Constitution provides in relevant part:

That in criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, and to call for evidence in his favor, and he shall enjoy the right to a speedy and public trial, by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty.

VA. CONST. art. I, § 8.

6. *David v. Commonwealth*, 493 S.E.2d 379, 381 (Va. Ct. App. 1997) (stating that "[t]he true test of impartiality lies in the juror's mental attitude. Furthermore, proof that she is impartial must come from her uninfluenced by persuasion or coercion. The evidence used to show the requisite qualifications must emanate from the juror herself, unsuggested by leading questions posed to her" (internal quotation omitted)).

7. See JOHN L. COSTELLO, VIRGINIA CRIMINAL LAW AND PROCEDURE § 57.4-4 (2d ed. 1995).

8. Nielsen/NetRatings estimates that approximately 167 million members of all United States households had home access to the Internet in September 2002. *Average Web Usage Home*, <http://prn.netratings.com/nnpn/owa/NRpublicreports.usagemonthly> (last visited November 14, 2002). Approximately 50.6 million Americans had Internet access at work during the same period.

This Article argues that defense counsel must consider the circulation of information over the Internet when conducting voir dire and when moving for changes of venue and venire. In Part II, the Article explains the precautions defense counsel should take to ensure that information potential jurors have gained through the Internet does not render them ineligible for jury service. Part III of this Article describes additional factors relating to information available on the Internet and how defense counsel should address these considerations when moving for a change of venue or venire. In Part IV, this Article illustrates other methods by which defense counsel and the court should incorporate an understanding of the particular issues the Internet raises into trial strategies.

II. *The Internet and Voir Dire*

Lawyers specifically must ask veniremen about contacts with the Internet during voir dire. Virginia Code Section 8.01-358 gives the court, the Commonwealth, and defense counsel the right to examine potential jurors under oath regarding whether the venireman: (1) is related to either party, (2) has an interest in the case, (3) has expressed or formed an opinion in the case, or (4) possesses any bias or prejudice.⁹ Section 8.01-358 also provides that “[a] juror, knowing anything relative to a fact in issue, shall disclose the same in open court.”¹⁰ Defense counsel can use questions regarding potential jurors’ Internet usage as a valuable tool to investigate the “formed an opinion” and “bias or prejudice” disqualifiers. It is especially important that during voir dire counsel explore the possibility that a juror has been tainted by pretrial publicity accessible on the Internet because courts denying motions for change of venue repeatedly have cited the availability of searching voir dire as a remedy to pretrial publicity.¹¹

A. *Juror Has Expressed or Formed an Opinion in the Case*

The Supreme Court of Virginia and the United States Supreme Court have held that the trial court is not required automatically to exclude any jurors who

Average Web Usage Work, <http://pm.netratings.com/npmp/owa/NRPublicReports.Usages> (last visited November 14, 2002). The United States Census Bureau projected the United States population to be approximately 280.3 million in July 2002. U.S. CENSUS BUREAU, POPULATION PROJECTIONS OF THE TOTAL RESIDENT POPULATION BY QUARTER: MIDDLE SERIES, APRIL 1, 1999 TO JANUARY 1, 2101. <http://www.census.gov/population/projections/nation/summary/np-t2.pdf> (last visited November 14, 2002). Based on these statistics, somewhere between sixty percent and seventy-seven percent of Americans have Internet access, assuming some overlap in the statistics from people who have access in both places.

9. VA. CODE ANN. § 8.01-358 (Michie 2000).

10. *Id.*

11. See, e.g., *United States v. Lindh*, 212 F. Supp. 2d 541, 550 (E.D. Va. 2002) (denying motions for dismissal of indictment or change of venue, relying in part on the availability of voir dire as a remedy); *United States v. King*, 192 F.R.D. 527, 532-533 (E.D. Va. 2000) (denying motion to restrain publication of a witness’s television interview because prejudicial effect of interview was not so great that impartial jurors could not be found or voir dire could not cure prejudice).

have any preconceived notion as to the guilt or innocence of the defendant.¹² The Virginia court has stated:

To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.¹³

Therefore, a juror is qualified for jury service if he can put aside any pre-existing notion or opinion and render a verdict based on the evidence presented at trial. However, "[t]he influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man."¹⁴ The Supreme Court of Virginia has stated:

[I]n deciding whether a venireman who has formed an opinion is constitutionally impartial, courts must determine . . . the nature and strength of the opinion formed. The spectrum of opinion can range, by infinite shades and degrees, from a casual impression to a fixed and abiding conviction. The point at which an impression too weak to warp the judgment ends and one too strong to suppress begins is difficult to discern.¹⁵

In fact, one social science study found that the group of potential jurors who most strongly believed there was "a lot of evidence" against the defendant in the case on which they had been called to sit also had the highest proportion of potential jurors who indicated they could be fair and set aside their pre-existing knowledge.¹⁶ As a result, defense counsel must investigate the depth and strength of a juror's preconceptions through the use of voir dire questions designed to probe whether a juror can put aside his formed opinion and consider the case on the evidence alone.¹⁷

12. See, e.g., *Irvin v. Dowd*, 366 U.S. 717, 722-27 (1961) (finding that it is not required that the jurors be "totally ignorant of the facts and issues involved" but vacating defendant's sentence because pretrial publicity was so great and of such a nature that two-thirds of the jurors that eventually sat in the case believed him to be guilty before trial began); *Calhoun v. Commonwealth*, 307 S.E.2d 896, 897 (Va. 1983) (stating that "[t]o assure an impartial jury, however, the trial court is not required to exclude all veniremen who have any preconceived opinion of the case"); *Briley v. Commonwealth*, 279 S.E.2d 151, 154-55 (Va. 1981) (affirming defendant's conviction even though trial court sat two jurors who admitted that news stories and the grand jury indictment led them to think the defendant was guilty).

13. *Calhoun*, 307 S.E.2d at 897 (quoting *Irvin*, 366 U.S. at 723).

14. *Irvin*, 366 U.S. at 727.

15. *Briley*, 279 S.E.2d at 154 (internal quotation omitted).

