RESTRAINTS ON SPEECH

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State Bar of Texas
28th Annual Advanced Civil Trial Course
November 9-11, 2005
Houston, Texas

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I. INTRODUCTION

This article discusses restraints on speech imposed by the government, through the judiciary, prior to the speech occurring, as opposed to restraints that operate to punish speech after it occurs, such as the law of defamation. Governmental attempts to restrict or censor speech before it occurs are commonly referred to as "prior restraints" and strike at the heart of the First Amendment's protection against laws *"abridging the freedom of speech, or of the press…."* As such, both federal and state courts have long abhorred prior restraints, requiring that any alleged speech-based violations of law be addressed after the speech occurs.

The U.S. Supreme Court made its position clear in the landmark prior restraint decision of New York Times v. United States, 403 U.S. 713, 725-726 (1971) (the "Pentagon Papers" case), in which the government sought to enjoin publication of stolen classified papers concerning the Vietnam War: "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." Id. at 714, quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963). Justice Brennan, in his concurring opinion rejecting the request for a prior restraint, stated the principle even more strongly: "The First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result." Id. at 725-26. The Texas Supreme Court has echoed this intolerance of prior restraints, noting that such restraints "will withstand scrutiny . . . only under the most extraordinary circumstances." Davenport v. Garcia, 834 S.W.2d 4, 10 (Tex. 1992). Very few cases present such extraordinary circumstances, as the Pentagon Papers case (discussed more fully in Section II below) clearly demonstrates.

Prior restraints can take many forms, ranging from statutes requiring governmental approval of certain speech (e.g., attorney advertisement laws and licensing statutes) to gag orders imposed by courts to control trial publicity. This article focuses on restraints imposed by the judiciary in the form of gag orders related to trial proceedings and orders granting temporary injunctive relief that restrict speech before it occurs.

II. A BRIEF HISTORY OF PRIOR RESTRAINT DOCTRINE

For more than 70 years, the U.S. Supreme Court has articulated the chief purpose of the First Amendment's protection of freedom of the press -- "to prevent previous restraints upon publication." Near v. Minnesota, 283 U.S. 697 (1931). In Near, the Court firmly established that prior restraints on speech are presumptively unconstitutional. At issue in Near were several articles appearing in *The Saturday Press* that claimed a Minneapolis gangster was in control of gambling, bootlegging, and racketeering in the city, and further alleging that the police force was incompetent. The state brought suit to "abate" this alleged defamation under a Minnesota statute. The trial court issued an order allowing the press to only publish information in harmony with the general welfare. The Supreme Court reversed, holding that the order was an unconstitutional prior restraint that did not meet the high burden required to justify such a restraint.

Subsequent decisions by the Supreme Court have focused on a variety of laws and court orders attempting to censor speech. In Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963), a Rhode Island law created a commission designed to encourage the morality of youth. As part of its mission, the commission stopped circulation of certain publications. The Supreme Court held that the law was unconstitutional, reiterating its position as stated in Near that "[a]ny system of prior restraints of expression comes to the Supreme Court bearing a heavy presumption against its constitutional validity." Id. at 63. The Court determined that the procedural safeguards in place were insufficient to protect the First Amendment rights of the publishers -- the commission had the authority to act entirely on its own, was not subject to oversight, and had insufficient measures for notice requirements.

Less than a decade later, the Supreme Court decided the seminal prior restraint case of New York Times v. United States, 403 U.S. 713 (1971), commonly referred to as the "Pentagon Papers" case. The background facts of the case seemed to suggest a strong national security interest justifying a prior restraint. The Nixon Administration had attempted to prevent *The New York Times* and the *Washington Post* from continuing to print excerpts of a classified forty-seven volume Pentagon study entitled "History of U.S. Decision-Making Process on Viet Nam Policy" that had been stolen by Daniel Ellsberg. The government claimed that the papers contained "Top Secret – Sensitive" information, and the release of the information would compromise national security. The government failed, however, to provide any specific facts to support their claim of a threat to national security. The Supreme Court, in a *per curiam* opinion, summarily and speedily rejected any prior restraint on publication of the Pentagon Papers. The Court held that vague allegations of threats to national security

were insufficient to overcome the presumption of invalidity placed on a prior restraint. As Justice Douglas eloquently wrote in his concurring opinion:

> The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information . . . [o]pen debate and discussion of public issues are vital to our national health. On public questions there should be 'uninhibited, robust and wide-open' debate.

New York Times, 403 U.S. at 723-724 (Douglas, J., concurring).

The Court turned its attention to a number of prior restraint cases during the 1970s. In Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975), the father of a deceased rape victim brought an action for invasion of privacy against a broadcasting company for identifying the victim in one of its broadcasts. The state trial court granted summary judgment for the father, which was affirmed on appeal. The Supreme Court reversed, holding that a state may not impose sanctions on the accurate publication of a rape victim's name obtained from judicial records that are part of a public prosecution. The Court determined that the privacy interest at stake diminishes when the information reported is obtained from public records. First Amendment rights do not diminish and, therefore, outweighed the privacy interest. The reporter in this investigation had obtained the reported information from public records and hearings. In a similar case, Oklahoma Publ'g Co. v. District Court, 430 U.S. 308 (1977), the Supreme Court determined that a state court's pretrial order enjoining the news media from publishing the name or photograph of an 11-year-old boy in connection with a pending juvenile proceeding charging the boy with delinquency by second-degree murder was a First Amendment violation. In yet another similar case just two years later, Smith v. Daily Mail Publ'g Co., 443 U.S. 97 (1979), a newspaper published the name of a juvenile offender that it had obtained from public records. The Court overturned the state statute forbidding the dissemination of the information under the rationale of Cox.

