Public's Right of Access to Juror Information Loses More Ground... and What We Can Do About It

By Steve Zansberg

For the first part of the title above, I decided to recycle the title of an article I authored, 22 years ago, in *Communications Lawyer* (it is available here). Back then, as a young associate, I criticized (and labeled unconstitutional) a newly enacted Colorado statute that mandated that the home addresses of jurors and seated jurors, in all state court cases, could not be placed in the public court file. Of course, everyone understood back then that the *names* of the jurors – the twelve citizens chosen to decide the guilt or innocence of criminal defendants – was to be a matter of public record.

So, where do things stand today?

To put it bluntly, the trajectory – with respect to transparency of juror information – has been steadily moving in the wrong direction, i.e., backwards. A recent spate of high-profile cases, across the country, demonstrate that many judges, in both state and federal courts, are of the view that there is no presumption of public access to the names of seated jurors, not only at the outset of a trial, but even post-verdict.

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Indeed, in 2004, the Judicial Conference of the United States promulgated a formal policy, renewed in 2008, which mandates that in all federal criminal cases *all* "identifying information about jurors or potential jurors" *shall* not be included "in the public case file." *See* Judicial Conference Policy on Privacy and Public Access to Electronic Case Files. I'll bet you did not know that. Thankfully, to date, only two federal judges have cited this official policy as grounds for withholding jurors' names. *See United States v. Bruno*, 700 F. Supp. 2d 175, 180 (N.D.N.Y. 2010) ("Generally, juror information is considered private, and courts are encouraged to protect it.") (citing the Judicial Conference policy)); *Brown v. United States*, No. 407CV085, 2008 U.S. Dist. LEXIS 81096, at *12 (S.D. Ga. Oct. 14, 2008). Arguably, this blanket policy, declaring court records non-public in all cases, violates the holding of *Globe Newspapers Co. v. Superior Court*, 457 U.S. 596, 607-08 (1982), which forbids across-the-board, "in all cases," automatic closure of matters to which a presumptive right of access under the First Amendment extends.

Furthermore, judges are increasingly using written questionnaires to conduct *voir dire* outside of public view, and then sealing those answers until after a verdict has been returned, or worse yet, permanently. Thus, notwithstanding settled Supreme Court precedent guaranteeing the

public's presumptive right to "attend" and "observe" *voir dire*, judges are conducting jury selection outside the presence of the public.

Below, I will canvass a handful of these rulings, and I'll point out that the "problem," as it were, is not a new one, although it appears to have become exacerbated in the era of multiple 24/7 news platforms and social media. Finally, I will offer some recommendations for what we media lawyers, across the nation, should do to help stop this trend, if not reverse it.

Unnamed Jurors Becomes "The Norm" in High-Profile Cases

In the past eight months, we have seen a surprisingly large number of criminal mega-trials that have garnered national (and international) interest:

- former Minneapolis Police officer Derek Chauvin, tried and convicted of the murder of George Floyd;
- Kyle Rittenhouse tried and acquitted of all charges for shooting three (killing two) Black Lives Matter demonstrators in Kenosha, Wisconsin;
- Travis and Gregory McMichael and William "Roddy" Bryan, tried and convicted of murdering 25-year old Ahmaud Aubrey in Satilla Shores, Georgia;
- two wealthy fathers tired and convicted of having bribed college admissions officials to obtain admission offers for their children, in the so-called "Varsity Blues" sting operation;
- Elizabeth Holmes, founder/former CEO of Theranos, Inc., the now defunct blood testing company in Silicon Valley, presently on trial for allegedly defrauding that company's investors and customers;
- Ghislaine Maxwell, the billionaire heiress from London, presently on trial for allegedly procuring young women to be sexually abused by Jeffrey Epstein and his cronies.

In each of the cases above, the presiding judge decided that the twelve citizens empaneled to decide the guilt or innocence of the accused were entitled to have their identities (and in some cases, also their answers provided on written questionnaires) withheld from the public. In the *Chauvin* case, Judge Peter Cahill granted the media's motion to unseal the jurors' names a full six months post-verdict.