16. Christina A. Studebaker & Steven D. Penrod, *Pretrial Publicity: The Media, the Law and Common Sense*, 3 PSYCHOL. PUB. POL'Y & L. 428, 434-35 (1997) (describing studies of the prejudicial effects of pretrial publicity).

17. See *id.* at 440-41 (describing study regarding jurors' capability to disregard pretrial publicity to which they had been exposed and concluding that "jurors who claimed that they could disregard

Defense counsel must consider the possibility that potential jurors who report that they do not read the newspaper or watch television news on a regular basis still have been exposed to information about the current case through Internet sources.¹⁸ Because Internet usage is not considered part of the traditional news media, potential jurors who are asked general questions about exposure to information may not even consider what they have seen on the Internet unless specifically asked about it. The Internet may even be beginning to supplant potential jurors' use of other media as an information source and therefore specifically must be addressed during voir dire.¹⁹

Even when veniremen do follow news in the traditional media, voir dire questions regarding the information about the case to which a potential juror has been exposed through reading newspapers or watching television news should be followed by questions regarding the type of information the juror has accessed on-line. Predictably, the more media sources a potential juror regularly monitors, the more he is likely to know about a capital case on which he may be seated.²⁰ Social science research indicates that pretrial knowledge of a case is the best predictor of juror prejudice.²¹ Therefore, defense counsel must use all the tools at his disposal to assess the level to which veniremen possess knowledge of the case and whether that knowledge has led the juror to form an opinion in the case.²²

Voir dire questions should reflect the possibility that facts about the case, accurate or otherwise, may be available on the Internet, whether or not this information has been made public through other media. The amount of information available on the Internet far surpasses that available through traditional

the pretrial publicity simply did not—despite their apparent belief that they could”).

18. *Sheppard*, 384 U.S. at 345. The Court noted that “[t]he jurors themselves were constantly exposed to the news media” and that at least seven out of the twelve jurors subscribed to local newspapers. *Id.* The Court also made note of the fact that the remaining five jurors were never questioned about newspaper subscriptions during voir dire and none of the jurors were ever questioned “as to radios or television sets in the jurors’ homes, but we must assume that most of them owned such conveniences.” *Id.*

19. A recent consumer study found that approximately twenty percent of Internet users said they watch television and read newspapers less than they did before they had Internet access; fifteen percent said they read fewer magazines. Christopher Saunders, *Net Hurts Offline Communications, Media Use* (October 10, 2002) <http://www.internetnews.com/IAR/article.php/1480301> (last visited November 14, 2002).

20. See Studebaker, *supra* note 16, at 434 (describing a study indicating that the more media sources to which a participant was exposed, the more the participant knew about the case, and the more likely the participant was to think the accused was guilty).

21. *Id.* at 434, 436-37.

22. See John E. Nowak, *Jury Trials and First Amendment Values in “Cyber World,”* 34 U. RICH. L. REV. 1213, 1225 (2001) (“The attorney with information about cyber activities of potential jurors will be able to use jury challenges for cause, and use preemptive challenges, in a strategically wise manner. The attorney without that information may be consenting to the impaneling of a jury that is biased against his client.”).

media. In addition, Americans are more frequently getting their news on-line.²³ Defense counsel already may be familiar with websites maintained by traditional media outlets such as network television stations, cable news networks, national newspapers, and widely-circulated magazines. Counsel, however, should be aware that even websites of this type often contain wire reports and other more in-depth information on news topics that was never broadcast or published in the host media's original coverage of the topic.²⁴ Websites associated with traditional media also often contain archived material, in written or video form, which allow the user to access original broadcast footage or previously-posted supplementary material.²⁵ As a result, any potential juror with Internet access anywhere in the world has access to information that may not originally have been available through traditional media in his locality and to information whose declining effect over time is resurrected with more recent viewings and repetition of that information.

Prejudice is more likely to result when a potential juror possesses information before the trial that is never admitted in court than when facts known to a juror pretrial are then admitted at trial.²⁶ "The prejudice to the defendant is almost certain to be as great when . . . evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence It may indeed be greater for it is then not tempered by protective procedures."²⁷ This danger is never more pressing than in a capital case.²⁸ Therefore, counsel at least must be

23. See Victoria D. Bush & Faye W. Gilbert, *The Web as a Medium: An Exploratory Comparison of Internet Users Versus Newspaper Readers*, 10 J. MKTG. THEORY & PRAC. 110, 2002 WL 25332625, at *1 (2002) (stating that an estimated thirty-three percent of Americans now get their news on-line, up from twenty percent in 1998).

24. See, e.g., *Information Center/FAQ's*, <http://www.msnbc.com/m/info/FAQlinks.asp> (last visited October 16, 2002) (stating that "the web site publishes stories that are not found on TV").

25. See, e.g., *Viewer Services: Frequently Asked Questions*, <http://foxnews.com/foxfan/faq.html> (last visited October 16, 2002) (instructing viewers looking for more information on a story that aired on Fox News Channel to "check out our topics and guest archive for our primetime programming").

26. See Joanne Armstrong Brandwood, Note, *You Say "Fair Trial" and I Say "Free Press": British and American Approaches to Protecting Defendants' Rights in High Profile Trials*, 75 N.Y.U.L. REV. 1412, 1420 (2000) (stating that recanted confessions, prior criminal records and failed lie detector tests are particularly damaging forms of pretrial publicity for defendants); Studebaker, *supra* note 16, at 436 (describing social science study in which more than seventy-two percent of jurors exposed to mock news stories detailing inadmissible information voted to convict defendant in mock trial, whereas less than forty-four percent of jurors not exposed to this information voted to convict).

27. *Marshall v. United States*, 360 U.S. 310, 312-13 (1959) (internal citation omitted) (holding that some jurors' exposure to newspaper articles about the defendant was so prejudicial as to warrant the order of a new trial).

28. See *Irvin*, 366 U.S. at 728 ("With his life at stake, it is not requiring too much that [the defendant] be tried in an atmosphere undisturbed by so huge a wave of public passion and by a jury other than one in which two-thirds of the members admit, before hearing any testimony, to possessing a belief in his guilt.").

aware of the number of websites, other than the traditional news media, which might feature stories or commentary regarding a case.