In an important case involving trial court gag orders, the Court in Nebraska Press Association v. Stuart, 427 U.S. 539 (1976) struck down an order that limited news coverage of a sensational murder case in Nebraska. The Court determined that the Nebraska trial court had not met the strong requirements necessary to support the validity of a prior restraint. Absent compelling justifications stated in the record, prior restraints are presumptively unconstitutional and cannot stand. The trial judge's determination that publicity would adversely affect the defendant's rights in the murder case were purely speculative and unsupported by any evidence in the record.

In a series of cases involving the CIA, courts have grappled with the overlay of contract law on First Amendment free speech principles. In Snepp v. United States, 444 U.S. 507 (1980), the Supreme Court upheld a secrecy agreement providing for government prepublication review of a book, *Decent Interval*, compiled by a CIA operative detailing events related to the Vietnam War. The government sued alleging breach of the prepublication agreement, but the book had already been published. The Court imposed a constructive trust on the revenue received from the book in order to deter future authors from attempting to capitalize on their government service and information the government deemed confidential. The Court relied upon security agreements that Snepp had signed in order to impose the constructive trust, even though both sides in the litigation conceded that the book contained no classified information. The D.C. Circuit dealt with the prepublication review system at issue in Snepp a few years later in McGehee v. Casey, 718 F.2d 1137 (D.C. Cir. 1983). In McGehee, another CIA operative intended to publish a book detailing his experiences. The operative submitted the manuscript to the CIA, deleted portions the CIA deemed confidential, and then sued, challenging the review system. On appeal, the court applied a balancing test. First, restrictions on speech must protect a substantial government interest unrelated to the suppression of speech. Second, the restriction must be narrowly tailored and restrict no more speech than is necessary to protect the government interest. In McGehee, the court found that national security was a compelling interest, and the restriction imposed was narrowly tailored to restrict no more speech than necessary.

In a case implicating but not directly dealing with prior restraint doctrine, the Court addressed the important issue of public access to criminal trials in Globe Newspaper Co. v. Superior Court for Norfolk County, 457 U.S. 596 (1982). The Court in Globe Newspaper held unconstitutional a Massachusetts statute that required the exclusion of the press and general public from the courtroom at trials involving sexual offenses with minors. In order to justify the restraint on speech, the Court required that the state show a compelling government interest and that the exclusion is a narrowly tailored measure that achieves the compelling purpose. Statutes excluding the press from the courtroom cannot be justified on the basis of either a state's interest in protecting minors involved in sex crimes from further trauma or embarrassment, or in encouraging victims to testify in a truthful and credible manner. The particular statute did not require that the state conduct any specific findings into the necessity of press exclusion in any particular case, but rather simply

relied upon the two justifications that the court found to be insufficient to support such exclusion.

Two important federal appeals court decisions were issued in 1990 involving injunctive relief against the media. In In re King World Productions, Inc., 898 F.2d 56 (6th Cir. 1990), the Sixth Circuit addressed an *Inside Edition* investigation in which a reporter was sent into the offices of a weight-loss doctor with a hidden camera. The doctor sued, and the trial court issued a broad temporary restraining order prohibiting *Inside Edition* from airing the footage. The Sixth Circuit reversed, holding that even if taping the doctor allegedly engaging in malpractice violated federal laws against intercepting communications, the order restraining the broadcast was not justified. The privacy interest of the doctor did not trump the interest in disseminating information under the First Amendment. In In re The Charlotte Observer, 921 F.2d 47 (4th Cir. 1990), the Fourth Circuit addressed a district court's injunction against reporters from *The Charlotte Observer* and *Rock Hill Herald* that prohibited disclosure of the name of an attorney who had been identified in open court and in the presence of the two reporters as a target of an ongoing grand jury investigation. The Fourth Circuit held that the injunction was an excessive prior restraint that did not interfere with the defendant's right to a fair trial.

The Eleventh Circuit balanced the competing constitutional interests of a defendant's Sixth Amendment right to a fair trial and the First Amendment in United States v. Noriega, 917 F.2d 1543, 1546-47 (11th Cir.), cert. denied, 498 U.S. 976 (1990). The Noriega case involved the refusal by Cable News Network ("CNN") to obey a court order to allow an *in camera* inspection of alleged attorney-client material it sought to publish. The appeals court upheld a prior restraint concerning publication of the material, primarily because the trial court's "delicate, difficult and important" task of weighing the competing interests to determine if a prior restraint was valid had been made impossible by CNN's refusal to yield the documents at issue. However, the court noted that there were at least some circumstances in which the First Amendment would prohibit the prior restraint of even privileged attorney-client communication. The U.S. Supreme Court denied review, with Justice Marshall filing a dissent questioning whether it was even appropriate to balance the competing interests when faced with a prior restraint. See Cable News Network, Inc. v. Noreiga, 498 U.S. 976 (1990) (Marshall, J., dissenting from denial of certiorari) ("Our precedents make unmistakably clear that '[a]ny prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity' … I do not see how the prior restraint imposed in this case can be reconciled with these teachings.").

The Supreme Court again addressed an explicit prior restraint against the media in CBS, Inc. v. Davis, 510 U.S. 1315 (1994), where a television network obtained undercover footage at a South Dakota meat packing plant which it intended to air. The packing plant operator sought and obtained an order restraining the network from broadcasting its footage, relying on the argument that disclosure of the conditions at the plant would constitute defamation and result in irreparable harm. Writing for the Supreme Court, Justice Blackmun vacated the temporary restraining order: "Although the prohibition against prior restraints is by no means absolute, the gagging of publication has been considered acceptable only in 'exceptional circumstances.'" Id. at 1317. Recognizing the irreparable injury to First Amendment rights implicated by the order, Justice Blackmun stated that "each passing day may constitute a separate and cognizable infringement of the First Amendment." Id.