U.S. District Judge Nathaniel Gorton (D. Mass.), presiding over the so-called "Varsity Blues" prosecution, captured the view of all these judges when he explained why, in high-profile cases, jurors are purportedly entitled to be anonymous (not to the counsel of record, but to the press and public):

> [Questioning potential jurors outside of public view] is done to preserve the privacy of individual citizens summonsed to sit as jurors in a federal case and is

> not pertinent to the subsequent evidence presented by the government in its case-in-chief, or to the defendant's case, both of which are presented in open court.
>
> Citizens called to serve as jurors do not choose to be in court and, of course, have not been charged with crimes. They are there to perform their civic duty as part of our unique and venerated criminal justice system that is without precedent in this world. Most citizens called to serve on juries agree to serve at considerable inconvenience and sometimes physical and financial cost. They do so because they are good citizens. They do not thereby give up their right to reasonable privacy . . . If that fundamental right is taken away from citizens called to serve on juries, our entire judicial system, which assures those charged with crimes with a trial by jury, will be jeopardized.

Needless to say, this view is directly contrary to a good number of settled judicial precedents, which have recognized, and held, that:

> Jurors may be citizen soldiers, but they are soldiers nonetheless, and like soldiers of any sort, they may be asked to perform distasteful duties. Their participation in publicized trials may sometimes force them into the limelight against their wishes. We cannot accept the mere generalized privacy concerns of jurors, no matter how sincerely felt, as a sufficient reason for withholding their identities under the interests-of-justice standard.
>
> . . . the prospect of criminal justice being routinely meted out by unknown persons does not comport with democratic values of accountability and openness.

In re Globe Newspaper Co., 920 F.2d 88, 98 (1st Cir. 1990); *see also In re Baltimore Sun Co.*, 841 F.2d 74, 76 (4th Cir. 1988) ("We recognize the difficulties which may exist in highly publicized trials such as the case being tried here and the pressures upon jurors. But we think the risk of loss of confidence of the public in the judicial process is too great to permit a criminal defendant to be tried by a jury whose members may maintain anonymity."); *People v. Mitchell (In re Juror Names),* 592 N.W.2d 798, 809 (Mich. App. 1999) ("Privacy concerns alone, unaccompanied by safety concerns, are not sufficient to justify total denial of media access to jurors' names. . . .. As with any other public officers, jurors sometimes must bear certain irritations in carrying out their duties. However, [legitimate] privacy concerns may justify a lesser restriction, such as a brief waiting period or an order prohibiting reporters from repeatedly attempting to question jurors who have already refused an interview.").

Voir Dire **Closed to the Public – By Conducting it in Writing**

Numerous courts have recognized that "[t]he fact that the questioning of jurors was largely done in written form rather than orally is of no constitutional import." *Copley Press, Inc. v. San Diego Superior Court*, 228 Cal. App. 3d 77, 89 (1991); *see also In re Jury Questionnaires*, 37 A.3d 879, 886 (D.C. 2012) ("Every court that has decided the issue has treated jury questionnaires as part of the voir dire process and thus subject to the [First Amendment]

presumption of public access.") (collecting cases). But, once again, judges in high profile cases, like the "Varsity Blues" prosecution, have chosen to keep written *voir dire* from the public, likening it to sidebar discussions with individual jurors concerning highly personal subjects.

Most recently, (on November 19), U.S. District Judge Edward Davila, in the Northern District of California, denied a motion by ten media companies to unseal the completed juror questionnaires, prior to the end of the trial, in *United States v. Elizabeth Holmes*. Judge Davila accepted the media coalition's argument that under *Press-Enterprise* the First Amendment presumptive right of access attaches to completed questionnaires. But after interviewing each of the seated jurors and alternates individually in chambers, he made lengthy and detailed findings that disclosure of their answers before the verdict is returned poses a "substantial probability" that they will be distracted from their duties, subjected to information about the case through social media contacts, and possibly also threats to their personal safety or that of their loved ones. Accordingly, he concluded, withholding their completed questionnaires until the verdict is returned is narrowly tailored and the "least restrictive means" to prevent those harms. Only then will the questionnaires be unsealed in redacted form, maintaining all jurors' anonymity with the exception of two panelists who expressed no concerns whatsoever.