For instance, an Internet search for information regarding Andrea Yates, sentenced to a capital life sentence for the deaths of her children, turned up articles, commentaries, and discussion board topics about her on a wide range of websites.²⁹ Many of these websites were associated with traditional media such as magazines, newspapers, television stations and programs, and radio stations.³⁰ However, many more websites mentioning Yates were otherwise primarily focused on academia, legal issues, opposition to the death penalty, support of the death penalty, politics (from conservatism to liberalism to socialism to capitalism), true crimes research/descriptions, women's organizations, feminist organizations, men's organizations, senior citizens' organizations, religion, spirituality, anti-religion, on-line encyclopedias, term paper services, mental illness, support for victims of incest and abuse, pregnancy, and parenting.³¹

Defense counsel also should be aware of the number of "chat rooms" and "bulletin boards" in which information about current events is exchanged and opinions are shared in a discussion forum. Here too the results can be surprising. For example, the website for a nationally known bookseller contained a page regarding a well-known fiction author's newest release and an on-line message board intended for discussion of the bookseller's products and suggestions for trivia questions regarding the famous author's works.³² However, the discussion board also contained a series of forty postings, some using inflammatory language and even profanity, regarding Andrea Yates and the writers' views on the appropriateness, or insufficiency, of her life sentence.³³

"The theory of our [American justice] system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."³⁴ In

29. On September 23, 2002, the author conducted a search on <http://www.google.com> using the search terms "Andrea Yates," which located approximately 53,200 websites mentioning her name.

30. See, e.g., *CNN.com In-Depth Special: The Case of Andrea Yates*, <http://www.cnn.com/SPECIALS/2001/yates> (last visited October 16, 2002) (presenting CNN television network's special report on the Yates case); *Time Online Edition: The Yates Odyssey*, <http://www.time.com/time/nation/article/0,8599,195267,00.html> (last visited October 16, 2002) (featuring Time magazine's archives of articles regarding the Yates case).

31. See, e.g., <http://www.mayhem.net/Crime/andreyates.html> (last visited October 16, 2002) (featuring a "Mass Murderer Hit List" and classifying Yates as a "Mass Murderer-Family Annihilator"); <http://www.suddenlysenior.com/andreyates.html> (last visited October 16, 2002) (touting the webpage as "[a] place for everyone who's become senior before their [sic] time" and containing a column titled "The Insane Judgment of Andrea Yates").

32. <http://bbs.simonsays.com/bbdocs/Forum4/HTML/008840.html> (last visited October 6, 2002).

33. *Id.* The postings began on March 15, 2002, the date Yates was sentenced, and ran until August 21, 2002. <http://bbs.simonsays.com/bbdocs/Forum4/HTML/008840-4.html>

34. *Sheppard*, 384 U.S. at 351 (internal quotation omitted).

order to protect the defendant's right to a fair trial, defense counsel must be prepared to assess during voir dire the extent to which potential jurors have expressed or formed an opinion regarding the case to be tried. In an age when access to electronic media is widespread, a thorough and searching voir dire must include direct questions regarding the information to which veniremen have been exposed on the Internet.³⁵

B. Juror Possesses Any Bias or Prejudice

The Internet can be a powerful tool for defense lawyers to discover more about potential jurors' biases and prejudices.³⁶ Voir dire questions should reflect the understanding that websites the juror regularly visits may inure him with particular biases or shed light on his own views and affiliations. Defense counsel should familiarize himself with the content of some popular websites, mainstream and otherwise, so that a juror's examples of websites he frequents may serve as useful indices of bias. Simple searches of Internet websites using key words or phrases that might be present in a website about a particularly troubling organization or philosophy could provide a starting point for defense counsel's base-level knowledge of the information available on the Internet.

Current practice is that counsel must make his challenge for cause immediately upon completion of the individual juror's voir dire.³⁷ This cannot effectively be done when a juror refers to an Internet site with which counsel is not familiar. Counsel must, therefore, be afforded an opportunity to view a website mentioned by a juror before counsel is asked to strike jurors for cause. Quick and easy Internet searches can reveal information about a worrisome potential juror and his group memberships or associations which can be useful in striking jurors for cause. For example, Minnesota defense lawyers in a suit seeking to recover medical costs from tobacco companies used the Internet to investigate the affiliation of a potential juror who disclosed his membership in a group called INFACT during voir dire.³⁸ An Internet search revealed to defense counsel that INFACT is a "staunchly anti-tobacco" organization.³⁹ The defense lawyers moved to exclude the juror based on his admitted membership in the group.⁴⁰

Veniremen may feel more free to conceal their on-line activities than their subscriptions to the daily newspaper because they may believe their Internet

35. See Studebaker, *supra* note 16, at 440 ("Extended voir dire and judicial admonitions appear to be the most commonly used remedies for prejudicial pretrial publicity Use of voir dire reflects a widespread belief that an extensive voir dire can effectively identify and eliminate jurors influenced by exposure to pretrial publicity." (internal citations omitted)).

36. See Nowak, *supra* note 22, at 1225.

37. COSTELLO, *supra* note 7, at § 57.7-1.

38. Frederick S. Lane III, *Internet Research and Voir Dire*, at <http://legalminds.lp.findlaw.com/list/net-lawyers/msg02769.html> (last visited October 6, 2002).