Even when information is illegally obtained and passed on to the media, courts cannot constitutionally issue a prior restraint against publication. In Bartnicki v. Vopper, 532 U.S. 514 (2001), a radio station published the contents of a phone conversation between a union negotiator and union president who were negotiating a school collective bargaining agreement. An anonymous source had provided tapes of the conversation to the radio station. The private tapes were obtained illegally and violated both federal and state wiretapping statutes. The Supreme Court ruled that although the party initially obtaining the tapes may be guilty of a crime, the radio station had a right to publish the information under the First Amendment. The Court balanced the value of the information, determining that it was a matter of public concern, against the interests of the individuals. In this particular case, the individuals had made covert threats during the conversation that made the matter one of grave public concern. Therefore, the Court held that the interest of the public in receiving this information was greater than the interest of the private parties to maintain the secrecy of the conversation.

The U.S. Supreme Court has disapproved of the entry of prior restraint orders *ex parte* without notice to the affected parties, beginning nearly 40 years ago in Carroll v. President & Commissioners of Princess Anne, 393 U.S. 175 (1968):

> There is a place in our jurisprudence for *ex parte* issuance, without notice, of temporary restraining orders of short duration; but there is no place within the area of basic freedoms guaranteed by the First Amendment for such orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate.

Id. at 180; see also United States v. Quattrone, 402 F.3d 304, 312 (2nd Cir. 2005) ("the lack of notice or opportunity to be heard normally renders a prior restraint invalid"); Proctor & Gamble Co. v. Bankers Trust Co., 78 F.3d 219, 226 (6th Cir. 1996) (same).

III. JUDICIAL GAG ORDERS

Judicial gag orders are typically entered on a case by case basis, ostensibly to control publicity concerning court proceedings to ensure a fair trial for the defendant. Gag orders primarily appear in two forms – orders restricting the speech of trial participants, such as the parties, attorneys, and witnesses, and orders that reach out to silence non-participants, such as trial observers and the media, to control publicity or prevent disclosure of certain information. It has become increasingly clear that the Sixth Amendment right to a fair trial guaranteed to criminal defendants will often trump the First Amendment free speech rights of trial participants and the media. As a practical matter, this is not surprising when you consider that trial judges can be reversed and a new trial ordered if they fail to take measures necessary to guarantee the defendant a fair trial, while an unconstitutional gag order, even if overturned, will not affect the ultimate trial result. See Rene L. Todd, A Prior Restraint by Any Other Name: The Judicial Response to Media Challenges of Gag Orders Directed at Trial Participants, 88 Mich. L. Rev. 1171, 1184-85 (1989-90). But where possible, trial judges should attempt to vindicate both rights, not choose one over the other.

A. Gagging Trial Participants

Orders restricting trial participants from speaking about a pending case are becoming increasingly common in high profile civil and criminal cases, particularly in criminal cases where the Sixth Amendment right to a fair trial is at its zenith. The U.S. Supreme Court approved the use of such orders in Sheppard v. Maxwell, 384 U.S. 333 (1966). In Sheppard, the Court ordered that Sam Sheppard, a doctor convicted of murdering his wife, be released from custody due to massive publicity during his trial that violated his Sixth Amendment right to receive a fair trial. The Court recognized gag orders as a legitimate means of controlling trial publicity, criticizing the trial court judge for failing to issue such an order to participants in the case. However, the Court failed to articulate a standard by which trial courts could determine the necessity of a gag order and its contours. In 1991, the Court decided by a 5-4 vote in Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991), that lawyers in a case can be prohibited from making statements that have a "substantial likelihood of materially prejudicing" the case. Such prohibitions are constitutionally permissible to ensure that the defendant receives a fair trial, thus subordinating the First Amendment interest to the defendant's Sixth Amendment interest.

A gag order must be entered pursuant to procedural safeguards that reduce the danger of suppressing constitutionally protected speech. Bernard v. Gulf Oil Co., 619 F.2d 459, 477 (5th Cir. 1980), aff'd, 452 U.S. 89 (1981). The order " 'must be narrowly drawn and cannot be upheld if reasonable alternatives are available having a lesser impact on First Amendment freedoms.' " Id. at 476 (quoting Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 559 (1975)). An overly broad order cannot be justified on grounds that the court is merely exercising its discretion to control the fair and orderly administration of justice. Id. at 474. As stated by the Fifth Circuit in Bernard:

> [T]he interest of the judiciary in the proper administration of justice does not authorize any blanket exception to the first amendment. It is obvious that in the conduct of trial the judge restrains expression and association in innumerable ways. But, whatever may be the limits of a court's powers in this respect, it seems clear that they diminish in strength as the expressions and associations sought to be controlled move from the courtroom to the outside world.

Id.

Even in the context of a criminal trial, where there is a competing interest in a defendant's right to a fair trial, " 'the barriers to prior restraint remain high and the presumption against its use continues intact.' " Id. (quoting Nebraska Press Association v. Stuart, 427 U.S. 539, 570 (1976)). " '[B]efore a prior restraint may be imposed by a judge, even in the interest of assuring a fair trial, there must be an imminent, not merely likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil.' " Id. (quoting United States v. Columbia Broadcasting System, Inc., 497 F.2d 102, 104 (5th Cir. 1974)). Thus, prior restraint remains " 'the most serious and the least tolerable infringement on First Amendment rights,' " and "the general presumption against prior restraints is not mitigated by a claim that the fair and orderly administration of justice is at stake." Id. (quoting Nebraska Press Association, 427 U.S. at 559).