The Problem Is Not New; But It Is Getting Worse

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The fact the courts are maintaining the anonymity of jurors, and particularly those serving in high-profile cases, has generated some recent discussion among the media law bar**.** Jane Kirtley wrote an excellent piece, subtitled "The Case Against Anonymous Juries," in the October 2021 edition of ABA's *Litigation* magazine (buttressed by a kindred spirit on the federal bench). And PLI's 2021 Communications Law in the Digital Age program brochure asked (somewhat rhetorically), "Are anonymous juries now the norm?" But, as my 22-year old article mentioned at the outset of this article demonstrates, this phenomenon is not of recent origin. *See also* Marcus M. Wilson, Jr., *Juror Identities in High-Profile Trials: The Case for a First Amendment Right of Access*, 3 First Amend. L. Rev. 437 (2005); Marc O. Litt, "*Citizen Soldiers" or Anonymous Justice: Reconciling the Sixth Amendment Right of the Accused, the First Amendment Right of the Media, and the Privacy Right of Jurors*, 25 Colum. J. L. & Soc. Probs. 371 (1992); Robert L. Raskopf, *A First Amendment Right of Access to a Juror's Identity: Toward a Fuller Understanding of the Jury's Deliberative Process*, 17 Pepp. L. Rev. 357 (1990).

It is worth noting that "public knowledge of jurors' names is a well-established part of American judicial tradition," *U.S. v. Wecht*, 537 F.3d 222, 236 (3d Cir. 2008); so much so, in fact, that that the first recorded instance of a completely anonymous jury empaneled in this country was in 1977. *See also* Marcus M. Wilson, Jr., *Juror Identities in High-Profile Trials,*

supra, 3 First Amend. L. Rev. at 458 ("Jurors' names traditionally have been just as much a part of the public record as any other documented fact in a given case.") (citation omitted).

One cannot truthfully assert that there is an unbroken chain of precedents guaranteeing the public's right to know jurors' identities, either at the outset of trial or even post-verdict. While several courts have expressly held that right exists, *see, e.g., United States v. Wecht*, 537 F.3d 222, 236 (3d Cir. 2008) (holding that First Amendment presumption of access attaches the moment jurors are empaneled); *State ex rel. Beacon Journal Publ'g Co. v. Bond*, 781 N.E.2d 180, 194 (Ohio 2002) (holding that "the First Amendment qualified right of access extends to juror names and addresses, thereby creating a presumption of openness"), several other courts have rejected that claim. *See, e.g., Gannett Co., Inc. v. State*, 571 A.2d 735 (Del. 1989); *United States v. Brown*, 250 F.3d 907 (5th Cir. 2001); *United States v. Gurney*, 558 F.2d 1202 (5th Cir. 1977); *United States v. Calabrese*, 515 F. Supp. 2d 880 (N.D. Ill. 2007). And, legal commentators have also argued against a First Amendment presumption of access to jurors' identities. *See, e.g.,* Scott Ritter, *Beyond the Verdict: Why Courts Must Protect Jurors from the Public Before, During, and After High-Profile Cases*, 89 Ind. L. J. 911 (2014); Nancy J. King, *Nameless Justice: The Case for the Routine Use of Anonymous Juries in Criminal Trials*, 49 Vanderbilt L. Rev. 123 (1996).