39. *Id.*

40. *Id.*

habits are less easily discovered by counsel.⁴¹ Demonstrating an awareness of the topic and a willingness to probe it during voir dire may encourage more complete and honest answers from potential jurors. Therefore, it is of particular importance that defense counsel specifically ask potential jurors about on-line activity. The potential for bias or misinformation to be presented on the Internet is great.⁴² Unlike traditional news sources and their corresponding websites, many other Internet sites that furnish information to the public do so without reference to the source of the information and without disclosing biases or particular agendas of the creators of the website. Because many sources of information on the Internet are not bound by professional standards regarding unbiased presentation of information to the public, the potential for opinion or speculation to be presented as fact is even greater than in the traditional news media.⁴³ In *Mu'Min v Virginia*,⁴⁴ the United States Supreme Court held that voir dire inquiries into the specific content of pretrial publicity to which a potential juror has been exposed are not constitutionally mandated.⁴⁵ The *Mu'Min* rule should be applied very carefully to Internet media which often consist of unrestricted content. For example, if a juror responds during voir dire that she regularly visits websites for CNN or *The Washington Post*, under *Mu'Min*, the task of uncovering specific information she saw on-line falls squarely on defense counsel. If a juror responds that she regularly visits an agenda-oriented website or one that is unknown to counsel, the case is distinguishable from *Mu'Min*. In *Mu'Min*, the defendant raised the issue of whether counsel could inquire into a juror's prior knowledge of the case, gained through pretrial publicity in traditional media.⁴⁶ When a juror indicates that she regularly views websites not associated with traditional media, the concern is with the built-in bias that the juror may possess, rather than merely the information to which she has been exposed. That particular situation is outside of the reach of *Mu'Min*, and the rule from that case should be applied with great care. Defense counsel should inquire further into the particular content of content-oriented or unknown websites and should, if

41. See Nowak, *supra* note 22, at 1218 (predicting future advances in Internet technology and their effects on potential jurors).

42. See, e.g., Editorial, *Bats and the Bark: Internet Inaccuracies Inevitable*, THE RECORD, Oct. 8, 2002, at L14, available at 2002 WL 4675596 (recounting several recent public errors made by people relying on information gleaned from the Internet).

43. See, e.g., Laura Landro, *Online Health Groups Step Up Attempts to Enforce Standards*, WALL ST. J., July 20, 2001, at B1, available at 2001 WL-WSJ 2870212 (describing the task of setting standards for the publication of medical information on the Internet); Richard B. Schmitt, *Lowering the Bar: Lawyers Flood Web, But Many Ads Fail To Tell Whole Truth*, WALL ST. J., Jan. 15, 2001, at A1, available at 2001 WL-WSJ 2850972 (discussing the difficulty in regulating lawyer advertising and the need for Internet watchdogs).

44. 500 U.S. 415 (1991).

45. *Mu'Min v. Virginia*, 500 U.S. 415, 431 (1991).

46. *Id.* at 418-19.

possible, be afforded the opportunity to view the websites before continuing the voir dire.

Counsel should use voir dire not only to probe the prejudicial information to which potential jurors may have been exposed, but also as an opportunity to rehabilitate jurors regarding (mis)information they may have seen on the Internet. In order to rehabilitate a juror who might otherwise be struck for cause, the juror must respond to non-leading questions in such a way as to demonstrate his impartiality in the case in which he sits.⁴⁷ When a juror's recitation of information he has seen on the Internet suggests he may be struck for cause, defense counsel should use non-leading questions to rehabilitate the juror and to ensure that the juror could render a fair and impartial verdict in a case based solely on the evidence presented at trial.

III. *The Internet and Change of Venue and Venire*

A. *Change of Venue*

Under Virginia Code Section 19.2-251, which governs change of venue, either the accused or the Commonwealth may make a motion for change of venue in order to afford both parties a fair and impartial trial.⁴⁸ Defense counsel's motion for change of venue must be supported by affidavits of disinterested individuals stating the facts and circumstances tending to show that a fair and impartial trial cannot be held in the location where venue originally was laid.⁴⁹ A motion for change of venue is a powerful tool for defense attorneys given the potential link between residence in the venue county and the influence of pretrial publicity. One study found that a far greater number of survey respondents in the venue county of a capital trial had heard or read about the case than citizens of other counties.⁵⁰ Respondents in the venue county were also significantly more likely to know inadmissible information about the case and to believe the defendant was guilty.⁵¹ This study seems to indicate great potential for juror bias in the county in which venue originally is laid.

A motion for change of venue is properly granted in two circumstances. When the defendant clearly shows that there is such a widespread feeling of prejudice in the locality where venue originally is laid that such prejudice is reasonably certain to prevent a fair and impartial trial, a change of venue is

47. *David*, 493 S.E.2d at 381.

48. VA. CODE ANN. § 19.2-251 (Michie 2000) (providing in pertinent part: "A circuit court may, on motion of the accused or of the Commonwealth, for good cause, order the venue for the trial of a criminal case in such court to be changed to some other circuit court").

49. *Ramsay v. Harrison*, 89 S.E. 977, 980 (Va. 1916) (upholding trial court's refusal to grant defendant's motion for change of venue where affidavits given in support of motion did not contain specific facts and circumstances showing a fair trial could not be had).

50. *Studebaker*, *supra* note 16, at 433-34.

51. *Id.* at 434.

proper.⁵² The court may also properly grant a motion for change of venue when the court finds difficulty in seating an impartial jury free from challenges for cause.⁵³

Lawyers and judges must understand that the Internet changes the timing of publicity in a case. Traditionally, when considering motions regarding pretrial publicity, courts have considered the timing of the pretrial publicity in relation to the date of trial.⁵⁴ The court looks at the conditions that existed at the time of trial rather than at the time the crime took place.⁵⁵ In addition, the court may postpone trial to allow publicity regarding the case to subside.⁵⁶ The emphasis placed on the conditions at the time of trial and the determination that postponement is a remedy for pretrial publicity indicates judicial reliance on a publicity cycle in which initial publicity at the time of arrest or filing of charges will dissipate closer to the date of trial. But given the number of Internet resources now available to the public, there is no reason to assume this model still holds true.⁵⁷

The Internet is more conducive to sustaining interest in a case over longer periods of time than traditional news media because of the unique self-selected nature of the information the public gathers on-line. Information that circulated at the time of arrest or formal charges remains accessible six months or a year later because traditional media websites provide archived materials. This allows constant access to the full range of past and present information about a case.⁵⁸ For example, approximately seventy-five days following the end of the trial of

52. See, e.g., *Irin*, 366 U.S. at 727 (vacating defendant's sentence in case in which ninety percent of the veniremen "entertained some opinion as to guilt—ranging in intensity from mere suspicion to absolute certainty").