As recent news articles reflect, courts are entering case-specific gag orders at an alarming rate, seeking to cut off the source of information before it ever reaches the media or public. See Theresa Schmidt, *News Media Fights Gag Order*, 7KPLC, May 5, 2005 at http://www.kplctv.com/Global/story.asp?S=3307662; I-Team: Illinois State Police troopers issued gag order,

ABC7Chicago.com, Dec. 14, 2004, *at* http://abclocal.go.com/wls/news/121404_ns_gag-order.html (last visited June 15, 2005); Steve Lipsher and Felisa Cardona, *Media Drop Bryant Lawsuit: Release of Edited Transcripts Ends Challenge*, THE DENVER POST, Aug. 4, 2004, at B2; Adam Liptak, *Internet Battle Raises Questions About Privacy and First Amendment*, THE NEW YORK TIMES, June 2, 2004, at National Desk 13; Harvey Rice, *Judge's Gag Order Called Unconstitutional: Experts Contend Williams Jurors Could Only be Advised Not to Talk*, HOUS. CHRON., Mar. 24, 2004, *at* http://www.chron.com/cs/CDA/ssistory.mpl/special/deadlycrossing/trial/3101721; Jonathan D. Glater & Andrew Ross Sorkin, *Media Told Not to Name Jurors in Trial of a Banker*, THE NEW YORK TIMES, April 14, 2004, at Business/Financial 1.

In Texas, the recent high profile murder prosecutions of Robert Durst (millionaire who killed his neighbor and chopped up the body), Clara Harris (woman who killed adulterous husband outside a hotel), Andrea Yates (mother who drowned her five children in a bathtub), and Susan Wright (wife who tied up and stabbed her husband in excess of 100 times) were all litigated in the context of broad gag orders directed to the trial participants with access restrictions imposed on the media.

B. Gagging Trial Observers and the Media

The U.S. Supreme Court soundly rejected a gag order directed at the media in the case of Nebraska Press Association v. Stuart, 427 U.S. 539 (1976), where the Court struck down an order limiting news coverage of a sensational murder case in Nebraska. The gag order was an unconstitutional prior restraint unsupported by compelling justifications set forth in the record. The Court found that conclusory statements by the trial judge concerning publicity and its effect on the defendant's rights would not suffice to justify a prior restraint. Such "findings" were entirely speculative and unsupported by evidence. Absent particularized findings of harm to the defendant's rights, the gag order was presumptively invalid.

The decision in Nebraska Press Association relied conceptually upon prior precedent recognizing the right of the media and public to receive information from the government in order to protect public debate central to the First Amendment. The foundation for this right is set forth in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), in which the Court reversed an Alabama police official's libel award for an advertisement place in *The New York Times* by civil rights organizations. The Court in New York Times articulated a constitutional interest in encouraging robust debate on matters of public concern, not simply by protecting the right to speak, but protecting all aspects of communicative behavior – the speaker, subject matters of public concern, and the audience – for the purpose of ensuring "the freedom of those activities of thought and communication by which we govern" ourselves. Id. at 255. Subsequently, an admittedly vague "right to gather news" was articulated in Branzburg v. Hayes, 408 U.S. 665 (1972), and the right of access to criminal trial proceedings was established in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980), which matured into a qualified First Amendment right of public access to criminal cases in Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986). Lower courts have applied the holding in Richmond Newspapers to civil proceedings as well. See, e.g., Westmoreland v. Columbia Broadcasting Sys., 752 F.2d 16, 22-23 (2nd Cir. 1984), cert. denied, 472 U.S. 1017 (1985); Publicker Indus. v. Cohen, 733 F.2d 1059, 1067-71 (3rd Cir. 1984). This right of access includes a presumptive right to inspect judicial records and public trial exhibits. See, e.g., Nixon v. Warner Communications, Inc., 435 U.S. 589, 598 (1978) ("It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents."); United States v. Corbitt, 879 F.2d 224, 228 (7th Cir. 1989) (recognizing common law right of access creating a strong presumption in favor of public access to materials submitted as evidence in open court).

Unfortunately, the Sixth Amendment right to a fair trial has been used broadly to deny public access to trial participants, court proceedings, and records. As the First Circuit has pointed out, "the public's right to know can be frustrated by the mere invocation of a threat to the accused's Sixth Amendment right to a fair trial." In re Providence Journal Co., Inc., 293 F.3d 1, 13 (1st Cir. 2002). A court faced with such a claim "must, on a case-specific basis, construct a balance." Id. The denial of access can only be sustained "if a substantial likelihood exists that the accused's right to a fair trial will otherwise be prejudiced." Id. This inquiry "requires specific findings; the First Amendment right of public access is too precious to be foreclosed by conclusory assertions or unsupported speculation." Id.; United States v. Kirk, 887 F.2d 646, 648-49 (6th Cir. 1989). If a court wants to limit access to court proceedings or records, it must issue specific findings of fact that such denial of access is "essential to preserve higher values [than the constitutional right of access] and is narrowly tailored to serve that interest." Press Enterprise Co. v. Superior Court, 478 U.S. 1, 13-14 (1986); see also Davenport v. Garcia, 834 S.W.2d 4 (Tex. 1992); Dow Jones & Co. v. Kaye, 90 F. Supp. 2d 1347 (S.D. Fla. 2000) (holding that order was improper where court failed to make findings based on evidence that order was necessary),

appeal dism'd, 2001 WL 789166 (11th Cir.). Most state courts follow the same rule. See, e.g., NBC Subsidiary, Inc. v. Superior Court, 980 P.2d 337 (Cal. 1999) (court must make rigorous findings before closure or sealing order is entered); Montana ex rel. The Missoulian v. Montana Twenty-First Judicial District Court, 933 P.2d 829 (Mont. 1997) (gag order improperly imposed where lower court failed to take any evidence or make any factual findings with regard to the restrictive orders); Twohig v. Blackmer, 918 P.2d 332 (N.M. 1996) (order may not be imposed until certain procedural requirements have been met); Care and Protection of Edith & Others, 659 N.E.2d 1174 (Mass. 1996) (any order must be based on detailed findings of fact and there must be a hearing to determine whether there is adequate evidence to support such findings); State ex rel. National Broadcasting Company, Inc. v. Court of Common Pleas, 556 N.E.2d 1120 (Ohio 1990) (order cannot issue unless specific, on the record findings are made and representatives of the press and public are given an opportunity to be heard); State ex rel. New Mexico Press Association v. Kaufman, 648 P.2d 300 (N.M. 1982) (stating that restrictive orders were improper where judge failed to make any findings to support them); State v. Clifford, 733 N.E.2d 621 (Ohio App. 1999) (finding that a court must make a finding of necessity before closing a trial).