Moreover, in the securities fraud prosecution of television celebrity Martha Stewart, in which the Second Circuit strongly supported the public's right to observe *voir dire*, that court noted "[w]e do not see why *simply concealing the identities of the prospective jurors* would not have been sufficient to ensure juror candor." *ABC, Inc. v. Stewart*, 360 F.3d 90, 104 (2d Cir. 2004) (emphasis added). Some courts have also cast doubt on whether the First Amendment provides a presumption of public access to completed juror questionnaires. *See, e.g., United States v. Abdelaziz*, Crim. Action 19-10080-NMG, at *1 (D. Mass. Sep. 20, 2021). As a result, arguing for public access to jurors' identities and completed questionnaires in a high-profile case is far from an open-and-shut endeavor.

Social Media and 24/7 Politicized News Causes Judges to Fear Mistrials, or Worse

Judges thrust into the vortex of presiding over a "mega-trial" have been understandably cautious about disclosing information that might cause a mistrial, long before the dawn of the digital era. But the speed and ubiquity of social media available on our cellphones– which, for many of us, is literally an addiction (*see, e.g.,* Lee Levine) – has prompted judges to accept at face value claims by trial attorneys that if jurors' names are publicly disclosed, "it is *inevitable* that they will be exposed to information outside the courtroom." Accordingly, judges have become convinced that keeping jurors' names out of the public record as the United States Judicial Conference instructs – referring to potential jurors only by assigned numbers in open court, and sealing their identities in court records – is a necessary step to protect them from outside influences and harassment.

That was the view espoused by Judge Davila in the Elizabeth Holmes case. This excerpt from an Arizona Court of Appeals ruling, this past August, expresses this view perfectly:

> Individuals who are called for jury duty do not forfeit their privacy rights . . . If potential jurors know that they and their families may be subject to danger, harassment, or unwanted media attention as a result of their service, they will be deterred from serving. Although a court may move to a more secret jury scheme upon discovering that a case has garnered media attention or that a threat has arisen, it may be too late to secure jurors' identities. *Once a juror's name is public, with the current availability of information through the internet and other sources, a vast array of information about them is accessible –sometimes in a matter of seconds. The courts should not be bound to create an incentive for others to seek out private information about jurors who have done their civic duty, thereby exposing them to risk of public embarrassment, harassment, or danger*. Creating a presumption for disclosure of juror names would do just that.

Neff v. Dickerson, 496 P.3d 793 (Ariz. Ct. App. 2021) (quotation marks and citation omitted, and italics added).

What Can Be Done to Stem the Tide?

Suppose that the next mega-trial is venued in your jurisdiction, and your media clients call upon you to ensure the public is not denied its right to observe *voir dire* (including the written questionnaires) and to know who are the jurors, and alternates, chosen to decide the accused's guilt or innocence. What do you do?

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First, you should avail yourselves of the plethora of helpful materials the MLRC provides its members. In 2004, the DCS Newsgathering Committee published a Model Brief on Juror Access Issues (which sorely needs to be updated), that addresses anonymity, questionnaires, post-verdict interviews and more. The Panic Book (2008) also contains an extremely helpful chapter on Access to Jurors which was authored by David Schulz. Lastly, *amicus* briefs of the Reporters Committee for Freedom of the Press, such as this one in the Roger Stone case, are of tremendous help.

But merely citing supportive precedent is *not enough*. Below are three strategic options I highly recommend:

Educate the Judge Early On & Ask in Advance of *Voir Dire*. It is foolhardy to presume that the judge presiding in your case is well-versed in the *Richmond Newspapers* and *Press-Enterprise* case law and all the wonderful things they say about the need for, and benefits of, public scrutiny of our criminal justice system. The sooner you can put that case law before the judge and begin educating him/her/they, the better. Do not wait to do so until *after* a blank jury questionnaire has been posted and/or sent out to all summoned potential jurors (as was the case in *U.S. v. Elizabeth Holmes*) which contains language like this:

Your answers are confidential. It is important that you understand that the Court is sensitive to your privacy. They will be reviewed by the Judge and the lawyers in this case. After a jury has been selected the original questionnaire will be returned to the Clerk of the Court *and* kept under seal and *will only be disclosed, if at all, with names and other identifying information removed*.