53. *Thomas v. Commonwealth*, 559 S.E.2d 652, 660-61 (Va. 2002) (holding that the trial court properly postponed ruling on a motion for change of venue until after it had attempted to seat a jury, even though the defendant produced 111 articles and transcripts of 188 television reports; the proper inquiry for the trial court is the volume and nature of the pretrial publicity and the ease with which a jury free from exception is then seated). See generally Cynthia M. Bruce, Case Note, 14 CAP. DEF. J. 395 (2002) (analyzing *Thomas v. Commonwealth*, 559 S.E.2d 652 (Va. 2002)).

54. See *Thomas*, 559 S.E.2d at 660 (stating that one of the relevant factors in determining whether a change of venue is warranted is the timing of publicity).

55. See *Greenfield v. Commonwealth*, 204 S.E.2d 414, 420 (Va. 1974) (noting the significant lapse of time between the date of the crime, when most of the press coverage occurred, and the date of trial).

56. See *Sheppard*, 384 U.S. at 363 (stating that "where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county"); *King*, 192 F.R.D. at 532 (naming "postponement of the trial to allow public attention to subside" as an alternative to placing a prior restraint on publicity).

57. See *Studebaker*, *supra* note 16, at 440 (describing a study indicating that a postponement may help diminish the effects of "factual" pretrial publicity, but not "emotional" publicity).

58. See, e.g., <http://www.cnn.com/INDEX/about.us/> (last visited October 16, 2002) (stating: "CNN.com features the latest multimedia technologies, from live video streaming to audio packages to searchable archives of news features and background information").

Andrea Yates, an Internet search for her name produced about 58,100 websites mentioning her.⁵⁹ Approximately 170 days after Andrea Yates was sentenced to life in prison, an Internet search for her name still found about 52,200 websites mentioning her.⁶⁰ An Internet search for the name of Chandra Levy, the infamous former Washington, D.C. intern who disappeared in April 2001, found approximately 48,600 websites discussing the Levy disappearance.⁶¹ This search was conducted following the discovery of Levy's remains and prior to any arrest in connection with her death. This information likely will remain accessible to potential jurors if and when a defendant is tried for her death.

A change of venue is not warranted unless pretrial publicity "is so inherently prejudicial that trial proceedings must be presumed to be tainted."⁶² Because this is a difficult burden to meet, defense counsel pro-actively must research the publicity surrounding his current cases on-line. To represent effectively to the court the need for a change of venue or venire, the defense must be aware of the volume and nature of the information available regarding the case.⁶³ Counsel should visit regularly news forums and bulletin boards where the case is discussed to gather information about the comments being made and the information being transmitted. Because the court may conduct a sua sponte Internet search to evaluate the level of pretrial publicity, counsel should be informed about what that search may reveal to the court.⁶⁴ "In deciding whether a change in venue is warranted, it is pertinent whether the publicity concerning the case is factually accurate, temperate, and noninflammatory."⁶⁵ Defense counsel specifically should draw the court's attention to misinformation, inflammatory statements, or incitements to public action which are posted on the Internet.⁶⁶

59. On May 31, 2002, the author conducted a search on <http://www.google.com> using the search terms "Andrea Yates."

60. On September 8, 2002, the author conducted a search on <http://www.google.com> using the search terms "Andrea Yates."

61. On May 31, 2002, the author conducted a search on <http://www.google.com> using the search terms "Chandra Levy."

62. *Lindh*, 212 F. Supp. 2d at 541 (quoting *United States v. Bakker*, 925 F.2d 728, 732 (4th Cir. 1991)).

63. See VA. CODE ANN. § 19.2-251 (Michie 2000) (describing procedure and standard for change of venue); VA. CODE ANN. § 8.01-358 (Michie 2000) (describing procedure for summoning jurors from other jurisdictions).

64. See *King*, 192 F.R.D. at 530-33 (denying motion to restrain publication of a witness's television interview because prejudicial effect of interview was not so great that impartial jurors could not be found or voir dire could not cure prejudice; relying on its own " cursory search on the Internet" and defendant's representations of pretrial prejudice in its analysis).

65. *Buchanan v. Commonwealth*, 384 S.E.2d 757, 768 (Va. 1989) (holding that the trial court did not err in denying defendant's motion for change of venue because the pretrial publicity of which the defendant complained was "accurate and noninflammatory").

66. See *id.* (stating that factors relevant in determining impact of pretrial publicity on defendant's ability to secure a fair trial include whether publicity is accurate, temperate, and non-inflam-

It is important to be aware of the possible negative effect of presenting the court with evidence of widespread publicity about the case on the Internet. In *United States v Lindh*,⁶⁷ the defense presented evidence from an expert who conducted a telephone interview survey to assess the impact of pretrial publicity in Lindh's case.⁶⁸ The expert interviewed 400 individuals in the Eastern District of Virginia, where venue was laid, and 200 individuals in Chicago, Minneapolis, San Francisco, and Seattle for purposes of comparison.⁶⁹ The expert concluded that "the stated attitudes of jury eligible respondents in Virginia toward Mr. Lindh between April 29 and May 2 did not differ from stated attitudes in the rest of the country."⁷⁰ The defense may have presented this information to the court because it sought dismissal of the indictment as a remedy for pretrial publicity, and a change of venue in the alternative.⁷¹ The court stated that dismissal of the indictment as a remedy is "severe and rarely warranted," but also declined to grant the motion for change of venue, in part because the expert's evidence showed that "Lindh is just as likely to receive a fair trial in this district as he is elsewhere in the country."⁷²

To avoid this particular problem, the Internet information should be only a part of the total package of pretrial publicity presented to the court. Although it may not be possible in every case, counsel should consider seeking information regarding the demographics of computer users from the webmasters or organizations maintaining a website that mentions counsel's case. Counsel should use evidence of extraordinarily prevalent or prejudicial types of information available on the Internet to bolster his argument regarding the influence of other more local media.