The right of access to criminal proceedings, including the right to disseminate information based on such access, has long been the law in Texas. In two early criminal cases involving prior restraints, the Texas Court of Criminal Appeals ruled that injunctions imposed by the trial courts which prohibited the publication of trial testimony by members of the press covering the trials were void and in violation of the Texas Constitution.

> Our constitution is but in accord with the genius and spirit of our free institutions, which is intended to guaranty publicity to the proceedings of our courts, and the greatest freedom in the discussion of the doings of such tribunals, consistent with truth and decency. And as has been well said, 'When it is claimed that this right has in any manner been abridged, such claim must find its support, if any there be, in some limitation expressly imposed by the lawmaking power.' And this imposition must be in accord with the provisions of our constitution guarantying the publicity of all trials, as well as the freedom of speech and of the press. . . . We accordingly hold that the court had no power to prohibit the publication of the testimony of the witnesses in the case, and that his act in punishing the relator for contempt for violating that order was without jurisdiction, and was consequently void.

Ex Parte Foster, 71 S.W. 593, 595 (1903); see also Ex Parte McCormick, 88 S.W.2d 104, 106 (1935) ("It is generally conceded that liberty of the press means immunity from previous restraints or censorship.").

Restrictions directed at the media that prohibit publication of information obtained from access to court proceedings or records are almost always unconstitutional prior restraints, based on Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) and the cases discussed above. There is also a line of cases holding that courts should not interfere with the editorial decisions of the media in deciding whether certain information should be published. See, e.g., Green v. CBS Broadcasting, Inc., 200 WL 33243748, *7 (N.D. Tex. 2000) ("Defendants' editorial decisions and newsworthiness judgments concerning the content of its broadcast are not subject to review by the courts."); United Food & Commercial Workers Local 919 v. Ottaway Newspapers, Inc., 1991 WL 328466, *4 (D. Conn. 1991) ("[T]he Supreme Court has held that a court cannot interdict its judgment into the editorial decisions of a newspaper absent some special set of circumstances, such as racial discrimination."); Newton v. National Broadcasting Co., 930 F.2d 662, 686 (9th Cir. 1991) ("Editorial decisions about broadcasts are best left to editors, not to judges. . . ."); Janklow v. Newsweek, Inc., 788 F.2d 1300, 1304 (8th Cir. 1986) ("[T]he First Amendment cautions courts against intruding too closely into questions of editorial judgment."); Medure v. New York Times Co., 60 F. Supp.2nd 477, 489 (W.D. Pa. 1999) ("[I]t is not the court's role to second-guess either the reporting or the editorial decisions which determined the final form of the [publication]."); Ruzicka v. Conde Nast Publications, Inc., 733 F. Supp. 1289, 1301 (D. Minn. 1990) ("Editorial decisions about the information in an article or broadcast may not be second-guessed in court.").

Not surprisingly, most successful gag orders are directed more towards the parties, lawyers, and witnesses than the media or public. By directing such orders to the trial participants, courts can often restrict communications, and hence publicity, without the increased risk of subjecting their orders to challenge by the media, where well-settled prior restraint and public access doctrines apply. Of course, if the participants themselves challenge the gag order, prior restraint analysis would apply; however, the parties, attorneys, and witnesses are less likely than the media to mount a challenge. When the media does intervene to challenge a gag order directed only at trial participants, the media is at a comparative disadvantage – it must rely on the weaker First Amendment right of access and right to receive information cases, rather than the

much stronger prior restraint precedent with the "heavy presumption" against such orders. Hence, the trend toward trial participant gag orders.

IV. ORDERS ENJOINING SPEECH

A second category of judicial prior restraints are injunction orders that either restrain speech on a specific subject by a party to a lawsuit (e.g., trade secrets litigation), or prevent third-parties, most often the media, from publishing certain information.

A. Injunctive Relief as Prior Restraint

There are occasions in certain types of civil litigation, particularly involving claims of defamation, intellectual property right violations, and unfair competition, when a party seeks to enjoin another party from continuing certain speech-based conduct that may prejudice its rights or cause further injury. Courts have made clear that in defamation suits, a prior restraint of further defamatory speech is unconstitutional except in the most limited circumstances where the speech has already been determined libelous. See, e.g., Hajek v. Bill Mowbray Motors, Inc., 647 S.W.2d 253, 255 (Tex. 1983) (defamation alone is not a sufficient justification for restraining an individual's right to speak freely); Kramer v. Thompson, 947 F.2d 666, 677 (3d Cir. 1991) (restating "the maxim that equity will not enjoin a libel [which] has enjoyed nearly two centuries of widespread acceptance at common law."); Greenberg v. De Salvo, 229 So.2d 83, 84 (La. 1969) (overturning an injunction against future defamation, holding that the plaintiff had an adequate remedy at law if in the future he suffered from additional slander or libel at the hands of the defendant). In other cases, often involving commercial litigation, courts have permitted limited restraints on speech-based conduct of trial participants (e.g., advertisements, dissemination of trade secrets), where the standards for injunctive relief are otherwise met, on grounds that commercial speech is entitled to less protection than speech on matters of public concern. See Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York, 447 U.S. 557, 562-63 (1980) ("The Constitution accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.").