Once a judge has (mistakenly) made such a written commitment to the jurors, even if it *is* unconstitutional, it is far more difficult to persuade him/her/they to renege on it, and thereby lose the jurors' trust. *See, e.g. Brown v. United States,* No. 407CV085, 2008 U.S. Dist. LEXIS 81096, at *11-12 (S.D. Ga. Oct. 14, 2008*)* ("It may be that the law does not authorize what this Court promised and thus its decision to honor that promise by redacting juror-identifying information," but redacting that information nonetheless); *but see Forum Communs. Co. v. Paulson*, 752 N.W.2d 177, 185 (N.D. 2008) ("A blanket promise of protection from public disclosure of information on jury questionnaires is not legally effectual where public access is mandated under the constitution."); *State ex rel. Beacon Journal Publ'g Co. v. Bond*, 781 N.E.2d 180, 190 (Ohio 2002) ("trial courts should make no such promise of confidentiality, but instead conspicuously advise prospective jurors in writing that . . . their responses may be subject to public disclosure.").

The moment you (or reporters covering a case) see that the parties have submitted proposed juror questionnaires, usually under seal, is the time to alert the court of the press' interest in seeing them, as well as discovering the potential jurors' names. Be proactive and preemptive, not reactionary. You can't act too soon, only too late. Also, *do not wait* until *voir dire* has been completed to assert the public's right to "attend," by having access to the completed questionnaires. Do so *before* oral *voir dire* begins.

"Train" the Court, Through Requests in Other Cases. As soon as charges have been publicly filed in a new high-profile case in your jurisdiction, ask local reporters to begin requesting access to jurors' names and completed questionnaires in multiple other "run of the mill" criminal cases that are brought to trial in the intervening months/years before the mega-case gets to trial. Establish a pattern or "habit" of routine disclosures by fellow jurists, and the presiding judge, in those other cases, that will help convince the judge handling the high-profile case that such disclosure is "par for the course," and demonstrate that such disclosures have not interfered with the handling of any of those other cases.

Be Sure to Explain *Why* Access is Beneficial. Lastly, when you are asserting the public's "right to know" jurors' names and/or written *voir dire* responses, you must explain to the court what is the public benefit of having this information be publicly available. Jurors' answers on questionnaires is a straightforward extension (application, really) of *voir dire* ordinarily conducted orally. *See, e.g. Forum Communs. Co. v. Paulson*, 752 N.W.2d 177, 185 (N.D 2008) ("a written questionnaire serves as an alternative to oral disclosure of the same information in open court and is, therefore, synonymous with, and a part of, voir dire.").

But jurors' *identities* are different. Be prepared to explain how the press' access to jurors' identities helps promote all of the positive functions that openness provides to the trial process. Access to the jurors' identities primarily makes possible post-verdict interviews of those jurors who are willing to speak with the press, and such interviews have proven, time and again, to help educate the public about the criminal justice system and even generate important subsequent reforms thereto. Both the Panic Book chapter and the Reporter's Committee *amicus* brief cited above contain several specific concrete examples you can cite. Here's just one: After the acquittal of John Hinckley for the attempted murder of President Reagan, press interviews with jurors played "a large role in shaping public and legislative attitudes toward the insanity defense in the future," *In re New York Times Co*., Misc. No. 82-0124 (D.D.C. June 19, 1982), and propelled enactment of the Insanity Defense Reform Act of 1984.

Better Results Ahead?

Will pursuing these strategies carry the day in *your* case and, hopefully, "turn the tide" in the country overall? That remains to be seen. But I'm fairly certain that unless we media attorneys adopt them, the trend toward routine juror secrecy will only continue.

Steve Zansberg practices at The Law Firm of Steven D. Zansberg, LLC, in Denver, Colorado. He represented the coalition of ten media companies in seeking access to the completed juror questionnaires in United States v. Elizabeth Holmes.