Lindh also illustrates the necessity of covering Internet exposure in voir dire; it may be a much more effective strategy to reveal pretrial exposure of particular jurors than to argue that widespread effects of Internet access have tainted the entire jury pool in a particular venue.⁷³ In fact, the court in *Lindh* stated that the fact that many of the individuals polled in Virginia knew someone injured or killed in the September 11, 2001 attacks to which the prosecution was attempting

matory). *But see Lindh*, 212 F. Supp. 2d at 549 (denying alleged Taliban-linked defendant's motion for change of venue despite the existence of "expressions of opinions on newspaper editorial pages or the Internet that were specifically designed to inflame or persuade readers").

67. 212 F. Supp. 2d 541 (E.D. Va. 2002).

68. *United States v Lindh*, 212 F. Supp. 2d 541, 550 (E.D. Va. 2002).

69. *Id.*

70. *Id.*

71. *Id.* at 547-48.

72. *Id.* at 548-50.

73. *See id.* at 551 (finding that an expert's report comparing media coverage in Minneapolis and in the venue of Alexandria did not support transferring the case because newspaper reports in Alexandria were not more harsh than those in Minneapolis and because the defendant is not entitled to a favorable jury, but a fair and impartial jury).

to connect the defendant was a matter "adequately addressed and dealt with during the voir dire process."⁷⁴ It is interesting to note that the *Lindh* court also called a second expert's methodology flawed in his content analysis of pretrial newspaper coverage in two newspapers in Alexandria, Virginia, and two newspapers in Minneapolis, Minnesota, partly because of the expert's failure "to take into account any television or computer generated publicity."⁷⁵

B. Change of Venire

A motion for change of venire essentially encompasses the same concerns regarding Internet information as does a motion for change of venue. Virginia Code Section 8.01-363 governs change of venire in criminal cases.⁷⁶ Section 8.01-363 protects the right of an accused to a fair trial by allowing the defendant, the Commonwealth, or the court sua sponte, to move for a change of venire "in order to secure a fair trial."⁷⁷ Like a motion for change of venue, a change of venire is proper when an impartial jury, essential to an impartial trial, cannot be obtained in the county in which venue lies.⁷⁸ "It must appear that impartial jurors cannot with reasonable effort be obtained in the jurisdiction and that there is a necessity for summoning them from without it."⁷⁹

Changes of venue and venire are not entirely distinct concepts and counsel should be aware of the interplay between them. For strategic reasons, counsel may want to move for a change of venue, even though he would not want a change of venire. For instance, counsel may conclude that a change of venue to a distant region of the Commonwealth would be necessary to ensure a fair and impartial trial for the defendant. However, defense counsel may be of the opinion that bringing veniremen from a bordering county into the current venue

74. *Lindh*, 212 F. Supp. 2d at 551.

75. *Id.*

76. VA. CODE ANN. § 8.01-363 (Michie 2000) provides in pertinent part:

In any case in which qualified jurors who are not exempt from serving and who the judge is satisfied can render a fair and impartial trial cannot be conveniently found in the county or city in which the trial is to be, the court may cause so many jurors as may be necessary to be summoned from any other county or city.

Id. Although this section appears in the Civil Remedies and Procedure section of the Code, it has been applied repeatedly to criminal cases by Virginia courts. See, e.g., *Newberry v. Commonwealth*, 66 S.E.2d 841, 846 (Va. 1951) (upholding the trial court's grant of a change of venire because a sufficient showing was made that the change of venire was reasonably necessary to obtain qualified jurors); *Fisher v. Commonwealth*, 431 S.E.2d 886, 890 (Va. Ct. App. 1993) (granting a change of venire sua sponte when the criminal defendant moved for a change of venue).

77. See *Richmond Newspapers, Inc. v. Commonwealth*, 281 S.E.2d 915, 920 (Va. 1981) (holding that the statute allowing a trial court to exclude from trial any person whose presence would compromise a fair trial is constitutional and finding error in the trial court's order to close the trial to the media because the court did not afford the intervenors a hearing on merits of their claims).

78. VA. CODE ANN. § 8.01-363 (Michie 2000).

79. *Newberry*, 66 S.E.2d at 845.

would essentially be no remedy at all because those veniremen may have been subject to essentially the same pretrial publicity as citizens of the original venue. In this situation, it is important to note that a motion for change of venue based solely on the grounds of difficulty finding jurors free from exceptions must be preceded by a motion for change of venire.⁸⁰ This rule does not apply, however, when the motion for change of venue is based on the grounds of prejudice so prevalent as to render the trial unfair or impartial.⁸¹

The significance of this predicate rule is that counsel must be mindful of the ways in which motions for changes of venue or venire are presented to the court and must tailor supporting evidence accordingly. In the situation noted above, in which a change of venue is sought but a change of venire is undesirable, counsel must be careful to describe the grounds for a motion for change of venue as prejudice so prevalent as to render the trial unfair or impartial. Counsel must present the problem as one of exposure to pretrial publicity. Evidence regarding information available on the Internet should be structured to support an argument that pretrial publicity in the traditional media increases the likelihood that a potential juror in the current venue would either actively seek out information or pay more attention to inadvertently discovered information regarding the case.

Even when counsel seeks a change of venire, he must be mindful that information regarding Internet publicity may be a double-edged sword. It is insufficient simply to demonstrate that publicity exists or that a general prejudice has formed.⁸² Defense counsel must think through the potential consequences of introducing evidence of Internet information. The Fourth Circuit has held that a change of venue or change of venire that remained in Virginia would not necessarily ease the defendant's concerns about pretrial prejudice because "[o]bviously, the same broadcasts and telecasts heard and seen in the county of trial would extend over the State generally."⁸³ Similarly, information can just as easily be accessed from a computer in one county as from a computer in any other part of the state. Furthermore, the court has explained that "rigorous and scrupulously searching voir dire" often will protect a defendant against prejudice in the venire.⁸⁴

When making a motion for change of venire on the basis of information available on the Internet, defense counsel should be sensitive to the possibility that the court may deem a searching voir dire to be a sufficient remedy for

80. See *Waller v. Commonwealth*, 5 S.E. 364, 366 (Va. 1888) (holding that motion for change of venue should have been preceded by a motion for change of venire).