Even the use of standard protective orders issued to protect confidential information are, in essence, prior restraints on speech. However, almost all such protective orders are entered by agreement of the parties and do not raise First Amendment concerns. What happens in the situation where a third-party obtains information subject to a protective order and the court attempts to enjoin further dissemination? This situation was presented in Proctor & Gamble Company v. Bankers Trust Company, 78 F.3d 219 (6th Cir. 1996). A document marked confidential and subject to a court-ordered protective order was obtained by a business magazine, even though the document was filed under seal with the Court. The trial court issued an *ex parte* restraining order prohibiting the magazine from publishing the information. On appeal, the Sixth Circuit reversed and dissolved the restraining order, commenting that the trial court did not "appear to realize that it was engaging in a practice that, under all but the most exceptional circumstances, violates the Constitution: preventing a news organization from publishing information in its possession on a matter of public concern." Id. at 225.

Texas courts have not hesitated to overturn or modify injunctions that violate the First Amendment or Article I, Section 8 of the Texas Constitution. See, e.g., Hajek v. Bill Mowbray Motors, Inc., 647 S.W.2d 253, 255 (Tex. 1983) (dissolving temporary injunction as violative of Article I, Section 8 of the Texas Constitution); Brammer v. KB Home Lone Star, L.P., 114 S.W.3d 101, 107 (Tex. App.—Austin 2003, no pet.) (modifying temporary injunction to delete portions enjoining speech based on content); Markel v. World Flight, Inc., 938 S.W.2d 74, 79-81 (Tex. App.—San Antonio 1996, no writ) (holding temporary injunction unconstitutional prior restraint on free expression); Pirmantgen v. Feminelli, 745 S.W.2d 576, 578-79 (Tex. App.—Corpus Christi 1988, no writ) (holding temporary injunction violated Texas Constitution); Stansbury v. Beckstrom, 491 S.W.2d 947, 947-50 (Tex. Civ. App.—Eastland 1973, no writ) (dissolving temporary injunction infringing on appellant's freedom of speech).

It is particularly troublesome when a party attempts (often successfully as in the Bankers Trust case) to obtain temporary restraining orders enjoining speech on an *ex parte* basis. Courts have repeatedly discouraged such orders because of the immediate and incurable effect they have on free speech rights. See Nebraska Press Association v. Stuart, 427 U.S. 539, 609 (1976) (Brennan, J., concurring) (quoting A., Bickel, The Morality of Consent 61 (1975)) ("Prior restraints fall on speech with a brutality and a finality all their own. Even if they are ultimately lifted they cause irremediable loss – a loss in the immediacy, the impact, of speech."); New York Times v. United States, 403 U.S. 713, 715 (1971) (Black, J. concurring) ("every moment's continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment."); Proctor & Gamble Company v. Bankers Trust Company, 78 F.3d 219, 226 (6th Cir. 1996) (stating that *ex parte* injunctions should not be permitted "where no showing is made that it is impossible to serve or to notify the opposing parties and give them an opportunity to participate."), quoting

Carroll v. President and Comm'rs of Princess Anne, 393 U.S. 175, 180 (1968).

The authors of this article recently represented a Houston television station and one of its reporters in challenging an *ex parte* temporary restraining order that prohibited the station from airing any part of an allegedly stolen document. Brewer, Anthony, Middlebrook & Dunn, P.C. v. KTRK Television, Inc. and Ted Oberg, Cause No. 2005-13331, 80th District Court of Harris County, Texas. In Brewer, the television station and its reporter sought and obtained an emergency dissolution of a temporary restraining order that prohibited the broadcast of information contained in a document that was allegedly stolen from the plaintiff law firm, which represented TV evangelist Benny Hinn. The document at issue was a draft of a response to an IRS tax inquiry made to Benny Hinn's religious organization. After a full evidentiary hearing on the motion to dissolve and plaintiff's request for temporary and permanent injunctions, the Court vacated the prior restraint and, subsequently, the plaintiff non-suited its tort-based claims.

Despite the legion of cases in which injunction orders against the media have been overturned, there remain cases in which such orders have been sustained. For example, in United States v. Progressive, 467 F.Supp. 990 (W.D. Wis. 1979), dismissed without opinion, 610 F.2d 819 (7th Cir. 1979), the federal government sought a temporary restraining order to enjoin the publishers of a magazine from publishing or otherwise communicating or disclosing allegedly restricted data contained in an article entitled "The H-Bomb Secret; How We Got It, Why We're Telling It." The district court determined that the article would violate the Atomic Energy Act and endanger national security and, therefore, granted the restraining order.

B. Unlawfully Obtained Information

Often in cases involving a request for a temporary restraining order or injunction, a party claims that the speech sought to be enjoined involves information illegally obtained, such as by theft or invasion of privacy. The Pentagon Papers case in 1971 made clear that the manner in which the information at issue is obtained does not alter the prior restraint analysis. This principle was reiterated in CBS, Inc. v. Davis, 510 U.S. 1315 (1994), where a television network obtained undercover video footage at a meat packing plant without authorization. Justice Blackmon, writing for the Court, rejected the temporary restraining order issued by the trial court, noting that prior restraint doctrine applies even if the videotape at issue was obtained through the "calculated misdeeds" of the network. In support of this proposition, Justice Blackmon referred to the Court's prior refusal to suppress publication of papers stolen from the Pentagon by a third party. Id. at 1318.

The Supreme Court has rejected a "fruit of the poisonous tree" argument by holding that the press cannot be held liable for publishing information it lawfully receives from a source even if the source obtained the information through illegal means. Bartnicki v. Vopper, 532 U.S. 514, 528 (2001) ("[I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need . . . of the highest order.") (quoting Smith v. Daily Mail Publishing Co., 443 U.S. 97, 103 (1979)). In Bartnicki, a cell phone conversation relating to collective bargaining negotiations of a school board, which had been intercepted and taped by an unknown third party in violation of federal and Pennsylvania state wiretap statutes, was forwarded to an individual who distributed the tape to the press. The tape and its contents were subsequently published to the public. In holding that the government could not punish the press for publishing the tape and its contents, the Court stated that "a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern". Id. at 535.