81. See *Uzzle v. Commonwealth*, 60 S.E. 52, 54-55 (Va. 1908) (holding that a motion for change of venire is only required to precede a motion for change of venue when the change of venue is requested on the grounds of inability to secure jurors free from exception).

82. See *COSTELLO*, *supra* note 7, at § 57.4-2.

83. *Rees v. Peyton*, 341 F.2d 859, 863 (4th Cir. 1965).

84. *Id.* at 863-64.

pretrial publicity or may decide that because only an imperfect remedy may be had, none should be had at all.⁸⁵ Therefore, evidence of Internet publicity, while extremely important, should be but one piece of the evidence offered to the trial judge in support of the motion for change of venue. The danger in basing a motion for change of venue on the amount and type of information available on the Internet is the risk that a court will deny the motion because the availability of information on the Internet makes it unlikely that potential jurors from another locale would be more apt to render a fair and impartial trial than potential jurors in the county where venue is laid.⁸⁶

IV. Internet and Other Trial Strategies

A. Judicial Restraint on Speech

The Internet continues to exert an influence on a criminal trial even after venue has been selected and a jury seated. Any gag order or other restraint on the dissemination of information regarding a case should make specific reference to the use of the Internet.⁸⁷ Because Internet usage is so commonplace to many, an order which does not specifically mention the Internet may not impress upon its subject the idea that the Internet is another forum in which information is disseminated to the public. The subject of a gag order or restraint must be reminded that the Internet is not a free forum in which to discuss that which cannot be broadcast on television or printed in a newspaper. It may also be less likely that information "leaked" to an Internet source will be discovered by counsel or the court since it may be less readily apparent than information revealed in traditional media. Therefore, the court must take additional precautions in preventing subjects of a gag order from inadvertently violating the order by relaying information to an Internet source. In addition, if the court demonstrates an awareness of the particular issues raised by the Internet, the subject of a gag order may be less likely intentionally to circumvent the order by communicating through the Internet, for fear of being caught.

B. Media Coverage of Trial Proceedings

Judicial determinations regarding media coverage of a trial should include a consideration of the unique nature of the Internet. The Internet provides wider circulation and greater ability for scrutiny and replaying of actual courtroom

85. See Studebaker, *supra* note 16, at 440 (stating that use of voir dire as a remedy for pretrial publicity "reflects a widespread belief that an extensive voir dire can effectively identify and eliminate jurors influenced by exposure to pretrial publicity").

86. See *L. inth*, 212 F. Supp. 2d at 548-50 (denying defendant's motion for change of venue, in part because pretrial knowledge of the case was so widespread that defendant was "just as likely to receive a fair trial in this district as he is elsewhere").

87. See *King*, 192 F.R.D. at 535-36 (issuing order restraining perspective witnesses from forecasting their future testimony and opinions in interviews with the press or any way which might lead to their public dissemination, specifically including the Internet).

footage.⁸⁸ Voir dire proceedings are generally open to the public unless there is specific evidence that a closure order is “essential to preserve higher values and narrowly tailored to serve that interest.”⁸⁹ Therefore, the existence of prevalent Internet information sources may discourage potential jurors from responding honestly to questions in voir dire when personal information they reveal at that time could be disseminated on the Internet.⁹⁰ When deciding issues regarding broadcasts or photography of court proceedings, judges should be mindful of the increased access to these sources on the Internet and the ease with which they can be quickly and widely disseminated.

C. Limiting the Jury's Access to Information During Trial

Jurors must be instructed specifically to control their use of the Internet or email during the course of trial. Jurors may be exposed to information from either of these sources that is different from or in addition to the evidence at trial, which should be the sole basis for the decision they will render in a trial. “Unless it is shown otherwise, [the court] will presume that jurors follow the trial court’s instructions to avoid exposure.”⁹¹ Therefore, just as jurors are reminded nightly during the course of trial not to read newspapers or watch television coverage of the case and not to discuss the case with anyone, they should be reminded not to access any information regarding the case on the Internet or through email.⁹² Because the Internet is such a vast resource, the potential exists for jurors to do independent research on matters of law with more ease and stealth than going to the local law library would require. For example, a simple Internet search for information on the death penalty in Virginia returned approximately 129,000 websites.⁹³ Courts must also instruct jurors to use email carefully during the course of the trial in order to avoid juror contact with acquaintances who may want to discuss the case and unknown interested parties who may want to attempt to influence the outcome of the trial.

88. See *United States v. Moussaoui*, 205 F.R.D. 183, 187-88 (E.D. Va. 2002) (refusing to lift ban on photographing and broadcasting of federal criminal proceedings in trial of an alleged terrorist due to concerns for security of jurors, members of court, and proceedings and stating that these concerns would still be present, though to lesser degree, if trial were audio-broadcast over the radio or Internet).

89. *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 510 (1984) (holding that the trial court could not constitutionally close voir dire to protect the privacy interests of prospective jurors without first considering alternatives and without articulating findings in support of the closure order).

90. Nowak, *supra* note 22, at 1238.

91. *Buchanan*, 384 S.E.2d at 768.

92. See, e.g., Nowak, *supra* note 22, at 1243 (advocating the use of a judicial order to monitor the transmission of information to jurors by email during trial).

93. On September 21, 2002, the author conducted a search on <http://www.google.com> using the search terms “Virginia Death Penalty.”

Counsel should be concerned about more than just the information a juror may find on-line about the specifics of the case on which he sits. The danger of a juror's exposure to information during trial is illustrated by the strategies of the Fully Informed Jury Association ("FIJA"). FIJA has aggressively promoted the use of "jury nullification" since its inception in 1989.⁹⁴ FIJA's campaign seeks to inform jurors and veniremen of "the raw and undisclosed power of juries to render verdicts contrary to both law and fact," returning political power to the people by vetoing the law in individual cases in favor of determining case outcomes by public policy determinations.⁹⁵ In *Turney v. State*,⁹⁶ a FIJA member challenged a grand jury indictment charging him with jury tampering based on his attempts to inform sitting jurors of their rights to use "jury nullification" through the distribution of pamphlets and a toll-free telephone number.⁹⁷ Turney's actions resulted in several jurors calling the phone number, hearing a recording purporting to appraise them of their rights as jurors, and changing their votes during deliberations based on a new-found understanding that they could vote any way they want to, without regard to the judge's instructions on the law.⁹⁸

The *Turney* case indicates that the jurors more readily accepted FIJA's explanation of a juror's rights and duties than the judge's explanation of what is required of jurors. This case illustrates the influence that extrajudicial sources of information can have on a sitting jury during trial. Jurors who are not sequestered during trial have a world of resources and potential sources of influence at their fingertips when they return to the privacy of their homes and immediate access to the Internet and email. In order to prevent jurors from seeking out information on the Internet which they might use to supplement the jury's knowledge of the facts of the case or even supplant the judge's instructions on the legal duties of jurors, the court specifically must address such conduct in its instructions. Jurors must understand that they are not free to search the Internet for information regarding a case, just as they are not free to read newspaper or view television coverage of the case on which they sit. Judges must also be aware that, as discussed above, even seemingly innocuous websites could contain posting boards or other forums discussing issues relevant to a pending criminal case.

Jurors should also be instructed to be cautious about email contact during the course of trial. An interested group, such as FIJA, could use email to direct jurors to information that improperly could influence or pressure the jury in making its verdict. A partial restraint on Internet use will not shield jurors effectively from all information regarding highly publicized cases or special

94. Erick J. Haynie, Comment, *Populism, Free Speech, and the Rule of Law: The "Fully Informed" Jury Movement and Its Implications*, 88 J. CRIM. L. & CRIMINOLOGY 343, 344 (1997).

95. *Id.*

96. 936 P.2d 533 (Alaska 1997).

97. *Turney v. State*, 936 P.2d 533, 535-36 (Alaska 1997).

98. *Id.* at 536-37.

interest groups when information of those types can be linked to or mentioned in a varied array of Internet sites not necessarily related (sometimes not even logically related) to a site a juror may access. However, jury instructions should limit Internet and email usage by jurors during trial in a similar manner to the ways in which they currently instruct jurors to limit their exposure to traditional media and influential personal contacts.⁹⁹

V. Conclusion

The Internet and the "information age" have changed the way the public receives and analyzes information. Defense counsel should adapt defense strategies in order to ensure a fair and impartial trial for capital defendants. Counsel should be particularly sensitive to the ways in which the reach of the Internet affects strategies for voir dire, motions for change of venue, and motions for change of venire.

Defense counsel must adopt a pro-active approach to learning about potential jurors' habits on-line. This investigation should include the use of voir dire questions that probe pretrial information that jurors have obtained about the case and the source of this information. Potential jurors must be asked specifically about their on-line habits in order to elicit truthful responses about possible sources of bias which jurors might not otherwise consider when responding to questions in voir dire. Counsel should use voir dire as an opportunity to educate the court about the ways in which the Internet affects the amount and character of pretrial publicity potential jurors possess.

Most importantly, voir dire questions regarding the Internet must be structured to reveal information about veniremen's pre-existing opinions about the case and any biases or prejudices they may hold. Counsel should investigate websites which jurors admit to frequenting and carefully should screen such sites for information regarding their capital defendants or the criminal justice system in general. Becoming familiar with the information sources jurors visit can also shed light on the potential biases or prejudices those jurors may hold.

The widespread availability of information on the Internet also dramatically changes how counsel should view motions for change of venue and change of venire in highly-publicized cases. The court must be educated as to the amount and type of information being made available, just as counsel educates the court about the contents of traditional media outlets. Counsel should appreciate fully the increased potential for factual information presented on the Internet to be inaccurate or opinion masquerading as fact. Defense counsel should also be particularly sensitive to the often highly-prejudicial and inflammatory nature of information on the Internet and should consider the motive and bias of individuals or organizations who post the information on-line.

99. For an example of a model jury instruction that reflects the concern that jurors' Internet and email access during trial presents, see Appendix A to this article.

The court and counsel must recognize that traditional notions of the "publicity cycle" in criminal cases no longer may describe accurately the ways in which potential jurors are exposed to information about a case. Defense counsel should be well-acquainted with the particular sources of Internet information in any case and should use this evidence in support of motions for change of venue or venire. Counsel should also anticipate that courts *sua sponte* may use an Internet search as a short-hand calculation of the amount of pretrial publicity that exists in a case. As much as is practicable, counsel must try to tailor his arguments both to express the widespread nature of the Internet publicity, but also to emphasize its localized effect. To do otherwise may result in a ruling that pretrial publicity is in fact so widespread and prevalent that a change of venue or venire would be no remedy at all, leaving defense counsel with a searching *voir dire* as his only line of defense against juror bias.

Outside of the pretrial context, defense counsel must urge the court to encompass specific reference to a prohibition against speech on the Internet when issuing a gag order or other restraint on disseminating information in a case. Witnesses in a trial, like potential jurors in *voir dire*, may not consider the inclusion of the Internet in discussions of traditional media sources unless specifically instructed to consider them. The court also should consider the effect of the release of photographic or audio coverage of court proceedings on the Internet when determining whether proceedings will be open.

Finally, defense counsel must ensure that seated jurors are instructed specifically to exercise caution when accessing any information on the Internet or email during trial. This is especially important given the diminished reliability of information found on the Internet or received by email, as opposed to traditional news sources. A jury instruction should be read indicating the caution with which jurors should use the Internet and email, just as the jurors are instructed on the types of contacts with other media and persons which should be limited during trial.

APPENDIX A
MODEL JURY INSTRUCTION INCLUDING CONSIDERATION OF
THE INTERNET AND EMAIL RESOURCES AVAILABLE TO JURORS
DURING TRIAL

My instructions to you about newspaper or television reports and conversations about this case also apply to the Internet and email. You should not visit any Internet site that might contain information about this case. If you do access such a site, exit it immediately. In addition, you must not attempt any form of Internet investigation or research about any issue pertaining to this case during the trial. Be very cautious about your use of email while you are a juror. Do not open any email that appears to have a connection to this case. If you do open such an email, exit it immediately. Should anyone attempt through email to discuss this case with you, report that fact to me.