Other cases have also made clear that even when the media has been accused of criminal misconduct in its information gathering, prior restraints have been denied. Gardner v. Bradenton Herald, 413 So.2d 10, 12 (Fla. 1982) (prior restraint held unconstitutional even though information was obtained from an illegally tapped or bugged telephone, noting that "there is no meaningful way under the [wiretap] statute to balance the asserted overriding governmental interest allegedly inherent in the confidentiality sought here with the restraint on the first amendment rights of the appellee newspaper"); In re King World, 898 F.2d 56, 58-59 (6th Cir. 1990) (prior restraint denied even though media surreptitiously procured videotape in violation of 18 U.S.C. § 2511, stating that "[n]o matter how inappropriate the acquisition, or its correctness, the right to disseminate that information is what the Constitution intended to protect"); Worrell Newspapers of Indiana, Inc. v. Westhafer, 739 F.2d 1219 (7th Cir. 1984), aff'd, 469 U.S. 1200 (1985) (statute enjoining publication of name in sealed indictment unconstitutional as prior restraint, concluding that "while we recognize the State's interest in apprehending criminals, we do not think it is sufficiently compelling to justify the prohibition of publication by *any* person, including members of the press, of the contents of a sealed document"); see also Proctor & Gamble Company v. Bankers Trust Company, 78 F.3d 219 (6th Cir. 1996) (ex parte TRO prior restraint vacated even though magazine had

obtained confidential documents under seal in active civil litigation).

The overarching conclusion to be drawn from a review of the litany of prior restraint cases is that it is of no consequence how the information that is sought to be published is obtained. For instance, in Proctor & Gamble Company v. Bankers Trust Company, 78 F.3d 219 (6th Cir. 1996), the trial court issued an *ex parte* order prohibiting a business magazine from publishing an article which would have disclosed the contents of documents that had been produced as confidential and subject to a court-ordered protective order in the litigation. Although the parties to the underlying suit went to great lengths to file the documents under seal, the business magazine lawfully discovered and obtained copies of the documents from representatives of the parties who were not involved in the case. The Court, in criticizing the trial court for entering the injunction against the business magazine, commented that the trial court did not "appear to realize that it was engaging in a practice that, under all but the most exceptional circumstances, violates the Constitution: preventing a news organization from publishing information in its possession on a matter of public concern." Id. at 225.

V. RECENT DEVELOPMENTS AND RESOURCES

A. Cases

1. In Tory v. Cochran, 125 S. Ct. 2190 (2005), the petitioner Tory appealed an injunction which prohibited him from making any reference to famed attorney Johnny Cochran. The injunction had no termination date. After Cochran's death, Tory again appealed the injunction. The Supreme Court determined that the grounds for the injunction after Cochran's death were greatly diminished, and the injunction infringed upon Tory's freedom of speech. The Court vacated and remanded for further review of the previous injunction order.

2. In Cooper v. Dillon, 403 F.3d 1208 (11th Cir. 2005), a publisher of a free weekly newspaper sued for injunctive relief and damages against a police chief who had the publisher arrested for violating a state statute prohibiting the disclosure of nonpublic information, which the publisher obtained as part of an internal investigation of a law enforcement officer. The Eleventh Circuit held that the statute was not a prior restraint because criminal sanctions for publishing certain information are not considered prior restraints, citing Alexander v. United States, 509 U.S. 544, 553-54 (1993) (prior restraint on speech prohibits speech before it can take place). The restriction was, however, a content-based restriction on speech and could not survive strict scrutiny analysis because the state failed to show a compelling state interest.

3. In In re WLBT, Inc., 2005 WL 107171 (Miss. Jan 20, 2005), the WLBT television station sought coverage of sentencing proceedings with television cameras as permitted under the Mississippi Rules for Electronic and Photographic Coverage of Judicial Proceedings. The lower court denied the television station's request. The station appealed and eventually the Mississippi Supreme Court reversed. The judge who denied the request stated that he believed the television coverage would adversely affect another defendant who was being charged with conspiracy for the crimes covered in the sentencing proceedings. The state supreme court determined that while there is no constitutional right to have cameras present, nor any constitutional principle banning cameras from the court, the circuit court had failed to present sufficient reasons to prohibit camera access to the proceedings.

4. In In re People v. Bryant, 94 P.3d 624 (Colo. 2004), a court reporter inadvertently released transcripts, related to the sexual history of the alleged victim in Kobe Bryant's prosecution to members of the media. The trial court subsequently issued an order preventing further release of the contents of the information marked as *in camera* proceedings. Media representatives challenged the order. The Colorado Supreme Court determined that the trial court's order prohibiting further release of the contents of the *in camera* proceeding transcripts was a prior restraint, but was sufficiently narrow to make it constitutional. The Colorado Supreme Court stated that protecting information in rape cases was a compelling state interest, and the lower court narrowly tailored the order by striking the portion of the order that required organizations to destroy the inadvertently sent transcripts, but upheld the part of the order prohibiting further dissemination of the information. Furthermore, the Supreme Court ruled that the trial court should rule on the applicability of the rape shield law quickly and then draft a redacted version for public dissemination of relevant information that would be material to the case. Ultimately, the trial court withdrew its order, thus rendering the issue moot.

5. In S.E.C. v. Lauer, 2004 WL 2931398, *1, 18 Fla. L. Weekly Fed. D 80 (S.D. Fla. Nov. 18, 2004), the *pro se* plaintiff filed a motion for a gag order on a receiver in a bankruptcy proceeding along with a motion to revoke the receiver's immunity from liability for his actions. The plaintiff blamed the receiver and a journalist for *The New York Times* for creating "investor redemption panic" relating to his business and sought a gag order prohibiting communication between the receiver and the press. The trial court

stated that gag orders serve as a prior restraint on speech and, as such, are subject to a heavy presumption of unconstitutionality. The court then determined that the plaintiff failed to prove collaboration between the receiver and the press and that the press releases were based upon information contained in court records and proceedings. Therefore, the court denied the requested gag order.

6. In San Jose Mercury News, Inc. v. Criminal Grand Jury of Santa Clara County, 18 Cal. Rptr.3d 645 (Cal. App. 6 Dist. 2004), the *San Jose Mercury News* petitioned for a writ of mandate concerning a grand jury order that prohibited witnesses from revealing questions, responses, and other information they learned during the grand jury proceedings. After the Superior Court of Santa Clara denied its petition, the newspaper appealed. The Court of Appeals upheld the lower court's ruling. The court determined that the grand jury order was not a prior restraint on the newspaper because the order was directed at witnesses rather than the newspaper. Furthermore, the suppressed matter was not available to the public because of the secrecy under which the grand jury investigation was conducted. The order did not prohibit the witnesses from volunteering any information they had obtained outside the grand jury investigation hearings. "Although it might function somewhat like a prior restraint by impeding the flow of information, the information impeded is not the type that is generally available to the public."

B. Resources

For more detailed discussions of various issues related to prior restraint doctrine and media coverage of trials, see generally Lonnie T. Brown, Jr., *"May It Please the Camera, . . . I Mean the Court"-An Intrajudicial Solution to an Extrajudicial Problem*, 39 GA. L. REV. 83 (2004); David D. Smyth, *A New Framework for Analyzing Gag Orders Against Trial Witnesses*, 56 BAYLOR L. REV. 89 (2004); Richard Favata, *Filling the Void in the First Amendment Jurisprudence: Is There a Solution for Replacing the Impotent System of Prior Restraints?*, 72 FORDHAM L. REV. 169 (2003); Jeffrey S. Johnson, *The Entertainment Value of a Trial: How Media Access to the Courtroom is Changing the American Judicial Process*, 10 VILL. SPORTS & ENT. L.J. 152 (2003); Jaime N. Morris, *The Anonymous Accused: Protecting Defendant's Rights in High-Profile Criminal Cases*, 44 B.C. L. REV. 901 (2003); Michael I. Meyerson, *Rewriting Near v. Minnesota: Creating a Complete Definition of Prior Restraint*, 52 MERCER L. REV. 1087 (2001); Alberto Bernabe-Riefkohl, *Another Attempt to Solve the Prior Restraint Mystery: Applying the Nebraska Press Standard to Media Disclosure of Attorney-Client Communications*, 18 CARDOZO ARTS 7 ENT. L. J. 307 (2000); Ariel L. Bendor, *Prior Restraint, Incommensurability, and the Constitutionalism of Means*, 68 FORDHAM L. REV. 289 (1999); Giles T. Cohen, *Protective Orders, Property Interests and Prior Restraints: Can the Courts Prevent Media Nonparties from Publishing Court-Protected Discovery Materials?*, 144 U. PA. L. REV. 2463 (1995-1996); René L. Todd, *A Prior Restraint by Any Other Name: The Judicial Response to Media Challenges of Gag Orders Directed at Trial Participants*, 88 MICH. L. REV. 1171 (1990); Sheryl A. Bjork, *Indirect Gag Orders and the Doctrine of Prior Restraint*, 44 U. MIA. L. REV. 165, (1989); Stanly Godofsky & Howard M. Rogatnick, *Prior Restraints: The Pentagon Papers Case Revisited*, 18 CUMB. L. REV. 527 (1987-1988); Blaise Curet, *John Z. DeLorean v. The Media: The Right to a Fair Trial Without a Prior Restraint upon the Media*, 15 GOLDEN GATE U. L. REV. 81 (1985); Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53 (1984).

There are also several internet websites that provide information concerning prior restraints and other First Amendment issues. See generally *The First Amendment Handbook*, Reporters Committee for Freedom of the Press, at http://www.rcfp.org/handbook/index.html (last visited June 16, 2005); Al White, *The-FACTS: Committed to Family Preservation and the Constitutional Right to be a Parent*, *at* http://www.the-facts.com/HTM's/Gag%20Orders.htm (last visited June 16, 2005); *News and Articles on Gag Order*, LawKT.com, at http://news.surfwax.com/law/files/Gag_Order.html (last visited June 16, 2005); *Free Press and Fair Trial*, Media and Law Ethics at Radford University, at http://www.radford.edu/~wkovarik/class/law/1.7fairtrial.html (last visited June 16, 2005); JACK C. DOPPELT, MEDIA LAW HANDBOOK, *Chapter 7, Access to Courts and Documents/Gag Orders*, (2001) *available at* Copley First Amendment Center, http://www.illinoisfirstamendmentcenter.com/FileGallery/1.pdf.

VI. CONCLUSION

Judicial prior restraints on speech are presumptively unconstitutional under well settled U.S. Supreme Court precedent. However, attempts to suppress or censor speech continue in both legislative and judicial form. Naked prior restraints issued by courts to the media enjoining publication of information already in their possession rarely survive appellate review. However, through the increasing use of gag orders directed at trial participants,

particularly in criminal proceedings, courts are able to cut off the flow of information to the public through the rationale of protecting the defendant's Sixth Amendment right to a fair trial, which insulates such orders from rigorous prior restraint analysis. While the media may intervene for the limited purpose of challenging such orders, in most cases the interest in receiving information is subordinated to the interest in providing the defendant a fair trial. Only when injunctions and gag orders are directed at the media are such restraints almost universally rejected.